SUPREME COURT OF QUEENSLAND

CITATION:	*Armour Energy Limited v AEGP Australia Pty Ltd* [2016] QSC 153
PARTIES:	**ARMOUR ENERGY LIMITED** ACN 141 198 414 (plaintiff) **v** **AEGP AUSTRALIA PTY LTD** ACN 605 683 798 (defendant)
FILE NO:	BS 1235 of 2016
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 July 2016
DELIVERED AT:	Brisbane
HEARING DATES:	16, 17, 18, 21, 22, 23 and 24 March 2016
JUDGE:	Atkinson J
ORDER:	**The Farm-Out Agreement entered into on 11 September 2015 should be specifically performed.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the plaintiff agreed to sell to the defendant a 75 per cent interest in petroleum exploration permits and permit applications that it held – where the main dispute between the parties was whether the conditions precedent to that agreement had been satisfied – where the agreement incorporated, by reference, a number of native title agreements – whether the proceedings were properly constituted to involve construction of the native title agreements – whether, construed objectively, the sale agreement required the signatures of all relevant native title parties to a deed of assignment and assumption – whether, alternatively, the native title parties had agreed to a novation of the native title agreements such that execution by the Northern Land Council of the deed was sufficient to fulfil the relevant condition precedent

Native Title Act 1993 (Cth), s 24AA, s 25, s 28, s 29, s 30, s 30A, s 31
Petroleum Act 1984 (NT)

Argo Fund Ltd v Essar Steel Ltd [2005] 2 Lloyd's Rep 203, cited
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24, cited
CSG Limited v Fiji Xerox Australia Pty Ltd [2011] NSWCA 335, considered
Electricity Corp v Woodside Energy (2014) 251 CLR 640; [2014] HCA 7, cited
Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd [2010] EWCA Civ 1335, cited
John Alexander's Clubs v White City (2010) 241 CLR 1; [2010] HCA 19, cited
Leveraged Equities Ltd v Goodridge (2011) 191 FCR 71; [2011] FCAFC 3, applied
Mount Bruce Mining v Wright Prospecting (2015) 89 ALJR 990; [2015] HCA 37, applied
Olsson v Dyson (1969) 120 CLR 365; [1969] HCA 3, applied
Pacific Carriers Ltd v PNB Paribas (2004) 218 CLR 451, cited
Toll (FGCT) P/L v Alphapharm P/L (2004) 219 CLR 165; [2004] HCA 52, cited

COUNSEL:	S Couper QC with D Logan QC and N Derrington for the plaintiff F Douglas QC with D Keane for the defendant
SOLICITORS:	Corrs Chambers Westgarth for the plaintiff Gilbert + Tobin for the defendant

[1] The plaintiff, Armour Energy Limited ("Armour"), is the holder of a number of petroleum exploration permits in the Northern Territory numbered EP 171, EP 174, EP 176, EP 190, EP 191 and EP 192 (the "exploration permits"). It is also an applicant for a number of other exploration permits EP(A) 172, EP(A) 173, EP(A) 177, EP(A) 178, EP(A) 179, EP(A) 193, EP(A) 194, EP(A) 195, EP(A) 196 (the "permit applications").

[2] On 20 August 2015, Armour made an announcement to the Australian Securities Exchange to the effect that it had signed a letter of intent with American Energy – Acquisitions LLC, an affiliate of American Energy Partners LP, to "jointly further the exploration and development of Armour's oil and gas prone McArthur Basin Project in the Northern Territory of Australia." This was the first public announcement of the negotiations which led to the execution of, *inter alia*, a Farm-Out Agreement on 11 September 2015.

The Farm-Out Agreement

[3] By a written contract made on 11 September 2015, referred to as the Farm-Out Agreement, Armour (referred to in the Farm-Out Agreement as the Seller) agreed to sell to the defendant, AEGP Australia Pty Ltd ("AEGP")[1] (referred to in the Farm-Out Agreement as the Buyer), a 75 per cent interest in the exploration permits and as bare trustee of a 75 per cent interest in the permit applications[2] for the sum of approximately US$ 13,000,000 for the existing permits and a further US$ 7,000,000 to US$ 10,000,000 for certain permits to be granted as a result of permit applications. The Farm-Out Agreement was subject to a number of conditions precedent. Whether or not the relevant condition precedent has been satisfied is the main area of dispute between the parties to this litigation.

[4] In its Claim filed on 3 February 2016, the plaintiff, Armour, sought the following substantive relief:

1. A declaration that the Farm-Out Agreement should be carried into execution and specifically performed;

2. Specific performance of the Farm-Out Agreement;

3. Alternatively, a declaration that the plaintiff has used all reasonable endeavours to ensure that the condition in clause 2.1(e) of the Farm-Out Agreement was satisfied as expeditiously as possible and before the cut off date; and

4. Alternatively, a declaration that the plaintiff is entitled to terminate the Farm-Out Agreement.

[5] In its Defence and Counterclaim filed on 15 February 2016, the defendant, AEPG, also sought specific performance of the Farm-Out Agreement and a number of declarations including a declaration that Armour is not entitled to terminate or to seek to terminate the Farm-Out Agreement. By its Amended Defence and Counterclaim filed on 4 March 2016, AEGP also claimed further declarations and orders which were not pursued at trial.

[6] Clause 2 of the Farm-Out Agreement contained a number of conditions precedent. Importantly, cl 2.1 provided that the operative clauses of the agreement did not become binding on the parties and were of no force or effect unless and until each of the conditions therein had been satisfied or waived in accordance with cl 2.3.

[7] The waiver cl in cl 2.3 had its own rather unusual aspects. It provided that the conditions in:

> "(i) clauses 2.1(a), 2.1(b), 2.1(c), 2.1(e), 2.1(f), 2.1(g) and 2.1(i) are for the benefit of the Buyer and may only be waived by the Buyer by giving

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1 AEPG is the Australian affiliate of American Energy Partners LP.

2 Clause 5.6 of the Farm-Out Agreement provides:

"**5.6 Assignment of Initial Farmout Interest**

Upon and from Closing:

(a) Seller will assign a 75% interest in the Existing Permits and Assets to Buyer; and

(b) Seller will hold the Permit Applications as bare trustee on trust for Buyer (to the extent only of a 75% interest) and subsequently assign an interest in each of the Pending Permits to Buyer in accordance with clause 5.9."

written notice to the Seller specifying that it no longer requires the condition to be fulfilled;

(ii) clause 2.1(d) is for the benefit of the Seller and may only be waived by the Seller by giving written notice to the Buyer specifying that it no longer requires the condition to be fulfilled;

(iii) clause 2.1 are [*sic*] for the benefit of all parties and may only be waived by written agreement between the parties."

Clause 2.1(e)

[8] The condition precedent which is relevant to this matter is condition precedent 2.1(e) which was in these terms:

> "(e) **Native Title Agreement**: execution by the NLC [Northern Land Council] in respect of each Native Title Agreement and the other parties thereto of a deed, subject to satisfactory due diligence by the Buyer, substantially in the form attached hereto as Annexure 6, or otherwise approved by Buyer."

No question was raised in this litigation as to a lack of satisfactory due diligence by the Buyer.

[9] The relevant native title agreements were listed in Schedule 4 of the Farm-Out Agreement as follows:

> "Co-Existence and Exploration Deed – Exploration Permit Application EP(A)171 and EP(A)176 in the Northern Territory, between Armour Energy Limited, the Native Title Parties and the Northern Land Council dated 22 June 2011.
>
> Tripartite Deed (Regarding the grant of EP171 and EP176) between the Native Title Applicants on behalf of the Native Title Claim Group, the Land Council, the Grantee and the Northern Territory of Australia dated 22 June 2011.
>
> Co-Existence and Exploration Deed – Exploration Permit Application EP(A)174 in the Northern Territory, between Armour Energy Limited, the Native Title Parties and the Northern Land Council (undated).
>
> Tripartite Deed (Regarding the grant of EP174) between the Native Title Applicants on behalf of the Native Title Claim Group, the Land Council, the Grantee and the Northern Territory of Australia (undated).
>
> Co-Existence and Exploration Deed – Exploration Permit Application EP(A)190 in the Northern Territory, between Armour Energy Limited, the Native Title Parties and the Northern Land Council (undated).
>
> Tripartite Deed (Regard the grant of EP 190) between the native Title Applicants on behalf of the Native Title Claim Group, the Land Council, the Grantee and the Northern Territory of Australia (undated).

> Co-Existence and Exploration Deed – Exploration Permit Application EP(A)191 in the Northern Territory, between Armour Energy Limited, the Native Title Parties and the Northern Land Council dated 13 August 2013.
>
> Tripartite Deed (Regarding the grant of EP191) between the Native Title Applicants on behalf of the Native Title Claim Group, the Land Council, the Grantee and the Northern Territory of Australia dated 13 August 2013.
>
> Co-Existence and Exploration Deed – Exploration Permit Application EP(A)192 in the Northern Territory, between Armour Energy Limited, the Native Title Parties and the Northern Land Council dated 13 August 2013.
>
> Tripartite Deed (Regarding the grant of EP192) between the Native Title Applicants on behalf of the Native Title Claim Group, the Land Council, the grantee and the Northern Territory of Australia dated 13 August 2013."

[10] For each exploration permit, the Native Title Agreements were those that were attached to the application for that exploration permit. For each, that is a Co-Existence and Exploration Deed ("CEED") and a Tripartite Deed. [3] In each case, the parties to the CEEDs were Armour, the Native Title Parties and the Northern Land Council; the parties to each Tripartite Deed were the Native Title Applicants on behalf of the Native Title Claim Group, the Northern Land Council, Armour and the Northern Territory.

[11] Annexure 6 to the Farm-Out Agreement is in the form of a draft Deed of Assignment and Assumption ("DOAA"). The parties to the DOAA were said to be Armour as assignor, AEGP as assignee, the Northern Land Council and the Native Title Parties (being each of the parties listed in the Schedule). However, no Native Title Parties were listed in the Schedule.[4] Each of the Native Title Parties and the Northern Land Council was said to be a "Continuing Party" in the recitals. The purpose of the signatures of the continuing parties was said, in the recitals of the DOAA, to be to consent to the assignment of the assigned interest and the assumption by the assignee of assumed obligations.

[12] Clause 2 of the DOAA dealt with the assignment by Armour to AEPG from the closing date of the Farm-Out Agreement and cl 3 dealt with the assumption by AEPG from the closing date of the obligations under the CEEDs and Tripartite Deeds to the extent of the assigned interest.

[13] Clause 4 of the DOAA provided for consent, release and covenant by each of the continuing parties in the following terms:

> "Each Continuing Party:
>
> (a) consents to the assignment of Assigned Interest referred to in clause 2 and the assumption referred to in clause 3;

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[3] It appears that a practice arose of having two agreements rather than one under the *Native Title Act* 1993 (Cth). The Tripartite Deed allows a valid grant of the tenement but does not contain any compensation or payment provisions. The CEED contains payment provisions. The reason for having two agreements is said to be to prevent State and Territory Governments from seeing the amount of payments being made in compensation to the Native Title Parties who are never parties to the CEEDs.

[4] The Schedule to the DOAA provides: *"Insert details of Native Title Parties"*.

(b) on and from the Effective Date irrevocably releases the Assignor from the performance of the Assumed Obligations and all further liability under the Agreements to the extent of the Assigned Interest without prejudice to any liability incurred or obligations arising or accrued before the Effective Date; and

(c) covenants with Assignee to observe the terms and conditions of the Agreements which are on its part required to be observed."

[14] The Signing Page of the DOAA made provision for it to be executed as a Deed by AEGP, Armour, the Northern Land Council, and by one of the Native Title Parties, and by and on behalf of a number of other Native Title Parties. None of the Native Title Parties is specifically identified on the Signing Page.

Clause 2.2

[15] Clause 2.2 of the Farm-Out Agreement was a reasonable endeavours and notice provision. It provided, in cl 2.2(b), that Armour must use all reasonable endeavours to ensure that the condition in cl 2.1(e) was satisfied as expeditiously as possible and in any event before the cut-off date. Armour was also said to be responsible for the preparation of all documentation in relation to the satisfaction of that condition. Clause 2.2(d) required each party to provide all reasonable assistance and information to the other party as was necessary to satisfy the conditions in cl 2.1.

[16] The notice provision was found in cl 2.2(e) which provided:

"(e) Each party must keep the other party informed of the progress towards satisfaction of the conditions in clause 2.1, and must promptly notify the other in writing if it becomes aware that a condition in clause 2.1 has been satisfied or has become incapable of being satisfied."

Cut-off Date

[17] The cut-off date was defined in cl 1.1 of the Farm-Out Agreement as being 180 days after the date of the Farm-Out Agreement. The date 180 days after 11 September 2015 was 9 March 2016.

[18] Clause 2.5 also referred to the cut-off date. It relevantly provided as follows:

"**2.5 Cut-off Date and Due Diligence Date**

A party may, by not less than 10 Business Days' Notice to the other party, terminate this agreement at any time before Closing if:

(a) it has complied with its obligations under clause 2.2; and

(b) one of the following has occurred:

…

(ii) any condition in clause 2.1 becomes incapable of satisfaction or the parties agree that any of the conditions in clause 2.1 cannot be satisfied;

…"

Deed of Variation

[19] On 13 October 2015, Armour and AEGP entered into a Deed of Variation to the Farm-Out Agreement (the "Variation Deed"). Paragraph B of the Recitals set out that the parties wished to amend certain terms and dates and other provisions in relation to the conditions precedent set out in the Farm-Out Agreement. By the Variation Deed, the cut-off date in cl 1.1 was amended to become 9 January 2016 in place of 9 March 2016. The Variation Deed also amended cl 2.3 with regard to waiver so that it was clear that cl 2.1(e) was for the benefit of AEGP and could only be waived by AEGP.

Closing date

[20] The time of closing was set out in cl 5 of the Farm-Out Agreement. It was relevantly said to be the "day which is 10 Business Days after satisfaction or waiver of the conditions in clause 2.1." Armour's obligations as at the closing date were set out in cl 5.2. These included a requirement, pursuant to cl 5.2(a)(v)(A), for Armour to give to AEGP copies of "all deeds for the purposes of cl 2.1(e), in respect of the Native Title Agreements, duly and validly executed by the relevant parties." Closing was taken to have occurred under cl 5.4(c) when each party had performed all its obligations under cll 5.2 and 5.3.

Execution of a DOAA

[21] The Northern Land Council did not execute the DOAA which is Annexure 6 to the Farm-Out Agreement. Armour has, however, procured execution by the Northern Land Council of a Deed of Covenant for each CEED (the "executed Deeds of Covenant") but has not procured execution of a DOAA by the other parties to the Native Title Agreements. The executed Deeds of Covenant were delivered by Armour's solicitors to AEPG's solicitors on 21 December 2015.

[22] In each Deed of Covenant, Recital B states that:

> "B. The NLC has been appointed by the Native Title Parties as the legal representative for the purposes of the Agreement, and enters into this deed in its capacity as a party to the Agreement and as the legal representative of the Native Title Parties."

The "Agreement" referred to is the CEED for the relevant exploration permit.

[23] Paragraph E of the Recitals asserts:

> "E. The NLC has the authority to administer the Agreement on behalf of itself and the Native Title Parties, and enters into this deed for the purposes of consenting to the assignment of the Assigned Interest to the Assignee and to the Assignee assuming the Assumed Obligations and agrees to release the Assignor from the performance of the Assumed Obligations in accordance with the provisions of this deed."

[24] Clauses 2, 3 and 4 of the Deeds of Covenant are in the same terms as those clauses in the DOAA except that in cl 4 the words "each continuing party" in the DOAA are replaced with the words "the NLC" in the executed Deeds of Covenant.

[25] Clause 6 of each Deed of Covenant is entitled "Acknowledgements" and provides:

> "6.1 **Condition precedent**
>
> The parties to this deed acknowledge that:
>
> (a) it is the NLC which must give its prior written consent to the assignment of the Assigned Interest in accordance with clause 12 of the Agreement; and
>
> (b) the Assignee must execute a deed of assumption in a form reasonably acceptable to the NLC.
>
> 6.2 **This deed satisfies clause 12 of the Agreement**
>
> The parties to this deed agree that this deed satisfies the requirements for the deed of assumption required by clause 12 of the Agreement.[5]
>
> 6.3 **NLC authority**
>
> The NLC agrees for the benefit of the other parties to this deed that, as legal representative of the Native Title Parties, it has actual authority to enter into this deed for the purposes of giving full effect to this deed."

Meaning of clause 2.1(e)

[26] The first question to be answered by the court is what did the condition precedent set out in cl 2.1(e) of the Farm-Out Agreement require? Was that condition precedent satisfied by the execution by the Northern Land Council of the Deeds of Covenant?

[27] In *Mount Bruce Mining v Wright Prospecting*[6] the joint judgment of French CJ, Nettle and Gordon JJ set out the applicable legal principles for construing a commercial contract. In doing so they referred to the leading cases of *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*[7] and *Electricity Corp v Woodside Energy*.[8]

[28] Their Honours held:

> "[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.

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5 In the Deed of Covenant relating to EP 171 and 176, the reference is to Clause 12. In the Deeds of Covenant relating to EP 174, 190, 191 and 192 the relevant reference is to Clause 13.

6 (2015) 89 ALJR 990; [2015] HCA 37.

7 (1982) 149 CLR 337 at 350, 352.

8 (2014) 251 CLR 640 at [35]; see also *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109–110; *Pacific Carriers Ltd v PNB Paribas* (2004) 218 CLR 451 at [22]; *Toll (FGCT) P/L v Alphapharm P/L* (2004) 219 CLR 165 at 178 [36], 179 [40].

> [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable business person would have understood those terms to mean. That inquiry 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.
>
> [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 result'. Put another way, a commercial contract should be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'." (citations omitted)

[29] Armour submitted that the Farm-Out Agreement and the DOAA had to be understood in the context of the Native Title Agreements (the CEEDs and the Tripartite Deeds) which were referred to in the text of the Farm-Out Agreement and the *Native Title Act* 1993 (Cth).

[30] AEPG contended that these proceedings are not properly constituted to make good any legal argument as to the proper interpretation of the CEEDs as neither the Northern Land Council nor any of the Native Title Parties was a party to the proceedings. Relying on the High Court's decision in *John Alexander's Clubs v White City*[9] AEPG

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[9] (2010) 241 CLR 1 at [131] and [137].

submitted that this court has been invited to make orders directly affecting the rights or liabilities of non-parties and should not do so unless those parties are joined.

[31] That argument must be rejected. This court must construe the relevant terms of the Farm-Out Agreement. As the terms of the CEEDs and the Tripartite Deeds were not only part of the surrounding circumstances known to both parties, but were incorporated into the Farm-Out Agreement by being listed in Schedule 4, their terms are relevant to the proper construction of the Farm-Out Agreement.

The Native Title Act

[32] The *Native Title Act* sets the statutory context in which the Native Title Agreements were made. Subdivision P of Division 3 of Part 2 of the *Native Title Act* deals with the right to negotiate. Parties who want certain future acts on land subject to native title to be valid must satisfy the right to negotiate.[10] Future acts include conferral of mining rights (s 25(1)(a)).

[33] Section 29 of the *Native Title Act* deals with the requirement of a government to give notice of an act intended to be done. Subsections 29(2)(a) and (b) provide as follows:

> "(2) The Government party must give notice to:
>
> (a) any registered native title body corporate (a ***native title party***) in relation to any of the land or waters that will be affected by the act; and
>
> (b) unless there are one or more registered native title bodies corporate in relation to all of the land or waters that will be affected by the act:
>
> (i) any registered native title claimant (also a ***native title party***); and
>
> Note: Registered native title claimants are persons whose names appear on the Register of native title claims as applicants in relation to claims to hold native title: see definition of ***registered native title claimant*** in section 253.[11]
>
> (ii) any representative Aboriginal/Torres Strait Islander body;
>
> in relation to any land or waters that will be affected by the act."

[34] Under s 30A the government party, any native title party and any grantee party is a negotiation party. Section 30 of the *Native Title Act* provides for a number of other persons, as well as those listed in s 29(2), to be native title parties. The native title parties set out in s 30 are as follows:

> "**30 Other native title parties etc.**
>
> (1) Each of the following is also a ***native title party***:
>
> (a) any person who, 4 months after the notification day (see subsection 29(4)), is a registered native title claimant in

[10] *Native Title Act* s 24AA(5).
[11] cf s 30 and 531 in [23] and [24].

relation to any of the land or waters that will be affected by the act, so long as:

(i) the application containing the claim was filed in the Federal Court, or given to the recognised State/Territory body, before the end of 3 months after the notification day; and

(ii) the claim related to any of the land or waters that will be affected by the act;

Note: The note to subparagraph 29(2)(b)(i) explains who can be a registered native title claimant.

(b) any body corporate that, 3 months after the notification day, is a registered native title body corporate in relation to any of the land or waters that will be affected by the act;

(c) any body corporate that becomes a registered native title body corporate in relation to any of the land or waters that will be affected by the act;

(i) after the end of that period of 3 months; and

(ii) as a result of a claim whose details were entered on the Register of Native Title Claims before the end of that period of 3 months.

Ceasing to be a native title party

(2) A person ceases to be a native title party if the person ceases to be a registered native title claimant.

Note: If a native title claim is successful, the registered native title claimant will be succeeded as a native title party by the registered native title body corporate.

Registered native title rights and interests

(3) For the purposes of this Subdivision, the ***registered native title rights and interests*** of a native title party are:

(a) if the native title party is such because an entry has been made on the National Native Title Register—the native title rights and interests described in that entry; or

(b) if the native title party is such because an entry has been made on the Register of Native Title Claims—the native title rights and interests described in that entry.

Replacing a native title party

(4) If:

(a) a person becomes a registered native title claimant because the person replaces another person as the applicant in relation to a claimant application; and

(b) the other person is a native title party;

the first-mentioned person also replaces the other person as the native title party."

[35] Section 31(1) sets out the usual procedure for negotiations to occur between the negotiation parties. It provides:

"**31 Normal negotiation procedure**

(1) Unless the notice includes a statement that the Government party considers the act attracts the expedited procedure:

(a) the Government party must give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and

(b) the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to:

(i) the doing of the act; or

(ii) the doing of the act subject to conditions to be complied with by any of the parties.

Note: The native title parties are set out in paragraphs 29(2)(a) and (b) and section 30. If they include a registered native title claimant, the agreement will bind all of the persons in the native title claim group concerned: see subsection 41(2)."

The Tripartite Deeds

[36] Pursuant to s 31(1)(b) of the *Native Title Act*, the negotiation parties for the issue of petroleum exploration permits entered into negotiations and made agreements with regard to each exploration permit in the form of Tripartite Deeds. The parties who signed the Tripartite Deeds for EP 171 and 176, 174, 190, 191 and 192 were the Northern Territory, Armour, the Northern Land Council and various Native Title parties. It appears there were a total of 58 Native Title parties who signed one or more of the Tripartite Deeds. Those who signed one or more of the Tripartite Deeds as a Native Title Party are shown in the attached table. It should be noted that they are not precisely the same persons who are listed as Native Title Applicants in the Schedule of Tripartite Deeds.

Name	**171 & 176**	**174**	**190**	**191**	**192**
Katie Baker				X	
Leo Charlie					X
Tony Chong		X	X		X
John Clarke		X	X		
Billy Coolibah	X		X	X	

Virginia Davey	X				
Reggie Dixon		X	X	X	X
Roy Dixon	X				
Thelma Dixon	X				
Amy Friday	X	X	X		
Graham Friday			X		
Tom Friday	X	X	X		
Garrick George		X	X		X
Kathy Ger	X				
Victor Godfrey			X	X	X
Jacky Green	X	X	X	X	
Topsy Green	X			X	X
Robert Hammer		X	X		
David James Harvey			X		
Roddy Harvey			X		
Dennis Hogan	X				
Elizabeth Hogan				X	X
Jack Hogan					X
Nelson Hogan	X		X	X	
Robert Hogan	X				
Jimmy Holt				X	X
Eunice Isaac	X				
Harry Lansen	X				
Nancy McDinny	X				
Rachel McDinny	X				
Wailo McKinnon	X	X	X		
Dulcie Mawson	X				
Ian Mawson			X		
Peggy Mawson	X		X	X	
Billy Miller	X		X		
Chloe Mulholland	X				
Daniel Mulholland	X				
Dinah Norman	X	X	X		
Leonard Norman			X		
Joanne O'Keefe	X			X	
Robert O'Keefe (Jnr)			X	X	
Robert O'Keefe (Snr)	X				
Dixie Pluto	X				
Douglas Pluto	X				
Edna [Pluto]	X				
John Pluto (Snr)	X				
Patsy Pluto	X				
Asman Rory	X				
Keith Rory	X	X	X		
Donald Shadforth				X	X
Larry Simon		X	X		
Shirley Simon	X				
Mavis Timothy	X				
Norma Timothy			X		
Wilton Timothy			X		X
Royce Walden		X	X		
Marshall Wallace					X
Gerald Woologorang			X		X

[37] In the Tripartite Deed for EP 171 and 176, the grantee party is shown as Armour. Clause 13 of that Tripartite Deed deals with assignment and provides:

> "Subject to the terms of the NT legislation, the Grantee Party may assign its rights and obligations under this Deed to any assignee of the Interest, and the assignee shall thereupon be considered to be the Grantee Party for the purposes of this Deed."

[38] Under cl 4 of the Tripartite Deed each Native Title Party:

> "(a) agrees to the grant of the Interest and to the Grantee Party exercising its rights and discharging its obligations under the Interest;
>
> (b) agrees to any renewal of the Interest in accordance with the NT legislation whether granted over all or part of the land; and
>
> (c) acknowledges that this Deed is an agreement of the kind mentioned in Sections 28(1)(f) and 31(1)(b) of the *Native Title Act*."

[39] The Tripartite Deeds with regard to EP 174, 190, 191 and 192 have an additional subclause in cl 14[12] dealing with assignment. That additional subclause provides:

> "Subject to the requirements of the *Native Title Act*, in the event that an approved determination is made by the Federal Court in respect of any of the Native Title Determination Applications the subject of this Deed, the Native Title Applicants may assign their rights and obligations under this Deed to any registered native title body corporate that the Federal Court determines is to perform the functions of a registered native title body corporate for an area including the land, and the assignee registered native title body corporate shall thereupon be considered to be the representative of the determined common law holders for the purposes of this Deed."

Co-existence and exploration deeds

[40] The parties to each CEED are said to be Armour, the Northern Land Council and the Native Title Parties.

[41] Dealing first with the CEED for EP 171 and 176, the Grantee Party was Armour, however, it was also defined in cl 1.1 of that CEED to mean "each person who from time to time holds a legal or beneficial interest in any or all of the Exploration Permits including the Company as defined in the Production Principles, Terms and Conditions so far as the context permits." Clause 1.8 provides for the circumstance where more than one party becomes the grantee party in the following terms:

> "1.8 When the interests, rights or obligations of the Grantee Party under this Deed, the Exploration Permit, any Production Interest or otherwise in connection with the Project are held by or imposed upon more than one person (including pursuant to a joint venture), then each of the persons holding or subject to any of those interests, rights and obligations shall be liable for the obligations of the Grantee Party under this Deed."

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[12] The first subclause of cl 14 in these Tripartite Deeds is the same as cl 13 in the Tripartite Deed for EP 171 and 176.

[42] The "Native Title Parties" were defined to mean those Aboriginal people who have or claim Native Title in the application area as at the date of the CEED.

[43] The principles of agreement are set out in cl 2.1 of the CEED which provides:

> "The Parties acknowledge and agree that:
>
> (a) the objectives of this Deed are to enable the grant to the Grantee Party of the Exploration Permits and to enable the Grantee Party to undertake exploration on the Permit Area with a view to proposing a Production Operation on such area which is not inconsistent with the rights and interests of the Native Title Parties and their members in relation to the Permit Area; and
>
> (b) they wish by this Deed to ensure that the Project is undertaken in a way which, so far as reasonably possible:
>
> (i) shows understanding and respect for the interests of the Native Title Parties and their members in the Permit Area according to Aboriginal Tradition and as people who will be affected by the Project and any subsequent Production Operations;
>
> (ii) minimise the deleterious impact upon the Native Title Parties and their members;
>
> (iii) minimise the deleterious impact upon the environment; and
>
> (iv) contributes to the social and economic well-being of the Native Title Parties."

[44] Clauses 4.1 to 4.3 set out obligations of the Native Title Parties. Clauses 4.4 and 4.5 set out obligations of the Native Title Parties and the Northern Land Council. Clause 4.10 deals with a warranty by the Northern Land Council. Much of the bulk of the rest of the CEED is taken up with the obligations and responsibilities of the Grantee Party and the rights and duties of the NTP Representative including an obligation to consult and negotiate with the Native Title Parties about certain matters. Clause 13.1 of the CEED is a provision by which the Native Title Parties appoint the NTP Representative as agent for the purposes of the CEED and provides that the NTP Representative is to exercise its functions and powers under the CEED for and on behalf of and in the interests of the Native Title Parties. Clause 13.2 provides that the Native Title Parties appoint the Northern Land Council as their NTP representative. Clause 14.1 provides that, except to the extent provided in cl 13, nothing in the CEED constitutes a party as the agent or legal representative of another party for any purpose.

[45] Clause 12 deals with assignment. It relevantly provides as follows:

> "**12. Assignment**
>
> 12.1 The Grantee Party (referred to in this Clause 12 as the 'Assignor') may only assign its interest in or any part of its interest in the Exploration Permits to any other entity (the 'Assignee') with the prior

written consent of the NTP Representative, which consent shall not be unreasonably withheld.

12.2 It shall be unreasonable for the NTP Representative to withhold its consent if the Assignee:

(a) is Financially Sound; and

(b) has a demonstrated record of the technical and financial expertise necessary to fully comply with the Assignor's obligations under this Deed.

12.3 Prior to any assignment pursuant to Clause 12.1, the Assignor shall:

(a) forward to the NTP Representative, which shall treat in a confidential manner, a written certificate executed by both the Assignor and the Assignee notifying of the proposed assignment, the interest to be assigned and the proposed date of assignment from the Assignor to the Assignee and, where, after the assignment, the Assignor will no longer be the holder of any interest, provide to the NTP Representative sufficient details to enable a basic appraisal to be made as to whether the Assignee is Financially Sound (but nothing in this Sub-clause requires the provision of such detailed information as would be required for an in-depth financial analysis of the proposed Assignee);

(b) execute a deed of assumption in a form reasonably acceptable to the NTP Representative by which the Assignee covenants to observe, perform, comply with and be bound by the provisions of this Deed as if it had been expressly named as a party to this Deed in the place of the Assignor and assumes all the obligations of the Assignor hereunder; and

(c) obtain all necessary governmental or other approvals or consents to such assignment.

12.4 Where there is an assignment under this Clause 12, the Assignor shall, on or prior to the date of such assignment, pay to the NTP Representative an amount equal to $20,000 (Indexed)."

[46] Significantly, cl 11 of the CEED anticipates further negotiations for a Production Agreement. A Production Agreement is for the grantee party to undertake a Production Operation consequent upon an Exploration Permit. "Production Agreement" is defined in cl 1.1 of the CEED for EP 171 and 176 to mean "an agreement outlining the terms and conditions under which a Production Interest may be granted to the Grantee Party in respect of any part of the Permit Area." "Production Interest" is defined in the CEED to mean:

> "any production licence or other interest in, or right in respect of, the Permit Area granted under the Petroleum Act or any law of the Northern Territory relating to the recovery of Hydrocarbons and does not include the Exploration Permits."

[47] "Production Operation" is defined to mean:

> "all operations proposed or undertaken (as the context or circumstances require) by the Grantee Party for or incidental to:
>
> (a) the recovery and processing of Hydrocarbons from any part(s) of the Permit Area pursuant to a Production Interest, and related activities;
>
> (b) the marketing of those Hydrocarbons; and
>
> (c) the rehabilitation of those areas of the Production Operation Area disturbed by the operations referred to in Clause (a) above, and of such other areas as may be required to be rehabilitated under a Production Agreement."

[48] Clause 11 of the CEED for EP 171 and 176 anticipates that the NTP Representative will meet with the relevant Native Title Parties "for the purposes of discussing the implementation of such Production Agreement." Under cl 11.12 the Grantee Party agrees to pay the NTP Representative the reasonable costs incurred by the Native Title Parties and the NTP Representative in connection with negotiating a Production Agreement.

[49] The CEEDs were executed by Armour, the Native Land Council and a number of Native Title Parties. The Native Title Parties who executed the CEED for EP 171 and 176 were the same as those who executed the Tripartite Deed for EP 171 and 176, with the exception of Josephine Davey who executed the CEED but not the Tripartite Deed.

[50] Turning to the other CEEDs, that is those relating to EP 174, 190, 191 and 192, the Native Title Parties who executed the CEEDs for EP 174, 190 and 192 were the same as those who executed the Tripartite Deed for EP 174, 190 and 192 respectively. With regard to EP 191, the executing parties were the same except that Keith Duncan, Robert Holt and Aide Miller signed the CEED but not the Tripartite Deed.

[51] Although they were substantially in the same form as the CEED for EP 171 and 176, there were some differences in the terms of the agreement.

[52] "Grantee Party" was defined to mean "each person who from time to time holds a legal or beneficial interest in the Exploration Permit." The assignment clause was cl 13 and was in the same terms as cl 12 of the CEED relating to EP 171 and 176 except that the words "NTP Representative" were replaced with the words "Land Council" referring to the Northern Land Council.

[53] Clause 15.1 of the CEEDs for EP 174, 190, 191 and 192 specifically provides that:

> "Nothing in this Deed constitutes a Party as the … agent or legal representative of another Party for any purpose or creates any … agency …"

[54] A requirement for negotiation of a Production Agreement with not only the Northern Land Council, but also the Native Title Parties, is set out in cl 11 of the CEEDs dealing with EP 174, 190, 191 and 192. For example, cll 11.2, 11.3, 11.7 and 11.8 of those CEEDs provide:

> "11.2 On the date that notice is given pursuant to clause 11.1, the Land Council, the Grantee Party and the Relevant Native Title Parties will commence bona fide good faith negotiations for the purpose of

reaching agreement on the terms and conditions subject to which the Grantee Party may undertake a Production Operation (the 'Production Agreement').

11.3 At the same time as, or as soon as practically possible following the commencement of negotiations pursuant to clause 11.2, the Land Council, the Grantee party and the Relevant Native Title Parties must meet to discuss the implementation of a Production Agreement.

…

11.7 Without limiting the generality of clause 11.2 and the range of matters that may be included in a Production Agreement, the Production Agreement will include:

(a) the Production Payments;

(b) provisions relating to:

(i) the protection of Sacred Sites and Sacred Objects and such provisions will be, at a minimum, those required by Clause 6 of this Deed;

(ii) maximising the employment, training and business opportunities for members of the Relevant Native Title Parties;

(iii) consideration for the impact of infrastructure including a processing plant, camps, pipelines, ports and roads (whether monetary or otherwise);

(iv) inspection of the Production Operation by the Land Council and the provision of information about the Production Operation to the Land Council and such provisions will be, at a minimum, those required by Clause 7 of this Deed;

(v) environmental protection and rehabilitation and such provisions will be, at a minimum, those required by Clause 9 of this Deed; and

(vi) if agreement is reached other than by arbitration, provision for the Relevant Native Title Parties to provide native title consent to the grant of the Production Interest under section 31(1)(b) of the Native Title Act."

[55] There was no assignment from the Native Title Parties to the Northern Land Council in the relevant CEEDs of the right to negotiate and agree to a Production Agreement.

[56] But, of course, the Farm-Out Agreement was not a Production Agreement. Rather it dealt with exploration permits. Any production agreements are separate agreements to the Farm-Out Agreement. A production agreement will require a licence to be granted under the *Petroleum Act* 1984 (NT). It is in that context that the right and duty of any licence applicant to negotiate in good faith with the relevant Native Title Parties will arise (as recognised by the provisions in the CEEDs regarding production agreements).

This does not apply to the assignment of interests in exploration permits which are governed by cll 12 and 13 of the CEEDs for EP 171 and 176 and cl 13 of the other CEEDs.

[57] Armour contended that the effect of cll 12 and 13 of the CEED for EP 171 and 176 and cl 13 of the other CEEDs is that the Native Title Parties have agreed in advance to a mechanism for novation of the CEEDs by the assignment of, relevantly, part of Armour's interest in the exploration permits and the assumption by the assignee of obligations under the CEEDs. That mechanism, Armour submitted, effectively authorises the Northern Land Council to consent to an assignment and novation in a way which binds the Native Title Parties. Armour submitted that in that sense it might be said that the Northern Land Council is the agent of the Native Title Parties for the purpose of giving consent, because its act, by express contractual authority, binds the Native Title Parties. If, it was submitted, the Northern Land Council has the authority of the Native Title Parties to bind them when granting consent, it follows that the Northern Land Council in exercising that authority may manifest its consent by signing a document, without the need to have the additional signatures of the Native Title Parties. The consent given by the Northern Land Council in a Deed of Covenant was, it was submitted, sufficient to satisfy cl 2.1(e).

[58] Armour submitted that the general provision found in cl 15.1 of the CEEDs for EP 174, 190, 191 and 192 could not derogate from the express authority granted to the Northern Land Council by cl 13 of those CEEDs. Armour submitted that if, contrary to that submission, it was held that it is not a simple matter that the Northern Land Council was granted authority of the Native Title Parties by contract, then the mechanism of cl 13 is one by which the Native Title Parties consent in advance to the novation of the CEEDs.

[59] The question then is whether the CEEDs, properly construed, are intended to permit a novation and, if so, how that novation is to occur.

[60] The distinction between the assignment of a contract and its novation was discussed, in relation to a debt, by Windeyer J in *Olsson v Dyson*:[13]

> "That the result of a novation may be the same, or much the same, as if there had been an effective assignment is not surprising. At one stage of the history of our law, when debts were not freely assignable at law, novation was a common method of circumventing the common law rule and accomplishing the same result as can now be accomplished directly by assignment pursuant to the statute. Novation can still be used as it was in earlier times. It can still be the means to the end which the law now allows to be reached by other means. The ultimate distinction, in juristic analysis, between a transfer of a debt by assignment and by novation is simple enough. Novation is the making of a new contract between a creditor and his debtor in consideration of the extinguishment of the obligations of the old contract: if the new contract is to be fully effective to give enforceable rights or obligations to a third person he, the third person, must be a party to the novated contract. The assignment of a debt, on the other hand, is not a transaction between the creditor and the debtor. It is a transaction between the creditor and the assignee to which the assent of the debtor is not needed.

[13] [1969] HCA 3; (1969) 120 CLR 365 at 388.

> The debtor is given notice of it; for notice is necessary to complete an assignment pursuant to the statute or in the case of an equitable assignment to preserve priorities. But the debtor's assent is not required. He is not a party to the transaction."

[61] After quoting that passage, Sackville AJA, with whom Bathurst CJ and Campbell JA agreed, observed in *CSG Limited v Fiji Xerox Australia Pty Ltd*:[14]

> "The distinction has perhaps become a little less distinct now that it has been held that a party to a contract can prospectively authorise a novation to be made by another party unilaterally: *Leveraged Equities Ltd v Goodridge* [2011] FCAFC 3; 191 FCR 71, at 108-110 [299]-[317], per Jacobson J (with whom Finkelstein and Stone JJ agreed); *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40; 149 FCR 395, at [32], per Finn and Sundberg JJ. Thus, while it remains the law that the burden of a contract cannot be assigned (*Pacific Brands*, at [32]), a party to a contract may agree in advance that a third party can later assume the obligation to perform the contract."

[62] Referring to the specific contract under consideration, Sackville JA analysed whether there was an assignment or novation in respect of third party contracts made pursuant to two dealership agreements under which Fiji Xerox Australia Pty Ltd (FXA) appointed CSG Limited (CSG) to be a dealer in multi-function devices (MFD) supplied by FXA in the areas of Brisbane and Maroochydore. When an MFD was sold (including leased), the customer entered into a "full service management agreement" (FSMA) with CSG. The income stream from the FSMAs was more profitable than revenue from sales of the MFDs.

[63] FXA had terminated the agreements for breach of various contractual obligations by CSG. In the context of that contract, the Court of Appeal held that the word "assignment" could be properly be taken to include novation since what was prospectively agreed to was the transfer not only of the benefit of the contract but also its burdens.

[64] That a party to a contract can agree to a later novation of the rights given and the obligations imposed by a contract in the original contract in advance of any proposed novation has been authoritatively determined by the Full Court of the Federal Court in *Leveraged Equities Ltd v Goodridge*.[15] I refer in particular to the judgment of Jacobson J where his Honour referred to the state of authorities in Australia, England and the United States. His Honour set out his reasons for concluding that the preliminary judge was in error in expressing the view that it was impossible for one party to a contract prospectively to authorise a novation to be made by another party to the contract unilaterally.

[65] The analysis by Jacobson J, which I would respectfully adopt, is set out in the following passage:

> "300 His Honour relied on the well known statement of principle of Windeyer J in *Olsson v Dyson* (1969) 120 CLR 365 at 388. There,

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[14] [2011] NSWCA 335 at [134].
[15] (2011) 191 FCR 71; [2011] FCAFC 3.

novation was described as the making of a new contract between a creditor and its debtor in consideration of the extinguishment of the obligations under the old contract; if the new contract is to be fully effective, the third person must be a party to the novated contract: see also *Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473 at [78] (*Fightvision*) (Sheller, Stein and Giles JJA).

301 In *Olsson v Dyson*, Windeyer J at 390 pointed to the foundation of the concept of novation in Roman Law. He referred to some of the conceptual difficulties of the development of the doctrine in Roman law but observed that the requirements of the common law are satisfied by a tacit agreement to extinguish the former obligation, and this may be inferred when an inconsistent obligation is, by agreement, substituted.

302 There are three separate lines of authority which in my opinion make it clear that the primary judge was in error in coming to the view that it is impossible for a contracting party to prospectively authorise a novation to be made by another party unilaterally.

303 First, the proposition is contrary to the views expressed authoritatively by two members of a Full Court (Finn and Sundberg J) in *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395 at [32] (*Pacific Brands*).

304 It is true that their Honours' observations in that case were obiter but they expressed them in setting out a number of 'relatively non-contentious propositions'. The seventh of the propositions included the statement that:

> Novation will, ordinarily, require the agreement of the original and the substituted party although the original contract may, on its proper construction, authorise a party to substitute a contracting party in its place without need for a further tri-partite agreement.

305 Their Honours cited the decision of King CJ in *Harry v Fidelity Nominees Pty Ltd* (1985) 41 SASR 458 at 460 as authority for the proposition. …

306 … in my view, *Harry's* case is consistent with the proposition stated by Finn and Sundberg JJ. The only issue in each case is whether substitution is authorised in advance by the proper construction of the original contract.

307 Second, English authority, both before and after the primary judge's decision, supports the proposition that a contracting party may authorise the other contracting party, in the terms of the original contract, to novate the contract to a third party.

308 The position was considered, approximately five years before the primary judge's decision, by Aikens J in *Argo Fund Ltd v Essar Steel Ltd* [2005] 2 Lloyd's Rep 203 (*Argo*). In that case the clause in question was contained in a syndicated loan facility which permitted participating lending banks to transfer their rights and obligations by

the delivery of an executed Transfer Certificate in favour of a bank or other financial institution.

309 The essential question in *Argo* was whether the transferee fell within the description of a financial institution. However, in the course of his judgment, Aikens J observed at [50] that the delivery of the Certificate effected the transfer, with nothing more being required to be done. He observed that the borrower had no role to play and went on to explain how, as a matter of legal analysis, the novation came about.

310 This was explained by Aikens J at [51] upon the basis that the contract was a unilateral one which contained a standing offer in the transfer clause. The offer to terminate the old contract was made to each original participant and the offer to conclude a new contract was made to all those who were eligible, namely, those who fell within the description of 'bank or other financial institution'.

311 He referred to the classical authorities of *Carlill v Carbolic Smoke Ball Company* [1893] QB 256 (*Carlill*) and *New Zealand Shipping Company Ltd v AM Satterthwaite & Company Ltd* (*The Eurymedon*) [1975] AC 154, to support the analysis. He also observed that there is mutual consideration for the novation because the borrower and the lender each agrees to give up its respective rights and obligations under the original contract. The decision of Aikens J was affirmed on appeal, but the Court of Appeal did not refer to the contractual analysis of the standing offer which was not in issue on the appeal.

…

313 The decision of the primary judge in the present case was strongly criticised by Cooke J in *Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd* [2010] EWHC 702 (Comm). His Lordship observed at [28] that the primary judge said that there was no support for the proposition that a party can consent in advance to a novation. Cooke J went on to describe the primary judge's decision as 'wholly uncommercial', and a 'purist point' which is contrary to the development of the law of contract.

314 Cooke J's views were endorsed on appeal by Moore-Bick LJ (with whom Rix LJ agreed), though without the level of criticism contained in the first instance judgment: *Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd* [2010] EWCA Civ 1335 at [20]-[22] (*Habibsons*).

315 Third, the position in the United States is that a contracting party may provide advance consent to a novation. In *216 Jamaica Avenue LLC v S & R Playhouse Realty Company* 540 F (3d) 433 (2008), Sutton J, who delivered the opinion of the United States Court of Appeal, 6th Circuit, said at 438:

> There is nothing exceptional about permitting two parties to a contract to establish ahead of time the ground rules for consenting to the substitution of one party to the contract for another.

> Sutton J referred to a line of American Authority to support that proposition, including leading text writers and the Restatement (Second) of Contracts.
>
> 316 In summary therefore, I consider that the approach to the issue of general principle apparently adopted by the primary judge cannot be supported. The position is aptly summed up by Moore-Bick LJ in *Habibsons* at [22]. His Lordship did not think that the primary judge entirely rejected the possibility that a party can consent in advance:
>
> > … since he distinguished *Carlill v Carbolic Smoke Ball Co* on the grounds that the clause he had to consider was too nebulous, but if he did, I agree with Cooke J that the decision does not represent English law.
>
> 317 Nor does it represent Australian law."

[66] As Armour submitted, as a matter of straightforward construction, the CEEDs did not require the execution by the Native Title Parties of any further form of consent in order for there to be an effective novation and therefore, relevantly, an effective assignment of a part of the interest of Armour in the exploration permits.

[67] Amour also argued that consideration and a standing offer to consent to a novation had been given by the Native Title Parties and the Northern Land Council because they each made promises in the CEEDs in favour of the grantee party which was defined to mean "each person who from time to time holds a legal or beneficial interest in the exploration permit". Once AEGP obtained an assignment from Armour, it fell within the class of persons to whom the Native Title Parties and the NLC had made standing promises.

[68] However, this is not a case where the terms of the CEEDs show that there had been prospective consent to a novation by both the Northern Land Council and the Native Title Parties. Clause 12 of the CEED for EP 171 and 176 and cl 13 of the other CEEDs specifically require the consent of the Northern Land Council and the execution of a Deed of Assumption in a form reasonably acceptable to the Northern Land Council by which the assignee covenants to observe, perform, comply with and be bound by the provisions of the CEED as if it had been expressly named as a party to the CEED in place of the assignor and assumed all the obligations of the assignor. Accordingly, none of the CEEDs could be said to be a unilateral contract in which it was prospectively agreed that there would be a novation without any further agreement except between Armour and AEGP.

[69] Acceptance of the proposition that there had been an effective novation requires acceptance of the proposition that there can be a novation of part only of the contractual rights and duties so that Armour remained or became contractually bound whether under the original or the novated contract and of the proposition that the contract could not be effectively novated without the approval of the Northern Land Council but could be with the contemporaneous approval of the assignor and the assignee and the Northern Land Council and the prior approval of the Native Title Parties.

[70] Each CEED specifically contemplates that there may be more than one grantee party who will be bound by the terms of the CEED. Each also provides for the novation of

the CEED with the express approval of the Northern Land Council and the prior approval of the Native Title Parties. It appears therefore that the Farm-Out Agreement can be novated and that the consent of the Native Title Parties to its novation is contained in the CEEDs which have been incorporated into the Farm-Out Agreement.

[71] AEPG argued, in the alternative to its argument that the court was not entitled to construe the CEEDs, that the requirement in cl 12 of the relevant CEED for the assignee to obtain the prior written consent of the NTP Representative or the Northern Land Council, as the case may be, did not exclude an assignor and an assignee agreeing that the assignor must also obtain the written consent of other parties. What is in issue in these proceedings, it argued, is not how the CEEDs should be interpreted but rather what is the proper interpretation of the Farm-Out Agreement.

[72] It is therefore necessary to consider whether cl 2.1(e) is unambiguous or is susceptible of only one meaning in the context of the contract as a whole and, if so, what that meaning is. Does it, notwithstanding the terms of the CEEDs, objectively require execution by each of the Native Title Parties to a Deed of Assignment and Assumption as well as execution by the Northern Land Council?

[73] AEGP submitted that the Farm-Out Agreement specifically provides that execution by each of the parties defined in the relevant Native Title Agreements as Native Title Parties was required. The clause was unambiguous.

[74] Armour submitted that, on the proper construction of cl 2.1(e), only execution by the Northern Land Council was required or, alternatively, that AEGP was obliged to approve a form of deed which provided for execution only by the Northern Land Council.

[75] The terms of the CEEDs provide the context for the construction of cl 2.1(e) of the Farm-Out agreement. The opening words of the clause "execution by the NLC in respect of each Native Title Agreement and the other parties thereto of a Deed" on its proper construction expressly requires only execution by the Northern Land Council. The Northern Land Council is to execute in respect of all parties to the CEEDs who have conferred on it, by the assignment clauses of the CEEDs, the power to consent. The Deed required to be "substantially in the form attached hereto as Annexure 6, or otherwise approved by Buyer" is a Deed which gives consent to the assignment of rights under the CEEDs.

[76] Amour submitted that the clause could have been expressed more clearly. It could have provided support for AEGP's proposition if it had said "*execution by the NLC* ***and the other parties thereto*** *in respect of each Native Title Agreement of a deed*" or "*execution* ***of a deed*** *by the NLC* ***and the other parties thereto*** *in respect of each Native Title Agreement.*" In these circumstances, and where there is ambiguity because the Annexure 6 deeds provide for the signatures of Native Title Parties, Armour submitted that the proper approach is to determine what a reasonable business person would have understood cl 2.1(e) to mean.

[77] In my view, when viewed objectively in the context on the contract as a whole, the clause could not be said to unambiguously require execution of a DOAA by the Native Title Parties as well as the Northern Land Council.

[78] It appears on one reading to explicitly require execution of a deed not only by the Northern Land Council but also by the other parties to each Native Title Agreement, that is the Native Title Agreements listed in Schedule 4 of the Farm-Out Agreement, the CEEDs and the Tripartite Deeds.

[79] The Native Title Agreements include the Tripartite Deeds yet it appears that no party is advocating that cl 2.1(e) should be understood to require the signature of the Northern Territory government which is a party to each of the Tripartite Deeds listed in Schedule 4 as Native Title Agreements.

[80] Clause 2.1(e) provides not that the Deed to be signed must be precisely in the form of Annexure 6 but only substantially in that form, leaving some doubt as to precisely the form of the deed to be signed.

[81] The grammatical construction of cl 2.1(e) is awkward, raising some ambiguity as to whether the execution of a Deed is to be by the Northern Land Council "in respect of each Native Title Agreement and the other parties thereto", that is that the Northern Land Council is to sign for each Native Title Agreement and for the parties to the Native Title Agreement, or whether it means that the Deed must be executed, with respect to each Native Title Agreement, that is the CEEDs and the Tripartite Agreements, by the Northern Land Council and all the other parties to those agreements.

[82] The form of Annexure 6 is itself somewhat ambiguous. Although it does not refer to itself as a novated contract, the fact that it purports to assign not only rights but also duties means that it must be considered to be a novation and not merely an assignment. Indeed its title, "Deed of Assignment and Assumption", is consistent with a novation rather than merely an assignment.

[83] Annexure 6 provides that the parties to it are AEGP, Armour, the Northern Land Council and "Each party listed in the schedule (Native Title Parties)." However there are no parties listed in the schedule. Under cl 6, the only address for service of the continuing parties is the "Northern Land Council".

[84] The signing pages include provision for execution in one place "by Native Title Parties" and on another page "by and on behalf of the Native Title Parties" in four places. There is no explanation of the different provisions or why only five signatures of the numerous Native Title Parties are proposed.

[85] One possible explanation is that there were five CEEDs and it was envisaged that someone would sign on behalf of the Native Title Parties and thereby bind them in respect of each CEED. How the Native Title Parties agree to a novation of the Deed to a new "grantee party" such as AEGP is set out in the CEEDs.

[86] The document to be executed is to be or to be substantially in the form of the DOAA which is Annexure 6 of the Farm-Out Agreement or as otherwise approved by AEGP.

[87] Once it is accepted that the terms of the CEEDs have been incorporated by reference into the Farm-Out Agreement it is possible to resolve any ambiguity. The signature of the Northern Land Council is sufficient to bind the assignee to the rights and obligations owed to the Native Title Parties under the exploration permits.

[88] The Deed of Covenant executed by the Northern Land Council is substantially in the form of Annexure 6. For the reasons given, its signature binds the Native Title Parties and therefore the condition precedent set out in cl 2.1(e) of the Farm-Out Agreement has been satisfied. It is not therefore necessary to consider whether the plaintiff has used all reasonable endeavours to ensure that the condition in cl 2.1(e) has been satisfied.

[89] It follows that as the conditions precedent have been satisfied, the Farm-Out Agreement should be specifically performed.

[90] I shall hear submissions as to costs and as to the precise form of the order.