

**(1) Amax Gold Mines New Zealand Limited and
(2) Welcome Gold Mines New Zealand Limited**

Appellants

v.

**(1) Alfred John Durham Moore
(2) Winton Gill Cox
(3) AUAG Resources Limited and
(4) Martha Mining Limited**

Respondents

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 9th May 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Jauncey of Tullichettle
Lord Mustill
Lord Lloyd of Berwick
Lord Hoffmann

[Delivered by Lord Jauncey of Tullichettle]

This appeal relates to the construction of a Joint Venture Agreement ("the JVA") dated 17th July 1987 to exploit the Martha Hill gold mine in New Zealand. The four participants in the JVA were Amax Gold Mines New Zealand Limited ("Amax"), the first appellant, Welcome Gold Mines New Zealand Limited ("Welcome"), the second appellant, AUAG Resources Limited ("AUAG") the third respondent, and Martha Mining Limited ("Martha") the fourth respondent. All Martha's shares subsequently came to be owned by the other three companies.

The only issue before this Board was whether time was of the essence of a particular provision for payment of the price of a participant's share in certain events. To understand the position it is unfortunately necessary to set out at some length the relevant contractual provisions which appear in section 6 of the JVA

headed "Assignments and Encumbrances". Clause 6.01 contains a general prohibition on assignment or transfer by participants of their interests, to which general prohibition clause 6.03 provides exceptions:-

"6.03 Exception to General Prohibition: Sale of participating Interest on Ceasing to be related to Principal

- (a) Notwithstanding Clause 6.01(a) in the event that a Participant ceases to be a related company of its Principal then that Participant (by Clause 1.01 and for the purposes of this Clause 6.03 and Clause 6.05 called the 'Withdrawing Participant') thereupon shall be deemed to have:-
 - (i) Defaulted under this Agreement;
 - (ii) Elected to withdraw from the Joint Venture when all the other Participants receive notice ... of the cessation of that related company relationship; and
 - (iii) Offered the whole but not part of its Participating Interest for sale to the other Participants who are not then in default under this Agreement ... in accordance with this Clause 6.03.
- (b) Pursuant to the Withdrawing Participant's deemed offer of sale made pursuant to Clause 6.03(a) each of the Other Participants shall thereupon have the right exercisable within 30 days from the deemed date of that election to withdraw by written notice to all Other Participants and to the Withdrawing Participant to accept such offer to sell at a price calculated in accordance with Clause 6.05(a) and any such acceptance may be expressed to be conditional on the purchase price if calculated pursuant to Clause 6.05(a)(i)(bb) being acceptable to the Other Participants accepting such offer and those of the Other Participants accepting such offer shall be entitled as among themselves to purchase the Participating Interest of the Withdrawing Participant in the proportions that their respective Participating Interests bear to the total of their Participating Interests and to the extent that such Participating Interest is not taken up by any of the Other Participants in accordance with its entitlement the remaining Other Participants shall be entitled to that portion of such Participating Interest not so taken up in proportion to their respective Participating Interests or in such other manner as they may agree.
- (c) Clause 6.05(b) shall apply to the payment of the purchase price.
- (d) In the event that the offer of sale made pursuant to Clause 6.03(a):

- (i) Is not accepted by the Other Participants or any of them;
- (ii) Is acceptable as to part only;
- (iii) Is conditionally accepted by the Other Participants as permitted by Clause 6.03(b) but the purchase price if determined in accordance with Clause 6.05(a)(i)(bb) is not accepted by them and notice thereof is given to the Withdrawing Participant within 3 days of such determination of purchase price,

the Other Participants shall forfeit all purchase rights under this Clause 6.03 in respect of that particular offer to sell and the Withdrawing Participant's election to withdraw from the Joint Venture from which such offer resulted shall be deemed to have been revoked Provided That such revocation shall not be construed as a waiver by the Other Participants of their right of purchase should an offer to sell arise in respect of any subsequent deemed election to withdraw pursuant to Clause 6.03(a).

- (e) A Withdrawing Participant upon ceasing to be a related company of its Principal forthwith shall give notice thereof to the Other Participants and to the Project Manager.
- (f) In the event that the Withdrawing Participant fails to give notice as required by Clause 6.03(e) any Other Participant or the Project Manager being aware of the Withdrawing Participant ceasing to be a related company of its Principal forthwith shall give notice thereof to the Other Participants including the Withdrawing Participant and to the Project Manager.
- (g) In the event that a Withdrawing Participant's election to withdraw has by Clause 6.03(d) been revoked the company which became the ultimate holding company of that Withdrawing Participant at the time it became a Withdrawing Participant shall thereupon be deemed the Principal of that Participant for the purposes of this Section 6."

Clause 6.03 is relevant because certain events occurred on 4th June 1993 as a result of which AUAG gave notice on 7th June 1993 under sub-clause (f) thereof to the effect that Amax had ceased to be a related company of its principal thereby setting in motion the provisions of the clause. These provisions, having been activated, it is necessary to turn to clause 6.05 which, so far as is relevant, is in the following terms:-

"6.05 Calculation and Payment of Price Payable under Clause 6.03 or 6.04

- (a) The price payable for the Participating Interest of the Withdrawing Participant under Clauses 6.03(b) or 6.04(b) (as the case may be) shall be paid within 75 days of the date on which the offer of the Withdrawing Participant to sell its Participating Interest was duly accepted and shall be whichever is the greater of:-
- (i) An amount equivalent to the fair value on an ongoing concern basis of that Participating Interest where such fair value shall be:-
- (aa) As agreed between the Other Participant or Participants accepting the offer to sell and such Withdrawing Participant: or
- (bb) As determined by an Expert appointed in accordance with Clause 6.05(e) and in accordance with Clause 11.01;
- in either such case as at the date the default concerned first arose less any sum:-
- (cc) Payable by way of reimbursement to such Other Participant or Participants accepting the offer to sell in accordance with the proviso to Clause 6.05(b); and
- (dd) Required to be paid by such Other Participant or Participants accepting the offer to sell in accordance with clause 6.06(a)(ii) or
- (ii) ...
- (b) Payment of such purchase price shall be made by such Other Participant or Participants accepting the offer to sell within the period specified in Clause 6.05(a) by the payment in full on behalf of the Withdrawing Participant of such total amount (if any) referred to in Clause 6.05(a)(ii) owing to the holders of the charges liens and encumbrances therein referred to and to the Other Participants or Participants under the proviso to this Clause 6.05(b) and/or under Clause 6.06(a) and any balance of such purchase price thereafter remaining shall be paid by such Other Participant or Participants to the Withdrawing Participant or as a court of competent jurisdiction may direct. Such Other Participant or Participants purchasing the Participating Interest of the Withdrawing Participant shall comply with the obligations imposed on a purchaser under Clause 6.06 Provided That all stamp duties and registration fees payable in respect thereof shall be paid by the

Withdrawing Participant or reimbursed by it to the Other Participant or Participants who may have paid that amount on behalf of the Withdrawing Participant;

- (c) A Withdrawing Participant shall not have withdrawn from the Joint Venture and shall in all respects retain all its rights and obligations under the Joint Venture until discharge in full by the Other Participant or Participants of the purchase price in accordance with Clause 6.05(b);
- (d) [This covers the position of a Participant who has failed to pay a sum called for by the Project Manager and has therefore been deemed to have elected to withdraw and to have offered its Interest for sale to the Other Participants. If all sums due are paid within 3 days of a determination of the purchase price by an Expert under Clause 6.05(e) the Participant is deemed to have revoked his election to withdraw].
- (e) For the purposes of Clause 6.05(a)(i)(bb) if there is not agreement pursuant to Clause 6.05(a)(i)(aa) within 21 days of the date on which the offer of the Withdrawing Participant to sell its Participating Interest was duly accepted then the determination of fair value shall be referred to an Expert appointed in accordance with Clause 11.01 and the Expert shall within 14 days of his appointment accept submissions as to that fair value from the Withdrawing Participant and the Other Participant or Participants accepting the offer to sell and the Expert shall state his determination of that fair value in writing within 21 days of his appointment. In making his determination the Expert may consult with such other professionally qualified persons as he in his absolute discretion thinks fit."

Clause 11.01 provides for the appointment of an expert failing agreement:-

"11.01 Reference to Determination

- (a) For the purposes of Clause 6.05(e) if the Participants concerned fail to agree on the Expert within 14 days after the date on which the right to purchase was exercised any Participant concerned may request the President for the time being of the New Zealand Society of Accountants to appoint an independent person expert in the matters in issue as such Expert.

- (b) The Expert shall be deemed to be acting as an expert and not as an arbitrator and his determination shall be final and binding on the Participants."

Within 30 days of AUAG's notice of 7th June 1993 which was accepted as being valid, AUAG, Welcome and Martha gave notice to each other and to Amax of their acceptance of the latter's deemed offer in terms of clause 6.05(b) subject to the calculated price being acceptable. Amax then disputed and has continued to dispute AUAG's contention that the events of 4th June 1993 resulted in Amax ceasing to be a related company of its principal. After the above notice of conditional acceptance had been given little happened until 1st September 1993 when, agreement upon price and the appointment of an expert having failed, an urgent communication was sent on behalf of the respondents to the President of the New Zealand Society of Accountants requesting the immediate appointment of an expert. The first-named respondent, who has taken no part in this appeal, was appointed on 2nd September but on 13th September 1993 Amax and Welcome challenged the appointment in the High Court ("the procedural challenge"). On 11th October 1993 AUAG commenced proceedings in the Commercial List to determine whether the events of 4th June 1993 resulted in Amax ceasing to be a related company of its principal. These proceedings have not yet been determined. Judgment in the procedural challenge was given by Robertson J. on 30th November 1993 in which, *inter alia*, he held that there had been no valid appointment of an expert. Certain procedural problems then arose upon which it is unnecessary to condescend. Suffice it to say that Amax and Welcome appealed the judgment and argued *inter alia* that time was of the essence of the 75 days specified for payment in clause 6.05(a). Parties had in the meantime agreed that the running of the 75 days would be stopped pending the determination of all the issues raised in the procedural challenge with the result that there would remain outstanding 13 days after final judgment. On 8th July 1994 the Court of Appeal held that time was not of the essence of payment within 75 days and dismissed the appeal. That is now the only issue raised before the Board.

Mr. Burton Q.C., for the appellants, advanced 5 reasons as to why time of payment was of the essence, namely (1) that clause 6.03 conferred on the Other Participants an option to purchase whose time limits must be strictly complied with; (2) that in any event where a party could unilaterally create or discharge contractual rights, it could only do so in strict accordance with the terms upon which such rights were created, with the result that all conditions other than payment required to be fulfilled within the specified time limit; (3) that having regard to the subject matter of the contract, namely mining, which was a particularly volatile

industry, time of payment was of the essence; (4) that the period of 75 days made ample allowance for the contingencies likely to arise during the valuation process; and (5) that prejudice to the Withdrawing Participant would result if the matter dragged on beyond the 75 days.

Although a great many authorities were referred to during the course of argument most of these turned on their own facts and did not assist in the construction of the JVA. However the general law as to when time is to be treated as being of the essence of a contract is not in doubt. It was stated very clearly in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904 by Lord Diplock at pages 926-7 in the following terms:-

"In 1925 section 25(7) of the Supreme Court of Judicature Act 1873 was replaced by section 41 of the Law of Property Act 1925. The wording differs slightly:

'Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules.'

...

My Lords, the rules of equity, to the extent that the Court of Chancery had developed them up to 1873 as a system distinct from rules of common law, did not regard stipulations in contracts as to the time by which various steps should be taken by the parties as being of the essence of the contract unless the express words of the contract, the nature of its subject matter or the surrounding circumstances made it inequitable not to treat the failure of one party to comply exactly with the stipulation as relieving the other party from the duty to perform his obligations under the contract."

In relation to the option argument it was, however, contended that as a matter of construction payment within 75 days was a condition precedent of its exercise. This argument was developed by reference to *Hare v. Nicoll* [1966] 2 Q.B. 130 in which the Court of Appeal considered an option to repurchase in the following terms:-

"... if the vendor shall before May 1, 1963, give notice in writing to the purchaser of his desire to repurchase 25,000 of the said shares at the price of £4,687 10s. and on payment of the said sum of £4,687 10s. before June 1, 1963, to the purchaser the vendor may at any time thereafter by deed revoke the trusts hereby declared in whole or in part and may declare fresh trusts ..."

Willmer L.J. at page 141 said:-

"It is well established that an option for the purchase or repurchase of property must in all cases be exercised strictly within the time limited for the purpose. The reason for this, as I understand it, is that an option is a species of privilege for the benefit of the party on whom it is conferred. That being so, it is for that party to comply strictly with the conditions stipulated for the exercise of the option. In the present case, clause 2 of the agreement prescribes two specific dates: (1) a date before which the plaintiff must give notice of his desire to repurchase the shares, and (2) another date before which he must make his payment of the purchase price."

The option in that case was in simple terms and for an agreed price. It is to be noted that before the first stipulated date the purchaser was only required to give notice of his desire to repurchase and that it was not until payment that the vendor required to take any action. As a matter of construction the giving of notice *per se* created no contractual obligation either way. By contrast clause 6.03(b) confers a right on the Other Participants to accept the deemed offer of sale by the Withdrawing Participant within 30 days at a price to be calculated either unconditionally or conditionally upon the price so calculated being acceptable. Thus timeous acceptance produces an immediate unconditional or conditional bargain and therefore constitutes an exercise of the right, whereas in *Hare v. Nicoll* what was required before the first date was merely a notice of intention which produced no bargain at all. Their Lordships have no doubt that *Hare v. Nicoll* was a correct decision on the contract in question and that, where an option is framed in such a way that it is to be treated as exercisable only within specified time limits, such limits must be strictly adhered to. However that principle does not necessarily apply to events occurring after exercise has taken place and obligations have already been incurred. A clear example of such a case is to be found in the unreported Privy Council case of *Samuel Ayoung Chee v. Diaram Ramlakhan* (Judgment delivered on 18th December 1985), which concerned an option in a lease in the following terms:-

"(4) At any time before the expiration of the term of FOUR (4) YEARS hereby created the Tenant shall be entitled to purchase the freehold property described in the SCHEDULE hereto subject to good title and free from encumbrances for the sum of ONE HUNDRED AND TWENTY THOUSAND DOLLARS (\$120,000.00) and on condition that the said sum of (\$120,000.00) shall be paid in full by the Tenant to the Landlord before the expiration of the term of FOUR (4) YEARS hereby created; and upon payment by the Tenant as aforesaid of the said purchase price as well as all arrears of rent

hereunder (if any), the Landlord shall forthwith execute a Deed of Conveyance vesting the said freehold property in the Tenant in fee simple or as he shall direct."

Sir Robert Megarry, delivering the judgment of the Board, analysed the terms of the option and continued at page 4:-

"The provision for the time of payment is thus embedded in provisions prescribing how the sale is to be carried out; there is nothing to suggest that it is to form a condition precedent to the coming into existence of any obligation to sell. In other words, on a straightforward reading of the language, the requirement as to the time of payment is worded not as one that must be satisfied before the option is exercised, but as one which regulates what is to be done once the option has been exercised."

At page 5 he said:-

"Both on the ordinary meaning of the words of the option in the present case and on the reasoning to be found in the authorities, it seems to their Lordships to be impossible to treat the payment of the sum of \$120,000.00 prior to November 1st 1977 as being a condition precedent to any contract of sale coming into being. The obligation to pay that sum was instead one of the terms of the contract which arose once the option had been exercised. Indeed, during the argument, Mr. Harvie, on behalf of the landlord, was ultimately constrained to accept that this was so; and on the footing stated in the Case for the landlord that was really the end of the appeal."

The position in relation to the second argument was substantially similar to that of the first. Mr. Burton argued that unilateral power to create or discharge contractual rights could only be exercised in strict conformity with the relevant contractual provision. As a general proposition that may be correct but the right of acceptance conferred on the Other Participants by clause 6.03(b) can hardly be described as unilateral given that it only arises as a result of action by the Withdrawing Participant which constitutes a deemed offer. It is of a very different nature to an option or similar right conferred on say, a tenant, which is exercisable on a specified date without any precipitating action by the landlord.

The third argument rested on the proposition that since mining was a volatile industry wherein prices were liable to fluctuate violently it was essential that contractual timetables were strictly adhered to. In *Stickney v. Keeble* [1915] A.C. 386 Lord Parker of Waddington at page 416 referred to the fact that

the equitable doctrine that time fixed for completion was not of the essence had no application "where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract". These observations were made in the context of an agreement to purchase land. In *British Holdings PLC v. Quadrax Inc.* [1989] 1 Q.B. 842, Sir Nicolas Browne-Wilkinson V.-C., at page 857 expressed the view that if a date had been specified for the completion of the sale of shares in unquoted private companies trading in a very volatile sector of the market time would have been of the essence of completion.

In evaluating this argument three matters must be borne in mind. In the first place the date of actual payment does not affect the price which has already been determined as at the date of the deemed offer to sell. In the second place the Withdrawing Participant will have lost no opportunity to dispose of its interest elsewhere because any further attempt to dispose thereof would either contravene the prohibition against sale in clause 6.01 or activate procedure under clause 6.03. In the third place if the Withdrawing Participant is likely to suffer loss by late payment he could serve a notice making time of the essence and thereafter sue for the price and any quantifiable damages. These matters are also relevant to the fifth argument on prejudice.

The fourth argument related to the adequacy of the period of 75 days within which to complete all the procedure necessary for the purchase of the Withdrawing Participant's interest. Reliance was placed on *In re. Sandwell Park Colliery Co.* [1929] 1 Ch. 277 in which Maugham J. held that where, in a debenture holders' action, the receiver contracts to sell property covered by the debenture, subject to the contract being approved and sanctioned by the court, and no date is fixed for obtaining such approval, it must be obtained before the date fixed for completion. Maugham J., however, expressed no opinion as to whether time was of the essence of the latter date. It was argued that if approval of the court could be obtained within a specified time there was no reason why the valuation of an independent expert could not be similarly maintained. However there is a significant difference between the two situations as will later be demonstrated.

In relation to the fifth argument on prejudice matters referred to as relevant to the third argument are also relevant to this argument. It is only necessary to add that until payment a Withdrawing Participant retains all his rights and obligations under the JVA by virtue of clause 6.05(c).

At the risk of some repetition it is now time to look in more detail at the relevant clauses of the JVA. The starting point is the

deemed offer by the Withdrawing Participant of its interest for sale under clause 6.03(a)(iii). Thereafter under clause 6.03(b) the Other Participants have the right within 30 days to accept the offer. Their Lordships agree with the Court of Appeal that time was here intended to be of the essence. The offer to sell is to be treated as at a price calculated in accordance with clause 6.05(a). Another Participant may accept the offer unconditionally or conditionally upon the calculated price being acceptable to it. If none of the Other Participants accept the deemed offer it is deemed to have been revoked (clause 6.03(d)(i)) and the company which became the ultimate holding company of the Withdrawing Participant shall be deemed to be the principal of the Withdrawing Participant for the purposes of section 6 (clause 6.03(g)). A similar result follows if the deemed offer is accepted conditionally by the Other Participants but the calculated price is not accepted and notice thereof is given to the Withdrawing Participant within 3 days of the price being determined. The Court of Appeal concluded that time was also intended to be of the essence of this period and their Lordships agree with this conclusion. Thus if notice of non-acceptance is not given within the 3 days the conditional acceptance becomes absolute. The condition as to acceptability of the calculated price is therefore so framed as to be resolute rather than suspensive of the acceptance under clause 6.03(b).

These provisions are relatively simple. Clause 6.05, however, sets out a more complex procedure for the calculation and payment of the price of a Withdrawing Participant's share. The price is to "be paid within 75 days of the date on which the offer ... was duly accepted and shall be an amount equivalent to the fair value ..." either as agreed between the Participants or determined by an expert appointed in accordance with later provisions (clause 6.05(a)). So far so good. Clause 6.05(b) provides how and to whom payment within 75 days is to be made. First of all payment is to be made by the Other Participants on behalf of the Withdrawing Participant of such amount, if any, as is owing by the Withdrawing Participant to the holders of such charges, liens and encumbrances as are excluded from the general prohibition against such charges and encumbrances and to the Other Participants. Thereafter any balance is to be paid by the Other Participants to the Withdrawing Participant "or as a court of competent jurisdiction may direct". Pausing there, it is obvious that the sub-clause contemplates that it will be necessary to ascertain not only the extent of the Withdrawing Participant's secured indebtedness but also the identity of the creditors to whom it is indebted. The reference to payment on behalf of the Withdrawing Participant of the amount owing to the Other Participants under clause 6.06(a) is not entirely easy to follow but it

appears to relate to the provision in the clause whereby a sale of the Withdrawing Participant's interest is only effective to pass title therein when the purchasing Other Participants have paid and satisfied the unpaid Called Sums of a Withdrawing Participant. The significance of this provision is that it appears to introduce a further step which may have to be taken before the purchase price can be treated as having been paid and the title of the Withdrawing Participant has passed to the Other Participants. The clause also contemplates that an application to the court may be necessary.

Moving on to clause 6.05(e) it is provided that if agreement on the price is not reached within 21 days of the date of acceptance of the deemed offer the determination of the fair value shall be referred to an expert appointed in accordance with clause 11 which provides that if the Participants have failed to agree on the expert within 14 days after the date of acceptance any Participant may request the President of the New Zealand Society of Accountants to appoint one. The expert must accept submissions from the Participants within 14 days of his appointment and state his determination within 21 days of his appointment. He is empowered to consult with other professionally qualified persons. It is to be noted that no time limit is provided for the appointment of an expert by the President of the New Zealand Society of Accountants.

There are a number of factors which, in their Lordships' view, are of significance in relation to the issues in this appeal:-

- (1) Although clause 6.03(d) makes provision for what is to happen if the Other Participants do not accept the offer of sale within 30 days or if conditionally accepting Other Participants fail to give notice of non-acceptance within 3 days, provision for the consequence of non-timeous payment is made neither therein nor in any other provision.
- (2) The lack of any time limit within which a request must be made to the President of the New Zealand Society of Accountants for appointment of an expert or within which he is asked to make the appointment. Thus, if he were ill or otherwise unavailable, a not inconsiderable time could elapse before an appointment could be made.
- (3) Although a timetable is prescribed for the appointed expert accepting submissions and making his determination no provision is made for his failing to adhere to this timetable and the parties have no means of controlling his actions. Pertinent to this and the immediately preceding factor are the following observations of Viscount Dilhorne in relation to a rent review clause involving arbitration failing agreement:-

"After the hearing some time might elapse before the arbitrator made his award. For circumstances beyond the lessors' control delivery of the award might be delayed beyond the year. It is most unlikely in these circumstances that the lessors, if they had been asked at the time the leases were entered into to agree that time should be of the essence, would ever have agreed to that and I see no reason for imputing to them an intention which no reasonable landlord would have had."

(United Scientific Holdings Ltd. v. Burnley Borough Council [1978] A.C. 904 at page 938H).

- (4) Once the price has been determined by the expert further enquiries may have to be made as to the identity of persons to whom part thereof will be payable and also as to the extent to which there may be outstanding unpaid Called Sums of the Withdrawing Participant.

It is correct that if the timetable in clause 6.05 were followed to the letter there could be 30 days in hand out of the 75 days, but this presupposes that in the event of a dispute as to an expert the appointment by the President of the New Zealand Society of Accountants is made on or before the expiry of the 21 day period provided by clause 6.05(e) for agreement between the Participants as to the price. However given the fact that no time is specified for approaching the President and that the Participants have the means of ensuring neither a speedy appointment by him nor adherence to the timetable by the appointed expert it is clear that the 75 day period could easily be exceeded by circumstances entirely outwith the control of the Participants. In their Lordships' view this points strongly against the parties to the JVA having intended that payment within 75 days was essential to the exercise by the Other Participants of their right to accept the deemed offer under clause 6.03(a). The case is *a fortiori* of *Chee v. Diaram Ramlakhan* not only because the rights of the Other Participants arise only by virtue of the actings of the Withdrawing Participant whereby it cannot be considered to be a unilateral option case but also because of the extent to which the 75 day period is subject to events beyond the control of the parties.

Their Lordships have no doubt that the Court of Appeal were correct to conclude that the general presumption that time is not of the essence of the contract had not been displaced. It follows that they will humbly advise Her Majesty that the appeal should be dismissed. The appellants will pay the respondents' costs before the Board.