SUPREME COURT OF QUEENSLAND

CITATION:	*QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd & North Queensland Pipeline No 2 Pty Ltd; QNI Metals Pty Ltd v North Queensland Pipeline No 1 Pty Ltd & North Queensland Pipeline No 2 Pty Ltd* [2017] QCA 297
PARTIES:	**In Appeal No 5364 of 2017 & Appeal No 5365 of 2017:** **QNI RESOURCES PTY LTD** ACN 054 117 921 (appellant) **v** **NORTH QUEENSLAND PIPELINE NO 1 PTY LTD** ACN 100 946 281 (respondent) **NORTH QUEENSLAND PIPELINE NO 2 PTY LTD** ACN 100 946 263 (respondent) **In Appeal No 5369 of 2017 & Appeal No 5370 of 2017:** **QNI METALS PTY LTD** ACN 066 656 175 (appellant) **v** **NORTH QUEENSLAND PIPELINE NO 1 PTY LTD** ACN 100 946 281 (respondent) **NORTH QUEENSLAND PIPELINE NO 2 PTY LTD** ACN 100 946 263 (respondent)
FILE NO/S:	Appeal No 5364 of 2017 Appeal No 5365 of 2017 Appeal No 5369 of 2017 Appeal No 5370 of 2017 SC No 2742 of 2017 SC No 2743 of 2017 SC No 2744 of 2017 SC No 2745 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Queensland Supreme Court – Unreported, 23 May 2017 (Byrne SJA)
DELIVERED ON:	5 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2017

JUDGES: Holmes CJ and Fraser and McMurdo JJA

ORDERS: **1. Each of the four appeals dismissed.**

2. Appellants to pay the respondents' costs.

CATCHWORDS: CORPORATIONS LAW – STATUTORY DEMANDS – where the appellants were each the subject of two notices of statutory demand served under s 459E of the *Corporations Act* 2001 in respect of monies said to be owed under a gas transportation agreement (GTA) – where the appellants unsuccessfully applied to have the statutory demands set aside, arguing that there were genuine disputes as to: whether they were bound by the GTA, whether they were obliged to pay service charges where gas supplies were reduced by reason of a force majeure event, whether they were properly invoiced for the service charges and whether the respondents' invocation of a contractual dispute resolution mechanism amounted to an acknowledgment that there was a genuine dispute as to their liability, or provided "some other reason" for setting aside the demands – where the appellants each now appeals from the dismissal of its applications to set aside the statutory demands – whether the primary judge applied the wrong standard to the question of whether there was a genuine dispute by deciding the merits of the dispute and construing contractual terms – whether competing views were open as to the construction of terms in the contract concerning liability and the obligation to pay where supplies were reduced by reason of a force majeure event – whether there was any genuine dispute as to whether the appellants were bound by the GTA – whether the respondents' invocation of the contractual dispute resolution mechanism was an acknowledgement of a genuine dispute as to liability – whether the discretion as to whether to set aside the demands for "some other reason", identified as the respondents' invocation of the contractual dispute resolution mechanism, was correctly exercised – whether the dispute as to whether the service charges were properly invoiced was raised in the supporting affidavit – whether the appeals should be allowed

Corporations Act 2001 (Cth) s 459E, s 459G, s 459H, s 459J

COUNSEL: P Zappia QC, with D Mackay, for the appellants
G Beacham QC, with B O'Brien, for the respondents

SOLICITORS Alexander Law for the appellants
King & Wood Mallesons for the respondents

[1] **HOLMES CJ:** The applicants, QNI Resources Pty Limited and QNI Metals Pty Limited ("QNI Resources" and "QNI Metals") were each the subject of a notice of statutory demand served under s 459E of the *Corporations Act* 2001 (Cth) by each of the respondents (the "Pipeliners") in respect of monies said to be owing under a gas transportation agreement ("GTA"). QNI Resources and QNI Metals each now

appeals from the dismissal of its applications to set aside the two statutory demands served on it. Because the factual matrices were similar and the arguments identical in all four applications, the judge at first instance delivered a judgment in the application by QNI Resources to set aside the demand of North Queensland Pipeline No. 1 Pty Ltd, with orders of dismissal made, by agreement, in the remaining applications for the same reasons. Similarly, these appeals were argued by reference to that matter, with the result to prevail in all the appeals.

The relevant statutory demand provisions

[2] Section 459G of the *Corporations Act* permits a company to apply for the setting aside of a statutory demand and prescribes how the application is to be made:

> "**459G Company may apply**
>
> (1) A company may apply to the Court for an order setting aside a statutory demand served on the company.
>
> (2) An application may only be made within 21 days after the demand is so served.
>
> (3) An application is made in accordance with this section only if, within those 21 days:
>
> (a) an affidavit supporting the application is filed with the Court; and
>
> (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company."

Depending on the ground relied on, it may then fall to the court to determine whether there is, within the meaning of s 459H(1)(a),

> "a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates"

or an off-setting claim (s 459H(1)(b)). If so, the court must calculate the substantiated amount of the demand, and if it is less than the statutory minimum, set the demand aside. Alternatively, s 459J(1)(b) gives the court the discretion to set aside a statutory demand where it is satisfied that it should do so because of a defect causing substantial injustice, or for "some other reason".

The Gas Transportation Agreement

[3] QNI Resources and QNI Metals were parties with a third company, Queensland Nickel Pty Ltd ("Queensland Nickel"), in the Queensland Nickel Joint Venture, which operated a nickel refinery. Queensland Nickel's role was to manage the business of the joint venture; it had, among other things, the power to acquire services for the joint venture. It was also given power to act as agent of the joint venturers in buying and shipping nickel ore from overseas for processing at the joint venture's refinery. Under the GTA, the Pipeliners were to construct and operate a pipeline for the transporting of gas to the refinery.

[4] Clause 1 of the GTA identified the parties to it:

> 1. **PARTIES**
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> Between:
>
> (a) **Enertrade (NQ) Pipeline No 1 Pty Ltd** ABN 64 100 946 281 ("**ENQPl**") and **Enertrade (NQ) Pipeline No 2 Pty Ltd** ABN

60 100 946 263 ("**ENQP2**") both of Level 10, Comalco Place, 12 Creek Street, Brisbane, Queensland (collectively ENQPI and ENQP2 are referred to as the "**Pipeliners**" and each as a "**Pipeliner**"); and

(b) **Queensland Nickel Pty Ltd** ABN 85 009 842 068 of Level 14, Riverside Centre, 123 Eagle Street, Brisbane, Queensland in its capacity as manager of the Queensland Nickel Joint Venture and as agent for and on behalf of the joint venture participants QNI Resources Pty Ltd ABN 14 054 117 921 ("**QNR**") and QNI Metals Pty Ltd ABN 56 066 656 175 ("**QNM**") (referred to as "**QNI**")….

[5] Under cl. 10 of the GTA, QNI was to provide weekly nominations of the quantity of gas it required to be delivered each day for the next week, and under cl. 3.1, the Pipeliners were to provide the service of gas transportation where nominations had been made in accordance with the contract. The latter clause provided that the gas transportation service consisted of these elements: receiving the nominated quantity of gas, transporting it to delivery points, and delivering it at the delivery point. Clause 5 of the GTA required QNI to pay specified service charges in accordance with cl. 21. Clause 21 set out the procedure by which the Pipeliners were to render their bills to QNI each month and the way in which payment was to be made.

[6] Clause 20.4 of the GTA permitted a party to give notice of a force majeure event preventing it from meeting an obligation under the contract, in which case the obligation was suspended until the party was able to perform it: the "Suspension Period". Clause 20.5 provided for what was to happen if the gas transportation service, which was included in "QNI Services", was curtailed:

20.5. Payment obligations

If QNI Services are curtailed in accordance with clause 20.4, QNI's Service Charges will, subject to clause 5.13, be unchanged, but the Pipeliners will record the actual quantities of gas received and delivered on behalf of QNI during the Suspension Period. Subject only to clause 5.13 in relation to a Force Majeure Event affecting the Pipeliners, QNI's obligation to pay charges to the Pipeliners will not be suspended, reduced or otherwise affected by a Force Majeure Event.

Clause 5.13 provided for a rebate payable to QNI if it paid more than it should over the course of a contract year.

[7] Clause 32 provided a dispute resolution procedure, to be commenced by giving notice "identifying the dispute or difference", following which the parties' representatives had seven days to try and resolve the dispute and, in the event there was no resolution within 14 days of the dispute notification, the parties' chief executive officers were to meet to try to resolve it. After that, the parties could agree on arbitration or expert resolution.

[8] The four statutory demands claimed moneys owed for gas transportation, for which, pursuant to clause 41.6.3 (b)(i) of the GTA, QNI Metals and QNI Resources were said to be liable. Clause 41.6.3 provided:

41.6.3 Several Liability of QNI

In this contract:

(a) to the extent that an obligation can not be performed severally by QNI (an "**Integral QNI Obligation**"), QNR and QNM shall be jointly liable to perform that Integral QNI Obligation; and

(b) all liability to pay, or cause to pay, an amount of money (including, for avoidance of doubt, liability to pay money in respect of failure to perform an Integral QNI Obligation) shall:

(i) while the Queensland Nickel Joint Venture exists between QNR and QNM and the aggregate of the percentage interests each such person holds in that joint venture is 100%, be borne by QNR and QNM severally (and not jointly or jointly and severally), according to the percentage interests which each holds from time to time in the Queensland Nickel Joint Venture which, at the date of this contract are:

A. QNR: 80%; and

B. QNM: 20%; or

(ii) Otherwise, be borne by QNR and QNM jointly and severally.

The applications to set aside the statutory demands

[9] The applications of QNI Metals and QNI Resources to set aside the statutory demands were expressed to be made "on the facts stated in the supporting affidavit". That affidavit was made by Mr Iskander, the principal of the firm of solicitors acting for QNI Resources and QNI Metals. In it, he described those companies as parties to the GTA with Queensland Nickel, the latter in its capacity as a manager of the Queensland Nickel Joint Venture and as agent for QNI Resources and QNI Metals. (In a later affidavit, Mr Iskander said that his description of the parties in that way was merely his opinion, formed when he reviewed the GTA.) He identified the relevant dispute as whether any amounts were owing, the joint venture parties having given notice that a force majeure event under the GTA had occurred. Mr Iskander deposed that the Pipeliners had disputed the occurrence of the force majeure event, had given notice of a dispute regarding outstanding invoices and had invoked the dispute resolution procedure.

[10] Mr Iskander exhibited to his affidavit the GTA, the joint venture agreement, letters from the Pipeliners about the amounts outstanding, correspondence about the force majeure claim, the statutory demands, and the Pipeliners' notice of dispute and letters relating to it. Later, outside the 21 day period prescribed for filing a supporting affidavit, Mr Iskander filed two supplementary affidavits, the first of which annexed a number of exhibits including invoices rendered by the Pipeliners, with their covering letters.

[11] The aspects of dispute relied on before the primary judge were:

1. whether QNI Resources and QNI Metals were bound by the GTA, and, in a related point, whether "QNI", for whose obligations QNI Resources and QNI Metals were said to be liable under clause 41.6.3, encompassed those companies as well as Queensland Nickel;

2. whether clause 20.5 of the GTA, which provided that the service charges would be unaffected by curtailment of the services as a result of a force majeure event, applied where no services were provided;

3. whether the Pipeliners had properly given invoices for the service charges in accordance with the procedure under clause 21 of the GTA;

4. whether the fact that the Pipeliners had invoked a contractual dispute resolution mechanism amounted to an acknowledgement of a genuine dispute as to the appellants' liability or constituted "some other reason" for setting the demands aside.

The primary judge's decision

[12] The first of the issues considered by the primary judge was whether there was a genuine dispute as to the compass of cl. 20.5 of the GTA, which provided that service charges were to remain unchanged if services (including the gas transportation service) were curtailed.[1] The appellants argued that "curtailed" meant reduced, not completely stopped; hence, the clause did not apply where, as in this case, services were ceased entirely. The primary judge rejected the argument. There was no reason to give "curtailed" such a restrictive meaning; it was contrary to its ordinary usage; and nothing in cl. 20.5 supported it. To the contrary, "curtailed" was defined in the GTA as meaning "interrupted or reduced". That could only mean the alternatives of a complete cessation or a reduction of services. Consequently, there could be no dispute as to QNI Resources' liability to pay charges based purely on the occurrence of a force majeure event.

[13] The primary judge then turned to the dispute as to whether QNI Resources was a party to the GTA or otherwise liable under it to pay the debt asserted in the relevant notice of statutory demand. His Honour observed that by the end of the argument it had been:

> "common ground that [QNI] Resources is not a party to the GTA. What is in contest is whether it is nonetheless liable on the footing that its agent for the purpose, Queensland Nickel, has, by entering into the GTA, committed [QNI] Resources to the payments the subject of the claimed debt".

The appellants had sought to argue that cl. 1(b) of the GTA served to describe Queensland Nickel's role under the joint venture agreement, rather than to identify the capacity in which it executed the GTA. The primary judge rejected an attempt to use the joint venture agreement in aid of that argument, because there was no evidence that it had been available to the Pipeliners when the GTA was concluded.

[14] His Honour expressed his view that cl. 1(b) of the GTA made it clear that "QNI" referred to both Queensland Nickel and the joint venture participants, QNI Resources and QNI Metals, for which Queensland Nickel acted as agent. The contention that QNI Resources was not bound by the promises to which its agent

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[1] It was accepted for the purposes of the argument that force majeure events - a combination of circumstances which prevented the refinery from being operated and gas obtained for it - had occurred within the meaning of cl 20.4 of the GTA, and notice of them had been given to the Pipeliners; interestingly, in light of a later argument about the relevance of post-contractual conduct, by QNI Resources and QNI Metals.

had committed it through the GTA failed. There was no evidence to suggest that QNI Resources could establish at trial that it had not authorised Queensland Nickel to conclude the GTA on its behalf and commit it to the contractual promises contained in the agreement.

[15] Clause 5 provided for the payment of service charges by QNI and cl. 21 for the rendering of bills to QNI and when and how it was to make payment. Clause 41.6.3(b)(i) then obliged QNI Resources and QNI Metals to meet any liability arising from QNI's failure to perform its obligations; which accorded with the understanding derived from cl. 1(b) of "QNI" as including QNI Resources. Clause 41.6.3(b)(i) made no sense unless it was intended to affect contractual relations between QNI Resources and the Pipeliners. Contextual anomalies such as the use of singular verbs or the reference to "the Board of Directors of the QNI" were insignificant, particularly given that GTA contained the standard provision to the effect that the singular included the plural.

[16] The arguments about invoicing requirements turned on the fact that the Pipeliners were required by cl. 21.1 to "give QNI a bill" each month. Copies of invoices exhibited to Mr Iskander's first supplementary affidavit were addressed to Queensland Nickel Pty Ltd, although Queensland Nickel had ceased to act as manager of the joint venture when it went into administration in January 2016. That contention, his Honour observed, raised matters of fact; but the supporting affidavit[2] had not raised non-satisfaction of cl. 21, either expressly or inferentially. Because the contention had not been raised by the supporting affidavit, it was not open to QNI Resources to rely on it.

[17] In September 2016, the Pipeliners had sent a notice to QNI Resources and QNI Metals commencing the formal dispute resolution procedure under the GTA. It referred to a dispute in "relation to unpaid charges validly invoiced under the GTA and QNI's claims of an alleged Force Majeure Event". The procedure was not completed by the hearing of the application in April 2017: no meeting of chief executive officers had taken place. The appellants' contention before the primary judge was two-fold: having issued the notice identifying the dispute, the Pipeliners could not assert that there was not a genuine dispute; or, alternatively, there existed "some other reason" to set aside the statutory demand, which was that the Pipeliners should not be permitted to use the mechanism of statutory demand to "subvert" the contractual regime for dispute resolution.

[18] But the primary judge did not accept that the engagement of the dispute mechanism amounted to any acknowledgement that there was merit to the dispute. The notified dispute was the failure to pay invoices for amounts owing; it did not involve any question about the debtors' liability. And the mere circumstance that cl. 32 had been engaged in an effort to obtain payment was not a reason to preclude the Pipeliners from using the statutory demand procedure.

The grounds of appeal

[19] The notice of appeal set out alleged errors on the part of the primary judge, which were, paraphrased and summarised:

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[2] At various points where this finding by his Honour is discussed, I refer to Mr Iskander's "supporting affidavit", by which I mean that it was filed for the purpose of meeting the s 459G (3)(a) requirement of an affidavit supporting the application. That does not indicate any acceptance that it did meet that requirement; that question, the subject of an appeal ground, is dealt with later.

1. applying the wrong standard to the question of whether there was a genuine dispute by deciding the merits of the dispute and determining complex questions of contractual construction in circumstances where competing views were open;

2. failing to find a genuine dispute as to the liability of QNI Resources and QNI Metals, when it was accepted that they were not parties to the GTA;

3. failing to find that there was a genuine dispute as to the proper construction of the expression "QNI" and refusing to have regard to extrinsic evidence as to the meaning of the term;

4. failing to find that there was a genuine dispute as to whether Queensland Nickel had purported to bind QNI Resources and QNI Metals to the GTA, and, if so, whether it had authority to do so;

5. failing to find a genuine dispute as to the meaning and effect of clause 20.5 and whether it imposed an obligation on QNI Resources and QNI Metals where no services were provided as a result of a force majeure event;

6. failing to find that there was a genuine dispute as to QNI Resources' and QNI Metals' liability where the Pipeliners had invoked a contractual dispute resolution mechanism;

7. failing to set aside the statutory demands under s 459J on the basis that a dispute resolution mechanism had been invoked and was still under way when the demands were issued;

8. finding that the appellants could not argue the cl. 21 point relating to the provision of invoices because it had not been raised in the supporting affidavit.

Alleged application of the wrong standard

[20] Under s 459H, the task for the court is to determine whether there exists a genuine dispute about the debt in question; it is not to determine whether the debt exists. The bar for establishing a genuine dispute is not set high; a "plausible contention requiring investigation" will suffice.[3] But as Barrett J observed in *Drillsearch Energy Ltd v Carling Capital Partners Pty Ltd*,[4] determination of a legal argument may be appropriate where the argument is "patently feeble". The appellants' first ground of appeal was that the primary judge had wrongly proceeded to deal with complex questions of construction of the GTA as to which there were competing views open, and to determine a question of fact: whether it was intended that the appellants should be bound by the agreement. Whether that complaint has any force will depend on an examination of conclusions by his Honour which are the subject of other grounds of appeal, so I will put it to one side in order to consider them.

Disputes as to whether QNI Resources and QNI Metals were parties to the GTA, or had assented to it, and the meaning of "QNI"

[21] The appellants contended, at first instance and here, that Queensland Nickel alone had contracted with the two Pipeliners. The reference to Queensland Nickel as

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3 *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 at [787].

4 [2009] NSWSC 1192 at 45.

manager and agent in cl. 1(b) of the GTA was merely descriptive of its role in the joint venture, which, as the joint venture agreement showed, was to act as manager, incurring liabilities later to be funded by the joint venturers; it was appropriate, accordingly, that it should incur obligations under the GTA. On appeal it was said that the description in cl. 1(b) of Queensland Nickel's role served to make it clear that QNI Resources and QNI Metals had a beneficial interest in the contract, pursuant to the joint venture agreement. And, under the joint venture agreement, it was to act as the joint venturers' agent in buying nickel ore from overseas sources; hence the reference to agency in cl 1(b). It was a reasonable inference from the fact that the joint venture agreement was referred to in the GTA that the Pipeliners were aware of its content when they entered the latter agreement.

[22] Only Queensland Nickel executed the GTA, and the execution clause did not state that it was doing so as agent for QNI Resources and QNI Metals. It was suggested that there was a significant distinction to be drawn between the identification in cl. 1 of the Pipeliners and Queensland Nickel, whose names were in bold (indicating that they were parties) and that of QNI Resources and QNI Metals, the names of which were not in bold.

[23] References in the GTA indicated (it was argued) that the expression "QNI" referred only to Queensland Nickel. In cl. 1, where an expression was to encompass more than one party (in cl. 1(a), the Pipeliners), it was specified that they were "collectively" referred to; in contrast, in cl. 1(b), the word "collectively" did not appear in reference to QNI. Clause 27 of the GTA, which dealt with rights of termination, contained two references to "a resolution of the Board of Directors of QNI" (in connection with QNI's giving the Pipeliners such a document if it was decided to close the refinery). That was consistent only with QNI being a single corporate entity. It was also suggested that the use of singular forms of verbs in cl. 2 of the GTA (for example, "if QNI requires a service"; or, "QNI gives notice") indicated that a single entity was contemplated. That was to be contrasted with the use throughout the contract of a plural verb with the expression "Pipeliners".

[24] During the course of argument, the primary judge observed that it did not matter whether the appellants were parties to the GTA; the question was whether they had been bound by their agent to perform promises under it. Counsel for the Pipeliners agreed with that proposition. It was at that point that his Honour made the observation, repeated in his reasons, that it was common ground that QNI Resources and QNI Metals were not parties to the agreement.

[25] The appellants argued here that from the concession that the two companies were not parties, it must follow that Queensland Nickel could not have entered the GTA as agent for them, because had it done so, they must have been parties. That made it unnecessary for the primary judge to consider whether Queensland Nickel had authority to bind QNI Resources and QNI Metals. Nonetheless he had done so, and had thereby answered the wrong question, addressing his reasons to whether Queensland Nickel had authority to act as the appellants' agent in entering the GTA, rather than whether it had purported to do so. In respect of the latter issue, he had recognised that there was a genuine dispute, saying in the course of argument that the two companies had "not acknowledged, in any way, QNI's assertion that QNI is their agent for any purpose". (In context, it is clear that by "QNI" his Honour here meant to refer to Queensland Nickel.)

[26] It was further put that the concession that QNI Resources and QNI Metals were not parties had precluded them from raising post-contractual conduct which would have established the fact. A later amending agreement named only Queensland Nickel as a party with the Pipeliners and was executed only by Queensland Nickel and the Pipeliners, although cl. 29 of the GTA permitted its amendment only in writing signed by the parties. A letter from the Pipeliners which had accompanied the amended agreement described the GTA as made between Queensland Nickel and the Pipeliners. Clause 8 of the GTA required the Pipeliners and QNI to act in accordance with a "User Manual" setting out certain procedures to be adopted. The manual, of which a December 2010 (post-contractual) iteration was in evidence, defined the GTA as an agreement between "Queensland Nickel Pty Ltd (QNI)" and the Pipeliners. Invoices had been sent to Queensland Nickel, with covering letters again describing the GTA as made between "Queensland Nickel Pty Ltd (QNI)" and the Pipeliners. After Queensland Nickel had gone into administration, the administrator had called on QNI Metals and QNI Resources to meet certain joint venture expenses and had annexed a list of proofs of debt lodged in respect of Queensland Nickel, which included claims by the Pipeliners.

[27] The primary judge had relied on cl. 41.6.3(b) as creating a liability in QNI Resources and QNI Metals to meet QNI's obligation to pay service charges as imposed by cl. 5 and cl. 21. But the fact that the contract contained a provision purporting to bind the appellant companies did not mean that it had done so. On his Honour's construction of cl. 41.6.3(b), any obligation on the part of Queensland Nickel would be removed; which could not be reconciled with the proposition that "QNI" meant that company as well as QNI Resources and QNI Metals.

Conclusions

[28] The argument that, once it was accepted that QNI Resources and QNI Metals were not parties to the GTA, the primary judge must have found a genuine dispute as to their liability, can be put to rest at once. His Honour reiterated throughout the course of argument and in his judgment that he considered them to be bound by the terms of the GTA because Queensland Nickel had entered it on their behalf as their agent. The correctness of his rejection, in that circumstance, of the term "party" might be questioned, but it is beside the point. It is plain that he had concluded that they were parties, in the legal sense of being bound by the agreement. His Honour's statement in the course of argument that the appellants had not acknowledged that Queensland Nickel was their agent was put for the purposes of eliciting submissions. It certainly did not amount to an acceptance, in advance of his construction of the GTA, that there was a genuine dispute as to whether Queensland Nickel was purporting to act as their agent.

[29] The primary judge did not fail to consider the argument that Queensland Nickel had not purported to enter the contract as agent for the appellants. He concluded that it was not tenable by resolving the question of what cl. 1(b) meant: "QNI" was a reference to all three parties, QNI Resources, QNI Metals and Queensland Nickel, the last being the agent for the other two. His Honour dealt separately with the question of actual agency, noting that there was no evidence on the point. That was plainly correct. In none of his affidavits did Mr Iskander suggest a lack of authorisation; nor was there anything in the exhibited material to that effect.

[30] The appellants' contention that his Honour ought not to have resolved the construction question against them, but should instead have found that there was a genuine dispute as to whether Queensland Nickel had purported to bind them as disclosed principals, must fail. Clause 1(b) bears no other sensible meaning. It identifies the capacities in which Queensland Nickel is entering the contract: in its own right as manager of the joint venture agreement and also (the second "as" is significant) as agent for and on behalf of QNI Resources and QNI Metals.

[31] The appellants relied on authority for the proposition that the form in which a contract is executed may indicate who is to be bound by it,[5] and that where a signature is appended without qualification as to the signer's capacity it may, in the absence of contrary indication, be assumed that the signer is bound as principal.[6] There is no issue about that; but it is not to the point here. Queensland Nickel was a principal, but cl. 1(b) made it clear that it was also entering the contract on behalf of QNI Metals and QNI Resources. That being so, it was unnecessary to reiterate that fact. And if Queensland Nickel had authority to sign on their behalf, there was no necessity for the two companies to execute the contract.

[32] In the absence of any evidence that the Pipeliners were aware, not just of the joint venture agreement's existence but its contents, its provisions could hardly constitute part of the surrounding circumstances relevant to the parties' intention in forming the GTA. Even if one were to refer to the joint venture agreement, Queensland Nickel's ability to incur liabilities added nothing to what appeared on the face of the GTA. The fact that under the joint venture agreement Queensland Nickel was agent for the limited purpose of buying nickel ore overseas was entirely irrelevant to the GTA, its purposes and the promises it contained. There was simply no reason to mention it in the GTA; nor was there any reason to mention QNI Resources and QNI Metals at all, if they were not to be bound by the GTA.

[33] The fact that the phrase "referred to as 'QNI'" appears at the end of cl. 1(b) suggests that "QNI" means to embrace all the identities identified in the sub-clause. That is not of itself of great weight, because it might simply be the product of clumsy drafting; but the existence of cl. 41.6.3 puts the matter beyond doubt. It is self-evident that it does not follow from the existence of a clause purporting to bind an entity that it is so bound; but in this case, the appellants raised no challenge to Queensland Nickel's authority to act as agent for them, so that the determination of whether it had in fact bound them turned on what could be ascertained from the GTA itself.

[34] The appellants proposed that "QNI" where it appeared in the GTA was a reference to Queensland Nickel alone; but the reference in cl. 41.6.3 to several performance of QNI obligations is entirely inconsistent with that suggestion. And the clause had no purpose if it were not to impose obligations and liabilities on QNI Resources and QNI Metals in their role as members of QNI. The contention that the effect of reading cl. 41.6.3 in that way was to remove all obligation from Queensland Nickel is wrong: cl. 41.6.3(a) left unaffected any obligation which was capable of being performed by it alone as a member of QNI. As a further indication that "QNI" could not possibly have been limited to Queensland Nickel, cl. 6 required "each

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5 *Clark Equipment Credit of Australia Ltd v Kiyose Holdings Pty Ltd* (1989) 21 NSWLR 160 at 174.

6 *James Thane Pty Ltd v Conrad International Hotels Corporation* [1999] QCA 516 at [60].

QNI participant" to remain "creditworthy"; no doubt to ensure that the Pipeliners' recourse against them was worth something.

[35] In the face of the unequivocal statement in cl. 1(b) about the capacity in which Queensland Nickel entered the GTA and the intent to bind the appellants manifested in cl. 41.6.3, other usages and forms of names in the contract are inconsequential. In any case, the argument that there is something to be gleaned from the fact that the names of the Pipeliners and Queensland Nickel were printed in bold becomes less compelling when one observes that the shortened forms ("QNR" and "QNM") of the appellants' names were, in fact, also in bold. At the highest, it suggests a rather haphazard approach to the use of bold print, capable of pointing either way. And since "QNI" was being used as a collective term, and thus was singular in form, the use of a singular verb in connection with it was, as a matter of syntax, irreproachable; "Pipeliners", on the other hand, was plural and appropriately given a plural verb. While the reference to the "Board of Directors of QNI" was an oddity, in light of the other clear indications in cl. 1(b) and cl. 41.6.3, it cannot support an alternative construction so as to found a genuine dispute about whether Queensland Nickel was purporting to enter the contract as agent for the appellants.

[36] Given the unambiguousness of cl. 1(b) in making it clear that Queensland Nickel entered the contract as agent for and on behalf of QNI Resources and QNI Metals, there was no occasion to resort to evidence of post-contractual conduct. Such evidence may be admissible to determine the identity of the parties to a contract where it is also relevant to the existence of the contract itself.[7] It is less clear whether evidence of the kind is admissible solely to determine whether a particular entity is a party to an agreement the existence of which is not in doubt. But even if that evidence were taken into account in this case, there is nothing which could reasonably be inferred from it as to the intended parties.

[37] References in correspondence or the amending agreement or the 2010 version of the user manual to the agreement as being between the Pipeliners and Queensland Nickel were consistent with a recognition that the latter acted on behalf of QNI Resources and QNI Metals. The amending agreement, anyway, recites the fact that the original agreement was made by Queensland Nickel in its capacity as manager of the joint venture and as agent for and on behalf of QNI Resources and QNI Metals. The fact that it was executed only by Queensland Nickel was unremarkable if it had the authority to do so on behalf of the appellants. The standard covering letters which had accompanied the invoices and referred to "Queensland Nickel Pty Ltd (QNI)" as a party with the Pipeliners in the GTA were, like the terminology in the user manual, also consistent with Queensland Nickel's being treated as the representative of QNI. None of those references, which were at best ambiguous, could be regarded as constituting an admission by the Pipeliners that QNI Resources and QNI Metals were not bound by the GTA. Nor could the fact that the Pipeliners had lodged proofs of debt against Queensland Nickel reasonably be taken as an admission that QNI Resources and QNI Metals were not liable.

[38] The primary judge did not err in finding that there was no genuine dispute as to whether Queensland Nickel purported to, and was authorised to, enter the GTA on behalf of QNI Resources and QNI Metals; as to the meaning of "QNI" as including

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7 *Nurisvan Investment Ltd v Anyoption Holdings Ltd* [2017] VSCA 141.

all three companies; or as to whether QNI Resources and QNI Metals were liable as being bound by the GTA.

The dispute as to the construction of clause 20.5

[39] The appellants contended here, as they did before his Honour, that cl. 20.5 of the GTA was ambiguous; it was arguable that it applied only where the services were to be reduced, and not, as in their situation, ceased. The reference in cl. 20.5 to the Pipeliners recording the actual quantities of gas received and delivered during a suspension period indicated that it contemplated a reduction, rather than cessation, of delivery. In addition, cl. 4.6 of the GTA permitted the Pipeliners, where a force majeure event occurred, to "curtail the provision of all or part of" a service; the reference to "all or part" would be redundant if "curtail" carried with it the alternative meanings of entire or partial cessation of a service.

Conclusion

[40] But the last submission ignores cl. 3.1, which provided that the gas transportation service consisted of distinct elements; receiving the nominated quantity of gas, transporting it to delivery points, and delivering it at those delivery points. The Pipeliners could reduce or cease all of the service or a part – the receipt, the transport or the delivery. In order to calculate the cl. 5.13 rebate, it was necessary to establish what actually had been delivered in suspension periods – which might be nothing – so the recording requirement in cl. 20.5 offers no assistance in construction. The only available conclusion is that reached by the primary judge. His reading, that the meaning of "curtailed" could not be limited to "reduced", must be correct; otherwise, the alternative meaning of "interrupted" contained in the term's definition would have no work to do.

[41] The learned primary judge was right to find that there was no room for genuine dispute on this point of construction.

Whether the Pipeliners' use of the dispute resolution mechanism amounted to evidence that there was a genuine dispute as to liability

[42] The appellants argued that the Pipeliners having given notice of a dispute as to unpaid charges and QNI's claims of a force majeure event, they could not consistently invoke contractual rights on the premise of that dispute and then assert that no genuine dispute existed. The notice, it was contended, would not have been issued if the Pipeliners had regarded the dispute as spurious. They had not put on any material to explain the circumstances in which they issued the dispute notice. In those circumstances, the primary judge had erred in proceeding on the basis that the dispute was devoid of merit. And he had erred in saying that the referred dispute did not entail a contest about the liability of QNI Resources to pay; in fact, that was the issue.

Conclusion

[43] Those submissions cannot be accepted. The dispute notice raised, not a question about liability to pay, but the fact of non-payment of "charges validly invoiced". And although non-payment was identified as an area of dispute, the assertion that the charges were validly invoiced clearly involved rejection of any suggestion that

there was a *genuine* dispute about them. There was no error in his Honour's conclusion that this contention lacked merit.

Invocation of dispute resolution mechanism as providing "some other reason"

[44] The second limb of the appellants' argument concerning the notice of dispute differs from the other grounds of appeal in that it entails asserting error in his Honour's exercise of a discretion; in this case to refuse to set aside the statutory demand "for some other reason". The argument was based on the Pipeliners' having invoked their contractual rights of proceeding by way of the dispute resolution mechanism provided for by the GTA and not having exhausted that process. The appellants contended that the dispute resolution mechanism, once invoked, gave rise to mandatory steps which had not been taken: the chief executive officers had not met. This amounted to a breach of contract which the court should not countenance: the primary judge should have set aside the demand under s 459J(1)(b).

[45] The appellants placed reliance on a statement by Palmer J in *Arris Investments Pty Ltd v Fahd*.[8] Palmer J was dealing with a contract which required disputes to be determined by arbitration; a circumstance which, he said, should, where the dispute was not immediately resolvable,

> "carry great discretionary weight in considering whether a Statutory Demand should be set aside under s 459J(1)(b)".

In that event, his Honour said the court should not encourage parties to breach their contract by ignoring the arbitration clause and issuing a statutory demand. It is to be noted that Palmer J had, in that case, found that there was a genuine dispute as to the applicant's liability.

Conclusion

[46] The circumstances of this case are somewhat different. The primary judge found that there was no genuine dispute as to the appellants' liability; the notice of dispute served identified a refusal to pay validly invoiced sums; and the GTA itself did not provide for any exclusive or mandatory means of dispute resolution but merely gave the parties the option of proceeding in that way. His Honour was entitled to decline to exercise the s 459J(1)(b) discretion in the appellants' favour.

The cl. 21 dispute concerning the giving of invoices to QNI

[47] Annexed to Mr Iskander's first supplementary affidavit were copies of invoices addressed to Queensland Nickel Pty Ltd over the period from May 2015 to December 2016. Clause 21 of the GTA provided that the Pipeliners each month

> "must give QNI a bill, setting out the amount payable by QNI and details of …. charge components…"

QNI Metals and QNI Resources asserted that compliance with the clause was a precondition to an entitlement to payment. The clause had not been complied with, if QNI were taken to include the two companies, because the bill had been given only to Queensland Nickel in each case. Even if it were to be accepted that Queensland Nickel had acted as agent for QNI Resources and QNI Metals and received the invoices in that capacity, that could no longer be the case from March

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8 [2010] NSWSC 309.

2016 when, as Mr Iskander deposed in his supporting affidavit, a new entity became manager under the joint venture agreement, Queensland Nickel having gone into administration.

[48] The primary judge held, however, that QNI Resources could not rely on the argument as a genuine dispute for the purposes of the Act, because it had not been raised in the supporting affidavit.

[49] QNI Resources and QNI Metals argued, at first instance and here, that the requirement of s 459G that the application to set aside the statutory demand be supported by an affidavit would be met if the grounds of dispute could be inferred from evidence annexed to the supporting affidavit. Once that requirement was met, it was permissible to act on supplementary affidavits filed outside the 21 day period for the making of the application.

[50] The evidence said to raise the invoicing issue consisted of two letters annexed to Mr Iskander's supporting affidavit. The first, sent on behalf of the Pipeliners in May 2016, was a letter addressed to Queensland Nickel giving notice to remedy a default in payment. It referred to a March invoice and to the GTA, which it described as being between the Pipeliners

> "and Queensland Nickel Pty Ltd ("**QNI**"), in its capacity as manager of the Queensland Nickel joint venture and as agent for and behalf of the joint venture participants QNI Resources Pty Ltd and QNI Metals Pty Ltd".

The letter went on to say that monies remained owing under the March invoice, which was validly issued, and that "QNI" had not validly disputed it. The letter's reference to Queensland Nickel as "QNI" was an indication, the appellants contended, that the Pipeliners had invoiced Queensland Nickel rather than all the participants of QNI; which gave rise to an available inference that there was an issue as to compliance with cl. 21.

[51] The second letter, which was sent by Mr Iskander in March 2017, referred to the statutory demand and argued that it could not be said that there was no genuine dispute about the debt, because the Pipeliners had issued a notice of dispute. It referred to the following statement in the notice of dispute:

> "As you are aware, in the course of 2016 a dispute has arisen between QNI and the Pipeliners in relation to unpaid charges validly invoiced under the GTA and QNI's claim of an alleged Force Majeure Event."

Mr Iskander's letter went on to observe:

> "Your clients have correctly identified the two issues in dispute:
>
> (a) Being such charges are validly invoiced under the GTA; and
> (b) The effect of QNIs [sic] claim of Force Majeure."

This raised, it was contended, an argument as to the validity of the invoices.

Conclusions

[52] The statutory demand provisions:

> "constitute a legislative scheme for quick resolution of the issue of solvency and the determination of whether the company should be wound up without the interposition of disputes about debts, unless they are raised promptly."[9]

The requirement in s 459G(3) that the application to set aside a statutory demand and the affidavit supporting the application must both be filed within 21 days of the demand itself goes to the jurisdiction of the court to deal with the application.[10] The affidavit must provide support for the application in the sense that it discloses the ground of the application; in the case of an application made in reliance on s 459H, by identifying the dispute. It has been said that it will suffice if that dispute is identified "expressly, by necessary inference, or by reasonably available inference".[11]

[53] Courts have been prepared to accept that a ground evidenced by a document annexed to the supporting affidavit can properly be said to be raised by the affidavit.[12] Provided the supporting affidavit filed within the 21 day period reveals the genuine dispute, it may be supplemented by further affidavits filed outside that period.[13] However, appellate courts have held that an affidavit filed outside the 21 day period which raises a new ground may not be used.[14] ("Ground" in this context is used in the sense of a particular area of dispute, rather than in the broad sense of involving a genuine dispute, off-setting claim or substantial injustice.)

[54] The basis of that proposition might be questioned: if, for example, the supporting affidavit raises a genuine dispute, the jurisdictional requirement of s 459G is met, and there is certainly no explicit bar on the subsequent raising of other disputes. But it is consistent with the scheme of the Act that a viable ground should be raised in the supporting affidavit filed within the 21 days. The alternative, of characterising an affidavit which raises grounds ultimately found to be spurious as a "supporting affidavit" within the meaning of s 459G(3), would defeat the Act's purpose of providing a quick resolution of the issue of solvency.

[55] It was necessary, then, for the appellants to be able to demonstrate that a genuine dispute was raised in Mr Iskander's supporting affidavit, before it could rely on his later affidavits in further support of that contended dispute.

[56] Mr Iskander's supporting affidavit did not by any stretch of the imagination raise a dispute about whether invoices had been given to the members of QNI. The reference to the GTA parties in the Pipeliners' May 2016 letter said nothing at all to indicate to whom invoices had or had not been provided. Mr Iskander's letter of March 2017 mischaracterised what the Pipeliners had identified as the issues in

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9 *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 270.

10 Ibid at 276.

11 *Hansmar Investments Pty Ltd v Perpetual Trustee Co Ltd* (2007) 61 ACSR 321 at 326, an approach referred to with apparent approval by the New South Wales Court of Appeal in *Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd* (2012) 297 ALR 372 at 377.

12 *Canon Australia Pty Ltd v Yong Bros Pty Ltd* [2009] NSWSC 842 at [8]; *Saferack Pty Ltd v Marketing Heads Australia Pty Ltd* [2007] NSWSC 1143 at [25]; *GoConnect Ltd v Sino Strategic International Ltd (in liq)* [2016] VSCA 315 at [40].

13 *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd* (2013) 85 NSWLR 601 at 613.

14 *Energy Equity Corporation Ltd v Sinedie Pty Ltd* (2001) 166 FLR 179 at 185; *Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq)* [2015] VSCA 330 [105]; *GoConnect Ltd v Sino Strategic International Ltd (in liq)* [2016] VSCA 315 at [40].

dispute; but in any event, the reference to charges being "validly invoiced" appeared in the context of the argument about the significance of the claimed force majeure event, with no hint that any issue was taken about whether QNI Resources and QNI Metals had received the invoices. The most liberal of readings could not identify in Mr Iskander's supporting affidavit a dispute arising by reason of clause 21 of the GTA. The primary judge was correct to say that the argument had not been raised and could not be relied on.

The primary judge's approach to determining the question of whether there was a genuine dispute

[57] I return now to the first of grounds advanced by the appellants. The primary judge determined construction questions in relation to the GTA in circumstances where there was in each case only one rational construction, the appellants' arguments, being "patently feeble". There was, consequently, no error in his Honour's making those determinations. The question of intention to bind the appellants was a question of fact as to which the terms of the GTA admitted of only one answer. There was no error, therefore, in his Honour's proceeding to determine that matter.

Orders

[58] I would dismiss each of the four appeals and order the appellants to pay the respondents' costs.

[59] **FRASER JA:** I agree with the reasons for judgment of Holmes CJ and the orders proposed by her Honour.

[60] **McMURDO JA:** I agree with the Chief Justice.