

In the matter of an arbitration
under the Rules of Arbitration of
the International Centre for
Settlement of Investment Disputes

Case No. ARB/14/14

ICC Hearing Centre
112, avenue Kléber
75016, Paris

Day 4 Thursday, 15th September 2016
Hearing on Jurisdiction and Liability

Before:

PROFESSOR PIERRE MAYER
PROFESSOR BRIGITTE STERN
PROFESSOR EMMANUEL GAILLARD

EUROGAS INC and BELMONT RESOURCES INC
Claimants

-v-

SLOVAK REPUBLIC
Respondent

MONA BURTON and MAUREEN WITT, of Holland & Hart LLP,
appeared on behalf of EuroGas Inc.

HAMID GHARAVI, EMMANUEL FOY and ELLEN-LOUISE MOENS, of
Derains & Gharavi International, appeared on behalf of
Belmont Resources Inc.

STEPHEN ANWAY, DAVID ALEXANDER, ROSTISLAV PEKAR, RAÚL MAÑÓN,
MARIA POLAKOVA and EVA CIBULKOVÁ, of Squire Patton Boggs,
appeared on behalf of the Respondent.

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NOTE: Since at the Paris hearing a dispute occurred between the Parties regarding translation of certain mining terms (such as: banská činnosť, ťažba, dobývanie), in order to ensure that correct mining term used by a Slovak speaking witness is noted in the transcript, the Parties agreed to add after English version of the mining term used by an interpreter, a Slovak language version that was actually used by a witness in the following form: "In Slovak language version:...".

09:00

Thursday, 15th September 2016

1

2

(9.02 am)

3

THE PRESIDENT: Before we resume the cross-examination of

4

Mr Corej, the parties, or at least one of them, wished

5

to know whether we had specific points on which we would

6

like to hear them tomorrow. No, we don't make a list of

7

specific points, just two messages. The first one is

8

maybe to insist on legal issues both of Slovak and Utah

9

law. And second, although it may be obvious, but it

10

seemed to us that in the opening statements that were

11

arguments that were, if not entirely new, not really

12

developed in the memorials and to which there was no

13

opportunity to answer yet, and we would like to have

14

detailed answers on these points. That's all.

15

So we resume.

16

(9.03 am)

17

MR PETER COREJ (continued)

18

(Evidence interpreted)

19

Cross-examination by DR GHARAVI

20

Q. Good morning.

21

A. (In English) Good morning.

22

THE INTERPRETER: Perhaps we could check whether Mr Corej is

23

hearing the interpreting. (Pause)

24

DR GHARAVI: Sir, could you tell us at what date the

25

exploration rights were assigned to Economy Agency?

09:05

1 A. (Interpreted) Good morning, ladies and gentlemen.

2 Exploration (in Slovak language version: ťažobné) rights for the Economy
Agency were assigned

3 by tender. There was an order of bidders established in

4 the tender, which I think was held sometime in

5 April 2005. I don't remember the exact date. It might

6 have been 21st April.

7 Q. Could you kindly turn, sir, to tab 37. It should be

8 C-33. You must have the Slovak version before you.

9 It's the first bundle. It's the Supreme Court decision

10 of 2007 this time. So tab 37, Exhibit C-33. The part

11 that is highlighted should say:

12 "The regional court also stated that on April 21,

13 2005 a tender procedure was held ..."

14 Then it continues to say:

15 "... and to the winning company in a letter number

16 ... which also ..."

17 PROFESSOR STERN: Which page?

18 DR GHARAVI: It's the second page.

19 A. Yes, I see it.

20 DR GHARAVI: The second page on the left, Professor.

21 Page 2. More towards the bottom, there is a sentence

22 that starts with:

23 "The Regional Court also stated that on April 21,

24 2005 ..."

25 Then it states that:

09:07

1 "... the winning company in a letter number
2 [whatever] ... also announced that a corresponding
3 change in the mining areas record ... will be carried
4 out on April 22, 2005."

5 I wanted to make sure that that was in line with
6 what you just said. Would you agree with me, with the
7 court, the chronology? Do you agree with the court
8 chronology?

9 A. You mean the one stated here in writing?

10 Q. Yes, that it was --

11 A. I suppose, yes, once that's been written by the Supreme
12 Court, I would suppose they should not make a mistake in
13 that.

14 But let's try to agree on one thing, so we don't
15 catch each other on dates, because it's 2016 now, so
16 I apologise for not remembering some of the days
17 precisely going back ten or more years. It's just
18 a side comment. Thank you.

19 Q. I appreciate this.

20 Then I would like you to look at the two first
21 documents in the pochette: it's R-0249 and R-0250. The
22 reason I bring these two documents to your attention is
23 that yesterday, as far as R-0250 was concerned, the
24 draft contract with Transunited and Economy Agency, you
25 seemed to indicate that it may not be April 22nd 2005,

09:09

1 but in May, and I showed you that even the Slovak
2 version said April 22nd 2005.

3 I wanted to bring R-0249 to your attention because
4 there is another draft contract that is dated May, which
5 may lift your confusion; namely that there were two
6 draft contracts negotiated, one on April 22nd 2005, and
7 the second dates May 2005. Does that fit your
8 recollection of the events?

9 A. No. I think I did say this yesterday. I'm not sure
10 where you are going with this. I have explained
11 completely clearly my opinion and my position in this
12 regard; I don't know what else is this fact going to
13 show.

14 There are two draft contracts here which -- one
15 submitted by I don't know which company, I have never
16 seen this company before. I knew EuroGas or [Belmont]
17 Resources. And then there's a counter-draft or proposal
18 of my company, and I think I explained to you the date
19 yesterday already, and also the fact that I could not
20 have known on 22nd April that this is [Trans]united
21 Corporation company, because I only could have found
22 that out once the draft contract was delivered to me.
23 Otherwise there would be EuroGas contract or Belmont, as the title on
24 the draft contract.

25 So I could not have known in advance that this is

09:11

1 going to be this company, and which I point out
2 completely is unknown to me; I am not even familiar with
3 the owners or anything else about it. And I was not
4 willing to go into cooperation with some shell
5 corporation whose portfolio I'm completely unfamiliar
6 with. I was never given a record or extract out of
7 business register, or anything like this, which would
8 show me what company is this.

9 And that was one of the reasons why I have strictly
10 defined myself vis-à-vis Mr Rauball and I have excluded
11 completely any cooperation with him, and it was
12 an effort of trying to get me into a dead end, to bring
13 me into complicated problems.

14 Q. Sir, you are going on and on and on to talk and answer
15 something that I have not asked yet. I am asking you
16 whether that lifts your concern regarding the dates.

17 If you turn to your second witness statement at
18 paragraph 42, you mention, "After exchange of drafts of
19 the cooperation agreement"; then you have a footnote and
20 you refer to these two contracts. So I was just
21 reminding you that there were two drafts of contracts:
22 one dated April 22nd and the other one May. That's it.
23 And my question was whether you recall that that enabled
24 you to fit the dates right. That's it.

25 Now, the question I have for you is: would you agree

09:13

1 with me that whatever means the shareholder of Rozmin
2 had or did not have were superior than the financial means
3 of Economy Agency? Otherwise you would not, immediately
4 upon securing the exploration rights, enter into,
5 I would say, extensive discussions for over a month
6 period with them.

7 A. I think I explained this clearly enough yesterday. Let
8 me try again. These are two draft contracts here: one
9 submitted by Transunited and the other one
10 I submitted. Since there was no agreement reached, no
11 merger reached, neither one of these draft contracts was
12 signed, I didn't have the smallest reason to continue in
13 negotiations.

14 One thing else I'd like to point out: never before,
15 even in this case, was it that I would contact Rauball
16 myself as the first one, or Belmont or EuroGas. It was
17 all the other way round: them contacting me, asking me
18 for some kind of services or advice or assistance.

19 So I have nothing else to add to that.

20 Q. But you entertained those discussions and you exchanged
21 drafts, proposals and counter-proposals, as stated at
22 paragraph 42 of your witness statement, and as you
23 confirmed this morning. You said there were proposals,
24 counter-proposals and discussions, obviously over
25 a month period. That was the point that I wanted to

09:15

1 make; not that these contracts were signed.

2 If you have anything to add, please do so; otherwise
3 I will move to my next question.

4 A. All I can add is that the talks were underway, but from
5 the content thereof I understood clearly that there is
6 no serious interest but it's only a speculative nature
7 of talks, trying to gain dobývacie rights and trade them, which was not
8 my aim. My goal was to achieve -- which I have ended up
9 achieving later on -- something I don't have to be
10 ashamed of.

11 Another comment, if I may. I think that Rozmin had
12 other options as well. They could have transferred
13 their excavation area to another entity within the
14 deadline. They could have done another thing: to
15 participate in the tender. There is a catch: if they
16 did succeed in the tender, they would never be able
17 to be assigned again the same excavation area. So if
18 they didn't want to participate themselves, Rozmin, in
19 that new tender, by not participating at all they have
20 as though confirmed the fact that it was legitimate that they lost
21 the excavation area by [their] own inactivity.

22 So they were obviously trying to find another
23 company, and they tried to use me for that purpose, for
24 me to win the tender on their behalf and then give it to
25 them back, or sell it to them; which did not happen

09:17

1 because I understood the trick they were trying to pull.
2 And after such experience even from the past, I have
3 refused completely to go ahead with this.

4 That's all I can say to that. For me, the chapter
5 with regard to Mr Rauball and Agyagos and the EuroGas
6 company and Belmont is over.

7 Q. I had put to you a question on the financial means,
8 comparing the financial means of Economy Agency and
9 Rozmin. That was my previous question. And I am going
10 now to try to compare the intention of Rozmin with the
11 intention of Economy Agency to move forward the project;
12 the intention, obviously, of Rozmin before the
13 termination of its exploration rights, and the intention
14 of Economy Agency as of the time it tendered and then
15 won the tender.

16 I put to you -- would you agree with me? -- that
17 Rozmin, who had entered a contract with Siderit, and the
18 contract was in performance, had the intention to carry
19 out the works themselves; whereas you, Economy Agency,
20 you never had such intention, because as soon as you got
21 that tender, you were negotiating with others, including
22 these two companies, to transfer the rights, as you
23 ultimately did, to VSK. Would you agree with what
24 I just said?

25 A. I absolutely disagree with your interpretation, because

09:19

1 first of all, you put into one question -- I would have
2 to give you ten answers. So it would be good if we
3 could fragment the questions bit by bit, instead of
4 asking one lengthy question, so I could give you short
5 answers.

6 Q. I can break it down if you want.

7 A. But I can say this very clearly and briefly.

8 Rozmin had the excavation area available to it since
9 1997. I, as Peter Corej, was since 1997 still at all
10 major decisions present. Rozmin until the time of the
11 tender, which was seven or eight years later, had done
12 what they had done, and I know what I have done because
13 I was managing my work in person. There was
14 a construction site built up, the ramp was built,
15 93.3 metres, there was explosive storage built and that was it - the
16 works ended.

17 Something else I have to say. The financial
18 situation was so critical that Rozmin was not capable of
19 paying even for services we have performed for them for
20 guarding the area for security.

21 In 2004, that year in question when Siderit came
22 in -- I don't know if it was exactly 2004, it might have
23 been 2003; don't take me for that exactly -- I was
24 summoned to the police department in the city of
25 Rosnava. I was shocked by finding that the location

09:20

1 I have built, which was handed over to Rozmin, was
2 completely burglarised: everything was stolen,
3 electrical cables and equipment was stolen. So you are
4 telling me Siderit was going to continue in this
5 burglarised construction site?

6 One thing I would like to say --

7 Q. Sir, so that you understand my question --

8 A. Let me finish, please.

9 Q. Could you allow me to clarify, then you can move on.

10 I'm not talking about the technical means, the financial
11 capacity. I'm talking about the intention: the
12 intention of you, Economy Agency, to carry out these
13 works directly, not via another company. Not get the
14 tender, dump it on somebody and continue as a director
15 of that company; to do it yourself. And I'm putting to
16 you that you never had the intention to carry out this
17 project yourself, as Economy Agency or as Mr Corej; that
18 the intention was to get the tender and dump it on
19 somebody and have that company continue.

20 Now, please, I apologise to have interrupted you,
21 but I wanted you to answer that question, not a side
22 question.

23 A. You know, one serious thing I have to say. I'm
24 a technician, I'm an engineer, and that's my engineering
25 thinking. Most of you here are lawyers, and you think

09:22

1 as a lawyer, and you ask me some question while
2 answering the question and at the same time not letting
3 me explain it to you.

4 I don't know to what extent you are familiar with or
5 who of you present here are familiar with my design
6 project which I have submitted. If you were familiar
7 with it in depth, there is a business plan part of my
8 project. And I remember very well because I put it
9 together, and my wife as an experienced economist was
10 doing the economic part. Which is a significant and
11 substantial part with any project: to have a good,
12 decent business plan, with economic side to it as well.
13 And it clearly declares in which way and with whom the
14 mining works I'm intending to open. It is written there
15 that I will do it with my own capacity, own machinery,
16 and that is something I tried to stick with.

17 The second thing is that after the tender I was
18 approached by a company who was second in the order of
19 the bidders asking me whether it would not be possible
20 to join our forces into cooperation. And when I talked
21 at length with the owner of the company, I understood
22 that this is a different situation entirely, that these
23 people are truly interested in going into this. That is
24 why I have decided then to go and join forces with them.

25 That's where I have something to say about the old

09:23

1 Siderit. My father was building Siderit. My father was
2 a mining engineer, he was one of the directors in this
3 company, and that's why I respect this company. It is
4 difficult for me to talk about this now because Siderit
5 would get into similar trouble as we did.

6 Q. Sir, I would move on on this subject a bit --

7 A. I'm sorry, I forgot, I got interrupted in my train of
8 thought, trying to say as well, speaking that I am
9 an engineer.

10 At the end of the day, that Siderit that you have
11 been declaring about, that Siderit at a certain given
12 time approached me, Mr Engel trying to participate
13 in the project. They wanted to do parts of the project,
14 it's a fairly broad project, and I did agree with that.
15 There were negotiations which took place, there were
16 drafts contracts, draft agreements reached.

17 However, at the moment when work was supposed to
18 have begun, I think it was around 15th September,
19 I think it was in 2006/07, Siderit was supposed to enter
20 the site and commence working. It was Friday,
21 I remember exactly. The management from Siderit, whom
22 I am very well familiar with, they came to the site and
23 I asked them, "Gentlemen, why didn't you start and
24 commence working?" And they said, "Peter, look, we're
25 not prepared, we don't have the machinery. We need to

09:25

1 wait a couple more weeks".

2 So on my own risk, I gave instruction to my staff
3 and they came to the site and started working
4 immediately. So neither Siderit nor anybody else but
5 Rima Muran, with own staff, my company I used to own,
6 commenced work. And there is a relevant -- it can be
7 proven with relevant data. So I have commenced the first digging
8 works with my own staff and my own equipment.

9 So that is all about Siderit what I have to say. So
10 that's the type of management, how capable they were.
11 Today they no longer operate. And my father used to
12 build it, so I have a very close relation to the
13 company. My father used to work there for 30 years,
14 used to have 900 employees, and my father was managing
15 the entire large company.

16 Q. Sir, if you had to describe your profession, how would
17 you describe it? If I [ask] you what's your job, if you
18 say, "I'm a technician", yes, but what's your job?
19 Because I have engineer, technician. When I refer to
20 your letters to the government badmouthing us before our
21 rights were revoked, trying to secure as a lobbyist,
22 intermediary, I have contractor, I said wheeler-dealer
23 with the receipt for a million. How would you describe
24 yourself?

25 A. You know, I understand that this is a court hearing and

09:27

1 dispute, but in civilian life I'm a sportsman, I'm
2 an athlete, and I respect my opponents. With regard to
3 my profession, I'm a mining engineer, yes, who for
4 36 years has been working in this business. And I'm
5 also a doctor of mining sciences; that's just a side
6 comment.

7 As a young boy -- I was maybe 34 -- I have handed
8 over the job of chief engineer in the company of 400
9 employees. It was a mining engineering company where
10 I was given the job of a manager. And just for
11 consideration, at that time Dr Rozloznik was in
12 a similar job: he was the head of a geology department
13 managing 20 people. I was managing 400 people. That's
14 a major responsibility. So that is when I have grown
15 into a sense of responsibility, into an ability of
16 humility and decency. And I am not ashamed of my job,
17 of my profession. I'm doing it all my life, and I'm
18 happy that I can still continue to do it today.

19 If those people had at least elementary character
20 features I was referring to earlier, we would not be
21 here today trying to tackle this problem.

22 Q. Who, the others? The same ones that you were
23 negotiating with once you got the tender? Are you
24 talking about the same people --

25 A. I meant specifically Mr Rauball and Mr Agyagos, who seem

09:28

1 to be experts each on their own field, because
2 Mr Rauball in my opinion never has even been at this
3 site; and as I know, Mr Agyagos was there once in 2000,
4 if I remember correctly, when there was an official
5 opening with all of the generals in mining business.
6 And he was asked by journalists: how does he picture the
7 next continuation and opening and exploitation of the
8 business? He said, "I don't understand this business
9 because I'm a plumber by trade". So this is the kind of
10 people who were trying to manage this business.

11 I think I have proven one thing, and I have proven
12 that for the first time: the opening of the deposit when
13 the ramp was being built, after experience with the
14 ramp, I have decided for another way of opening, through
15 the adit, and if the money would have been available,
16 the ramp would have been completed, believe me. As
17 I have declared, I have completed my declarations.

18 Q. Let's move on to whether or not your company Economy
19 Agency, or the one you merged with, managed to meet the
20 deadlines of the 2002 amendment. The question to you
21 is: did you or VSK or Economy Agency manage to extract
22 minerals within three years; that is, [before]
23 April 22nd 2008?

24 May I suggest that it's a clear no, based on your
25 [first] witness statement, which talks about, at

09:30

1 paragraph 61:

2 "The works were completed some time in 2009 and in
3 this period, I presume in April, the first ton of talc
4 was extracted."

5 A. During this time there was a tender for designation of
6 the mining excavation area to another organisation?

7 I don't think so. That means the merged company,
8 Economy Agency and VSK, had met all the requirements.

9 That is a question to State Mining Authority and
10 professional supervision, whether the deadlines were
11 okay. The only thing I can say from the technical point
12 of view -- and please pay attention to what I say:

13 VSK Mining, if not by itself but through its
14 subcontractor Skanska, had drilled 4, [1]60 metres in
15 24 months' time. That was the length of the adit.

16 I don't think anything else needs to be said to that.

17 It was 24 months. That was a high pace of work. If
18 such pace had been from the very start, it would have
19 been operating a long time ago. But the effort
20 initially was zero. Not from me. I got myself into
21 an incredibly complicated situation as a result back
22 then.

23 Q. Sir, you have engaged extensively in your witness
24 statements to say what "dobývanie" means; the 2002
25 amendment, you gave your view on this. And I apologise,

09:33

1 I'm not going to let you off on this question, whether
2 you complied with the 2002 amendment, as you construed
3 it, against Rozmin.

4 Did you start extraction [by] April 22nd 2008? And
5 I guess the answer can only be no, because you claim you
6 did it in April 2009.

7 A. My answer is as follows. Mining activity and activities performed by
8 mining means, there is a supervision always by State
9 Mining Administration. Was (as heard in Slovak) dobývací area removed
10 from VSK Mining due to the deadlines not having been
11 met? Was there a new tender called to assign mining (in Slovak language
version: dobývací) area to another company?

12 There
13 was not. So I therefore declare all the deadlines were
14 respected, they are valid. Because otherwise the Mining
15 Administration would have proceeded in the same way as
16 they have proceeded back in 2004 and 2005, when the
17 tender took place in 2004 and 2005 consequently.

18 Q. That's why we are here: because we are submitting to you
19 that that amendment was applied against us differently
20 than the way it was applied to you. That's the whole
21 point; that's why we are here. If it was just to
22 declare --

23 MR ANWAY: Mr President, there is again a premise in that
24 question that the 2002 amendment even applied at this
25 time.

09:34

1 DR GHARAVI: Let the witness say it. He is the expert.

2 MR ANWAY: There is a presumption in one of your questions
3 with a false factual premise. It is not appropriate to
4 put the question to the witness.

5 DR GHARAVI: No, let him. That's a new argument that we
6 hear from you.

7 THE PRESIDENT: The point has been clarified, so we can move
8 on.

9 DR GHARAVI: When did extraction start? Can you prove that
10 it started even in April 2009? What proof can you bring
11 us?

12 A. It's not my job to give you any evidence. I don't see
13 why I should give you any evidence here. I was not the
14 owner at that time of the company anymore. I was
15 a technical director responsible for something else
16 entirely, for technical issues, for supervision over the
17 project which I have designed myself.

18 One more comment, if I may. Certainly this was not
19 the only situation when a tender was called. There was
20 a modus operandi in other cases. And myself, as member
21 of the execution of the Slovak Mining Chamber, had
22 participated in other tenders on behalf of the Slovak
23 Mining Chamber. And I can confirm that this was not the
24 only case that, due to inactivity of a company, a new
25 tender would be called to reassign the excavation area

09:36

1 to another company. I know this exactly, and I can
2 confirm this in relevant cases. I was a member of such
3 commission in two cases personally.

4 So by saying that this was only specifically
5 designed against Rozmin is completely untrue. And you
6 had the head of the Main Mining Office; you could have
7 consulted this with him. So I don't know what else
8 I can say to that.

9 Q. Do you think the 2002 amendment applied in 2005, 2006,
10 2007, when VSK was undertaking those works?

11 A. No, because there was an amendment, I'm not sure in
12 which year -- 2005, if I remember correctly -- there was
13 an act amendment in the way that the deadlines were
14 changed for underground exploitation (in Slovak language version:
15 dobývanie) from three to five
16 years. And with above-ground, it stayed the same: for
17 three years, I think. So underground excavation differs
18 from the above-ground operation, obviously.

19 So when -- it just occurred to me now -- when during
20 that time there was an amendment of the law, which it
21 did, then VSK Mining did not have the obligation by law
22 to start excavating within three, but within five years
23 instead.

24 Q. What law do you say was that? And when did it come into
25 force, do you recall?

A. You had the MMO head here who was responsible for this;

09:38

1 you could have asked him. I don't know exactly. It
2 might have been 2007, I'm not certain. I suppose there
3 are many acts which govern this business, and mining
4 acts and decrees, I'm sorry to say there are really
5 a huge number. I'm not familiar with all of them. But
6 when I need something, I know where to look for it and
7 how to look it up.

8 Q. Is that the 2007 law explaining what "dobývanie" means
9 as it was reported in 2011? Meaning that "dobývanie"
10 was explained only in 2007, and that the same law where
11 it explained it, it extended the deadline to five years?
12 Is that the one you are taking about?

13 A. I suppose.

14 Q. Okay. Now let us assume that the 2007 law that
15 clarified the meaning of "dobývanie" in 2007 and
16 extended it to five years, whether you complied with
17 that, and assuming it was applicable to you, so it goes
18 to April 2010. And I asked you: what proof can
19 you give me that the company started extraction? And
20 you answered, I think, "I don't have to give you proof",
21 but then you went on. So you don't want to give me the
22 proof, or you don't know because you were a technical
23 director? What is your answer?

24 A. I will answer you very gladly. At that time company
25 VSK Mining existed legitimately. So if you need to know

09:40

1 some details with regard to activity of that company,
2 you should approach the owners and managers of the
3 company, because I at that time was the technical
4 director responsible for technical implementation of the
5 mining works, and that was the alpha and omega of my
6 activities of my job. It was totally not my job to be
7 observing deadlines or transfers and legal issues which
8 the company could have handled differently by their own
9 management. I was not an executive officer of the
10 company. What I wanted is what I was doing: being
11 a technical director, responsible with the supervision
12 authorities, making sure that the quality and the
13 dimensions as I have initially designed were also
14 performed for the mining works.

15 And I have to say that is exactly how things were
16 done. So the adit was dug 4,160 metres, 320-metre
17 chimney; the toughest mining work ever in Slovakia --
18 maybe in Central Europe -- over the past 20 years, which
19 is not simple mining operations, and we have been able
20 to stay within deadlines and now we are excavating. Why
21 was it not possible, having had all licences, all
22 permits before, all equipment and people, abilities?
23 Why we were not able to do that with Rozmin?

24 Q. Yes, but we're past that stage. You have to get over it
25 at one point. What about your heart? Doesn't your

09:41

1 heart, your desire, or as a citizen, tempt you to wish
2 to find out when exactly the deposit went into
3 extraction?

4 You say all this you wanted to do, but it's not
5 an abstract project. It has an end goal, which is to
6 extract talc. You are a citizen of the country, you are
7 an industrial player there. You were the director of
8 the company at least; I know you were not the owner.
9 You were the director of the company. How could you not
10 know, answer my question, when the mine started
11 extraction?

12 A. I think that the first tonne was excavated -- and
13 I think I mentioned the specific date -- April 2009.

14 Q. Yes, but that's your word. That is the same word you
15 have for the 1.5 million deutschmarks. What evidence
16 can you give me?

17 Let's move to the next exhibit, C-306. You see,
18 because all I'm left, when I ask these questions, is
19 with your statement, moreover which is qualified as
20 "I believe". So I look at the press, and what do
21 I have? I have a September 30th 2011 -- and this time
22 it is not the World Bank report on corruption or
23 European Commission; it is Rosnava, C-306, dated
24 September 30th 2011. Okay? That's your country. And
25 if you go to the second page -- it should be the last

09:43

1 one, Professors.

2 So if you look at it -- I start again. All I'm left
3 with is the information I can find online. So Rosnava,
4 that's in your country, September 30th 2011, which is
5 way, way past the even the five-year deadline. I turn
6 to the second page, and it says:

7 "The company has invested more than €20 million ..."

8 Of course, that's not your company but the company
9 that you handed it to:

10 "... into extraction of talc ... Since 2006 it has
11 driven a 4.2 kilometer long tunnel leading to the
12 deposit and 320 meter ventilation shaft. The necessary
13 infrastructure for the mine has also been built ...

14 "While preparation work was being done, the company
15 employed 41 people. When talc starts to be
16 extracted..."

17 When talc starts to be extracted. When talc starts
18 to be extracted.

19 "... the company should hire a further dozens of
20 people to work in the mine and the treatment plant.
21 Further jobs should be created at contractors."

22 Of course, it didn't say three times "When talc
23 starts to be extracted"; I am just emphasising. Yes,
24 it's a problem?

25 A. This is not a problem at all, because over the ten years

09:45

1 there were a series of such articles, 30 of them,
2 published by Mr Rauball. In the majority of these
3 articles, nonsense was published, and personal
4 invectives and personal attacks on myself and my family.

5 So I don't really attribute much value to these
6 articles. This is published by journalists who can
7 write anything, and basically they give their own
8 meaning to things they don't understand. Please
9 understand, I am a technical expert who is truly
10 familiar with the matter, and I don't really put much
11 weight to such articles.

12 Q. But you told me that you don't know precisely when there
13 was extraction.

14 And this article, why Mr Rauball? I mean, what does
15 it have -- it talks about the main shareholder. If you
16 look at the first page, there was a discussion with
17 Robert Schmid, general director of Schmid
18 Industrieholding and VSK Mining's shareholder. The
19 title is a very complimentary one: "Hungry Gemer clearly
20 has the world's largest talc deposit!" Then it goes on,
21 you see it says, besides creating jobs and other
22 benefits for the local region, employment, it says your
23 achievements, 4.2 kilometres. This is a good,
24 congratulations, nice article.

25 Anyway, unless you have something to add, I want to

09:46

1 put a final conclusion that I draw from all this. Do
2 you have something to add on this or should I move?

3 A. I don't think it is necessary to comment on it any
4 further. I believe that I gave you quite a broad
5 answer, I gave you my opinion, my position on this, and
6 there is nothing else I could add.

7 Q. Good, good. If I sum it up --

8 A. Please understand, please permit me a few words.
9 Because if we go into technical details, we would
10 definitely spend much more time here than these hours,
11 but I'm not sure this would be of interest to the
12 members of the Tribunal and we would unnecessarily
13 burden them with this.

14 There are certain details and differences in
15 understanding what the term "dobývanie" or "excavation"
16 means, in your perspective and in my perspective. But
17 this is for an expert discussion, which definitely is
18 not suitable for this environment and I don't think it
19 is needed. Journalists' articles, well, please take
20 them as a certain make-up story of journalists who don't
21 truly understand the technical side of this.
22 Journalists barely cover, whoever wrote this.

23 What is rather interesting and perhaps shocking [to]
24 me: at the end of every article it says what treasure is
25 this deposit, what an incredible sight this is to see.

09:48

1 And yet if they would approach the site and if they
2 would talk to me, I would definitely explain it to
3 them -- and I think Dr Rozloznic would give them the
4 same answer -- this is not exactly the case, this is
5 a very complicated problem, because it is not a pure
6 deposit, this is not just a vast bulk of pure talc, it
7 is a complicated deposit and the whole mining (in Slovak language
version: ťažobný) process
8 will have to be floated. So it is definitely
9 a complicated situation.

10 So whoever writes that this is the best deposit in
11 the world -- Mr Rauball likes to pretend it's the best
12 deposit in the world -- well, these people are very far
13 from the truth.

14 Q. Again, sir, you have to focus with me. The article
15 quotes Robert Schmid, which is VSK Mining's main
16 shareholder. It quotes him:

17 "We have just completed extensive exploration ..."

18 It doesn't talk about extraction.

19 Okay, I will move on to the conclusion I draw on
20 this. Before I do so, you say you were the technical
21 director of VSK until 2012. When did you start: 2005,
22 as technical director?

23 A. I suppose 2005.

24 Q. So 2005 to 2012, okay. And you never held any shares at
25 VSK, did you?

09:50

1 A. No.

2 Q. The conclusion I draw from this -- and I leave aside
3 Rozmin -- is that the government gave a company,
4 Economy Agency, a mine deposit, whereas Economy Agency
5 never had itself -- I am talking itself -- the financial
6 means nor the intention to carry out the project, and
7 ultimately it landed in the hands of someone that had
8 not reached extraction even six/seven years after.
9 That's the conclusion I draw from this, and I have
10 nothing else to say but to put that conclusion to you.
11 And I think you have already answered everything, but if
12 you want to add ...

13 A. Well, sir, counsel, have you ever been there, seriously?
14 I would truly recommend you to see it in person, to talk
15 to those people who understand the issue truly, who
16 technically have to solve daily challenges, and you
17 would understand how complicated this project is.

18 And one thing: the Government of the Slovak Republic
19 did not give anything out as a gift, nor did it take
20 anything away from anyone. Rozmin, by its lack of
21 activity -- and everyone knows this in the industry, and
22 I do hope that even people here understand it finally --
23 by their lack of activity and lack of responsibility
24 reached a status quo where a new tender procedure had to
25 be initiated in order to award the excavation area to

09:52

1 another organisation. If they had behaved responsibly,
2 decently, and if they would continue financing the
3 activities, I can guarantee you we would reach the
4 deposit eventually.

5 It's not about the Slovak Government taking
6 something away or giving something out as a gift. The
7 Mining Act which is in force and which we have to
8 respect -- everyone has to respect it, everyone who
9 works in the mining industry -- clearly states under
10 which conditions any organisation can have the mining (in Slovak
11 language version: dobývací) area,
12 and under which it does not have any mining (in Slovak language version:
13 dobývací) area
14 -- nothing else, nothing more -- for a given
15 excavation area.

16 And I can only testify that I have worked in this
17 industry for 36 years, and up to this date I am still
18 responsible for some serious projects. So much for my
19 side.

20 DR GHARAVI: What I have learnt by listening to the
21 witnesses of the Slovak Republic is precisely, sir, that
22 there is no talk. The law is the law; there should not
23 be any explanation of the law. And that after
24 a deadline is a deadline. And you receive a letter, and
25 there is no talk, you move. That's what I understood.
And I see that this was not applied to your company,
even if we take the five-year deadline. You never

09:53

1 received this letter: clack, go.

2 That ends my examination, sir, and I thank you very
3 much.

4 THE PRESIDENT: Re-direct?

5 MR ANWAY: We have no questions, Mr Chairman, thank you.

6 (9.54 am)

7 Questions from THE TRIBUNAL

8 PROFESSOR GAILLARD: Mr Corej, speaking for myself,

9 I understand your answers as to the press regarding the
10 question of the date of the first extraction of talc, as
11 opposed to excavation, the first time you extract talc,
12 and I understand your answer to be that you don't think
13 that what is said in the press is reliable. But my
14 question to you is: what is your personal understanding
15 of the date of extraction in this project?

16 A. "Tazba" and "dobývanie" mean the same. In technical
17 understanding of
18 mining are ťažba and dobývanie the same.

19 I prefer to use the term "tazba", because in Slovak
20 normal jargon we used to talk about "mining (in Slovak language version:
ťažobné) companies",
21 we never talk about "excavation companies". So that's
22 why I use the term "tazba" and not "dobývanie".

23 I personally think that the key term -- and please
24 don't take my word for granted; I am not an official
25 state representative, nor am I an official

09:55

1 representative of the company, I am just a technical
2 director -- I think that the key deadline was
3 April 2009. This is when the first tonne of the mineral
4 was excavated.

5 PROFESSOR GAILLARD: So your answer is that the first tonne
6 of talc was excavated in April 2009? That's your
7 answer?

8 A. I think so, yes.

9 THE PRESIDENT: No other question following this one? No.

10 Then thank you, Mr Corej, for having come and
11 answered these questions. So now you are free.

12 MR COREJ: Thank you very much.

13 THE PRESIDENT: Now we go to the experts. The first one is
14 Ms Jarvis, and then maybe a little later, or coming in
15 at some point, Mr Gardiner; is that right?

16 MS BURTON: Mr Chairman, we have decided that we will take
17 them at the same time. (Pause)

18 (10.03 am)

19 MS ANNETTE W JARVIS (called)

20 MR SAMUEL P GARDINER (called)

21 THE PRESIDENT: Good morning, Ms Jarvis and Mr Gardiner. So
22 you have presented expert reports in this case and you
23 are going to be asked questions, but first can you read
24 aloud, please, the expert declaration, each of you.
25 It's individual.

10:03

1 MR GARDINER: I solemnly declare upon my honour and
2 conscience that my statement will be in accordance with
3 my sincere belief.

4 MS JARVIS: I solemnly declare upon my honour and conscience
5 that my statement will be in accordance with my sincere
6 belief.

7 THE PRESIDENT: Mr Anway, your -- no?

8 MR ANWAY: We have no direct. Thank you, Mr Chairman.

9 THE PRESIDENT: No direct. Then Ms Burton.

10 (10.04 am)

11 Cross-examination by MS BURTON

12 Q. Good morning.

13 A. (Mr Gardiner) Good morning.

14 Q. We've never met, Mr Gardiner. I've known Annette for
15 a number of years. So my first question is going to be:
16 how do you want me to address you? Do you want me to
17 address you by your first name, or as Ms Jarvis and
18 Mr Gardiner?

19 Q. Do you have a preference?

20 A. (Mr Gardiner) "Sam" is great for me.

21 Q. "Sam"?

22 A. (Ms Jarvis) Whatever you feel comfortable with is fine.

23 Q. Alright, thank you.

24 I'm going to be questioning you today on your two
25 expert reports. You are going to notice that my client

10:04

1 and I disagree with some of your conclusions. By doing
2 so, I mean no disrespect to either one of you.

3 My first question is: I noticed that neither of your
4 reports contained in them a list of the sources of
5 information on which you relied in making your
6 conclusions. Was that intentional?

7 A. (Ms Jarvis) I think what they list is in the statements
8 of fact it lists every document that we reviewed for,
9 you know, making those conclusions. So in the reports
10 themselves is a list of all of the documents we reviewed
11 in making these conclusions.

12 Q. So rather than have a separate list, would it be
13 accurate to say your footnotes where you reference your
14 documents contain the universe of information on which
15 you relied to reach your conclusions?

16 A. (Ms Jarvis) Yes.

17 Q. Is that true for you, Sam, also?

18 A. (Mr Gardiner) Yes.

19 Q. Now, Annette, you're certainly recognised as an expert
20 in bankruptcy law; and Mr Gardiner, you're here to
21 testify with regard to your conclusions as a corporate
22 attorney. Is that right?

23 A. (Mr Gardiner) That is right.

24 Q. You have to give verbal answers, Annette.

25 A. (Ms Jarvis) Yes.

10:06

1 Q. However, I would take it neither one of you is an expert
2 in international law; is that correct?

3 A. (Ms Jarvis) That is correct.

4 A. (Mr Gardiner) That is correct.

5 Q. So you're not here to provide any opinions today
6 regarding any of the issues that are before the Tribunal
7 under international law as they relate to the Bilateral
8 Investment Treaty between the United States and the
9 Slovak Republic; is that correct?

10 A. (Ms Jarvis) That is correct.

11 A. (Mr Gardiner) That is correct for me as well.

12 Q. I want to talk with Annette first about some bankruptcy
13 issues. Although it's set out in your report, I think
14 it might be helpful to the Tribunal to just go through
15 the basics of the Bankruptcy Code and Chapter 7, so
16 that's what I will do first.

17 You state in your report that a bankruptcy case is
18 commenced when a petition is filed. So if you would
19 take a look, there should be a bundle -- we call them
20 "binders" -- that might be of -- those are your reports,
21 but there should be some exhibits, a bundle of exhibits
22 there. (Pause)

23 If you take a look at item number 2 in that bundle.
24 It will be tab 2, and it's Exhibit R-85. It's tab 2 in
25 your bundle. This is the petition that was filed on

10:08

1 May 18th 2004 commencing the involuntary Chapter 7 case
2 of the 1985 company known as EuroGas Inc; is that right?

3 A. (Ms Jarvis) Yes, that is correct. As I stated in my
4 report, there are two ways that a bankruptcy can be
5 commenced: one, a voluntary petition that is filed by
6 the debtor, the company themselves; and the other is
7 an involuntary [one] that is filed by creditors.
8 An involuntary petition is sort of like commencing
9 a complaint saying there's a reason for them to be in
10 bankruptcy under the statute, and then the court makes
11 a determination as to whether in fact the involuntary
12 petition is correct and the company should be put into
13 bankruptcy.

14 Q. And that eventually did happen --

15 A. (Ms Jarvis) Yes.

16 Q. -- with regard to this particular --

17 A. (Ms Jarvis) Yes.

18 Q. Now, the other thing I need to tell both of you is we
19 can't speak at the same time, due to the recording
20 equipment. So I will try not to interrupt you, and
21 request the same back.

22 Property of the estate, let's talk about that
23 a minute. The Bankruptcy Code has various lists within
24 Section 541 of what constitutes property of the estate;
25 I don't think we need to cover all of those today. But

10:10

1 just for the Tribunal's edification, property of the
2 estate includes all legal and equitable interests of the
3 debtor in property as of the date that the case is
4 commenced; you would agree with that?

5 A. (Ms Jarvis) Yes.

6 Q. So with regard to the 1985 company's bankruptcy case,
7 its bankruptcy estate would include all property, legal
8 and equitable interests it owned in property, as of
9 May 18th 2004; would you agree with that?

10 A. (Ms Jarvis) That is correct.

11 Q. With regard to other types of property, certainly
12 property of the estate also includes property that the
13 estate itself acquires; do you agree with that?

14 A. (Ms Jarvis) Yes.

15 Q. As examples. It may be easier for the Tribunal to
16 understand this concept if we take a look at
17 a bankruptcy filing by an individual person. If
18 an individual person files bankruptcy on January 1st of
19 a year, he is employed, he gets a pay cheque on
20 February 1st, that pay cheque income is not going to be
21 property of his Chapter 7 bankruptcy estate; you would
22 agree with that?

23 A. (Ms Jarvis) Right, if it's earned after and it's with
24 an individual afterwards, then it would not be property
25 of the estate.

10:11 1 Q. But with regard to a corporate entity, if the trustee is
2 authorised to operate the business -- and you discuss
3 this a little in your report: that in a Chapter 7 for
4 a corporate debtor, a trustee may request permission
5 from the court to operate the business. And if he or
6 she does, revenues generated during the time the case is
7 pending will be property of the estate?

8 A. (Ms Jarvis) Correct. And under a Chapter 7, they could
9 only operate it temporarily.

10 Q. Right. So property that the estate obtained is going to
11 be property of the estate. Another example would be if
12 the trustee sells an asset -- for instance, the trustee
13 in this particular case sold some interest in corporate
14 entities, and the proceeds that he received from the
15 sales of those entities were property of the EuroGas
16 1985 company bankruptcy estate; is that right?

17 A. (Ms Jarvis) That's correct.

18 Q. And that would be because the other principle is
19 proceeds of property of the estate are also property of
20 the estate; is that right?

21 A. (Ms Jarvis) That's correct.

22 Q. Property of the estate remains property of the estate
23 until the trustee administers it in some fashion: he
24 sells it, he abandons it, he destroys it, some type of
25 administration. Would you agree with that?

10:13

1 A. (Ms Jarvis) Property of the estate remains property of
2 the estate until it's administered by the trustee or
3 abandoned, or relief from stay is granted.

4 Q. Or foreclosed?

5 A. (Ms Jarvis) Well, relief from stay.

6 Q. Yes, relief from stay is granted. And a creditor that
7 has a lien on the property forecloses on it would be
8 another example.

9 A. (Ms Jarvis) Yes.

10 Q. A debtor's status, I want to talk about this for
11 a minute. A corporation files bankruptcy, and its
12 assets are property of the estate. But its status as
13 a corporation is not itself property; would you agree
14 with that?

15 A. (Ms Jarvis) If you are asking me, for instance, if the
16 company as it is remains as it is when it becomes
17 a debtor, the change is that in a Chapter 7 case with
18 a corporation, once Chapter 7 is filed, the officers and
19 directors no longer have any control over the
20 corporation; that vests solely in the trustee.

21 Q. That's not quite my question. A corporation files
22 bankruptcy. The bankruptcy trustee can sell its
23 accounts receivable, its real estate, its equipment, its
24 machinery; but it can't sell the corporate status to
25 somebody?

10:14

1 A. (Ms Jarvis) No, the corporation is as it is when it
2 files bankruptcy.

3 Q. Right. A debtor in bankruptcy has an obligation under
4 the Bankruptcy Code to file schedules of its assets; you
5 would agree with that, I'm sure?

6 A. (Ms Jarvis) Yes, that's correct. Section 521 requires
7 that of every debtor that files. And whether they are
8 involuntarily filed or they file themselves, they must
9 file a statement and schedules of assets and
10 liabilities.

11 Q. And those are reflected by specific forms that the
12 debtor is to fill out and file with the court; is that
13 right?

14 A. (Ms Jarvis) Right. There are standard forms they have
15 to file. They have to file them under penalty of
16 perjury.

17 Q. And those forms request certain information: list your
18 real estate, list your cash, list your bank accounts,
19 list your accounts receivable. Machinery, equipment,
20 interests and other entities are all among the types of
21 property that have to be placed on those forms and filed
22 with the Bankruptcy Court. Is that right?

23 A. (Ms Jarvis) Right. In fact, the law is very broad in
24 what has to be included, what property has to be
25 included in the statements and schedules filed with the

10:15

1 Bankruptcy Court.

2 Q. Okay. So in this particular instance you would expect,
3 had the 1985 company filed schedules, it would have
4 listed as an asset in its bankruptcy estate its stock
5 interest in an entity known as EuroGas GmbH?

6 A. (Ms Jarvis) That is correct.

7 Q. Often corporations have affiliates: they have
8 subsidiaries, they have parent corporations. Let's take
9 a series of corporations, and we're going to assume they
10 are in the United States, just to make it easier, and
11 they are all filing bankruptcy, and they are affiliates.

12 So you have the parent corporation. It files
13 bankruptcy. You would expect that on its schedules it
14 would list its stock interest in the subsidiary that it
15 owns?

16 A. (Ms Jarvis) That is correct.

17 Q. And then with regard to the subsidiary -- it files
18 bankruptcy at the same time -- you would expect that it
19 would list its assets: its equipment, its machinery,
20 whatever it specifically owns?

21 A. (Ms Jarvis) That is correct.

22 Q. But you would not expect the parent corporation to list
23 the machinery, equipment, and other assets of the
24 subsidiary on its own schedules; isn't that correct?

25 A. (Ms Jarvis) Yes, that's correct.

10:17

1 Q. So in this particular case, with the 1985 company, while
2 you would have expected it to list in its schedules its
3 interest in EuroGas GmbH, you would have not expected it
4 to list EuroGas GmbH's stock interest in Rozmin?

5 A. (Ms Jarvis) That's correct.

6 Q. And you would not have expected the 1985 company's
7 assets schedules to include Rozmin's assets -- its
8 mining rights, its permits, et cetera -- that it owned
9 in the Slovak Republic?

10 A. (Ms Jarvis) That is correct.

11 Q. You also mention in your report, Annette, about the
12 automatic stay, and that the automatic stay goes into
13 effect when a case is commenced. Describe what the
14 automatic stay is for the Tribunal.

15 A. (Ms Jarvis) The automatic stay is a statutory injunction
16 that goes into place when a bankruptcy is filed. So it
17 prevents suits from being continued against the debtor,
18 it protects property of the estate, it protects acts
19 against property of the estate. So it's called
20 a "breathing spell", in order to allow the debtor to
21 reorganise or to liquidate in a bankruptcy. It protects
22 the debtor and its assets.

23 I would add, too: as an injunction, what the law
24 says is that, if someone violates the stay, then
25 whatever they do in violation of the stay is void

10:19

1 ab initio, so of no effect.

2 Q. The automatic stay goes into effect the minute, the
3 second that the petition is filed; is that correct?

4 A. (Ms Jarvis) Correct. It's statutory, so as soon as the
5 petition is filed, it goes into effect.

6 Q. So with regard to EuroGas, the 1985 company, the
7 automatic stay with regard to its bankruptcy proceedings
8 commenced on May 18th 2004, when the involuntary
9 petition was filed; would you agree with that?

10 A. (Ms Jarvis) There is some split in the circuits on the
11 issue, when you have an involuntary petition, whether
12 the stay goes into effect when they are determined to be
13 a debtor, which would have happened in October or on the
14 date the petition is filed. But in the Tenth Circuit
15 that is decided that it goes into effect on the day the
16 petition is filed.

17 Q. Right. So in this instance that would have been
18 May 18th 2004?

19 A. (Ms Jarvis) That is correct.

20 Q. The automatic stay does not last forever, and there are
21 specific provisions in the Bankruptcy Code for when the
22 automatic stay terminates. You would agree with that
23 statement?

24 A. (Ms Jarvis) That is correct.

25 Q. For example, specifically the Bankruptcy Code provides

10:20

1 that as against property of the estate, the automatic
2 stay terminates when the property ceases to be property
3 of the estate?

4 A. (Ms Jarvis) That is correct.

5 Q. Yes. So that could occur by the trustee selling
6 an asset, abandoning an asset, or a creditor obtaining
7 relief from the automatic stay to take action against
8 the asset?

9 A. (Ms Jarvis) That is correct.

10 Q. And the automatic stay as against the debtor itself
11 terminates when the debtor's discharge is denied or the
12 case is closed?

13 A. (Ms Jarvis) That is correct, because there are parts of
14 the stay that protect the property of the estate, then
15 there are parts of the stay that protect the debtor.

16 Q. It might be helpful to give some context to the Tribunal
17 by discussing the different types of bankruptcies that
18 can be filed. They are hearing about one, but I think
19 it would be good to give context of others.

20 For example, there is a chapter in the Bankruptcy
21 Code called Chapter 11, which would provide for a type
22 of reorganisation either of a business's affairs or even
23 an individual's affairs; is that right?

24 A. (Ms Jarvis) Yes, that's correct. Chapter 11 allows
25 either individuals or companies to file and they can

10:22

1 either reorganise in some way, coming out as an entity
2 that remains in effect, or they can liquidate in
3 a Chapter 11, at least a company can.

4 Q. Then there is a Chapter 12, which is specifically for
5 farmers, family farmers; is that right?

6 A. (Ms Jarvis) That's correct.

7 Q. And a Chapter 9 which is for municipalities filing
8 bankruptcy?

9 A. (Ms Jarvis) That's correct. That's correct.

10 Q. Chapter 13, which is for individuals who want to have
11 a court-supervised plan of repayment for their
12 creditors; is that right?

13 A. (Ms Jarvis) Right, it has to be individuals with regular
14 income, and they can then pay out their creditors over
15 a period of years under a plan confirmed by the court.

16 Q. Then Chapter 7, which is what the 1985 company was
17 placed into, is designed to liquidate a debtor's assets
18 and then distribute that money equitably among creditors;
19 is that right?

20 A. (Ms Jarvis) Right. And when a Chapter 7 is filed,
21 a trustee is immediately appointed. The trustee takes
22 complete control over the assets of the estate. That's
23 different than a Chapter 11, where a debtor themselves,
24 if the company files, remains in possession unless the
25 court decides a trustee should be appointed. In a 7,

10:23

1 a trustee is immediately appointed that takes complete
2 control of all the assets in the company.

3 Q. A Chapter 7 trustee, such as the one that handled the
4 1985 company's case, has a number of duties that are
5 spelt out in the Bankruptcy Code; is that right?

6 A. (Ms Jarvis) That's correct.

7 Q. And among those duties is to collect and reduce to money
8 the property of the estate for which the trustee serves
9 and close the estate as expeditiously as compatible with
10 the best interest of parties in interest?

11 A. (Ms Jarvis) That is correct.

12 Q. I'd like to have you take a look at your first report,
13 which should be there in front of you, and specifically
14 paragraph 31. Tab 13, I'm sorry.

15 You state in paragraph 31 of your first report that:

16 "In its SEC filings, EuroGas I also reported various
17 information about its direct and indirect interest in
18 Rozmin s.r.o. (the EuroGas GmbH interest in Rozmin and
19 the 57% interest purchased by EuroGas I from Belmont
20 Resources Ltd., being referred to hereinafter as the
21 'Slovakian Talc Mine Interests')."

22 Do you see that there?

23 A. (Ms Jarvis) Yes, that's correct.

24 Q. I don't see a footnote that would refer the Tribunal to
25 the sources of information on which you base that

10:26

1 conclusion.

2 A. (Ms Jarvis) There are SEC reports in the statements of
3 fact, there are several referred to.

4 Q. Can you point us to the SEC filings that are in your
5 report that you used to come to this conclusion?

6 A. (Ms Jarvis) There are various 10-K filings that are
7 referred to. There's 2007, 2008; there's some other
8 ones, I think, in 2004, 2003. So there are various
9 ones.

10 Q. Alright. So what we will need to do then, since you
11 didn't point people to a specific source of information
12 on which you base this conclusion, is we will need to go
13 through your footnotes in other parts, find the SEC
14 filings, and then figure out what information is in
15 those that would support this conclusion?

16 A. (Ms Jarvis) Right. This was meant to -- you know, what
17 the SEC filings showed were an investment in these
18 interests. It's an indirect investment. But that's
19 what this was meant to capitalise, is that there was
20 disclosed in the SEC filings that EuroGas I had
21 an investment in the Rozmin talc mine. It was
22 an indirect investment.

23 Q. Indirect. And from purposes of scheduling assets on the
24 asset schedules in a bankruptcy case, we had discussed
25 earlier you would have expected that the 1985 company

10:27

1 would have listed its interest in GmbH on its schedules,
2 but not GmbH's interest in Rozmin on its schedules?

3 A. (Ms Jarvis) That is correct. But when you're talking
4 about an investment that you have, an investment right,
5 that would have to be disclosed on the schedules. So
6 like, for instance --

7 Q. Well, let me stop you there.

8 A. (Ms Jarvis) Okay.

9 MR ANWAY: Mr Chairman, I'd ask that the witness be allowed
10 to complete her answer.

11 THE PRESIDENT: Please.

12 A. (Ms Jarvis) So, for instance, the way you determine
13 property of the estate is you look at the property under
14 the law that applies to determine if the debtor has
15 a property interest. If that property interest exists,
16 then it needs to be -- then you look at whether that
17 fits within the definition of "property of the estate".

18 So let me give you an example. In the Dittmar case,
19 which is set forth in my report -- it's a Tenth Circuit
20 case, a case that has direct authority over the Utah
21 court -- there was an issue that came up whether stock
22 appreciation rights that were given to employees were
23 a part of their bankruptcy estate. The issue that came
24 up is these rights were given orally before the
25 bankruptcy was filed by these individuals, but they

10:29

1 weren't actually documented till a year after they had
2 actually filed. So the issue came up whether those were
3 property of estate, whether they should be listed, were
4 they actually an asset.

5 The lower court had looked at the Kansas law that
6 said: these are not -- they are oral promises, they are
7 not property of the estate, you know, therefore they
8 shouldn't be included. But the Tenth Circuit said: no,
9 no, because these are rights under collective bargaining
10 agreement, that's governed by federal law. Under
11 federal law, these rights belong to these debtors at the
12 time that an oral promise is given as part of the
13 collective bargaining agreements, and therefore they
14 have a right that has to be listed.

15 The way it works in this case is that -- so when you
16 look at what is property of the estate, a right under
17 the investment treaty would be determined under
18 international law. So however the investment is defined
19 under international law would be what the right is that
20 the debtor has. And then you look at: is that property
21 that fits within the very broad definition of "property
22 of the estate", and is it property of the estate? In
23 this case, the investment that was made -- the
24 investment right under this treaty -- would have been
25 property of EuroGas I under international law, and

10:30

1 therefore it would be property of the estate under 541.

2 MS BURTON: We'll talk about that. First, can you point to
3 me what footnote in your report refers to Exhibit C-1?

4 A. (Ms Jarvis) Can you tell me: which document are you
5 referring to?

6 Q. The bilateral investment treaty.

7 A. (Ms Jarvis) I have not referred to the bilateral
8 investment treaty.

9 Q. So by your earlier testimony, you have not relied on the
10 bilateral investment treaty in reaching your opinion?

11 A. (Ms Jarvis) Whatever rights there are, Slovakian rights
12 belong, right.

13 Q. My question earlier was: what sources of information did
14 you rely on in reaching your opinion? And you said:
15 those that are reflected in the footnotes. So I am
16 taking you at your word that if it's not reflected in
17 your footnote, you didn't rely on it.

18 A. (Ms Jarvis) Right, but the footnotes -- the SEC does
19 refer to an investment. And what I was explaining is:
20 that investment, whatever it is, would be part of the
21 property of the estate, and it is defined by whatever
22 law governs it.

23 Q. Property of the estate -- let's talk about that -- is
24 determined not by bankruptcy law but by non-bankruptcy
25 law; is that right?

10:32

1 A. (Ms Jarvis) Well, no. It's a two-step process, and
2 that's what Dittmar explains. You first look at what
3 the property rights are under the law that governs that
4 property. So sometimes it's state law, sometimes it's
5 federal law. In the United States in this case it would
6 be international law that would determine what property
7 rights, what assets belong to the company. And then you
8 look at whether those fit in: are they contingent? Are
9 they unliquidated? Would they fit into the broad
10 definition of "property of the estate" under Section 541
11 of the Bankruptcy Code?

12 Q. So the first step is: determine what the property right
13 is under applicable non-bankruptcy law?

14 A. (Ms Jarvis) Yes.

15 Q. Whether it's state law, federal law or international
16 law. And then take that property right and determine
17 whether or not it constitutes a legal or equitable
18 interest of the debtor in property as of the date the
19 bankruptcy is commenced?

20 A. (Ms Jarvis) That is correct.

21 Q. So let's take a few examples then that might apply. If
22 the debtor owns real estate, you would agree with me
23 that in general, in the United States, property rights
24 in real estate are governed by state law?

25 A. (Ms Jarvis) That is correct.

10:33

1 Q. If the debtor owns patents or trademarks, its property
2 rights in those assets will be determined by applicable
3 federal patent and trademark law?

4 A. (Ms Jarvis) That is correct.

5 Q. With regard to the 1985 company's interest in EuroGas
6 GmbH, which was an Austrian company, its rights as to
7 distributions, and whatever rights it has in that asset,
8 would be governed by applicable Austrian corporate law?

9 A. (Ms Jarvis) That's correct.

10 Q. Then with regard to EuroGas GmbH, its interest in
11 Rozmin, in what property rights that gives it, that
12 would be governed by applicable Slovak corporate law?

13 A. (Ms Jarvis) Right, so you go up the chain.

14 Q. Right. And whatever property rights under the bilateral
15 treaty, the investment, as it is defined under the
16 bilateral treaty, will be determined by international
17 law?

18 A. (Ms Jarvis) That's correct. What the investment is is
19 determined by international law.

20 Q. So the first step is to determine under applicable
21 non-bankruptcy law: what's the property interest? And
22 then determine: is that property interest a legal or
23 equitable interest of the debtor in property as of the
24 date the bankruptcy was commenced?

25 A. (Ms Jarvis) That is correct.

10:34

1 Q. Okay.

2 THE PRESIDENT: Can I interfere and ask a question?

3 MS BURTON: You may interfere all you want.

4 THE PRESIDENT: But what if a right under international law
5 appears after the bankruptcy was started?

6 A. (Ms Jarvis) That is answered -- actually there is in the
7 report, although the question wasn't asked, but this is
8 in the Gache case, which is a Southern District of
9 New York case. And it cited to Segal v Rochelle, which
10 is a Supreme Court case, the highest court in the land,
11 a 1966 case which was decided under the old Bankruptcy
12 Code, which is still valid today.

13 In that case what happened is there was a piece of
14 real estate that belonged to the estate, it was property
15 of the estate as of the date it was filed. During the
16 bankruptcy case -- this was a corporate Chapter 7
17 case -- a litigation arose. So it arose afterwards, but
18 was related to the real estate. And the court found --
19 and relying on the Supreme Court case of Segal v
20 Rochelle -- that when property is acquired or arises
21 post-petition, but is derived from assets that were
22 assets of the estate at the time of filing, then that is
23 property of the estate.

24 There is also a second case cited in the report, the
25 Brumfiel case, which is from the Tenth Circuit Court of

10:36

1 Appeals. There are three Brumfiel cases. This is the
2 Tenth Circuit case, where Judge Matheson, who wrote the
3 opinion, said that even though the debtor had claimed
4 that this lawsuit arose after the bankruptcy filing, her
5 Chapter 7 petition, that in fact, because it was derived
6 from her, or was a potential at the time that they
7 filed, and derived from her foreclosure action that she
8 had reported, that it was property of the estate.

9 In that case Judge Matheson also explains that it's
10 very, very broad: what needs to be disclosed is property
11 of the estate, and that includes all potential claims.
12 So if the debtor had any idea that they might have
13 a potential cause of action, the Tenth Circuit says:
14 that has to be disclosed in the schedules.

15 In this case we have the possibility of a potential
16 cause of action. Assuming that the debtor had some
17 idea -- which I understand that the evidence has
18 shown -- that they had the possibility of losing their
19 licence after the filing of bankruptcy, then that would
20 be a potential claim that they would have to disclose in
21 their schedules. And in fact, when the schedules were
22 ordered to be filed in this case, which was January 28th
23 2005, the revocation of the licence had already
24 occurred. So that definitely would have had to be
25 included on the statements and schedules.

10:38

1 THE PRESIDENT: Thank you.

2 MS BURTON: We will get into that more.

3 Property, when you're talking about the Brumfiel
4 case, in that case the debtor owned real estate; is that
5 right?

6 A. (Ms Jarvis) Yes.

7 Q. Which had a lien on it, a mortgage on it?

8 A. (Ms Jarvis) Yes.

9 Q. She had a claim -- or asserted she had a claim --
10 against her mortgage company which she did not list?

11 A. (Ms Jarvis) That is correct.

12 Q. And after her case was closed, she sought to assert that
13 claim against the mortgage company. And it was held
14 that she should have listed that claim on her schedules
15 because it was an asset of her estate?

16 A. (Ms Jarvis) That's correct. She had listed the real
17 estate and the foreclosure action, but she had not
18 listed her claim that she might have against the lender.

19 Q. And the foreclosure action was pending on the date that
20 she filed her bankruptcy case?

21 A. (Ms Jarvis) That is correct.

22 Q. So her counterclaim would have also been in existence at
23 the time of her bankruptcy filing?

24 A. (Ms Jarvis) That is correct.

25 Q. Now, you're not here to testify on the nature and extent

10:39

1 of whatever the 1985 company's property interest may
2 have been in its investment for purposes of this
3 bilateral investment treaty; is that correct?

4 A. (Ms Jarvis) If you're asking me whether I'm here to
5 testify under the international treaty what the interest
6 is, no, I am not. Whatever it is, that would have been
7 property of the estate.

8 Q. If it was, if there was an interest --

9 A. (Ms Jarvis) Whatever was there, yes.

10 Q. So when we talk about the first step, that first you
11 determine what is the property interest, and then you
12 take the second step once you determine what that
13 property interest is, then you determine whether or not
14 it constituted a legal or equitable interest of the
15 debtor in property as of the date the petition is filed.
16 And you're here to testify to the second step, not the
17 first step; isn't that correct?

18 A. (Ms Jarvis) Right, I'm not determining whether this
19 is -- whatever rights there were under, you know, the
20 international treaty, those would have been property of
21 the estate.

22 But there are kind of two issues though. One is:
23 whatever the investment rights are, those would have
24 been property of the estate, and anything that derived
25 from that would be property of the estate. But there is

10:41

1 also the claim itself that is being made, and that would
2 also independently -- that's the point that was made in
3 the Brumfiel case -- that would be property of the
4 estate that would have to be listed, because that's
5 a potential claim.

6 Q. Let's back up. You're not here to testify that the
7 debtor, the 1985 company, as to what the nature and
8 extent of its property interest was in the investment
9 under international law?

10 A. Right. I am here to --

11 Q. You're not doing that -- just let me --

12 A. Whatever their interest is under the treaty --

13 MR ANWAY: Ms Burton, please let the witness finish her
14 response.

15 A. Whatever their interest is under the international
16 treaty, that is property of the estate.

17 MS BURTON: So you're already jumping to the conclusion that
18 there's only one step: if there's an interest under
19 international law, then it's property of the estate.
20 You're making that conclusion?

21 A. (Ms Jarvis) As long as it fits into the 541 definition,
22 that's right. If it's contingent, it's unliquidated;
23 it's a very, very broad definition under the Whiting
24 case, which is cited in the report, a Supreme Court
25 case.

10:42

1 Q. But you still have to make the analysis of whether or
2 not, whatever the property interest is under
3 international law, is that a legal or equitable interest
4 in property; and you have to make that analysis first,
5 before you conclude whether it's property of the
6 bankruptcy estate?

7 A. (Ms Jarvis) Right, you determine you have some right
8 under some law, and then: is that a legal or equitable
9 interest? Is it contingent, fit under the 541? Then if so,
10 it becomes property of the estate.

11 Q. Now, we also need to keep in mind -- I don't want to
12 belabour it too much -- but property acquired by the
13 bankruptcy estate is property of the estate, right?

14 A. (Ms Jarvis) That is correct.

15 Q. But in general, property acquired by a debtor following
16 the bankruptcy petition is not property of the estate?

17 A. (Ms Jarvis) Well, when you -- I mean, you have to
18 distinguish between individuals and corporations.

19 Q. Let's do that.

20 A. (Ms Jarvis) Because when an individual files a Chapter 7
21 case, the individual still has a life in existence
22 outside the trustee. So, for instance, a trustee can
23 abandon property to an individual and the individual can
24 maintain that property. So say the trustee abandons the
25 house of the individual: the individual can take that

10:43

1 house and live in that house and use that house, it
2 becomes their property, and contemporaneously with the
3 Chapter 7 going on.

4 But in a corporate case, when a corporation files,
5 the trustee becomes the debtor, becomes the corporation.
6 There is no existence of the corporation outside of the
7 Chapter 7 case, because both the Supreme Court case in
8 Weintraub, which is in the report, as well as the
9 CW Mining case, which is the Tenth Circuit case in the
10 report, once a trustee is appointed, then the trustee
11 becomes the only person that can control this company.
12 They are the company. There is no company outside of
13 that.

14 In fact, in the CW Mining case the debtor tried to
15 appeal, and the court said, "You cannot appeal because
16 the debtor doesn't exist, the corporation doesn't exist
17 except in the form of the trustee". So the trustee has
18 complete control over all assets in the corporation
19 itself.

20 Q. The trustee has control but I'm not talking about the
21 trustee; I'm talking about property rights.

22 A. (Ms Jarvis) Right. But I think, you know, in that
23 instance I don't see how a company can acquire rights
24 that aren't acquired by the trustee, because the trustee
25 is the only party that can act for the corporation.

10:45

1 Q. But you do not know when the property right -- if there
2 was one -- in the investment arose under international
3 law. You're not here to testify to that?

4 A. (Ms Jarvis) No, I'm not here to testify about that. If
5 it arose, if there was a right that existed at the time
6 that they filed bankruptcy, that right became property
7 of the estate. If there was a right that arose or
8 a property right that arose after the filing that is
9 derived from the right at the time that it was filed,
10 then it is property of the estate.

11 Q. I would agree.

12 A. (Ms Jarvis) If there was a potential claim or, you know,
13 possibility that was existing at the time of the filing,
14 then that is property of the estate, as long as the
15 debtor -- is the way the Tenth Circuit said in the
16 Brumfiel case -- had enough information to know that
17 there was some potential that a claim could arise in the
18 future.

19 Q. So if the property right in the investment existed on
20 May 18th 2004, it was property of the estate; correct?

21 A. (Ms Jarvis) Yes, any property right that they had would
22 have been property of the estate.

23 Q. If the property right arose after that date, but was
24 derivative of property of the estate, in the sense the
25 proceed, then it would be property of the estate?

10:46

1 A. (Ms Jarvis) Well, a proceed, it's not that narrow,
2 because when you look at the Gache case, Southern
3 District of New York, it was litigation that arose out
4 of a real estate property interest. So it's not just
5 proceeds. And Segal v Rochelle, the Supreme Court case,
6 explains that. It's something that arose because you
7 had some interest at the time of the bankruptcy filing.

8 Q. As you had said, "derivative"?

9 A. (Ms Jarvis) That's a term that is used. There is also
10 "related"; there are a variety of words. But
11 "derivative" is the most common term used because it
12 needs to relate to the property as it existed when the
13 bankruptcy was filed.

14 Q. So if it existed on the date of the filing, or arose
15 afterwards but is related or derivative of property that
16 was owned on the date of the filing, it would be
17 property of the estate?

18 A. (Ms Jarvis) Right. Or if it's a potential claim that
19 arose -- you know, that at the time of the filing there
20 was some potential or possibility of a claim, that would
21 also be property of the estate.

22 Q. Again, related to property of the estate?

23 A. (Ms Jarvis) Well, no, that is independent. You know,
24 there is property of the estate and property that's
25 derivative of that, or that comes out of that, that is

10:47

1 property of the estate, even if it arises after the
2 bankruptcy filing.

3 Q. Mm-hm.

4 A. (Ms Jarvis) But then there is also the separate issue
5 that was raised by the Tenth Circuit in the Brumfiel
6 case, which is: if you have a potential claim, that has
7 to be disclosed. That is property of the estate.

8 Q. But in Brumfiel, that claim was related to property of
9 the estate: her home, right?

10 A. (Ms Jarvis) That's correct. That's correct. But for
11 instance I think it's the Stephens case, the District of
12 Utah, that also talks about this very broad definition:
13 that if there is a claim that is potential at the time
14 of filing, it has to be listed as property of the
15 estate.

16 Q. I think we've confused you enough. I'll move on.

17 THE PRESIDENT: I'm sorry, can I ask a question here.

18 Suppose the debtor has a house, it exists at the
19 time the bankruptcy starts, then there is a fire, and
20 it's caused by the fault of someone, so it could give
21 rise to damages. That right to damages, would you think
22 it is property of the estate or not?

23 A. (Ms Jarvis) Yes, it would be.

24 THE PRESIDENT: Thank you.

25 MS BURTON: Because it's related to property of the estate?

10:49

1 A. (Ms Jarvis) Yes. Right, exactly. So even though the
2 event happened after the bankruptcy was filed, it was
3 related to property of the estate, it is property of the
4 estate.

5 THE PRESIDENT: Sorry.

6 MS BURTON: No, that's okay, thank you.

7 I don't see in the first report, Annette,
8 a reference to the ownership interest in GmbH as being
9 property of the estate. Why is that?

10 A. (Ms Jarvis) Well, directly, I think this wasn't --
11 I mean, it was defined, you know, as whatever that
12 interest is, you know, reported, so not specifically
13 identified, I think. I think we identified it in the
14 second report.

15 Q. You did in the second report, which is ...

16 A. (Ms Jarvis) And let me explain why that is: because in
17 the first report the issue was dealing with the merger.
18 That was the way that it was explained by the Claimants:
19 that the right under the investment treaty went from
20 EuroGas I to EuroGas II, through a merger. So I dealt
21 with only the merger theory.

22 In the second report, then the Claimants had claimed
23 that actually it came through a sale of GmbH to
24 McCallan. And that's why we addressed that in the
25 second report, because that now became the focus,

10:50

1 whereas in the first case it was simply a merger theory.

2 Q. Alright. So that answers my question on why GmbH is
3 mentioned in the second but not the first.

4 A. (Ms Jarvis) Yes, that's correct.

5 Q. At the time the 1985 company filed bankruptcy, it had
6 been dissolved administratively by the State of Utah; is
7 that right?

8 A. (Ms Jarvis) Right. And in fact the two years had passed
9 for reinstatement, so it could no longer be reinstated.

10 Q. Right. You discussed in your first report, at
11 paragraph 54, that the functions of dissolution and
12 reinstatement are governed by state law?

13 A. (Ms Jarvis) That is correct.

14 Q. The bankruptcy of the 1985 company would not have made
15 the company more dissolved than it already was under
16 state law?

17 A. (Ms Jarvis) No, it's dissolved. But I think there is
18 the issue of whether a bankruptcy acts as the wind-up.
19 Where you have a dissolved company, the company can only
20 wind up; that's all they can do. Statutorily, that's
21 what they are allowed to do.

22 I think that was the point of the case in Texas, the
23 Liberty Trust case, that the District Court was making
24 there, is that a bankruptcy can be the wind-up, because
25 the trustee now becomes the substitute for the officers

10:52

1 or directors of the corporation. Their job is to
2 liquidate all the assets of the estate and distribute it
3 to creditors. So there is the possibility that in
4 essence this is the wind-up under state law, because
5 that's essentially what the trustee was supposed to do.

6 Q. A dissolved company can file a Chapter 7 petition as
7 part of its wind-up?

8 A. (Ms Jarvis) Yes.

9 Q. Or be placed into involuntary --

10 A. (Ms Jarvis) Right, and it can wind up in a Chapter 7,
11 where it's now distributing. And in fact when you do
12 file a dissolved company in a Chapter 7, it is wound up
13 in the Chapter 7.

14 Q. It can sue and be sued?

15 A. (Ms Jarvis) Yes, it can sue and be sued. You mean
16 a dissolved corporation? Yes.

17 Q. Yes. And, Sam, this is also your area too, so feel free
18 to step in. You agree that a dissolved company under
19 the dissolution statute has standing to sue and be sued?

20 A. (Mr Gardiner) Yes, I do.

21 Q. Going back to just some post-petition events, Annette,
22 the 1985 company filed bankruptcy on May 18th 2004, and
23 in early January 2005 the Slovak Republic terminated
24 Rozmin's mining rights. As a result of that, Rozmin
25 commenced litigation in the Slovakian court system to

10:54

1 seek reinstatement of those rights, and asserting claims
2 that it was entitled to have those back.

3 Rozmin's claims that it pursued in the Slovakian
4 courts you would agree were not property of the 1985
5 company's bankruptcy estate, would you?

6 A. (Ms Jarvis) Right. Unless they fit under the
7 international treaty rights, no.

8 Q. Okay. So you would agree that Rozmin's action in
9 pursuing those claims did not violate the automatic
10 stay?

11 A. (Ms Jarvis) That is correct.

12 Q. Because those rights were its rights, not the 1985
13 company's rights?

14 A. (Ms Jarvis) Right. If they are not the rights pursued
15 under the investment treaty that belong to EuroGas I,
16 then they would be rights they can pursue on their own.

17 Q. So going back to dissolution, the company had been
18 dissolved by the time it had filed bankruptcy, beyond
19 the reinstatement period. The bankruptcy did not change
20 that status as a dissolved corporation; you would agree
21 with that?

22 A. (Ms Jarvis) Yes. The Bankruptcy Code -- dissolution is
23 a state law concept and it has to be done under state
24 law.

25 Q. Okay. I'm having a bit of trouble finding it, maybe you

10:56

1 can find it for me: I'm looking for your reference to
2 Thornton v Mankovitch. Is that in your first report or
3 your second report?

4 A. (Ms Jarvis) I think it might be in the second report.

5 Q. Tab 14. (Pause) Perhaps we could take a --

6 A. (Ms Jarvis) Wait, wait.

7 Q. Did you find it?

8 A. (Ms Jarvis) Yes. Thornton v Mankovitch is actually in
9 the first report on page 40, in footnote 143.

10 Q. Ah, here we go. What's the relevance of this decision
11 to your opinion if the 1985 company's ability to be
12 reinstated had expired when the bankruptcy was filed?

13 A. (Ms Jarvis) The point of this section is -- this is
14 really a kind of odd situation, there is very little
15 case law on this. But the issue is whether a company
16 that has been dissolved -- so it can't be reinstated, so
17 it's not able to continue in business under state law,
18 it can only liquidate -- then files a Chapter 7 and is
19 liquidated, is wound up in the Chapter 7, whether they
20 have a life beyond that.

21 There are very few cases that deal with this.
22 I think really the only case is the Liberty Trust, where
23 you actually have a corporate debtor that is trying to
24 continue business or deal with assets outside of
25 a Chapter 7. In that case what happened was the

10:59

1 Chapter 7 trustee made the decision that there were
2 certain contracts that weren't worth it to the estate,
3 so he rejected or terminated those contracts and then
4 abandoned certain assets that he felt were not of value
5 to the estate. The principal of the debtor then,
6 supposedly under the name of the company itself that was
7 in Chapter 7, took those assets and started running its
8 business again on the side.

9 So the trustee went in to ask the court, "Can the
10 debtor do this? Can they take these assets that I have
11 decided are abandoned, were not worth it, they don't
12 create any value for the company, and run those on the
13 side?" And the District Court -- it was not
14 a bankruptcy court that made this decision -- said, "No,
15 you can't do that, because the assets have to be wound
16 up, basically, and dealt with in the bankruptcy case".

17 Now, the District Court I think in that case made
18 a mistake in saying that it was dissolved by means of
19 the bankruptcy. That clearly is not true. And if you
20 look at another case cited, the CVA construction case,
21 where a bankruptcy court in Texas said it can't be
22 dissolved through bankruptcy but did not disagree with
23 the fact that a company that goes through bankruptcy
24 that's been dissolved cannot further act. In fact, in
25 the CVA case the Bankruptcy Court said, "Gee, we've got

11:01

1 to figure out if these insurance policies actually
2 vested and happened before the case went through
3 bankruptcy, after it's been dissolved, or they may not
4 be able to operate in them".

5 When you look through the cases, we haven't been
6 able to find any cases -- nor have the Claimants cited
7 any cases -- where a company that has been dissolved
8 under state law and cannot be reinstated, and then has
9 gone through a Chapter 7, has been able to be operated,
10 to either sue or -- they can be sued, because once you
11 come out of bankruptcy as a corporate Chapter 7 debtor,
12 you don't get a discharge. So to make sure they can't
13 continue to operate, you can be sued, but can't
14 administer assets, actually sue on assets and administer
15 assets that the Chapter 7 bankruptcy case did not.

16 There's only one case where that was done, it was
17 a Wyoming case, I think it was Catamount, that was cited
18 by the Claimants. In that case, while the
19 post-Chapter 7, post-dissolved company brought a suit,
20 that suit was in defence of suits that were being
21 brought against it. So in that case they had
22 a homeowner, they built a home, there was a construction
23 defect case, and they were going to be sued by that
24 debtor or that claimant. And so they sued their
25 subcontractors to get reimbursement for that, because

11:02

1 they blamed the subcontractors for actually what they
2 were going to have, a claim against them.

3 But there's no cases that have had
4 a post-dissolution, post-Chapter 7 corporation actually
5 administer assets, so sue on assets, continue with
6 assets, because these cases, I think, say -- and this is
7 one of them -- that there is a wind-up that occurs in
8 the 7, and the post-Chapter 7 corporate debtor,
9 post-dissolution corporate debtor cannot act any
10 further, except to be sued.

11 MS BURTON: This would be a good time to take a break,

12 I think, if we could, because we've been going a while.

13 THE PRESIDENT: Very good. 15 minutes. So we come back at

14 11.20.

15 (11.04 am)

16 (A short break)

17 (11.22 am)

18 THE PRESIDENT: We can resume. Ms Burton.

19 MS BURTON: Thank you, Mr Chairman.

20 We were discussing Thornton v Mankovitch and you
21 also mentioned Liberty Trust. I take it you based your
22 conclusion, which is at paragraph 72 of your original
23 report, that:

24 "... once EuroGas became a Chapter 7 debtor and went
25 through the Chapter 7 Bankruptcy Case emerging without

11:22

1 a discharge, it ceased to exist as an entity with any
2 assets ..."

3 A. (Ms Jarvis) Right. You've got to remember that
4 EuroGas I was already dissolved and couldn't reinstate
5 under Utah law when it went into bankruptcy. Then in
6 Chapter 7 all of its assets were wound down and
7 liquidated; it came out without assets. There's also
8 the additional issue of they never filed statements and
9 schedules. So because of that, no, if there was
10 anything, nothing could be abandoned.

11 Q. Have you, since preparing your first report, checked to
12 see how many courts have cited the Thornton v Mankovitch
13 opinion for the proposition that as a defunct
14 corporation following bankruptcy, a corporation ceases
15 to exist? Have you looked for those?

16 A. (Ms Jarvis) You know, I've looked for cases. Like
17 I said, this is very rare, it doesn't happen very often,
18 there's only a few decision which are in there, so it's
19 not what I would call a settled area of bankruptcy law.

20 I believe that, you know, in this instance -- it's
21 my opinion that in this instance, where -- and these
22 cases also look -- we go back to state law. So
23 I believe in this instance, when you look at those cases
24 that are saying that if a company, you know, goes
25 through a Chapter 7, and in this instance where they

11:24

1 have already been dissolved they cannot reinstate, so
2 their assets are wound down, that this company would not
3 have any assets left to pursue.

4 Now, this also deals with -- I know the Wyoming
5 case, the Catamount case, talked about looking at state
6 law. So if you now take this and look at state law, the
7 wind-up activities were completed in the Chapter 7 case,
8 and there are the cases under state law, the Hilcrest
9 case and the Holman case, that say: after some period of
10 time, the wind-up has to complete. And therefore this
11 would be consistent with those state law cases as well.

12 Q. Okay. So just for your information, yesterday I went
13 online and checked to see if any court in the country
14 has cited Thornton v Mankovitch for the same proposition
15 on which you rely on it, and I find none.

16 A. (Ms Jarvis) Yes, it's rare, a rare situation.

17 Q. The two Utah cases you just mentioned that you relied on
18 in your opinion were cases that were decided under
19 a prior statute?

20 A. (Ms Jarvis) Hilcrest wasn't, but Holman was.

21 Q. Then Liberty Trust, which is another case on which you
22 rely for your conclusion, I have a copy of that at
23 tab 16 in your bundle, and it is RA-016. If you go to
24 page 4 of 6, I think we find the language which you
25 quote in yours. But I want to start at the last

11:26

1 sentence there on page 4 of 6, where it says:

2 "The consequence of denying discharge to
3 corporations and partnerships in a Chapter 7 proceeding
4 is to render such entities 'defunct'."

5 Which is the word you're using in your report. And
6 then the court goes on to state:

7 "The Court assumes that 'defunct' depicts a status
8 akin to that of a dissolved corporation or partnership,
9 and so interprets [it] in this case."

10 What I want to talk to you about is taking
11 a hypothetical of a corporation that is in good
12 standing. So the opposite of being dissolved, in our
13 parlance in Utah, is that the corporation would be in
14 good standing; is that right?

15 A. (Ms Jarvis) Yes, right.

16 Q. And because corporations are creatures of state law and
17 not bankruptcy law, to determine a corporation's status,
18 you go to the State of Utah's website and look at the
19 particular page on that website from the Utah Division
20 of Corporations; isn't that right?

21 A. Yes.

22 Q. We will take a corporation, we'll call it Jarvis
23 Corporation, and it's in good standing with the State of
24 Utah. I see that online: corporation is in good
25 standing. Jarvis Corporation, for whatever reason, is

11:27

1 placed into Chapter 7 bankruptcy, and six months later
2 its case is closed. Following that closure, if I were
3 to go back to the State of Utah's website, the Division
4 of Corporations page, and look up Jarvis Corporation, it
5 would reflect that the company was in good standing,
6 would it not?

7 A. (Ms Jarvis) That's correct.

8 Q. And that's because dissolution or good standing are
9 creatures that are determined by the State of Utah, not
10 by the Bankruptcy Code; is that right?

11 A. (Ms Jarvis) Right. And that's why I said that with this
12 case, the one thing I disagreed with him about was this
13 statement that he made that the company was dissolved
14 under state law because they had gone through Chapter 7.
15 And in fact the Bankruptcy Court in the CVA construction
16 case said they thought that was wrong; and they were
17 right, in the sense that you can't dissolve a case (sic)
18 by going through bankruptcy.

19 However --

20 Q. Excuse me, I think you meant "corporation".

21 A. (Ms Jarvis) You can't dissolve a corporation by going
22 through bankruptcy; that has to be done by state law.

23 However, I don't think that the Bankruptcy Court
24 disagreed with the proposition that it was problematic,
25 once a case has been liquidated under 7, to administer

11:29

1 assets thereafter, which is why it avoided making
2 a statement about that finding, the contract in
3 question, to have been dealt with prior to the filing of
4 the Chapter 7.

5 Q. So I want to give you another hypothetical relating to
6 Jarvis Corporation. It's in good standing, it owns real
7 estate. It files bankruptcy, Chapter 7. It lists the
8 real estate on its schedules, fully disclosed; there's
9 no issue with regard to disclosure. For whatever
10 reason, the bankruptcy trustee does not administer that
11 real estate, and that real estate is then abandoned, on
12 the closing of the case, to Jarvis Corporation.

13 Is it your opinion that Jarvis Corporation cannot
14 sell that real estate?

15 A. (Ms Jarvis) You know, I would say: in that situation
16 I assume the corporation is still in good standing, so
17 it's not like this situation. And the trustee, their
18 job was to sell anything of value; but, for whatever
19 reason, they decided not to sell this. Then I think the
20 corporation could, as finishing the wind-up activities,
21 sell that.

22 Q. Well, it's still in good standing with the State of
23 Utah.

24 A. (Ms Jarvis) Yes. I mean, I guess it could reinstate
25 itself.

11:30

1 Q. No, it's in good standing to begin with.

2 A. (Ms Jarvis) Oh, right. Okay, right. So it could sell
3 it, yes.

4 Q. Right, it could.

5 At paragraph 65 of your first report you quote from
6 the Senate report with regard to Chapter 7 and the
7 reason why Congress made the decision to deny the
8 Chapter 7 discharge to corporations, and you state that
9 the change in policy -- because previously they could
10 get discharges --

11 A. (Ms Jarvis) Yes.

12 Q. -- and that the reason that was changed was to avoid
13 trafficking in corporate shells.

14 It would seem to me, if that's the policy, that
15 a corporation -- and we will start with one that's in
16 good standing -- that files bankruptcy, for whatever
17 reason its assets are not administered, or an asset is
18 not administered, it gets abandoned, that that
19 corporation would be free under state law to sell that
20 asset and do what it can with the proceeds.

21 A. (Ms Jarvis) I think --

22 Q. You would agree with that?

23 A. (Ms Jarvis) This is not the case here. But I agree that
24 if a corporation was in good standing, they went through
25 a Chapter 7 for whatever reason, they would come out

11:31

1 without a discharge, meaning they still owed all their
2 debts, had to pay all their debts. But if they had
3 assets they wanted to reinstate, or they wanted to
4 continue in business because they were still in good
5 standing, they could do that.

6 Q. They could even continue in business?

7 A. (Ms Jarvis) Right. So they become defunct when they are
8 winding up in a bankruptcy, when there is nothing left.
9 And in this case they were dissolved before they went
10 in.

11 Q. So let's change the hypothetical. Jarvis Corporation is
12 dissolved, and it is beyond the statutory reinstatement
13 period. It files bankruptcy as part of its winding-up.
14 Its officers and directors, or board of directors,
15 decide that filing a Chapter 7 will be helpful to
16 winding up. And you agree that they can do that?

17 A. (Ms Jarvis) Yes.

18 Q. It has real estate. The trustee, for whatever reason,
19 doesn't administer that real estate, and it is abandoned
20 back to the corporation.

21 Is it your opinion that because Jarvis Corporation
22 is dissolved and has now gone through Chapter 7, that it
23 can do nothing with that real estate?

24 A. (Ms Jarvis) I doubt this situation would ever occur
25 because if the real estate had any value, the Chapter 7

11:32

1 trustee would sell it, they would administer it. That's
2 their job: to take all the assets and administer.

3 But if that would happen -- so it's dissolved, it's
4 gone through Chapter 7, but there's something left; it's
5 been properly scheduled, but was abandoned for whatever
6 reason -- then I think they could sell it, just
7 finishing the wind-down.

8 Q. They could still, as part of the winding-up activities
9 under state law?

10 A. (Ms Jarvis) Right. But they can't create new claims or
11 whatever. But they could, yes.

12 Q. Sam, I don't want you to feel left out of all this.

13 A. (Mr Gardiner) Thank you.

14 Q. Although maybe your preference would be to be left out!

15 Your expertise is in corporate law; is that right?

16 A. (Mr Gardiner) That's right.

17 Q. So I'd like to talk to you specifically about the Utah
18 dissolution statute. That's really where my questions
19 for you are going to be focused.

20 A. (Mr Gardiner) Okay.

21 Q. Specifically I want to talk to you about Section 1405 of
22 the Utah corporation statute, which is tab 8, R-19.

23 I asked Annette to explain to the Tribunal a bit and we
24 walked through the basics of the Bankruptcy Code, so
25 that the Tribunal could have an understanding of

11:34

1 bankruptcy law. And I want to do the same with regard
2 to the dissolution statute with you, on the effect of
3 dissolution.

4 So with regard to the 1985 company, can you tell the
5 Tribunal why it was dissolved?

6 A. (Mr Gardiner) Yes, I can. The company was dissolved
7 administratively because it failed to file annual
8 reports with the Division of Corporations, which it was
9 required to do. And if you continue to fail to do that,
10 you will eventually be administratively dissolved, and
11 you will receive a notice from the Division of
12 Corporations that you have been dissolved.

13 Q. I don't know if you have any sense of the percentage of
14 Utah corporations that get dissolved in any particular
15 year for failing to file an annual report?

16 A. (Mr Gardiner) I don't have any idea what the percentages
17 are.

18 Q. It seems to me it is something that could easily fall
19 through the cracks. You get the annual report request;
20 particularly if it's a small company, they are busy,
21 somebody is sick who is supposed to handle it, it gets
22 lost in the cracks; and lo and behold, the company ends
23 up getting dissolved.

24 A. (Mr Gardiner) Yes.

25 Q. Have you ever seen that?

11:36

1 A. (Mr Gardiner) Yes, I have seen it.

2 Q. In a prior life I represented a lot of small companies
3 as debtors in bankruptcy, and it wasn't all that unusual
4 for them to come in and say, "My company needs to file
5 a bankruptcy", and I would have to tell them, "Well,
6 there might be a different route to go because your
7 company has been dissolved by the state". Do you see
8 instances where the principals of a company don't even
9 know it's dissolved?

10 A. (Mr Gardiner) I see instances where principals of
11 companies find out that they are late in filing
12 an annual report; that happens commonly. Instances
13 where they have been formally administratively
14 dissolved, I've seen that less.

15 Q. But in any event, the State of Utah has enacted
16 Section 1405 for purposes of winding up and liquidating
17 a company's assets. That does not prevent a dissolved
18 company from entering into contracts or transactions, so
19 long as they are designed to wind up and liquidate the
20 company's affairs. Is that an accurate way to describe
21 it?

22 A. (Mr Gardiner) Well, that's an interesting question. And
23 I would have answered that question, "Absolutely, yes",
24 except I just read a case that came out on September 1st
25 from the Utah Court of Appeals. It's called Wittingham

11:38

1 LLC v I think TNE Partnership, or something like that.

2 It's a brand new case.

3 Q. Can you give us the citation to that?

4 A. (Mr Gardiner) It's back in the room. I didn't memorise
5 the citation, but I have it back in our breakout room.

6 I could go get it for you.

7 MS BURTON: Would the Chairman allow a brief recess to allow
8 him to go get that case?

9 THE PRESIDENT: Will you find it very quickly?

10 MR GARDINER: Yes, I can find it very quickly.

11 THE PRESIDENT: Well, why not?

12 MR GARDINER: One minute and I'll come back with the
13 citation. I just wasn't allowed to bring it in here
14 with me. (Pause) Thank you. I have that citation here.

15 MS BURTON: Okay. You don't have a copy of the case?

16 A. (Mr Gardiner) I have an electronic copy of the case.

17 Q. Okay. What's the citation?

18 A. (Mr Gardiner) 2016 UT App 187, or 2016 Utah App Lexus
19 193, or 820 Utah Advance Report 68.

20 Q. Okay. And what's the name?

21 A. (Mr Gardiner) The name is Wittingham LLC v TNE Limited
22 Partnership.

23 Q. Did that involve Section 1405 of the Utah Corporations
24 Act?

25 A. (Mr Gardiner) The case involved -- it's a partnership,

11:42

1 so it refers to the partnership statute. It refers to
2 the case Orvis v Johnson, which is referred to in our
3 report and in the Claimants' -- or the Snell & Wilmer
4 report.

5 Q. Can you point to me where in your report the reference
6 is made to Orvis v Johnson?

7 A. (Mr Gardiner) Certainly. Let me just remove this for
8 second. I know it's referred to at least twice, but
9 I look at footnote 71.

10 Q. First off, first report or second?

11 A. (Mr Gardiner) Second report.

12 Q. So that's going to be tab 14. And it's going to be
13 footnote -- which one again?

14 A. (Mr Gardiner) Footnote 71. So page 29 of the second
15 report.

16 Q. You rely on it for the proposition that, "a dissolved
17 company's powers to enter into contracts 'may only be
18 used to wind up and liquidate such company's business'?"

19 A. (Mr Gardiner) Right.

20 Q. Okay.

21 A. (Mr Gardiner) So Orvis v Johnson stands for the
22 proposition -- that also refers to a partnership rather
23 than a corporation, but I think we would agree it's
24 relevant to a corporate context. Orvis v Johnson
25 relates to the proposition that a contract entered into

11:44

1 by a dissolved corporation is not necessarily void, but
2 may be voidable by the third party or by the party that
3 entered into that contract with them.

4 This new case that just came out overturns that
5 principle and says that a contract entered into by
6 a dissolved corporation is void, referring back to
7 a 1919 Supreme Court case. I can't remember the name of
8 the case.

9 Q. When you refer to "Supreme Court", I'm assuming you're
10 referring to the Utah Supreme Court?

11 A. (Mr Gardiner) The Utah Supreme Court. Yes, I am.

12 Q. So that particular decision held that a contract entered
13 into by a dissolved corporation is void?

14 A. (Mr Gardiner) Is void.

15 Q. So how does a dissolved corporation wind up?

16 A. (Mr Gardiner) I think that's a good question. And I'm
17 reading the case. And certainly the statute that you've
18 pointed out refers to a dissolved corporation being able
19 to wind up its affairs, that's what our statute says,
20 and it says it's able to dispose of its assets and those
21 types of activities. So I'm not sure how it all works
22 together, but I wanted you to be aware of that case and
23 what it says.

24 Q. If we could take a look at -- of course, you're kind of
25 surprising all of us, including you, I know.

11:46

1 A. (Mr Gardiner) I learned about this case within the last
2 24 hours.

3 Q. Okay.

4 A. (Mr Gardiner) And it's dated September 1st 2016; that's
5 when it was filed.

6 Q. Right. Let's start with your analysis that you
7 submitted, that's been submitted to the Tribunal. I'm
8 wondering if you can point to the case authorities which
9 you relied on in connection with your conclusion that
10 dissolved companies can enter into transactions in the
11 course of liquidation, provided they are in furtherance
12 of winding up and liquidation. Were there any court
13 opinions you relied on?

14 A. (Mr Gardiner) Thinking back, I believe at the time we
15 wrote the report we thought cases like Orvis v Johnson
16 supported that proposition; maybe not directly, but at
17 least indirectly. And then relying on the statute,
18 which says corporations that are dissolved, in the
19 process of liquidating their assets and winding up, have
20 to be able to dispose of their assets. Candidly,
21 I don't know how you do that without being able to enter
22 into a contract to do so in certain circumstances.

23 Q. This changes the landscape, I think, of your opinion.
24 I mean, how does this new opinion from the Utah Court of
25 Appeals change your opinion?

11:48

1 A. (Mr Gardiner) About what?

2 Q. The ability of a dissolved corporation to be able to
3 enter into contracts for the purpose of winding up and
4 liquidating its affairs.

5 A. (Mr Gardiner) So my opinion is that ultimately Utah
6 courts would have to figure this out, and the Utah
7 Supreme Court, if it ever looked at this again, would in
8 essence overturn this new case.

9 Q. You disagree with it?

10 A. (Mr Gardiner) I disagree with it.

11 Q. And your sincere belief is that the court in Wittingham
12 v TNE has come to the wrong conclusion?

13 A. (Mr Gardiner) Not the wrong conclusion; they just --
14 they actually, if you read the case -- and I know you
15 haven't had that opportunity yet -- they actually
16 indicate that -- I can't remember if it's in a footnote
17 or another section of the case -- but they indicate that
18 they, in essence, hope that the Utah Supreme Court will
19 look at this some day and correct itself.

20 A. (Ms Jarvis) Let me also just add: this doesn't affect
21 our opinion about merger, that this --

22 Q. Sure. I know that.

23 A. (Ms Jarvis) -- that it can't be affected as a wind-down.
24 So ...

25 MS BURTON: Obviously if they can't do anything, they can't

11:49

1 merge. But that opinion I would imagine is -- well, I'm
2 not going to ...

3 I would like to make a suggestion, since this is
4 a surprise for all of us: that we take our lunch break
5 and allow my corporate expert and me to review that, get
6 a copy of the opinion, and maybe we can discuss it with
7 Mr Gardiner after the lunch break.

8 THE PRESIDENT: I think it's a good idea.

9 I seize this opportunity to ask a question about the
10 word "void". What exactly does it mean in US law? Does
11 it mean that it is automatically void, and even if
12 no one has requested the contract to be annulled or
13 voided, it's void, or the opposite?

14 A. (Mr Gardiner) I think it means just what you said.

15 THE PRESIDENT: Okay, thank you.

16 MS BURTON: Well, he said, "Is it one thing or the
17 opposite?", and you said, "It's just what you said".

18 A. (Mr Gardiner) Well, the first -- well, it's void,
19 meaning it's an invalid contract --

20
21 A. (Mr Gardiner) -- automatically. There is another
22 concept that you would read in the Orvis v Johnson case
23 that talks about a contract being "voidable", in which
24 case it isn't automatically void. But if it's void,
25 it's automatically void.

11:51 1 THE PRESIDENT: Thank you.

2 A. (Mr Gardiner) My apologies for not being clear.

3 THE PRESIDENT: No, no, I understood.

4 MS BURTON: Thank you. What time do you want us back?

5 I think we're going to take the lunch break. Is it

6 noon? I wanted to get this new opinion and read it with

7 my expert, and then come back and question him on it.

8 THE PRESIDENT: We could go on with something, yes, and then

9 during lunch you see that and come back to it

10 afterwards. Because it's not even 12.00.

11 MS BURTON: I do have one other area to question him, and

12 I will do that, and then we can -- if that would be

13 fine?

14 THE PRESIDENT: Yes.

15 MR GARDINER: May I just say, would it be helpful if

16 I emailed to someone a copy of the case? I have

17 an email. So I'm happy to email it to anyone.

18 MS BURTON: If you could email it to Mr Merrill and me,

19 I would appreciate that.

20 MR GARDINER: I am more than happy to. I'm not sure I have

21 your email addresses right here, but if you want to give

22 them to me, I'll email it to you immediately. (Pause)

23 So let me discuss with you then your reliance on the

24 doctrine of ejusdem generis in connection with

25 Section 1405 of the corporation statute. I believe it

11:54

1 starts on page 27 of your rebuttal report.

2 A. (Mr Gardiner) Okay, yes.

3 Q. Tab 14. I understand that you're contending that the
4 catch-all provision in Section 1405, every other act
5 necessary to the winding up of the corporation's
6 business, is limited in some way by the sections that
7 precede it. Is that correct?

8 A. (Mr Gardiner) Yes, that's my view.

9 Q. For the Tribunal's understanding, Section 1405 is tab 8
10 (R-19), if you want to take a look at that.

11 So this particular statute states that:

12 "A dissolved corporation ... may not carry on any
13 business except that appropriate to wind up and
14 liquidate its business and affairs, including:

15 "(a) collecting its assets;

16 "(b) disposing of its properties that will not be
17 distributed in kind to shareholders;

18 "(c) discharging or making provision for discharging
19 liabilities;

20 "(d) distributing its remaining property among its
21 shareholders according to their interests; and

22 "(e) doing every other act necessary to wind up and
23 liquidate its ... affairs."

24 You cite at footnote 66 in your report the opinion
25 of the Utah Supreme Court in State ex rel AT for this

11:56

1 proposition. Do you see that there?

2 A. (Mr Gardiner) Yes, I do.

3 Q. I'm puzzled why you would use an opinion that is
4 interpreting a criminal lewdness statute in order to
5 come to the conclusion that this doctrine should apply
6 in connection with a corporate wind-up. Can you tell us
7 why that is?

8 A. (Mr Gardiner) Certainly the cases are different. But
9 the concept of ejusdem generis, when it relates to what
10 happens when you're referring to a list of specific
11 things and then a very broad term to follow them, that
12 that broad term ought to be qualified by the list of
13 things that it relates to, we wanted to provide some
14 support for that idea. And we thought it provided some
15 support for that idea, even though the facts are
16 unrelated.

17 Q. The doctrine of ejusdem generis is a doctrine to assist
18 with statutory construction; would you agree with that?

19 A. (Mr Gardiner) Yes.

20 Q. When it comes to determining when the doctrine of
21 ejusdem generis should be applied, would you agree that
22 a pronouncement from the United States Supreme Court
23 would be instructive?

24 A. (Mr Gardiner) I would agree.

25 Q. I pulled a few cases, and I'm not going to belabour

11:58

1 them, but it appears to me -- and I want to see if you
2 agree with me -- that the doctrine is used to assist in
3 statutory construction when the words of the statute are
4 not clear. Would you agree with that?

5 A. (Mr Gardiner) I haven't read the Supreme Court cases, so
6 I can't agree or disagree.

7 Q. Right. The United States Supreme Court, in its decision
8 in *Norfolk & Western Railway v American Train*
9 *Dispatchers*, at 111 Supreme Court 1156, basically
10 stated --

11 MR ANWAY: Is this in the record?

12 MS BURTON: No.

13 MR ANWAY: So the witnesses haven't had an opportunity to
14 study this case for the proposition that you are about
15 to --

16 MS BURTON: It's true. So you would object?

17 THE PRESIDENT: Do you object?

18 MR ANWAY: I think if there were cases that these experts
19 should have read so they could address what Ms Burton is
20 about to put to them, they should have been put in the
21 record before now.

22 THE PRESIDENT: I think that's correct.

23 MS BURTON: Alright. Then I will not belabour the point.

24 Even though you've got this new opinion that you say
25 may change the landscape, before this opinion came out,

11:59

1 you would have come before this Tribunal and said:
2 a dissolved corporation can enter into transactions and
3 contracts so long as they are designed to further the
4 wind-up and liquidation; is that right?

5 A. (Mr Gardiner) I would have, yes.

6 Q. In fact in your rebuttal opinion at paragraph 51, you
7 actually had the opinion that:

8 "Companies can enter into transactions whose
9 practical, economic effect would be substantially the
10 same as a merger -- although not technically
11 a merger ..."

12 Do you see that opinion?

13 A. (Mr Gardiner) Yes.

14 Q. I take it by that that you would agree, at least until
15 this new opinion came out, that a dissolved corporation
16 could enter into a contract under which it transfers all
17 of its assets to another entity which assumes all of its
18 liabilities?

19 A. (Mr Gardiner) Yes.

20 Q. Okay. And would you agree that in that event the
21 transaction could include the issuance of shares by the
22 new entity to the shareholders of the dissolved entity?

23 A. (Mr Gardiner) What could happen is the issuance of new
24 shares to the corporation that sold it the assets, and
25 then that corporation in turn possibly could distribute

12:01

1 those shares to its shareholders.

2 Q. Right. So that at the end of that transaction, on the
3 books of the new entity that has acquired the assets and
4 assumed the liabilities, its shareholder list would
5 reflect the shareholders of the dissolved entity?

6 A. (Mr Gardiner) Yes, that's right.

7 Q. You indicated in your opinion that the joint
8 resolution -- which is at tab 6, C-57 -- did not
9 actually effect a transfer of assets and an assumption
10 of liabilities?

11 A. (Mr Gardiner) Yes, that is my opinion.

12 Q. I take from the fact that your footnote for that
13 references only the joint resolution that it is the
14 joint resolution on which you base that opinion?

15 A. (Mr Gardiner) Which footnote are you referring to?

16 Q. 61. You state that:

17 "... the Joint Resolution contemplates the potential
18 transfer of assets ... [but] there is no evidence that
19 any actual transfer ... ever occurred."

20 A. (Mr Gardiner) Correct. Companies can resolve to do all
21 sorts of things, but that doesn't mean they've done
22 them. A board of directors can approve an action, and
23 then two days later un-approve that action.

24 So to get something done, certainly board approval
25 is an important part of the process. But then you have

12:03

1 to do it, which in the case of an asset transfer is:
2 execute an instrument of transfer, like a bill of sale,
3 or assignment agreements, or other related documents.
4 And if there were to be an assumption of liabilities,
5 there would have to be an agreement by which a company
6 assumes the liabilities of another company.

7 That didn't happen here. I've never seen any
8 indication, in any of the documents that have been
9 presented to me at least, to indicate anything like that
10 ever happened.

11 Q. Okay. I take it you did not, as part of your research
12 and investigation, speak with the principals of either
13 the dissolved entity or the 2005 company to ascertain
14 what their intent was with regard to the joint
15 resolution?

16 A. (Mr Gardiner) I did not speak with them.

17 Q. And you were not here in the hearing room when
18 Mr Wolfgang Rauball testified to the intent of the
19 parties to this joint resolution?

20 A. (Mr Gardiner) I was not here.

21 Q. Would you agree that in ascertaining the terms of
22 an agreement, the intent of the parties is an important
23 consideration?

24 A. (Mr Gardiner) It's relevant, but not as important as
25 actually entering and executing an instrument of

12:05

1 transfer to make a transaction happen.

2 MS BURTON: With the exception of questioning him relating
3 to this new opinion, I am done.

4 THE PRESIDENT: Right. So we will take the break now for
5 lunch, and then we can come back to the issue.

6 One hour, so 1.05.

7 (12.05 pm)

8 (Adjourned until 1.05 pm)

9 (1.09 pm)

10 THE PRESIDENT: When you're ready.

11 MS BURTON: Mr Gardiner, I've had a chance to review this
12 opinion in Wittingham which you indicate may affect your
13 opinion.

14 A. (Mr Gardiner) I don't think it significantly affects the
15 overall conclusions in our opinion.

16 Q. We'll talk about that further in a little bit. I just
17 want to, now that I have had a chance to review it, be
18 able to ask you about it.

19 It appears that it dealt with a dissolved
20 partnership?

21 A. (Mr Gardiner) Yes.

22 Q. There's a different statute for partnerships than for
23 corporations, right?

24 A. (Mr Gardiner) Agreed.

25 Q. This particular partnership, while dissolved, borrowed

13:10

1 money and used it to pay a lien on one of its assets, on
2 its real property?

3 A. (Mr Gardiner) That's how I understand the facts to read
4 too.

5 Q. The real estate was in the name of the dissolved
6 partnership, and the dissolved partnership purported to
7 give a deed of trust to the lender; is that how you read
8 it also?

9 A. (Mr Gardiner) Yes, that's how I read it.

10 Q. Then after the dissolved partnership received the funds
11 and paid them over to someone else, the lender wanted to
12 foreclose its lien against the real property; am
13 I reading that right? Is that your understanding too?

14 A. (Mr Gardiner) I think so.

15 Q. And the court held that the lender could not foreclose
16 because the transaction under which the dissolved
17 partnership borrowed the money and gave the lien was
18 void because the transaction occurred while the
19 partnership had been dissolved, or after its
20 dissolution?

21 A. (Mr Gardiner) Basically, yes, agreed.

22 Q. While this decision specifically dealt with
23 a partnership, the ruling was based upon a Utah Supreme
24 Court opinion relating to dissolved corporations, right?

25 A. (Mr Gardiner) Right, the Houston opinion.

13:12

1 Q. And the Utah Supreme Court held that contracts entered
2 into by dissolved corporations are void in Utah, no
3 matter how inoffensive the subject matter?

4 A. (Mr Gardiner) That's what the case says.

5 Q. So this opinion in Wittingham comes from the Utah Court
6 of Appeals, which is a lower court from the Utah Supreme
7 Court?

8 A. (Mr Gardiner) Yes.

9 Q. And previously, as cited in both your opinion and the
10 Snell & Wilmer opinion, the Utah Court of Appeals, in
11 Orvis v Johnson, had held that contracts entered into by
12 dissolved corporations are merely voidable at the
13 counterparty's option?

14 A. (Mr Gardiner) Right.

15 Q. But the Court of Appeals is disavowing its prior
16 decision in Orvis in this new opinion in Wittingham?

17 A. (Mr Gardiner) That's how I read it.

18 Q. And it's doing so because it determined that the Utah
19 Supreme Court's opinion in Houston has never been
20 overruled?

21 A. (Mr Gardiner) Yes, exactly. That's what it says.

22 Q. The Utah Supreme Court, in Houston, held that contracts
23 entered into by dissolved corporations are wholly void?

24 A. (Mr Gardiner) That's what it says.

25 Q. Alright. "Void" meaning they are never enforceable,

13:14

1 I take it is what --

2 A. (Mr Gardiner) That's what I think "void" means: they are
3 invalid.

4 Q. From the beginning?

5 A. (Mr Gardiner) From the beginning.

6 Q. Just as Ms Jarvis testified that acts taken in violation
7 of the bankruptcy stay are void from the very beginning,
8 this new opinion you have brought to our attention
9 indicates that contracts entered into by a dissolved
10 corporation are void from the beginning?

11 A. (Mr Gardiner) I think it's worth noting that that
12 partnership had been -- I think it says it was dissolved
13 in 2007, and that this contract or this loan was entered
14 into over two years later. So ...

15 Q. After the --

16 A. (Mr Gardiner) After the period in which it could have
17 reinstated, potentially, as a partnership.

18 Q. The Houston opinion was rendered in 1919?

19 A. (Mr Gardiner) (Nods head)

20 Q. You have to give verbal answers.

21 A. (Mr Gardiner) Yes, it was.

22 Q. Thank you. Section 1405 postdates 1919, so that
23 legislation was enacted after the Houston opinion. What
24 is your opinion as to the effect of the legislator's
25 enactment of Section 1405 on the Houston ruling?

13:15

1 A. (Mr Gardiner) Well, I believe that the statute is
2 important, and the statute matters and has to be dealt
3 with. So I believe that whoever is looking at this
4 again and dealing with the statute -- which this case
5 doesn't deal with, because it doesn't deal with the
6 corporate statute. If a case comes up later in which
7 1405 comes up, that's going to have to be an issue to be
8 dealt with.

9 THE PRESIDENT: If I understand correctly, it's a question
10 of void or voidable? Or that's one of the issues?

11 A. (Mr Gardiner) Yes.

12 THE PRESIDENT: What would be your guess -- You seem to say: we don't know,
13 we have to
14 wait until the issue comes again.

15 A. (Mr Gardiner) So my personal opinion is that if this
16 issue came before a court having to do with a dissolved
17 corporation that was involved in the process of
18 liquidating and winding up its affairs, under this
19 statute which we have before us, which allows it to do
20 things like collect its assets and dispose of its
21 properties, the court is going to permit that
22 corporation to dispose of its properties. That's my
23 personal opinion. But that hasn't been addressed in the
24 courts yet.

25 THE PRESIDENT: But what about the contracts that the
company is not allowed to do: would they be considered

13:17

1 void or voidable?

2 A. (Mr Gardiner) I think they would have to be allowed to
3 enter into contracts to dispose of their assets. I do
4 think that. In which case they would either be valid
5 contracts or, at a minimum, voidable contracts, but not
6 void.

7 THE PRESIDENT: Maybe these cases are not relevant to what
8 I am going to ask, but I ask it all the same: there are
9 still contracts that the company is not allowed to enter
10 into?

11 A. (Mr Gardiner) Yes, there certainly are contracts they
12 cannot be allowed to enter into. Those ones would be
13 void.

14 THE PRESIDENT: Would be void?

15 A. (Mr Gardiner) Yes.

16 THE PRESIDENT: Okay, thank you.

17 A. (Mr Gardiner) And by the way, my views are separate from
18 the fact that this is the law that's come down, and the
19 law is what it is now. Apparently we have to deal with
20 the fact that we have a case that says these contracts
21 are void. My view is one thing, and the law that we
22 have to abide by says that these are void.

23 THE PRESIDENT: Thank you. Sorry.

24 MS BURTON: No, I want to follow on from that line of
25 questioning.

1 If we take this opinion, and in particular the
2 Houston opinion, and we compare that to Section 1405,
3 I think, if I understand what you're telling us, your
4 opinion is that once this is revisited by the Utah
5 Supreme Court, your opinion is that it's likely the Utah
6 Supreme Court would determine that contracts which are
7 entered into and which are not in furtherance of
8 a winding-up and liquidation would be void; is that
9 right?

10 A. (Mr Gardiner) Yes, that's right.

11 Q. But that contracts entered into by a dissolved
12 corporation which are in furtherance of winding-up and
13 liquidation will be, at worst, voidable; is that right?

14 A. (Mr Gardiner) Yes.

15 Q. And could very well be enforceable?

16 A. (Mr Gardiner) Possibly.

17 Q. So when I'm reading this opinion, paragraph 7 in
18 Wittingham, it refers to "limited circumstances in which
19 the contracts of a dissolved partnership would be
20 valid", your opinion is that if the Utah Supreme Court
21 revisits this issue with regard to corporations, that
22 the "limited circumstances" set out in Section 1405
23 could be those that are valid contracts?

24 A. (Mr Gardiner) Well, my opinion is that's what I think
25 the court ought to do. Whether that's what the court

13:21

1 will do, I have no idea.

2 Q. Who would have thought the Utah Court of Appeals would
3 have done this, huh?

4 A. (Mr Gardiner) I was surprised by this.

5 Q. The elements of a contract under Utah law, they require:
6 an agreement and consideration; more than one party; and
7 offer and acceptance of consideration. Is that right?

8 A. (Mr Gardiner) That sounds familiar, yes.

9 Q. If you take a look at, in your bundle, tab 6, which is
10 C-57.

11 A. (Mr Gardiner) I have it.

12 Q. This is the joint resolution.

13 A. (Mr Gardiner) Yes.

14 Q. And I simply want to have you confirm that it is signed
15 by the directors of both the dissolved entity and the
16 2005 entity.

17 A. (Mr Gardiner) That's what it says.

18 MS BURTON: That concludes my questioning, Mr Chairman.

19 (1.23 pm)

20 Questions from THE TRIBUNAL

21 PROFESSOR STERN: Yes, I have just a question. How do you
22 draw the line between contracts in furtherance of
23 winding-up and the ones which are not in furtherance of
24 winding-up? Could you elaborate a little bit on that?

25 A. (Mr Gardiner) Certainly.

1 A company that's dissolved has one purpose, and
2 that's to wind up its affairs, that's to cease
3 operations and extinguish its assets, so that all of its
4 liabilities can be paid, and if any assets remain after
5 that, those can be distributed to the owners of the
6 business, and then it can stop doing anything at that
7 point. So that's liquidation, and the process of
8 winding-up is the process of doing just that: of taking
9 actions to cease operations and to extinguish assets.
10 So that's what we focus on.

11 So there's a variety of things that can happen, but
12 most typically a company that's dissolved will find ways
13 to sell its assets, and that's primarily what it will
14 do, and then use the proceeds to pay creditors, and
15 hopefully at the end of the day there's something left
16 to pay shareholders.

17 PROFESSOR STERN: For example, transferring its assets to
18 another company could or could not be in the winding-up
19 process?

20 A. (Mr Gardiner) You could transfer assets, in my view, to
21 another company, if you receive valid consideration for
22 those assets. That would be disposing of those assets
23 in a manner that's consistent with Section 1405, which
24 is our dissolution statute.

25 A. (Ms Jarvis) And I would just add that when disposing of

13:25

1 those assets, the monies you get would be distributed to
2 the creditors of that company and, if there's anything
3 left over, to its shareholders.

4 PROFESSOR STERN: But I guess they are borderline cases
5 where you have to decide whether it is for the purpose
6 of winding-up or not, I imagine? Or is it quite
7 clear-cut?

8 A. (Mr Gardiner) Sorry?

9 PROFESSOR STERN: Is it quite clear-cut, or are there some
10 contracts that could be seen as in furtherance or not?

11 A. (Mr Gardiner) Okay. I think it's pretty clear-cut. For
12 example, in my view a merger is something different from
13 winding up a corporation, because a merger actually is
14 a means by which the business of a company is continued,
15 and it continues on, rather than ceasing operations and
16 ceasing the process. A merger, that's what that does.
17 So a sale of assets is different from that.

18 So I think it's actually pretty clear-cut. It's
19 pretty easy to decide, in my view, what is a transaction
20 that is in the process of liquidating and winding up
21 a company versus what isn't.

22 PROFESSOR STERN: Thank you. That clarifies.

23 THE PRESIDENT: Re-direct?

24 DR GHARAVI: I apologise, Belmont has questions.

25 THE PRESIDENT: Oh, sorry.

13:26

1 (1.26 pm)

2 Cross-examination by DR GHARAVI

3 Q. Sir, I just want to make clear: I'm within the context
4 of the opinion you expressed, not what the law says;
5 even less now.

6 Your opinion, as I understand it, is that
7 a dissolved company can dispose of its assets as long as
8 it is for winding-up purposes, and that is, you say, at
9 best or at worst -- I don't know how you qualified it --
10 voidable; correct? That's how I understood it.

11 A. (Mr Gardiner) I think that under this case that we've
12 just been talking about, that there is risk now that
13 a court would say somehow that even that type of
14 a transaction would somehow be void. I think that's
15 what the case says.

16 Q. Okay.

17 A. (Mr Gardiner) What my personal opinion is: that what
18 should be is that a corporation should be able to
19 dispose of its assets --

20 Q. Okay.

21 A. (Mr Gardiner) -- consistent with the statute, and if it
22 is doing so in a manner that's consistent with its
23 mandate to liquidate and wind up its affairs, then, at
24 best, such a transaction or a contract entered into in
25 that situation would either be enforceable or, at worst,

13:28

1 voidable, but it shouldn't be void. That's my opinion.

2 Q. That's how I understood it.

3 A. (Mr Gardiner) Okay.

4 Q. Within that context, you were put, I think, a question,
5 and you clarified what the law says about "dispose".

6 You said: "dispose" means basically, as I understand it,
7 sell, and certainly not merger. Is that correct?

8 A. (Mr Gardiner) That's my view, yes.

9 Q. And if you cannot merger, you cannot close on
10 a transaction to purchase, I guess; that's even worse.
11 You would agree?

12 A. (Mr Gardiner) Sorry, say that again?

13 Q. If you can only dispose, and dispose is not merger, then
14 even less can you buy or close on something to purchase?

15 A. (Mr Gardiner) You could -- yes, I guess the answer to
16 your question is: buying an asset after you're dissolved
17 would be inconsistent with liquidating and winding up.

18 I would point out though, when a company is
19 administratively dissolved, there's a two-year period in
20 which that company can be reinstated. And the statute
21 says -- a different statute than 1405, I think it's
22 1422 -- says that if a company is reinstated within that
23 two-year period, then all actions taken from the date of
24 the administrative dissolution until that reinstatement,
25 those actions are ratified and completely valid. So

13:30

1 that creates a question that actions taken immediately
2 after administrative dissolution, and for the two-year
3 period thereafter, certainly can be ratified and made
4 valid if a company does a reinstatement.

5 Q. What about, within your scenario, if the purchase was
6 intended for purposes of continuing purchase of majority
7 shares and continue investing in and managing the
8 company? Would that change your answer for the
9 two-year...?

10 A. (Mr Gardiner) It wouldn't change my answer if the
11 company did in fact get reinstated as a valid
12 corporation. Frankly, if it did anything in that
13 two-year period and was reinstated, any action it would
14 have taken, whether it was for dissolution or for
15 anything else, by the statute it would be a valid
16 action.

17 Q. I am still within the context of your opinion, and not
18 the court decisions. Take the scenario that a dissolved
19 company, after being dissolved, enters into a contract
20 to dispose of its assets, and assume that that is
21 voidable. My question is: who is the aggrieved party?
22 Only the aggrieved party can ask for performance;
23 correct? It's only the aggrieved party?

24 A. (Mr Gardiner) It's only the aggrieved party who could
25 seek to ask a court to say, "I want this contract to be

13:32

1 voided".

2 DR GHARAVI: Thank you.

3 THE PRESIDENT: Re-direct?

4 (1732 pm)

5 Re-direct examination by MR ANWAY

6 Q. Good afternoon, Ms Jarvis and Mr Gardiner.

7 Mr Gardiner, let me start with you. The new opinion
8 that you brought to our attention today, do you think
9 that strengthens the conclusions you reached in your
10 report or weakens them?

11 A. (Mr Gardiner) Overall, by the way it reads, it
12 strengthens.

13 Q. Why do you say that?

14 A. (Mr Gardiner) Because my portion of the report focuses
15 on the merger and whether a merger occurred or not. And
16 if we assume for the sake of argument that a contract
17 was entered into for a merger, this case supports the
18 conclusion that that contract would be void.

19 Q. And you had other reasons in your report to conclude
20 that it was --

21 A. (Mr Gardiner) Yes.

22 Q. -- void, but this provides you an additional reason; is
23 that how I understand your answer?

24 A. (Mr Gardiner) My answer is: it provides an additional
25 reason that I wasn't aware of when we wrote the report,

13:33

1 because the case hadn't come out.

2 Q. One issue is, of course, the alleged merger. The other
3 issue is, as you well know, in this case there's
4 an issue of the transfer of a 57% interest pursuant to
5 an SPA dated March 2001.

6 Does this new case, in your view, apply to
7 a transaction like that, or do you think there are
8 differences with that type of transaction as to what was
9 at issue in the case?

10 A. (Mr Gardiner) I do think there are differences, in that
11 in this case -- meaning the present case -- the
12 March 27th contract preceded the administrative
13 dissolution of the 1985 company, or EuroGas I, as I call
14 it, and then EuroGas I was administratively dissolved on
15 July 11th 2001.

16 Q. I see. So in the new case you cited today, the contract
17 was executed after the company was dissolved?

18 A. (Mr Gardiner) The contract was executed before.

19 A. (Ms Jarvis) Sir, I think you meant in the new case?

20 Q. Sorry, yes, that's correct. That was my question. In
21 the new case that you brought to our attention today,
22 the contract was executed after the company was
23 dissolved; and not only that, it was also --

24 DR GHARAVI: That's an argument, "not only that but also".

25 MR ANWAY: It's a statement of fact.

13:35

1 DR GHARAVI: There is a problem, Mr President, because that
2 sale purchase agreement does not really arise. I didn't
3 mention the sale purchase agreement. So I have no
4 objection that my colleague mentions that, but he then
5 has to characterise it carefully, accurately, meaning
6 the contract entered before the company was dissolved,
7 but not closed at the date of when the company was
8 dissolved. So I have no objection, but you have to
9 adequately define the chronology of the events, in
10 a non-leading way.

11 MR ANWAY: Mr Gardiner, with respect to the SPA --

12 A. (Mr Gardiner) The March 27th SPA?

13 Q. -- what do you understand to be the relevance of
14 March 2001?

15 A. (Mr Gardiner) March 2001 is the effective date of the
16 SPA.

17 Q. Do you know whether that contract was signed before
18 EuroGas I was dissolved?

19 A. (Mr Gardiner) My understanding is it was signed before
20 EuroGas I was administratively dissolved.

21 Q. In the new case you brought to our attention today, was
22 the contract at issue signed before or after the
23 company was dissolved?

24 A. (Mr Gardiner) It was signed after the partnership was
25 dissolved.

13:36

1 Q. In the new case that you brought to our attention today,
2 was the contract signed before or after the two-year
3 period for which the company could seek reinstatement
4 had expired?

5 A. (Mr Gardiner) It was signed after two years.

6 Q. Going back to some of the questions from the Tribunal,
7 is the fact that in the new case you brought to our
8 attention the contract was signed after the two-year
9 reinstatement period relevant to your assessment as to
10 whether this ought to be the law or not, or how issues
11 like this might be considered in the future?

12 A. (Mr Gardiner) I think it is relevant. I think it is
13 relevant in the sense that I think it's unclear how
14 a court would deal with a corporation or another entity
15 that (a) has entered into a contract before it was
16 dissolved, but perhaps not fully performed, or (b)
17 entered into a contract during the two-year period in
18 which it could be reinstated. The present case, or
19 other cases that I am aware of, don't deal with those
20 facts.

21 Q. You have noted that in your own personal view the court
22 perhaps should have reached a different conclusion. Is
23 this now binding law in Utah, notwithstanding your
24 opinion on that issue?

25 A. (Mr Gardiner) In my view, it is binding law.

13:38

1 Q. You were shown a document just a moment ago which is at
2 tab 6 of Claimants' bundle: it's the joint unanimous
3 consent resolution, C-57. You've read this document?

4 A. (Mr Gardiner) Yes, I have.

5 Q. You note that throughout document they use the phrase
6 "Class 'F' reorganization". My question is whether
7 a type-F restructuring, as the Claimants use that
8 phrase, can merge two corporate entities.

9 A. (Mr Gardiner) No, it can't.

10 MS BURTON: Objection. We did not ask him questions with
11 regard to class F and merger. It's outside the scope.

12 MR ANWAY: That's okay, I have the answer.

13 In your view, Mr Gardiner, does this joint unanimous
14 consent resolution merge two corporate entities?

15 MS BURTON: Objection. Outside the scope.

16 MR ANWAY: Mr Chairman, the witness was asked specifically
17 about this document, and there is no question that one
18 of the issues in this case is whether it in fact merged
19 the two corporate entities. You will recall the witness
20 specifically said that it required an instrument of
21 transfer, and one of the issues during that
22 cross-examination was whether this was such
23 an instrument.

24 THE PRESIDENT: You can have the question.

25 MR ANWAY: Thank you.

13:39

1 In your view, Mr Gardiner, does this joint unanimous
2 consent resolution effectuate a merger?

3 A. (Mr Gardiner) No.

4 Q. Why?

5 A. (Mr Gardiner) This joint resolution reflects the
6 intentions of the two boards of directors to do
7 something to, in essence, combine the two corporations
8 and make them into one, without complying with merger
9 statute or without at least providing evidence of actual
10 transfers of assets or contractual assumptions of
11 liabilities. It also contemplates that the new EuroGas
12 entity would simply treat the outstanding shares of the
13 prior EuroGas entity, or EuroGas I, as I call it, simply
14 treat those shareholders as its own, which in my
15 experience as a corporate lawyer, I don't know how you
16 do that. One company can't, just by a resolution -- and
17 by the way, the directors are the same on both sides,
18 right? -- decide that the shareholders of one company
19 are now the shareholders of another company. That just
20 doesn't work, at least in Utah corporate law.

21 Q. How do companies merge in Utah?

22 A. (Mr Gardiner) They enter into an agreement: we usually
23 call it an "agreement and plan of merger". And they
24 agree to file articles of merger with the Division of
25 Corporations, and they file them. The public gets

13:41

1 notice of the fact that these corporations have merged.
2 And the merger is effective once those articles of
3 merger have been filed.

4 Q. So the merger cannot take effect before the articles of
5 merger are filed?

6 A. (Mr Gardiner) No.

7 Q. Ms Jarvis, I think I'm going to turn to you now.
8 Ms Burton took you through hypotheticals concerning
9 Jarvis Corp; do you recall those?

10 A. (Ms Jarvis) Yes.

11 Q. Could you tell us why you think this case is different
12 than the hypotheticals Ms Burton gave to you?

13 A. (Ms Jarvis) Well, as we said particularly in the
14 rebuttal opinion, this is a case of a corporation that
15 was dissolved, and after two years could not be
16 reinstated, then filed bankruptcy. It filed bankruptcy,
17 it did not file any statements and schedules. And under
18 bankruptcy law then nothing, no assets could have been
19 abandoned and could be within the corporation's control
20 after the bankruptcy had concluded. So there would be
21 nothing to administer at that point.

22 Q. And this may be a question for Mr Gardiner as well, but
23 since it does bear on bankruptcy, I'll ask it to you:
24 could a merger operate, executed after a bankruptcy had
25 been concluded but that purported to apply retroactively

13:43

1 during the bankruptcy, is that something that could be
2 valid in Utah?

3 A. (Ms Jarvis) I think Sam has stated that under Utah
4 corporate law, it cannot. You cannot have a retroactive
5 merger. It has to be at the time that the articles of
6 merger are filed. And if you're asking for something to
7 come in effect at the time the automatic stay is in
8 place, that would be void. Any act taken in violation
9 of a stay is void ab initio, absolutely void.

10 Q. Now, in her questions today Ms Burton focused almost
11 exclusively on EuroGas GmbH, the Austrian entity. Are
12 there other assets or interests you know of owned by
13 EuroGas concerning this talc project, aside from
14 EuroGas GmbH?

15 A. (Ms Jarvis) Well, my understanding from reading the SEC
16 documents is that there is an issue with respect to the
17 57% that was bought from Belmont. And while I can't
18 opine exactly when that, you know, was transferred,
19 because that would be a subject of Canadian law, which
20 is what would determine when it was transferred, but as
21 I explained with other assets of the estate, if at the
22 time of the bankruptcy filing under Canadian law --
23 which is what you would apply -- this was an asset of
24 the estate, then it would become property of the estate
25 at that point in time.

13:44

1 Q. Do you know whether, if that 57% was transferred, it
2 would have been held directly by EuroGas I or through
3 GmbH, the way the 33% was?

4 A. (Ms Jarvis) My understanding is it was directly by --
5 again, from reviewing the SEC documents and other public
6 filings.

7 Q. There was also some discussion about how causes of
8 action that may arise after a bankruptcy is commenced
9 can relate back to an existing asset. I just wondered
10 if you could provide a bit more of a fulsome explanation
11 about how that actually works.

12 A. (Ms Jarvis) Because there are some causes of action that
13 arise that are property of the estate that aren't
14 connected with another asset.

15 One of the examples would be the Stephens case,
16 which was decided by the District Court in the District
17 of Utah, so a court that is the appellate court and the
18 court of original jurisdiction for the Bankruptcy Court
19 in Utah. In this case, the Stephens case, the court was
20 actually applying judicial estoppel, meaning: can this
21 claimant actually bring this claim in their court? But
22 in doing, so they interpreted -- and had to interpret --
23 what was property of the estate.

24 The facts of the case are such that the claimant had
25 an employment claim, but the claim didn't arise until

13:46

1 after she filed the Chapter 7 bankruptcy. However,
2 before she filed that bankruptcy, there were clearly
3 issues that had happened that she thought it was
4 a possibility that this could be a claim at some point
5 in time. So at the time she filed the Chapter 7
6 bankruptcy, she knew there could be a claim that would
7 arise, and that claim actually didn't arise until after
8 the bankruptcy was filed. She did not list this on her
9 statements and schedules.

10 So the District Court looked at whether that was
11 an asset of the bankruptcy estate, and found, again
12 interpreting the potential claims, that from decisions
13 of the Tenth Circuit in that case -- they looked
14 specifically at the Eastman case -- said: this is
15 a potential claim and was a potential claim at the time
16 of the filing of bankruptcy, should have been listed as
17 an asset of the bankruptcy. Because it was not listed
18 as an asset of the bankruptcy, it was not abandoned and
19 it could not be pursued by her.

20 And in addition to that, she was judicially
21 estopped, meaning because she took the position that
22 this didn't belong to her in the bankruptcy, she could
23 not now say that it belonged to her thereafter when she
24 sued.

25 Q. Again, this might be a question for either of you.

1 Ms Burton raised the question about a share transfer
2 and, Mr Gardiner, I think you replied that as winding-up
3 activities, a dissolved corporation could sell its
4 assets and receive back the shares of the buyer.

5 Could you tell the Tribunal why you think this case
6 is different from that scenario, if you do think it is
7 different?

8 A. (Mr Gardiner) Well, in this case there was no actual
9 issuance of any shares by what I call EuroGas II to
10 EuroGas I; there was just a statement that it would deem
11 the shareholders of EuroGas I to be the shareholders of
12 EuroGas II. And like I said before, that's not
13 a concept that makes any sense to me under US or Utah
14 corporate law; that's not a valid way to acquire
15 shareholders or to issue shares.

16 Q. Ms Jarvis, one of Ms Burton's questions to you revealed
17 that there were two cases on which you had relied for
18 a particular proposition. Counsel can correct me if I'm
19 misstating this. One of them relied on a prior statute
20 and one of them relied on a current statute. And I had
21 noted in the Claimants' Reply memorial there seemed to
22 be some suggestion that you had relied on an incorrect
23 statute. Could you just address that for the Tribunal?

24 A. (Ms Jarvis) Yes, the two cases were cited in the
25 original opinion to talk about mergers and whether

13:49

1 mergers could happen beyond the two years of
2 reinstatement, and the law did not change with respect
3 to one or the other. So it didn't matter that they were
4 under the old law or the new law, because under both
5 laws the time for reinstatement -- there was a period of
6 time where it used to be one year, but then it became
7 two years, and during that two-year time is the only
8 time that a corporat[ion] can reinstate. Once it passes
9 that two-year period, it cannot reinstate. And that's
10 the same under both laws.

11 Q. So in your view, is the fact that one case relied on
12 a previous statute relevant?

13 A. (Ms Jarvis) No.

14 Q. Why?

15 A. (Ms Jarvis) Because again, the law hasn't changed with
16 respect to a merger. Can a merger occur beyond the
17 two-year period? No, it cannot. The only thing that
18 changed was the wind-up period beyond that, where you
19 cannot merge but where you can sell off other assets;
20 the time period was taken from that.

21 But actually, because one of the cases is a new case
22 under the new law, there is still the issue that there
23 is, at some point in time, a time where the wind-up
24 period cannot go beyond. So I think the Hilcrest case,
25 which I believe is under the new act, said: ten years

13:50

1 after the company was dissolved, too late to now raise
2 and try to pursue an asset. So it would be an equitable
3 standard, but at some point it's too late to even pursue
4 wind-down activities. They have to complete at some
5 point.

6 Q. Mr Gardiner, I don't know if I have already asked this
7 question; I'm sure I will be told if I have. You had
8 noted before about statutory merger. Is there any other
9 way to merge in Utah lawfully?

10 A. (Mr Gardiner) I am not aware of any other way.

11 Q. Ms Jarvis, a number of questions asked to you by
12 Ms Burton concerned trustees' control over property and
13 abandonment. Does the trustee have complete control
14 over whether property is abandoned?

15 A. (Ms Jarvis) No. Under the abandonment statute, there
16 are three ways that property can be abandoned. The
17 first is: the trustee can file a motion to abandon, or
18 a notice of abandonment. But the Cook case, the
19 Tenth Circuit case cited in my opinion, is very, very
20 clear that the trustee has to be precise about noticing
21 what asset is going to be abandoned, giving notice to
22 all the creditors, give them an opportunity to object,
23 before an asset can actually be abandoned.

24 The second way that an asset can be abandoned is
25 another party -- not the trustee -- can ask that the

13:52

1 court order the trustee to abandon the asset. That can
2 be done, but again it has to be done by motion, there
3 has to be notice given to parties. There's a rule,
4 Rule 6007, that makes it clear that these have to be
5 noticed because they are serious issues that the court
6 has to decide.

7 The third way for assets to be abandoned: very, very
8 clearly they have to be scheduled, so they have to be
9 filed in the statements and schedules, and then the
10 trustee has to have not administered them during the
11 bankruptcy case; and then, when the case is closed, then
12 they are abandoned by operation of law. But no assets
13 that are not scheduled can be abandoned by operation of
14 law.

15 MR ANWAY: I have nothing further.

16 THE PRESIDENT: Thank you.

17 (1.52 pm)

18 Questions from THE TRIBUNAL

19 THE PRESIDENT: Mr Gardiner, a contract, having not as its
20 object the liquidation, is entered into on a certain
21 date, it is executed by the parties; then the company
22 who is one of the contractors is dissolved; and after
23 that the contract is closed. What's the effect of the
24 dissolution in that situation on the validity of the
25 contract?

13:53

1 A. (Mr Gardiner) In your hypothetical it's closed within
2 the two-year period of reinstatement or not?

3 THE PRESIDENT: Within. But there is no reinstatement at
4 any time.

5 A. (Mr Gardiner) Okay. Well, my view is that, consistent
6 with Section 1405, when a company is able to dispose of
7 assets -- well, first it says it can collect its assets
8 and then dispose of them, and then it also indicates it
9 can take care of or satisfy obligations. In my view,
10 the closing of a transaction pursuant to an agreement
11 that's already been entered into would be consistent
12 with the dissolution and winding-up procedures permitted
13 by Section 1405.

14 So I believe they could close the transaction, and
15 that that closing would represent valid actions, because
16 that would be moving the company towards winding up and
17 proper liquidation of its assets. It's entered into
18 a contract. What does it do? It has to do something to
19 get to the ultimate point of ceasing its operations and
20 winding up. So I would say it could take those actions
21 to close the transaction.

22 THE PRESIDENT: Thank you. Any follow-up question?

23 DR GHARAVI: Yes, I want to be more specific on a follow-up.

24 (1.55 pm)

25 Further cross-examination by DR GHARAVI

13:55

1 Q. Have you read the SPA?

2 A. (Mr Gardiner) I have looked at the SPA. I did not read
3 it carefully.

4 Q. Take my representation -- and it's an undisputed
5 point -- that it was signed between the parties,
6 EuroGas I and Belmont, before EuroGas was dissolved,
7 okay? The closure date is after the company EuroGas was
8 dissolved.

9 Now please listen to me carefully, because there is
10 a contract, as you mentioned, to dispose. This one is
11 to purchase majority shareholding in a company that is
12 abroad as an ongoing project. Is that considered --
13 according to your opinion again; I'm leaving the court
14 aside -- a voidable-only contract that falls within the
15 spirit of the winding-up?

16 A. (Mr Gardiner) I'd like to answer that question. Could
17 someone tell me which tab Section 1405 is? I just found
18 it: it's tab 8 (R-19).

19 So my answer to your question is: I think it could
20 do that -- in other words, it could still close that
21 transaction -- because subsection (c) of 1405(1) says
22 a permitted action after dissolution is:

23 "... discharging or making provision for discharging
24 liabilities ..."

25 I view that to contemplate performing obligations

13:57

1 under a contract. So even if the contract entered into
2 prior to dissolution involves the acquisition of
3 an asset, still the company is bound by that contract,
4 has a duty to perform, and the statute permits "[the]
5 discharg[e] or making provision for discharging
6 liabilities", and I view "liabilities" to include
7 contractual obligations. As it moves forward toward
8 liquidation and winding-up, it has to take care of its
9 obligations, and one of them is to close transactions it
10 has previously agreed to enter into.

11 Q. But what about if the closure date has not arrived even?

12 A. (Mr Gardiner) Nothing changes in the analysis I just
13 stated. The closure date is when it is. It has
14 an obligation. I didn't read the contract carefully,
15 but I assume it had conditions involved which needed to
16 be satisfied in order for a closing to occur. When
17 those conditions were satisfied, it would have been
18 legally obligated to close the transaction, and I don't
19 think it would be viewed as inconsistent with the
20 statute to proceed to do that closing.

21 Q. And it could issue cheques after the company is
22 dissolved?

23 A. (Mr Gardiner) When you say "issue cheques" ...?

24 Q. Issue cheques: take its chequebook, EuroGas I, and
25 I issue a cheque to Belmont.

13:59

1 A. (Mr Gardiner) If that's consistent with an obligation it
2 has, particularly one that it entered into prior to
3 being dissolved, then I would say yes.

4 Q. And it could issue new shares as well?

5 A. (Mr Gardiner) Again, issuing new shares, I also agree it
6 could do that, in particular in the fact that the action
7 was occurring within two years after the administrative
8 dissolution, because within that two-year period, again,
9 if it were to reinstate, everything would have been
10 permitted. Ultimately in this case it wasn't
11 reinstated, so there might be a question as to whether
12 at that point there's a problem with the shares. But
13 I think at that point in time of closing, prior to that
14 two-year period being ended, it should be able to have
15 issued those shares, and that's what I believe it did.

16 Q. What about if under the SPA -- assume with me; I'm not
17 saying that is the case. Take another SPA with the same
18 chronology. There is no obligation on the part of -- no
19 obligation, no consequence?

20 A. (Mr Gardiner) No obligation to close?

21 Q. Yes.

22 A. (Mr Gardiner) So you're proposing a hypothetical where
23 there is an SPA entered into, but --

24 Q. And EuroGas I can take the position not to close.

25 A. (Mr Gardiner) Can take the position not to close. In

14:00

1 a strange hypothetical of a company entering into an SPA
2 which then it doesn't have an obligation to close,
3 I guess in theory you'd have to reconsider whether it
4 could close in that particular case if it had been
5 dissolved. However, even if it did, and it did
6 reinstate within the two-year period, that would be
7 perfectly fine.

8 Q. Yes, but the assumption is that it has not been
9 reinstated.

10 A. (Mr Gardiner) Okay.

11 Q. What is the statute of limitations in all this?

12 A. (Mr Gardiner) You know, I'm not sure what the statute of
13 limitations is in all this. I could look that up, but
14 I don't know off the top of my head.

15 Q. And whether or not one party is aggrieved or not, does
16 it change any of your answers?

17 A. (Mr Gardiner) If one party is aggrieved or not?

18 Q. You say it can discharge its obligations. Who is the
19 aggrieved party in the context of a situation that you
20 describe when reading the statute, as part of its
21 obligation to discharge? Who is the aggrieved party in
22 that context?

23 A. (Mr Gardiner) Well, an aggrieved party would be if
24 a company -- let's take your example or this case. The
25 SPA was entered into. EuroGas had an obligation to

14:02

1 issue shares. The closing was to acquire the 57% and
2 issue shares, right? That's the transaction. So if it
3 didn't issue the shares but acquired the 57%, then
4 I guess it would be Belmont that's the aggrieved party.

5 Q. And if the aggrieved party is not requesting at a point
6 of time that EuroGas I discharge its obligations, when
7 it learns that the company is dissolved --

8 A. (Mr Gardiner) Well, I don't --

9 Q. Sorry, I apologise, I don't want to interrupt you,
10 I just want you to focus.

11 Assume Belmont learns that EuroGas I is dissolved,
12 and from the moment it learns, it is not requesting
13 EuroGas I to discharge its obligations. How could then
14 EuroGas I perform under a contract, under the provision
15 you read?

16 A. (Mr Gardiner) If EuroGas I has an obligation under the
17 contract, absent, like, an agreement to modify the
18 contract, but it has an obligation to close, then
19 I think the statute would still permit it to close.
20 Because in the facts you present to me, Belmont might
21 say for a time, "Oh, we don't want you to close", but it
22 could change its mind; or Belmont could go bankrupt and
23 someone, some trustee or some other party, could take
24 control and say, "Why didn't you pursue remedies?"

25 So I think it would still, under the statute, not

14:04

1 be -- somehow the fact that Belmont isn't demanding
2 performance, I don't think that would impact EuroGas I's
3 ability or permission under the statute to close the
4 transaction, because it still has a liability under the
5 contract. It doesn't matter to me whether or not
6 Belmont is asking for them to perform or not.

7 A. (Ms Jarvis) Can I answer that too? I think part of what
8 you're asking is: if a contract is voidable, you know,
9 then the other party has the right to void it. And
10 I think what you're saying is: could Belmont have, you
11 know, refused to close or accept the consideration?
12 I think it is possible that this contract is voidable,
13 but then Belmont could not have accepted the
14 consideration and disposed of it, because at that point
15 the contract is no longer voidable.

16 Q. I understand. But stay with me on that scenario.
17 Imagine Belmont learns five years after that that
18 contract, SPA, at the time of closure, EuroGas I was
19 dissolved, okay? And it takes the position, the
20 assumption, that full performance, the obligations in
21 full had not been discharged by EuroGas I --

22 A. (Mr Gardiner) Had not been?

23 Q. Had not. Had not. In full.

24 Could Belmont take the position, "Oh, I learned
25 today that at closure date your company was dissolved,

14:05

1 and I don't want to exercise my right to obtain
2 performance"? Then you have no obligation to discharge
3 any liabilities. How could you, EuroGas I, then
4 exercise that voidable possibility?

5 A. (Mr Gardiner) Well, I find the hypothetical a little bit
6 difficult to follow. You're talking five years later?

7 Q. Yes.

8 A. (Mr Gardiner) I don't think it -- in my view, I don't
9 think it changes anything, unless EuroGas and Belmont
10 have agreed to -- well, okay, you say five years later.
11 No, it's still a contract that was entered into before
12 the dissolution occurred.

13 Q. Yes, but obligations were not discharged.

14 A. (Mr Gardiner) Obligations were not discharged. Then
15 there's a question after two years whether or not some
16 of those obligations could -- it depends on what those
17 obligations are as a question, maybe whether some of
18 those obligations could be discharged. But there's also
19 a possibility they could be. I don't think it's clear.

20 DR GHARAVI: Okay.

21 THE PRESIDENT: No further question? Thank you very much.

22 MR GARDINER: Thank you.

23 THE PRESIDENT: Where are we now?

24 MR ANWAY: So Mr Anderson is the next witness, and he is
25 ready.

14:07

1 THE PRESIDENT: Okay. We started one hour ago, so we will
2 proceed. (Pause)

3 (2.11 pm)

4 MR JOHN ANDERSON (called)

5 THE PRESIDENT: Good afternoon, Mr Anderson. You have been
6 called here to testify as an expert witness. Can you
7 read the statement in front of you aloud, please.

8 MR ANDERSON: Yes, Mr Chair. I solemnly declare upon my
9 honour and conscience that my statement will be in
10 accordance with my sincere belief.

11 THE PRESIDENT: Thank you.

12 Any direct?

13 MR ANWAY: None, Mr Chairman.

14 THE PRESIDENT: Maître Gharavi.

15 DR GHARAVI: Thank you, Mr President.

16 (2.12 pm)

17 Cross-examination by DR GHARAVI

18 Q. Dear colleague, Mr Anderson, good afternoon.

19 A. Good afternoon.

20 Q. I will start with your first testimony and the CV.

21 Prior to your CV, a curiosity at paragraph 2: you cite
22 Chambers Global's rankings guide. Is that something
23 important in Canada that people rely on? Because here
24 it depends on the event and who thinks that it is
25 important or not. So you listed it, and I am asking

14:12

1 you: is that something important?

2 A. It depends what you mean by "important". But yes, it's
3 a lawyer rating service that is becoming more important
4 in Canada, because they put out a specific Canada guide
5 since the time of this expert report, and our belief is
6 the clients look to this expert guide when they need
7 an expert, in order to assess who are the best people to
8 hire.

9 Q. Clients, I can understand. But what about if you go
10 before a Canadian judge, for example? If he asks for
11 your expert opinion, would you put that credential
12 forward: "I'm listed in the Canada section of ..."?

13 A. Yes.

14 Q. You would? For example, for arbitration you have
15 I think superstars band 1, and you have all the members
16 of the Tribunal; then you have bands 2, band 3, band 4,
17 where you have people like me, and stuff like that.
18 Where are you in that?

19 A. In the Chambers, I can't recall, to tell you the truth.

20 Q. I think I looked: you are in band 4. Do you recall?

21 A. I don't recall. My marketing department handles where
22 we are in these rankings. And I know new ones came out
23 in the last month or so, and I didn't look.

24 Q. You mean you may have been better ranked before?

25 A. I have no idea.

14:14

1 Q. Moving on to publications. First, I see you are
2 a transactional lawyer; correct?

3 A. That's correct.

4 Q. You are not a litigator, are you?

5 A. No. No, I have never appeared in court, and this is my
6 first time as a witness. So when you say, "Do you
7 normally put these accolades after your name?", and
8 I said, "Yes", I'm guessing, because I have never done
9 this before.

10 Q. I see also that you have a number of publications, but
11 they are transactional-related publications. For
12 example, you cite a number of them. The question I have
13 is: have you ever written on contractual law questions,
14 questions of interpretation? Have you written a book or
15 an article on this subject?

16 A. No, I have not written a book or an article on the
17 subject of contractual interpretation.

18 Q. And I assume you have never acted as an arbitrator or as
19 a judge?

20 A. I have never acted as an arbitrator or a judge, and I've
21 got a lot of sympathy for them, having had to try to
22 figure out what's been going on here.

23 Q. I have also sympathy for you, because you take a little
24 bit the shoe of a judge, basically, in your two
25 opinions, which say, "A judge would have construed this

14:15 1 situation as follows".

2 A. Correct.

3 Q. Isn't that what you do?

4 A. Correct.

5 Q. So you're kind of a novel -- how do you say? -- it's

6 your bizutage. Anyway, you offered that to us.

7 So what I would like to do, dear colleague, is to

8 engage with you in three ways, to see: (1) whether you

9 identified the right principles to carry out what your

10 mission is; (2) whether you applied these principles;

11 and (3) whether you have applied these principles

12 correctly.

13 So I will start with whether or not you have

14 identified the required principles. At paragraph 10 of

15 your first statement, you mention "Governing Legal

16 Principles", and you say:

17 "Under British Columbia law, the interpretation of

18 a contract is an objective exercise. Courts applying

19 British Columbia law will, you start:

20 "(a) initially interpret a contract by giving the

21 words of a contract their ordinary meaning ..."

22 Okay?

23 A. Correct.

24 Q. Then I would like to pause there for a second and then go to

25 paragraph 16. And I read paragraph 16 in conjunction

14:17

1 with 10(a), because at 10(a) you identify a principle,
2 and then you identify other principles that allow you to
3 step away a little bit from (a).

4 A. Correct.

5 Q. My understanding is that you say: well if I interpret the
6 contract by giving the words of the contract their
7 ordinary meaning, it would lead to this result; yet for
8 the reasons, and based on the principles -- I am not
9 here to discuss yet the fact details -- but based on
10 these principles, I think it would not be sound to give
11 the words their ordinary meaning.

12 A. Yes, I'd say, summarising, that it would lead to
13 a commercial absurdity.

14 Q. I understand. Let's go through the three reasons you
15 state. You say:

16 "(a) the Purchase Price ... could all be sold for
17 less than the specified threshold of ... 3 million ...
18 and then the condition would never be capable of being
19 satisfied" -- then you say -- "in particular, the Purchase Price Shares,
20 since they were all sold for less than the specified ...
21 3 million, could not thereafter generate any additional
22 proceeds for Belmont to achieve the ... 3 million
23 threshold ..."

24 Correct?

25 A. Correct.

14:19

1 Q. Then you say:

2 "(b) the Share Purchase Agreement contains no
3 positive obligation on the part of Belmont to use
4 reasonable efforts to sell the Purchase ... Shares with
5 dispatch, or at all -- with the potential illogical
6 result that the 57% ... would never be transferred,
7 despite EuroGas having delivered the Purchase Price
8 Shares and otherwise having fully complied with its
9 obligations under the Share Purchase Agreement ..."

10 And then:

11 "(c) in each of the above circumstances, EuroGas
12 would have paid the NRAR, the Purchase Price Shares, and
13 given the covenants regarding other royalties and
14 registration rights, all as consideration under the
15 Share Purchase Agreement, and would receive nothing in
16 exchange."

17 Here I put to you: aren't there principles that
18 allow a court to correct or remedy any of the alleged
19 pathologies you have described, other than by deviating
20 from the ordinary meaning of the contract terms? And
21 allow me to elaborate. For example, if somebody has
22 paid not the full amount, and the other party, such as
23 Belmont, has kept the shares in the whole amount, isn't
24 it a principle of unjust enrichment? On (b), isn't
25 there a principle of good faith that the judge could

14:20

1 exercise in applying whether or not a party performed
2 those terms?

3 A. Well, I think --

4 Q. Or abuse of law?

5 A. So I think unjust enrichment is actually a remedy that
6 people seek when they're wronged, whereas when we're
7 trying to interpret the contract to determine whether
8 people are wronged or not in the first place, we need to
9 understand what the contract requires people to do.
10 I don't see unjust enrichment as being a statutory
11 interpretation principle or a contractual interpretation
12 principle.

13 I think the other comment that you made, that courts
14 will impose in certain circumstances an obligation on
15 parties to undertake their obligations in a reasonable
16 fashion: yes, I've certainly heard of that, and it's
17 often imposed that where one party is required to
18 provide a consent, for example, the courts will imply
19 an obligation that that consent is not to be
20 unreasonably withheld. So, yes, there is, in
21 interpreting a contract, the imposition of
22 a reasonableness standard, to answer the second part of
23 your question.

24 Q. Because, you know, what I understand is that what you
25 say here is that the contract terms could be clear, but

14:22

1 it would generate this result, and this result would not
2 be fair, basically, and that's why you go around it.
3 You don't say: well, it's unclear, let me go and do
4 an interpretation. You come and say: this is clear, but
5 it would lead to this, which I don't think is correct
6 because then the one party could not sell the shares, or
7 would sell them at a lower price, and then Belmont could
8 keep the shares and the amount, and that would be
9 unfair.

10 Hence I say there are remedies available if some
11 party, in interpreting, applying the contract terms,
12 abuses of it, or that application leads to an injustice.

13 A. So just to be clear, you said two things. First, there
14 is no abuse if you look at the specific words that were
15 here. What I'm pointing out is that if you look at
16 these specific words, they could lead to a commercial
17 absurdity. In effect this is, one could argue,
18 a gambling contract: will you be able to sell these
19 shares for \$3 million? If yes, I get something; if no,
20 I lose. That's not a commercial transaction, right?
21 That's a commercial absurdity.

22 So the principles of contractual interpretation
23 require a court to depart from the plain meaning of the
24 words where it would lead to a commercial absurdity.

25 Q. But looking at it step by step, (a), (b), (c), for

14:24

1 example the (b). What would be the commercial absurdity
2 of (b):

3 "(b) the Share Purchase Agreement contains no
4 obligation on the part of Belmont to use reasonable
5 efforts to sell ..."

6 Isn't that implied? Or if it's not implied,
7 wouldn't a good faith requirement by the court ensure
8 fair application of the strict terms of the contract?

9 A. Well, there is no strict terms of the contract requiring
10 any sale. Indeed, the contract in other places
11 contemplates there will be no sale.

12 Q. Okay. But a certain amount needs to be achieved;
13 correct?

14 A. But the contract suggest that there need be no sale
15 whatsoever, and the investor could retain the share
16 ownership because they think it's a wonderful thing to
17 retain.

18 Q. Who do you call "the investor" here?

19 A. This would be the vendor, Belmont, who is now the
20 investor in EuroGas and the investor in the talc project
21 to the tune of the 12 million shares that represented
22 approximately 10%, I seem to recall.

23 Q. That would be an abuse of law if you would do that,
24 wouldn't it, if the other party could put up the
25 consideration and Belmont, by way of playing with the

14:25

1 shares, would end up benefiting from the shares and the
2 amount that it has partially received? Or if EuroGas
3 wishes restitution, it could argue unjust enrichment,
4 for example, and Belmont would retribute. So that's why
5 I am puzzled.

6 A. So, as I say, unjust enrichment is a remedy. When we're
7 trying to figure out what the contract means in the
8 first place we don't come up with constructions that
9 necessitate the reliance on an unjust enrichment remedy
10 to correct the deficiency.

11 Q. But I thought that your plain interpretation of the
12 contract led to a clear result, from which then you
13 derogate because you think that it is absurd.

14 A. Yes, that's exactly what I said: because it leads to
15 a commercial absurdity. Not because it's unfair or
16 something else. Because it leads to a commercial
17 absurdity.

18 Q. Okay. But what I'm saying: that there is no commercial
19 absurdity if there are remedies under the law that could
20 correct the pathologies; that the absurdities are not
21 absurdities.

22 A. No. No. As I've told you, that's not the approach
23 that's taken.

24 Q. Okay, that's not the approach. Well, we differ on that
25 approach, because then the principles of unjust

14:26

1 enrichment, abuse of law, good faith would not be --

2 MR ANWAY: Mr Chairman, I think the witness has answered

3 this question repeatedly. Is there a new question that

4 he needs to --

5 DR GHARAVI: Sir, I was going on. I said I differ --

6 MR ANWAY: Right, but --

7 DR GHARAVI: What "but"?

8 MR ANWAY: I'm looking for questions to the witness, rather

9 than --

10 DR GHARAVI: Well, it's a --

11 MR ANWAY: -- argument and speeches from counsel.

12 DR GHARAVI: It's a back-and-forth.

13 THE PRESIDENT: I think Mr Anway is right in principle.

14 DR GHARAVI: Okay, I will move on. I was moving on.

15 THE PRESIDENT: Although of course it is difficult sometimes

16 not to have a reaction to on answer one doesn't like.

17 DR GHARAVI: Paragraph 10. I go back to paragraph 10.

18 A. Yes.

19 Q. Then let's see the principles you apply. The first one

20 was "[giving] the words of a contract their ordinary

21 meaning", okay? Then you go on and say:

22 "(b) have reference to the contract as a whole in

23 interpreting the words of a contract -- individual words

24 and phrases must be read in the context of the entire

25 document ..."

14:27

1 Okay? Then you go:

2 "(c) examine the factual circumstances that gave
3 rise to the contract to assist in interpreting the
4 contract; ambiguity is not a prerequisite to considering
5 the surrounding circumstances, but these circumstances
6 must not overwhelm the meaning of the contract; and

7 "(d) give commercial efficacy to the parties'
8 agreement in business settings. Interpretation which is
9 commercially absurd should be avoided, but the purpose
10 of the interpretation is not to rewrite the contract nor
11 relieve a party from the consequence of an improvident
12 contract."

13 On (d), I understand the latter part of the
14 sentence:

15 "... but the purpose of the interpretation is not to
16 rewrite the contract nor relieve a party from the
17 consequence of an improvident contract."

18 It is precisely what we were discussing. Basically
19 you are saying: yes, you should engage in
20 interpretation, as long as it is not commercially
21 absurd. But you cannot use the commercial absurdity
22 opt-out, because:

23 "... the purpose of the interpretation is not to
24 rewrite the contract nor relieve a party from the
25 consequence of an improvident contract."

14:29

1 Correct?

2 A. Correct.

3 Q. So at least on that we agree?

4 A. Yes.

5 Q. There are footnote references to the cases. Have you
6 read these cases?

7 A. Yes.

8 Q. There is no footnote when you say "interpretation which
9 is commercially absurd". I don't find any support for
10 that.

11 A. So that's footnoted to Scanlon; is that right?

12 Q. Is the gentleman a colleague who wrote the report with
13 you?

14 MR ANWAY: It's an associate.

15 DR GHARAVI: Okay. Even if he was, I had no objection.

16 I was just trying to find out. Don't be sensitive.

17 A. I don't know who this person is, to tell you the truth.

18 I have met him, but --

19 Q. Okay. But even if it was your assistant, partner,
20 brother, he would be welcome, as far as I'm concerned.

21 A. Thank you. So I see that we here cite page 744 at
22 770 --

23 Q. When you see "here", what are you citing? Can we start
24 with the case?

25 A. I am looking at Scanlon v Castlepoint.

14:30

1 Q. But here you're saying:

2 "... commercial efficacy to the parties' agreement
3 in business settings."

4 I was talking about the commercial absurdity.

5 A. Okay, so that's Jedfro. Is that footnote 12?

6 Q. I found your reference to absurdity only in your second
7 report, and that was Consolidated-Bathurst v Mutual
8 Boiler at page 7 of your second report. If you go to
9 (d), you cite:

10 "... unrealistic result or commercial absurdity ..."

11 A. Sorry, which paragraph did you say?

12 Q. Page 7 at (d).

13 A. Paragraph (d), yes.

14 Q. Here you say "unrealistic result or commercial
15 absurdity", and this is the first backup that I found,
16 but it's in your second report. And I understand you
17 refer to Consolidated-Bathurst v Mutual Boiler. Is that
18 the reference you provide?

19 A. Yes, that's the reference that's provided on page 7,
20 correct.

21 Q. Okay. I understand that it's for point 7, but it's
22 a case law that you rely on to say that you get out of
23 the strict interpretation of the contract, plain
24 meaning, when it's absurd; correct?

25 A. I wouldn't say "get out of". I'd say it's one of the

14:32

1 rules that's applied; yes, that's correct.

2 Q. Okay. Have you read that case?

3 A. Consolidated-Bathurst?

4 Q. Yes.

5 A. Yes.

6 Q. Does it concern the sale purchase agreement?

7 A. No. This is a case from our Supreme Court of Canada
8 that involved the purchase of a contract of insurance,
9 and was related to claims under that contract of
10 insurance and what was being purchased and what was not
11 being purchased.

12 But this case is the sort of thing that you learn
13 about in law school. In fact, I was taught it in 1989,
14 and it's one of the leading authorities in our country
15 on contractual interpretation, and is cited in hundreds
16 if not thousands of other cases, and followed. It is
17 the highest authority in our country since the appeal to
18 the House of Lords was done away with.

19 Q. I am not challenging that. But sometimes when I read
20 cases -- I was at law school, and I realise now that
21 I knew them better when I was at law school. Can we
22 read that together?

23 A. Certainly.

24 Q. It's RL-0084. You qualify an insurance contract as
25 a purchase contract? I was curious to see the

14:33

1 qualification of that. A purchase contract. Is it
2 a purchase contract or is it an insurance contract?

3 A. Well, let's go see it.

4 Q. Okay. (Pause) Are you waiting for my question?

5 A. Yes. You said you wanted to lead me somewhere.

6 Q. Oh, I'm sorry. Just by courtesy I was waiting for you;
7 maybe you had something to say. I understand it to be
8 an insurance contract; correct?

9 A. Yes.

10 Q. And I see that there is a difference as to what is
11 covered or not under the insurance, okay?

12 A. Correct.

13 Q. It says at page 2, in the middle of the first paragraph:

14 "The insurer, as was its right, sought in the terms
15 of the contract to limit its exposure to accidental
16 loss, and did so by seeking to confine the definition of
17 accident."

18 And the insurer was relying on corrosion, saying the
19 word "corrosion" in essence excludes accidental loss.

20 And then the court said:

21 "Such an interpretation would necessarily result in
22 a substantial nullification of coverage under the
23 contract."

24 Because then it would then defeat the interest of
25 the person who was covered, because it means that he

14:36

1 would not get coverage basically. That's why I don't
2 understand even the relevance of this. Basically they
3 are interpreting what is covered under insurance or not.

4 A. They are interpreting a contract, a contract of
5 insurance, correct.

6 Q. I understand. I understand. Yes, but you can always
7 make an analogy with any case. But would you agree with
8 me that the analogy is quite weak?

9 A. No. As I say, this is a leading authority in Canada,
10 not for insurance cases only, and it's something that
11 you can find referred to in hundreds if not thousands of
12 cases, as I said. So this is ...

13 Q. So there is no misunderstanding, I value very much the
14 Supreme Court, I value very much that everybody relies
15 on this. But is it a reference to point out that
16 an absurd result really would allow you, in the same way
17 you are doing, to leave the ordinary meaning of
18 a contract? Maybe I can move on and say: look, are they
19 really looking at the question of absurdity? They are
20 looking for the true intent of the parties, if you look.

21 A. Yes, that's what the quote says, absolutely.

22 Q. Okay. So it's more the true intent --

23 A. "... advance the true intent of the parties at the time
24 of entry into the contract."

25 Consequently, a literal meaning should not be

14:37

1 applied; correct.

2 Q. I will come back to this. But just for the sake of
3 time, I will move on a little, and then go to the end of
4 footnote 12.

5 A. In report 1 or 2?

6 Q. 1, I apologise. Footnote 12.

7 A. Footnote 12, yes.

8 Q. In your paragraph 10, you say: first of all you look at
9 the clear meaning. Then you say you have recourse to
10 something else. You list commercial absurdity, for
11 example, tests. You cited the case we just read. And
12 then as to the limit of the recourse to the commercial
13 absurdity and to the business settings, you say: but
14 watch out, you can look at commercial absurdity,
15 business efficiency.

16 "... but the purpose of this [exercise] is not to
17 rewrite the contract nor relieve a party from the
18 consequence of an improvident contract."

19 And you cite Jedfro, which you should have at
20 RL-0088, which is the second and last case. I read
21 page 3 of that decision:

22 "As a result, the appellants should not receive the
23 return of their initial investment in the joint venture,
24 as the monies were formally forfeited by the foreclosure
25 ... on the note and the trust deed. The doctrine of

14:39

1 unjust enrichment also did not apply; the appellants
2 chose not to pay and suffered the consequence the law
3 prescribed."

4 So the feeling I have -- I come back to the answer
5 the President said I didn't like -- is, you know, you go
6 into the ordinary meaning; you can opt out of it by
7 using other principles in certain circumstances. One is
8 commercial absurdity, and we saw the case you rely on.
9 Then you say: even commercial absurdity should not be
10 used to restore the bargain, and when you look at the
11 case that is cited, it's what we were discussing, isn't
12 it: that there are even remedies such as unjust
13 enrichment. That could address any concerns you
14 identified at paragraph 16?

15 A. I thought in this particular case they said those
16 weren't available. But this is not a case that I have
17 cited as being on all fours with our situation. This is
18 again a case where we're drawing from the general
19 principles of contractual interpretation, and so ...

20 Q. I'll move on to another related topic. But the feeling
21 I have when I read the case law you cite: that those
22 terms, clear terms that you want to deviate from, you
23 want to deviate from certain of these clear terms based
24 on pathologies, and the cases you cite show that there
25 are remedies under the law to allow these pathologies to

14:41 1 be addressed, and it cannot serve as an excuse for you
2 to undo the clear meaning of a contract.

3 A. No, that's -- I'm not aware of any case that says:
4 ignore the rule of contractual construction because it's
5 possible that there's a remedy in some other manner.
6 We're still trying to determine what the contract
7 requires in the first place, before we even get to the
8 question of: is there a remedy, based on what we now
9 understand this to mean? So I'm still on the principle
10 of: what does this really mean, what was the intent?

11 Q. Okay. I then want to a little bit engage further with
12 you on the different principles you set out. Don't you
13 think you have left other principles out?

14 A. Yes, there's lots of principles that I didn't think were
15 applicable, *contra proferentem* probably being a key one.

16 Q. Okay. But can we start with the question what is the
17 intent, what was the intent of the parties?

18 A. Certainly.

19 Q. Why don't you put that? I mean, every case law,
20 especially the Supreme Court that you've been
21 identifying, lists that as the primary thing somebody
22 looks at: the intention of the parties. And I see here
23 that you engage in an interpretation to deviate,
24 moreover, from the clear terms of the contract, and you
25 don't even have intention of the parties nowhere listed

14:43

1 here.

2 A. Well, in Canada, in British Columbia, the
3 intention of the parties is to be determined from the
4 four corners of the document. We've got a rule against
5 parol evidence and the like. So that you're not
6 supposed to go and say, "Gee, what I intended was the
7 result of X". We're supposed to look at the contract
8 and determine from the contract what a reasonable person
9 would determine to be the intent of the parties and what
10 they were trying to achieve. We then have the principle
11 that allows us to go beyond and examine the factual
12 circumstances, where that's of assistance to determine
13 the intent of the parties, and we have done that.

14 Q. I understand that the judge would not take for granted
15 what one party says about its intention. But am
16 I correct or not that a judge will ask the parties what
17 was their intention?

18 A. No.

19 Q. It would not?

20 A. Typically not. As I understand the law, the
21 determination of the intention of the parties is
22 an objective exercise, not a subjective exercise. And
23 hence we don't call you as a witness to tell us, "What
24 did you think you were doing here? What did you want to
25 achieve?" The approach is to determine what a party

14:45

1 reading this would expect you to have wanted.

2 Otherwise -- I don't want to speculate as to why we have
3 that rule, but I'm sure there are reasons for it.

4 Q. Let me move a little bit forward. What about the
5 position of the parties at the date of the dispute;
6 don't tell me that the judge is not interested in that?

7 A. The position of the parties --

8 Q. ... of the parties on the intention of the parties. The
9 position of the parties. There is a dispute, and the
10 parties to the contract say, "I meant that, and now
11 I think it means this and I want this". Isn't that
12 relevant?

13 A. I think the Jedfro case that you sent us to look at is
14 an example of where that's exactly not relevant. Didn't
15 that case involve the joint venture that one of the
16 partners wasn't contributing and said, "Gee, I want this
17 to be at an end", and, "We don't want this joint venture
18 to exist", and --

19 DR GHARAVI: Stop there. Stop there, stop there. Exactly,
20 exactly.

21 MR ANWAY: He should be allowed to answer his question.

22 DR GHARAVI: I apologise, it was not to interrupt him. You
23 can finish, but I was interested in one sentence --

24 MR ANWAY: No, I think he needs to finish now, before
25 another question or comment is made.

14:46

1 DR GHARAVI: Please do. Please do. I apologise. It was
2 not to stop you from talking. Please do.

3 A. So in that case the position of the parties was that,
4 "We don't want this contract to be afoot, we would like
5 it to have been dealt with in the past", and court said,
6 "No, you didn't do that. This contract is still in
7 effect and you didn't terminate it or waive it or vary
8 it, and we have interpreted it to say one thing and
9 that's what it says".

10 So coming to the court later and saying, "I wish my
11 situation was different", or, "I would like my situation
12 to be X", that is not relevant in assessing what this
13 contract meant on the day it was signed.

14 Q. I understand. But in that case there was a motion to
15 oppose; correct? That's why there was a dispute.

16 A. Yes.

17 Q. Okay, so that's my point. Maybe I should have gotten
18 there sooner.

19 Maybe before we discuss that, who has standing in
20 Canada? For example, if there was EuroGas and Belmont
21 in a dispute, and if they agreed on the interpretation
22 of the contract, and then the Slovak Republic comes in,
23 gets some sort of standing, what would be the burden of
24 proof? Who would have the burden of proof to say the
25 position of the parties is not as they state it, but as

14:47

1 the Slovak Republic or a third party says? Could it do
2 that? What is the burden of proof? Who has the burden
3 of proof and what is the threshold?

4 A. You know, I think we're getting into an area that's
5 outside my expertise. As I told you, I'm not the sort
6 of person that litigates contracts at the end of the
7 day; I'm the sort of person that puts contracts into
8 place. And so my specialty is writing these contracts
9 and understanding what they mean on day one. So,
10 honestly, I can't tell you who, five years later, has
11 standing to bring a case in British Columbia to assess
12 a contract.

13 Q. Let's say you write a contract, you negotiate a contract
14 with your client, with another party, the two of you
15 agree, and then a third party that claims to be impacted
16 challenges the effect you want to give now to the
17 contract, saying its meaning is different than the two
18 parties to the dispute. Do you know who would have the
19 burden of proof and what is the threshold that would be
20 applicable in those circumstances?

21 A. As I said, no. I certainly can think of examples that
22 I have heard of. For example, our Canada Revenue Agency
23 will often say that, "We think the outcome of this
24 particular transaction is X and you need to pay some
25 tax", and the parties can say, "No, we think it's Y and

1 we don't have to pay tax", and there will be a court
2 case about that. But I don't know who bears the burden
3 of proof and what sort of standing the CRA has to bring
4 that case; I just know it happens. But that's, as
5 I say, not my area of expertise.

6 Q. I am embarrassed to suggest to you -- because I'm not
7 qualified; that's what my understanding is, simply, so
8 I don't want to misrepresent -- my understanding is that
9 the burden of proof would be on the third party, and
10 that burden of proof would need to meet the threshold of
11 fraud or collusion, which is huge, huge, assuming
12 statute of limitations are met. Would that --

13 A. As I say, I am no expert, and you said you aren't
14 either, but I can't believe it needs to be fraud.
15 Because I know as a fact that our CRA reassesses and
16 attacks many commercial transactions on the basis that
17 we think this had a particular result that leads [to]
18 tax payable.

19 And they're not alleging fraud. Fraud is something
20 that's really, really, as you say, up there, hard to
21 prove, and has consequences if you allege fraud and
22 don't prove it.

23 Q. But tax administration is a creature of its own. In all
24 countries, I think: thank God, they can re-qualify the
25 parties.

14:50

1 I will move on to the other standards. Don't you
2 think a judge would consider who drafted the contract?

3 A. Yes, that's the contra proferentem rule, correct.

4 Q. And whether one party is a professional, or both of
5 them, or businessmen, would they consider that a little
6 bit?

7 A. Certainly they assess -- that's part of the factual
8 circumstances: are these sophisticated businesspeople or
9 they not? Yes, absolutely.

10 Q. Have you considered that?

11 A. The contra proferentem rule I have not been able to
12 apply to this because I don't have all the facts. This
13 is why I said I have a lot of sympathy for our panel,
14 because when I was given the task of trying to assess
15 what this is and what it means, I found myself missing
16 many facts, one of which is: where did this contract
17 come from?

18 I've got a press release on February 14th by Belmont
19 saying, "We've got a deal", and I've got a press release
20 April 27th saying, "I've received signed agreements",
21 and I presume the signed agreements they're talking
22 about is the March 27th SPA. But I haven't seen any
23 evidence as to who drafted it, where it came from,
24 whether it was a lawyer, whether it was businesspeople.
25 And, you know, I wasn't here for the testimony of the

14:51

1 other witnesses, but hopefully they could tell us who
2 drafted this and where it came from.

3 Q. That's what my point is: who has the burden of proof?

4 The question of burden of proof is not addressed.

5 Contra proferentem is not listed as a principle. I see
6 the position of the parties, and the specificities of
7 a case that there is a third party involved is not assessed in
8 the principles, and then whether or not the signatories
9 are businessmen or not is not identified.

10 Then may I suggest that you didn't set out also
11 whether the correspondences and the amendments are
12 relevant? Wouldn't the correspondences and the
13 amendments to the SPA be relevant?

14 A. Well, I'm not sure what correspondences and amendments
15 you are referring to.

16 Q. I don't want to interrupt you. I am not saying whether
17 you applied it or not. I'm identifying the principles
18 that you state. Then we will go to whether or not you
19 applied these principles --

20 A. Sir, absolutely, if the contract is amended, then the
21 contract is amended. There are many, many principles,
22 and that's why it takes three years to get through law
23 school: to understand all these principles. When I am
24 asked a precise narrow question as to what this contract
25 means, I pull out the relevant provisions -- that

14:53

1 I think are relevant in my opinion -- and lay them out
2 and give you the resulting conclusion.

3 So, yes, I'm sure that we could spend a lot of time
4 finding in a contractual interpretation textbook many,
5 many, many principles that aren't here.

6 Q. I will move on, for the sake of time, to whether or not
7 the principles were applied. I kindly ask you to turn
8 to tab 76 that's in opening bundle 1. It's R-0106.

9 (Pause)

10 A. R-0106, bankruptcy filing docket; is that correct?

11 Q. Yes. In your first report, did you take into
12 consideration what is said here by the representatives
13 of EuroGas? You can read it: that they owed
14 \$1.6 million, and they think it would be lost if no
15 payment is made.

16 A. Which page?

17 Q. It should be the tab pages: 04-2807 ...

18 A. I've got a page 68, 69, 70, 71.

19 Q. It should be 71.

20 A. Thank you:

21 "Question: Now, you're buying this Rozmin talc
22 deposit from Belmont?

23 "Answer: Correct.

24 "Question: And you did that by issuing 12 million
25 shares ...?

14:55

1 "Answer: No. There was subsequently going to need
2 to be issued 12 million shares, but they haven't been
3 issued. They would prefer the cash at this point."

4 I have not seen this before, so I have not taken
5 this into account. When was this --

6 Q. Could you proceed a little bit, and read again, take
7 your time:

8 "Question: And now you owe another 12 million, if
9 they're willing to take it, or they want 1.6 million
10 Canadian dollars?

11 "Answer: Correct.

12 "Question: Do you have the ability to pay that
13 \$1.6 million?

14 "Answer: Right now, no.

15 "Question: ... is it true that your testimony was
16 that you had four to six weeks to pay that or the talc
17 deposit would be lost?

18 "Answer: There's a very distinct possibility ..."

19 That's what I was talking about: the intention of
20 the parties.

21 A. When was this?

22 Q. In 2004 before the bankruptcy.

23 A. In 2004, so three years after the contract.

24 Q. Yes. So you have the buyer declaring before bankruptcy
25 proceedings that if it doesn't pay a certain amount,

14:56

1 those shares will be lost. That's why I was asking you
2 whether you considered the parties' position, the
3 parties' intention, and then all the correspondences.

4 A. Well, as I say, I have not looked at this. I question
5 its relevance, given it was three years later and this
6 contract of 2001 may well have been amended by that
7 time. And lastly, to tell you the truth, I don't even
8 know what this means, "We could lose it". If I don't
9 pay my mortgage, the bank will take the house that
10 I own, but ... So I don't see that this is of relevance
11 in terms of trying to assess what the legal position of
12 the parties was at the time of the 2001 contract.

13 Q. Mr Anderson, you are moving ahead, and I don't want to
14 interrupt you, not because my learned colleague Mr Anway
15 may object but just by courtesy towards you, because you
16 are a dear colleague. But question one was whether or
17 not you identified all the principles; then two, whether
18 you applied them; and three, whether you applied them
19 correctly, and there you get to the relevance. But I am
20 at stage two, and my understanding is that when you
21 issued your report you did not consult that. And I will
22 now move on to another topic.

23 A. Correct. My report identifies what I consulted and does
24 not identify what I did not, because I didn't know
25 whether it existed or not.

14:57

1 Q. Tab 66, which should be C-343, January 18th 2005.

2 A. Correct, I have that.

3 Q. May I suggest that you didn't take that into
4 consideration --

5 A. Yes, I did.

6 Q. Not in your first report. I'm talking about your first
7 report.

8 A. I will have to check. But I certainly saw this and read
9 this, yes. And this was certainly part of the
10 voluminous statements made by the parties, some of which
11 were more or less clear.

12 Q. My question was simply for the first report, and my
13 understanding is that it was not considered in your
14 first report.

15 What about tab 76, August 25th 2008, C-344?

16 A. Yes. Once again, I don't want to separate between
17 report 1 and report 2; I think of them altogether as my
18 opinion. But certainly I have seen this and considered
19 it; perhaps in the second, perhaps in the first, but
20 certainly within the totality.

21 Q. Okay. But certainly not in your first report where you
22 reached a conclusion; correct?

23 A. Both reports reach the same conclusion.

24 Q. I understand. But it's hard, I suggest to you, when you
25 write the expert opinion for a party, then to change

14:59

1 that, isn't it a bit more difficult?

2 A. No, I --

3 Q. You would be fine with --

4 A. -- I'd be happy to change it. When I was originally --

5 if you gave me facts, like, I'd love to get more facts.

6 The financial statements of Belmont say it received the

7 repricing of a warrant valued at somewhere between

8 \$100,000 and \$200,000 as consideration for this

9 transaction. I see that referred to nowhere in the SPA;

10 I see it referred to only in these financial statements.

11 Clearly I don't have all the facts.

12 Q. Yes.

13 A. Once I have all the facts and it leads me to a different

14 conclusion, absolutely I will provide a different

15 conclusion.

16 Q. Well, let's pause here, whether you would provide

17 a different conclusion. You say you are not an expert,

18 could not answer the question of burden of proof and the

19 fact that there is a third-party element, so I leave

20 that aside. But based on the two documents that I just

21 read, the three of them -- one of them you said you

22 didn't [see], whether it was in your first or your

23 second report, which is the bankruptcy?

24 A. Correct, the bankruptcy I never saw.

25 Q. The two others that you saw in your second report?

15:00

1 A. Correct.

2 Q. Can I show you now two other statements. One is
3 page 180 of Day 2 of these proceedings.

4 A. Do I have that?

5 Q. Yes, you should have in the pochette.

6 A. Page 180.

7 Q. This is Mr Rauball on the stand, and he was asked,
8 page 180:

9 "Question: Do you think today you, Belmont,
10 EuroGas I, EuroGas II, EuroGas V, VI, anyone that you
11 are aware of, has any claim to the ownership of the 50%
12 shares of my client, Belmont?"

13 And the answer is:

14 "Answer: Honestly, no."

15 Then a follow-up question:

16 "Question: How about the money you paid?"

17 Basically, you know, it's one of your hypotheses
18 where you conclude that there could be an injustice, and
19 you use that to part from the clear meaning of the
20 terms. The answer is:

21 "Answer: That will be a situation which the lawyers
22 will have to sort out. I myself am not the guy who
23 initiates lawsuits. On the other hand, it is very
24 difficult to initiate a lawsuit because Belmont could
25 argue that we were in default of the payments,

15:02

1 et cetera, so they could come with a damage lawsuit.
2 It's a very difficult question right now."

3 And before you answer the question that I will put
4 to you, could you look also at what is said during the
5 testimony of Mr Agyagos. He was asked:

6 " Can you offer any us explanation as to what that
7 mean, 'The company holds the Rozmin ... shares pending
8 settlement of the amount of guarantee shares'?"

9 Then he explains this had never happened:

10 "Nothing ever happened."

11 Then on the right hand column, 11:56, page 95:

12 "When you issued those, did anyone at the stock
13 venture exchange ..."

14 "When you issued those" is in reference to the
15 letter I mentioned, you know, I read to you previously
16 which was one of the three exhibits I asked you to
17 consider. It is at tab 66/67. Do you remember?

18 A. Yes, the two press releases saying, "We think we own
19 this or we own this, and we are challenging the
20 expropriation", yes.

21 Q. Yes. Then he says:

22 "When you issued those ..."

23 In reference, "those", to tab 66 and the following
24 one, namely tab 67:

25 "... did anyone at the stock venture exchange --

15:03

1 EuroGas I, EuroGas II, Mr Rauball, anyone in the
2 world -- challenge the fact that this was inconsistent
3 with your financial statements?

4 "Answer: No.

5 "Question: Today, is anyone apart from the Slovak
6 Republic alleging that you do not own full ownership of
7 the 5[7]% shares?

8 "Answer: Slovak Republic is --

9 "Question: Except the Slovak Republic. I'm asking
10 you: does anyone in the world --

11 "Answer: No, no."

12 So do all these things change your conclusion? You
13 have EuroGas I, during the bankruptcy proceedings,
14 saying, "Well, I have to pay, it's going to be lost".
15 Then there is evidence it was not paid. Then you have,
16 during that process, Belmont sending a press release to
17 the world -- the world; it's not a private transaction
18 between two parties -- saying, "I own these shares".
19 And then in these proceedings, both of them -- now one
20 is EuroGas II, but the signatory of the SPA is
21 Mr Rauball -- both of them are saying, "There is no
22 claim". So does that change your conclusion?

23 A. No, not at all. This is a statement that was made --
24 this one was made fifteen years after the fact; the ones
25 in 2005 and 2008 were made five to eight years after the

15:05

1 fact. The question I've been asked and my conclusion is
2 based on what was the state of affairs in 2001/2002,
3 when this contract was entered into and performed.

4 The statements made ten years later, who knows what
5 they're made on the basis of and why. I could certainly
6 understand, for example, someone saying, "Gee, if this
7 is owned by EuroGas I, it's owned by EuroGas I
8 creditors", or some such thing, "and it is better to be
9 owned by Belmont". So I am not saying anybody is lying,
10 but I could certainly see that people would allow the
11 changes in the factual matrix over the last fifteen
12 years to colour their perceptions.

13 Q. Yes, I understand that's what you're suggesting, but
14 I have two things to say in response to your suggestion.
15 It's that to some extent we could entertain that
16 suggestion, if I had not shown you other documents,
17 namely EuroGas I, within the bankruptcy proceedings,
18 also taking that position openly before the trustee that
19 initiated bankruptcy proceedings, giving us access to
20 documents to follow up, and it says --

21 A. Yes, but those statements were three years after the
22 fact. As I say, we look to contemporaneous statements,
23 we look to immediately subsequent statements to try to
24 ascertain the position of the parties. We don't tell
25 people, "Wait ten years to bring this lawsuit and we'll

15:06

1 see what you say over the course of the next ten years".

2 We assess what the facts were and what the contract
3 provided for in the context of that factual matrix.

4 Q. But then I come back, if you would do that, that there
5 must be a threshold, frankly. I'm not talking here
6 about a third party; I'm talking about the judge, with
7 the two parties, trying to re-qualify. The threshold
8 must be very high. I mean, you have both parties now,
9 a few years, before a Bankruptcy Court, taking this
10 position that the transaction was not complete.

11 Do you agree with me that at least you should apply
12 a different threshold?

13 A. You know, I'm sure that you and Mr Anway and the panel
14 understand a threshold that should be applied in this
15 hearing; I honestly do not. All I was asked was: based
16 on all these facts that you have, tell us what you think
17 the conclusion is, and that's what I've done. And
18 whether that's sufficient for this panel or meets
19 a particular burden of proof, I don't know.

20 Q. Okay. Now you have all these elements, now that you
21 have all the elements, don't you think that at least it
22 attenuates what you have said in your report, because
23 you know that you have both parties that take this
24 position? You know ...

25 A. No. As I say, it's a matter of weight.

15:08

1 Q. Okay.

2 A. And if you showed me things from 2001, 2002, 2003, I'd
3 be much more interested, and say, "You know what? Maybe
4 I need to reconsider". But when you show me things from
5 2005 and 2008, I'm not particular interested, and a BC
6 judge wouldn't be particularly interested. And that's
7 what I'm trying to assess: what would the BC judge
8 applying BC law, what conclusion would that person
9 reach?

10 Q. Yes, but even if you add the ones in 2002/2003, don't
11 you remember that those financial statements had
12 provisions that Belmont was keeping the shares as
13 a guarantee, and other correspondence showing that the
14 transaction had not been completed? It used the words
15 "to be completed", "We have to do this to complete the
16 transaction".

17 So even if you take that into consideration, the
18 whole thing, don't you think you are doing something
19 wrong?

20 A. No, no, not at all. When you read my report, I think
21 it's crystal-clear that there are post-closing
22 obligations that were secured by the retention, the
23 security arrangement of retaining the 57% shares in
24 a trust or escrow. And that was to secure not
25 an obligation to actually receive 3 million cash, but to

15:09

1 receive the 4.1(b) and 4.1(c) shares.

2 It may be that in 2003/2004 the parties reached
3 different agreements -- I will agree with you -- that
4 say "Gee, maybe you will keep those 3.2 million shares
5 and we will give you half of the 1.6 million". Yes,
6 I agree the contract may have been amended.

7 But my question isn't: where were we in 2009? The
8 question I have been asked is: what was the position of
9 the parties at the time of this contract?

10 Q. I understand that, sir. But the other problem that
11 I have combined with this, the problem that I set out at
12 the beginning, is that you are saying that the terms of
13 the contract are very clear. And if the terms of the
14 contract are very clear, they actually lead to the
15 statements that I just read from the parties and the one
16 of EuroGas before the Bankruptcy Court. So that's the
17 second problem I have: that you want to get out of the
18 terms of the contract, based on the principles of
19 absurdity and others that you are applying. So it's not
20 just one problem; it's the way also you want to get out
21 of these.

22 A. Am I allowed to see a monitor? Because that was
23 a lengthy question that had a few parts.

24 MR ANWAY: I also don't think there was a question.

25 DR GHARAVI: I can repeat --

15:11

1 A. I had a number of comments in there; in fact, so many
2 that I've lost track of them. I guess the thing that
3 really jumps out at me is: you've just made a statement
4 that, for example, a businessman's suggestion that he
5 may lose shares in 2004 in bankruptcy proceedings is
6 consistent only with one conclusion, where it could be
7 a whole variety of things that causes a businessperson
8 to say, "Maybe I will have these shares, maybe I won't".

9 Q. No, that's not what I --

10 A. And in addition, I am certainly aware of amendments that
11 were made to the transaction after 2001. Other people
12 can comment on whether those were validly made or not,
13 whether the company even existed when it entered into
14 them. I will leave that for other people; that's not my
15 expertise. I am just focused on what happened in 2001,
16 what was the position of the parties.

17 Q. I understand.

18 A. And I'm not trying to avoid anything; I'm trying to
19 interpret what was actually intended here.

20 Q. I'm not saying, sir, you are trying to avoid. Let me
21 put it a different way.

22 My understanding is that you considered the terms of
23 the contract in 2001 -- I am back with you in 2001 --
24 clear. But you say: based on certain principles -- and
25 I have questions as to whether or not these principles

15:12

1 are complete, but leave that aside -- based on these
2 principles, if I were to interpret the clear terms of
3 the contract this way, it would cause these problems.
4 Therefore, I reach another conclusion.

5 And I read to you that those who are parties to the
6 agreement don't see any problems with the pathologies
7 you have identified to search for another
8 interpretation. So unless you identify a public policy
9 problem in the terms, the way [they] are construed,
10 I just cannot understand even your philosophy, your
11 approach. Can you ...

12 A. So I guess, first, the statement you've made is that
13 I am looking -- once again, I don't have a monitor --
14 but I am looking at the clear words of the contract.
15 No, what we are talking about here is just the words of
16 Section 6. I am also applying the rule whereby
17 I interpret the contract as a whole.

18 And I am certainly alive to and giving absolute
19 effect to 4.1(b) and 4.1(c), which are the mechanisms
20 that are referred to throughout the materials, that have
21 been described to the shareholders in approving this
22 transaction, that entitle Belmont to receive additional
23 shares; not a particular amount of money but
24 a particular amount of shares. And I am interpreting
25 all of that together so that it hangs together and gives

15:14

1 us a rational result; as opposed to treating Section 6
2 on its own as if it raises a separate right on the part
3 of Belmont in terms of what it is entitled to receive
4 under the contract.

5 I don't know who drafted this contract, I've told
6 you that before, and I can't apply the contra
7 proferentem rule. But I think whoever drafted this, to
8 be blunt, did a very sloppy job. And the best thing
9 I can do is to try to tie 6 to 4 to make it all hang
10 together.

11 Q. A sloppy job for whom? I'm 100% convinced that if one
12 of the parties had recourse to your services, it would
13 be excellent. But a sloppy job for whom? Can you say
14 who is the aggrieved party here, based on the plain
15 meaning of the terms?

16 A. I'd say a sloppy job in terms of having a contract
17 that's clear and understandable, and doesn't require
18 flying me from British Columbia to sit here today to
19 talk about what this might mean.

20 Q. But who bears today, based on the facts, the flaws that
21 you identified, the sloppiness you identified?

22 A. The parties.

23 Q. Why Belmont? Because when you opt out of the clear
24 terms of the contract, you identify three reasons; all
25 of them are adverse to the purchaser. And the case law

15:15

1 then you cite says you have principles of unjust
2 enrichment, and it adds: unjust enrichment is not
3 a principle that you can use to modify the bargain
4 for -- I would understand it -- the sloppiness.

5 A. The sloppiness affects both parties, I think. Today we
6 find ourselves in a situation, I assume, where we're
7 trying to say that [EuroGas] owns the shares. I think
8 if [EuroGas] eight years ago or ten years ago was
9 arguing that it should own the shares, it might not own
10 the shares as a result of somebody then attacking this
11 contract on a variety of bases: ambiguity; Section 6
12 being severable because it's an illegal gambling
13 contract on its face; who knows? Right? The ambiguity
14 benefits no one. The ambiguity allows people to, yes,
15 say what they want, take different positions from time
16 to time, but it doesn't benefit any party.

17 Q. Okay. Identify a problem for Belmont. What would be
18 the problem? It owns the shares, it keeps the shares,
19 and it waits for performance. So why is it at risk?

20 A. It's at risk because the contract could be such that
21 it's not entitled to receive \$3 million in cash; it's
22 entitled to receive exactly what it told its
23 shareholders, which is additional shares. It had
24 a right to ask for those additional shares, and if it
25 did or didn't, it either got additional shares or it

15:17

1 didn't get additional shares. But it's got no 57% in
2 Rozmin shares anymore.

3 Q. And meanwhile it retains the shares?

4 A. In your interpretation, perhaps; in my interpretation,
5 no.

6 Q. Okay. Let's go to that at Article 6.1, if you could
7 kindly look at the SPA. I can identify the tab for you:
8 it should be tab 57, R-0107.

9 A. Yes, I'm there.

10 Q. Okay. I am at "Closing", okay?

11 A. Article 6, yes.

12 Q. Okay. You agree with me that it addresses closing,
13 right? This we can agree on; correct?

14 A. Yes, it's titled "Closing", yes.

15 Q. So based on the facts that you have -- not the facts
16 that you have only in your first report, not only the
17 facts you have in your second report, but the facts that
18 you have today -- did the transaction close?

19 A. Yes, I think so. All the evidence I have is that it
20 closed. I don't have a piece of paper that specifies
21 the closing date; I wasn't able to find that anywhere.
22 But the only thing I could find is that the parties seem
23 to have issued the shares and agreed a closing occurred
24 on July 16th 2001, and I base that on the financial
25 statements of Belmont that suggest the 12 million shares

15:19

1 it received became tradable on July 16th 2002. So I am
2 assuming that's not a coincidence, that there's some
3 sort of -- without being a US law expert -- some sort of
4 one-year hold period, and that's why they've identified
5 July 16th.

6 Q. That's your assumption?

7 A. That's certainly an assumption, absolutely.

8 And secondly, you typically -- once again, who knows
9 what rules were broken or bent -- but typically, you
10 don't file and receive your TSX final approval on
11 a transaction until it's closed, and the July 18th press
12 release of Belmont said, "We have received our final
13 approval of the TSX VE".

14 Q. Okay. That's another assumption as well?

15 A. I'm assuming that things were done properly, yes. I'm
16 saying that in the ordinary course, that final approval
17 is not given until a closing has occurred.

18 Q. Then how do you read the other correspondences, even in
19 the financial statements, that the shares are held in
20 guarantee until realisation, the term "until
21 realisation" is used; then "transaction to be
22 completed"; then the letters between counsel from
23 different parties alleging breach? You recall that
24 there is also a letter from Belmont saying, "We have the
25 right, we will exercise our right to dispose of the

15:21

1 shares"?

2 A. Yes, there's lots of talk about foreclosure and all
3 these things. And as I say, that's entirely consistent
4 with the position that these shares were held as
5 security for the post-closing obligations, which is
6 exactly what my report says and exactly what the
7 financial statements say.

8 Q. Did you see any request for closure?

9 A. Sorry?

10 Q. Did you even see any request for closure?

11 A. For closure or for foreclosure?

12 Q. For closure, not foreclosure.

13 A. No, I did not see a request for closing this
14 transaction.

15 Q. Okay. Let's look at Article 6, if you don't mind, and
16 let's go over it. There is reference to the terms of
17 the trust, so the shares being placed into trust;
18 correct?

19 A. Mm-hm.

20 Q. Were they placed into trust?

21 A. With a solicitor of Rozmin; is that correct?

22 Q. Yes.

23 A. I don't know.

24 Q. Well, you don't want to ask? It's not of interest to
25 ask that? Did you try to find out?

15:22

1 A. I don't know that I'm allowed to phone up the witnesses
2 and ask them what happened. I'd be given the facts --

3 Q. No, but the counsel you can --

4 A. Oh, yes, I asked. I asked for all the documents and the
5 like, and I was told that there was no response that was
6 available to me. Mr Anway would know better than me.

7 But I put together lists -- he asked me and I put
8 together lists of requests, and I was told, "Sorry" --

9 Q. And the answer you got is what?

10 A. I was given a small subset of what I had asked for, and
11 was told that the rest was unavailable or did not exist
12 or was not being produced.

13 Q. No, I'm not talking about documentary evidence. I'm
14 talking about: did you ask whether there was a trust in
15 place?

16 A. Yes, I asked for evidence of all these things.

17 Q. Okay. And when you don't see it, that means what:
18 either one party is hiding, or it means that no? Does
19 the fact that there was no trust here, the trust
20 provision was not complied, does it change any of your
21 conclusions?

22 A. To tell you the truth, no, because in my mind I'm
23 looking at this, as I told you, as a secured interest,
24 and the way -- certainly Slovakia law probably has some
25 bearing on this -- but the way you would perfect that

15:23

1 security interest, both in British Columbia under our
2 Personal Property Securities Act, as well as,
3 I understand, in the -- I'm no US lawyer, but under the
4 UCC is by possession. So whether you possess the shares
5 yourself or have them in a trust or escrow held by
6 a lawyer, that is security, or can be security, and
7 that's the way I've interpreted this.

8 Q. What about the 100,000? I read in your first report
9 that you assume that it was not important, it was
10 waived. That's your --

11 A. Or paid, yes.

12 Q. You made that assumption?

13 A. Either paid or waived, I said.

14 Q. So you're happy with that assumption?

15 A. Well, then your Reply said, "No, no, only 76 has been
16 paid" --

17 Q. And you're happy with that?

18 A. -- and my reply to that said: well, the financial
19 statements say it has been paid, 100,000 net, 96
20 recovery, 150,000 Canadian dollars. So when I look at
21 the financial statements, not only do I see what I think
22 is payment of the NRAR -- I'd love to get more facts --
23 I also see a repricing of a warrant, and I have no idea
24 whether an agreement was made between the parties as to
25 why this warrant was repriced and that had a value of

15:24

1 \$120,000 in the financials.

2 Q. Come back to your table. That was in one financial
3 statement, and there were shares, they was value placed
4 on those shares, and there was an amount of 100,000 and
5 there was an amount next to it. But weren't those
6 projections?

7 MR ANWAY: Why don't we go to that document?

8 A. Yes, I'd like to look at those financials, because I had
9 read it not as a projection --

10 DR GHARAVI: Well, you cited them. I would be happy. And
11 then to the best of my recollection, it uses the word
12 "guarantee", moreover, down there.

13 MR ANWAY: Mr Chairman, I would ask that the document be put
14 to the witness.

15 THE PRESIDENT: Wait until the witness has seen the
16 document.

17 A. There's a whole variety of financials, but I think the
18 2002, which is R-0114.

19 DR GHARAVI: It should be in the same binder, because in the
20 opening I raised those as well. It's in chronological
21 order, so if you go back, you will see that probably.
22 (Pause) We'll find it for you.

23 A. I've got R-0114 at tab 17 of this binder. (Pause) I'm
24 looking at 2002 compared to 2001, and there's subsequent
25 ones as well, but --

15:26

1 THE PRESIDENT: Where do we find that?

2 DR GHARAVI: It's tab 58. It's R-0114. (Pause) Are you
3 there? It should have even a sticker?

4 A. Yes.

5 Q. Do you have it?

6 A. Yes.

7 Q. Okay. So we're talking about R-0114.

8 A. Correct.

9 Q. Okay.

10 A. Oh, but this is just an extract. This isn't the full
11 set of financials. Because this transaction is both
12 under "Significant Accounting Policies" and under
13 note 3, "Disposition of Subsidiary".

14 Q. Anyway, you mentioned this table and I think you were
15 referring -- maybe I'm wrong -- to this table. And for
16 me, I see that has "expectations not realised", and in
17 any event there is settlement of the amount in
18 guarantee. Then you go on to the next tabs, it still
19 doesn't matter: it says "pending realisation", and then
20 the correspondences are self-explanatory.

21 If you move with me to a final topic: it is
22 precisely the closure. So you mention in July 16th?

23 A. That's what I've been able to piece together. But I'd
24 be happy to see additional evidence that suggests
25 something else.

15:28

1 Q. But that's on the assumption of the Canadian Venture
2 Exchange --

3 A. Final approval.

4 Q. -- resolution of the deal; correct?

5 A. Final approval, yes.

6 Q. Okay. Let's go back to the SPA, if you don't mind.

7 It's [tab] 57 (R-0107). So Article 6 says:

8 "Within 30 days of the ... approval by the Canadian
9 Venture Exchange of the transactions described in this
10 Agreement the Vendor shall deliver in trust ..."

11 Which it didn't do:

12 "... the Shares ..."

13 Okay?

14 A. Yes.

15 Q. So the Canadian Venture Exchange, if you then move to
16 tab 71, R-0217, it says:

17 "The Annual General Meeting of Belmont was
18 [approved] ... on July 16 ..."

19 Correct?

20 A. Mm-hm.

21 Q. So that was the special resolution for the sale by
22 Belmont. Then on July 18th:

23 "The [Canadian Venture Exchange] has accepted for
24 filing the share purchase agreement ..."

25 So it's July 18th; correct?

15:29

1 A. That's the final approval, yes, that you file for and
2 obtain after your transaction is completed.

3 Q. So when could you close? What's the earliest day that
4 it could have possibly closed, based on Article 6?

5 A. Well, there's an approval by the Canadian Venture
6 Exchange on May 16th, the conditional approval, which is
7 the approval you normally close on.

8 Q. Yes.

9 A. So I guess the earliest date would have been July 16th,
10 which is 30 days later. This transaction was also --

11 Q. In May? 30 days later than May is --

12 A. Sorry, June 16th. My mistake. So June 16th is 30 days
13 after May 16th.

14 But this transaction, as you will know from the
15 information circular sent to the Belmont shareholders to
16 approve the transaction, identified this transaction as
17 a -- I will colloquially call it a "fundamental
18 transaction", but it was a transaction that involved the
19 sale of all or substantially all of the assets of
20 Belmont. The information circular identifies 57% of
21 Rozmin as constituting 90% roughly of its assets.

22 So as a corporate matter, this transaction could not
23 be completed until that shareholder approval had been
24 obtained. And that shareholder approval, as you've
25 pointed out in this exhibit, there's a press release

15:31 1 saying that shareholder approval was obtained July 16th;
2 and as far as I can tell, people closed immediately
3 after receiving that.

4 Q. Based on everything you just said, different assumptions
5 in your interpretation -- correct? -- it closed on
6 July 16th?

7 A. That's the best I have been able to ascertain, because
8 the July 18th final approval would not be given until it
9 had closed, and --

10 THE PRESIDENT: Sorry. We will have to make a break soon,
11 so chose the right time.

12 DR GHARAVI: Thank you very much, Mr President.

13 So based on your assumptions, interpretations, you
14 conclude that July 16th 2001 is the closure date under
15 Article 6.1?

16 A. That's the best I have been able to ascertain, yes, on
17 the evidence I have seen.

18 Q. Okay. Have you considered that on July 11th -- I guess
19 you have, because you have been sitting in the room now
20 for some time -- that EuroGas I was dissolved?

21 A. No, I'm not a US law person so I haven't considered
22 that.

23 Q. Let me make an assumption. May I assume that you don't
24 think that that changes your conclusions?

25 A. Someone will have to tell me whether it changes my

15:33

1 conclusion.

2 Q. I'm asking you objectively. You're here as
3 an "independent expert". I'm asking you, as the
4 independent expert that has been produced by Respondent,
5 whether or not you think that there could have been
6 a closure on July 16th when the purchaser was
7 a dissolved company since July 11th.

8 A. So I guess there's two answers to your question. The
9 first answer is the factual answer, which is: did people
10 actually issue shares? Did they do something to
11 complete this transaction? All evidence points to: yes.
12 Indeed, the financial statements are replete with not
13 only having received the shares but having sold them and
14 realised some amount of money. So did it happen? Yes.

15 Was it legally authorised to happen? That's the
16 second part of your question. Once again, I always
17 hesitate to wander into areas I don't know anything
18 about. But I heard people sitting here a little while
19 ago say that you can do things within two years of the
20 date you're dissolved, and those are, if you reinstate,
21 are just fine actions. So I would have -- once again,
22 I'm treading into territory I'm not an expert in. But
23 it sounds to me like it is authorised.

24 THE PRESIDENT: I think he should not be brought to that
25 territory.

15:34

1 DR GHARAVI: I understand. I understand. I am going to
2 a territory under Canadian law, if you allow me.

3 THE PRESIDENT: First we will take a break.

4 DR GHARAVI: Okay.

5 THE PRESIDENT: 15 minutes, so 3.50.

6 DR GHARAVI: Thank you.

7 (3.35 pm)

8 (A short break)

9 (3.54 pm)

10 THE PRESIDENT: Yes, go ahead, if you're ready.

11 DR GHARAVI: I was on the question of dissolution --

12 A. Yes.

13 Q. -- that occurred on July 11th. I do not want to address
14 the consequences in relation to Utah law. But in
15 relation to Canadian law, how does that impact
16 Article 4, the "Covenants, Representations and
17 Warranties", when it says:

18 "The Purchaser covenants, represents and warrants to
19 the Vendor that now and at the Closing:

20 "(a) it has the full authority to enter this
21 Agreement ..."

22 A. Well, if I understood the Utah law correctly, Utah law
23 permits, during the two years following dissolution,
24 an entity to complete contracts and complete its
25 obligations. That's what I heard Sam say. So this says

15:56

1 to me that if that's true, this representation is true.

2 THE PRESIDENT: He shouldn't be asked these questions

3 because he doesn't know.

4 DR GHARAVI: Okay, but I was trying to analyse this under

5 Canadian law. If the answer is that this has to be

6 viewed in conjunction with Utah law, which

7 I understand --

8 A. That's correct.

9 Q. -- I'm happy to move on.

10 THE PRESIDENT: Yes, but on Utah law he is not an expert.

11 DR GHARAVI: Mr President, I agree with you on that.

12 I didn't ask him: where are the acts that a dissolved

13 company can do under Utah law? I said: what is the

14 impact under Canadian law, based on Article 4? And he

15 answers that it relates to Utah law. So once he gave me

16 that answer, I move on to my next question.

17 THE PRESIDENT: But he says things on Utah law which I think

18 he tries to guess. But that's not relevant.

19 DR GHARAVI: That's why I said I completely agree with you,

20 I am moving on to my next question.

21 THE PRESIDENT: Okay.

22 DR GHARAVI: Because he linked that to Utah law. So once he

23 pronounces that it depends on Utah law, I go to the next

24 subject.

25 What about the Canadian Venture Exchange

15:57

1 approbation? Does the fact that the company is
2 dissolved, the purchaser, have any impact on the
3 approbation under Canadian law, or does that also relate
4 to Utah law?

5 A. What do you mean by "approbation"?

6 Q. Well, on July 16th -- look at 6.1. It says:

7 "Within 30 days of the date of approval of the
8 Canadian Venture Exchange of the transactions described
9 in this Agreement ..."

10 And on July 16th the Canadian Venture Exchange
11 approved the transaction.

12 A. Well, sorry, on May 16th, I think we said, the Canadian
13 Venture Exchange gave its approval, and on July 18th it
14 gave its final approval, yes.

15 Q. Yes, yes. Well, is there any consequence, or potential
16 consequence, on the validity under Canadian law of that
17 resolution, final resolution?

18 A. Final approval of the Canadian Venture Exchange?

19 Q. Yes, yes.

20 A. It depends, I imagine, on Utah law.

21 Q. Okay. What about --

22 A. Just so you understand and it's clear, and I haven't
23 seen the approvals, but on May 16th the stock exchange
24 would review the transaction and identify its
25 requirements to allow it to be completed. And it would

15:59

1 say, "You need to do X, Y, Z. Go get your shareholder
2 approval, go do this, go do that". And if you do all
3 those things, you are allowed to close. And then on
4 the 17th you would go to the exchange and say, "We've
5 closed and we've met all of your conditions", and the
6 exchange would then issue its final approval.

7 So I guess it depends: what did Belmont tell the
8 exchange? Did Belmont tell the exchange, "Oh, by the
9 way, this company was dissolved under Utah law, but
10 don't worry, that has no legal impact because we,
11 Belmont, have obtained a Utah opinion"? I don't know.

12 Q. Forget about Utah law. Let's say it's Congo, or another
13 country, the purchaser comes from Congo, so that we're
14 not under Utah law. And assume that under Congo law,
15 the purchaser, once it's dissolved, cannot carry out the
16 transaction. Would an approval of the shareholders'
17 meeting of a public company to proceed with a share
18 purchase agreement be affected in any way under Canadian
19 law?

20 A. The shareholder approval, no. But the actual completion
21 of the transaction, if you're saying you're trying to
22 complete a transaction with somebody that doesn't exist
23 and has no ability to exist, then I would think the
24 answer should be no, because you're missing one of the
25 key elements of a transaction: a party.

16:01

1 Q. But the resolution itself would not be affected under
2 Canadian law by the fact that -- I'm working on the
3 assumption that the company did not know about the fact
4 that it was dissolved. Wouldn't a resolution under
5 Canadian law be affected?

6 A. No, so the resolution -- so the directors have the power
7 to do whatever they want to do --

8 Q. Yes.

9 A. -- subject in the statute to half a dozen exceptions.
10 One of those exceptions is that directors do not have
11 the power to sell all or substantially all the
12 undertaking of the company without first receiving
13 a special resolution of the shareholders.

14 Q. Okay.

15 A. And so the directors were unable to complete this
16 transaction until the shareholders authorised the
17 directors to do so at the shareholder meeting on
18 July 16th.

19 Q. Okay. But the authorisation to do so, is it impacted by
20 the fact that they did not know before giving the
21 authorisation that the purchaser was a dissolved company
22 under Congo law that could not proceed? Would that,
23 under Canadian law --

24 A. No. The shareholder approval is a box that has now been
25 ticked: the directors have the ability to enter into and

16:02

1 complete the transaction. But if you're saying that
2 there is no party in existence on the other side of the
3 transaction, then how can you transact if the party
4 doesn't exist?

5 Q. Okay. But I just want to, a last time, make sure that
6 you are with me. You're saying that the authorisation
7 given without knowledge that the purchaser is dissolved,
8 is not, by this fact alone, void? You're saying it
9 becomes impossible to perform because the purchaser is
10 dissolved. Those are two separate things. But is your
11 testimony that under Canadian law, that consent given is
12 not void because --

13 A. That's correct.

14 Q. What?

15 A. That's correct: the consent is not void.

16 Q. Is not void?

17 A. Is not void.

18 Q. Is voidable?

19 A. It's given. It's not voidable, it is given.

20 Q. It is given irrespective whether the authorisation was
21 given that the purchaser was dissolved; that's your
22 testimony?

23 A. The authorisation was authorising the directors to sell
24 all or substantially all of the assets to a party on the
25 terms identified in the share purchase agreement, as

16:04 1 transcribed into the information circular. The question
2 is --

3 Q. What about the directors? Let's take it to the next
4 step. Okay, the authorisation was given to the
5 directors to enter into the contract. How about the
6 directors' closure? Is the closure which occurred,
7 according to you, void because the directors who closed,
8 according to you, at the time did not know that they
9 were dealing with a dissolved company which, under Congo
10 law, could not carry out the transaction?

11 A. Well, as I say, if you're saying that the thing did not
12 exist, then yes, it's a nullity that did not exist. You
13 and I can't reach an agreement if you don't exist.

14 Q. No, I'm talking about the consent, the consent of the
15 seller. Is it the consent that is --

16 A. I'm saying the shareholder approval is done. The
17 directors no longer have an impediment to their power to
18 enter into and complete this transaction. However, the
19 question of whether the contractual counterparty is
20 existing and able to complete the transaction is
21 a question in this case for Utah law, or in your
22 hypothetical is a question for Congo law: does this
23 person exist?

24 Q. That was not my question. But I will ask it within the
25 context of the Canadian Venture Exchange approval. The

16:05

1 Canadian Venture Exchange final approval of a public
2 company, isn't it void for public policy reasons
3 because --

4 A. No.

5 Q. Well, if you start with a "no" before I ask my
6 question --

7 A. It's not void. For public policy reasons it's not void.

8 Q. Or voidable?

9 A. No. You've got to remember: the final consent is not
10 given prior to completion of the transaction, it's given
11 after completion of the transaction. It is telling the
12 exchange, "We have completed the transaction". And the
13 exchange says, "Great": tick, stamp, you're done.

14 Q. It is telling them. But at the time imagine that the purchaser
15 doesn't know that it is allowing a listed company to
16 close a sale purchase agreement with a company that is
17 dissolved. Don't you think that's material information?

18 A. If the approval to close was given on May 16th, if
19 I have my date correct, the final approval is not
20 a permission to close. The conditional approval is the
21 permission to close. The final approval is something
22 that's saying, "We have closed our file; the transaction
23 is completed". That certificate or approval is issued
24 on the basis of what Belmont told the TSXV, as it's now
25 called.

16:07

1 If what you're saying is: we lied to the TSXV, and
2 does that vitiate the TSX's closure of their file and
3 their approval --

4 Q. Not lying. It's that it was not disclosed by the
5 purchaser, and that the seller didn't know; and as
6 a result of that, the securities [exchange] did not know
7 that, and this is a listed company. I cannot understand
8 how this could not --

9 A. Well, no, you either close or you don't. And if there
10 is a party to close with -- which is a question of Congo
11 law -- and you have closed, you have told the exchange
12 you have closed, and the exchange says, "Thank you very
13 much". If there's no party in existence and it's
14 impossible to close, and you tell the exchange,
15 "I closed", clearly you were wrong if it's impossible to
16 close; and yes, the exchange would have issued their
17 approval and closed their file on the basis of your
18 incorrect representation to them. You should have said,
19 "I'm sorry, we haven't closed because the counterparty
20 has disappeared".

21 Q. Forget about whether or not the purchaser, once
22 dissolved, can or not carry out the transaction. So
23 whether it's Congo law or Utah law, it doesn't matter.
24 Assume it can carry out the transaction to close, once
25 dissolved.

16:08

1 The mere information, new information that was not
2 disclosed to the shareholders, the directors that
3 entered into the company, or the Canadian Venture
4 Exchange that gave its final approval, wouldn't that by
5 itself be a material element that would void or render
6 the approval voidable? Because it would allow then
7 a listed company, with all the consequences to the
8 shareholders, to enter into a transaction not knowing
9 that it is entering into that transaction with
10 a dissolved company.

11 THE PRESIDENT: If you understand, you will answer. But
12 then you will not ask the same question a fourth or
13 fifth time.

14 A. I think maybe I can make headway this time though,
15 because I think I've got a way to address this. Perhaps
16 you misunderstand the nature and scope of the TSX's
17 approval.

18 DR GHARAVI: Maybe. And the approval of the shareholders --

19 A. The TSXV only regulates those people who obtain
20 a listing with the TSXV, and it prohibits people from
21 undertaking material fundamental transactions without
22 getting their approval. If you violate that, and do it
23 without getting their approval, their only remedy is not
24 to say that the transaction you completed is void.
25 Their only remedy is to say, "I don't like you anymore.

16:10

1 I am de-listing your shares because you don't follow my
2 rules".

3 So the TSXV -- the Canadian Venture Exchange at that
4 time, or the Vancouver Stock Exchange before then -- has
5 no power, unlike a court, to void or rescind or
6 otherwise impact a transaction.

7 Q. Then you can complete the answer with respect to
8 a company, Belmont. Try to help me. I retain you.
9 I say to you, "I entered into a contract with
10 a purchaser. Once I entered into the contract, I didn't
11 know that that company was dissolved. And I don't care
12 if that company can carry out or not the transaction,
13 but I would never have closed with a company like that
14 had it disclosed that it was dissolved". Under Canadian
15 law, do I have a remedy for that?

16 A. Yes, to sue that company --

17 Q. Sue to do what?

18 A. I don't know what damages would flow. But you would
19 argue that there has been some breach of the reps and
20 warranties or covenants in this agreement, and you would
21 sue to recover damages.

22 Q. Or to get out of the contract?

23 A. I don't know whether this is a situation that would
24 entitle you to rescind.

25 Q. Now, coming back on Article 6, I want to engage with you

16:11

1 on your interpretation as of the date the contract was
2 entered into. If I read Article 6, "Closing", it says:

3 "... the ownership of the Shares shall not pass to
4 the Purchaser ..."

5 Okay? And if I turn to the next page, it says:

6 "... unless and until the Vendor has received 125%
7 of its initial investment ..."

8 And it has a set amount.

9 A. 3 million Canadian, yes.

10 Q. I cannot find anything clearer. It says it has to go
11 into a trust. The trust was not there. Then it says
12 the ownership of the shares shall not pass to the
13 purchaser. Then it says "unless and until".

14 So can you explain to me why practically you would
15 want these clear provisions not to apply?

16 A. So this goes back to exactly what we were talking about
17 half an hour ago --

18 Q. Yes. From a practical perspective, if you can --

19 A. Absolutely. So to me this is a bet as to whether or not
20 these shares, if they were sold, would achieve 3 million
21 in sale proceeds. And if they don't achieve 3 million
22 in sale proceeds, there is no ability to improve or
23 supplement the proceeds that were received, there is no
24 ability to give additional shares. I have sold the
25 purchase price shares, the 12 million shares. I have

16:13

1 received X; hypothetically, let's say 1.5 million.

2 I have received 1.5 million. I guess I've got no
3 further obligations because I did not receive 3 million.

4 So where is the ability, the guarantee that
5 everybody talked about in all the disclosure? When this
6 deal was sold to the shareholders, nobody talked about
7 Article 6; everybody talked about 4.1(b) and 4.1(c).

8 They said, "We've got to guarantee these shares? We're
9 guaranteed to get money out of them, because if they're
10 sold" --

11 Q. Can you just --

12 MR ANWAY: Mr Chairman, I think the witness should be
13 allowed to finish his answer.

14 DR GHARAVI: At what point in time are you talking about
15 when you're talking about the guarantee? I'm with you
16 in 2011.

17 A. Let's go to 2001. Let's go to the shareholders'
18 circular. The shareholders were described this
19 transaction and told, "Please approve it". The
20 shareholders were told in a proxy circular that, "This
21 is what the deal is: we are selling our 57% interest".
22 We can actually go to that document if you like, but let
23 me paraphrase for now, and then we can go to that
24 document.

25 The shareholders were told, "I, Belmont, want to

16:15

1 sell all or substantially all of my assets", this 57%.
2 "I am selling it to EuroGas. EuroGas is giving me
3 12 million shares, they are giving me 2% royalty, they
4 are giving me a variety of things. And good news,
5 shareholders: if these shares go down in value, and they
6 reproduce 4.1(b), and if I sell the shares for less than
7 3 million, they reproduce 4.1(c)". The circular says,
8 "This is what happens, shareholders".

9 Nowhere in the circular does it say anything about,
10 "Oh, but if we sell all the shares for \$1.5 million,
11 nothing happens, we've just won our gambling bet".
12 That's not what the deal was. That's not what's been
13 described to shareholders. Before we even close the
14 transaction, we described something different.

15 PROFESSOR STERN: Can we have the reference for this
16 circular?

17 MR ANWAY: R-0109.

18 DR GHARAVI: I am with you. You are a practitioner;
19 correct?

20 A. Yes.

21 Q. I am at Article 6. What I see in the hypothesis that
22 \$3 million are not reached: I do not see why the parties
23 could not implement remedies to cure that. This is what
24 I don't understand. You can go to (c), you can issue
25 shares, you can pay an amount --

16:16

1 A. But it doesn't say that. It doesn't say, "Please sell
2 your shares and, if there is a shortfall of less than
3 3 million, then the shares will be released if the
4 purchaser pays more cash". It doesn't say that here.

5 What it says in 4.1(b) and (c) is nothing about
6 topping up with cash. It says: pay an additional number
7 of shares, calculated based on a historical price that
8 bears no relationship to what you might sell them for.
9 And those aren't purchase price shares. Those aren't
10 the 12 million.

11 So this just does not work, and that's why I have
12 come to the conclusion that this is sloppy shorthand for
13 people to refer back to 4.1(b) and 4.1(c). And that's
14 what the circular says.

15 Q. But sloppiness is something; practical possibilities to
16 remedy it in practice are another.

17 A. Yes, and that's exactly what my expert report goes into.
18 We use these rules of interpretation to start with the
19 plain meaning. And when that arrives at an unreasonable
20 result, or a commercially inappropriate result, we then
21 go to the intent.

22 As I say, in this R-0109 on page 8, when Belmont was
23 describing this transaction to its shareholders at the
24 end of the second paragraph on page 8, the last
25 sentence, it says:

1 "The value represented by the Payment Shares shall
2 be guaranteed by the following formula ..."

3 And then (a) and (b), and it reproduces 4.1. It
4 doesn't say anything about, "Article 6 sort of gives us this
5 strange unknown top-up", or something. It says nothing
6 about that.

7 Q. Yes, but it has the ownership of the shares that do not
8 pass Belmont. So the sloppiness basically that you are
9 describing is the problem of the purchaser that could be
10 remedied either by the issuance of new shares to meet
11 that, the payment of the amount; or, if it is with
12 a counterparty that is a seller that is acting in bad
13 faith, avoiding performance, by an action before the
14 courts, either for restitution or unjust enrichment or
15 other things. That's the --

16 A. But you are falling into the trap of rewriting the
17 contract that we have agreed a long time ago, under
18 principle 1, what are the principles: that we don't
19 rewrite or redo a contract for parties. And that's
20 exactly my point. We're not redoing this contract.

21 Article 6, if you read it, has a brand new right,
22 that nobody talked about anywhere, to realise 3 million,
23 and is not capable of remedy in the contract itself.
24 But what is a real remedy, and is capable of -- without
25 correcting or rewriting the contract for these parties,

16:20

1 4.1(c) and (d) provide for exactly what you're saying
2 the court should write into the contract.

3 Q. It says, "in the event the Vendor is unable", 4.1, then
4 there are shares that are issued to meet the 3 million
5 threshold.

6 A. Correct. Yes, I agree, 4.1(c).

7 Q. So the sloppiness that you identify is expressly
8 provided at (c). So I just don't understand what's the
9 problem, why you need to rewrite, first.

10 A. Well, you need to rewrite. You're the one that said: we
11 need to add to Article 6 the ability to top up in cash,
12 so that somebody gets cash.

13 Q. I said: if there are problems that you need to cure.
14 But if it's the 3 million shortfall, there is no
15 problem; it's written. 4.1: you issue shares to meet
16 the 3 million. And in practice that's what happened:
17 they tried to issue shares to meet that threshold. So
18 what sloppiness?

19 A. But there's nothing -- so you realise \$1 from the sale
20 of the shares, you give me the notice as required within
21 the one year, and I give you, let's assume, 12 million
22 more shares, because the price, for some odd reason, is
23 back to where it was. What's happened now? Have you
24 realised 3 million from your sale of the purchase price
25 shares within the first year? No, you have not. You

16:21

1 have realised \$1 and you have a batch of top-up shares.

2 Q. Okay.

3 A. What does Article 6 say happens? Article 6 says: you
4 have not received your \$3 million and so you haven't
5 transferred the shares. That's the commercial
6 absurdity. And that's why I'm saying that 6.1 -- this
7 is not hard stuff, right? This is like: let's look at
8 this, it's obvious that they've --

9 Q. Start again. You issue shares. At the time you issue
10 shares, do you know that this is not ridiculous, that it
11 cannot be \$1 amount? You have an idea, because the
12 shares exist, right, they're quoted?

13 A. Yes.

14 Q. So on its face, if it was \$1, that would be absurd
15 perhaps. But you have an existing base, and there is no
16 bet. It protects the seller to make sure that it hits
17 at least this amount, okay? And if it doesn't hit that
18 amount, there is an express -- why rewrite the contract
19 at 4.1(c)? Okay?

20 A. So at a minimum, you are asking me to rewrite this to
21 say: the vendor has received 125% of its initial
22 investment, equal to Canadian 3 million, through the
23 sale of the purchase price shares, together with any
24 other shares that are issued by the buyer under 4.1(c)
25 or 4.1(b), and the vendor has an additional year period

16:23

1 during which to reasonably sell those shares and realise
2 these proceeds. So you're asked me to add a whole
3 paragraph to Article 6, instead of looking at
4 paragraph 4.1 that says exactly what happens.

5 Q. Sir, I'm not asking you to rewrite anything. There are
6 two issues. I'll get to the rewriting part. One: why
7 do you need rewriting if Article 6 is clear? I'm
8 reading it, and I think in your expert report you agree
9 that it's clear. So you say:

10 "... the ownership of the Shares shall not pass to
11 the Purchaser ..."

12 And then it goes on to say:

13 "... unless and until the Vendor has received 125%
14 of its initial investment equal to CDN \$3,000,000 ..."

15 Then there is a hypothesis: if that 3 million is not
16 provided for. You say: okay, then that would lead to
17 a problem. But that problem -- assuming it is one --
18 that would allow you to read out of the terms of the
19 contract is set out at 4.1(c), namely you issue shares
20 and you hit that. So why do you need to rewrite?

21 A. Hold on a second. Purchase price shares, how do you hit
22 3 million from the sale of the purchase price shares?
23 You've already sold them for 1.5.

24 Q. "... then the Purchaser shall within 10 ... days of the
25 written request by the Vendor issue such additional

16:24

1 common shares to compensate for any shortfall ..."

2 A. But those aren't purchase price shares.

3 Q. Yes, so?

4 A. So how can you satisfy the clear condition that says:

5 I have realised 3 million from the sale of the purchase
6 price shares?

7 Q. By applying the express remedy provided in the contract
8 under 4.1, which is a warranty.

9 A. So the point is --

10 Q. It's a contract as a whole. I didn't sign this page.

11 A. I agree the contract is read as a whole and that's
12 exactly why I'm tying Article 6 to Section 4, because
13 Article 6 cannot be a stand-alone provision, it can't be
14 a separate remedy. If it is, it's a gamble, it's a bet.

15 Q. Okay.

16 A. Will these shares sell for more than 3 or not?

17 Q. I already addressed the thing of the bet, because you
18 cannot characterise it, as a practitioner, as a bet,
19 because the company is listed, so you have a share and
20 you know it's not going to be \$1. So that think, the \$1
21 hypothesis --

22 A. Well, it is a bet. What happened? It turned into 1.5.

23 Q. Okay. Then let's go to the final hypothesis that you
24 would need to rewrite that because of sloppiness. Okay,
25 I'm engaging with you now on the theory of sloppiness

16:26

1 and you would need to rewrite, and that, according to
2 you, would prevent further application of the terms of
3 the contract.

4 Now, Belmont, I submit to you, is very protected by
5 this contract. It's a very good contract for Belmont.
6 Why? Because it says that: we keep the shares, they
7 shall not pass until we meet that threshold. Okay? So
8 we keep the shares, we keep the title, it doesn't pass.

9 So any sloppiness, assuming that it's not remedied
10 under the contract -- that would require something
11 else -- is for EuroGas. It's EuroGas, it's
12 professionals, and they cannot close. It's their
13 problem. It's a badly negotiated -- they didn't hire
14 Mr Anderson. They should have hired Mr Anderson of
15 Stikeman Elliot, expert, and we will do so in the
16 future.

17 A. I guess that's where you and I differ, because I'm
18 saying -- and hear me loud and hear me clear -- I'm
19 saying it would not be interpreted to lead to
20 a commercial absurdity. You're saying: it's great if it
21 leads to a commercial absurdity because it's in
22 Belmont's favour, and why would Belmont complain about
23 that? I agree entirely, I've got no dispute with that
24 statement. My dispute is: we don't even get there in
25 the first place because the court would just not say

16:27

1 that this is what this means.

2 Q. Well, you qualify it as a commercial absurdity, but you
3 have used the word "sloppiness". I would say in the
4 extreme scenario, even with the \$1, even if I gained you
5 a few of the \$1 shares, it would not be a commercial
6 absurdity; it would be a professional that entered into
7 a sloppy contract.

8 And I would read to you the decision that you
9 submitted, that:

10 "In these circumstances ..."

11 The holding is, the doctrine:

12 "... as a result, the appellants should not receive
13 the return of their initial investment in the joint
14 venture."

15 It goes on:

16 "The doctrine of unjust enrichment ..."

17 Or the doctrine of whatever you want to rely on; on
18 absurdity, I would say.

19 "The appellants also did not ... the appellants
20 chose not to pay and suffer the consequences the law
21 prescribe."

22 So it's tough luck. It's a sloppy contract by
23 professionals, according to the case law you cited,
24 Jedfro, RL-0088. And at paragraph 16 of your statement
25 you say: the absurdity theory should not be interpreted

1 to change the bargain.

2 A. That's correct. I agree entirely. And as I say, you
3 are trying to change the bargain by changing Article 6
4 so that it actually makes some sense and works. And my
5 proposition is: no, we don't change it so it makes some
6 sense and works, we don't import reasonableness, we
7 don't import obligations to sell when maybe they want to
8 keep their shares, and that's inconsistent with the
9 remainder of the contract that says you can keep your
10 shares. All of that requires us to rewrite the
11 contract. And my point is: no, the reason it leads to
12 a commercial absurdity is because the person that
13 created the words was sloppy.

14 Q. To close finally on this, what happens, according to
15 you, now? What do I hold, Belmont, according to you?
16 You see, I am engaging all the way with you. Now you
17 won. What do I hold?

18 A. I think there's a lot of facts we need to understand.
19 Because you had a right under 4.1(b) and 4.1(c) to sue
20 because your rights were not respected. As far as
21 I know, you did exercise your rights under 4.1(b), and
22 I see evidence in the record that Belmont did that and
23 received 3.83 million additional shares under 4.1(b).

24 Belmont also had the right under 4.1(c) to claim the
25 receipt of additional shares. It either did or did not

16:30

1 do that. If it made the request, and the contractual
2 obligation was breached by EuroGas, it's open to Belmont
3 to sue. And it holds as security, in my vision of the
4 world, the 57% interest that provides it a remedy
5 against this company that may or may not be able to meet
6 its obligations anymore.

7 So just like the bank wants you to pay your
8 mortgage, and if you don't pay your mortgage, it can sue
9 you and then take the house away, and realise on that
10 security, here Belmont was in the position of holding
11 security over these Rozmin shares.

12 I wasn't looking at bankruptcy documents, as you've
13 identified, so I don't know whether it made a claim in
14 the bankruptcy for its entitlements as against those
15 shares or not.

16 Q. Well, you saw the bankruptcy was the other way round.
17 But I don't want to engage with you again on bankruptcy.
18 I said: what do I have now practically? I have the
19 ownership, you agree, on paper, registry. At least you
20 could agree with me that I hold them, right, Belmont?

21 A. I agree that Belmont holds it as security, yes.

22 Q. Okay. So according to you, at the minimum, under
23 Canadian law I hold them, at the very minimum. I am
24 with you all the way now, all you want. I hold them as
25 a security, okay?

16:32

1 A. As security, yes.

2 Q. As a security, okay. Now, there are a few questions
3 relating to that. I hold them as a security under
4 Canadian law. That means there has been a security
5 arrangement over the shares. And I understand under
6 Canadian law that concept to turn ownership of shares
7 into a security is a complex formal process. Would you
8 agree with me?

9 A. No. Under the Canadian statute that governs this --
10 it's actually a British Columbia statute, the Personal
11 Property Security Act, at this time -- the granting of
12 a security interest needs to be evidenced in writing,
13 right here I say (indicating), and can be perfected by
14 possession. And as far as I know, either -- and you
15 have to help me which case it is -- either Belmont holds
16 them or the solicitor for Rozmin holds them, and that is
17 possession on behalf of Belmont. So it's secured as
18 against other creditors.

19 Q. Okay. There are a number of things you said.

20 First, there was no trust. So let's work on the
21 assumption there is no trust, okay?

22 A. Okay.

23 Q. So it's Belmont that holds them directly.

24 A. Okay.

25 Q. Then you said another thing: that this document you

16:33

1 pointed to creates a security. That's a problem I have
2 with you. Under Canadian law, how could this
3 document -- what are the terms, substantively and from
4 a point of view of form -- meet the test of security
5 under Canadian law? Can you tell us? And if you don't
6 know, then you can say you don't know.

7 A. I agree with you that I am not a secured transactions or
8 bankruptcy expert. That's not my field of endeavour.
9 However, in conversations with a variety of my
10 colleagues, they suggested to me that this certainly
11 would be something that could form the basis of
12 a security interest. But I can't tell you that of my
13 own --

14 Q. Well, that's very --

15 A. -- belief.

16 Q. I talked to my colleagues that said that --

17 A. No, I agree.

18 Q. -- this could form the basis for a security.

19 A. Yes.

20 Q. We are far from this meeting the requirements of
21 security. So once you've said that, I see Belmont with
22 full ownership, when I read this, full ownership,
23 unqualified, of the shares, don't I?

24 A. Well, you might, but you're not a BC lawyer and you're
25 not a bankruptcy lawyer and you're not a secured

16:35

1 transactions lawyer. So I don't see how you can say
2 that I read this as not creating a security interest.

3 THE PRESIDENT: Sorry to interrupt. I'd like to understand
4 your opinion exactly.

5 In terms of ownership, in your analysis, who owns
6 the 57% interest?

7 A. The beneficial owner is EuroGas.

8 THE PRESIDENT: Beneficial owner?

9 A. Yes. So if I can make an analogy, in Canada, when
10 I want to buy a house, I'm the kind of person that needs
11 to borrow money from a bank. I then "own" my house, but
12 that mortgage that was granted to the bank gives the
13 bank in effect the legal title to that property. And
14 if, as and when, I fail to make the mortgage payments,
15 the bank can foreclose. And what I have is called the
16 "equity of redemption". I am entitled to make the
17 payments and redeem the interest of the mortgage holder.

18 I think we can analogise to this situation, where
19 there has been a title retention by Belmont as security
20 for the obligations of EuroGas under this agreement.
21 And EuroGas has the equity of redemption to meet its
22 obligations and obtain title to these shares, in
23 addition to its beneficial equitable interest, or not;
24 and if it doesn't meet it, then there is a possibility
25 that it can be foreclosed against.

16:37

1 The evidence we have in the case, there is a variety
2 of threatening letters and the like made in 2003 and
3 2004 that talk about, "We will foreclose. We will sue.
4 We will sell the shares. And if there's a shortfall, we
5 will come back to recover that from you", in a variety
6 of exhibits. I'm trying to remember. One was
7 Paul Fang, a lawyer, fall of 2004, and similar letters
8 between the parties that contemplate exactly what I am
9 describing as being the case.

10 THE PRESIDENT: Is your interpretation compatible with the
11 words, in a certain situation, "the ownership of the
12 shares shall not pass to the purchaser"? You said it
13 becomes the beneficial owner, but is that reconcilable
14 or not with the sentence I have just read?

15 A. I think so, because, as I say, this is a title retention
16 mechanism. This clause doesn't clearly go into detail,
17 but provides for the basic title retention mechanism
18 that forms the basis of the security. So that is
19 exactly what I have been saying throughout my report.

20 THE PRESIDENT: I'm not familiar with these concepts. Where
21 there is a beneficial owner, what is the situation of
22 the other party? How do you characterise it?

23 A. They are a secured party that holds title as security
24 for the obligations.

25 Another example that I can give you is a lessor and

16:39

1 lessee of equipment under a capital lease, where there
2 might be a title retention mechanism and you, as the
3 lessee, are using your forklift or photocopier every
4 day. And once you have paid out the lease over time,
5 you then get title to that piece of equipment to
6 continue to use it. But during the term of the lease,
7 if you fail to make payments, there can be a foreclosure
8 action by the lessor. And you have the equity of
9 redemption to pay them out, and then you will own the
10 equipment; or you can walk away, in which case bad
11 things happen: the property is seized, it's sold.

12 But, you know, as I told you a few minutes ago, this
13 is not my area of expertise. I'm not like Annette, a secured
14 transactions/bankruptcy kind of lawyer that deals with
15 this.

16 THE PRESIDENT: Okay, thanks.

17 DR GHARAVI: Sir, I am on this with you, at the year 2001,
18 and what I have problems with is then you using
19 correspondences afterwards, remember because your whole
20 theory was that 2001 --

21 A. Oh, yes.

22 Q. So I don't know why in certain responses, to help you,
23 you pick and choose certain correspondences in the
24 future. So focus with me on 20[01], because that is
25 your theory.

16:40

1 2001, under Article 6, I read to you what we both
2 agree in fact again are clear terms: that the ownership
3 of the shares shall not pass to the purchaser until
4 a condition has been met. You have relied on certain
5 principles of law that you have applied in the way you
6 have to arrive at the conclusion that I, Belmont, today
7 hold the shares -- this you agree under Canadian law --
8 but as security.

9 Then I put to you -- this is your case, this is not
10 mine. Because you bounce back to me: you're not
11 a security lawyer.

12 A. Mm-hm.

13 Q. It's your case. My case is that I'm a full legal owner
14 based on that clear clause, and I don't need to go to
15 that construction. You use that principle to get out
16 then, to say that it is a security. So you have to
17 prove to me, not me to prove to you, that I hold it as
18 a security.

19 I asked you to cite the provisions of the law that
20 allow you to say that I am not the legal owner, I am not
21 the beneficial owner and I hold it as a security. And
22 I understand your answer was that, "I did not know.
23 I spoke to a colleague that said this provision may form
24 the basis of an entitlement to security".

25 Do you have anything to add to convince me that

16:42

1 I hold it as a security?

2 A. Yes. So I need to correct perhaps either what I said or
3 how you summarised it.

4 As I said, the requirements are that it be in
5 writing. And you said I pointed to this and which words
6 is it that created it, and I told you that the
7 satisfaction of the clause -- that the grant of security
8 be in writing is satisfied by this. I didn't say that
9 I don't think a security has been granted and that's the
10 conclusion that a court would arrive at.

11 So I'm convinced that on reading this and the
12 problems in the literal interpretation would cause
13 a court to come to the conclusion that what is really at
14 issue here is there's a guarantee that is represented by
15 4.1(b) and 4.1(c), and the security for that guarantee
16 is the title retention mechanism in Article 6.

17 Q. Okay. And under the Canadian law of security, can you
18 tell us what provisions of law that you apply to say
19 that this could, under law, these terms -- not going
20 back to correspondence in the future -- meet the
21 requirements of a security under Canadian law, only as
22 opposed to ...

23 A. It's a case that I would have to present to you that
24 I don't have with me today.

25 Q. Okay, so we are in agreement on that.

16:43

1 Finally, I would like to even go a further step with
2 you, to say that I hold it, let's assume, as a security,
3 and the beneficial owner, I put to you, is a bankrupt
4 company since a long time ago. And there is no claim
5 made to me for beneficial ownership, either EuroGas I,
6 EuroGas II, the bankruptcy, the trustee; there is no
7 claim put. And I have exercised it? And written to the world that I am
8 the owner.

9 What's the solution to this situation under Canadian
10 law and your theory?

11 A. Well, I think the answer is actually found under Utah
12 law, as opposed to Canadian law.

13 DR GHARAVI: Okay, which you don't know anything about. So
14 that ends my questioning. Thank you.

15 THE PRESIDENT: Re-direct?

16 MR ANWAY: Very short, Mr Chairman.

17 (4.44 pm)

18 Re-direct examination by MR ANWAY

19 Q. Mr Anderson, in preparing your report, did you review
20 any documents signed after the SPA in which EuroGas
21 and/or Belmont characterised their deal?

22 A. Yes, I reviewed many documents. I think the two
23 principal and most reliable documents, from
24 an evidentiary perspective under Canadian law, are those
25 that are most contemporaneous with the transaction. So

16:45

1 to me the two documents that best represent and are most
2 helpful in interpreting the contract are the information
3 circular that was prepared June 8th, I believe, that
4 outlined for the Belmont shareholders what it is they
5 were being asked to approve and what the nature of the
6 transaction was; and the second document is the series
7 of financial statements that report and record what
8 happened as a result of the transaction.

9 Q. In fact I think I am going to take you to those two
10 documents. But before I do, let me ask you: in all of
11 those statements that you said you reviewed by Belmont
12 and/or EuroGas after the SPA was signed, characterising
13 their deal, did you find those statements consistent?

14 A. I think prior to 2004/2005 they were quite either
15 consistent or ambiguous enough that they were capable of
16 any number of interpretations. After roughly 2005, as
17 evidenced by the press releases that you brought me to,
18 certainly I see evidence of Belmont saying, "No, no, we
19 own the shares", by that time.

20 Q. In those later statements, around that same time, were
21 you also noticing inconsistent statements being made,
22 again around the same time?

23 A. Yes, there's ...

24 DR GHARAVI: You are leading in your questions: "Do you
25 notice again inconsistencies ...?"

16:47

1 MR ANWAY: I don't know if anything in my question suggested
2 what the answer should be.

3 A. I think, just to identify, within the documents
4 themselves, for example in 2003 when somebody says,
5 "I am going to foreclose or recover these shares", it
6 can be capable of two interpretations: one, "I own the
7 shares", and one, "I hold them as security". So what
8 I was trying to say in the last question: the first time
9 I've ever seen a statement that, "No, no, we hold these
10 shares, it's not a security or anything else", didn't
11 arrive until later; for example, 2006, 2008, 2009, those
12 press releases you showed me or led me to.

13 However, are there contrary statements that you have
14 shown me from that same time period that you have
15 provided? Yes, I have certainly seen many statements;
16 for example, the one from the criminal proceeding that
17 specifically stated, "No, we have no interest, we sold
18 those shares". So I think there are documents that are
19 on their face contradicting each other later; there are
20 documents that are more ambiguous earlier.

21 Q. So let's just look very quickly at the two documents you
22 said you found most instructive. The first you said was
23 the information circular?

24 A. Yes. You'd call it a "proxy circular" in the US. It's
25 the information record that's sent to the shareholders

16:48

1 so they can -- the legal test is to have sufficient
2 information to make a reasoned decision.

3 Q. This is, for the record, R-0109.

4 THE PRESIDENT: Can you point to us which part of this
5 document you find relevant?

6 A. The description of the transaction starts at the very
7 bottom of page 7, and it's section 1, "Disposition of
8 the 57% interest held by the Company in Rozmin s.r.o."

9 It starts out by identifying that a share purchase
10 agreement has been entered into, and it identifies
11 Rozmin as being the owner of the talc deposit. And it
12 goes on to identify the Rozmin interest constituting --
13 I think I said earlier 90%; here it says 91%, so I was
14 mistaken -- 91% of the assets of the company. And that
15 is the reason, I mentioned earlier, that the
16 shareholders need to approve this: because it's the sale
17 of all or substantially all of the company's
18 undertaking.

19 The transaction is described, and the key point is
20 that the last sentence at the end of the second
21 paragraph on the page says:

22 "The value represented by the Payment Shares shall
23 be guaranteed by the following formula: ..."

24 And then it goes (a) and (b), and reproduces
25 Section 4.1(b) and (c) of the share purchase agreement.

16:50

1 MR ANWAY: Mr Anderson, I'd like to direct your attention to
2 a different paragraph in the document, on page 12. And
3 I am focused on the second full paragraph, the second
4 paragraph from the end of the summary. Do you see that?

5 A. Yes, I do.

6 Q. Could you just take a moment and read that paragraph.

7 A. Yes, I have.

8 Q. I noted that this paragraph mentions the 125%.

9 A. Correct.

10 Q. Do you see in this paragraph any mention -- as we did in
11 Article 6 from the SPA -- that title will not pass
12 unless and until the vendor has received 125% of its
13 initial investment, equal to 3 million Canadian?

14 A. No, I didn't notice anything anywhere here that talked
15 about the title retention mechanism; although, truth be
16 told, I wasn't so focused on pages 9, 10, 11 and 12,
17 because that's actually a portion of the information
18 circular -- it's a fairness opinion, written by
19 a valuator who is identifying and justifying the
20 purchase price. And so that's not someone that we can
21 rely on to tell us what the legal effect of the purchase
22 agreement is.

23 Q. Then the second document I'd like to take you to is one
24 that Claimants' counsel took you to, which is R-0114.
25 These are the Belmont audited consolidated financial

16:52

1 statements for the years ending January 31st 2002 and
2 2001. Counsel took you to tab -- and I will tell the
3 Tribunal now, there is no need to do so -- but he took
4 you to tab 58 to view this document, but that tab only
5 contains a very small portion of the actual
6 financial ...

7 A. That's correct. When I got there, I said: this is
8 missing note 3 that actually describes the disposition.

9 Q. Right. So I think it would be helpful if we all looked
10 at the full document, since you had both referenced it
11 in your testimony and since counsel took you to it. So
12 it's R-0114. I don't have it in a bundle.

13 I am informed this may be in the witness bundle we
14 had. It was part of Mr Agyagos's cross-examination.

15 THE PRESIDENT: We have it.

16 MR ANWAY: Do you have the full exhibit in front of you?

17 A. I do.

18 Q. Oh, excellent. Just to speed this up, I know these
19 pages are not numbered, but if we flip forward ...

20 Mr Anderson, just before I get to my question, you
21 indicated you found this document significant. Why is
22 that?

23 A. Well, it provided a variety of evidentiary information
24 for me as to the nature of the transaction and what
25 happened, given that this is the first set of financials

16:53

1 that were produced immediately afterwards and during the
2 financial year in which the transaction occurred. And
3 it deals with the disposition both in note 2,
4 "Significant Accounting Policies", and in note 2(a) it
5 describes the fact that, as a result of the sale, the
6 Rozmin results are no longer being consolidated into
7 Belmont's results because Rozmin is no longer
8 a subsidiary.

9 Q. So how did they book this transaction?

10 A. Well, as a sale, it's no longer a subsidiary; suggesting
11 that, as I said earlier, the shares are held as security
12 only.

13 Q. Can you --

14 A. And then in note 3, we are now longer just talking about
15 accounting policies, we are actually giving a lot of
16 more detailed information about the disposition of the
17 subsidiary and what the transaction involved and what
18 was received or not received in connection with the
19 transaction.

20 There were two points. I think I was originally led
21 here to talk about the NRAR, the advance royalties, and
22 I think there was some debate about whether or not 76 or
23 some other amount had been received. Note 3(iii) says:

24 "Payment by EuroGas of \$100,000 U.S. as advance
25 royalties ..."

16:55

1 And it goes on to say:

2 "... (subsequently net recovery to Belmont of
3 \$96,774)."

4 I think when we originally talked about this, the
5 suggestion was that 100 was aspirational and some other
6 amount was probably received. I don't know what
7 "subsequently net recovery" means, but certainly I see
8 there they have got \$96,774.

9 Then they go on to describe the market guarantee and
10 the fact that the shares of the 57% interest are held as
11 security for that market guarantee.

12 And then lastly, the piece that had me scratching my
13 head was (ii) at the bottom of this page --

14 Q. Just so the Tribunal can follow, what page are you on?

15 A. There is no page number, but I'm in note 3, the second
16 page of note 3, (ii). So note 3 is "Disposition of
17 Subsidiary".

18 THE PRESIDENT: Which page?

19 MR ANWAY: Is it the last page?

20 A. So after the statements, which double-sided is three
21 pages, there are notes to the consolidated financial
22 statements, and note 3 starts at the bottom of the
23 fourth page of those notes. And in between double lines
24 there's a heading: "3. Disposition of Subsidiary".

25 Q. Can you specify for the Tribunal the subsection you are

16:57

1 under?

2 A. Earlier, when we were talking about the NRAR, I was on
3 this initial page. I was in (iii), that says:

4 "Payment by EuroGas of \$100 million U.S. as advance
5 royalties ..."

6 Q. And which provision in the SPA do you think that
7 connects with?

8 A. The 100,000 NRAR, the non-refundable advance royalty.

9 And then the second thing I was pointing out: that
10 at the top of the next page, under (i), it describes the
11 market guarantee that was provided by the shareholders
12 and summarises 4.1(b) and 4.1(c) of the SPA. (Pause)

13 And then the last thing that I was noting in passing
14 is on this same second page of note 3, at the bottom
15 there's a (ii) that speaks to:

16 "The fair value of the repricing of 2,500,000 share
17 purchase warrants under the agreement has been estimated
18 using the 'Black Sholes' ... model ..."

19 And that is, as I say, something I was uncertain
20 about because it's not dealt with anywhere in the share
21 purchase agreement. But if these financial statements
22 are saying it happened and this is additional
23 consideration that was received, I wasn't sure why this
24 additional consideration was received and whether it has
25 anything to do with the payment of the NRAR or something

17:00

1 else; I just don't know. But clearly there is evidence
2 here that the transaction didn't unfold exactly as the
3 share purchase agreement contemplated.

4 THE PRESIDENT: Can you tell us what's the reasoning to come
5 to the conclusion that your interpretation is correct,
6 based on this? Because we see what is written, but
7 where's the reasoning?

8 A. The first note under "Significant Accounting Policies"
9 identifies the fact that the 57% has been disposed of
10 and is no longer being consolidated --

11 MR ANWAY: And maybe, Mr Anderson, you could point to the
12 specific language to which you're referring.

13 A. In note 2(a), "Consolidation", there's a subheading
14 called "SSSRO". If you skip after that, there's
15 a subheading called "ROZMIN s.r.o.", and the words
16 underneath that Rozmin heading are:

17 "The Company sold its 57% in Rozmin s.r.o. effective
18 March 27, 2001. The accounts and operations of Rozmin
19 have been consolidated in the accounts up to the date of
20 disposition."

21 It goes on to speak to the gain arising as a result
22 of the disposition.

23 Q. Is there any language on the next page you might point
24 to?

25 A. And after the table identifying the values that are

17:02

1 being ascribed to the various components of the
2 consideration being received for the 57% interest, it
3 goes on in two key paragraphs to say:

4 "The Company holds the Rozmin ... shares pending
5 settlement of the amount of guarantee shares to be
6 issued ... and completion of the U.S. registration
7 statement which requires the inclusion of certain
8 financial information from EuroGas."

9 And the second paragraph that says:

10 "The Company has recorded the EuroGas transaction as
11 a sale and disposition of a subsidiary and holds the
12 shares as a collateral measure only. EuroGas acquired
13 effective control of Rozmin on March 27, 2001."

14 So those statements would tie directly into what
15 I was suggesting was the correct state of affairs.

16 PROFESSOR STERN: Can I just ask a material question. When
17 there is a reference to note 3, does it mean that this
18 is note 3 or does it refer to another document that we
19 don't have?

20 A. So the title to --

21 PROFESSOR STERN: Or that I haven't seen at least.

22 A. So the notes themselves have a double bar, or two bars,
23 one on top and one on the bottom of the note heading.

24 And then where there's a little bold "See Note 3" or
25 "See Note 5", it's a reference to the other notes in

17:04

1 these financial statements. So, as a for instance,
2 where we were previously, "Note 3" meant: please find
3 more information in this note 3 about what I've been
4 describing in note 2(a).

5 MR ANWAY: Can you explain just again why you think
6 subsection (iii) under note 3 -- I think it's 3(iii), if
7 I remember well -- is important to your analysis?

8 A. Well, that speaks to the receipt of payment. So I think
9 earlier there was a suggestion that there was just
10 a hope that payment would be made; whereas the way
11 I read this, it speaks to a receipt of the payment and
12 the payment having been satisfied through this net
13 recovery of the 96,000.

14 Q. Was that one of the conditions precedent?

15 A. That's correct.

16 Q. And your conclusion is based on what?

17 A. That the conditions precedent to the transfer of the
18 shares -- being the payment of the NRAR and the payment
19 of the 12 million consideration shares -- have been
20 achieved and the remainder of the conditions were
21 conditions subsequent, that had to be satisfied
22 following completion of the closing, that were secured
23 by way of the security interest in the 57% interest.

24 Q. Is there anything else about this document that you
25 found particularly relevant to your analysis?

17:06

1 A. No, I think I touched on all of it: the disposition, the
2 no longer being consolidated because it's not controlled
3 anymore, the amount of proceeds being received, the
4 guarantee being identified, the shares being held as
5 security being identified.

6 And as I say, the big question mark for me was that
7 note 3(ii), right after the little parenthetical to
8 "(See Note 17)", it speaks to the fact that this
9 repricing had been received, its consideration, and the
10 value calculated using this particular method of valuing
11 it.

12 Q. So that footnote resolved the question for you?

13 A. Yes.

14 MR ANWAY: Mr Chairman, I have nothing further.

15 (5.06 pm)

16 Further cross-examination by DR GHARAVI

17 Q. Sir, in this document, in answer to the President's
18 question about how you read this to support your
19 conclusion, there's the word "guarantee" here applied,
20 then "collateral". And is for you guaranteed shares
21 within that context, followed by collateral measures,
22 the same thing as security under Canadian law?

23 A. Yes.

24 Q. Or these are complete separate things, or you don't
25 know?

17:07

1 A. No, that's exactly what it suggests to me: that these
2 shares are held as collateral -- i.e. as security -- for
3 the performance of some obligations.

4 Q. Okay. But for you the terms "guarantee", "collateral"
5 and "guaranteed shares", and then within that context
6 "collateral measure only", means that there is
7 a security --

8 A. That's correct.

9 Q. -- that meets the provisions of security under Canadian
10 law? Are you just suggesting that it could?

11 A. No, this doesn't meet the conditions for the
12 determination of the granting of a security. What I'm
13 saying is this describes the fact that a security has
14 been granted, but not by virtue of these financial
15 statements.

16 Q. But please reassure me that I understood, after all
17 this, your position in your reports correctly: that this
18 document which you rely on is a subsequent document to
19 the exercise that you proposed to carry out to reach the
20 conclusion? Because every time I pointed you to further
21 correspondences and the statements of Belmont and
22 EuroGas, you told me, "Yes, but those for me, under
23 Canadian law, are irrelevant. I look at the date of the
24 SPA". Did I understand you correctly?

25 A. I didn't say "irrelevant"; I said the weight to be given

17:08

1 to them is much less.

2 DR GHARAVI: Okay, thank you.

3 A. But we started out this question about what are the most
4 relevant contemporaneous documents, and my point was
5 that there's one of these documents that was prepared
6 before the transaction was completed and one prepared --
7 the next set of financial statements prepared
8 afterwards, and so those are as contemporaneous as
9 I had.

10 THE PRESIDENT: So thank you. This completes your
11 examination. Thank you very much.

12 MR ANDERSON: Thank you. Sorry for being so long.

13 THE PRESIDENT: We have time to start with the next witness.
14 At what time did we break?

15 MR ANWAY: We had talked about breaking a little early
16 today, but ...

17 THE PRESIDENT: Do you want a break or not now, a short one?

18 MR ANWAY: Mr Mañón will be conducting this
19 cross-examination. I think a five-minute break might be
20 helpful, just to organise ourselves and move some files
21 away.

22 THE PRESIDENT: Okay, five minutes.

23 MR ANWAY: Thank you.

24 (5.10 pm)

25 (A short break)

17:10

1 (5.22 pm)

2 MR ALEX HILL (called)

3 THE PRESIDENT: Good afternoon, Mr Hill.

4 MR HILL: Good afternoon, Mr President.

5 THE PRESIDENT: You appear as an expert witness in this
6 case. Can you read please the statement in front of
7 you.

8 MR HILL: I solemnly declare upon my honour and conscience
9 that my statement will be in accordance with my sincere
10 belief.

11 THE PRESIDENT: Thank you.

12 Direct examination? No, okay. Then cross.

13 MR MAÑÓN: Thank you, Mr President.

14 Cross-examination by MR MAÑÓN

15 Q. Good afternoon, Mr Hill. My name is Raúl Mañón. I will
16 be asking you some questions about your expert reports
17 in this case.

18 A. Thank you.

19 Q. I'd like to start first with the cost assessment for the
20 development of the mine in your report. I will be
21 specifically referring to the supplemental report, where
22 I believe you address the issue of cost?

23 A. I can open the binder?

24 Q. Yes of course.

25 A. Which one are you referring to, please?

17:23

1 Q. The supplemental report. I believe that's -- there,
2 that one. I believe that's both.

3 A. Yes. I just wanted to make sure they were the same.

4 Q. So what we have done, just to give you a little bit ...

5 (Pause)

6 So both of your reports are there, and the binders
7 have some of the exhibits that we're going to be going
8 over. So your supplemental report, page 21. Let me
9 know when you get there, please.

10 A. Thank you.

11 Q. At the bottom there's a section titled "Capital Costs".

12 A. Yes.

13 Q. And I see you list there a series of costs which you
14 have divided into four categories: "Mining" -- which you
15 take from a prior report, and we'll get to that --
16 "Capital costs alterations", "Processing" and
17 "End-processing". Do you see that?

18 A. Yes.

19 Q. And you have figures on the right-hand side to each of
20 those categories?

21 A. Yes, noted.

22 Q. I've made a rough estimate converting all of those into
23 euros, and I come up with about €30 million, give or
24 take.

25 A. Yes.

17:25

1 Q. Would that be accurate?

2 A. Yes, I think we came up with the same number into euros,
3 in here somewhere.

4 Q. Okay. So these capital costs, in terms of the
5 development of the mine, how would you describe them?

6 A. The development of the mine? This would include putting
7 the ramp in, which you have called the winze; and also
8 putting an adit in, which is the raising. That's the
9 capital development. But I also took out the vent
10 raises, to make a balance between using the numbers that
11 were in the original reports, and made a balance between
12 the two.

13 Q. Okay. And just for the benefit of the Tribunal, when
14 you say "adit", what do you mean by "adit"? If you can
15 describe it in layman's terms.

16 A. An adit is a horizontal or a near-horizontal tunnel.

17 Q. So it would be the opening?

18 A. It's the opening, yes.

19 Q. So this envisioned the cost of the opening as well?

20 A. Yes.

21 Q. Then I see there the "Processing". This envisioned also
22 the cost of building the processing plant?

23 A. Yes.

24 Q. And you need that to actually operate the mine?

25 A. No, it is in the phased build-up of operating the mine.

17:26

1 Q. Okay.

2 A. In the initial two years, the processing plant would be
3 under construction and you would raise funds, as normal,
4 basically using minimal processing, selling your crude
5 rock. So this process plant would be built in order to
6 facilitate flotation within year 3 or end of year 2.

7 Q. Okay. And this processing plant was part of the plan
8 set out by Rozmin at the time? I am going to put a date
9 on that: the year 2000.

10 A. In the year 2000 it was within their -- they have got
11 several reports. But within their mine approval, no,
12 it's not. This is within their studies. They were
13 carrying out extensive flotation studies, defining the
14 brightness, the whiteness and the recoveries that could
15 be obtained from different products.

16 Q. Okay. My question was a little bit more general.
17 I just want to know if, generally speaking, this
18 processing plant was something that Rozmin was
19 envisioning as part of its development; not in the
20 technical sense, but the development of the mine. This
21 is something they wanted to do?

22 A. Yes.

23 Q. Okay. So in essence they would need the funds, all
24 €30 million, to proceed with all of these plants?

25 A. No, not all these funds. They would need some of these

17:27

1 funds for the primary development. But as I said, they
2 would instigate production on a basic scale, which is
3 actually what's carried out at the moment. And in the
4 first two years you are actually generating funds to
5 enable you to have capital going forward for the process
6 plant build.

7 Q. Okay. And what would they need for the initial stages?

8 I think that's the --

9 A. For the initial stage, you would need your primary
10 underground development capital.

11 Q. Okay. And how much are we talking about?

12 A. You're probably looking at 15-18 million.

13 Q. Euros?

14 A. Euros.

15 Q. Okay. And you need that just to get off the ground?

16 A. Really, yes.

17 Q. Okay. I see you cite here the DEG report on that same
18 page, and I'd like to take you through that report, if
19 I may. I believe it's Exhibit C-0137, and it's your tab
20 number... It's that stand-alone document I believe you
21 have there right in front of you.

22 A. Yes.

23 Q. Is that it?

24 A. That's the DEG ...

25 Q. Yes. Is that marked C-0137?

17:28

1 A. C-0137, yes.

2 Q. If the Tribunal is there ... I believe it's
3 a stand-alone document that may have been made available
4 for the Tribunal. I'd like to just confirm that they
5 have it. No? Let me see if it's in the bundle.

6 (Pause) I'm sorry, it's Mr Agyagos's binder, and it will
7 be tab 10. (Pause)

8 C-0137 is titled the Hansa Geomin report. Have you
9 read this report before?

10 A. Yes, I've read this report.

11 Q. Can you describe for the members of the Tribunal the
12 nature of this report?

13 A. It's a feasibility study carried out in 1998. This is
14 a typical feasibility study of the time, 20 years ago
15 nearly. This would be a standard study carried out for
16 raising funds, a standard study for presenting to a bank
17 for an investment, to cover all elements of the business
18 at a fairly general level, defining the deposit,
19 defining how it is going to be operated and defining the
20 costs. It was generally known as a "bankable
21 feasibility study" at that time; a "feasibility study"
22 is the common name. So it would be to raise funds.

23 Q. Okay, thank you. I just want to ask you a follow-up
24 question, because I'm a little bit confused and I want
25 to make sure we get all the documents right. This is

17:33 1 not Mr Haidecker's feasibility study, is it?

2 A. No. Are you telling me?

3 Q. It's a question, yes.

4 A. No, it's not, is it? No --

5 Q. I don't believe it is, but I'm asking you.

6 A. -- it's a different study.

7 Q. Okay. Do you know who commissioned this study?

8 A. No, I don't think I do; unless it was Dorfner. But

9 I don't know.

10 Q. Okay. Would it surprise you if I tell you that it was

11 commissioned by Rozmin for purposes of raising funds

12 with DEG?

13 A. Not at all.

14 Q. Okay.

15 A. Yes.

16 Q. I'd like to point you to page 33 of that feasibility

17 study, please. There's a table there under "Total

18 Investment Cost". Are these the numbers that you

19 reproduce on the capital costs that we saw on your

20 supplemental report earlier?

21 A. This isn't a reproduction. As I've written into the

22 preamble for those costs, I drew the costs from here,

23 but also from the three ARP studies and the 2000

24 internal reports. This is where they are going in 1998.

25 Every year, in the development of a business, it's like

17:35

1 steppingstones, so you will adapt your business to your
2 latest thinking.

3 Q. Okay. So back in 1998 these are the capex, so to speak,
4 the costs that were going on?

5 A. Yes.

6 Q. Okay. If you look at the paragraph that starts with,
7 "The overall investment cost amounts to", the second
8 sentence in this paragraph reads:

9 "This part of the investment is further considered
10 as an initial ..."

11 A. Sorry, I can't find, "The overall ..."

12 Q. I'm sorry. Exhibit C-0137, page 33, the paragraph that
13 starts, "The overall investment cost", right after the
14 numbers.

15 A. Thank you.

16 Q. Then the second sentence says:

17 "This part of the investment is further considered
18 as initial investment cost."

19 Do you see that?

20 A. I see that.

21 Q. Is the term "initial investment cost" consistent with
22 what we had discussed earlier: that funds were needed to
23 get the project off the ground?

24 A. In this report it's more than that. This is to get the
25 project off the ground, into, like, a phase 1 of

17:36

1 operation, because it included the milling and bagging
2 plants, primary crushers, secondary crushers and
3 screens. So you would actually make a refined product.
4 So it's a step further than initial kick-off. And you
5 would actually make four different products, really
6 targeting different industries: one is a paints and
7 plastics product, one is quite a basic product, and two
8 will probably head for the paper industry.

9 Q. Okay. And these costs later increased, I believe. I'm
10 sorry, I'm likely confused. Is that what you explained
11 earlier, that some of these costs increased, given the
12 ARP studies?

13 A. Given the ARP study, it would be the introduction of
14 flotation.

15 Q. Okay.

16 A. The introduction of flotation -- the deposit does have
17 wonderful grade products, but like any deposit, there is
18 a lot of low-grade. And in order to capture a lower
19 cut-off grade, to maximise the deposit, you would have
20 to introduce flotation. To do this milling, your
21 cut-off grade would be over 40%, 40% to 60%. To carry
22 out a flotation you could take a much lower grade and
23 maximise your recovery from the deposit.

24 The deposit within it, if you come to it, the
25 deposit is weighted into the exploration area as

17:38

1 a high-grade zone of 60%. So the first area they would
2 be mining would fit this scenario, where you could just
3 do milling with the product. So you could mine it,
4 screen it and mill it, and you have an end product that
5 is suitable. This sort of high grading isn't long-life,
6 but this is the reason to introduce flotation. So you
7 would target the same products, but with a floated
8 product.

9 Another reason to go to the flotation is that they
10 highlighted the pyrite and the graphite within the
11 products. So the graphite and pyrite, into most
12 industries this is not acceptable. So the flotation is
13 necessary to take out the impurities, shall we say, the
14 dirty products.

15 Q. So it was an integral part of the whole process?

16 A. What was?

17 Q. To ferret out the impurities.

18 A. Absolutely, long-term.

19 Q. The sentence that follows says:

20 "Following coverage rates are calculated: ..."

21 Then it talks about credit financing and equity, and
22 it identifies that 60% of those costs were going to be
23 raised by credit financing, and 40% by equity. Do you
24 see that?

25 A. Yes, I see that.

17:39

1 Q. Did you consider the ability of Rozmin to raise capital
2 in your report?

3 A. No, I did not.

4 Q. So your estimate in the report that we saw, the
5 supplemental report, assumes that Rozmin is able to come
6 up with the capital needed?

7 A. Yes, my remit only took it to that point. My remit
8 didn't take me on to financing; it wasn't part of my
9 remit.

10 Q. Okay. And when you said it didn't take it to financing,
11 does it include also you didn't assess the financial
12 risk of the project, or just the -- well, let me put it
13 to you.

14 A. I assessed the technical risk of the project.

15 Q. Okay.

16 A. The financial risk, I had no view of where the financing
17 was coming from, so that was not included in the
18 financial risk.

19 Q. Okay.

20 A. Just the technical risk.

21 Q. Okay, thank you.

22 Now, sir, you have been sitting throughout this
23 hearing for this week and you have heard the term
24 "de-risked" mentioned frequently. Are you familiar with
25 that term?

17:40

1 A. Absolutely, yes.

2 Q. Is it an industry-standard term?

3 A. Terms which mean the same thing, yes.

4 Q. Okay. What would be your understanding of "de-risked"?

5 A. You have to be secure in your knowledge, I would say
6 would be a fair assessment.

7 Q. So would it include being secure on the technical
8 aspects and the financial aspects of a mine?

9 A. Yes. Under the -- if you come out of [Slovakia], out of
10 the Russian bloc, and you move to things such as the
11 JORC Code, since the 2012 JORC Code almost includes
12 that -- now, pre the 2012 JORC Code, it was a JORC Code
13 of 2004, and the previous JORC Code rules were slightly
14 different. But certainly since the 2012 JORC Code came
15 into place, you would have to de-risk the project
16 financially.

17 Q. Okay. I'm going to step ahead on some questions I had
18 about the JORC Code, because I saw you mentioned it in
19 the your report.

20 Could you explain to the members of the Tribunal
21 what the JORC Code stands for and what is its purpose?

22 A. The JORC Code is -- there's JORC Codes of such different
23 names all over the world and slightly different
24 interpretations and standards all over the world. The
25 western bloc, shall we say, Europe -- well, not Europe,

17:42

1 that's stretching it, but the old Europe -- looks on to
2 the JORC Code; Canada, Australia, looks on to the JORC
3 Code.

4 Previously a technical assessment of a deposit
5 meant: if you can mine it, then it's approved. But now
6 the modern JORC Code means that you have to mine it and
7 be able to sell it. That's the changes in the JORC
8 Code. Where before the JORC Code was purely all you had
9 to do was to be able to mine it. That is a very basic
10 premise.

11 In [Slovakia] they mainly work under a Russian code,
12 which is different classifications, but they haven't
13 moved on to the 2012 JORC Code so much. They're still
14 mainly working under like a parallel to the JORC Code of
15 2004, which means: if you can mine it, that's the end of
16 it.

17 There's also different interpretations whether it's
18 an industrial mineral, whether it's diamonds or if it's
19 a metal. The interpretations are different for the
20 three classifications.

21 Q. Now, this JORC Code -- just correct me if I'm wrong --
22 it has objective standards by which you can define
23 a "resource" or a "reserve"?

24 A. Absolutely, yes.

25 Q. Okay. Who relies on these categories of definition for

17:43

1 "resources" and "reserves"?

2 A. Investors.

3 Q. Okay.

4 A. Whether it's banks or privates. Very much in the
5 western world they rely on the JORC Code. Russia and
6 the old CIS bloc do not rely on the JORC Code. They
7 rely on very much the study we're looking at. Studies
8 like this still pertain in the Russian bloc and in
9 neighbouring countries: a much more simplistic approach
10 than the JORC Code.

11 Q. Okay. Are you familiar with the PERC, or the
12 Pan-European Reserves and Resources --

13 A. Yes, JORC really comes as part of that; it's just
14 an umbrella.

15 Q. Okay.

16 A. So am I familiar with its interaction? No. But my
17 understanding and behaviour with it, it's an umbrella
18 for different codes similar to the JORC Code. Because
19 still there's codes within Australia and Canada which
20 are identical to JORC, but it's a different name. So
21 it's an umbrella carrying the codes.

22 Q. So PERC would govern in Europe: Pan-European?

23 A. I'm not sure of its governance.

24 Q. Okay. Are you familiar with CRIRSCO?

25 A. It's similar, it's governance. But equally it's not so

17:45 1 much the governance, it's different banking institutions
2 demand different things. So if you were trying to raise
3 funds in the western area, even if you had a deposit in,
4 shall we say, Russia, or, shall we say, Slovakia, then
5 they would look for JORC Code.

6 Q. Okay.

7 A. But if you went to Russian, they wouldn't be looking for
8 a JORC Code; they would be looking for different
9 parameters.

10 Q. Okay. And would it be accurate to say that JORC and
11 CRIRSCO employ the same kind of definitions for purposes
12 of classifying reserves and resources?

13 A. To my understanding, yes.

14 Q. Okay. I'd like to show you some of the classifications
15 in the CRIRSCO standards, just because I think it might
16 be useful. I tend to learn and understand stuff by
17 being very visual.

18 A. Is it pertaining to this site?

19 Q. What is?

20 A. This code. To this country?

21 Q. To which country?

22 A. Slovakia. Is it pertaining? The code doesn't pertain
23 to this country; they work under the Russian codes.

24 Q. Okay. It may not -- well, let me ask you this. Isn't
25 your testimony that western investors would look at the

17:46

1 standards under CRIRSCO?

2 A. Absolutely. I would agree with you.

3 Q. Okay, good. I want to take you there, please. It would
4 be tab 54, and this would be Exhibit R-0139. I would
5 like you, sir, to turn to page 6 of that exhibit, if you
6 may.

7 A. Yes.

8 Q. Okay. There's a table there at the top, a figure 1 at
9 the top of page 6. Can you describe to us what that
10 figure shows?

11 A. It's the same as the JORC Code. It's a general
12 indication from having confidence to invest and
13 confidence to operate. So you go from a confident level
14 of having a mineral resource, you then go from
15 a confident level to actually invest and operate, and
16 the "Measured" is how you are operating.

17 Q. Now, would it be accurate to state that if you go under
18 "Mineral Resources" and then "Inferred", that would be
19 one end of the pendulum in terms of risk associated with
20 a project?

21 A. No, that's not correct. The pendulum goes further down
22 than that: you have exploration zones, and below that
23 you have exploration potential. So once you get to
24 "Inferred", I would say you're in the middle of your
25 pendulum. You have identified a mineral resource; by

17:49

1 drilling or sampling, you have actually secured that you
2 have a resource.

3 Q. Okay. So you're telling me then, if I understand
4 correctly, that there are two other categories outside
5 of this figure that are riskier than an inferred mineral
6 resource?

7 A. Naturally these are not categories in there. But when
8 you know nothing about a location, there isn't
9 a category for it.

10 Q. Okay.

11 A. For example, a licence with no drilling would not be
12 an inferred licence. So you would have an exploration
13 licence and there would be no category on it. So this
14 is obviously a lot riskier than having an area that's
15 been drilled and you have moved into -- I won't --
16 I wanted to use the word "proven". It's not proven, but
17 you have actually drilled and mapped out an area.

18 It was actually brought up by Mr Corej yesterday.
19 And this is where I've got the same conclusion, which we
20 will get to, I guess. Mr Corej had said he'd worked out
21 that he had got a class 3 classification, which is the
22 Russian classification -- or a Z3 in Russia; we call it
23 C3 -- through his drilling programmes. So he had moved
24 to that classification, and he had moved further by
25 targeting a high-grade area.

17:50

1 So within this deposit you have a big inferred area.
2 "Inferred" doesn't mean you want to mine it yet.
3 "Inferred" tells you you have a very good probability
4 what you see is what you get: it's there. To move to
5 "Indicated", now you have a confidence to go there and
6 mine there. "Measured", you have to actually expose the
7 ore body and sample the ore body to get to "Measured".
8 So this happens when you actually move underground. So
9 once you get to "Indicated", this is when you start
10 developing your business, whether you're going to invest
11 and go underground.

12 In this case they actually drilled an area of more
13 intensity, which within my report -- which I can draw
14 you to in a minute -- I selected, and it's the
15 definition that came out of the reports from Rozmin:
16 they had an extraction area, which they called the
17 "first extraction area". But this gave a target to
18 start at, which they targeted their incline and they
19 targeted their design. In 2000 they made a design to
20 run a ramp into that area. There was no measured
21 material identified.

22 Q. So it wasn't even on this graph, on this chart?

23 A. Measured? No, they did not identify any measured,
24 because you have to actually be underground or expose
25 the ore body.

17:52

1 Q. Did they identify an indicated mineral resource?

2 A. They had a small area which I have considered as
3 indicated, yes.

4 Q. Did you see it on their report, using that --

5 A. They didn't call it "indicated" because they were not
6 working to these standards.

7 Q. Okay.

8 A. Yesterday Mr Corej expanded that he had designed a grid
9 and drilled to the grid. The grid is clearly clear on
10 the drill patterns: you can see the pattern he has
11 followed, and then you can see the concentrated drilling
12 to actually up the levels of confidence for one area.

13 Q. Okay. So you believe it's an indicated mineral
14 resource?

15 A. No, I believe the vast bulk of it is inferred.

16 Q. The vast bulk is inferred?

17 A. The vast bulk is [inferred]. There is a small target --
18 from memory, it's just over 1 million tonnes -- of
19 indicated.

20 Once they identified this high-grade area, they then
21 put a very large borehole -- I couldn't actually work it
22 out from the data, but I believe it to be an 8-inch
23 diameter borehole straight into the middle of that
24 deposit on that area. And that 8-inch borehole wasn't
25 really to sample it; they are fully aware of the grades

17:53

1 from the other boreholes in that area. But that was to
2 get bulk material to bring out and then carry out the
3 testing and the quality inspection of the products in
4 bulk. This isn't a borehole just for visual; this is
5 just to get a bulk sample out to give you the
6 confidence.

7 So you would have the primary drilling pattern,
8 which the grid -- this would then -- they brought to the
9 attention there was a zone of high grade, so this is now
10 moving into an indicated. But to give you the
11 confidence of the indicated, this large borehole
12 quality, then they could carry out the sampling and
13 testing of how they could process it and manufacture it.

14 So this actually brings this area out of the
15 inferred and puts it into an indicated area, a very
16 small area.

17 Q. Very small. Would that --

18 A. Very small, of about 1 million tonnes. This is compared
19 to about 1 billion tonnes of the whole deposit. It's
20 about 1 billion tonnes of mineralised ground.

21 Q. Okay. And --

22 A. So just to get the scope of that small area, that's why
23 I'm just giving the numbers. It's very small. But
24 there's sufficient tonnes there, if you target and mine
25 it, that will generate the funds to expand the mine.

17:54

1 Q. Okay. So you say that this small area, as compared to
2 the rest of the deposit, are indicated mineral
3 resources?

4 A. They were not classified as such by Mr Corej or Rozmin
5 at the time, nor with the current VSK -- VSK's report
6 has classified it as inferred and a target area.

7 Q. Have you classified it like that in your report?

8 A. No, I have not done the calculations. But I can see the
9 amount of drillholes there, the quality of the
10 information and the quality of the products, and in my
11 opinion that small area -- could I show you the plan?

12 Q. Yes, of course. Please.

13 A. It's in my first report. If you turn to page 7.

14 Q. Which report, sir?

15 A. This is my first report.

16 Q. Okay.

17 A. Page 7, there's a plan. This just is a general plan
18 showing the boreholes. The red are showing talc and the
19 blue are showing no talc.

20 Q. Okay.

21 A. In addition to that, I would point out that there's
22 a couple of holes which are named HO2, HO3. There is
23 an HO1, but I couldn't find it, but the data is there.
24 These are hydrological holes which is also -- this is
25 part of giving confidence of what's going in the

17:56

1 deposit, because one of the big constraints and big
2 problems in this deposit is the amount of water. So
3 they had already progressed into tackling how to tackle
4 the hydrology of the project with those holes.

5 But if I just move on to page 12 --

6 Q. In the first report?

7 A. Page 12 in the first report.

8 Q. Okay.

9 A. Figure 5.1 is a repeat of the previous plan that you've
10 looked at, and I put a little yellow square in the
11 middle almost. That is what is classified as the "first
12 extraction area" or the "extraction area". So in the
13 scope of things, it's a small extraction area. And the
14 plan below gives a more closer zoom-in showing the
15 different drillholes within that area.

16 Q. Okay.

17 A. Within that plan, hole number 43, looking at it, there's
18 three in a cluster there which appears maybe as a "Why
19 drill three holes in one area?", but there's method at
20 times in madness. 26 was an old hole which showed
21 good-quality ore. Number 43 was drilled as a check
22 hole. A check hole is really to prove what you have,
23 because number 26 was old drilling, from 10/15 years
24 before. Once they had established that quality and that
25 grid in that area, they drilled this hole number 45,

17:58

1 which was the large-diameter hole to give you the bulk
2 samples to do your testing from.

3 Q. Okay.

4 A. Just to take that -- if I then move on. I will come
5 back. I have taken the drillhole data, and if you look
6 at figure 6.2, I have mapped out an envelope. I have
7 not carried out a full, if you like, JORC report, but
8 I have developed an envelope, which is all part of,
9 like, the first step.

10 So you have an envelope there showing the ore body,
11 and the ore body runs through talc bands which were
12 400 metres down to 2 metres. The DEG report says it's
13 an average of 200, but I wouldn't like to support that.
14 But certainly there is very thick zones. It's like
15 a layered cake of talc/no talc. It's very banded. But
16 what it is, it's all part of the folded structure. So
17 all these bands are in there, captured in there. But
18 all that zone in there, that was identified by Rozmin,
19 has been sort of redeveloped by VSK, and VSK have
20 actually ended up with a larger area of mineralisation
21 than Rozmin now.

22 Q. Okay.

23 A. They have a larger area. So it's about 2.5 kilometres
24 by 1 kilometre. I think now it's 2.7 kilometres by
25 1.2 kilometres. So I can understand the excitement

17:59

1 going back when the first borehole went in: it's just
2 colossal. This is the excitement. But the thing is,
3 it's an industrial mineral. This is not gold, it's not
4 copper; it's a metal. It's not diamonds. So it's an
5 industrial mineral. And industrial minerals, you can
6 get prices for some, but in the main industrial minerals
7 is a product of \$150-200 a tonne, almost whatever
8 industrial mineral it is.

9 Q. How does that relate to, for example, risk? And before
10 I let you answer the question, I would appreciate if you
11 were a little bit shorter in your answer, because we
12 have a lot of ground to cover and I want to make sure we
13 get to it.

14 A. Absolutely.

15 Q. So in terms of risk, when you say that this is
16 an industrial mineral, this is not gold, does that mean
17 that you need to be a little more certain before you go
18 into a project of this kind than, for example, if you go
19 into another type of mineral, for example gold or
20 diamond?

21 A. No, quite the opposite. Gold's price is \$1,340 an ounce
22 this week, so your investigation to get that right is
23 very heavy. Copper prices is about \$4,650. Talc price
24 per tonne is sitting, as a bulk product, at about
25 €130-150 per tonne. So the actual returns per tonne

18:01

1 mined is very different for talc: far, far less.

2 Q. Far less than gold?

3 A. Far less. And that's why the levels of scrutiny, if you
4 like, or the levels of investment -- to raise funds for
5 a gold mine, you can raise hundreds of millions very
6 fast. To raise funds for an industrial mineral project
7 is very hard work, because the industrial mineral
8 market, a lot of the industry is -- there's key players,
9 big players. Whether it's phosphate or whether it's
10 pyrite or china clay or carbonate, there's key players.
11 But equally then there's only key markets to play it
12 into; where the metal business and diamonds, this market
13 is much more open. Gold is a security, diamond is
14 a security.

15 THE PRESIDENT: Mr Mañón, there was a perspective yesterday
16 that we would end today at 6 o'clock. It seems not to
17 be the case, but can you tell us --

18 MR MAÑÓN: I could certainly wrap up this specific topic
19 within 10 to 15 minutes at the most.

20 THE PRESIDENT: Alright.

21 MR MAÑÓN: And then we can continue tomorrow, if that's okay
22 with the Tribunal.

23 THE PRESIDENT: Okay.

24 MR MAÑÓN: So I want to go back to this CRIRSCO graph that
25 we have, which is Exhibit R-0139, page 6. So let's

18:03

1 forget for a minute that there are other categories that
2 are not listed here that would not be even a resource.
3 So if I am looking at this chart and considering this,
4 and I am considering a pendulum of a risk associated
5 with the development of a mining project, which would be
6 the riskiest category, so to speak?

7 A. That's a bit of a leading question, isn't it?

8 Q. I get entitled to do that.

9 A. What's sitting at the bottom? Well, it's me. Well, it
10 is the inferred, but the inferred is actually -- it's
11 the first serious rank --

12 Q. I understand, sir. I just want you to focus on this
13 figure.

14 A. Yes, but it's actually a very unfair question, because
15 it's not showing everything. And to answer that fully
16 I would like to actually read the CRIRSCO report,
17 because I'm sure these other elements are in here.

18 Q. I don't necessarily think that is necessary, because my
19 question is focused on this one figure. I'm sure that
20 if counsel has some other questions, he can address
21 that --

22 A. Then it's the inferred -- no, it's not. The exploration
23 results is the lowest.

24 Q. Okay. And then after the exploration results, we would
25 have what?

18:04

1 A. The inferred.

2 Q. The inferred?

3 A. Because I didn't notice earlier when I looked, but above
4 here you actually have "Exploration Results", which is
5 one of the classifications I gave you earlier, on that
6 chart.

7 Q. Okay.

8 Now I'd like to draw your attention to tab 59,
9 please. This document is Exhibit R-0109, and I believe
10 you were present when we were asking Mr Anderson about
11 this document. This is a communication made by Belmont
12 to its shareholders. Are you in front of the document,
13 sir?

14 A. Yes. Number 59?

15 Q. 59, correct.

16 A. Would you like me to read it?

17 Q. Yes. It starts with "Information Circular".

18 A. That's the page I have.

19 Q. Then I'd like you to go to page 10 on that document.

20 Let me know when you are there, sir. (Pause)

21 A. I am just getting to it. If you bear with me. I have
22 not seen this document before, before I leap into ...

23 Okay, page 10.

24 Q. Excuse me?

25 A. Yes, I'm on page 10.

18:06

1 Q. Oh, good. Can you please go to the [last] full
2 paragraph, that starts with "The mineralization".
3 (Pause) So if you go to that paragraph and you go to the
4 second-to-last sentence of that paragraph, it starts
5 with "The resource". Do you see that? (Pause)

6 A. "The resource appears to the writers to correspond to
7 a 'drill inferred resource' ..."

8 Q. Correct. And that would be the category we were
9 discussing earlier, right? In that figure 1 that we
10 saw, the CRIRSCO standard would be one of the higher
11 risk?

12 A. No, I think you are misguided. It's not a high-risk
13 category; it is a category. It's like comparing
14 colours: which is the brightest colour? "Inferred" has
15 less information compared to "indicated" and "measured".
16 But to bring a deposit to "inferred" can take years, and
17 can take massive investment, depending on the mineral.
18 But once you've got it to "inferred", you have then the
19 confidence. This is when businesses go to investors.

20 Q. I understand.

21 A. Usually a junior company can bring it on to
22 an "inferred" level, even not that far. But a good
23 junior company can take something to "inferred". Then
24 that's the time to start mining, to start developing the
25 deposit.

18:08

1 Q. I understand.

2 A. If it's not inferred, it's premature to develop the
3 deposit.

4 Q. I understand, thank you. I'd like to go back to your
5 first report, if I may, page 16, under section 6.4.
6 There are two bullet points. The second one says:

7 "- 'poorly explored' refers to an area that has some
8 bore holes but not sufficient to clearly define the
9 area, nor establish a resource or minable reserve."

10 Do you see that?

11 A. Yes.

12 Q. So if we go back to the CRIRSCO figure that we were at
13 earlier, then according to your assessment, this "poorly
14 explored" area would not even make that figure,
15 would it?

16 A. Correct.

17 Q. And this "poorly explored" area refers to the entire
18 eastern area of the deposit, does it?

19 A. Not the entire eastern area, no.

20 Q. Okay. Right next to there, on page 17 of your report,
21 there's a graph, and it has what you called earlier
22 an "envelope", I believe?

23 A. Yes.

24 Q. Which would be the "poorly explored" in that graph?

25 A. It's not indicated on that graph. What I have indicated

18:10

1 on that graph is the east and west, to be compatible
2 with the mapping of Rozmin.

3 Q. And if you had to identify the "poorly explored" for us
4 on that graph, which would it be?

5 A. It would be the core of the east.

6 Q. The core of the east?

7 A. The core of the east.

8 Q. I believe there are coordinates here on that graph. Do
9 you see it goes from 312500 all the way to 315000?

10 A. Yes.

11 Q. The core, would it start at the far end of the left end?

12 A. What would?

13 Q. Where would the core start? I just want to make sure
14 that I delineate the core of the east that you were
15 referring to earlier.

16 A. You could say everything to the left-hand side of that
17 middle hole there (indicating). There would be
18 a portion --

19 Q. I'm sorry, if you can verbalise exactly where the line
20 is.

21 A. If somebody could tell me the hole number; I think it is
22 hole number 10. I can look on the plan.

23 Q. We have coordinates there. If you look at the
24 coordinates, the top axis.

25 A. Everything to the east of borehole 40 is definitely

18:11

1 "poorly explored".

2 Q. But on this graphic specifically, I am trying to map it
3 out on this graph.

4 A. That is on the map.

5 Q. I'm sorry, I don't know that my figure shows a borehole
6 number.

7 A. Yes, there's a number on the top.

8 Q. So it would be the second borehole from the left?

9 A. Yes, that's what I was pointing out. Sorry, I couldn't
10 read the number until I got to the chart.

11 Q. So everything from that second borehole to the left you
12 would classify as "not sufficient to establish
13 a resource of minable reserve"; correct?

14 A. Correct.

15 Q. And then everything to the right would be
16 an "inferred" --

17 A. No, it's not that simplistic. It would be based around
18 the holes. What I have defined is that the eastern area
19 is about half a billion tonnes of mineralised rock. So
20 the east and the west volumes of rock is roughly the
21 same.

22 But what has been "well explored" is the western
23 area. The western area, which is defined on map 5.1,
24 the western area is certainly "well explored". But the
25 nature of having holes on the boundary, that "well

18:13

1 explored" would fall into the eastern area slightly.

2 Q. And when you say "well explored", are you talking about
3 indicated mineral resource?

4 A. It's in the main because they have carried out
5 a systematic drilling pattern.

6 Q. So you don't believe that it is an "inferred", that
7 well-mined area?

8 A. No, no, no. The well-mined area ...

9 Q. I just want to make sure, the well-mined area for you,
10 if it's an inferred or indicated resource.

11 A. It's indicated. The yellow area is what I would look to
12 be indicated, with the number of holes there.

13 Q. So your assessment differs from the document that we saw
14 earlier that Belmont circulated to its shareholders?

15 I have it here. R-0109 says "inferred resource".

16 A. But indicated is better than inferred.

17 Q. I understand that. But they didn't tell their
18 shareholders that it was indicated?

19 A. What they were telling their shareholders: that whole
20 western area was inferred. They were telling their
21 shareholders, from what I read here, that the whole area
22 is the inferred. And that inferred area, I haven't even
23 gone that far to explain. That, in volume, is colossal.
24 I haven't even gone to that extent. I have only picked
25 this small area, which is about 1.5 million tonnes of

18:14

1 talc, and upgraded it because of the concentration of
2 drilling, also the bulk sampling by the big boreholes,
3 and then the testing of the bulk sampling, to give me
4 the confidence that I can actually process it and handle
5 it commercially.

6 Q. Okay. I want to go back to R-0109 -- and I think this
7 is the last topic I am going to address today -- where
8 we saw that the document says "inferred resource".
9 Page 10, R-0109. If you want, I will let you read this,
10 and then I am going to ask you a question. I want you
11 to tell me there if you see the term "indicated
12 resource".

13 A. No.

14 Q. You don't?

15 A. I've already read it. "Indicated" is not there. They
16 are showing that whole area as inferred.

17 Q. Okay, thank you.

18 A. But a greater area than I have indicated is inferred.

19 Q. But it doesn't appear here?

20 A. Appear where?

21 Q. In this document R-0109 that we just saw.

22 A. "Indicated" does not appear in here, only "inferred",
23 I agree.

24 MR MAÑÓN: Thank you. I think we are done for tonight,
25 Mr Chairman.

18:15 1 THE PRESIDENT: Thank you. So we meet tomorrow at 9 o'clock
2 to continue your examination.
3 MR HILL: Thank you very much. Sorry, is it possible for me
4 to read the CRIRSCO preamble before tomorrow morning, as
5 it's being elaborated on and discussed? Can I have
6 a copy of that, please, to take away?
7 MR MAÑÓN: Yes, it's part of the record. Sure.
8 MR HILL: Thank you.
9 MR MAÑÓN: I think, Mr Chairman, since we are going to be
10 breaking for the evening, if you could instruct the
11 expert not to discuss his testimony.
12 THE PRESIDENT: I don't give that indication to experts
13 because they are independent.
14 MR MAÑÓN: Okay.
15 THE PRESIDENT: But of course you have to ...
16 MR HILL: Who have I got to discuss it with? I could
17 discuss it --
18 MR MAÑÓN: We could talk about it!
19 MR HILL: Is that an invitation?
20 MR MAÑÓN: Certainly not!
21 Thank you, Mr Chairman.
22 (6.17 pm)
23 (The hearing adjourned until 9.00 am the following day)
24
25