SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Nickel Pty Ltd (in liq) v Queensland Nickel Sales Pty Ltd & Ors* [2017] QSC 305
PARTIES:	**QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)** (plaintiff) **v** **QUEENSLAND NICKEL SALES PTY LTD** (first defendant) **QNI RESOURCES PTY LTD** (second defendant) **QNI METALS PTY LTD** (third defendant)
FILE NO/S:	SC No 6216 of 2016
DIVISION:	Trial Division
PROCEEDING:	Separate question
DELIVERED ON:	15 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2017
JUDGE:	Bond J
ORDER:	**The question stated and tried in this proceeding be answered as follows:** **Question:** **As at the time that Glencore paid the monies into court, which of** **(1) Queensland Nickel Pty Ltd;** **(2) QNI Metals Pty Ltd and QNI Resources Pty Ltd; or** **(3) Queensland Nickel Sales Pty Ltd;** **had the legal right to recover from Glencore amounts owing by it under the contract referred to in paragraph 1 of Queensland Nickel's amended application?** **Answer:** **Queensland Nickel Pty Ltd**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where Queensland Nickel, QNI Resources, QNI Metals and Glencore were

parties to a contract for the sale of nickel product – where Glencore owed monies under the contract for the purchase of nickel product – where Glencore paid the monies into court – whether, at the time the monies were paid into court, Queensland Nickel, QNI Metals and QNI Resources, or Queensland Nickel Sales, had the legal right to recover from Glencore the amounts owing by it under the contract

Australian Trade Commission v Goodman Fielder Industries Ltd (1992) 36 FCR 517, cited
Black v Smallwood (1966) 117 CLR 52, cited
Carminco Gold & Resources Ltd v Findlay & Co Stockbrokers (Underwriters) Pty Ltd (2007) 243 ALR 472, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337, cited
James Thane Pty Ltd v Conrad International Hotels Corporation [1999] QCA 516, cited
Montgomerie v United Kingdom Mutual Steamship Association [1891] 1 QB 370, cited
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104, cited
Movie Network Channels Pty Ltd v Optus Vision Pty Ltd [2010] NSWCA 111, cited
Neilson v Overseas Projects Corporation of Victoria Ltd (2005) 223 CLR 331, cited
QNI Resources Pty Ltd v Park [2016] QSC 222, cited
Queensland Nickel Pty Ltd v Glencore International AG [2017] QSC 57, cited
Queensland Nickel Sales Pty Ltd v Glencore International AG [2016] QSC 269, cited
Summergreene v Parker (1950) 80 CLR 304, cited
Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd [1968] 2 QB 53, cited
Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd [1968] 2 QB 545, cited
Victoria v Tatts Group Limited (2016) 328 ALR 564, cited

COUNSEL: J McKenna QC, with C G C Curtis, for the plaintiff
K S Byrne for the defendants

SOLICITORS: HWL Ebsworth for the plaintiff
Alexander Law for the defendants

Introduction

[1] On 18 January 2016, Queensland Nickel Pty Ltd (**Queensland Nickel**) was placed into voluntary administration. On 22 April 2016, it became subject to a creditors voluntary winding up.

[2] Prior to going into administration, Queensland Nickel managed and operated the Yabulu refinery near Townsville. The refinery processed ore into compact blocks of nickel (**nickel compacts**) which were capable of meeting certain quality specifications.

[3] The refinery and its production were owned (in the proportions of 20% and 80% respectively) by a joint venture comprised of QNI Metals Pty Ltd (**QNI Metals**) and QNI Resources Pty Ltd (**QNI Resources**).

[4] Queensland Nickel continued to carry on the same business under its administrators until about 7 March 2016, when QNI Metals and QNI Resources notified Queensland Nickel that it had been replaced as their joint venture manager by Queensland Nickel Sales Pty Ltd (**QNS**).

[5] On 23 June 2016, Glencore International AG (**Glencore**) commenced the present proceeding by originating application. Glencore was a large, diversified natural resources company which, among other things, traded in and distributed physical commodities from third party producers.

[6] Glencore was conscious that it owed US$3,759,246.71 under a 2009 contract with Queensland Nickel, QNI Metals and QNI Resources for the purchase of nickel product from the refinery (**the Contract**). Glencore knew that Queensland Nickel and QNS were in dispute as to which of them was entitled to the monies which it owed. Accordingly, Glencore proposed that it pay the monies into court and that there be appropriate directions made to resolve which of the two disputants was entitled to the monies.

[7] On 8 July 2016, an order was made by consent of Glencore, Queensland Nickel and QNS with the ultimate result that Glencore paid AU$5,028,430.17 into Court on 6 December 2016 and was otherwise excused from further participation in the proceeding.

[8] Further background to the proceeding is set out in my judgments in *Queensland Nickel Sales Pty Ltd v Glencore International AG* [2016] QSC 269 and in *Queensland Nickel Pty Ltd v Glencore International AG* [2017] QSC 57, the latter being the decision in which I set down for separate determination (and identified the utility of so doing[1]) the following question:

> As at the time that Glencore paid the monies into court, which of
>
> (1) Queensland Nickel Pty Ltd;
>
> (2) QNI Metals Pty Ltd and QNI Resources Pty Ltd; or
>
> (3) Queensland Nickel Sales Pty Ltd;
>
> had the legal right to recover from Glencore amounts owing by it under the contract referred to in paragraph 1 of Queensland Nickel's amended application?"

[9] At the trial of the stated question:[2]

(a) Queensland Nickel contended that the proper construction of the Contract was that Queensland Nickel was the party solely entitled to the legal right to payment from Glencore and that the question should be answered "Queensland Nickel Pty Ltd".

(b) QNI Metals, QNI Resources and QNS (together, **the respondents**) all appeared before me and contended that the question should be answered "QNI Resources Pty Ltd and QNI Metals Pty Ltd".[3]

[10] For the reasons expressed below, I agree with Queensland Nickel.

[11] Before embarking upon the contractual analysis which justifies that answer, it is appropriate to perform two preliminary tasks, namely to express my ruling in relation to an

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[1] See [2017] QSC 57 at [16]-[19].

[2] My order of 27 April 2017 had earlier designated the parties to the proceeding as Queensland Nickel (plaintiff) and QNS (defendant) and then my order of 18 July 2017 added QNI Metals and QNI Resources as defendants.

[3] The contention which had previously been advanced by the respondents, namely that QNS was the party with the legal right to recover from Glencore, was not advanced during the trial of the stated question.

evidentiary question which arose at the hearing, and to identify the principles by which the contractual analysis should proceed.

Evidentiary ruling

[12] The relationship between Queensland Nickel, QNI Metals and QNI Resources was regulated by two important instruments entered into in 1992, namely a joint venture agreement and an administration agreement. I discussed these instruments in another context in *QNI Resources Pty Ltd v Park* [2016] QSC 222 at [8]-[20].

[13] The respondents sought to rely on a solicitor's affidavit which exhibited those two agreements, together with a related agreement pursuant to which some interests in the joint venture changed hands in 1995. The respondents contended that the three agreements constituted extrinsic evidence admissible in aid of construction of the Contract, because it was admissible "context".

[14] Queensland Nickel objected to that evidence on the grounds of its irrelevance to the question of construction of the Contract. No objection was taken to the authenticity of the documents. I received the evidence subject to the objection, it being common ground that my decision on its admissibility should be reserved so as to be expressed in my judgment on the merits of the stated question.

[15] Although the proper law of the Contract was the law of England, no attempt was made to prove the content of English law on this question. Accordingly, it was common ground that I should resolve the question according to the law of Australia.[4]

[16] In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, French CJ and Nettle and Gordon JJ wrote (citations omitted):

> [46] The rights and liabilities of parties under a provision of a contract are determined objectively by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.
>
> [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
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> [48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.
>
> [49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
>
> [50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.
>
> [51] Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties ... intended to produce a commercial

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[4] See *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [125].

> result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".

[17] These principles of contractual construction were subsequently approved by the High Court in *Victoria v Tatts Group Limited* (2016) 328 ALR 564 at [51] per French CJ and Kiefel, Bell, Keane and Gordon JJ.

[18] There are two possible ways by which reference to the contested material in aid of construction of the Contract might be justified on the grounds that it is admissible "context".

[19] First, reference to the contested material here might be justified if there was some reference to it within the text of the subject contract. This is "context" as referred to in *Mount Bruce* at [46]. It may be described as "internally-referenced context". There is no such reference in the Contract, so this possibility may be eliminated.

[20] Second, the contested material might be the type of "context" which is referred in in *Mount Bruce* at [49], namely part of the events, circumstances and things external to the Contract, to which it is necessary to have recourse for the purposes referred to in *Mount Bruce* at [49] and [50]. But this possibility, too, may be eliminated, because it remains necessary for a party seeking to rely on such evidence to demonstrate, either by direct proof or inference, that both contracting parties had actual knowledge of the facts relied upon.[5] There was neither direct proof nor evidence supporting an inference that Glencore knew of the terms of the agreements concerned.[6]

[21] It follows that I uphold the objection of Queensland Nickel to the evidence referred to at [13] above.

Relevant legal principles

[22] It will shortly appear that it was plain that all four of Glencore, Queensland Nickel, QNI Metals and QNI Resources were parties to the Contract and that, on its face, the Contract recorded that Queensland Nickel was the agent of QNI Resources and QNI Metals.

[23] The general approach to contractual construction is that set out in *Mount Bruce* in the passages already cited.

[24] The problems posed by the ways in which disclosed agents might contract with third parties are familiar to the law. There was no significant dispute as to the legal principles which govern the determination of the question before me.

[25] Contracts which are entered into by an agent on behalf of a disclosed principal are commonly construed as having been entered into by the principal only and not by the agent – with the consequence that the agent cannot be sued, or sue on, the contract: see *Montgomerie v United Kingdom Mutual Steamship Association* [1891] 1 QB 370 per Wright J at 371.

[26] But that general rule might be altered by the terms of the relevant contract. Wright J described (at 372) as an "important proposition", the principle that:

> [I]n all cases the parties can by their express contract provide that the agent shall be the person liable either concurrently with or to the exclusion of the principal, or that the agent shall be the party to sue either concurrently with or to the exclusion of the principal.

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[5] *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352 per Mason J; *Movie Network Channels Pty Ltd v Optus Vision Pty Ltd* [2010] NSWCA 111 at [97]-[106] per Macfarlan JA with whom Young JA and Sackville AJA agreed. For completeness, I record that no attempt was made to suggest that knowledge of the agreements was notorious.

[6] For completeness, I record that the respondents submitted, but I reject, that the requisite inference was justified because, given the contractual reference to the joint venture, I should infer that Glencore must have done a "due diligence" which would have revealed the contested documents. The proposition was entirely speculative.

[27] Indeed, the highest authority confirms that the fundamental question in every case must be what the parties intended or must be fairly understood to have intended, and, if they have expressed themselves in writing, what is the proper construction of that writing: see *Black v Smallwood* (1966) 117 CLR 52 at 56 where Barwick CJ and Kitto, Taylor and Owen JJ approved what was said by Fullagar J in *Summergreene v Parker* (1950) 80 CLR 304 at 323-324.

[28] Consistently with this fundamental principle, in *Australian Trade Commission v Goodman Fielder Industries Ltd* (1992) 36 FCR 517 at 521, the Full Court of the Federal Court (Beaumont, Gummow and Einfield JJ) approved a statement of principle set out by Donaldson J in *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd* [1968] 2 QB 53 at 59-60, and affirmed by the Court of Appeal in *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd* [1968] 2 QB 545, in these terms:

> … an agent can conclude a contract on behalf of his principal in one of three ways:
>
> (a) By creating privity of contract between the third party and his principal without himself becoming a party to the contract.
>
> (b) By creating privity of contract between the third party and his principal, whilst also himself becoming a party to the contract.
>
> (c) By creating privity of contract between himself and the third party, but no such privity between the third party and his principal…

[29] And, similarly, in *Carminco Gold & Resources Ltd v Findlay & Co Stockbrokers (Underwriters) Pty Ltd* (2007) 243 ALR 472, the Full Court considered a loan agreement which had been entered into by a corporate advisor and underwriter (Findlays), which was referred to in various forms of draft loan agreements to be acting as an agent of principals acting as investors, who were the source of moneys eventually lent. Findlays alone sued for the recovery of moneys loaned under the agreement. The Full Court of the Federal Court (Finn, Rares and Besanko JJ) held:

> [22] The contract issue raised a simple question as to who, objectively considered, were intended to be the parties to the contract under which the monetary advances were to be made. …
>
> [23] Ascertaining whether Findlays entered into a personal engagement… if so, whether to the exclusion of its principals, or jointly and severally with them, raises a question of objective intention. As Brandon J said in *Bridges & Salmon Ltd v The "Swan" (Owner); Marine Diesel Service (Grimsby) Ltd v The "Swan" (Owner)* [1968] 1 Lloyd's Rep 5 at 12:
>
> > Where A contracts with B on behalf of a disclosed principal C, the question whether both A and C are liable on the contract or only C depends on the intention of the parties. That intention is to be gathered from (1) the nature of the contract, (2) its terms and (3) the surrounding circumstances…"

[30] Essentially the same proposition was advanced by the Court of Appeal in *James Thane Pty Ltd v Conrad International Hotels Corporation* [1999] QCA 516,[7] where Williams J (with whom McMurdo P agreed and Thomas JA agreed generally) stated at [60]:

> One must determine the intention of the parties objectively having regard to the nature of the contract, the terms of the contract (including the qualification in the recitals), and the surrounding circumstances. Further, in my view, where a party signs a contract without qualification in the execution clause it would be natural for any other party to assume that the party so signing was contractually bound unless the contrary was made clear beyond doubt.

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[7] Recently cited with approval by the Court of Appeal in *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 per Holmes CJ (with whom Fraser and McMurdo JJA agreed) at [31].

[31] In circumstances where a contracting party is identified as having a role as agent of other contracting parties, the question of the rights and liabilities *inter se* of the contracting parties, is to be determined by the application of orthodox principles of construction.

Analysis of the Contract

[32] The Contract was dated 4 August 2009. It comprised four parts:

(a) a Purchase Contract, comprising 6 pages which identified the 4 parties to the contract and set out recitals, 10 operative terms, and an execution page;

(b) Annexure A, titled "Uniform Terms and Conditions" comprising 5 pages and 23 operative terms;

(c) Annexure B, titled "Typical Material Specifications" comprising 1 page which set out details of the requisite chemical composition of the nickel compacts; and

(d) Annexure C, titled "Assay Procedures for Queensland Nickel Compacts" comprising 1 page which set out details of the assay procedures.

[33] The heading of the Purchase Contract identified that the Contract was between two sides, namely:

(a) on the one hand:

(i) Queensland Nickel – which was designated by use of the expression "Manager" (a term which was used only in the heading and in the recitals) and the expression "Seller" (a term which was used throughout the Contract);

(ii) QNI Metals – which was designated by the expression "QNIM" (a term which was used only in the heading and in the recitals);

(iii) QNI Resources – which was designated by the expression "QNIR" (a term which was used only in the heading and in the recitals);

(b) and, on the other hand, Glencore – which was designated by the expression "Buyer" (a term which was used throughout the Contract).

[34] The recitals to the Purchase Contract were in the following terms:

> **WHEREAS** QNIM and QNIR, co-joint venturers under Australian law, respectively own 20 percent and 80 percent of the Yabulu refinery located 25 kilometres north-west of Townsville and all production therefrom. The Yabulu refinery is managed by the Manager.
>
> **WHEREAS** the Manager, on behalf of each of QNIM and QNIR (on a joint and several basis), in its capacity as a Seller agrees to sell, and the Buyer agrees to purchase, all Material (defined below) produced at the Yabulu refinery, and as part of the sale and purchase transaction, the Buyer agrees to provide to the Seller an interest free line of credit in the form of a pre-payment mechanism as set out below for an aggregate amount up to USD80 million or such greater amount which can be supported by deliveries of compacts in accordance with the terms set out below, in each case subject to and conditional on the terms and conditions herein.

[35] After those recitals appeared these words:

> **THE PARTIES AGREES [sic] AS FOLLOWS:**

[36] As I have mentioned, there followed 10 operative terms and an execution page. I observe:

(a) The contractual intention that the agreement was to operate as an agreement between a seller and a buyer in which the former promised to sell and the latter promised to buy was made clear by the operation of cl 10 of the Purchase Contract with cl 1 of Annexure A, as to which see [36](d) and [37](a) below. Otherwise, the operative terms in the Purchase Contract did not express that agreement in terms. Rather, the terms worked by expressing definitions and discrete obligations under the headings

of Material, Term, Quantity, Delivery, Price and Payment, all of which ended up having the same effect as such an agreement.

(b) There was no mention of QNIM or QNIR in the operative terms. Indeed, with only three minor exceptions, insofar as the language of the operative terms in the Purchase Contract imposed obligations or created rights on particular persons, it did so by reference to the Seller and the Buyer, without the use of language capable of application to QNIM or QNIR. The exceptions were:

(i) Clause 4 expressed a detailed delivery obligation. For the most part it specifically used the language of "Seller" and "Buyer", but in two minor respects it used the term "parties": first, in relation to a possible agreement to alter how Material is packed, and, second, to express an agreement to cooperate on the provision of logistical services to minimize overall freight costs.

(ii) Clause 7 set out the "Payment / Financing" obligation, which incorporated the "interest free line of credit in the form of a pre-payment mechanism" referred to in the recitals. The clause expressly contemplated that the Buyer would make an advance payment of up to 93% of a provisional purchase price into the "Seller's nominated bank account". There was then a provision for a final payment to be made by the Buyer to the Seller by telegraphic transfer once final price, quality and weight were known. And, if the final value was less than the advance payment, then the Seller was obliged to pay the shortfall to the Buyer, by way of set-off against the following month's advance payment. Part of the mechanism was the expression of the Seller's obligation to release transportation documents to the Buyer upon the Seller's receipt of funds, but the timing of that release could be extended by agreement by "the parties".

(c) Clause 9 contemplated that the Contract could be executed in counterparts. The execution page revealed the intention that all four named parties would execute the Contract. Reference to the execution clauses themselves did not suggest that any of the parties was signing only in a representative capacity. And, in fact, all four parties did execute the Contract, albeit in counterparts.

(d) The last operative term of the Purchase Agreement stated that "all other terms and conditions are set out in Annexures A, B and C which shall form integral parts of this Contract".

[37] The various conditions set out in Annexure A were expressed in terms generally consistent with there only being two parties to the transaction, namely the Seller and the Buyer, and with the evident contractual intention being to confer specific rights and obligations on those two parties. I observe:

(a) Annexure A confirmed the contractual intention described in [36](a) above. That was made evident by the first three clauses of Annexure A, which provided:

> 1. These terms and conditions of purchase ("Conditions), the attached Glencore International AG Contract No. 227-09-15539-P dated 40, August 2009 ("Purchase Contract"), Annexure B ("Typical Material Specifications") and Annexure C ("Assay Procedures for Queensland Nickel Compacts") constitute the entire agreement ("Agreement") between the Seller and the Buyer with respect to the sale and purchase of the Material described in the Purchase Contract.
>
> 2. The Seller confirms and acknowledges that by signing the Purchase Contract, it has accepted this Agreement and agrees to be legally bound by this Agreement.
>
> 3. In the event of inconsistency between the Conditions and the Purchase Contract, the latter shall prevail.

(b) That intention was revealed by the continued use in Annexure A of the specific terms "Seller" and "Buyer" and by the use of the terms "party" or "parties" where the sense was only (or at least more obviously) consistent with the contemplation of there being two parties and the terms being taken as a reference to Seller or Buyer or both:

(i) cl 6 ("parties" and "losing party");

(ii) cl 8 ("both parties", "the party" and "the parties");

(iii) cl 11 ("neither party" and "either party");

(iv) cl 12 ("the party" and "the other party");

(v) cl 13 ("both parties and "the party");

(vi) cl 14 ("the party" and "the other party");

(vii) cl 15 ("neither party" and "the other party");

(viii) cl 16 ("one party" and "the other party"); and

(ix) cl. 21 ("one party to the other" and "the other party").

(c) That said, there were uses of "party" where the sense might be consistent with a reference extending beyond "Seller" and "Buyer" to some other party (see cl 5 ("the parties"), cl 7 ("the parties"), cl 17 ("each party"), cl 19 ("the parties"), cl 20 ("each party"), and, one could well imagine that the proper construction of some of the usages mentioned in the previous sub-paragraph might extend to encompass QNIM and QNIR, despite the language.

[38] The argument of the respondents was that, Queensland Nickel having contracted as a disclosed agent, the only privity of contract created by the Contract was between QNIM and QNIR on the one hand and Glencore on the other. The result, on their construction, was:

(a) QNIM and QNIR were jointly and severally:

(i) entitled to all contractual rights against Glencore under the Contract; and

(ii) subject to all the contractual obligations owed to Glencore under the Contract,

(b) Queensland Nickel had neither contractual rights nor contractual obligations under the Contract.

[39] I reject that hypothesis. Although it is an application of what has been described as the general rule (see [25] above) and gains some support from one line in the second recital, it does not pay sufficient regard to the fact that the fundamental question in every case is what was the revealed intention of the parties to the particular contract under consideration (see [26]-[27] above).

[40] In my view the only sensible construction of the Contract structured and executed in the manner just described is that all four companies in question were parties to the Contract and all four companies had legal rights and obligations under the Contract.

[41] The language which the parties chose to employ does not admit of the conclusion that Glencore only had rights against QNIM and QNIR, jointly and severally, but no rights against Queensland Nickel. If that had been the intention the Contract would not have defined Queensland Nickel as the Seller and would not have specifically stated in clause 2 of Annexure 1, quoted at [37](a) above that the Seller agreed to be legally bound by the Contract. The designation of Queensland Nickel as the Seller and the creation of rights and obligations by reference to that term and not by reference to the terms "QNIM" or "QNIR", allied with the non-representative execution of the Contract by Queensland Nickel, strongly suggests that Queensland Nickel was intended to owe obligations to

Glencore personally. If Queensland Nickel failed to perform Queensland Nickel would be liable to Glencore for damages for breach of contract.

[42] But what then was the point, so far as Glencore was concerned, of also making QNIM and QNIR parties to the Contract? The reasonable businessperson standing in the shoes of the parties would have concluded that the purpose was to obtain for Glencore certainty that it had the benefit of a promise by QNIM and QNIR (effected by "The parties agrees as follows": see [35] above) that Queensland Nickel (as the Seller) would do the things that the Seller had promised to do, including, obviously, that it would give good title to Glencore to the material the subject of the Contract. Notably, although the recitals had acknowledged that QNIM and QNIR owned all production from the refinery, the parties had agreed by cl 3 that the quantity of nickel product sold would be "owned by the Seller". This wording reinforces the obvious conclusion that QNIM and QNIR could not deny Queensland Nickel's ability to give good title and would be liable to Glencore for damages in the event that Queensland Nickel did not perform. QNIM and QNIR would also be impliedly obliged to do that which was necessary to put Queensland Nickel in a position to perform, including to give good title.

[43] The question before me, however, is not concerned with the rights which Glencore had against Queensland Nickel and QNIM and QNIR, but with the rights which those three companies had against Glencore, and, specifically, which of them had the legal right to payment of monies which Glencore owed pursuant to the Contract.

[44] The language which the parties chose to employ does not admit of the conclusion that QNIM and QNIR, jointly and severally, were the only parties with rights against Glencore. If that had been the intention the Contract would have defined QNIM and QNIR as the Seller. The designation of Queensland Nickel as the Seller and the creation of rights and obligations by reference to that term and not by reference to the terms "QNIM" or "QNIR", allied with the non-representative execution of the Contract by Queensland Nickel, strongly suggests the intention that Queensland Nickel was intended personally to have rights against Glencore.

[45] Further, that the intention was that Queensland Nickel be given the right to payment is demonstrable by the reference in the second recital to the intention that Queensland Nickel be provided with an interest free line of credit in the form of a pre-payment mechanism. I make the following observations:

(a) I would read that recital is as though it were formatted in this way:

> WHEREAS the Manager
>
> (a) on behalf of each of QNIM and QNIR (on a joint and several basis),
>
> (b) in its capacity as a Seller,
>
> agrees to sell, and–
>
> (c) the Buyer agrees to purchase, all Material (defined below) produced at the Yabulu refinery, and
>
> (d) as part of the sale and purchase transaction, the Buyer agrees to provide to the Seller an interest free line of credit in the form of a pre-payment mechanism as set out below for an aggregate amount up to USD80 million or such greater amount which can be supported by deliveries of compacts in accordance with the terms set out below,
>
> in each case subject to and conditional on the terms and conditions herein.

(b) The "interest free line of credit in the form of a pre-payment mechanism as set out below" was a reference to the obligation set out in cl 7, the operation of which is explained at [36](b)(ii) above. And it was specifically referred to as being given to the Seller and not QNIM and QNIR, in a recital which refers to all of these terms.

(c) It is difficult to see how the Contract could work as a matter of practicality if the right explicitly given to the Seller by cl 7 was in fact to be regarded as the right of QNIM and QNIR. And if that was the intention why word the terms and conditions of the Contract without reference to QNIM and QNIR?

(d) It is certainly possible that the recital was to be given operative effect,[8] although for the reasons explained in [36](a) above, it does not seem to me to be essential to read the recital in that way. Certainly the respondents' argument sought to give the first line (which I have reformatted as (a) above) not only operative effect but primacy. But even if it was to be given operative effect, one could not disregard:

(i) the reference to the Manager agreeing to sell in "in its capacity as a Seller";

(ii) the recited intention that Glencore agreed to provide the prepayment mechanism **to the Seller** "**as set out below**"; and

(iii) the reference in the last line of the recital to the primacy of the terms and conditions herein, namely the operative terms of the Contract.

(e) Overall, the recital supports the conclusion that Queensland Nickel had personal rights as against Glencore. That makes practical and commercial sense as it gave Glencore one person with whom it had to deal and through whom it could discharge its obligations, even though it had rights and obligations in relation to QNIM and QNIR in the event that something went wrong in the primary relationship.

[46] But what then was the point, so far as QNIM and QNIR were concerned, of their being made parties to the Contract? The reasonable businessperson standing in the shoes of the parties would have concluded that QNIM and QNIR had certainty as to the benefit of Glencore's promise (effected by "The parties agrees as follows": see [35] above) that Glencore (as the Buyer) would do those things that the Buyer had promised to do, including, obviously, that it would pay **the Seller** for the nickel compact production. QNIM and QNIR could enforce that promise. They would have the right to recover damages for breach of contract, in the event that Glencore breached its promise to pay monies to Queensland Nickel. But, as against Glencore, the person with the legal right to have payment made to it was Queensland Nickel, not QNIM and QNIR.[9]

[47] The result is that, as at the time the Contract was entered into, Queensland Nickel had the legal right to recover from Glencore amounts owing by it under the contract.

Post-contractual events

[48] There were a series of five amendments to the Contract, four executed prior to Queensland Nickel entering administration and one executed during the administration period (on 1 April 2016).

[49] All the amendments prior to the administration period were executed by each of Queensland Nickel, QNI Resources and QNI Metals. The amendments generally adopted references to the "Seller".

[50] No argument was advanced before me which suggested that any of these events affected the conclusion which should be reached in relation to the stated question.

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[8] For a discussion of the usual role of recitals, and of the circumstances in which they can be given operative effect, see *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 per Campbell JA at [379] et seq, with whom Allsop P and Giles JA agreed on this point.

[9] For completeness, I should note that no one contended that the legal right to payment was a right which existed in all three of Queensland Nickel, QNIM and QNIR. I agree with that judgment. As with other constructions which I have rejected, it would be inconsistent with the specific choices made in the wording of the Contract.

[51] The material before me also exhibits the invoices which reveal the dates and other details concerning the supply of nickel product giving rise to the quantum of the amount paid into Court by Glencore. It is not necessary to examine those matters further, because, like the contractual amendments, it is not suggested by any party that anything happened between the date of the contract and the date of Glencore paid the monies into court which changed the answer which should be given to the stated question.

Conclusion

[52] The question stated and tried in this proceeding should be answered as follows:

Question:

As at the time that Glencore paid the monies into court, which of

(1) Queensland Nickel Pty Ltd;

(2) QNI Metals Pty Ltd and QNI Resources Pty Ltd; or

(3) Queensland Nickel Sales Pty Ltd;

had the legal right to recover from Glencore amounts owing by it under the contract referred to in paragraph 1 of Queensland Nickel's amended application?

Answer:

Queensland Nickel Pty Ltd