SUPREME COURT OF QUEENSLAND

CITATION:	*Glencore Queensland Limited v Ventyx Pty Ltd* [2015] QSC 14
PARTIES:	**GLENCORE QUEENSLAND LIMITED** ACN 009 814 019 (applicant) **v** **VENTYX PTY LTD** ACN 010 087 608 (respondent)
FILE NO/S:	BS 5128 of 2014
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 February 2015
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2014
JUDGE:	Philip McMurdo J
ORDER:	**A declaration that, upon the proper construction of the Amended and Restated Enterprise License Agreement dated 25 June 2007 between the Applicant and the Respondent ('Licence Agreement') and the Amended and Restated Enterprise Software Support Agreement dated 25 June 2007 between the Applicant and the Respondent ('Support Agreement') (together, the 'Agreements'), the employees (whether employed under a staff employment contract or a collective or industrial agreement and whether employed for a defined or indefinite period) and contractors of any entities which were directly or indirectly owned and controlled by Glencore International plc prior to 2 May 2013 ('Pre-Merger Glencore Entities') should not be added to the Employee Count as at 31 March 2014 and should not be taken into account in the Employee Report dated 31 March 2014 under clause 12.2(c) of the License Agreement and clause 9.2(c) of the Support Agreement.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the applicant was to pay incremental fees to be calculated according to the number of employees provided in an Employee Report – where a dispute arose concerning the calculation of incremental fees –

where the applicant omitted to include the employees of certain companies in the Employee Count – where the respondent argues that the Employee Count was inaccurate – where the applicant seeks declaratory relief

COUNSEL: PL O'Shea QC, with E Goodwin for the applicant
RS Ashton for the respondent

SOLICITORS: King & Wood Mallesons for the applicant
Thompson Geer for the respondent

[1] The parties are in dispute about the interpretation of two contracts which they made in 2007. Under one of those contracts, which is entitled Amended and Restated Enterprise License Agreement, the respondent (then called Mincom Limited) granted to the applicant (then called Xstrata Queensland Limited) and certain other entities a licence to use computer software. I will call this the Licence Agreement. Under the other agreement, which is entitled Amended and Restated Enterprise Software Support Agreement, the respondent agreed to provide services to the applicant and the other licencees relating to the use of that software. I will call this the Support Agreement.

[2] When these agreements were made, there were certain entities involved in copper mining which, together with the applicant ("the Customer" in each agreement), were collectively described in the agreements as "the Customer's Copper Division" and "Xstrata Copper". In each agreement those other entities were described as "Xstrata Copper Group Affiliates" and were listed in a schedule. Each of those entities and the applicant was granted the licence and was to receive the services for which these two agreements provided.

[3] Each agreement required the payment of certain fees by the applicant to the respondent. The Licence Agreement required an initial fee and, year by year, an "Incremental License Fee". The Support Agreement required the payment, year by year, of a certain base fee as well as an "Incremental Support Fee".

[4] The dispute concerns the calculation of the Incremental License Fee and the Incremental Support Fee for the year ended 30 June 2014. Each of those fees is to be calculated according to the number of employees of "the Customer and the Xstrata Copper Group Affiliates" as at 31 March within a financial year. So the incremental fees for the year ended 30 June 2014 were to be calculated according to the number of such employees as at 31 March 2014. The agreements required the applicant to provide to the respondent a report of the number of those employees which was called the "Employee Count". The evident purpose of quantifying these fees by reference to the number of employees was to provide a level of remuneration to the respondent according to the extent of the use of and support for its software.

[5] The respondent says that the Employee Count which was submitted for the 2014 financial year was not accurate, because it omitted the employees of certain companies which it says were each an "Xstrata Copper Group Affiliate". The applicant maintains that it was correct in not including those employees, because those companies were not Xstrata Copper Group Affiliates. The question is one of the proper interpretation of that expression. The arguments accept that it has the same meaning in each agreement.

[6] As already mentioned, when the agreements were made the entities which were the Xstrata Copper Group Affiliates were identified by a list in each agreement. However, the parties anticipated the addition of further members of this group. They did so by a definition of Xstrata Copper Group Affiliates which is relevantly the same in each agreement. It is convenient from this point to refer only to the Licence Agreement, where the term was defined to mean:

> "… those Affiliates of the Customer listed in Schedule 4, and includes any additional Xstrata Copper Group Affiliates included under the mechanism in clause 12.2."

[7] The term "affiliate" was defined as follows:

> "Affiliate means, in relation to a corporation, any company controlling the corporation, controlled by the corporation or under common control with the corporation - in each case, irrespective of whether the control is direct or indirect (including through other Affiliates) and whether it is because of control of shares, votes at general meetings of shareholders, votes at meetings of directors or the appointment or removal of directors or otherwise."

[8] Clause 12.2 relevantly provided as follows:

> "12.2 Addition of Affiliates
>
> (a) Should the Customer or an Xstrata Copper Group Affiliate acquire a body corporate by gaining Control and such body corporate is or will operate in the Customer's copper division, the body corporate shall be deemed from the date of the acquisition to be an Xstrata Copper Group Affiliate.
>
> (b) If, following a reorganization or restructure, another Affiliate of the Xstrata Group joins the Customer's copper division, the Customer shall, by written notice to Mincom add such further Affiliate to the list of Xstrata Copper Group Affiliates.
>
> (c) Immediately upon the addition of an Xstrata Copper Group Affiliate under this clause, the Employees of such additional Xstrata Copper Group Affiliate shall be added to the Employee Count, and shall be taken into account in the next annual Employee Report. …"

[9] The respondent's case is that certain entities became Xstrata Copper Group Affiliates by the operation of cl 12.2(b). It contends that these entities joined the "Customer's copper division". The applicant agrees that each of these other entities is an Affiliate of the Xstrata Group. But it says that in the circumstances which I am about to describe, the Customer's copper division had ceased to exist by 2014.

The facts

[10] Until these agreements were made in June 2007, the parties were subject to licence and software support agreements which they made in June 1999. At that time, the applicant was called MIM Holdings Limited and owned, through subsidiaries, significant copper operations at Mount Isa and at the Ernest Henry Mine in Queensland.

[11] In 2003, Xstrata plc acquired all of the shares in the applicant. Xstrata plc's copper operations then became essentially two businesses: one managed by the applicant and another copper operation described as Xstrata Copper Americas. In 2004, those two businesses were restructured into a single copper division which was called Xstrata Copper. A Mr Sartain became the Chief Executive of the Xstrata Copper Division in 2004 and remained in that position until May 2013. His office was in the Brisbane headquarters of the applicant throughout that period.

[12] By June 2007, the Xstrata Copper Division managed copper assets and operations at sites in Queensland, Canada, Chile, Argentina and Peru.

[13] The Licence Agreement and the Support Agreement listed some 39 entities as the Xstrata Copper Group Affiliates as at the date of those agreements. All but one of those companies (Falconbridge Limited) was a subsidiary of the applicant.

[14] As at the date of the Licence Agreement and the Support Agreement, the Xstrata Copper Division had its own Board and Executive Committee, the latter being the principal management body for the Division, meeting on a monthly basis and reporting to the Board. The Division had its own management staff located at its head office in Brisbane. This structure of the Xstrata Copper Division was publicly known, including by publications on the website of Xstrata plc.

[15] The subject agreements were made on 25 June 2007 to replace the agreements which had been made in 1999. One change which they effected was to include additional software. Another change was to consolidate what had been separate software licences into what the Licence Agreement described as an "enterprise licence". In that respect, the Licence Agreement contained recitals as follows:

> "A. Under an initial license agreement No Q990601 dated 29 June 1999 between the Customer (then known as MIM Holdings Limited) and Mincom (the 'Original Licence Agreement'), Mincom granted to the Customer a license for computer software known as 'MIMS Open Enterprise'.
>
> B. MIMS Open Enterprise is now branded as Mincom Ellipse.
>
> C. The Customer and its affiliates have purchased additional software and/or additional user licences over time by way of several separate official orders and/or addenda to the Original Licence Agreement.
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> D. The Customer's copper division (Xstrata Copper) wishes, as far as possible, to convert the basis of licensing of all its presently licensed software from a 'per user' basis to an 'enterprise' basis that is referable only to the Customer's total employee count. The conversion is effected by termination and relicense of such software.

> E. In conjunction with the conversion to the enterprise basis, the Customer wishes to acquire additional functionality and/or other Mincom Products. …"

Substantially similar recitals were included in the Support Agreement.

[16] On 2 May 2013, Glencore International plc, a company based in Baar in Switzerland, acquired all of the issued shares of Xstrata plc. Glencore International plc, through its subsidiaries, had businesses which were concerned with the mining and processing of copper, which were managed from Baar.

[17] The result of this merger of the Glencore group and the Xstrata group was that companies within the Glencore group each became an "Affiliate" as defined in the Licence Agreement and the Support Agreement. This was because the Glencore entities and the Xstrata entities came under the "common control" of Glencore International plc.

[18] Under the terms of the original merger which Glencore International plc proposed, Glencore's mining and processing operations were to be integrated into the commodity business units of Xstrata plc, so that the Glencore operations would be managed by Xstrata plc's existing management. In particular, Glencore's copper operations were to be integrated into the applicant's copper division, under the continuing leadership of Mr Sartain. These proposed terms were circulated by Glencore to its shareholders in May 2012.

[19] But the merger proposal underwent several changes and in April 2013, Glencore International plc announced some relevant changes, to the effect that a number of Xstrata plc executives, including Mr Sartain, would not be engaged after the merger. The proposal became that the operations of the Xstrata Copper Division would be managed from Baar.

[20] The facts as to the Glencore/Xstrata merger are proved by the unchallenged affidavit evidence of Mr Farrugia, the applicant's company secretary and an employee of the applicant since 2005. According to his affidavit (where "GQL" means the applicant):

> "42 Glencore International plc's revised proposal has mostly been implemented. As a result, the GQL copper division has ceased to exist. The copper department in Glencore International plc's Metals & Minerals business segment is now responsible for managing the operations that were previously managed by GQL's copper division. The old Xstrata Copper management structure has been dismantled.
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> 43 Following the Merger:
>
> (a) Glencore International plc's existing headquarters in Baar are used as Glencore plc's headquarters;
> (b) Glencore International plc's existing management structure is used as Glencore plc's management structure, with Glencore plc's operations structured into, and managed along, the 3 business segments of

Metals & Minerals, Energy Products and Agricultural Products;

(c) Telis Mistakidis:

(i) has been appointed as the head of the copper department in the Metals & Minerals business segment for approval, budgeting, business planning, reporting and other management processes;
(ii) is responsible for Glencore plc's portfolio of copper assets and the marketing of those assets;
(iii) is a Swiss resident and continues to be based out of Glencore International plc's existing headquarters in Baar; and
(iv) is not, and has never been, an officer or employee of GQL;

(d) none of the current officers of GQL occupy a management role in the copper department of the Metals & Minerals business segment based in the Baar headquarters;

(e) no employees of GQL are based out of the Baar headquarters or are involved in the management or operation of Glencore plc's copper assets, as the employment of all existing employees of GQL have been either terminated or transferred to another entity in the Glencore plc group;

(f) Xstrata plc's existing head office structures have been rationalised, resulting in the closure of the Xstrata Copper head office located on Level 9, Riverside Centre, 123 Eagle Street, Brisbane, Queensland;

(g) GQL has not entered into, and does not have authority to enter into, any agreements as agent for companies in the copper department of the Metals & Minerals business segment; and

(h) the Pre-Merger Glencore Entities have not used, and do not use, the Ellipse software.

The term "Pre-Merger Glencore Entities" is there a reference to companies which were in the Glencore group prior to the merger. According to Mr Farrugia, they "sit outside, and have not been brought within, the GQL corporate structure".[1] It is uncontroversial, as Mr Farrugia said, that these companies have not used the software or the services which are the subject of the Licence Agreement and the Support Agreement.

[1] Affidavit of Farrugia, paragraph [38].

The arguments

[21] This dispute concerns the status of those of the Pre-Merger Glencore Entities which were involved in operations of copper mining or processing. The respondent says that they became Xstrata Copper Group Affiliates under the Licence Agreement and the Support Agreement. More particularly, it says that the circumstances engaged cl 12.2(b) of the Licence Agreement[2] and the identical terms of cl 9.2(b) of the Support Agreement, because "following a reorganization or restructure" those entities join[ed] the Customer's copper division …".

[22] The applicant submits that there was no "reorganization or restructure". Further, it says that the Glencore entities did not join the "Customer's Copper Division", because that division ceased to exist. To the extent that there was any joining of a group, it is said that it is the former members of the Customer's copper division which joined the Pre-Merger Glencore Entities.

[23] To discuss these submissions, it is necessary to refer to some other parts of the subject agreements, or at least of the Licence Agreement (it being common ground that there is no significant difference between the two).

[24] Clause 2 contained terms which describe the representative capacity in which the applicant entered into the agreement. It was as follows:

> "2. CAPACITY
>
> 2.1 Capacity
>
> This agreement is entered into by the Customer both in its own right, and as agent severally on behalf of the Xstrata Copper Group Affiliates.
>
> 2.2 Exercise of rights
>
> The rights and remedies in and under this Agreement may be exercised by the Customer on behalf of each Xstrata Copper Group Affiliate.
>
> 2.3 Affiliate compliance
>
> The Customer shall procure the compliance by each Xstrata Copper Group Affiliate with the provisions of this Agreement. All payment obligations in clause 6 are those of the Customer only.
>
> 2.4 Affiliate breach
>
> Any act or omission of an Xstrata Copper Group Affiliate that is a breach of this Agreement shall be deemed to be a breach by the Customer (a Deemed Breach).
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> 2.5 Customer liability

[2] Set out above at paragraph [8].

> Upon the occurrence of a Deemed Breach, Mincom may exercise against the Customer any rights that would be available to Mincom if the relevant act or omission of the Xstrata Copper Group Affiliate was an act or omission of the Customer."

[25] Clause 3.1, which provided for the 1999 licences to be terminated and replaced with this "Enterprise License", also described the representative capacity of the applicant:

> "3.1 Termination of licenses
>
> The Customer, acting in its own capacity as principal, and as agent for each of the Xstrata Copper Group Affiliates agrees, subject to clause 3.2, to terminate the licences for software described in Schedule 7, which software shall, to the extent stated in Schedule 2, be re-licensed on an enterprise licence basis as set out in clause 3.3. The Customer warrants that it is the duly authorised agent of each Xstrata Copper Group Affiliate to effect the termination referred to in this clause, and shall indemnify Mincom for any loss or damage suffered by Mincom in connection the breach of such warranty."

[26] The "Enterprise License" was granted and accepted under cl 3.3, which was in part as follows:

> "Mincom grants to the Customer and the Xstrata Copper Group Affiliates, and the Customer and Xstrata Copper Group Affiliates accepts from Mincom, a non-exclusive, non-transferable license to use the Licensed Software solely: (a) during the Term; and (b) on the Designated Systems; and (c) for installation at the Sites and with remote access permitted; and (d) for the Customer's, and the Xstrata Copper Group Affiliates' own internal business purposes and not for redistribution, remarketing, operation for a third party or in respect of a third party's data or any other use. …"

[27] The duration of the licence was "perpetual", subject to each party having a right to terminate for breach and to applicant having in any case a right to terminate the agreement on two month's notice: cll 5.1-5.4.

[28] The License Fee and Incremental License Fee were each payable by the applicant (rather than the applicant and the other affiliated entities). A failure by the applicant to pay any amount due to the respondent could ultimately result in a termination of the Licence Agreement: cl 5.4(d). Clause 5.4(e) further provided that:

> "(e) If the Customer or an Xstrata Copper Group Affiliate commits material breach of this Agreement which is a Serious IPR Breach, Mincom may terminate this Agreement on 30 days notice if Customer does not remedy the breach within the 30 day period."

A "Serious IPR Breach" was defined (by cl 1) to mean:

> "(a) acts of, attempts to, or knowingly permitting third parties to decompile, reverse engineer, disassemble or otherwise reduce any part of the executable code for the Licensed Software to human-readable form, except as permitted by applicable law;
>
> (b) intentional or reckless disclosure of the Licensed Software contrary to clause 9.1 where Mincom has suffered a serious loss as a result;
>
> (c) except as expressly provided in clause 12, extending the rights of use of the Licensed Software to a party that is not an Xstrata Copper Group Affiliate."

[29] Clause 12.1 permitted an assignment by the applicant of its rights under the Licence Agreement but only with the consent of the respondent:

> "12 ASSIGNMENT
>
> 12.1 Customer not to assign
>
> Subject to clause 12.3, the Customer may not assign or novate or sublicense its rights under this Agreement or the license granted under this Agreement without Mincom's prior written consent (and then only in strict compliance with any conditions of such consent, such conditions not to be unreasonable), such consent not to be unreasonably withheld. Notwithstanding the foregoing, the Amended and Restated Support Services Agreement shall be assigned or novated simultaneously."

[30] The respondent does not argue that cl 12.2(a) was engaged. That is because none of the Pre-Merger Glencore Entities was acquired by the applicant or an existing Xstrata Copper Group Affiliate. Its case is limited to the suggested operation of cl 12.2(b).

[31] As for cl 12.2(b), the applicant submits that there was no "reorganization or restructure". It is said that there was simply a change in the ownership of shares in Xstrata plc. But plainly there was a reorganisation or restructure, which is how the Xstrata Copper Division, as it was operated from Brisbane, came to be, at least in some ways, moved to Glencore's headquarters in Switzerland and operated with the Pre-Merger Glencore copper businesses. The applicant submits that this was not the type of reorganisation or restructure envisaged by cl 12.2(b), because that clause "contemplates changes to an existing internal framework of the Xstrata Group and not changes arising due to an acquisition, merger or the addition of new entities through any other means".[3] The applicant says that this limitation comes from reading this provision with cl 12.2(a), because it is there that the parties provided for the addition of a body corporate as an affiliate. The submission is that cl 12.2(b) is concerned only with the reorganisation or restructure of an existing group of

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[3] Applicant's written submissions paragraph [37].

Affiliates of the Xstrata Group. I do not accept this submission. The provisions of paragraphs (a) and (b) of cl 12.2 do not express such a limitation. And such a limitation would be an unlikely intention to attribute to the parties. That can be illustrated by the position which would have existed had the original merger proposal been accepted, whereby the Glencore copper operations were to be integrated into the Xstrata Copper Division. In that event, cl 12.2(a) would not have applied although (plainly) the Glencore copper entities would have joined "the Customer's copper division". Upon the applicant's argument, the Glencore entities, operating under the management of the applicant, would not have had the use of this software and the respondent would have been deprived of the fees for it. That could not have been intended.

[32] As the applicant accepts that the Pre-Merger Glencore Entities should be considered Affiliates of the Xstrata Group, the question becomes whether they "join[ed] the Customer's copper division". Neither agreement defined the term "the Customer's copper division". But clearly enough it referred to a group of entities, each involved in a business of the mining for or processing of copper and which, at the commencement of these agreements in 2007, was the group constituted by the applicant and those companies which were specifically identified as the then Xstrata Copper Group Affiliates.

[33] The applicant's argument emphasises the description of this division as *the Customer's* copper division. It argues that this signifies a particular association between the applicant and those other companies which has not existed since the Glencore merger. It argues that instead, the companies which were within that copper division came to be within what might be described as Glencore's copper division which was managed from Switzerland.

[34] Whilst accepting Mr Farrugia's evidence, the respondent argues that the identifiable (Xstrata) copper division immediately prior to the merger is still in operation. It argues that it and Glencore's copper entities have now been "joined", in the sense that their businesses are conducted in association with each other, under a common management and support structure. The respondent submits that it is irrelevant that the Xstrata copper companies no longer operate under the "Xstrata copper rubric". And the respondent points out that the subject agreements are still being performed by the applicant, acting for the (former) Xstrata companies, so that it cannot be said that the "Customer's copper division" has ceased to exist.

[35] However, it is that representative capacity which, in my view, is critical in the interpretation of this expression. The applicant is a party to these contracts both in its own right and as an agent on behalf of the Xstrata Copper Group Affiliates. It exercises rights and remedies under the agreements in that representative capacity (cl 2.2). It is required to procure the compliance by each Xstrata Copper Group Affiliate with the provisions of the agreement (cl 2.3) and, in turn, it is responsible for any act or omission of an Xstrata Copper Group Affiliate that is a breach of the agreement (cl 2.4). It may terminate the agreement, either for breach by the respondent (cl 5.3) or at any time on two month's notice (cl 5.2). By that termination, it would affect the licence of any Xstrata Copper Group Affiliate.

[36] That representative capacity necessarily requires a relationship between the applicant and the Xstrata Copper Group Affiliates which has a greater content than a

connection as mere "Affiliates". It requires at least a relationship by which the applicant can influence the conduct of the Xstrata Copper Group Affiliates.

[37] It can be said, as the respondent argues, that the group of companies which had constituted the Customer's copper division remained as a group after the merger, at least in the sense of their participation in the benefit of the subject agreements. They continue to have the benefit of the licence and the software support. It may be inferred that the applicant's relationship with those companies has remained such that the necessary influence of the applicant over them for the purpose of performance of these agreements has continued. But it may strain the language to describe that group of companies as "the Customer's copper division", when the applicant is no longer involved in the management of their copper operations. Therefore, the better view is that, as the applicant argues, the Customer's copper division ceased to exist upon the restructure described in Mr Farrugia's evidence. If so, then cl 12.2(b) was not engaged.

[38] Alternatively, if there remained an association which constituted "the Customer's copper division", constituted by the group of Xstrata Copper Group Affiliates as it was immediately prior to the merger, nevertheless the Glencore entities did not "join" that division. Plainly, by this restructure the Glencore entities and the Xstrata entities came to be managed as a group. But more was required in order for the Glencore entities to have "joined" the Customer's Copper Division in the relevant sense, which was that they become a part of what could be described still as the Customer's copper division. This interpretation is further indicated by cl 12.2(a), where an Affiliate which is acquired is added if it "is or will operate *in* the Customer's copper division". Assuming that there did remain a group which constituted the Customer's copper division, the Pre-Merger Glencore Entities did not come to operate within that division but only under a common management and the manager was not the applicant.

[39] The respondent argues that the applicant's interpretation would produce unfair and unintended consequences. Referring to the change from original merger proposal (whereby the Glencore entities would have been integrated into the Xstrata Copper Group) to what became of the restructure, the respondent says that the applicant's interpretation could deprive the respondent of part of the benefit of these agreements "by the stroke of an administrative pen". (It should be noted that the respondent disavowed a suggestion that the amendment of the original proposal was motivated by an intention to avoid the operation of the Licence Agreement and the Support Agreement.) However, the effect of the agreements, according to the applicant's interpretation, would not lead to any absurd or obviously unfair result, such that it could not have been intended. The respondent still has the benefit of these agreements and the substantial payments under them in respect of the use of the software by the Xstrata copper companies. On the applicant's interpretation, the respondent will not be paid further fees for the fact that there are affiliated companies which conduct copper operations under the same management as the Xstrata companies, but not which do not use the respondent's software or support services.

[40] It follows from my interpretation of s 12.2(b) that the so-called Pre-Merger Glencore Entities were not, as at 31 March 2014, Xstrata Copper Group Affiliates for the purpose of these agreements. Therefore, their employees were not to be added to the Employee Count as at that date under each agreement and did not have

to be brought into account in the Employee Report which was dated 31 March 2014 under cl 12.2(c) of the Licence Agreement and the corresponding terms of cl 9.2(c) of the Support Agreement. The relief ultimately sought by the applicant was a declaration to that effect.

Discretionary arguments

[41] Originally the applicant had sought a wider declaration, which would have had the effect of precluding the possibility that by some further restructure, the Pre-Merger Glencore Entities would become Xstrata Copper Group Affiliates under these agreements. Recognising that difficulty, the applicant sought leave to amend the originating application to confine its claim for a declaration about the position as at 31 March 2014. I allowed that amendment over the objection of the respondent. There was no prejudice to the respondent from the applicant's case being narrowed in that way.

[42] In the respondent's submissions, there were suggestions that the applicant may have acted in breach of an implied duty of good faith, by its facilitating or permitting a restructure to occur which changed the original "integration" proposal which Glencore plc had proposed in 2012. This case was commenced by an originating application and was tried on uncontested affidavit evidence from each side and without pleadings. But this argument had been foreshadowed, to an extent, in correspondence shortly before the hearing. It was the respondent that applied to have the case placed on the Commercial List and the issue or issues which the respondent then described as requiring determination gave no indication of a wider contest involving suggestions of lack of good faith or a related suggestion of some repudiatory conduct by the applicant (again by facilitating or permitting the restructure). The respondent did not seek findings that the applicant had breached an obligation of good faith or repudiated the agreements. It raised the possibility of these things as reasons, it suggested, for declining any declaratory relief.

[43] The matters for determination here are the obligations of the applicant in furnishing the Employee Reports under these two agreements. Whatever basis might exist for these other allegations by the respondent, they could not affect the questions raised by the Amended Originating Application. And there is utility in granting the declaration which is sought, first because there is a dispute as to whether the applicant is in breach by the content of the Employee Reports of 31 March 2014 and secondly because the declaration will resolve any dispute about the status of the Pre-Merger Glencore Entities whilst the existing structure of the Glencore copper division remains as it was on 31 March 2014.

[44] The declaration would not compromise any claim which the respondent might have upon its arguments of repudiation or a breach of a duty of good faith. It may be noted, however, that the restructure by which the Xstrata Copper entities came to be managed from Glencore's headquarters in Switzerland was apparently not something which resulted from a decision of the applicant.

[45] The applicant originally sought an injunction to restrain the respondent from suspending the provision of support services and from terminating the agreements upon the basis of the content of the Employee Reports of 31 March 2014. The respondent agreed not to take such action pending the outcome of this proceeding.

Ultimately, the applicant did not seek injunctive relief, perceiving it to be unnecessary.

Order

[46] The outcome is that there will be a declaration according to the amended originating application which is as follows:

> "A declaration that, upon the proper construction of the Amended and Restated Enterprise License Agreement dated 25 June 2007 between the Applicant and the Respondent ('License Agreement') and the Amended and Restated Enterprise Software Support Agreement dated 25 June 2007 between the Applicant and the Respondent ('Support Agreement') (together, the 'Agreements'), the employees (whether employed under a staff employment contract or a collective or industrial agreement and whether employed for a defined or indefinite period) and contractors of any entities which were directly or indirectly owned and controlled by Glencore International plc prior to 2 May 2013 ('Pre-Merger Glencore Entities') should not be added to the Employee Count as at 31 March 2014 and should not be taken into account in the Employee Report dated 31 March 2014 under clause 12.2(c) of the License Agreement and clause 9.2(c) of the Support Agreement."