SUPREME COURT OF QUEENSLAND

CITATION:	*QNI Metals Pty Ltd & Anor v Vannin Capital Operations Ltd & Ors* [2021] QCA 24
PARTIES:	**QNI METALS PTY LTD** ACN 066 656 175 (first appellant) **QNI RESOURCES PTY LTD** ACN 054 117 921 (second appellant) **v** **VANNIN CAPITAL OPERATIONS LTD** COMPANY NUMBER C74594 (first respondent) **ASHURST AUSTRALIA** ABN 75 304 286 095 (second respondent) **JOHN RICHARD PARK, KELLY-ANNE LAVINA TRENFIELD AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)** ACN 009 842 068 (third respondent) **QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)** ACN 009 842 068 (fourth respondent) **HWL EBSWORTH LAWYERS** ABN 37 246 549 189 (fifth respondent)
FILE NO/S:	Appeal No 10534 of 2020 SC No 6476 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2020] QSC 292 (Bond J)
DELIVERED ON:	19 February 2021
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2020
JUDGES:	Morrison JA and Boddice and Henry JJ
ORDERS:	**1. Appeal dismissed.** **2. The appellants are to pay the respondents' costs of the appeal to be assessed, if not agreed, on the standard basis.**

CATCHWORDS: PROCEDURE – MISCELLANEOUS PROCEDURAL – MATTERS – OTHER MATTERS – COUNSEL APPEARING FOR DIFFERENT PARTIES IN ASSOCIATED PROCEEDINGS – APPLICATION FOR DEPOSITION OF CERTAIN INFORMATION – where the fourth respondent incurred significant debts in managing a joint venture – where the fourth respondent and liquidator brought Supreme Court proceedings against the appellant to seek that the appellant indemnify the fourth respondent in respect of those debts – where a barrister appeared for the fourth respondent in that proceeding – where a later proceeding was brought about one of the alleged debts the fourth respondent was a guarantor to – where the same barrister acted for a creditor in this matter in seeking payment of the debt by the appellants – where the barrister was tasked to pursue the same argument regarding the fourth respondent's liability to the creditor in each proceeding – where the appellant's solicitors became aware the barrister was acting for the creditor and communicated their objection – where the barrister ceased acting for the creditor – where the appellants sought an order requiring the respondents to serve affidavits deposing to the information passing between themselves, and between themselves and the barrister in relation to both proceedings – where the appellants said it was necessary to ascertain if there had been dissemination of confidential information – whether there existed a factual foundation sufficient to justify the exercise of the discretion to grant relief

Uniform Civil Procedure Rules 1999 (Qld), r 255

ASIC v Anderson (2018) 134 ACSR 105; [2018] QCA 352, applied
Black v Taylor [1993] 3 NZLR 403, cited
Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd [2001] NZLR 343, cited
Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378, applied
Kallinicos v Hunt (2005) 64 NSWLR 561; [2005] NSWSC 1181, cited
PDP Group Pty Ltd & Anor v Bennett & Philp [2013] QSC 231, cited
Re Timbercorp (2019) 137 ASCR 189; [2019] FCA 957, cited
Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd (2009) 253 ALR 364; [2009] WASCA 31, cited

COUNSEL: P Dunning QC, with M Karam and K Byrne, for the appellants
A I O'Brien for the first and second respondents
J W Peden QC, with C G Curtis, for the fourth and fifth respondents

SOLICITORS: Robinson Nielsen Legal for the appellants
Ashurst Australia for the first and second respondents
HWL Ebsworth for the third, fourth and fifth respondents

[1] **MORRISON JA:** I have read the reasons of Henry J and agree with those reasons and the orders his Honour proposes.

[2] **BODDICE J:** I agree with Henry J.

[3] **HENRY J:** The appellants applied to the Supreme Court for orders obliging the respondents to depose to certain information. The application was premised upon concern purportedly arising from the same barrister ("barrister AB") having acted for different parties in associated proceedings. The application was rightly dismissed below. The appellants now appeal that decision. Their appeal should also be dismissed.

Background

[4] Queensland Nickel Pty Ltd ("Queensland Nickel") incurred significant debts in managing the nickel mining and refining joint venture of QNI Metals Pty Ltd and QNI Resources Pty Ltd ("the appellants"). In Supreme Court proceeding 6393/17 ("the Queensland Nickel proceeding") Queensland Nickel and its liquidator alleged the appellants were obliged to indemnify Queensland Nickel in respect of those debts. Barrister AB was one of various counsel who appeared for Queensland Nickel in that proceeding.

[5] A substantial component of the Queensland Nickel proceeding was compromised by a settlement deed ("the settlement deed") which contemplated the payment of certain monies pursuant to consent orders made by the Supreme Court on 5 August 2019. Order 1 of the consent orders was:

> "1. The Court orders that the [appellants] pay to the entities identified in Schedule A (**Claiming Creditor**) the amount of any final money judgment obtained by that Claiming Creditor against [Queensland Nickel] which is not stayed by order of the court within 28 days of the second plaintiff serving a written notification on the first and second defendants that such final money judgment not subject to a stay has been entered against [Queensland Nickel]."[1]

[6] The settlement deed had the presently relevant effect of hiving off from the Queensland Nickel proceeding a determination regarding one of the alleged debts with which that proceeding was concerned. That was Queensland Nickel's alleged debt as guarantor for the indebtedness of Palmer Aviation Pty Ltd to GE Commercial Australasia Pty Ltd ("GE") under a loan facility agreement.

[7] GE assigned its rights under that loan facility agreement to Vannin Capital Operations Ltd ("Vannin"). In Supreme Court proceeding 13947/18 ("the Vannin proceeding") Vannin claimed for payment of the alleged debt to GE against Palmer Aviation Pty Ltd, Queensland Nickel and the appellants.

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1 AR Book 2 Vol 4 p 1045.

[8] The settlement deed relevantly provided of the Vannin proceeding:

> "**7.1 Consent Order Payment**
>
> The parties acknowledge that QNIM and QNIR [the appellants] are entitled to exercise all rights at law arising as a result of any Consent Order Payment the subject of the Consent Orders.
>
> **7.2 Further rights of QNIM and QNIR**
>
> In addition to the rights referred to in clause 7.1:
>
> (a) as to the Vannin Proceedings:
>
> (i) the SPL [Qld Nickel's special purpose liquidator] himself whilst he is appointed as such and QN [Qld Nickel] whilst the SPL is appointed as such, will not seek to take any step which impairs the conduct of any claims by or defences available to QNIR and QNIM in relation to the Vannin Proceedings and will as far as permissible by the Court, if required to be a party to any such proceedings, enter only a submitting appearance and otherwise abide the outcome of the determination as between QNIM and QNIR (on the one hand) and Vannin (on the other) of the issues between them as concern the claims the subject of the Consent Order Payment, save as to costs; and
>
> (ii) QNIM and QNIR may do all acts as may be required or necessary for the purpose of defending or enforcing any rights or remedies or of obtaining relief or indemnity from any claims brought by the (sic) Vannin. …"[2]

[9] On about 22 April 2020 Vannin's solicitors briefed barrister AB to act for Vannin in the Vannin proceeding. The rationale justifying the unusual step of a barrister shifting from representing one party to another in the same or related cases was that the barrister's task remained the same. In the Queensland Nickel proceeding it was Queensland Nickel which sought to argue that Queensland Nickel was liable to GE (in seeking to be indemnified for the debt by the appellants), wheras in the Vannin proceeding it was Vannin which sought to argue Queensland Nickel was liable to GE (in seeking payment of the debt by the appellants). In being briefed to act for Vannin in the Vannin proceeding, barrister AB was thus tasked to pursue the same argument regarding Queensland Nickel's liability to GE as in the Queensland Nickel proceeding.

[10] On 2 June 2020 the appellant's solicitors became aware barrister AB was acting for Vannin and communicated their objection. By 12 June 2020 barrister AB ceased acting for Vannin.

[11] There the matter might be thought to have ended. Instead the appellants, for whom barrister AB had <u>not</u> acted, sought to frame themselves as somehow aggrieved by barrister AB's mixed roles.

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2 AR Book 2 Vol 5 p 1330.

[12] This they did in an originating application against Vannin, Vannin's solicitors Ashurst Australia, Queensland Nickel, the liquidator, and the latter two parties' solicitors HWL Ebsworth Lawyers (collectively "the respondents"). It is the dismissal of that application below which is the subject of this appeal.

An unmeritorious application

[13] The novel and invasive form of relief sought below was an order requiring the respondents to serve affidavits deposing to the information passing between themselves and between themselves and barrister AB in respect of the claims in the Vannin proceeding and the loan facility agreement and deed of mortgage to which GE and Palmer Aviation Pty Ltd were parties. The justification for such a form of relief seems to have been that it was necessary for the appellants to ascertain whether there had been any dissemination of confidential information in consequence of barrister AB acting for Vannin.

[14] The appellants contended below that the Court had jurisdiction to provide such relief on one or more of four bases, namely:

(a) equity's exclusive jurisdiction to protect confidential information;

(b) equity's auxiliary jurisdiction in aid of the appellants' rights at law to enforce their rights in relation to a settlement deed, including rights arising from subrogation;

(c) the Court's inherent jurisdiction to protect the integrity of its own processes; and

(d) the Court's inherent jurisdiction to make orders for the inspection, detention, custody or preservation of property (in this context the confidential information), the existence of which is recognised by rule 255 *Uniform Civil Procedure Rules* ("UCPR").[3]

[15] Each of the application's attempts to invoke those various jurisdictions faced one and or the other of two fundamental factual obstacles:

(a) Queensland Nickel's right to the preservation of confidences and avoidance of conflict of interest in respect of barrister AB was not a right of the appellants; and

(b) the risk of dissemination of truly confidential information was so low as to mitigate against interfering on a discretionary basis.

[16] As to the first obstacle, it was not Queensland Nickel but the appellants who were seeking relief. Such duty as barrister AB owed to not act in conflict with the interests of a party for whom barrister AB had formerly acted was owed to Queensland Nickel, not to the appellants.

[17] Further, pursuant to the settlement deed, at clause 7.2(a)(i), Queensland Nickel and its liquidator were obliged to only enter a submitting appearance and "abide the outcome" in the Vannin proceeding. This had the practical consequence that the party for whom barrister AB previously acted would do no more in the Vannin proceeding than comply with its disclosure obligations as a party. It is difficult to perceive a realistic risk of barrister AB acting in conflict with the interest of a party

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[3] AR Book 1 Vol 1 p 3.

to the Vannin proceeding which had no interest in the proceeding. Moreover, if it mattered, Queensland Nickel's liquidator had no objection and indeed consented to barrister AB acting for Vannin.

[18] This left the appellants to rely upon the consent order and settlement deed as sources of a right, it did not otherwise hold, to the protection of Queensland Nickel's confidential information. The consent order had no relevantly specific clause. The settlement deed by clause 7.2(a)(ii) did permit the appellants to do what was "required or necessary for the purpose of defending or enforcing rights or remedies or of obtaining relief or indemnity from any claims brought" by Vannin. That clause removed doubt, if there were any, that the appellants were at liberty to argue Queensland Nickel was not liable to GE (and thus Vannin). However, its terms did not confer Queensland Nickel's rights, such as the obligation of confidence owed to Queensland Nickel by barrister AB, upon the appellants.

[19] As much is similarly apparent from clause 7.2(a)(i). That clause precluded Queensland Nickel and its liquidator from actively participating in the proceeding or taking any step impairing the conduct of the appellants' claims or defences. Its effect was to neutralise the role of Queensland Nickel and its liquidator in the Vannin proceedings. To that extent it may be characterised as protective of the interests of the appellants, but it did not shift the rights of Queensland Nickel and its liquidator to the appellants. Put differently, it did not entitle the appellants to Queensland Nickel's right to the preservation of confidences and avoidance of conflict of interest in respect of barrister AB.

[20] As to the second fundamental factual obstacle, it may have been that information which came to barrister AB's knowledge while acting for Queensland Nickel was passed on by barrister AB to Vannin or its agents, before barrister AB ceased acting for Vannin. Factual information which Queensland Nickel and its liquidator were obliged by law to disclose in either proceeding was, self-evidently, not confidential. It is possible that, when acting for Queensland Nickel and its liquidator, barrister AB learned of factual information to which no duty of disclosure attached in the Queensland Nickel proceeding or the Vannin proceeding and such information might have been conveyed to Vannin and influenced any communicated advices of barrister AB as to the strengths or weaknesses of the parties' cases and how they may best be litigated or defended against. However, neither proceeding is the type of case in which information not disclosed in the proceeding is likely to be unknown to the appellants, who are at liberty to seek the opinion and advice of their own counsel. It is, after all, information which would have come to light in the context of a liquidator pursuing inquiries.

[21] As the learned primary judge noted, the evidence of Mr Park, Queensland Nickel's liquidator and former administrator, established the administrators had been unaware of the alleged liability to GE until GE lodged a proof of debt on 27 January 2016.[4] Two days earlier the administrators obtained access to the records of Queensland Nickel via a server network at the site of the nickel refinery in order to investigate the state of its debts and its financial position. They copied the books and records of Queensland Nickel including its mail server, G drive and employee files. A copy of the material was placed on external hard drive which they took with them on vacating of the site, returning it to the appellants on around 8 April

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4 AR Book 1 Vol 1 pp 21-22.

2016. It follows that the appellants had access to the original source of all the information which the administrators took with them. Mr Park's evidence explained that the liquidators' only knowledge about the alleged GE liability was obtained in the above way and through proof of debts lodged in the administration. The liquidators did not speak to any witnesses concerning the underlying transactions and had not taken or caused to be taken any witness statements.

[22] The upshot is that even if barrister AB had obtained factual information in acting for Queensland Nickel which did not attract the civil procedure obligation of disclosure and had caused that information to be communicated to Vannin, it would have been information from records to which the appellants also had access. It follows, as the learned primary judge noted, that it lay within the ability of the appellants to identify the information which they were concerned may have been disclosed to Vannin.[5] This they did not do.

[23] A determinative problem confronting the appellants below was that even if the appellants could manoeuvre around the first fundamental obstacle by reliance on a power to grant relief not as of right but on a discretionary basis, that could not avoid the second fundamental obstacle that there was an inadequate evidentiary foundation to justify the granting of the relief sought.

[24] In light of these two foundational obstacles, it is no surprise that the application below was dismissed and that, despite the multiplicity of appeal grounds now discussed, this appeal must likewise be dismissed.

Ground (a): "The learned primary judge erred in failing to hold; or alternatively that the appellants had established on a prima facie basis; that upon the proper construction of the settlement deed:

> ***(i) clause 7.1 of the settlement deed did not require a payment to be made for the rights conferred by it to arise, whether in conjunction with, or separate from, the operation of clause 8.3 of the settlement deed – cf generally J[17](a) and [38](a);***
>
> ***(ii) clause 7.2(a)(ii) of the settlement deed enabled the appellants to commence proceedings to vindicate the fourth respondent's equitable rights in relation to confidential information – cf generally J[38](b);***
>
> *(iii)* ***clause 8.7(a) of the settlement deed provided a basis for the appellants to obtain the relief sought in the originating application, including by requiring the fourth respondent to assist the appellants – cf generally J[38](d), [46] and [49]."***

[25] Those parts of clause 7 of the settlement deed to which this ground refers have been canvassed above. As to clause 8, clauses 8.3 and 8.7 (a) provide:

> "**8.3 Indemnities and reimbursement obligations**
>
> (a) Any indemnity, reimbursement, payment or similar obligation in this Deed given by any party:
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> (i) is a continuing obligation despite the satisfaction of any payment or other obligation in connection with this Deed or any other thing;

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5 AR Book 1 Vol 1 p 22.

(ii) is independent of any other obligations under this Deed or any other document; and

(iii) continues after this Deed, or any obligation arising under it, ends.

(b) It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity in connection with this Deed."

"**8.7 Further action**

(a) Each party must use reasonable efforts to do all things necessary or desirable to give full effect to this Deed. …" (emphasis added)

[26] The appellants' relied upon clause 8.3 and 7.2 in answer to the circumstance that the consent order payment referred to in clause 7.1 was yet to be made. They highlighted that their rights conferred by clause 7.2(ii) were expressed as being "in addition" to their rights under clause 7.1 and thus immediately active without waiting for the consent order payment to be made. In a similar vein they highlighted that under clause 8.3 the making of payment was not necessary before a party could enforce a right of indemnity in connection with the deed. As much is uncontroversial.

[27] The appellants' submissions complain:

> "Contrary to the conclusion of the learned primary judge, the rights under clause 7.1 did not depend on a payment being made pursuant to the Consent Orders (J[17](a)). The rights, including those sought to be exercised in the primary proceeding, were available to be exercised on the making of the Consent Orders. Objectively construed, the appellants were agreeing to indemnify QNI in respect of the Vannin claim in exchange for an extensive bundle of rights with respect to the manner in which the Vannin claim would be defended. It could not have been objectively intended that the appellants would be constrained to defending the Vannin proceeding without access to a full range of rights as a consequence of the Consent Orders being made."

[28] The learned primary judge's reasons at [17(a)] concluded that because the consent order payment had not yet been made it "follows that the rights of which cl 7.1 speaks have not yet arisen". That conclusion was clearly correct. Clause 7.1's words, "all rights at law arising as a result of any Consent Order Payment", could permit no other conclusion.

[29] It is to be appreciated, however, that clause 7.1 was solely concerned with those rights at law which arose as a result of the payment, not with rights otherwise conferred by the deed. The learned primary judge was clearly alive to that distinction. Clause 7.2 expressly conferred rights in addition to those referred to in clause 7.1 and it is apparent from the learned primary judge's reasons that he gave consideration to the operation of clause 7.2 independently of the inapplicable clause 7.1.

[30] The learned primary judge reasoned in effect that that an application of the kind brought below went beyond the presumed subjective intent, objectively determined, of clause 7.2.[6] More importantly though, his Honour went on to observe:

> "But in any event, the clause only authorises acts by the Applicants; it does not transfer Queensland Nickel's rights to the Applicants. Nor does it impose any obligation on Queensland Nickel or require it to take any steps."[7]

[31] That conclusion is correct for reasons explained above. The terms of the settlement deed did not entitle the appellants to enforce Queensland Nickel's rights as their own. Clause 7.2 only confers a right to do what may be necessary in defending or pursuing relief. It cannot make good the pursuit of relief which lacks factual support.

[32] There was seemingly an attempt in the appellants' above quoted submissions to raise by inference an entitlement to rights beyond those expressly specified by the consent orders and settlement deed. For instance, the submissions spoke of an exchange of "an extensive bundle of rights". Yet there is nothing in the terms of the consent orders or the settlement deed to suggest the appellants forthwith became the beneficiaries of rights additional to those stipulated in writing.

[33] The appellant's submissions also asserted, relying on *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd*,[8] a case about an insurer's right of subrogation, that the rights sought to be exercised below were available to be exercised on the making of the consent orders. The learned primary judge considered any argument for additional rights based by analogy on the doctrine of subrogation in indemnity insurance was academic in circumstances where the appellants had not yet paid monies pursuant to the consent order.[9] However, even if, as the appellant submits, an agreement to pay (as distinct from the actual making of payment) is enough to ground the exercise of a right of subrogation,[10] it remained a determinative problem that rights like and as extensive as a right of subrogation had not been conferred by the terms of the consent orders and settlement deed.

[34] The appellants' submissions emphasised the obligation, imposed upon the parties by clause 8.7, to do all things necessary or desirable to give full effect to the settlement deed. Such a clause undoubtedly obliges Queensland Nickel to co-operate in giving effect to the rights the settlement deed confers upon the appellants.[11] But it is not a source of benefits or rights of the appellant additional to those conferred by the settlement deed. Clause 7.2(a)(i) conferred upon the appellants a right to conduct their claims and defences without Queensland Nickel or its liquidator taking any step which would impair the conduct of those claims and defences. The appellant's right to litigate free of such impairing steps and Queensland Nickel's obligation to co-operate in giving effect to that right cannot sensibly be regarded as positively

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6 AR Book 1 p 18 [38(c)].
7 AR Book 1 p 18 [38(c)].
8 (2009) 253 ALR 364.
9 AR Book 1 p 19 (d).
10 *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd* 253 ALR 364, 395 [196].
11 It appears to be an iteration of the rule, explained in *Butt v McDonald* [1896] 7 QLJ 68, 70-71 as applicable to every contract, that a party to a contract must do that which is necessary to enable the other parties to have the benefit conferred by the contract.

conferring Queensland Nickel's rights, such as its right to enforce the obligation of confidence owed to it by barrister AB, upon the appellants.

[35] The appellants also rely upon clause 8.3 in aid of the present ground, complaining the learned primary judge's reasons did not refer to it. It is to be appreciated in respect of such a complaint that a judge's duty to give reasons does not exist in respect of every issue which was raised in the proceedings.[12] It is not enough, in purporting to establish appellable error on the basis of inadequacy of reasons, to merely demonstrate that an argument by a losing party was not addressed in the reasons for judgment.[13] Whether such an omission grounds error will inevitably depend upon the relative significance of the argument to the resolution of the determinative issues in the case. As was observed in *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd*,[14] a judge "may decide a case in a way which does not require the determination of a particular submission" and in such a case "may put it aside" or "merely salute it in passing".

[36] Clause 8.3 was only mentioned in passing during argument below. But even if it had been advanced in positive support of an argument it is unremarkable that it did not rate a mention in the learned primary judge's reasons. Clause 8.3 entitles a party to enforce a right of indemnity in connection with the deed independently of other obligations and without first incurring expense or making a payment. Yet the purpose of the application below was not to enforce a right of indemnity. The purpose of the application was conveniently summarised by the learned primary judge as follows:

> "The Applicants' expressed purpose in seeking of the Court's exercise of such jurisdiction was for the purposes of pleading or assisting them in the prosecution of causes of action for:
>
> (a) breach of a settlement deed and setting aside Court orders made pursuant to a settlement deed;
>
> (b) restraining a breach of confidence; or
>
> (c) restraining lawyers from acting against them in a particular proceeding."[15]

[37] Clause 8.3 was of no relevance because the application below was not concerned with enforcing a right of indemnity. However, even if the application did have some indirect connection with the enforcement of a right of indemnity, two problems remain. Firstly, clause 8.3 is not the source of the "right of indemnity" to which it refers. The appellants do not point to any clause of the settlement deed which specifically gives them a relevant right of indemnity against Queensland Nickel. If there be a source of such a right it might arguably arise not in connection with the deed but by inference from the making of the consent order payment.

[38] Secondly, even if, contrary to these reasons, clause 8.3 could overcome the failure to have yet made the consent order payment, it cannot overcome the application's lack of foundation occasioned by the aforementioned two fundamental factual

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12 *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 385.
13 *ASIC v Anderson* (2018) 134 ACSR 105, 114.
14 [1983] 3 NSWLR 378, 385 (citation omitted).
15 AR Book 1 p 9 [4].

obstacles to the application. That lack of foundation was such a determinative feature of the learned primary judge's reasons[16] as to make reference to clause 8.3 unnecessary.

[39] For all of these reasons ground (a) must fail.

Ground (b): "The learned primary judge erred in failing to deal with the argument before him on the basis that 'fully informed consent' denotes a legal practitioner disclosing to the client not only the circumstances which do or may give rise to the conflict, but also the fact of existing conflict or the risk of future conflict and the implications of and the risks to which those circumstances may give rise, and is thereby an admission by words and conduct that confidential information has been disclosed – cf J[25], [27](c), [28], [48], [49](e) and [56]."

[40] This ground relates to but one of an array of arguments advanced by the appellant below in support of the conclusion that relevant information must have been disclosed by barrister AB to Vannin. In paragraph [49] of his reasons, a paragraph occupying over one and a half pages, his Honour found that there was insufficient evidentiary foundation for such a conclusion and dealt with the array of arguments collectively in a lengthy set of observations accompanying that conclusion.

[41] Those observations included the following passage:

> "[49](e) The Applicants argue that the Respondents had "by their silence, and their conduct admitted that confidential information has been disseminated". In my view, the Applicants' contentions merited no response in any greater detail than was given was them in the correspondence to which I have referred at [25] to [28] above. I would not infer any admission from the absence of any further engagement with the Applicants' arguments. Nor would I infer from the reference to "fully informed consent" that there was any admission that there must have been actual disclosure of confidential information." (emphasis added)[17]

[42] The passage highlighted above demonstrates the learned primary judge specifically rejected the argument which ground (b) alleges his Honour failed to deal with. Considered in isolation, the highlighted passage suggests the argument was dispensed with summarily without explanation for the rejection of the argument.

[43] However, the reason for the rejection of that argument is readily apparent from his Honour's earlier analysis of facts which this ground seemingly overlooks.

[44] When the appellants' solicitors had taken issue with the fact that barrister AB was acting for Vannin, Queensland Nickel's solicitors responded by letter dated 2 June 2020 advising, inter alia, that Queensland Nickel and its general purpose liquidators provided their fully informed consent for barrister AB to so act. The appellants contended it ought be inferred that the provision of so-called fully informed consent necessarily constitutes an admission that a breach of fiduciary duty has occurred and that confidential information has been disclosed. However, flying in the face of this

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16 Eg AR Book 1 p 13 [38], p 19 [56].
17 AR Book 1 Vol 1 p 23.

inference was the direct evidence of Queensland Nickel's liquidator Mr Park who was the source of the provision of the so-called fully informed consent.

[45] The learned primary judge was well aware of this evidence and dealt with it at some length in his reasons.[18] Mr Park's evidence was to the effect that he had considered whether there was any possibility for a conflict of interest, real or potential, to arise if Queensland Nickel agreed to permit barrister AB to act for Vannin, that he did not see there was any real potential for the interests of Queensland Nickel to be prejudiced by barrister AB acting for Vannin, that in giving consent for barrister AB to act for Vannin he did not see any possibility of a conflict of interest and was not sure that Queensland Nickel needed to give such consent. Moreover, he deposed that at the time of giving the consent he was not aware of any evidence relating to the merits of issues in the Vannin proceeding which were of a confidential kind that might impair the defence of the appellants and the possibility of there being confidential information relevant to the appellants was not a factor that he considered.

[46] Far from this evidence supporting an inference that there was an existing or potential conflict or that confidential information had been disclosed, it was direct and uncontradicted evidence to the contrary. The primary judge's earlier exposition of the evidence pertaining to the giving of the consent readily explains the brevity with which he ultimately rejected the inference on the giving of "fully informed consent" sought by the appellants. It follows that ground (b) must fail.

Ground (c): "The learned primary judge erred in failing to deal with the argument before him on the basis that the confidential information of the fourth respondent included the 'getting to know you factors' (as they are known) including strengths, weaknesses, honesty or lack thereof, reaction to crisis, pressure or tension, attitude to litigation and settling cases and tactics and was not confined to the categories recorded in J[49](b)."

[47] In support of this ground the appellants submitted barrister AB's involvement with Queensland Nickel would have involved barrister AB at least possessing information related to getting-to-know-you factors. It was also submitted:

> "Relevant confidential information may also have included information concerning the strategy for running the case, the way in which the former client understands the case, or the evidence in the case. The disadvantage to be prevented may be as subtle as something which may have been observed by the lawyers in the body language of one of its representatives. Even an observation of that kind might give the lawyers a tactical advantage in deciding how to pursue the claim of their client."[19]

[48] The authorities cited by the appellants in respect of this ground are all cases in which applicants sought to restrain lawyers from further acting in litigation involving their former clients.[20] Barrister AB had already ceased acting for Vannin. There was thus no prospect of barrister AB advantageously using knowledge of

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18 AR Book 1 Vol 1 p 14.

19 Appellants' outline of argument [27]-[28].

20 *Re Timbercorp* (2019) 137 ASCR 189; *PDP Group Pty Ltd & Anor v Bennett & Philp* [2013] QSC 231; *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] NZLR 343.

such subtleties as the body language of a witness in further conducting Vannin's case. The probability that such knowledge had in turn been conveyed to some other lawyer so as to be so advantageously deployed by that lawyer as to justify the court's interference is low.

[49] Moreover, as already discussed and as was explained by the learned presiding judge, there had been no dealings with witnesses on the part of Queensland Nickel's liquidator. This was not then a case in which "getting to know you factors" could have been known to barrister AB other than the knowledge barrister AB may have had about the liquidators' intended strategies or attitudes regarding the pursuit or otherwise of the GE liability. Such knowledge was an irrelevancy because, pursuant to the settlement deed, Queensland Nickel and the liquidator were to take no active role in the Vannin proceeding.

[50] For all of these reasons there is no substance to ground (c).

Ground (d): "The learned primary judge erred in failing to hold that the appellants had; or alternatively they had established on a prima facie basis; a cause of action for breach of confidence in equity arising from each of the terms of the settlement deed and the terms of order 1 of the Consent Orders – cf generally J[38]-[40]."

[51] As with ground (a) this ground relies upon clauses in the settlement deed which have already been canvassed. It will be recalled order 1 is potentially relevant in that it required payment and clause 7.1 of the settlement deed contained an acknowledgment that the appellants were entitled to exercise all rights at law arising as a result of any consent order payment the subject of the consent orders.

[52] The argument advanced in respect of ground (d) was merely another iteration of part of the argument advanced in respect of ground (a), to the effect that the consent order and settlement deed conferred rights in the nature of an indemnity which were in substance rights of subrogation.

[53] The appellants' argument must fail for reasons already explained. In short, there is nothing in the terms of the consent orders or the settlement deed to suggest the appellants forthwith became the beneficiaries of rights additional to those conferred in the settlement deed. A right of subrogation was not so conferred. The deed relevantly only conferred upon the appellants a right to conduct their claims and defences with Queensland Nickel and its liquidator taking no active role and taking no step which would impair the conduct of those claims and defences. It remains a determinative foundational problem for the appellants that, as earlier explained, the settlement deed did not entitle them to enforce Queensland Nickel's rights as their own.

Ground (e): "The learned primary judge erred in failing to hold that the appellants were entitled; or alternatively they had established on a prima facie basis; in the context of the settlement deed and Consent Orders, to rely on the jurisdiction to restrain a legal practitioner from acting against that practitioners' former client, regardless of whether the former client made complaint - cf J[41]."

[54] The specific paragraph of the learned primary judge's reasons to which this ground refers was:

> "[41] I mention that the Applicants also sought to rely on the Court's well-established jurisdiction to restrain a legal practitioner

> from acting against a former client. At least some part of that jurisdiction turned on the protection of equitable rights, namely the former client's rights in relation to the protection of its confidential information and the former client's rights to enforce fiduciary duties owed to it. But the former client is Queensland Nickel and it does not complain. The analysis developed above explains why the Applicants are not in the position to exercise Queensland Nickel's equitable rights. For completeness – because it is not strictly relevant under this heading – insofar as the jurisdiction to restrain a legal practitioner from acting against a former client might turn on the former client's legal rights, the same analysis explains why the Applicants are not in a position to exercise Queensland Nickel's legal rights."[21]

[55] The appellants' argument in respect of this ground relies upon the above passage to submit the learned primary judge took the erroneous approach of concluding the Court's jurisdiction to restrain former legal practitioners did not arise because Queensland Nickel did not complain that a former legal practitioner was acting against it.

[56] The appellants' argument overlooks that paragraph 41 of the reasons does not fall for consideration in isolation, a point made obvious by the reference in that paragraph to the "analysis developed above". The argument seems to wrongly assume that the appellants failed to secure the Court's intervention simply because Queensland Nickel did not complain about barrister AB acting for Vannin. However, as is already apparent, their application failed for a variety of reasons – most fundamentally that the appellants were not entitled to exercise Queensland Nickel's right to the preservation of confidences and avoidance of conflict of interest in respect of barrister AB and that, in any event, it had not been demonstrated there was a real risk of dissemination of truly confidential information.[22]

[57] In support of ground (e) the appellants contend the Court has a power, deriving from its power to protect the integrity of the judicial process and the due administration of justice including the appearance of justice, to restrain a party's former lawyer from acting for another party where there is a real and sensible risk of disclosure of confidential information, even if the party for whom the lawyer formerly acted makes no complaint.[23] Accepting that is correct for present purposes, what of it?

[58] This was not an application to restrain barrister AB from acting for Vannin. It was an application to compel the provision of information by a range of persons including an opposing party, apparently in order to ascertain whether there had been any dissemination of confidential information in consequence of barrister AB having acted for Vannin despite earlier acting for Queensland Nickel. Given the appellants' failure to establish they held Queensland Nickel's right to the preservation of confidences and avoidance of conflict of interest in respect of barrister AB, the relief sought was, at best for the appellants, a discretionary remedy.

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21 AR Book 1 Vol 1 p 20.

22 See, for example, AR Book 1 Vol 1 p24 [56].

23 Citing, inter alia, *Black v Taylor* [1993] 3 NZLR 403, 412; *Kallinicos v Hunt* (2005) 64 NSWLR 561 [76]; *PDP Group Pty Ltd & Anor v Bennett & Philp* [2013] QSC 231 [48]-[50]; *Re Timbercorp* (2019) 137 ASCR 189 [79], [81].

[59] The appellants' reliance in support of their application upon the Court's jurisdiction to restrain a legal representative from acting was no more than an argument to support the existence of a power to grant the discretionary relief sought. The same may be said of an argument of the appellants' that they were seeking relief analogous to a mandatory interlocutory injunction.[24] But accepting for present purposes that there existed the power to grant the discretionary relief sought, it remained for the appellants, as the parties bringing the application, to establish a factual foundation sufficient to justify the exercise of the discretion to grant relief. This they did not do.

[60] The fact that the appellants had access to Queensland Nickel's evidentiary information was a consideration powerfully supporting the conclusion there was an insufficient basis to grant the relief sought. The learned primary judge acknowledged, barrister AB may also have become aware of "secondary information deriving from subsequent analysis of … records or work done or advice obtained in relation to them".[25] His Honour noted that prior to settlement of the Queensland Nickel proceeding Queensland Nickel delivered both a written and oral opening of its case regarding the GE liability.[26] As his Honour explained, the nature of the case which barrister AB knew was to be pursued, based on analysis of gathered records, was thus a matter of public record and not confidential.

[61] There remains the possibility that, by reference to the evidentiary information, barrister AB generated secondary information in the form of advice to Queensland Nickel. Such advice was prima facie confidential information. There exists a theoretical but unrealistic risk that barrister AB may have handed a copy of such advice to Vannin. The more realistic and likely scenario is that barrister AB would have rendered separate, fresh advice. Such separate advice may have been similar in some, perhaps many respects to the advice which may earlier have been given to Queensland Nickel, but it would not have been a dissemination of Queensland Nickel's confidential information. The prospect of such similarities may at best for the appellants have fuelled an argument regarding the appearance of justice if barrister AB had remained in the matter.

[62] The learned primary judge was correct to conclude the appellants did not demonstrate there was a real risk of dissemination of confidential information.[27]

[63] For all of these reasons ground (e) must fail.

Ground (f): "The learned primary judge erred in failing to hold that the appellants had demonstrated; or alternatively they had established on a prima facie basis; that preliminary discovery in equity should be made in equity's auxiliary jurisdiction in aid of enforcement of their contractual rights under the settlement deed – cf J[50]."

[64] The submission in support of this ground complain the learned primary judge should have concluded there was serious question to be tried in connection with a number of the appellants' arguments. Most of those arguments have already been dealt with and rejected above, for reasons which need not be repeated.

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24 AR Book 1 Vol 2 p 16 [33].
25 AR Book 1 Vol 1 p 22.
26 AR Book 1 Vol 1 pp 22-23.
27 AR Book 1 Vol 1 pp 20 [49], 24 [56].

[65] The only argument lingering is that the respondents' alleged silence, in supposedly not providing any evidence or explanation as to whether confidential information had passed, constituted an admission by conduct. It is unnecessary to here analyse the circumstances under which alleged silence by a respondent may be relied upon as an admission, because the respondents were not silent. They adduced uncontradicted evidence from the liquidator Mr Park. It will be recalled that evidence demonstrated the appellants had access to the same records which Queensland Nickel's case had been wholly based on. Mr Park's evidence also explained he was unaware of any evidence relating to the merits of issues in the Vannin proceeding which were of a confidential kind that might impair the defence of the appellants. While the appellants would doubtless contend they wanted to know more than was revealed by Mr Park's evidence, the adducing of Mr Park's evidence logically precludes the drawing of the inference sought. The appellants' argument was correctly rejected below.[28] This ground must fail.

Ground (g): "The learned primary judge erred failing to hold that the appellants had established; or alternatively they had established on a prima facie basis; that the Court's processes or potential processes were at risk of being frustrated such that relief should be granted in the Court's inherent jurisdiction to protect the integrity of its own processes – cf J[53] and [57]."

[66] The submissions advanced in support of this ground relied upon arguments already advanced in respect of earlier grounds and rejected for reasons already given. This ground must fail.

Ground (h): "The learned primary judge erred in failing to hold; or alternatively they had established on a prima facie basis; that the appellants had demonstrated a basis on which to invoke the Court's inherent jurisdiction to make orders for the inspection, detention, custody or preservation of property recognised by UCPR, r 255 – cf J[60]."

[67] The learned primary judge addressed and rejected an argument grounded upon the Court's jurisdiction to make orders for the inspection, detention, custody or preservation of property. He did so because the property was said to be the confidential information of Queensland Nickel and the appellants had not established a prima facie right to exercise Queensland Nickel's rights in relation to Queensland Nickel's information.[29]

[68] The submission advanced in respect of this ground is that the appellants were entitled to exercise or require Queensland Nickel to exercise rights with respect to confidential information. The submission relies upon arguments already advanced in respect of earlier grounds and rejected for reasons already given. This ground must fail.

Orders

[69] All of the grounds of appeal having failed the appeal must be dismissed. Cost should follow the event.

[70] I would order:

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28 As is apparent from paragraph 49(e) of the reasons quoted above.

29 AR Book 1 Vol 1 p 25 [59].

1. Appeal dismissed.

2. The appellants will pay the respondents' costs of the appeal to be assessed, if not agreed, on the standard basis.