SUPREME COURT OF QUEENSLAND

CITATION:	*Peabody (Wilkie Creek) Pty Ltd v Queensland Bulk Handling Pty Ltd* [2015] QCA 202
PARTIES:	**PEABODY (WILKIE CREEK) PTY LIMITED** ACN 007 683 454 (appellant) **v** **QUEENSLAND BULK HANDLING PTY LTD** ACN 010 284 509 (respondent)
FILE NO/S:	Appeal No 2462 of 2015 SC No 6085 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2015] QSC 37
DELIVERED ON:	23 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	30 July 2015
JUDGES:	Fraser JA and Douglas and North JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed with costs.** **2. Parties have leave to make submissions on costs in accordance with paragraphs 52(3) and (4) of Practice Direction No. 3 of 2013.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the appellant and the respondent were parties to the "Coal Port Services Agreement" (the "Agreement") – where the terms of the Agreement provided a process for the renewal of the Agreement – where the appellant was required to provide a "binding indication of preparedness to commit" to continuing the Agreement – where the appellant provided such an indication – where the appellant alleges that the making of a "binding indication to commit" only operates as a warranty of its state of mind at the time of the giving of the notice and not a 'binding commitment' to enter into a contract – where the Agreement was not unambiguous – where the phrase "binding

indication of preparedness to commit" must be interpreted in the context of the entire contract – where the relevant clause must be construed to give the Agreement commercial utility – where there was no uncertainty as to the terms of the renewed Agreement – whether a "binding indication to commit" ought to be construed as a 'binding commitment' to enter into a contract – whether the appellant was bound to enter into a binding agreement

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – OTHER MATTERS – where the respondent filed a notice of contention – where the respondent argued that the Agreement ought to be interpreted in the context of agreements with two other companies – where the trial judge held that these agreements could not be considered unless it was proved that the appellant knew the terms when it entered into the Agreement – where the trial judge did not decide this fact – where the respondent argued this could be inferred from the unchallenged evidence of a witness – whether such an inference could be made – whether this advanced the respondent's case

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – POINTS AND OBJECTIONS NOT TAKEN BELOW – WHEN NOT ALLOWED TO BE RAISED ON APPEAL – QUESTIONS NOT RAISED ON PLEADINGS OR IN ARGUMENT – GENERALLY – where the respondent filed a notice of contention – where the respondent acknowledged that it did not plead or argue the point before the trial judge – where the argument would require the resolution of factual questions – where the matter was a commercial matter – whether the respondent ought be permitted to raise such a point for the first time on appeal

Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, considered
GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631, cited
Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited [2015] HCA 37, cited
Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd [2014] 2 Qd R 132; [2013] QSC 148, cited
Sinclair, Scott & Company Ltd v Naughton (1929) 43 CLR 310; [1929] HCA 34, cited
Teviot Downs Estate Pty Ltd v MTAA Superannuation Fund (Flagstone Creek and Spring Mountain Park) Property Pty Ltd [2004] QCA 57, cited

COUNSEL: J Karkar QC, with P Franco QC, for the appellant
B O'Donnell QC, with R B Dickson, for the respondent

SOLICITORS: Johnson Winter & Slattery for the appellant
Campbell Standish Partners for the respondent

[1] **FRASER JA:** A judge in the Trial Division declared that the appellant ("Peabody", a coal mining company which exported coal through the Port of Brisbane) and the respondent ("QBH", the operator of a coal export terminal at that port) were bound to enter an agreement under cl 3.1(f) of the Coal Port Services Agreement ("the Agreement") made between them and dated 26 March 2009, upon substantially the same terms as that 2009 Agreement and otherwise according to cl 3.1(f), within 30 days of 8 July 2013.

[2] Peabody's appeal against that declaration turns mainly upon the construction of cl 3.1 of the Agreement.

The Agreement

[3] The commercial context in which the Agreement was made was recorded in recitals. Since 1983, QBH had operated the Coal Export Terminal at the Port of Brisbane under leases of land and infrastructure license granted by the Port of Brisbane Corporation ("PBC"). Peabody (called the "User" and an "Existing Customer" in the Agreement) mined coal which it wished to export through the Coal Export Terminal. The Agreement also recited that: "A number of existing Customers of QBH (Existing Customers) have utilised the services of QBH to take delivery of Coal by rail, allocate stockpile capacity for it for varying lengths of time, manage stockpiles and load it into ships provided by the Customers. This has always been on an informal basis. Those Existing Customers wish to continue to utilise the whole of the existing stockpile capacity of QBH for the foreseeable future… Existing Customers have indicated they wish to continue to utilise the QBH services… One Existing customer, and potential new Customers (Expansion Customers), wish to secure from QBH an allocation of additional stockpile capacity, which cannot be accommodated within the existing stockpile capacity and have QBH take delivery of Coal by rail, manage the stockpiles, and load it into ships provided by the Customers."

[4] The Agreement defined a "Static Stockpile Capacity" ("SSC") for Peabody "for the Term"[1] and required Peabody to provide a "Minimum Annual Throughput each Year"[2]. "Term" was defined to mean "the Initial Term" specified in certain provisions, "and, if so exercised, and the context permits, includes any Option Term." For "Existing Customers" of which Peabody was one, the Initial Term was 1 April 2008 to 31 December 2014. "Option" was defined to mean "the option for extension of this Agreement in Clause 3", and "Option Term" was defined to mean "from 1 January 2015 to 31 December 2026." The SSC and the throughput formed the main heads of QBH's charges, calculated per tonne of capacity per annum and per tonne loaded onto vessels.[3] Other provisions imposed liability upon Peabody for some or all costs QBH incurred if, as a result of Peabody not meeting the required throughput, QBH was required to surrender a part of its lease from PBC. Provision was made for the escalation of the charges payable by Peabody during the Initial Term according to contractual formulae.[4]

[5] Clause 3 of the Agreement, the provision in issue in this appeal, provides:

> "3.1 Right of First Refusal — Option

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1 Cl 4.1 and Appendix 1, Item 7.
2 Cl 7.3(a) and Appendix 1, Items 4 and 5.
3 Appendix 1, Items 9 and 10.
4 Cl 12.9 and Appendix 7.

If:

(a) the User is not in substantial breach of this Agreement, and has not on a consistent basis been in breach of the Agreement (whether substantial or not), and

(b) between 24 and 18 months before the expiration of the Initial Term the User provides to QBH a binding indication of preparedness to commit to continue to require the User's SSC at that time and such minimum annual throughput for the Option Term as will be required by the PBC on a pro rata basis determined by comparison of the User's SSC with the QBH SSC, together with supporting Capacity Criteria Information, and

(c) by 18 months before the Option Term commences, QBH has sufficient binding commitments from all Customers as to Static Stockpile Capacity and minimum annual throughputs for the Option Term to justify seeking from the PBC an extension of the rights to access and use the Coal Export Terminal,

then:

(d) QBH must make reasonable endeavours for 90 days to obtain agreement in principle from the PBC on reasonable commercial terms acceptable to QBH for the continued right to access and use the Coal Export Terminal for a period equal to or greater than the Option Term, and

(e) if QBH obtains agreement in principle from the PBC on reasonable commercial terms acceptable to QBH for the continued right to access and use the Coal Export Terminal and with the same Stockpile Areas as it then leased, for a period equal to or greater than the Option Term, QBH must notify the User of same within 14 days, which notice must also include confirmation:

    (i) of the base rates and escalation formula proposed by QBH for the Option Term, including reasonable details of any proposed reset, consistent with Clause 3.2; and

    (ii) that the terms on which QBH is offering capacity to other then current Customers, as to the rates, capital contribution for any necessary further expansion of the Coal Export Terminal, infrastructure upgrades, security, and any other matters QBH proposes in order to provide the requested SSC applicable for such Option Term are substantially the same for all Customers and potential Customers, and

(f) if within 30 days of the notice in Clause 3.1(e), the User has entered into an agreement for the Option Term for the User's then current Static Stockpile Capacity (comprised of Existing or Expansion Capacity) on substantially the same terms as this Agreement (omitting the provisions regarding Infrastructure Upgrades and the Expansion Project as these are completed during the Initial Term and the User's obligations to pay any Expansion Charge, Interim Capacity Charge and Infrastructure

Upgrade Charge, which are payable during the Initial Term only) and such other terms as referred to in Clause 3.1(e)(ii) as are agreed by the User, conditional upon:

(i) QBH obtaining from the PBC the continued right to access and use the Coal Export Terminal for a period equal to or greater then the Option Term, and

(ii) other Customers entering into agreements within the same time on similar terms and for the same duration to justify QBH seeking to enter into the agreements with the PBC contemplated by Clause 3.1(f)(1), with QBH relying on the Customers' Capacity Criteria Information,

then:

(iii) QBH will use reasonable endeavours for a further 90 days to obtain from the PBC on reasonable commercial terms acceptable to QBH the continued right to access and use the Coal Export Terminal for a period equal to or greater then the Option Term, and

(iv) QBH will notify the User whether it has obtained the right in clause 3.1(g) within 7 days of the right being obtained or refused.

3.2 Other provisions

(a) QBH intends to charge the same rates as would apply immediately prior to the commencement of the Option Term but in the event the Escalation Formula has failed to ensure QBH has recovered increases in costs (as determined by an independent auditor engaged by QBH) the Parties agree that the base rates and the escalation formula will be reset at that time, as recommended by that auditor, whose decision will be final and binding on all Parties and not subject to the dispute resolution provisions in Clause 19. For the avoidance of doubt, the Parties agree and acknowledge that the Escalation Formula is not intended to ensure recovery of increases in costs by way of Change in Law costs, PBC Rental Increases, and carbon trading costs if same are recovered under other provisions of this Agreement, or costs arising from wrongful acts or omissions of QBH.

(b) Unless the User fails to give a binding indication of preparedness in accordance with Clause 3.1(b) or enter into the agreement in accordance with Clause 3.1(f), QBH will ensure that (if its QBH Lease(s) for the Coal Export Terminal are extended or it is granted new QBH Lease(s) for the same area as the QBH Lease(s) immediately prior to the commencement of the Option Term) at least the SSC which applied for the Initial Term is available to the User for the Option Term.

(c) QBH will

(i) notify the User and other Customers of any previously allocated Customer Static Stockpile Capacity which may

become available as the result of (without limitation) a Customer relinquishing part or all of its SSC or for any other reason and invite requests from Customers (to be supported by Capacity Criteria Information) for allocation of that capacity, and

(ii) QBH will in its discretion, acting reasonably, allocate that capacity to one or more Customer having regard to the Capacity Criteria Information and such other matters QBH considers to be relevant at the time.

(d) In the event that QBH has less Static Stockpile Capacity than it had prior to the expiry of the Initial Term, the quantities of SSC which QBH will offer to Customers (again having regard to the Capacity Criteria Information) will be correspondingly reduced, with QBH being entitled to offer and allocate capacity in quantities to ensure maximum utilisation of the QBH SSC, having regard to operational constraints such as the quantity of Coal which can be accommodated on a Stockpile Area.

(e) In the event there are insufficient commitments from Customers to allocate all available QBH SSC, QBH may offer capacity to potential new Customers who are not existing Customers of QBH.

3.3 Adjustment of limitation of liability amount for Option Term

(a) In this Clause the following words have the following meanings:

(i) Consumer Price Index" means the index published by the Australian Bureau of Statistics known as the All Groups Brisbane index or if that index is suspended or discontinued, the index substituted for it by the Australian Statistician;

(ii) "Current CPI" means the Consumer Price Index number last published prior to the Review Date;

(iii) "Previous CPI" means:

(A) in respect of the first adjustment, the Consumer Price Index number last published before 1 January 2010; and

(B) in respect of each other adjustment, the Consumer Price Index number last published before the previous Review Date.

(iv) "Review Date" means:

(A) in respect of the first adjustment, the date of commencement of the Option Term; and

(B) in respect of each adjustment other than the first adjustment, each anniversary of the date of commencement of the Option Term.

(b) On the Review Date, the limitation of liability amounts (which prior to the date of commencement of the Option Term are $5million and $25million respectively) set out in Clauses 17.4 and 17.12 (as previously adjusted by this Clause) will:

(i) be adjusted by the proportionate amount by which (if any) the Current CPI is greater than the Previous CPI; and

(ii) on and from the Review Date, those limitation of liability amounts will be deemed to be the amount calculated in accordance with this Clause 3.3(b)."

The trial judge's reasons

[6] The trial judge quoted the following passage from the joint judgment of French CJ, Hayne, Crennan and Kiefel JJ in *Electricity Generation Corporation v Woodside Energy Ltd*:[5]

> "…The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties … intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".

[7] The trial judge summarised the steps which might occur under clause 3.1 as follows:

"(1) a notice by Peabody under cl 3.1(b);

(2) the receipt by QBH of "binding commitments from all Customers" under cl 3.1(c);

(3) endeavours by QBH to obtain agreement in principle from the PBC under cl 3.1(d);

(4) that agreement in principle being reached: cl 3.1(e);

(5) a notification by QBH to Peabody under cl 3.1(e);

(6) an entry into an agreement for the Option Term under cl 3.1.(f);

(7) other customers entering into agreements within the same time on similar terms and for the same duration: cl 3.1(f)(ii);

(8) endeavours by QBH to agree terms with PBC for use of the terminal for a period of no less than the Option Term: cl 3.1(f)(iii);

(9) notification by QBH to Peabody on obtaining that agreement with PBC or upon its being refused: cl.1(f)(iv)."[6]

[8] The trial judge found that step 1 occurred when Peabody provided to QBH a notice dated 28 June 2013, and that step 2 also occurred. The trial judge then found that,

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5 (2014) 251 CLR 640 at 656-657 [35].

6 [2015] QSC 37 at [15].

there being no suggestion that Peabody was in substantial breach of the Agreement in terms of cl 3.1(a), cl 3.1(d) obliged QBH to undertake step 3. Peabody did not challenge those findings. As to steps 3 and 4, the trial judge found that QBH did not merely obtain an agreement in principle from PBC; it concluded an agreement and extended its leases from PBC for a period of 12 years and it also renewed its wharf licence. The effect of that was in issue.

[9] As to step 5 the trial judge found that by QBH's letter to Peabody of 8 July 2013 and an enclosed draft Deed of Amendment of the Agreement (which recorded the proposed renewal or extension of the Agreement for the Option Term and amendments to the Agreement), QBH notified Peabody as required by cl 3.1(e). QBH's letter advised Peabody that QBH had "obtained agreement from [PBC] on reasonable commercial terms acceptable to QBH for the continued right to act and use the Coal Export Terminal…for a period equal to or greater than the Option Term…" It and the proposed Deed of Amendment, taken together, supplied the information which cl 3.1(e)(i) and (ii) required to be in the notice by QBH to Peabody.[7] The Deed did not include a provision making it conditional upon QBH entering into agreements upon the same or similar terms with other Customers: cf step (7)). The trial judge found that step 5 occurred.[8] The trial judge also found that, because any agreement under cl 3.1(f) would not contain the conditions in paragraphs (i) and (ii) of that clause, it would be unnecessary for QBH to perform steps 8 and 9.[9] Peabody and QBH did not enter into agreement under cl 3.1(f) (step 6). Instead, on 13 December 2013, Peabody wrote to QBH discontinuing discussions about an extension of the Agreement and disputing that it was bound to any such extension.[10]

[10] For the following reasons, the trial judge held that given the events which had occurred, the parties were obliged to enter an agreement for the option term.

[11] The trial judge acknowledged that cl 3.1(f) was expressed in the form of a contingency, the fulfilment of which would trigger QBH's obligations in cl 3.1(f)(iii) and (iv), rather than a promise by the parties to enter into an agreement for the Option Term, but the trial judge considered that cl 3.1(f) should be construed in the context of cl 3 as a whole.[11] The trial judge's "principal reason" for upholding QBH's case was that Peabody's submissions did not persuasively explain a sense in which the notice under cl 3.1(b) (step 1) could have been "binding," but not contractually binding.[12] The trial judge considered that the "binding indication of preparedness to commit" described in cl 3.1(b) was the same as the "binding commitment" described in cl 3.1(c); the latter subclause referred to commitments from "all Customers" (including Peabody) and there was nothing to justify a differentiation between the commitment required by Peabody and the commitments required by other users.[13]

[12] As to the content of Peabody's consequential contractual obligation, the trial judge found that if QBH gave to Peabody the notification required by cl 3.1(e) (step 5) both parties would be contractually bound at that time to perform an agreement for the Option Term in "substantially the same terms as this Agreement (omitting the provisions

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7 [2015] QSC 37 at [22]-[25], [54].

8 In that respect the trial judge instead referred to step 4 having occurred ([2015] QSC 37 at [22], [25]), but the intended reference was to step 5 (the trial judge already having found, at [20], that step 4 had occurred).

9 [2015] QSC 37 at [54].

10 [2015] QSC 37 at [26].

11 [2015] QSC 37 at [48].

12 [2015] QSC 37 at [43].

13 [2015] QSC 37 at [44].

regarding Infrastructure Upgrades and Expansion Project as these are completed during the initial Term and the User's obligations to pay any Expansion Charge, Interim Capacity Charge and Infrastructure Upgrade Charge, which are payable during the Initial Term)…", although the parties were free to agree upon "such other terms as referred to in Clause 3.1(e)(ii)…".[14] The trial judge regarded this as an example of a contract under which "the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms".[15]

[13] The trial judge also found force in QBH's argument that the finality and binding force given by cl 3.2(a) to a decision by the auditor to "reset" the base rates and escalation formula were consistent with the parties being contractually bound before an agreement was made under cl 3.1(f) (step 6).[16] The trial judge considered that "the words of cl 3.2(a) were inconsistent with the notion that the parties were not at all contractually bound after step (5) but preceding an agreement under cl 3.1(f)."[17] The trial judge accepted that the contractual intention was that if Peabody agreed with different base rates and/or a different escalation formula (a "reset') proposed by QBH in its notice under cl 3.1(e) (step 5), those matters would amount to "such other terms…as are agreed by the User" under cl 3.1(f), whereas if Peabody disagreed with such a proposal, the rate and escalation formula for the Option Term would be as determined by the auditor.[18]

[14] The trial judge observed:

> "As Peabody would have it construed, neither party would be bound in any respect although steps (1) to (5) had been taken. In that event, unless an agreement under cl 3.1(f) was entered into, each party would be at considerable commercial risk. Having decided to extend the duration of its use of the Terminal, Peabody would have had no entitlement to that use on any terms and conditions. On an objective view, that is unlikely to have been Peabody's intention."

[15] The trial judge considered that it was also relevant that there was no uncertainty about the terms of an agreement for the Option Term under cl 3.1(f), the terms being those which were "substantially the same" as the terms of the Agreement; the modifications were required because some provisions, by their terms could only apply within the context of the Agreement (for example provisions for liquidated added damages applied only by reference to particular time periods) and the cl 3.1(f) agreement would necessarily also exclude a provision in the terms of cl 3 (it being clear that the parties did not intend to make a perpetually renewable agreement).[19]

[16] The trial judge did not accept Peabody's argument that cl 3.2(b) demonstrated that cl 3 gave Peabody a discretion whether or not to enter into an agreement for a further term, holding instead that "the intention of the parties in this respect was to identify the ways in which Peabody would not have an entitlement for the Option Term (other than the entitlement conferred by cl 3.2(b))".[20]

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14 [2015] QSC 37 at [47].

15 [2015] QSC 37 at [47]; *Sinclair, Scott & Co Ltd v Naughton* (1929) 43 CLR 310 at 317, quoted by McHugh JA in *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634.

16 [2015] QSC 37 at [36], [53].

17 [2015] QSC 37 at [53].

18 [2015] QSC 37 at [52].

19 [2015] QSC 37 at [49]-[50].

20 [2015] QSC 37 at [51].

[17] Having accepted the construction of cl 3.1 propounded by QBH, the trial judge returned to the question whether it mattered that QBH had reached a concluded agreement with PBC, rather than an agreement in principle. The trial judge held that the concluded agreement satisfied cl 3.1(d) and obliged QBH to give the notice required by cl 3.1(e); accordingly, steps 3 and 4 occurred with the result that QBH was obliged to take step 5.[21] The trial judge considered that it would be nonsensical if cl 3 did not operate merely because the ability of QBH to become unconditionally bound for a further term became clear at an earlier date than was contemplated; the contractual intention could not have been that Peabody would lose its entitlement to the further term for which it elected by giving the notice under cl 3.1(b) merely because the negotiations between QBH and PBC had been quicker than anticipated.[22]

Peabody's arguments

[18] Peabody argued that the trial judge's approach to construction did not reflect the text of the Agreement and contravened the principles of construction of a commercial contract recently summarised by the High Court in *Electricity Generation Corporation v Woodside Energy Ltd*.[23] The expression in cl 3.1 of contingencies the fulfilment of which would result in obligations being imposed upon QBH (the "if …then" form), rather than a promise to enter into an agreement, and the presence of express provisions for arrangements which would mature into an agreement only at the cl 3.1(f) stage, precluded the trial judge's construction; the trial judge's construction rendered the scheme of cl 3.1, and cl 3.1(f) in particular, otiose and of no effect.

[19] Peabody argued that the trial judge was wrong to construe the phrase "binding indication of preparedness to commit to continue to require the User's SSC" as meaning a 'binding commitment' to enter into a contract." The trial judge should have found that those words "served merely to identify the content of the notice required by cl 3.1(b) of the Agreement … [or] operated to make a representation or warranty as to Peabody's state of mind at the time of the giving of the notice." Peabody accepted that the word "binding" connoted an "unalterable final indication" but argued that it amounted to no more than either a warranty or representation about the state of mind of Peabody; Peabody could not change its SSC, but, as cl 3.1(f) and cl 3.2(b) confirmed, there was a difference between a binding indication as to quantity and a final agreement. (Peabody also argued that the trial judge misapprehended its argument by describing that argument as attributing to the word "binding" a meaning of "sufficiently firm",[24] but that was a direct quote from Peabody's written submissions.[25])

[20] Peabody argued that the trial judge wrongly concluded that satisfaction of cl 3.1(f) was not contingent on the User entering into the specified agreement and should have held that cl 3.1(f) gave Peabody a "right of first refusal or [an] option to enter into a new agreement for the [O]ption [T]erm." The proper construction was that if Peabody gave a notice under cl 3.1(b) then, subject to satisfaction of the conditions in cl 3.1(c) – (e), QBH would be obliged to give Peabody a notice under cl 3.1(e); such a notice would be an offer to enter into the agreement contemplated by cl 3.1(f) on the terms proposed by QBH in its notice; and that offer would be open for acceptance by Peabody for

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21 [2015] QSC 37 at [21], [54].

22 [2015] QSC 37 at [54].

23 (2014) 251 CLR 640 at 656-657 [35].

24 [2015] QSC 37 at [32].

25 Written submissions of the defendant, 27 November 2014, paragraph 33. Peabody also accepted that its argument was that "binding" was synonymous with "reliable": Transcript, 1 December 2014, 1-39.

30 days. Peabody's construction was submitted to be supported by the absence from cl 3 of a mechanism for resolving disputes about the terms and conditions of a new agreement, particularly given that such mechanisms were found in other provisions of the Agreement.

[21] Peabody argued that its construction of the "binding" requirement of cl 3.1(b) was commercially useful because it prevented Users from giving notices under that clause merely to keep their choices open regardless of whether the Users genuinely intended to require SSC, thereby enabling QBH to negotiate with PBC on the basis of genuine statements by Users of their SSC requirements, or to commence the process of finding a replacement User. The commercial purpose of the provisions resulting in something less than concluded agreements (agreements in principle and binding indications) was to establish whether there was sufficient interest in the use of the port to warrant QBH obtaining an agreement in principle from PBC. This would allow QBH to formulate its proposed terms, put those terms to the Users, and ascertain then whether the Users would elect to accept those terms or not accept them. A notice under cl 3.1(b) was intended only to enable QBH to gauge whether there was enough interest from existing Users to warrant QBH entering into an agreement "in principle" with PBC. It was commercially sensible that Peabody be made aware of the terms proposed by QBH before Peabody was required to elect to enter into an agreement, especially in the absence of an obligation to negotiate in good faith and any applicable dispute resolution clause.

[22] Peabody argued that its construction gave effect to the structure of cl 3.1 in expressing contingencies, and the results of the fulfilment of those contingencies and, in particular, the provision in cl 3.1(f). Support for its construction was said to be found in the words "indication" and "preparedness to commit" in cl 3.1(b) and cl 3.2(b): they indicated a present state of mind about a future action and something less than an irrevocable commitment.

[23] Peabody emphasised that the first reference to an "agreement" with Users was in cl 3.1(f), and that it was expressed as a contingency. It argued that only its construction explained the staged process provided by cl 3, with provisional arrangements maturing into a final, unconditional agreement. Peabody argued that QBH's construction did not explain the requirement in cl 3.1(d) for QBH to seek an agreement in principle from the PBC; that requirement made sense only upon the footing that Users were not required to decide whether to enter into an agreement until after QBH had obtained the "in principle" agreement and notified Users of its terms. Peabody also argued that a concluded agreement at any stage earlier than cl 3.1(f) ought not to be inferred having regard to the magnitude of this transaction; the proposed agreement would require Peabody to pay QBH more than $100,000,000 over the Option Term (ignoring inflation and charges other than SSC charge[26]).

[24] Peabody argued that notification by QBH of the proposed terms under cl 3.1(e) constituted an offer that Peabody was entitled to accept or reject within the 30 day period stipulated by cl 3.1(f), and that this construction was consistent with the requirement that QBH first secure "in principle" agreement with PBC on reasonable commercial terms, terms which would inform the terms applicable to agreements for the Option Term between QBH and the Users (including Peabody) "if" they entered into an agreement for the Option Term. Peabody argued that reasonable minds might disagree upon what modifications were required for the Option Term to render this

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26 See *Teviot Downs Estate Pty Ltd v MTAA Superannuation Fund* [2004] QCA 57 at [13]-[14], [35], [59].

agreement "on substantially the same terms as [the] Agreement…", and that this also militated against the trial judge's construction even though that provision was not too uncertain to be enforceable. It argued that cl 3.2(a) did not assist QBH, particularly because the auditor's determination under cl 3.2(a) was not required to occur before an agreement was made under cl 3.1(f).

[25] Peabody abandoned appeal ground 2.9, which challenged a decision by the trial judge that the reasonableness of the terms of the respondent's agreement with PBC was not in issue on the pleadings.[27]

[26] I will refer to other arguments advanced by Peabody, and QBH's arguments, in the course of my consideration of the issues in the appeal.

Consideration

[27] This is not a case in which the contract is unambiguous. The trial judge adopted the conventional approach of seeking to identify which of the competing constructions of the ambiguous provisions was most clearly conveyed by the text construed in its context. There was no departure from the principles summarised in *Electricity Generation Corporation v Woodside Energy Ltd*.[28]

[28] In my respectful opinion the trial judge's analysis summarised in [11]-[13] and [15]-[17] of these reasons should be affirmed. In particular, I agree that the principal reason for adopting the construction advocated by QBH is that the process under cl 3.1 is initiated by Peabody providing to QBH a contractually binding commitment to require the SSC and Minimum Annual Throughput for the Option Term. Read in isolation from the context, the words in cl 3.1(b) "binding indication of preparedness to commit" could be understood as a reference to nothing more than a statement of Peabody's intention at the time it gives QBH the notice required by that clause, but the quoted words cannot be divorced from the subsequent words of cl 3.1(b) ("to continue to require the User's SSC at that time and such minimum throughput for the Option Term"). Those words are picked up by the shorthand expression in cl 3.2(b) "binding indication of preparedness to commit in accordance with cl 3.1(b)". With that in mind, and also bearing in mind the contextual matters mentioned in the following reasons, the intended meaning of those provisions is conveyed by the text of cl 3.1(c): "binding commitments …to [SSC] and minimum annual throughputs for the Option Term".

[29] Upon the express terms of cl 3.1(c), such a binding commitment by Peabody (as one of "all Customers") was required if QBH was to take the next step under cl 3. It seems unsurprising that the parties regarded a contractually binding commitment to the Option Term from each Customer as being necessary to "justify [QBH] seeking from the PBC an extension of the rights to access and use the Coal Export Terminal" (cl 3.1(c)).

[30] Peabody pointed out in the course of its argument that cl 3 does not use either of the words "Option" or "Term" otherwise than in the composite expression "Option Term", which is defined as meaning "From 1 January 2015 to 31 December 2026".[29]

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27 Appellant's Outline of Argument, 15 June 2015, paragraph 50.

28 See also *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 (14 October 2015) at [46]-[52], [108]-[112], [118]-[123].

29 The word "Option" is also used as a part of the heading of cl 3 and the heading of cl 3.1 ("Right of First Refusal – Option" (the right of first refusal apparently describing cl 3.2(c)), but cl 1.2(c) provides that "headings are used for convenience only and do not affect the interpretation of this Agreement". Accordingly the headings must be ignored for present purposes.

Nevertheless, the use of that expression "Option Term" and the presence of the definitions of "Option" ("the option for extension of this Agreement in Cl 3") and "Term" ("the Initial Term specified in Cl 2 and Item 2 of Appendix 1 and, if so exercised, and the contents permits, includes Option Term") supply some indication of the aim of cl 3, bearing in mind that the SSC (a term which is used repeatedly in cl 3.1, including in cl 3.1(b) and cl 3.1(c)) is fixed for the "Term": see [4] of these reasons. That is consistent with QBH's case that the provision by Peabody of the binding commitment required by cl 3.1(b) amounts to the exercise of an option to (conditionally) extend the agreement for the Option Term.

[31] That the essential terms of the Option Term are identified in the Agreement also supports QBH's case. As QBH also argued, further support is found in the language of the mechanism in cl 3.2(a) for the determination of QBH's remuneration during the "Option Term" if that remuneration will differ from its remuneration immediately prior to the commencement of that term. Congruently with that provision, cl 3.1(b) requires a commitment to the SSC and minimum throughput "for the Option Term". Upon Peabody's construction, any "option" is exercised only if and when it elects to enter into an agreement under cl 3.1(f), but Peabody's apparently unfettered power to bargain for the terms of the agreement for the Option Term under that construction is difficult to reconcile with the finality and binding force during the Option Term of a decision by the independent auditor created by cl 3.2(a). Upon Peabody's construction, whenever the auditor's determination was made, it could not be regarded as final or binding of its own force because it would have effect only if Peabody decided to make an agreement under cl 3.1(f) that did not exclude the application of such a determination.

[32] The text does not support Peabody's argument that the words in cl 3.1(b) "binding indication of preparedness to commit" have no operation beyond identifying the content of the notice required by cl 3.1(b). I also share the trial judge's doubt that there would be any legal basis for what Peabody contended on its construction would be its obligation to pay QBH's expenses incurred in taking steps towards an agreement if Peabody did not put into effect what it had represented or warranted under cl 3.1(b).[30] Upon Peabody's construction it would represent and warrant that its then present intention was to contract for the specified capacity and throughput during the Option Term, but it would make any such representation or warranty on the footing that it was contractually entitled to defer until the cl 3.1(f) stage any decision about the terms, if any, upon which it would be prepared to contract to take the represented capacity and throughput. A party in Peabody's position might be exposed to legal liability for representing or warranting that it held a state of mind which it did not in fact hold – for example, if it made a commitment which it had no intention of fulfilling on any terms – but it is difficult to accept that the clause was designed for such an unlikely situation. I accept QBH's arguments that cl 3.1(b) does not refer to a representation or contractual warranty about Peabody's state of mind. The representation or warranty suggested by Peabody's arguments would not amount to a "commitment" to take its SSC and throughput or a "binding commitment" as to its SSC and throughput.

[33] Peabody's argument based upon cl 3.2(b) is answered by the trial judge's reasons summarised at [16] of these reasons; that clause is consistent with QBH's construction, under which a failure by Peabody to enter into the written agreement under cl 3.1(f) would amount to a failure of a condition of the agreement for the Option Term, with the result expressed in cl 3.2(b) that QBH would be released from any obligation to

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30 [2015] QSC 37 at [43].

seek from the PBC the specified capacity for Peabody. The trial judge appreciated that cl 3.1(f) does not expressly mandate entry into a contract for the Option Term, but nor does it expressly confer upon Peabody a right to elect at the cl 3.1(f) stage whether or not to be contractually bound for the Option Term. Rather, that clause expresses a contingency the fulfilment of which subjects QBH to the obligations in (iii) and (iv). As QBH submitted, that is consistent with the trial judge's construction. In particular, it is consistent with a construction of cl 3.2(b) that it confirms that QBH is entitled to be relieved from the conditional contract formed upon Peabody's exercise of its option under cl 3.1(b) if Peabody does not take the necessary action to fulfil the contingency.

[34] I would affirm the trial judge's conclusion that the agreement for the Option Term would necessarily exclude a provision in the terms of cl 3 because the parties did not contract for a perpetually renewable agreement. Nevertheless there is some force in Peabody's argument that its construction derives support from the circumstance that the contractual provisions imposing obligations to negotiate the option terms in good faith and for the resolution of disputes do not apply in relation to the terms of the agreement for the Option Term, even though reasonable minds might disagree about what modifications were required to render the agreement for the Option Term "on substantially the same terms as this Agreement…". Peabody gave, as an example of the suggested commercial inconvenience arising from the trial judge's construction, the provision in Appendix 8 of the agreement for the "Peabody Termination Fee". The Appendix provided that for the period between 1 July 2014 and 30 June 2015, that fee was "$10,000,000 reduced proportionately for each day less than a year." Because that period extended into the first six months of the Option Term, the fee at the start of the Option period would be $5,000,000. As Peabody submitted, that fee was significant for the operation of aspects of the Agreement, including that QBH was entitled to require a bank guarantee or parent company guarantee up to the amount of the fee, and in certain events Peabody could be required to pay liquidated damages equal to the fee or, in a different circumstance, equal to one half of the fee. The support which Peabody seeks in examples of this kind is diminished by the circumstance that none of the terms is incapable of ascertainment or enforcement by legal proceedings in the event of a dispute and the scope of any permissible dispute about the terms is very limited. Contrary to one of Peabody's grounds of appeal,[31] the contract for the Option Term would be on substantially the same terms as the Agreement despite any adjustments which might be required to cater for examples of that kind.

[35] Peabody also has a reasonable argument that it seems objectively unlikely that a party in its position would commit itself to the Option Term before all of the terms of the agreement for that period were settled. The significance of this argument is diminished by the circumstance that the User would know the essential terms and that the charges for the SSC and throughput would be the charges applicable immediately prior to the commencement of the Option Term unless the independent auditor determined that QBH would not recover increases in its costs, in which event the rates would be fixed by the independent auditor.

[36] On the other hand, there are substantial difficulties with Peabody's construction. Clause 3.1(b), especially when it is understood in the context of the immediately following and inextricably related provision in cl 3.1(c), does not use the language of a representation or warranty of the truth of what is stated in a notice given by Peabody.

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31 Ground 2.8.

As I have mentioned, under Peabody's construction the notices required by those clauses could not reasonably be described as involving a "binding commitment" to the matters specified. Further, although the word "binding" in those provisions is referrable to something stated by the Customers, upon Peabody's construction the immediate result of all Customers providing binding commitments is that QBH alone becomes bound to take steps. Also, as I have mentioned, although the Agreement contemplates the exercise of an option to extend the Agreement, upon Peabody's construction no option in the conventional sense of the word is exercised by either party. Instead, upon that construction Peabody gives notice only of its then present intention to require an extension, QBH may become obliged by cl 3.1(e) to make an offer to enter into an agreement for the Option Term and, under cl 3.1(f), Peabody may elect whether or not to accept that offer.

[37] The trial judge's observation (quoted in [14] of these reasons) that upon Peabody's construction "neither party would be bound in any respect although steps (1), (2) and (5) had been taken" accurately reflected Peabody's argument before the trial judge.[32] That is not the effect of Peabody's argument on appeal, this argument incorporated the new contention, which was suggested as a possible construction by the trial judge but not then adopted by Peabody, that a notice by QBH under cl 3.1(e) was an offer which Peabody could accept within 30 days under cl 3.1(f).[33] The new argument should not be accepted for the reasons I have given and because cl 3.1(e) does not express a requirement for an offer to contract by QBH and cl 3.1(f) does not express a requirement that QBH keep an offer to contract open for acceptance by Peabody for 30 days.

[38] The construction propounded by Peabody in this appeal is arguably open on the text and the various arguments advanced in support of this construction are not insubstantial, but for the reasons I have given, which for the most part restate the reasons given by the trial judge, the trial judge's construction conforms more closely to the contractual text and better reflects the evident aim of the clause.

[39] Peabody's alternative case that the contingency expressed in cl 3.1(f) did not arise because QBH made a final agreement, rather than an agreement in principle, with the PBC is answered by the trial judge's reasons summarised in [17] of these reasons. I do not accept arguments advanced by Peabody that QBH departed from a contractually mandated sequence in a way which reasonable contracting parties would regard as prejudicial, such as by depriving Peabody of making a contribution to QBH's agreement with PBC or by accelerating the timetable. As QBH submitted, the Agreement does not contemplate that any of the Customers are entitled to influence QBH's decision about the acceptability of the terms of its agreement with the PBC. So much is consistent with Peabody's acknowledgment in cl 1.3 of the Agreement that "the contents of the PBC agreements (other than the PBC requirements[34]) have not been disclosed to the User". In that context, QBH's obligation in cl 3.1(e) to notify Peabody of "same" requires QBH to notify Peabody only of the fact that QBH has obtained "agreement in principle from the PBC on reasonable commercial terms acceptable to PBC…", rather than of the terms of that agreement. In so far as PBC might seek increased

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32 Transcript, 1 December 2014 at 1-33 to 1-37 (especially the submission at 1-37 that "The user can insist on a further term…if, under (f), he enters into that conditional agreement …But unless that step occurs, there would be no agreement between the parties as to the further terms"). That argument was consistent with Peabody's Written Submissions of the Defendant, 27 November 2014, at paragraphs 6 – 12.

33 Transcript, 1 December 2014 at 1-35 to 1-36. Peabody thereafter made the oral submission quoted in footnote 32, which was inconsistent with the possible construction to which the trial judge adverted.

34 As the expression "PBC Requirements" suggests, those requirements, which are set out in appendices to the Agreement, do not include the commercial terms of QBH's agreement with the PBC.

minimum throughput and increased rental which QBH might seek to pass on to Users,[35] the Agreement made it clear that so much could follow if Peabody exercised its option under cl 3.1(b); that clause required a commitment on a pro-rata basis to PBC's required minimum throughput and cl 3.2(a) signalled that, if the charges increased, any necessary "reset" for the Option Term would be determined by the auditor.

[40] The trial judge's conclusion is also consistent with the fact that the time limits for action by QBH in cl 3.1 are expressed as maximum periods rather than minimum periods. The staged structure of cl 3 is evidently designed for the exclusive benefit of QBH. Upon the footing that the parties were conditionally bound to the agreement for the Option Term once Peabody gave the notice under cl 3.1(b), QBH's conduct in making an agreement, rather than merely an agreement in principle, with PBC did no more than facilitate the acceleration of the written agreement for the Option Term. This is not a case in which a contracting party seeks to rely upon its own breach to its benefit or to deprive the other party of a benefit to which it is entitled under the contract.[36]

[41] Peabody contended that the form of the declaration by the trial judge did not specify the agreement the parties were obliged to make or clearly specify the terms of that agreement. To the extent that there is room for reasonable argument about what terms are "substantially the same terms as this Agreement" that is a function of the terms of the parties' contract. Peabody did not identify any deficiency in the form of the declaration.

Notice of contention

[42] QBH filed a notice of contention that the declaration should be affirmed on two grounds which were not relied upon by the trial judge. The first ground is that agreements QBH made in 2009 with two companies provided the context in which the Agreement was entered into and the process in cl 3.1 was intended to operate. The trial judge held that these agreements could not be taken into account unless it were proved that their terms were known to Peabody when it entered into the Agreement. The trial judge did not decide whether or not QBH had proved that fact.[37] QBH contends that it proved that fact by an affidavit of Mr Brown-Kenyon, who was not cross-examined. Peabody accepts that this evidence shows that QBH told Peabody that the agreements with the three customers would be the same but it contends that QBH did not prove that Peabody knew that this turned out to be the case.

[43] Peabody did not take issue with the analysis in QBH's written submission[38] of the negotiations for QBH's 2009 agreements with Peabody and each other customer. In summary, during the negotiation period a representative of QBH sent a series of uniform draft contracts by emails to all three customers by way of fulfilling QBH's expressed assurances to Peabody that all users would be treated equally and all of their agreements would be the same. QBH made and fulfilled that assurance after Peabody had expressed a concern that QBH might favour one of the companies, which was related to QBH. In the absence of any challenge to that evidence in cross-examination, or any evidence to the contrary, I am inclined to accept that Mr Brown-Kenyon's affidavit justifies an inference being drawn that Peabody knew when it contracted that QBH contracted at the same time, in relevantly identical terms with each other customer.

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35 Under cl 7.3 and cl 12.1(h) respectively.

36 Cf *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd* [2014] 2 Qd R 132 at [73], [80] – [89] and the cases therein discussed by Jackson J.

37 [2015] QSC 37 at [42].

38 Respondent's Amended Outline of Argument, 10 June 2015, [29]-[32].

[44] Upon the footing that such an inference should be drawn, QBH argued that it supported the trial judge's construction because it revealed that there was no scope for individual negotiation on important terms of the agreement for the Option Term as between QBH and Peabody. That was submitted to follow because the process in cl 3.1 of the Agreement was to operate in parallel with an identical process between QBH and each other user. So much is in any event suggested by cl 3.1(c) and cl 3.1(e)(ii) of the Agreement, subject to the prospect of individual negotiation under cl 3.2(c) or 3.2(e) (and QBH's argument does not deny that Peabody was entitled to negotiate for additional terms under cl 3.1(f)). This evidence is consistent with QBH's case but I am not persuaded that it significantly advances that case.

[45] The second ground of the notice of contention was directed to Peabody's alternative case that under cl 3.1(d) and cl 3.1(e) the alleged agreement formed by notice under cl 3.1(b) was conditional upon QBH obtaining an agreement in principal with PBC, and that condition was not satisfied by the final agreement between those parties. QBH contends that, if Peabody established that those conditions were not satisfied, Peabody did not establish that it had terminated the agreement consequent upon that non-satisfaction because it did not prove that it had given notice of termination to QBH. QBH acknowledged[39] that it did not plead or argue before the trial judge as a ground for defeating Peabody's alternative case that Peabody did not establish that it had terminated the agreement formed upon QBH giving notice under cl 3.1(b). The argument in this Court suggested that such an argument would require the resolution of factual questions. In a commercial case of this kind QBH should not be permitted to raise such a point for the first time on appeal.

Proposed orders

[46] I would dismiss the appeal with costs and order that the parties have leave to make submissions on costs in accordance with paragraphs 52(3) and (4) of Practice Direction No. 3 of 2013.

[47] **DOUGLAS J:** I agree with the reasons of Fraser JA and the orders his Honour proposes. His Honour's and the learned primary judge's interpretation of cl 3.1 of the Agreement seem to me to be more consistent with the aim of avoiding commercial inconvenience and a result that could not have been intended.[40]

[48] **NORTH J:** I agree with the reasons of Fraser JA and the orders his Honour proposes. I also agree with the observation made by Douglas J.

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39 Transcript 30 July 2015, p 1-32.

40 See *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640, 656-657 at [35] and *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [46]-[52] and [109].