SUPREME COURT OF QUEENSLAND

CITATION:	*Mount Isa Mines Ltd v Queensland Nickel Sales Pty Ltd & Ors* [2017] QSC 285
PARTIES:	**MT ISA MINES LIMITED (ACN 009 661 447)** (applicant) **v** **QUEENSLAND NICKEL SALES PTY LTD (ACN 009 872 566)** **(first respondent)** **QNI RESOURCES PTY LTD (ACN 054 117 921)** (second respondent) **QNI METALS PTY LTD (ACN 066 656 175)** **(third respondent)**
FILE NO:	BS 7515 of 2017
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	20 November 2017 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	20 November 2017
JUDGE:	Atkinson J

ORDERS:

THE COURT DECLARES THAT:

1. **The applicant may lawfully cause the equipment set out in Schedule 1 to the Application (the Equipment) to be dismantled, removed from its current location and delivered to the first respondent's premises at 1 Greenvale Street, Yabulu Qld 4818 (the Premises).**

THE COURT ORDERS THAT:

2. **The applicant have leave to file and serve the further amended originating application contained at pages 30 to 35 of exhibit "ADM-1" to the affidavit of Alexander David Monaghan filed on 16 November 2017.**
3. **The respondents stay application filed 17 November 2017 be dismissed.**
4. **The respondents pay the applicant damages of $270,215.**
5. **Provided the applicant gives the first respondent 3 clear days' notice in writing of the weekday date or dates on which the Equipment will be delivered to the Premises,**

the first respondent must accepted delivery of the Equipment (whether dismantled or not) at the Premises immediately on the expiry of the notice period, between the hours of 8am and 5pm.

6. **Order 3 of the orders dated 28 August 2017 be vacated.**
7. **The respondents pay the applicant's costs of the Application on the indemnity basis.**
8. **The respondents pay the applicant's costs of the respondent's stay application on the standard basis.**
9. **Liberty to apply**

CATCHWORDS: TORTS – TRESPASS – TRESPASS TO LAND AND RIGHTS OF REAL PROPERTY – where the applicant granted a license to the first respondent for non-exclusive access to a berth at the Port of Townsville (the Premises) for the loading and unloading of nickel ore and refined nickel from vessels – where the respondent failed to pay harbour dues pursuant to the agreement leading to the termination of the agreement – where the applicant submitted that equipment belonging to the respondents was trespassing on the Premises – where the applicant sought a declaration and related orders that the applicant may lawfully remove the equipment from the Premises – whether a declaration and related orders should be made

McVeigh (trustee of the bankrupt estate of Piccolo) v National Australia Bank Ltd (2000) 278 ALR 429; [2000] FCA 187

COUNSEL: R Traves QC with S J Webster for the applicant
K Byrne for the first respondents

SOLICITORS: Allens for the applicant
Robinson Nielson for the respondents

[1] There has been an application by the respondents to the application, and the applicants in an application for a stay, to recuse myself from hearing the applications on the basis that a reasonable bystander might form the view that I may not bring an impartial mind to the determination of these matters. That application appears to be based on a disclosure which I made at the beginning of the hearing that some 25 to perhaps 30 years ago, I acted firstly against a company associated with Mr Palmer and subsequently for a company or companies associated with Mr Palmer. I do not accept that a reasonable bystander could form the impression that I would not bring an impartial mind to this matter, and I refuse the application.

[2] This is a hearing of two applications, one made by Mount Isa Mines, an amended originating application was filed by Mount Isa Mines on 11 August 2017, and a further amended originating application was filed by leave today, and an application filed by the respondents, Queensland Nickel Sales Proprietary Limited, QNI Resources Proprietary Limited and QNI Metals Proprietary Limited, which was filed on 17

November 2017 – that is, last Friday. The application filed last Friday seeks a stay of the proceedings filed by the applicant, Mount Isa Mines.

[3] The amended originating application seeks the following orders:

1. A declaration that, if the respondents or any of them do not remove the things listed in schedule 1 to this application (the Equipment) from Berth 2 at the Port of Townsville within 35 days, the applicant may lawfully:
   (a) remove, or cause any person to remove, the Equipment from Berth 2;
   (b) sell and/or scrap the Equipment or cause any person to do so, on terms the applicant considers fit;
   (c) apply any proceedings from the sale of the Equipment;
      (i) first, to the applicant's costs of removing, selling and/or scrapping the Equipment;
      (ii) second, to the application's costs of this application; and
      (iii) third, to the extent of any surplus, to the first, second and third respondents.

[4] Before me today, it was not pressed by the applicant, Mount Isa Mines, that it be able to sell the equipment.

[5] The further amended originating application, filed this morning, sought, in addition, damages for trespass to land in the amount of $270,215, alternatively $87,615 and an order that the applicant pay the costs of the application on the indemnity basis, or alternatively on the standard basis.

[6] This matter came before me on 11 August 2017, where I was told by senior counsel for the respondents that he understood his instructions to be that there was an intention by the respondents to remove the equipment. Time was given for the respondents to have the opportunity to remove the equipment because of the time it was said it would take for the respondents to do so.

[7] To understand this matter, it is necessary to deal with the chronology of events. The applicant, Mount Isa Mines, has a long-term lease of wharf number 2 at the Port of Queensland in Townsville, which expires in 2024. In 1994, Mount Isa Mines granted a license to Queensland Nickel Proprietary Limited to use the berth for the loading and unloading of nickel ore and refined nickel from vessels. That is referred to as the license agreement, also due to expire in 2024.

[8] The license agreement is dated 23 August 1994 and is exhibited, inter alia, to Mr Zammitt's affidavit filed on 24 July 2017. The parties are said in the definition section to be the parties to the agreement. And the parties to the agreement are said, at the beginning of the license agreement, to be Mount Isa Mines and Queensland Nickel Proprietary Limited. Under the license agreement, QNI was granted a license for non-exclusive access to the berth, with the applicant, Mount Isa Mines, retaining possession. QNI had an obligation to pay all harbour dues due to the applicant, and promised that it would, at the termination of the license agreement, peaceably and quietly deliver up to the applicant the licensed area, and was obliged on termination of the license agreement to forthwith remove all moveable improvements.

[9] The requirement to duly and punctually pay all harbour dues to Mount Isa Mines is found in clause 12.1(k). There is no suggestion that the harbour dues have been paid since March 2016. They remain outstanding. Clause 21.1 of the license agreement provides that in the event that one party commits a material breach or makes a material default in any of its material obligations hereunder, the other party, in addition to all other rights, remedies, reliefs, actions and claims which it may have at law in consequence of that breach shall have the express additional right at its election to cause the term of this agreement to be brought to an end in the manner and subject to the provisions of clause 21.2.Upon failure of the payment of the harbour dues for such an extended period of time, Mount Isa Mines has exercised its rights under that clause and terminated the agreement.

[10] A rather novel, not to say adventurous, argument was put forward by the respondents that notwithstanding the parties are clearly set out in the license agreement, I should infer that, in fact, the second and third respondent had the rights under that license agreement because of another agreement called Townsville Port Authority and Queensland Nickel Proprietary Limited dated 23 August 1994, said to be the Nickel Ore Agreements. The parties to that agreement are the Townsville Port Authority and Queensland Nickel Proprietary Limited. It contains a condition precedent or subsequent that the Townsville Port Authority has agreed to consent to the licence agreement upon condition that Queensland Nickel enters into this agreement. That of course does not make Mount Isa Mines a party to the agreement between the Townsville Port Authority and Queensland Nickel, nor does it make any other parties a party to the licence agreement the subject of this litigation.

[11] I said the argument was novel and, indeed, perhaps adventurous because in support of it Counsel for the respondents relied on a decision of the Full Court of the Federal Court which does not go that far. The decision relied upon is *McVeigh (trustee of the bankrupt estate of Piccolo) v National Australia Bank Ltd*.[1] That case concerned an agreement which provided also for security in the form of a guarantee and indemnity. Finkelstein J referred to the usual rule at common law, at [31]:

> *English law has only developed to the point where several instruments representing a single transaction may be read together if the documents are between the same parties.*

[12] His Honour said that is also the position that has been taken in Australia. His Honour expressed the opinion in [32] that the view was altogether too narrow because it would produce anomalous results.

[13] Finkelstein J referred to the common example where a lender is willing to make a loan if it is secured by guarantee. The two instruments when taken together may contain precisely the same terms as the single agreement. Finkelstein J was in dissent.

[14] Kenny J wrote the majority judgment. Her Honour too referred, at [70] to the ordinary rule, but said that in some transactions:

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[1] (2000) 278 ALR 429; [2000] FCA 187.

> *Several instruments may be read together, even though the parties are not the same, providing the instruments were known to the other parties and were executed contemporaneously to accomplish a common purpose.*

[15] The example her Honour gave was in cases of what was said to be the kind found in that case. In that case where a question arises as the extent and obligation assumed by a surety or a mortgagor under guarantee or mortgage. That case is far removed from the present. I have been asked to extend Australian law so that it would apply in this situation which is not a situation of a guarantee, mortgage or indemnity and no authority has been given to me as to the reason why I should do that.

[16] And, in fact, although these documents were executed contemporaneously, it will be quite wrong not to read the terms of the agreements as they are. They were obviously carefully prepared. The parties to the licence agreement are quite clear and the second and third respondents were not parties to the licence agreement and have no rights under it.

[17] QNI was placed into liquidation on 22 April 2016. Neither QNI nor its external controllers contest the validity of the termination of the licence agreement and the general purpose liquidators are content to abide any decision of the Court.

[18] As the applicant says in its outline of submissions which has an attached chronology on which I am able to safely rely, the respondents have continually asserted that they own bulk equipment consisting of a utility vehicle, a truck, two excavators, a Bobcat, two rail mounted hoppers, a large magnetic wharf conveyor system which remain on the berth. That equipment is referred to earlier as the equipment.

[19] On 15 December 2016 – almost a year ago – the solicitors for the applicant wrote to the liquidators of QNI and the respondents giving notice that the applicant required the equipment to be removed within 14 days. It is set out in the chronology why the applicant served it on each of the respondents and notwithstanding the applicant has no contractual relationship with the respondents.

[20] The solicitors for QNI's liquidators wrote a letter in response on 21 December 2016 saying that QNI did not propose to take any steps or exercise any rights in relation to the equipment and it would allow the joint venture parties being the respondents to exercise the whole of the entitlements to the equipment at the berth. It appears that correspondence ensued with a view to the equipment being removed from the berth.

[21] It is of course intolerable from the licensor's point of view that there is continuing trespass of this large amount of equipment on the wharf which it is therefore unable to licence to anyone else, when the harbour dues have not been paid, the licence agreement has been terminated and no attempt has seriously been made by the respondents to remove the equipment, although it was said at the hearing before me in August that that was their current intention. No offer has been made by any respondent to tender payment of the outstanding harbour dues.

[22] As Mr Traves QC submitted, this case is really quite simple. There was an agreement. The agreement has been breached. The agreement has been terminated and there is a

continuing trespass on the applicant's property of the equipment which should be removed.

[23] And, as I said, that is precisely what was proposed on 11 August 2017 when the matter appeared before me and eminent Queen's Counsel appeared on behalf of the respondents.

[24] So what, apart from the rather adventurous submission that I should regard the second and third respondents as having some rights under the agreement to which they are not a party, is the argument put forward by the respondents? They assert that yesterday, that is, Sunday 19 November 2017, they sent an email and a letter to the minister or those from the department requesting that the state government resume Mount Isa Mines' property rights under its agreement with the Townsville Port Authority.

[25] Evidence was not produced, although later it was said it could be produced, that that material had actually been sent to the minister or the relevant department, but, even if it were, the question is what rights have arisen under an Act which first was oddly annexed to an affidavit, but has subsequently been tendered before me? It was submitted that the Schedule to the *Queensland Nickel Agreement Act* 1970 part 7, section 3, provides a right for the respondents to ask the Queensland government to resume Mount Isa Mines property rights.

[26] That section provides, first of all, that the companies have to satisfy the State that they had been unable to acquire under reasonable terms and conditions any land, easement, licence or other right. Of course given that they have not paid the harbour dues which they were required to pay since March 2016, a suggestion that they could satisfy the State that they had been unable to acquire a licence on any reasonable terms and conditions is risible.

[27] In addition any land so acquired or resumed, it is said, should vest in the Crown, but held in the name and for the benefit of the companies if all purchase money and compensation repayable in respect of any such licence so acquired and resumed together with all expenses incurred by the minister in effecting such resumption or acquisition shall forthwith be paid by the companies to the minister.

[28] Before any such acquisition were to take place, the minister may require the companies to deposit with him such monies or such securities as they are in his opinion sufficient to ensure the payment by the companies and sums to be paid by the companies as aforesaid. Of course there is no suggestion that the respondents have offered to pay all purchase money and compensation in respect of the licence which it says it has requested to be resumed together with expenses incurred by the minister because it said they have not been asked to do so.

[29] So not having paid the dues required under the licence, it is suggested now that I would grant a stay of the application to deal with the trespass which they have clearly been involved in because of some suggestion entirely without merit that they may be successful in persuading the government to resume the land, the licence which is property of Mount Isa Mines because they can satisfy the State they have been unable to acquire it under reasonable terms and conditions.

[30] Such a submission does no service to their argument. It is plainly without merit. All that Mount Isa Mines can do in the situation is remove the equipment which is trespassing on their property and of course for the Court to require the first respondent to pay the costs of that removal. The authority for doing so is set out in Mr Traves QC's useful submissions and I need not go into it any further. It is obvious.

[31] Accordingly, there is absolutely no reason to grant a stay and I propose to make the draft order sought by Mount Isa Mines. Further, the arguments put forward by the respondents today were clearly unarguable and given the history of the matter, which was adjourned on the basis of the respondent's request as to what they wanted to do with the equipment, it is appropriate to order costs on the indemnity basis. I make the order as per the draft which I will initial and place with the papers.