SUPREME COURT OF QUEENSLAND

CITATION:	*QNI Resources Pty Ltd & Anor v North Queensland Pipeline No 1 Pty Ltd & Anor* [2022] QCA 169
PARTIES:	**QNI RESOURCES PTY LTD** ABN 14 054 117 921 (first appellant) **QNI METALS PTY LTD** ABN 56 066 656 175 (second appellant) **v** **NORTH QUEENSLAND PIPELINE NO 1 PTY LTD** ABN 64 100 946 281 (first respondent) **NORTH QUEENSLAND PIPELINE NO 2 PTY LTD** ABN 60 100 946 263 (second respondent)
FILE NO/S:	Appeal No 10103 of 2021 SC No 8063 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2021] QSC 190 (Freeburn J)
DELIVERED ON:	2 September 2022
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2022
JUDGES:	Morrison JA and Ryan and Kelly JJ
ORDERS:	**1. The appeal is dismissed.** **2. The notice of contention is dismissed.** **3. The appellants pay the respondents' costs of and incidental to the appeal.**
CATCHWORDS:	INTERPRETATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – COMMERCIAL AND BUSINESS TRANSACTIONS – PARTICULAR TRANSACTIONS – where in 2005, Queensland Nickel Pty Ltd ("Queensland Nickel") and Pipeliner 1 and Pipeliner 2 ("the Pipeliners") executed a contract for the transportation of gas on the Pipeline ("the GTA") – where Queensland Nickel executed the GTA in its capacity as manager of the Queensland Nickel Joint Venture and as agent for and on behalf of the participants in that joint venture, QNI Resources Pty Ltd ("QNR") and QNI Metals Pty Ltd ("QNM") – where

the GTA was an agreement for the transportation, not the supply, of gas – where Queensland Nickel entered into voluntary administration in January 2016, and liquidators were appointed in April 2016 – where from on or about 10 March 2016, the nickel refinery could no longer use gas as it was shut down and its employees made redundant – where QNR and QNM dispute any liability in respect of the charges and invoices on the ground that, according to the proper construction of the GTA, no liability on their part arises – where they contend that Queensland Nickel was liable to pay the invoices – where the primary judge found that the relevant clause imposed a direct obligation on QNR and QNM to pay Service Charges and Imbalance Charges in their respective proportions as specified in that clause – whether "QNI" in the relevant clause meant Queensland Nickel alone or encompassed Queensland Nickel, QNR and QNM – whether the primary judge erred in concluding that the relevant clause of the GTA directly attributed liability to, or imposed a direct obligation on, QNR and QNM to pay the amounts owing under the GTA

INTERPRETATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – COMMERCIAL AND BUSINESS TRANSACTIONS – PARTICULAR TRANSACTIONS – where the GTA imposed "imbalance charges" when more or less gas is delivered to a delivery point than is received by the pipeline at the receipt point – where the appellants contended that the primary judge erred in concluding that the clause imposing imbalance charges was not a penalty – where the fact that, as events occurred, the reserved capacity was unused did not mean that it became unreserved or might be used by the Pipeliners or other users of the GTA – where to the contrary, the appellants remained entitled to use that reserved capacity or trade it to others – where the charge under the relevant clause was directed to a different situation where gas was stored on the Pipeline without notice and permission – where the charge under that clause was a payment for gas which took up capacity on the Pipeline in addition to the appellants' reserved capacity – where different charges applying for the negotiated reservation of firm service capacity and for the storage of gas without notice or permission was merely an incident of the contractual allocation of burdens and benefits under the GTA – where this was not a case where there were readily ascertainable limits to the conceivable damage that might be sustained by imbalances and where the burden imposed by the imbalance charges could be demonstrated to be out of all proportion to the protection of the relevant interest – whether the appellants have established that the clause of the GTA imposing imbalance charges was a penalty

INTERPRETATION – GENERAL RULES OF

CONSTRUCTION OF INSTRUMENTS – COMMERCIAL AND BUSINESS TRANSACTIONS – PARTICULAR TRANSACTIONS – where the appellants contended that the GTA contained an implied obligation which was breached by the Pipeliners – where the implied obligation was expressed in terms of an obligation to "act in good faith by acting reasonably and with fair dealing to take all reasonable steps available to [the Pipeliners] under the GTA to eliminate or correct the QNI imbalance before seeking to charge the Imbalance Charge" – where it is apparent that a number of intermediate appellate courts have refused to recognise an implied term to act in good faith as a legal incidence of all commercial contracts – where there are no intermediate appellate court decisions which countenance such a general implication – where the state of intermediate appellate authority does not support the implication of an implied term to act in good faith as a legal incidence of all commercial contracts – whether until such time as the High Court recognises the existence as a matter of law of a generally implied term of good faith, this Court should proceed on the basis that such a term is not to be generally or universally implied into all contracts or all commercial contracts – whether the obligation contended for by the appellants is implied into the GTA as a matter of law by reason of a rule of construction or because of the particular class of contract to which the GTA belonged – whether the obligation contended for by the applicants is implied into the GTA in fact

Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 359, cited
Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 CLR 205; [2012] HCA 30, considered
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266; [1977] UKPC 13, cited
Burger King Corporation v Hungry Jack's Pty Ltd (2001) 69 NSWLR 558, cited
CGU Workers Compensation (NSW) Ltd v Garcia (2007) 69 NSWLR 680, cited
Commonwealth Bank of Australia v Barker (2014) 253 CLR 169; [2014] HCA 32, cited
Electricity Generation Corporation v Woodside Energy Limited (2014) 251 CLR 640; [2014] HCA 7, cited
Gramotnev v Queensland University of Technology (2015) 251 IR 448, cited
Laurelmont Pty Ltd v Stockdale & Leggo (Qld) Pty Ltd [2001] QCA 212, cited
Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1994] 2 VR 290, cited
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, cited
Paciocco v Australia and New Zealand Banking Group Ltd (2016) 258 CLR 525; [2016] HCA 28, considered
Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd (2017) 95 NSWLR 82, cited

QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd [2017] QCA 297, considered
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234, cited
Ringrow Pty Ltd v BP Australia Pty Ltd (2005) 224 CLR 656; [2005] HCA 71, cited
Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 240 CLR 45; [2002] HCA 5, cited
Sentinel Robina Office Pty Ltd v Clarence Property Corporation Ltd [2019] 3 Qd R 159; [2018] QCA 314
Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15, cited
Waterside Workers' Federation of Australia v Stewart (1919) 27 CLR 119; [1919] HCA 63, cited

COUNSEL: D F Villa SC, with P F Santucci, for the appellants
G D Beacham QC, with B O'Brien, for the respondents

SOLICITORS: Alexander Law for the appellants
King and Wood Mallesons for the respondents

[1] **MORRISON JA:** I agree with the reasons prepared by Kelly J and the orders his Honour proposes.

[2] **RYAN J:** I agree with the reasons prepared by Kelly J and the orders his Honour proposes.

[3] **KELLY J:**

Background to this appeal

[4] In North Queensland, there is a gas pipeline which runs for 370 kilometres from the gas fields near Moranbah to Yabulu ("the Pipeline"). At a point near the town of Woodstock, the Pipeline includes a lateral section which extends for some 22 kilometres to Mount Stuart, an industrial suburb of Townsville. The Pipeline has one receipt or injection point at Moranbah, two delivery points at Yabulu and one delivery point at Mount Stuart.

[5] In December 2002, North Queensland Pipeline No 1 Pty Ltd ("Pipeliner 1")[1] and North Queensland Pipeline No 2 Pty Ltd ("Pipeliner 2")[2] formed an unincorporated joint venture to design, finance, construct, commission, operate, maintain and modify the Pipeline. On 12 May 2005, Queensland Nickel Pty Ltd ("Queensland Nickel") and Pipeliner 1 and Pipeliner 2 ("the Pipeliners") executed a contract for the transportation of gas on the Pipeline ("the GTA"). Queensland Nickel executed the GTA in its capacity as manager of the Queensland Nickel Joint Venture and as agent for and on behalf of the participants in that joint venture, QNI Resources Pty Ltd ("QNR") and QNI Metals Pty Ltd ("QNM"). The Queensland Nickel Joint Venture required gas for use in the operation of its nickel refinery at Yabulu.

---

1 Then named Enertrade (NQ) Pipeline No 1 Pty Ltd.
2 Then named Enertrade (NQ) Pipeline No 2 Pty Ltd.

[6] The GTA was an agreement for the transportation, not the supply, of gas. Broadly stated, the Pipeliners provided the transportation service and the Queensland Nickel Joint Venture was a user of that service. The GTA contemplated that gas would be received into the Pipeline at the receipt point at Moranbah and transported along the Pipeline to one of the delivery points at Yabulu. A user of the transportation service was required to nominate the quantities of gas to be received at the receipt point and delivered to the delivery point. The operational needs of the nickel refinery would dictate how much gas, from time to time, would be required by the Queensland Nickel Joint Venture to be transported along the Pipeline.

[7] The initial term of the GTA was 15 years. At the time of the GTA, BHP Billiton PLC was the ultimate holding company of Queensland Nickel, QNR and QNM. In mid to late 2009, Mr Clive Palmer, or entities associated with him, acquired the shares in Queensland Nickel, QNR and QNM. On 18 January 2016, Queensland Nickel entered into voluntary administration. On 22 April 2016, liquidators were appointed to Queensland Nickel. From on or about 10 March 2016, the nickel refinery could no longer use gas as it was shut down and its employees made redundant. On 10 March 2016, Mr Coffey, one of the refinery's managers, nominated zero gas to be received. Since that nomination, no gas has been received at the Moranbah receipt point pursuant to the GTA. All the while, the GTA remained binding on the parties and was not terminated.

[8] The proceeding below was concerned with charges imposed, and invoices issued, under the GTA. The Pipeliners claimed that the monies the subject of the invoices were due and owing to them by QNR and QNM. There are relevantly two groups of invoices. The first group comprises invoices issued by the Pipeliners to QNR and QNM for the months of March 2016 to December 2016 containing charges imposed between 1 March 2016 and 31 December 2016. The total of this group is approximately $9.2 million. The second group comprises invoices issued by the Pipeliners to QNR and QNM for the months of January 2017 to April 2021 containing charges imposed between 1 January 2017 and 30 April 2021. The total of this group is approximately $53 million.

[9] The first group of invoices became the subject of statutory demands issued by the Pipeliners. QNR and QNM applied to set aside those demands and were unsuccessful at first instance before Byrne J, and later on appeal. An application for special leave to appeal to the High Court was dismissed.[3] QNR and QNM subsequently paid the amount of the first group of invoices under protest and, at the trial, counterclaimed to recover that amount. The second group of invoices was not paid.

[10] The Pipeliners were successful at the trial and obtained judgments reflecting the amount of the second group of invoices together with interest.

[11] On this appeal, QNR and QNM dispute any liability in respect of the charges and invoices on the ground that, according to the proper construction of the GTA, no liability on their part arises. They contend that Queensland Nickel was liable to pay the invoices. Alternatively, QNR and QNM make two further contentions. First, they contend that a portion of the charges, referred to as imbalance charges (which portion comprises approximately $22.8 million of the total amount of the charges) is

---

3 *QNI Metals Pty Ltd v North Queensland Pipeline No 1 Pty Ltd* [2018] HCASL 67.

unenforceable as a penalty. Secondly, they contend that, in levying the imbalance charges, the Pipeliners breached an implied obligation of good faith owed to QNR and QNM and are disentitled from charging or seeking to recoup the amount of those charges.

The GTA: Commercial Context and Material Provisions

[12] There was no evidence before this Court, or before the primary judge, concerning the negotiations and drafting of the GTA. For the present task of construction, this Court had before it the terms of the GTA which, it should be observed, to some extent revealed the commercial context in which the GTA was made.

[13] By way of broad overview, the GTA contemplated the Pipeliners providing services styled as "the QNI Services" in exchange for the payment of various charges. It is convenient to set out the material provisions of the GTA by reference to the following broad subject headings: Introductory Matters, the QNI Services, Charges, Payments and Other Material Provisions.

Introductory Matters

[14] Each side appeared to accept that the GTA was a less than perfect example of legal drafting.[4]

[15] The first page of the GTA comprised a cover sheet which described the GTA as a contract "between [Pipeliner 1] and [Pipeliner 2] "the Pipeliners" and [Queensland Nickel] "QNI"". The cover sheet was followed by five pages comprising a Table of Contents. Following the Table of Contents, there was a page numbered 1 which was headed "Contract for Gas Transportation Moranbah to Townsville Pipeline Queensland". Under that heading appeared the words "Contract made on the 12th day of May 2005". The clauses of the GTA then followed.

[16] Clause 1 materially provided:

> "
>
> **1. PARTIES**
>
> Between:
>
> (a) [**Pipeliner 1**] ("**ENQP1**") and [**Pipeliner 2**] ("**ENQP2**") both of Level 10, Comalco Place, 12 Creek Street, Brisbane, Queensland (collectively ENQP1 and ENQP2 are referred to as the "**Pipeliners**" and each as a "**Pipeliner**"); and
>
> (b) [**Queensland Nickel**] of Level 14, Riverside Centre, 123 Eagle Street, Brisbane, Queensland in its capacity as manager of the joint venture participants [QNR] ("**QNR**") and [QNM] ("**QNM**") (referred to as "**QNI**");"

[17] Clause 2 was headed "Basic Information About This Contract". It relevantly noted that QNI wished to acquire the QNI Services and that the Pipeliners had each agreed to supply the QNI Services on the terms and conditions of the GTA.[5] The Pipeliners were required to provide the QNI Services under and in accordance with the provisions of the GTA from 1 August 2005.[6]

---

4 T 1-54; T 1-16.

5 AB2 Vol 1 p 427 cl 2.1(d).

6 AB2 Vol 1 p 428 cl 2.3(a) and cl 2.6; p 500, definition of "start date", p 510 annexure A.

The QNI Services

[18] The fundamental component of the QNI Services was the provision of the "Firm Forward Haulage service".[7] That expression was essentially defined to mean the transportation of gas in the Pipeline from the receipt point to the delivery point in the direction of Moranbah to Townsville.[8]

[19] There were two important features of the obligation to transport the gas. First, the obligation was dependent upon gas being delivered to the receipt point and nominations being made by QNI.[9] The Pipeliners were obliged to receive the quantity of gas nominated by QNI up to the "MDQ" on any "Day". Broadly put, the "MDQ" was a reference to the Maximum Daily Quantity of gas on any "Day".[10] A "Day" was defined as "a period of 24 hours beginning at 8:00 am Australian Eastern Standard Time… and ending at 8:00 am … the following day".[11]

[20] Secondly, the Firm Forward Haulage service was to be provided on a firm basis. Clause 3.1(d) provided that the Firm Forward Haulage service was required to be provided on a firm basis, without interruption or curtailment. The requirement to provide the Firm Forward Haulage service on a firm basis meant that the service was to be regarded as a Priority 1.0 Service, the highest priority.[12] Hence, the Pipeliners were obliged to effectively guarantee that, on any given day, they could transport a quantity of gas up to the amount of the MDQ. Put another way, this requirement reserved capacity in favour of QNI, meaning that QNI could expect to have transported a quantity of gas up to the MDQ subject to its being able to introduce gas into the Pipeline at the receipt point and take delivery of the gas at the delivery point.[13] This reservation of capacity occurred in a context where the Pipeline had a finite available capacity for the transportation of gas.[14] The Pipeline was capable of transporting up to 108 terajoules per day.[15] This figure represented the maximum capacity which the Pipeliners could potentially sell to customers on a guaranteed or firm basis.[16]

[21] The contractual requirement was to deliver an equivalent quantity of gas. That is, the Firm Forward Haulage service did not require the same molecules of gas received at the receipt point to be delivered at the delivery point. The Pipeline was rather to be operated in such a way that the received gas would comingle with other gases when transported along the Pipeline. The equivalent quantity of gas to be delivered at the delivery point could be comprised of different molecules to those received at the receipt point so long as the delivered gas met certain requirements set out in Annexure C to the GTA.[17]

Charges

---

7 AB2 Vol 1 pp 493, 499.
8 AB2 Vol 1 p 431 cl 3.1(a).
9 AB2 Vol 1, p 431 cl 3.1(c).
10 AB2 Vol 1 p 497.
11 AB 2 Vol 1 p 492.
12 AB2 Vol 1 pp 493, 498, 432-3.
13 AB2 Vol 1 p 327 [42].
14 AB2 Vol 1 p 429 cl 2.7(b)(i), p 437 cl 4.13.
15 AB2 Vol 1 p 327 [39]; Reasons [1]. A terajoule is 1000 gigajoules. Energy will be described in these reasons in gigajoules except in quotes.
16 AB2 Vol 1 p 327 [39]-[40].
17 AB2 Vol 1 p 462 cl 17.4.

[22] The invoices the subject of these proceedings contain charges which are predominantly all of the same character, namely "Firm Forward Shortfall Charges" and "Imbalance Charges".

[23] Clause 5.4 provided for the payment of a number of charges which were collectively referred to as "Service Charges". Relevantly, that clause provided that "QNI must pay … Service Charges in accordance with clause 21". The Service Charges included a "Firm Forward Charge" and a "Firm Forward Shortfall Charge".

[24] The Firm Forward Charge was a charge for the quantity of gas actually transported and delivered up to the MDQ for any given day calculated in accordance with the formula: Firm Forward Charge = Firm Forward Tariff x Firm Forward Quantity.[18] The Firm Forward Charge was calculated daily and invoiced in accordance with clause 21.[19] There was a formula for calculating the "Firm Forward Tariff" which fixed tariffs for particular tranches and specified daily quantities.[20] The Firm Forward Quantity meant "[t]he lesser of the Delivered Quantity and the Firm Forward MDQ for the Day".[21] The Delivered Quantity referred to the actual quantity of gas delivered to the delivery point on a Day.[22] For the purposes of this proceeding it was common ground that the Firm Forward MDQ was 14,862.6 gigajoules or 14.9 terajoules.

[25] Clause 5.11 provided for the Firm Forward Shortfall Charge in the following terms:

> "***5.11 Firm Forward Shortfall Charge***
>
> (a) The Firm Forward Shortfall Charge for a month is the amount (if any) by which the Firm Forward Minimum Charge for that month exceeds the aggregate Firm Forward Charge for that month.
>
> (b) The Firm Forward Minimum Charge for a month is the aggregate of the Firm Forward Minimum Charge for each Day in that month calculated in accordance with the following formula.
>
> Firm Forward Minimum Charge = Firm Forward Tariff x Firm Forward DMQ"

[26] The "Firm Forward DMQ" for any day was defined to mean 90% of the Firm Forward MDQ for that day. For the purposes of this proceeding, it was common ground that the Firm Forward DMQ was 13,376.34 gigajoules or 13.4 terajoules.

[27] The appellants helpfully summarised the operation and effect of the Firm Forward Charge and the Firm Forward Shortfall Charge as follows:[23]

> "… the effect of those provisions is this: if, on any particular day, Queensland Nickel had delivered to it the full 14.9 terajoules of gas, then it would pay a Firm Forward Charge calculated by reference to that quantity, and there would not be a Firm Forward Shortfall

---

18 AB2 Vol 1 p 441 cl 5.6.
19 AB2 Vol 1 p 442 cl 5.10.
20 AB2 Vol 1 p 437 cl 5.1.
21 AB2 Vol 1 pp 440-1, 493.
22 AB2 Vol 1 p 492.
23 T 1-20 ll 24-41.

> Charge payable. For any delivery of gas that exceeded 90% of the Maximum Daily Quantities – so any delivery between 13.4 and 14.9 terajoules – again Queensland Nickel would pay the Firm Forward Charge calculated by reference to the actual quantity delivered, and there would not be a shortfall charge payable.
>
> For any quantity of gas between 0 and 90% of the Maximum Daily Quantity, Queensland Nickel pays an amount which consists of both the Firm Forward Charge calculated by reference to the actual delivery and the Firm Forward Shortfall Charge calculated by reference to the amount by which the actual delivery falls short of the 90% of the Maximum Daily Quantity. … the ultimate effect of these provisions is in a financial and monetary sense to guarantee to the Pipeliners a minimum payment as if it had delivered at least 90% of the Maximum Daily Quantity on each day, irrespective of how much gas was, in fact, delivered."

[28] For each month between April 2016 and January 2021 (inclusive) the monthly aggregate Firm Forward Charge was $0. Between 10 March 2016 and 31 January 2021, the Firm Forward Quantity was zero. Hence, during this period, which is reflective of the period when the nickel refinery was not operational, the Pipeliners sought to recover the minimum payment calculated as if they had delivered 90% of the Firm Forward MDQ on each day.

[29] The appellants did not seek to challenge or impugn the calculation or validity of the Firm Forward Shortfall Charges. Indeed, on this appeal, the appellants' senior counsel candidly observed of the Firm Forward Shortfall Charges that "the commercial rationale for that arrangement is obvious given the investment that the Pipeliners have put into constructing this infrastructure."[24] The appellants however contended that, on the proper construction of the GTA, Queensland Nickel, not the appellants, was liable to pay those charges.

[30] The next concept relevant to the charges contemplated by the GTA concerns "imbalances". An imbalance arises where more or less gas is delivered to a delivery point than is received by a pipeline at the receipt point. Imbalances can be positive or negative. A positive imbalance arises where more gas is received into a pipeline than is delivered out from the delivery point. A negative imbalance arises where more gas is delivered out of a pipeline at the delivery point than is received into the pipeline at the receipt point.

[31] The balance of gas within a pipeline is important to its operation. In order to operate a pipeline, a certain base quantity of gas is required to guarantee a minimum pressure necessary to enable gas to flow along the pipeline.[25] The base quantity of gas required to enable a pipeline to operate efficiently is referred to as linepack. Ideally, the linepack "sits in the pipeline all of the time".[26] In the case of the Pipeline, the linepack was necessary to enable the Pipeline to be able to transport up to 108,000 gigajoules per day.[27] However, the amount of linepack in the Pipeline on any given day was not necessarily the minimum amount required to transport gas

---

24 T 1-20 l 46 - T 1-21 l 1.
25 AB2 Vol 1 p 328 [46].
26 AB2 Vol 3 p 1111 ll 40-45.
27 AB2 Vol 3 p 1112 ll 1-5.

on that particular day.[28] Rather, the amount of linepack on any given day tended to be a nominal amount determined by the operation of the Pipeline.[29] The GTA required the Pipeliners to acquire and maintain the linepack necessary to operate the Pipeline.[30]

[32] The contractual regime for dealing with imbalances was contained in clause 14. That regime is critical to the determination of the ground of appeal which contends that the imbalance charges are penalties. The regime may be materially set out as follows:

> " ***14. IMBALANCES***
>
> ***14.1 Absolute Imbalance***
>
> The Absolute Imbalance for a Day will be the absolute value of the Cumulative Imbalance for that Day.
>
> ***14.2 Cumulative Imbalance***
>
> The Cumulative Imbalance for a Day will be determined by reference to the period starting on the Start Date and ending at the end of the Day for which the Cumulative Imbalance is being calculated, as follows:
>
> (a) the quantity of gas received from QNI at all Receipt Points during that period; less
>
> (b) the quantity of gas delivered to QNI at all Delivery Points during that period; less
>
> (c) QNI's contribution to the Pipeline's System Use Gas requirements during that period, as determined in accordance with clause 18.1(b); less
>
> (d) all gas vented by the Pipeliners during that period under clause 15.
>
> ***14.3 QNI must control Imbalances***
>
> QNI must take reasonable steps to control and, if necessary, adjust receipts and deliveries of gas, in order to ensure that, on any Day, the Absolute Imbalance does not exceed the Imbalance Limit for that Day.
>
> The Pipeliners may each offer QNI an ancillary service to adjust scheduled flows in order to manage Imbalances on QNI's behalf.
>
> ***14.4 QNI to correct Imbalances***
>
> If at any time the Absolute Imbalance exceeds the Imbalance Limit, the Pipeliners may by Notice given to QNI as soon as reasonably practicable after the Pipeliners become aware of the Imbalance require QNI to correct the Imbalance within the time and to the extent determined by the Pipeliners, acting reasonably, and specified in that Notice ("**Imbalance Correction Notice**") but QNI shall not

---

28 AB2 Vol 3 p 1182 ll 10-25.
29 AB2 Vol 3 p 1182 ll 10-25.
30 AB2 Vol 1 p 464 cl 19.

be required to correct the Imbalance by more than is required to bring it within the Imbalance Limit. QNI must use reasonable endeavours to comply with an Imbalance Correction Notice.

14.5 Operational Flow Order to correct QNI's Imbalances

Without limiting clause 11.5, if QNI fails to comply with an Imbalance Correction Notice, the Pipeliners may issue an Operational Flow Order to QNI to alter gas receipts and deliveries as directed by the Pipeliners so that the Absolute Imbalance does not exceed the Imbalance Limit if, in the Pipeliners' reasonable opinion, QNI's Imbalance is adversely affecting:

(a) the Pipeliners' ability to perform their obligations to other Users under their Service Contracts for Firm Services;

(b) the Pipeliners' ability to offer Firm Services to prospective Users; or

(c) the Pipeliners' ability to operate and maintain the Pipeline as a Reasonable and Prudent Operator in accordance with Good Engineering and Operating Practices.

…

QNI must use reasonable endeavours to comply with the directions in an Operational Flow Order within 1 hour of its receipt or at such later time as is specified in the Operational Flow Order. If QNI fails to do so the Pipeliners may curtail receipts or deliveries of gas to the extent required to ensure that the Operational Flow Order is complied with.

Any quantities of gas delivered on QNI's account at the Receipt Points in accordance with the requirements of an Operational Flow Order issued in accordance with this clause 14.5 shall become the property of the Pipeliners at no cost to the Pipeliners and free and clear of any adverse claims.

14.6 What happens to Imbalances at the end of this contract

At the expiry or termination of this contract QNI may have a Cumulative Imbalance. Within seven (7) Days of the expiry or termination of this contract, QNI must eliminate any Cumulative Imbalance by settling the Imbalance with another User as contemplated in clause 14.8(d) or by offering to the Pipeliners to sell or purchase, as the case may be, the quantity of gas necessary to eliminate the Imbalance at the Linepack Price. This clause 14 survives the expiry or termination of this contract.

14.7 How Imbalances are charged

(a) The Imbalance Charge for a Day will be the Chargeable Imbalance for that Day multiplied by 200% of the Firm Forward Tariff for that Day.

(b) The Chargeable Imbalance for a Day is the Absolute Imbalance for that Day minus the Imbalance Tolerance for that

Day, provided that if the Absolute Imbalance does not exceed the Imbalance Tolerance:

(i) on every Day of a continuous period of seven (7) Days starting on that Day; and

(ii) on every Day of a continuous period of ten (10) Days ending on that Day,

then the Chargeable Imbalance for that Day will be zero.

14.8 Options for eliminating an Imbalance

QNI may correct or eliminate an Imbalance by undertaking any one or more of the following:

(a) increasing or decreasing the quantity of gas made available by QNI at the Receipt Points;

(b) increasing or decreasing the quantity of gas taken at the Delivery Points;

(c) utilising an ancillary service offered by the Pipeliners as contemplated in clause 14.3; or

(d) settling some or all of QNI's Imbalance by utilising another User's countervailing Imbalance provided that QNI and each User contemplating the settlement advises the Pipeliners by Notice of its agreement to proceed with the settlement and the Pipeliners approve of the settlement process, such approval not to be unreasonably withheld.

14.9 Correction of QNI Imbalance

(a) Without limiting any of their other rights or powers, the Pipeliners may correct, in whole or in part, an Imbalance which QNI has not corrected in accordance with clause 14.5 by:

(i) in the case of a negative Imbalance, crediting to QNI's account the required quantity of gas and debiting that quantity to the Pipeliners' account for Linepack; or

(ii) in the case of a positive Imbalance, debiting the required quantity of gas to QNI's account and crediting that quantity to the Pipeliners' account as Linepack,

and adjusting QNI's Cumulative Imbalance accordingly.

(b) If the Pipeliners wish to correct an Imbalance as provided for in clause 14.9(a) then they must do so and give QNI Notice of that correction within 3 Days after QNI's failure to correct that Imbalance in accordance with clause 14.5.

(c) The quantity of gas credited to QNI's account under clause 14.9(a)(i) shall become the property of QNI and QNI must pay the Pipeliners in accordance with clause 21 130% of the Linepack Price for each GJ of that quantity.

(d) The quantity of gas credited to QNI's account under clause 14.9(a)(ii) shall become the property of the Pipeliners and the Pipeliners must credit QNI in accordance with clause 21 70% of the Linepack Price for each GJ of that quantity."

[33] As is apparent from clause 14.7, the Imbalance Charge for any Day was the product of the "Chargeable Imbalance for that Day" multiplied by 200% of the "Firm Forward Tariff" for that Day. As has been noted, there was a formula for calculating the Firm Forward Tariff which fixed tariffs for particular tranches and specified daily quantities.[31] The "Chargeable Imbalance for a Day" was the "Absolute Imbalance for that Day" minus the "Imbalance Tolerance for that Day" provided that, if the Absolute Imbalance did not exceed the Imbalance Tolerance on every Day of a continuous period of seven Days starting on that Day and on every Day of the continuous period of 10 Days ending on that Day, then the Chargeable Imbalance for that Day would be zero.

[34] The Absolute Imbalance for a Day was the absolute value of the Cumulative Imbalance for that Day.[32] The Cumulative Imbalance for a Day was calculated by reference to the quantity of gas received and delivered at the receipt and delivery points, QNI's contribution to the Pipeline's System Use Gas requirements and gas vented by the Pipeliners.[33] The Imbalance Tolerance for a Day meant 35 per cent of the MDQ for that day.[34]

[35] There was no dispute about the calculation of the Imbalance Charges. It was common ground on this appeal that:

(a) from on or about 9 March 2016, no gas was received into or taken from the Pipeline pursuant to the GTA;

(b) as at and from 10 March 2016, 10,223 gigajoules of gas remained on the Pipeline and was treated as a positive Imbalance under clause 14.7 of the GTA;

(c) at all material times, the Imbalance Tolerance (being 35 per cent of the MDQ) was 5,201.91 gigajoules;

(d) as at and from on or about 10 March 2016 up to and including 31 January 2021, the Cumulative Imbalance was 10,223.235 gigajoules; and

(e) for each day from 10 March 2016 up to and including 31 January 2021:

(i) the Absolute Imbalance of 10,223.235 gigajoules exceeded the Imbalance Tolerance (5,201.91) on every day of the continuous periods referred to in clauses 14.7(b)(i) and 14.7(b)(ii); and

(ii) the Chargeable Imbalance (within the meaning of clause 14.7) for each day was 5,021.325 gigajoules.[35]

[36] In respect of the Imbalance Charges, the appellants relied upon the same construction arguments which they advanced in relation to the Firm Forward

---

31 AB2 Vol 1 p 437 cl 5.1.
32 AB2 Vol 1 p 451 cl 14.1.
33 AB2 Vol 1 p 451 cl 14.2.
34 AB2 Vol 1 p 495 cl 41.1.
35 AB2 Vol 1 p 215 [43].

Shortfall Charges to contend that they were not liable to pay the charges. However, they further argued that they had no liability in respect of the Imbalance Charges because they were penalties or imposed in breach of an implied obligation to act in good faith.

Payments

[37] Clause 21 materially provided:

> " ***21. BILLING AND PAYMENT***
>
> ***21.1 Monthly billing***
>
> On or before the 20th day of each month, each Pipeliner must give QNI a bill, setting out the amount payable by QNI and details of each of the following charge components:
>
> (a) Service Charges, Firm Forward Shortfall Charge and Authorised Overrun Shortfall Charge … for the preceding month;
>
> (b) ….
>
> (c) Service Charges for any other service specified in this contract;
>
> (d) Imbalance Charges and amounts to be paid or credited under clauses 14.9 and 14.10 for the preceding month;
>
> ….
>
> ***21.2 When to pay***
>
> Subject to clause 21.6, the party by whom the net sum is owed must pay the sum due to the other party to the bank account or bank accounts in Australia nominated in writing by the other party from time to time by the last day of the month in which the relevant bill is sent.
>
> …."

[38] Clause 27:

> " ***27. DEFAULT AND TERMINATION***
>
> ***27.1 The Pipeliners' right to terminate***
>
> If:
>
> (a) there is an Insolvency Default in respect of a QNI Participant and the rights, interests and obligations of that QNI Participant are not assigned to another person in accordance with clause 37 within ninety (90) days after QNI receives Notice from each Pipeliner of its intention to terminate this contract because of that Insolvency Default;
>
> (b) a QNI Participant fails to pay on the due date any amount payable under this contract and that default is not remedied

within 14 days after the Pipeliners or the relevant Pipeliner, as applicable, give QNI Notice to remedy the default; or

(c) …. ,

then the Pipleiners may terminate this contract by Notice to QNI."

[39] Clause 41 was headed "Interpretation and Definitions" and contained a number of subclauses dealing with definitions and general interpretation provisions. Subclause 41.1 was headed "What words and expressions mean in this contract" and contained a series of defined terms. One defined expression was "QNI Participants" which was defined to mean "QNR and QNM and their successors and assigns and each is referred to as a QNI Participant".

[40] Subclause 41.6 was headed "General interpretation provisions – 1" and provided as follows:

"***41.6.1 Basis of Liability – Pipeliners***

In this contract:

(a) to the extent that a QNI Service can be provided severally by the Pipeliners, that QNI Service shall, while the joint venture constituted by the Joint Venture Agreement exists between ENQP1 and ENQP2 and the aggregate of the Participating Interests of those persons is 100%, be provided severally by each of the Pipeliners according to their Participating Interests;

(b) to the extent that a QNI Service cannot be provided or obligation can not be performed severally by the Pipeliners in accordance with paragraph (a) (an '**Integral Pipeline Obligation**'), the Pipeliners shall be jointly liable to provide or perform that Integral Pipeline Obligation; and

(c) all liability to pay, or cause to pay, an amount of money (including, for avoidance of doubt, liability to pay money in respect of failure to perform an Integral Pipeline Obligation) shall:

(i) while the joint venture constituted by the Joint Venture Agreement exists between ENQP1 and ENQP2 and the aggregate of the Participating Interests of those persons is 100%, be borne by the Pipeliners severally (and not jointly or jointly and severally), according to their Participating Interests; or

(ii) otherwise, be borne by the Pipeliners jointly and severally.

41.6.2 Entitlement to Income – Pipeliners

This contract must be construed as a separate agreement between QNI and each Pipeliner for the transportation by each Pipeliner of a portion (corresponding to its Participating Interest) of the gas to be transported under this contract to the intent that all income derived by, or amounts payable to, the Pipeliners under this contract shall be severally derived or payable (as the case may be) in accordance with the relevant Participating Interest of each Pipeliner.

41.6.3 Several Liability of QNI

In this contract:

(a) to the extent that an obligation can not be performed severally by QNI (an "**Integral QNI Obligation**"), QNR and QNM shall be jointly liable to perform that integral QNI Obligation; and

(b) all liability to pay, or cause to pay, an amount of money (including, for avoidance of doubt, liability to pay money in respect of failure to perform an Integral QNI Obligation) shall:

(i) while the Queensland Nickel Joint Venture exists between QNR and QNM and the aggregate of the percentage interests each such person holds in that joint venture is 100%, be borne by QNR and QNM severally (and not jointly or jointly and severally), according to the percentage interests which each holds from time to time in the Queensland Nickel Joint Venture which, at the date of this contract are:

A QNR: 80%; and

B QNM: 20%; or

(iii) otherwise, be borne by QNR and QNM jointly and severally."

Other Material Provisions

[41] Clause 6 relevantly provided:

" ***6. CREDIT REQUIREMENTS***

6.1 Creditworthiness

Each QNI Participant must ensure that it is creditworthy at all times during the term of this contract. A QNI participant will be creditworthy only if it:

(a) has and maintains a long term unsecured debt or counterparty credit rating by Standard & Poor's of not less than BBB – or the equivalent rating from another recognised credit rating agency reasonably acceptable to each Pipeliner; or

(b) has provided credit support in respect of its obligations under this contract to the reasonable satisfaction of each Pipeliner.

6.2 Notification

A QNI Participant must notify each Pipeliner of any downgrade in the rating referred to in clause 6.1(a) or if that QNI Participant ceases to be creditworthy under clause 6.1(a), immediately that QNI Participant becomes aware of either of those circumstances.

6.3 Suspension of QNI Services

> Without limiting any other rights of the Pipeliners, the Pipeliners do not have to provide QNI Services to a QNI Participant and may suspend, wholly or partially, provisions of QNI Services to a QNI Participant if that QNI Participant ceases to be creditworthy under clause 6.1 or if there is an Insolvency Default in respect of that QNI Participant."

[42] Clause 18 required the Pipeliners to determine the Pipeline's System Use Gas requirements and QNI to then contribute to the Pipeline's System Use Gas requirements. "System Use Gas" was defined to mean "… the quantity of gas used in the operation of the Pipeline" and included gas used for compressors and other equipment, gas lost or not accounted for in connection with the operation of the Pipeline, gas recorded as lost or gained due to standard metering error, and gas for routine regular maintenance, but not Linepack. System Use Gas was effectively the gas that was used in order to transport gas and in operating the Pipeline.[36] The requirement in clause 18 for QNI to contribute to the Pipeline's System Use Gas requirements was determined by reference to, inter alia, the total quantity of gas received at the receipt point for or on behalf of QNI.[37]

The First Ground of Appeal and the Notice of Contention

[43] The first ground of appeal is that the primary judge erred by concluding that clause 41.6.3 of the GTA directly attributed liability to, or imposed a direct obligation on, the appellants to pay the amounts claimed as owing under the GTA. This ground involves questions of construction of the GTA.

The primary judge's reasoning

[44] The primary judge relevantly reasoned and found as follows:

> "…the focus in this case is the second limb of clause 41.6.3. [The Pipeliners seek] payment under the second limb. The express words of the second limb do not bear the character of a guarantee. The second limb expressly requires that all liabilities to pay amounts of money under the GTA are to 'be borne by QNR and QNM severally' in their designated proportions. That promise by QNR and QNM, or at least by Queensland Nickel on behalf of QNR and QNM, is not a contingent promise that QNR and QNM shall be liable for the obligations of Queensland Nickel in the event that, or to the extent that, an obligation of [Queensland Nickel] cannot be performed by QNI. It is a direct attribution of liability. …. That language of 'all liability to pay' does not exclude the liability of Queensland Nickel for its obligations. It simply specifies that all of the monetary obligations of the service acquirers are to be assumed 'directly' by QNR and QNM in their relevant proportions … the text of the second limb in clause 41.6.3 makes plain that 'all liability to pay … shall … be borne by QNR and QNM severally …'. In other words, the text speaks of QNR and QNM having a direct liability to pay. The text would not signal to a reasonable businessperson that QNR and QNM only became liable in the event that Queensland Nickel did not pay. … I accept the [Pipeliners'] submission that clause

---

36 AB2 Vol 2 p 842 [69].

37 AB2 Vol 1 p 463 cl 18.1(b)(i).

> 41.6.3(b) should be interpreted as imposing a direct obligation on QNR and QNM to pay monies under the GTA, or at least an obligation that is not contingent on Queensland Nickel's failure to pay."[38]

[45] In resolving the question as to the proper construction of clause 41.6.3, the primary judge found that the term "QNI" as it appeared in that clause meant Queensland Nickel.[39] His Honour had earlier referenced his "strong impression" that the term "QNI" was susceptible of different interpretations at different points in the GTA.[40] In response to this aspect, the Pipeliners filed a notice of contention which contended that the term "QNI", wherever it appears in the GTA, referred to Queensland Nickel, QNR and QNM.

The construction arguments on appeal

[46] The appellants and the respondents identified the principal question arising under the first ground of appeal as being whether clause 41.6.3(b) imposed a direct obligation on QNR and QNM to pay the amounts payable under the GTA by way of Firm Forward Charges, Firm Forward Shortfall Charges and Imbalance Charges.[41] The notice of contention gave rise to an anterior question, namely whether the expression "QNI" meant Queensland Nickel alone or encompassed Queensland Nickel, QNR and QNM.

[47] Although the appellants identified the principal question of construction as concerning clause 41.6.3, the starting point for their argument was clause 5.4. They submitted that clause 5.4 imposed a primary obligation upon Queensland Nickel to pay the Service Charges. That submission was built upon a series of propositions. First, the term "QNI" was said to mean Queensland Nickel. Second, in terms of reconciling the various clauses within the GTA, clause 5.4 was characterised as the source of the primary obligation to pay the Service Charges and clause 21 was described as "simply a machinery provision providing for the issuing of the invoices".[42] The argument also addressed what was styled as "the thorny question" as to the meaning of clause 41.6.3.[43] The appellant submitted that clause 41.6.3 should be regarded as the product of "lazy drafting"[44] in the sense that the draftsperson had mirrored a provision that was suitable to be applied to the Pipeliners but inapt to be applied to QNI. The first part of that clause, clause 41.6.3(a), was said to be a provision that could never have any operation because the reference to "QNI" was to Queensland Nickel and the GTA imposed no obligations upon QNI which could not be performed severally by Queensland Nickel. The second part of that clause, clause 41.6.3(b), was said to presuppose that QNR and QNM were liable to pay money but where there was no provision in the GTA which imposed any such liability.

[48] As the first ground of appeal was argued, it embraced a further, alternative error said to be discernible from the primary judge's *obiter* statement to the effect that,

---

38 Reasons [64], [70], [72], [77].
39 Reasons [48].
40 Reasons [38].
41 T 1-8 ll 15-20.
42 T 1-11 ll 10-12.
43 T 1-15 ll 13-14.
44 T 1-16 l 30.

had clause 41.6.3 operated as a guarantee, the Pipeliners would have been entitled to sue for a debt owing under that clause. As to these *obiter* observations, the Pipeliners argued that if the clause operated as a guarantee, it was of such a kind as to give rise to an obligation enforceable as a debt. At this point of the argument, the appellants sought to characterise clause 41.6.3 as being a promise by them to ensure that Queensland Nickel performed the GTA such that any failure by Queensland Nickel to perform gave rise to a claim in damages, and damages only, against the appellants.

Consideration of the construction issue

[49] The principal question of construction raised by this ground of appeal has been considered in two previous decisions. The question was first addressed in an *ex tempore* judgment delivered at first instance by Byrne SJA in *QNI Resources Pty Ltd v North Queensland Pipeline No 2 Pty Ltd*.[45] On that occasion, his Honour had before him an application by QNR to set aside a Statutory Demand dated 23 November 2017 made by Pipeliner 2. The demand was made on the basis that QNR was said to be indebted to Pipeliner 2 pursuant to clause 41.6.3(b)(i) of the GTA for a then current amount of $3,653,674.95. One of the grounds on which the application to set aside was made involved the contention that there was a genuine dispute as to whether QNR was liable under the GTA to pay Pipeliner 2 the amount of the claimed debt. As to this contention, Byrne SJA observed that:

> "…[I]t was common ground that [QNR] is not a party to the GTA. What is in contest is whether it is nonetheless liable on the footing that its agent for the purpose, Queensland Nickel, has, by entering into the GTA, committed [QNR] to the payments the subject of the claimed debt… [Pipeliner 2] contends that the GTA imposes a direct liability on [QNR] to pay [monies] payable under the agreement for such things as service charges, and in doing so, serves the commercial purpose of enabling [the Pipeliners], in the event of a dispute over amounts due under the GTA, to pursue the joint venturers directly, rather than by confining any such claim to suit against the manager."[46]

[50] After having observed that the GTA "is not an exemplar of excellence in drafting",[47] his Honour then relevantly reasoned:[48]

> "The language of clause 1(b) is clear enough. What is referred to as 'QNI' are the entities named in the paragraph: Queensland Nickel and the joint venture participants for which it acts 'as agent': [QNR] and [QNM]… The key to whether [QNR] is contractually obliged to make pertinent payments under the GTA is clause 41.6.3… Clause 41.6.3(b)(i) contains a contractual promise concerning the liabilities of [QNR] and [QNM] to pay monies that the agreement otherwise establishes are to be paid by those on the QNI side of the contract. For present purposes, the critical obligations are those imposed by a combination of clauses 5 and 21… The Notice of

---

45 (Unreported, Supreme Court Qld, No 2742 of 2017, 23 May 2017).
46 Ibid 4-5.
47 Ibid 6.
48 Ibid 6-8.

> Statutory Demand is founded upon the notion that clause 41.6.3 makes [QNR] directly liable to the [Pipeliners] for the payment of the monies which '[QNI]' is otherwise obliged to pay under the terms of the GTA'. That interpretation of the effect of clause 41.6.3 accords with the language of the document and its evident commercial purposes. It has the practical consequence, in present circumstances where there is no dispute with respect to quantum, of obliging [QNR] to pay its prescribed 80% share of the charges claimed.
>
> The inclusion of clause 41.6.3 in the GTA makes no sense unless the provision was intended to affect the contractual relations between [QNR] and the two [Pipeliners], not merely relations between the joint venture participants inter se or between one or other of them and Queensland Nickel – arrangements which would be expected to be the subject of the joint venture agreement and such other arrangements as those parties may choose to [include].
>
> Clause 41.6.3 has the effect for which the [Pipeliners] contend and imposes the burden to pay the amount claimed."

[51] The decision of Byrne SJA was appealed by QNR. The relevant grounds of appeal were to the effect that the primary judge had failed to find a genuine dispute as to the liability of QNR and QNM when it was accepted they were not parties to the GTA, had failed to find that there was a genuine dispute as to the proper construction of the expression "QNI" and had failed to find that there was a genuine dispute as to whether Queensland Nickel had purported to bind QNR and QNM to the GTA. In dismissing the appeal, Holmes CJ (with whom Fraser JA and McMurdo JA agreed) relevantly reasoned:

> "The argument that, once it was accepted that [QNR] and [QNM] were not parties to the GTA, the primary judge must have found a genuine dispute as to their liability, can be put to rest at once. His Honour reiterated throughout the course of argument and in his judgment that he considered them to be bound by the terms of the GTA because Queensland Nickel had entered it on their behalf as their agent. …It is plain that he had concluded that they were parties, in the legal sense of being bound by the agreement. …
>
> The primary judge did not fail to consider the argument that Queensland Nickel had not purported to enter the contract as agent for the appellants. He concluded that it was not tenable by resolving the question of what cl. 1(b) meant: 'QNI' was a reference to all three parties, [QNR], [QNM] and Queensland Nickel, the last being the agent for the other two. …
>
> The appellants' contention that his Honour ought not to have resolved the construction question against them, but should instead have found that there was a genuine dispute as to whether Queensland Nickel had purported to bind them as disclosed principals, must fail. Clause 1(b) bears no other sensible meaning. It identifies the capacities in which Queensland Nickel is entering the contract: in its own right as manager of the joint venture agreement

> and also (the second 'as' is significant) as agent for and on behalf of [QNR] and [QNM]…
>
> The fact that the phrase 'referred to as "QNI"' appears at the end of cl. 1(b) suggests that 'QNI' means to embrace all the identities identified in this sub-clause. That is not of itself of great weight, because it might simply be the product of clumsy drafting; but the existence of cl. 41.6.3 puts the matter beyond doubt. …
>
> The appellants proposed that 'QNI' where it appeared in the GTA was a reference to Queensland Nickel alone; but the reference in cl. 41.6.3 to several performance of QNI obligations is entirely inconsistent with that suggestion. And the clause had no purpose if it were not to impose obligations and liabilities on [QNR] and [QNM] in their role as members of QNI. The contention that the effect of reading cl. 41.6.3 in that way was to remove all obligation from Queensland Nickel is wrong: cl. 41.6.3(a) left unaffected any obligation which was capable of being performed by it alone as a member of QNI. As a further indication that 'QNI' could not possibly have been limited to Queensland Nickel, cl. 6 required 'each QNI participant' to remain 'creditworthy'; no doubt to ensure that the Pipeliners' recourse against them was worth something. …
>
> In the face of the unequivocal statement in cl. 1(b) about the capacity in which Queensland Nickel entered the GTA and the intent to bind the appellants manifest in cl. 41.6.3, other usages and forms of names in the contract are inconsequential."[49]

[52] The parties accepted below, and before this Court, that the decisions of Byrne SJA and the Court of Appeal were interlocutory in the sense that they were not finally determinative of the rights of the parties.[50] On this appeal, it was common ground that these two decisions did not give rise to an issue estoppel and should not be regarded as binding and finally determinative of the parties' rights. The two decisions do however concern the proper construction of the GTA, the instrument which falls to be construed on this appeal, and are plainly relevant and persuasive.

[53] The principles of construction relevant to the interpretation of a commercial contract were not in dispute. Unless a contrary intention is indicated in a contract, a Court is entitled to approach the task of giving a commercial contract a business-like interpretation on the assumption "that the parties intended to produce a commercial result".[51] There is no contrary intention indicated in the GTA. Further, a commercial contract is to be interpreted so as to avoid "making commercial nonsense or working commercial inconvenience".[52] The commercial purpose of the contract is the purpose of reasonable persons in the position of the parties at the

---

49 *QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd* [2017] QCA 297, 10-12, [28]-[35].

50 *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* [1994] 2 VR 290, 296-7; T 1-6 l 35 – T 1-7 l 30; T 1-48 ll 33-38.

51 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 117 [51] (French CJ, Nettle and Gordon JJ); *Electricity Generation Corporation v Woodside Energy Limited* (2014) 251 CLR 640, 657 [35] (French CJ, Hayne, Crennan and Kiefel JJ).

52 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 117 [51] (per French CJ, Nettle and Gordon JJ).

time of a contract.[53] Hence, in determining meaning, the Court has to ask "what a reasonable businessperson would have understood" the contract to mean.[54] This question directs the Court to consider "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".[55] The whole of the contract has to be considered as the meaning of one part may be revealed by other parts.[56] Literal interpretations which lack commercial efficacy or common sense are, where possible, to be avoided.[57]

[54] There is a further principle of interpretation that has some relevance to this ground of appeal. There is a presumption that a word or expression appearing multiple times in a document has the same meaning throughout.[58] However, the strength of that presumption depends on the particular circumstances of any given case. In *Interpretation*, the learned authors observe:[59]

> "Where the meaning of the word in the part of the document at issue is clear in the local context, the presumption has no work to do.[60] The presumption will be rebutted easily where the document is poorly drafted[61]".

[55] It is convenient to first consider the question raised by the notice of contention.

[56] The phrase "referred to as 'QNI'" appears at the end of clause 1(b). The words "referred to as" are of some significance. They are noticeably absent from any other definition or designation in clause 1 which was meant to identify a singular party. The words "referred to as" appear in one other context in clause 1, namely in clause 1(a) where there is a collective reference to ENQP1 and ENQP2. The language of clause 1(b) is sufficiently clear to conclude that the words "referred to as QNI" were objectively meant to indicate that "QNI" included Queensland Nickel, QNR and QNM.

[57] Two observations can be made against this conclusion. First, the word "collectively" is not used, which is in contradistinction to the use of that word in the definition of the Pipeliners. Secondly, the conclusion means that there is no standalone definition or designation for Queensland Nickel contained within the GTA. As I discuss below, neither of these observations warrant any departure from the conclusion that "QNI" was meant to include Queensland Nickel, QNR and QNM.

---

53 *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530, 559 [82] (per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ).

54 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [47] (French CJ, Nettle and Gordon JJ).

55 Ibid.

56 *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109 (Gibbs J).

57 *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455, 464 (Mason, Murphy, Brennan, Deane and Dawson JJ).

58 Perry Herzfeld and Thomas Prince, *Interpretation* (LawbookCo, 2nd ed, 2020) 486-7 [22-60] citing, amongst other authorities, *Victoria v Tatts Group Ltd* (2016) 328 ALR 564, 575 [55].

59 Perry Herzfeld and Thomas Prince, *Interpretation* (LawbookCo, 2nd ed, 2020) 486-7 [22-60].

60 *Watson v Haggitt* [1928] AC 127, 130-131 (Lord Warrington, for the Board).

61 See for example *Buick v Equity Trustees Executors & Agency Co Ltd* (1957) 97 CLR 599.

[58] Queensland Nickel entered into the GTA in its capacity as manager of the Queensland Nickel joint venture and as agent for and on behalf of the joint venture participants QNR and QNM. The commercial intent of the GTA was that Queensland Nickel as manager would not incur any financial obligation to the Pipeliners in isolation from the participants it represented, QNR and QNM. This commercial intent is made abundantly clear by the manner in which the GTA imposed credit requirements in respect of QNR and QNM. "QNI Participants" was relevantly defined to mean QNR and QNM.

[59] Clause 6.1 imposed an obligation on each QNI Participant to ensure that it remained creditworthy at all times during the term of the GTA. The Pipeliners were entitled to suspend the provision of the QNI services to a QNI Participant which ceased to be creditworthy or if there was an Insolvency Default in respect of that QNI Participant.[62] Further, an Insolvency Default, in certain circumstances, gave rise to a right on the part of the Pipeliners to terminate the GTA.[63] The Pipeliners were conferred with a further right to terminate in the event that a QNI Participant failed to pay on the due date any amount payable under the GTA where the default was not remedied within 14 days.[64] Having regard to clause 1 and the commercial intent of the GTA, any reference in the GTA to "QNI", at least in the context of payment obligations owed to the Pipeliners, should be construed as a reference to Queensland Nickel, QNR and QNM.

[60] The proper construction of clause 41.6.3 of the GTA is not to be considered in isolation from other clauses within the GTA which deal with payments or financial obligations to the Pipeliners. Those other clauses are clauses 5.4, 21 and 27.1. In my respectful view, the appellants were incorrect in submitting that clause 21 was "simply a machinery provision providing for the issuing of invoices". Clause 21.2 was concerned with payment obligations and, inter alia, was the sole source of any payment obligations imposed in respect of Imbalance Charges. All of these clauses fell to be read together in order to ascertain the proper construction of clause 41.6.3. Properly construed, clause 41.6.3 recognised a direct liability upon QNR and QNM, relevantly, to pay Service Charges and Imbalance Charges in their respective proportions as specified in that clause. There are a number of matters which compel this construction.

[61] Firstly, the reference to QNI in clauses 5.4 and 21.2 should be taken as a reference to Queensland Nickel, QNR and QNM for the reasons I have already outlined in respect of the issue raised by the notice of contention.

[62] Secondly, clause 41.6.3 was a general interpretative provision. Consistent with that general interpretative intent, the obligations to pay imposed upon QNR and QNM under clauses 5.4 and 21.2 fall to be interpreted as obligations to pay in their respective proportions as identified in clause 41.6.3(a).

[63] Thirdly, clause 27.1(b) makes it abundantly clear that a failure to pay "on the due date" by either QNR or QNM gave rise to a right in the Pipeliners to terminate the GTA. This language is wholly inconsistent with the idea that the payment

---

62 AB2 Vol 1 p 445 cl 6.3.
63 AB2 Vol 1 p 472 cl 27.1(a).
64 AB2 Vol 1 p 472 cl 27.1(b).

obligations of QNR and QNM were indirect or contingent upon a failure to pay by Queensland Nickel.

[64] Fourthly, clause 41.6.3(a) is apparently concerned with obligations owed to the Pipeliners other than payment obligations. An example of an obligation contemplated by clause 41.6.3(a) is the obligation imposed by clause 27.3 upon QNI to cooperate in good faith with a view to assigning rights and obligations under the GTA in the event of a proposed closure of the nickel plant. Clause 41.6.3(a) is to be contrasted with clause 41.6.3(b), the latter being expressly concerned with obligations involving a liability to pay money.

[65] The GTA imposed many obligations on "QNI" which were not concerned with the payment of money. To decide the principal question of construction on this appeal, it is unnecessary for this Court to form a concluded view as to whether, in every such case, "QNI" was meant to refer to Queensland Nickel, QNR and QNM or, in some instances, was meant to refer to Queensland Nickel. The meaning of QNI in those other contexts is, in my consideration, not material to the principal question of construction before this Court. It may also be observed that, whilst there would be a presumption that "QNI" would have the same meaning throughout the GTA, that presumption might be rebutted in a particular, local context within the GTA, particularly where, as in this case, it was common ground that the GTA was an imperfectly drafted document. The primary judge noted his "strong impression" that "QNI" was susceptible of different interpretations at different points in the GTA. There is no discernible error in that observation. Indeed, an example of where "QNI" is likely to have meant Queensland Nickel is where clause 27.3 spoke of a resolution of "the board of directors of QNI".

[66] The appellants have failed to demonstrate any error in the primary judge's approach to the construction of clause 41.6.3. The Pipeliners have not made good the ground contained in the notice of contention. Given my conclusion, it is unnecessary to consider the further, alternative error said to be discernible from the primary judge's *obiter* statement to the effect that, had clause 41.6.3 operated as a guarantee, the Pipeliners would have been entitled to sue for a debt owing under that clause.

The second ground of appeal

[67] The appellants contend that the primary judge erred in concluding that clause 14.7 of the GTA was not a penalty. A contractual provision imposing a penalty is unenforceable at common law.[65] A penalty is essentially a threat to be enforced *in terrorem*.[66] It is a collateral stipulation which acts to secure and, *in terrorem* of, a primary stipulation. The relevant inquiry can be framed in terms of whether the contractual provision requires an amount to be paid that "is out of all proportion"[67] to or in "gross disproportion"[68] with the interests damaged or which are sought to be protected.[69] The gross disproportionality must be such as to point to a predominant punitive purpose.[70]

---

65 *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 568 [122].
66 Ibid 581 [165] (Gageler J).
67 Ibid 555 [57] (Kiefel J).
68 Ibid at 595 [221] (Keane J).
69 Ibid 555 [57] (Kiefel J).
70 Ibid 595 [221] (Keane J); Gageler J used even stronger language of "no purpose other than to punish" at 580 [165], 581 [166].

[68] In *Andrews v Australia and New Zealand Banking Group Ltd*,[71] the High Court said of the penalty doctrine:[72]

> "Mason and Deane JJ observed in *Legione v Hateley* that, as the term suggests, a penalty is in the nature of a punishment for non-observance of a contractual stipulation and consists, upon breach, of the imposition of an additional or different liability.
>
> In general terms, a stipulation prima facie imposes a penalty on a party (the first party) if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation. … It should be noted that the primary stipulation may be the occurrence or non-occurrence of an event which need not be the payment of money. Further, the penalty imposed upon the first party upon failure of the primary stipulation need not be a requirement to pay to the second party a sum of money."

[69] Later in the judgement in *Andrews*,[73] the High Court rejected the notion that the only contractual provisions which engage the penalty doctrine must be those which are contractual promises broken by the promisor. The High Court recognised that the penalty doctrine applies even in "the absence of contractual breach or an obligation or responsibility on [a party to the contract] to avoid the occurrence of an event upon which the relevant [amount is] charged".[74]

[70] In *Paciocco v ANZ Banking Group Ltd*,[75] Gageler J explained this aspect of the High Court's reasoning in *Andrews* as follows:

> "The precise holding in *Andrews* was … that there is no reason in principle why the primary stipulation to which a penalty is collateral cannot consist of the occurrence or non-occurrence of an event which is neither a breach of contract nor another event which it is the responsibility or obligation of the party subjected to the penalty to avoid."

Clause 14.7 is collateral to a primary stipulation

[71] In the present case the primary judge observed that the GTA provided a complex regime for dealing with imbalances.[76] After having referred to clauses 14.3, 14.4, 14.5, 14.8 and 14.9 of the GTA, the primary judge found that it was Queensland Nickel's contractual responsibility to correct imbalances.[77] Before the primary judge, the Pipeliners had argued that the imposition of the charge under clause 14.7 did not engage the penalty doctrine because there was no primary stipulation that

---

71 (2012) 247 CLR 205.
72 Ibid 216-7 [9]-[10], [12].
73 Ibid 227 [45].
74 Ibid 236 [78].
75 (2016) 258 CLR 525, 567 [118]-[119].
76 Reasons [180].
77 Ibid [184].

had failed.[78] QNR and QNM had submitted that clause 14.7 was collateral to a primary stipulation in favour of the Pipeliners.[79] In rejecting the Pipeliners' contention, the primary judge found that clause 14.7 was collateral to a primary stipulation in favour of the Pipeliners. His Honour relevantly reasoned:[80]

> "[186] In my view, QNR and QNM are correct about the substance of clause 14.7 and its context. The Imbalance Charge under clause 14.7 only applies in the event that Queensland Nickel has failed to keep the imbalance within certain limits. It is true that the Imbalance Charge under clause 14.7 is not premised on Queensland Nickel exceeding its Imbalance Limit. The Imbalance Charge is premised on Queensland Nickel's Absolute Imbalance:
>
> (a) exceeding its Imbalance Tolerance; and
>
> (b) so exceeding that Imbalance Tolerance for a continuous period of 17 days.
>
> [187] Thus, where the Absolute Imbalance exceeds the Imbalance Tolerance for a continuous period of 16 days, the Chargeable Imbalance is zero. The evident commercial purpose was to forgive temporary imbalances, but to permit the Pipeliners to charge a fee for persistent imbalances.
>
> [188] That there are thresholds, in terms of quantity and time, does not alter the underlying character of clause 14.7. The intention was to impose a collateral charge for Queensland Nickel's failure to keep the imbalance within limits."

[72] There is no appeal from this reasoning or these findings.

[73] On this appeal, the Pipeliners submitted that the present case did not involve a breach of contract.[81] Whilst that may be true, by reason of the unchallenged findings made by the primary judge, the present case might properly be characterised as one involving an obligation or responsibility to avoid the occurrence of imbalances in the circumstances in which the relevant charges were imposed. Characterised in that way, whilst we are not concerned with a breach of contract in the strict sense, it would seem that this kind of case is not readily distinguishable from a case involving breach.[82]

The evidence and the arguments before the primary judge

[74] Before the primary judge, the appellants sought to characterise the Imbalance Charges as penalties essentially because:

(a) they were levied in circumstances where the imbalance could not conceivably result in loss to the Pipeliners;

---

78 Ibid [185].
79 Ibid [185].
80 Ibid [186]-[188].
81 T 1-62 l 20.
82 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 [78]; *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 567 [119].

(b) they were levied in circumstances where either party could take steps to avoid an imbalance;

(c) the same charge was imposed whether or not the imbalance was positive or negative, even though the consequence of a positive or negative imbalance could be different;

(d) they were grossly disproportionate being calculated at 200 per cent of the transportation tariff and were significantly more than charges payable for imbalances by other users of the Pipeline; and

(e) following the entering into of the GTA, the Pipeline had in fact operated at no more than 40 per cent of its capacity, which evidence could be relied upon in demonstrating that the Imbalance Charges were extravagant in comparison with the interest sought to be protected.

[75] The evidence established that imbalances occur effectively as the result of mismatched receipting and delivery of gas and that the Pipeliners did not control the receipting of gas into the Pipeline from the gas supplier nor the taking of gas out of the Pipeline by the User.[83] The primary judge found that it was Queensland Nickel that controlled the quantity of gas that it injected into and extracted from the Pipeline.[84]

[76] Expert evidence was adduced at the trial by both parties concerning the implications for a pipeline operator of positive and negative imbalances.

[77] The Pipeliners' expert, Mr Langford, opined that accumulated imbalances could expose a pipeline operator to breaches of other gas transportation agreements which the operator had entered into with other users, consequential loss of new business opportunities arising from reputational damage caused by such breaches and damage to third party infrastructure.[85] As to the last matter, Mr Langford gave evidence under cross examination that he had personal experience of situations where customers had "fallen over" because delivery pressure had dropped below its minimum at delivery points.[86]

[78] There was an exchange with the primary judge as follows:[87]

> "HIS HONOUR: What do you mean by the customer falls over?
>
> MR LANGFORD: So you have to supply the customer a minimum pressure. If the pipeline pressure falls below that minimum pressure, then the customer or, for example, the distribution network, can't actually get that gas, so the pressure has to be higher than the minimum pressure required to keep all the customers in the distribution network satisfied, or if the customer is directly connected to transmission pipeline and that – that pressure has to be above the minimum pressure which they – they are capable of receiving."

---

83 AB2 Vol 2 p 830 [20] - p 831 [24].
84 Reasons [193].
85 AB2 Vol 2 p 1024 [41].
86 AB2 Vol 3 p 1205 ll 24-34.
87 AB2 Vol 3 p 1205 ll 35-42.

[79] In re-examination, Mr Langford gave evidence that if customers lost supply, they lost production and would suffer economic consequences from the loss of production.[88]

[80] The appellants' expert witness, Mr Williams, accepted that a pipeline operator who had agreed to provide firm services was effectively guaranteeing the supply of gas supplied into the pipeline by a customer.[89] As he put it, "Basically, [the customer has] put it in, so they expect to receive it out".[90] He accepted that there could be reputational issues for the pipeline operator which arose in circumstances of a loss of supply.[91] Mr Williams gave evidence that reputation covered not only gas supply but also the manner in which the pipeline operator conducted itself in terms of being flexible and willing to service the particular requirements of the users.[92] In cross examination, Mr Williams gave evidence about the impacts of severe imbalances on the flexible operation of pipelines as follows:[93]

> "If there are severe imbalances which remain uncorrected, then effectively … it will affect firm service arrangements if they're not corrected relatively quickly. If they're allowed to be prolonged, then effectively those imbalances provide for less flexibility in the pipeline. And there are also … other inherent services which … some users may want firm service, some users may want … a gas packing service, a gas storing service. So if the imbalances are high, then it may impact upon the pipeline's ability to sell storing services. If it's low then it can impact on capacity of the pipeline."

[81] Mr Williams accepted that if a pipeline operator could not demonstrate that it was able to "control the users to within … the gas contract levels", the operator might miss out on customers.[94]

[82] Mr Williams also gave the following evidence in cross-examination regarding the assessment of possible costs and losses:[95]

> "[Counsel] I want to suggest to you in light of those things we've discussed about the costs … or the … monetary impacts, if I can put it that way… that it's not possible to calculate in advance how ... an imbalance of a particular level might impact a pipeline?
>
> [Mr Williams] Well, ... that's correct ... And if we're talking about a total imbalance or we're talking about a user's imbalance, then the user's imbalance – the total imbalance is … the thing that affects the actual pipeline, its capacity and its ability to provide services. The user's imbalance is a portion of that amount, and that can be – that imbalance can be positive or negative. You know … – it is the total imbalance which is the issue.
>
> …

---

88 AB2 Vol 3 p 1206 ll 5-30.
89 AB2 Vol 3 p 1210 ll 34-39.
90 AB2 Vol 3 p 1211 ll 1-5.
91 AB2 Vol 3 p 1211 ll 5-31.
92 AB2 Vol 3 p 1211 ll 37-45.
93 AB2 Vol 3 p 1213 l 45 - p 1214 l 6.
94 AB2 Vol 3 p 1214 ll 10-14.
95 AB2 Vol 3 p 1215 l 35 - p 1216 l 10.

> [Counsel] I want to suggest to you that the same applies for any cumulative level of imbalance?- … It's not possible to calculate in advance how much … a particular cumulative level of imbalance will cost the pipeline?
>
> [Mr Williams] No … it would be difficult, because it varies from day to day."

[83] Mr Giri had sworn an affidavit in which he had deposed to the potential for certain consequences arising for the Pipeline in the event of positive and negative imbalances. That evidence was given on the basis of his "experience with gas pipelines".[96] That evidence was to the effect that:

(a) positive imbalances could impact the operator's ability to flexibly receipt or deliver gas,[97] and require the operator to carefully align the timing of receipts and deliveries to avoid over pressurising the Pipeline;[98]

(b) negative imbalances might reduce the delivery capacity of the Pipeline below 108,000 gigajoules per day because of there not being enough linepack to facilitate the simultaneous receipt and delivery of gas at minimum pressures; and[99]

(c) it would be difficult or impossible to quantify the direct and indirect costs to the Pipeliners of these effects.[100]

[84] Mr Giri was cross-examined about this evidence but the thrust of the cross-examination was concerned to establish that the identified consequences had not materialised during the operation of the GTA.[101]

[85] The evidence as to the charges payable by other users was very limited. A contract dated 30 December 2002[102] was in evidence and whilst it revealed a lower tariff for the imbalance charges compared to the GTA, it had a less generous imbalance tolerance, namely 10% of the MDQ. Further, when that agreement was amended in 2005, it provided for an imbalance charge that was calculated at 200% of the transportation tariff.[103] There was evidence adduced in cross-examination that another user, AGL-Arrow, paid "something like … 20 or 30 cents a gigajoule, I think" by way of imbalance charges.[104] This answer was given by Mr Giri in response to a question about a paragraph of his affidavit in which he was considering "the relevant time" by reference to section 3.6 of Mr Williams' report. It appears that the relevant time was at point in time after the GTA had been entered. There was no evidence (including expert evidence) which purported to identify and analyse the imbalance charges payable within the relevant market at the time of the GTA.

---

96 AB2 Vol 2 pp 831-835 [26]-[27].
97 AB2 Vol 2 p 832 [26(a)(A)].
98 AB2 Vol 2 p 832 [26(a)(B)].
99 AB2 Vol 2 p 832 [26(b)].
100 AB2 Vol 2 p 832-3 [26(c)].
101 AB2 Vol 3 p 1182 l 30 – p 1184 l 25.
102 AB2 Vol 3 p 1043 and ff.
103 AB2 Vol 2 pp 857-953; AB2 Vol 3 p 1098.
104 AB2 Vol 3 p 1189 l 8.

[86] There was also evidence concerning how the Pipeline had in fact operated after the entering into of the GTA. That evidence revealed that from the time when the Pipeline was commissioned until in or about March 2016, the end use customers of the Pipeline were the Queensland Nickel Joint Venture, the Townsville Power Station and Glencore CRL.[105] Mr Giri accepted in cross-examination that, as of March 2016, immediately prior to the nickel refinery going offline, as between those three customers there was not more than about 25,000 gigajoules of gas being transported along the Pipeline.[106] Further, Mr Giri accepted that the 10,200 gigajoules positive imbalance that had been to the account of QNI since March 2016 had neither impeded negotiations with prospective users of the Pipeline nor placed the Pipeliners into a position of breach of contract with any other shipper of gas along the Pipeline.[107]

The primary judge's reasoning

[87] When construing the GTA, the primary judge found that the Pipeline was not to be regarded as a static asset but rather that the "scheme of the GTA is consistent with the [Pipeline] being managed in a dynamic way that enables the Pipeliners to make full use of the infrastructure."[108] This was a finding of commercial context. The primary judge recognised "clear commercial objectives [underlying] the imbalance regime contained in clause 14" of the GTA.[109] After finding that a positive imbalance meant that the appellants' gas was being effectively stored on the Pipeline and a negative imbalance meant that there had been an effective taking or borrowing of the Pipeliners' gas,[110] his Honour recognised "an obvious commercial justification in charging a person who is either obtaining a service (storage) or taking, even borrowing, a valuable commodity (gas)."[111]

[88] Further, his Honour found that the storage or taking of gas via imbalances was something which was contemplated to occur without permission or notice[112] and that the storage or taking of gas via imbalances "is not planned in the way that the firm forward transport services are, or in the way that a negotiated storage or sale of gas would be."[113] In this context, the primary judge recognised an "obvious commercial justification in charging a higher price for something that is given (or taken) 'on demand' and without notice"[114] and further found that "[t]he GTA demonstrates a level of acceptance of this concept of an increased payment for unplanned actions."[115]

[89] Beyond those matters concerning the parties' relationship *inter se*, his Honour also found that an imbalance, whether positive or negative, had the potential to affect the Pipeliners' management of the Pipeline and its other industrial customers in that

---

105 AB2 Vol 3 p 1109 l 5 – p 1110 l 7.
106 AB2 Vol 3 p 1114 ll 5-12.
107 AB2 Vol 3 p 1193 l 36 – p 1194 l 10.
108 Reasons [194].
109 Reasons [191].
110 Reasons [191].
111 Reasons [192].
112 Reasons [195].
113 Reasons [195].
114 Reasons [195].
115 Reasons [196].

"affects the use of the [Pipeline] and can impact the ability to receipt or deliver gas."[116] The Reasons identified those impacts as follows:[117]

> "The evidence is that both positive and negative imbalances can have an impact or a cost. Positive imbalances can reduce or eliminate the capacity to store gas in the [Pipeline] which can impact the ability to receipt or deliver gas and can make it necessary for the Pipeliners to carefully monitor and align the timing of the receipt and delivery of gas, to ensure that the receipt of gas does not over-pressurise the [Pipeline] and constrain receipts of gas. Negative imbalances can reduce the daily delivery capacity of the [Pipeline] to below its capacity of 108TJ per day. Those impacts can have led to loss of income or costs."

[90] The primary judge found that it was difficult to conclude that the Imbalance Charges were grossly disproportionate based only on a comparison with the Imbalance Charges payable by other users such as AGL/Arrow. His Honour reasoned in this regard as follows:[118]

> "The comparison with AGL/Arrow was not explored in any detail. It was not explained how the charge operated in its context, or whether the other charges in that agreement were similar or different, or whether either charge was inconsistent with a market price."

[91] To the extent that there was evidence that the Pipeline had operated at no more than 40 per cent of its capacity and there had been no impact or restriction on the transportation of gas, the primary judge regarded that evidence as being not relevant to the proper construction of the GTA.[119]

[92] The primary judge's ultimate finding was that there was "insufficient evidence to enable [his Honour] to conclude that clause 14.7 [was] penal in that its sole or predominant purpose [was] to punish …".[120] That finding was made after his Honour had given consideration to, and made findings about, the commercial context of the GTA, the circumstances in which imbalances might arise in the operation of the Pipeline and the interests that might be affected by imbalances.

The grounds of appeal and argument

[93] The appellants' notice of appeal contends that the primary judge erred in concluding that clause 14.7 of the GTA was not a penalty, in particular by:[121]

> "(a) failing to conclude that the charge of 200% of the otherwise applicable tariff was not grossly disproportionate (sic)[122] (Reasons [203], [204]);
>
> (b) concluding that the evidence of Mr Williams demonstrating the [Pipeline] operated at no more than 40% of its capacity

---

116 Reasons [194].
117 Reasons [202].
118 Reasons [204].
119 Reasons [205].
120 Reasons [206].
121 AB1 Vol 1 p 2-3 [3].
122 I have proceeded on the basis that this ground was meant to convey that there was a failure to conclude that the charge of 200% of the otherwise applicable tariff was grossly disproportionate.

was "not relevant" to a prospective assessment of whether the clause was a penalty (Reasons [205]);

(c) failing to take into account or to draw inferences as to the likely usage of the [Pipeline] as known to the parties at the time of contracting (cf Reasons [193]); and

(d) by failing to have regard to the fact that the [Pipeline] capacity reserved by the respondents for the benefit of Queensland Nickel Pty Ltd and paid for by the Firm Forward Shortfall Charge at all relevant times exceeded the positive imbalance."

[94] The appellants emphasised the GTA's failure to differentiate between the consequences of positive and negative imbalances. That lack of differentiation between the likely consequences of a positive and negative imbalance was said to be indicative of an impost directed at punishment rather than a concern to protect a legitimate financial interest. The appellants noted that, in the context of a negative imbalance, the Imbalance Charges were calculated to reflect 200% of the transportation tariff rather than a cost reflective of the expected cost of purchasing replacement gas. In the context of a positive imbalance, the appellants emphasised that, whilst there were numerous consequences that might arise in this context, the GTA did not address those consequences separately but rather imposed an immutable charge, again reflecting 200% of the transportation tariff. The Imbalance Charges, when imposed in respect of a positive imbalance, were said to have no regard to the commercial reality that QNI had effectively reserved 14,900 gigajoules of the Pipeline's capacity to its exclusive daily use. The appellants submitted that the Imbalance Charges as imposed in these circumstances were not seeking to protect any legitimate financial interest because the amount of gas being stored on the Pipeline was less than the amount reserved by QNI under the GTA.

[95] The Pipeliners focused upon the findings of fact made by the primary judge which were not the subject of challenge on appeal. The primary judge found that there was an obvious commercial justification in charging for imbalances. Indeed, on appeal the appellants accepted that it was rational to have a regime dealing with imbalances because, as they put it, having too much or too little gas in the Pipeline had the potential, at least theoretically, to impact its operation.[123] The Pipeliners embraced the primary judge's finding that a positive imbalance amounted to the storing of gas on the Pipeline. They argued that the GTA evidenced a bargain pursuant to which QNI had reserved a certain capacity in the Pipeline for the transportation, not the storage, of gas.

Consideration of the penalty issue

[96] The appellants bore the evidentiary and persuasive onus of establishing that clause 14.7 of the GTA was a penalty.[124] These onuses were significant and not lightly discharged.

[97] In *Paciocco v Australia and New Zealand Banking Group Ltd*,[125] Keane J observed:

---

123 T 1-21 ll 30-34.

124 *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 581 [167].

125 *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 594.

> "Given the importance of the values of commercial certainty and freedom of contract in the law, the courts will not lightly invalidate a contractual provision for an agreed payment on the ground that it has the character of a punishment."

[98] In *Ringrow Pty Ltd v BP Australia Pty Ltd*, the High Court had earlier said:[126]

> "… The law of contract normally upholds the freedom of parties, with no relevant disability, to agree upon the terms of their future relationships. As Mason and Wilson JJ observed in *AMEV-UDC Finance Ltd v Austin*:
>
> > [T]here is much to be said for the view that the courts should return to … allowing parties to a contract greater latitude in determining what their rights and liabilities will be, so that an agreed sum is only characterised as a penalty if it is out of all proportion to damage likely to be suffered as a result of breach.
>
> Exceptions from that freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed. That is why the law on penalties is, and is expressed to be, an exception from the general rule. It is why it is expressed in exceptional language. It explains why the propounded penalty must be judged "extravagant and unconscionable in amount". It is not enough that it should be lacking in proportion. It must be "out of all proportion". It would therefore be a reversal of longstanding authority to substitute a test expressed in terms of mere disproportionality…".

[99] What is called for is a tailored inquiry into the commercial circumstances in which the parties entered into the GTA.[127] In *Paciocco*, Gageler J observed:

> "[t]he relevant indicator of punishment lies in the negative incentive to perform being so far out of proportion with the positive interest in performance that the negative incentive amounts to deterrence by threat of punishment".[128]

[100] The interest sought to be protected is the promisee's probable or possible interest in the due performance of the principal obligation.[129] Some of the expressions used in the case law like "extravagant", "exorbitant" and "unconscionable" are directed to highlighting the requirement that a penalty must be plainly excessive in nature in comparison with the interest sought to be protected.[130] It has been said that the criterion of "exorbitant" or "unconscionable" should prevent the enforcement of only egregious contractual provisions.[131]

---

126 *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656, 669 [31]-[32].
127 *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 581 [166].
128 Ibid 580 [164].
129 *Clydebank Engineering & Ship Building Co Ltd v Castaneda* [1905] AC 6, 19; *Commissioner of Public Works v Hills* [1906] AC 368, 375-6.
130 Ibid 548 [34].
131 Ibid 553 [53].

[101] Further, the focus upon the promisee's "probable or possible interest in the due performance of the principal obligation" is not to be taken as a reference to the extent to which the relevant interest of the promisee in the performance of the bargain will be able to be compensated by an award of unliquidated damages for breach of contract.[132] Hence, when the penalty cases speak of "damage", that is not meant to simply reference compensable loss. In *Paciocco*, Gageler J explained this aspect as follows: [133]

> "The protection afforded by the stipulation of an obligation to pay a specified sum of money in the event of a breach of contract might be to the interests that the innocent party has in contractual performance which are intangible and unquantifiable. A party seeking contractually to protect its interests by insisting on a stipulation that another party pay a specified sum of money in the event of breach cannot be limited by considerations of common law causation of damage to protecting only against incremental loss that the party would sustain as the direct result of that breach."

[102] Further, the inquiry is directed to ascertaining whether the amount payable "is out of all proportion" to the interests said to be damaged or which are sought to be protected.[134] In *Paciocco*, Keane J said:[135]

> "Only in cases where gross disproportion is such as to point to a predominant punitive purpose have agreed payments payable on breach of contract been struck down as penalties. Thus, for example, where that purpose is not discernible because the evaluation and assessment of the loss covered by the agreed payment is 'very expensive and very difficult … to calculate precisely', the penalty rule has been held to have no application.[136] It may be that other laws concerned with the unfair or unreasonable use of superior bargaining power will affect the validity of the provision; but, subject to such laws, the penalty rule is not engaged by a provision which achieves a profit for the promisee at the expense of the promisor. That is because, if the provision is not distinctly punitive in its character, the penalty rule does not operate to displace the parties' freedom to settle for themselves the contractual allocation of benefits and burdens and the rights and liabilities following a breach of contract."

[103] In this passage, Keane J cited *Waterside Workers' Federation of Australia v Stewart*.[137] That case provides an example of a clause, held not be penal, which imposed a fixed sum in respect of a prospective loss that was indeterminate, in the sense that it may have been great or small, and was very difficult, if not impossible, to calculate precisely.[138]

[104] The primary judge's findings may be distilled to these:

---

132 *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 574 [145].
133 Ibid 579 [161].
134 Ibid 555 [57].
135 Ibid 595 [221].
136 *Waterside Workers' Federation of Australia v Stewart* (1919) 27 CLR 119, 132; see also 128-129. See also *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205, 217 [11].
137 *Waterside Workers' Federation of Australia v Stewart* (1919) 27 CLR 119.
138 *Waterside Workers' Federation of Australia v Stewart* (1919) 27 CLR 119, 132.

(a) the Pipeline was not a static asset;[139]

(b) the GTA objectively intended that the Pipeline would be managed in a dynamic way that enabled the Pipeliners to make full use of the asset;[140]

(c) a positive imbalance meant that the appellants' gas was being stored on the Pipeline and a negative imbalance meant that the appellants were taking the Pipeliners' gas;[141]

(d) this storage or taking of gas would occur without permission or notice[142] and was not planned in the way that firm transportation services were planned and negotiated;[143]

(e) there was a commercial justification in charging a higher price for something that was given or taken on demand and without notice;[144]

(f) an imbalance, whether positive or negative, had the potential to affect the Pipeliners' management of the Pipeline and its other industrial customers;[145]

(g) an imbalance could impact the Pipeliners' ability to receipt or deliver gas;[146]

(h) positive or negative imbalances can have an impact or cost;[147]

(i) positive imbalances could reduce or eliminate the capacity to store gas in the Pipeline which could impact the ability to receipt or deliver gas and could make it necessary for the Pipeliners to carefully monitor and align the timing of the receipt and delivery of gas, to ensure that the receipt of gas did not over pressurise the Pipeline and constrain receipts of gas;[148]

(j) negative imbalances could reduce the daily delivery capacity of the Pipeline to below its capacity of 108,000 gigajoules per day;[149]

(k) the impacts of positive or negative imbalances could lead to loss of income or costs.[150]

[105] The Notice of Appeal did not seek to appeal these findings.

[106] The appellants had submitted to the primary judge that an imbalance "could not conceivably result in a loss to the Pipeliners."[151] In their outline of argument, the appellants submitted that, from the evidence of one expert, Mr Williams, the primary judge "ought to have inferred that the risk of a positive imbalance actually impacting the Pipeliners was at the time of contracting, and remained, entirely theoretical … there being no evidence of any anticipated additional users of the

---

139 Reasons [194].
140 Reasons [194].
141 Reasons [191].
142 Reasons [195].
143 Reasons [195].
144 Reasons [195].
145 Reasons [194].
146 Reasons [194].
147 Reasons [202].
148 Reasons [202].
149 Reasons [202].
150 Reasons [202].
151 AB2 Vol 1 p 308 [122].

[Pipeline] for the life of the GTA."[152] That submission was further developed in these terms: "While it is true that the positive or negative imbalances can in theory affect a pipeline, there was no compelling evidence (either at the time of contracting or at a later time) of there being any limitation in transportation capacity on this particular pipeline."[153] The inference propounded on appeal was said to be compelled from Mr Williams' evidence which the appellants summarised in these terms:[154]

> "Mr Williams' evidence explained that customer usage, and customer numbers on the Pipeline remained stable and that:
>
> (a) pipeline capacity did not exceed 40% at any time since 2016 (Williams [3.2], line 347);
>
> (b) average monthly deliveries hovered around 12% or below, with a few exceptions (Williams, Table 2, line 351);
>
> (c) that '*carrying a positive imbalance has had no impact on pipeline operation or its capacity thereby restricting the transport of gas from Supplier/s to User/s*' (Williams [3.5], line 418-9);
>
> (d) that '*carrying a positive imbalance has had no impact on pipeline operation or its lower linepack limit thereby restricting the transport or storage of gas from Supplier/s to User/s*' (Williams [3.5], line 420-422)"

[107] It is noteworthy that, on appeal, there was a subtle shift in the appellants' position from that which had been adopted by them before the primary judge. Before the primary judge, it had been submitted that "an imbalance could not conceivably result in a loss". Before this Court, it was conceded that imbalances could affect a pipeline and that it was rational to have a regime dealing with imbalances because they had the potential, at least theoretically, to impact a pipeline's operation.[155] This shift in position involved a concession that it was conceivable that imbalances might cause loss.

[108] At the point of entering into an agreement, any prospective loss might be regarded as theoretical or hypothetical. By referencing hypothetical loss, the appellant's point appeared to be that, whilst any loss caused by an imbalance was conceivable, as no loss had materialised, the prospect of loss was always theoretical, rather than real, and, on that basis, the Imbalance Charges fell to be regarded as grossly disproportionate to the interest sought to be protected. Implicit in this argument was the contention that that the risk of damage or loss posed by imbalances was at the time of the GTA objectively understood to be a risk that was unlikely to materialise. There was no finding made to this effect and the evidence did not warrant such a finding. As I have noted there was no extrinsic evidence in this case. Mr Giri's evidence about the possible impacts of positive and negative imbalances was based upon his experience with pipelines. Mr Langford gave evidence of his personal experience with situations where customers had lost gas supply because pipeline pressure fell below minimum levels. He also gave evidence that if customers lost

---

152 Appellants' outline of argument [37].
153 Appellants' outline of argument [37].
154 Appellants' outline of argument [36].
155 T 1-21 ll 30-34.

supply, they stood to lose production and would suffer economic consequences. Mr Williams accepted that there could be reputational issues for pipeline operators in circumstances of a loss of supply which could lead to a loss of customers. All of this evidence supported the ultimate finding of the primary judge that the impacts of positive or negative imbalances could lead to loss of income or costs. The evidence as to how the Pipeline had in fact operated did not outweigh this evidence as to conceivable risks. The objective analysis that was required to determine whether clause 14.7 was penal was a prospective analysis to be undertaken at the time of signing of the GTA.[156]

[109] It was also established by the evidence that the costs or losses that might be caused by imbalances would include costs and losses that would be very difficult to estimate in advance. Mr Williams accepted that it was not possible to calculate in advance the costs or monetary impacts caused by an imbalance.[157] Mr Giri said it would be difficult or impossible to quantify the direct and indirect costs.[158]

[110] Two things may be said about this difficulty. First, once it is appreciated that the promisee's interest in due performance of the principal obligation may extend to the protection of interests which are intangible and unquantifiable,[159] a clause ought not be struck down as a penalty merely because, at the time of the contract, there had been no pre-estimate of the likely damage to be suffered.[160]

[111] Secondly, where the evaluation and assessment of the loss covered by the agreed payment is very difficult to calculate precisely, the penalty rule has been held to have no application.[161] As Keane J observed in *Paciocco*:[162]

> "… if the provision is not distinctly punitive in its character, the penalty rule does not operate to displace the parties' freedom to settle for themselves the contractual allocation of benefits and burdens and the rights and liabilities following a breach of contract."

[112] The appellants' reference to the Firm Forward Shortfall Charge in the context of this ground of appeal was not material to the proper characterisation of clause 14.7. The Firm Forward Shortfall charge was a payment to reserve capacity within the Pipeline for firm service, that is, for the movement of gas. The fact that, as events occurred, the reserved capacity was unused did not mean that it became unreserved or might be used by the Pipeliners or other users of the GTA. To the contrary, the appellants remained entitled to use that reserved capacity or trade it to others.[163] The charge under clause 14.7 was directed to a different situation, where gas was stored on the Pipeline without notice and permission. The charge under that clause was a payment for gas which took up capacity on the Pipeline in addition to the appellants' reserved capacity. That different charges applied for the negotiated reservation of firm service capacity and for the storage of gas without notice or

---

156 *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 556 [62], 582 [169].
157 AB2 Vol 3 p 1215 l 35 - p 1216 l 10.
158 AB2 Vol 2 p 832 [26(c)].
159 *Paciocco v Australia and New Zealand Banking Group Ltd Banking Group Ltd* (2016) 258 CLR 525, 579 [161].
160 Ibid 547 [30].
161 Ibid 595 [221].
162 Ibid 595]221].
163 AB2 Vol 1 p 485 cl. 37.3(b).

permission was merely an incident of the contractual allocation of burdens and benefits under the GTA.

[113] The evidence as to imbalance charges contained in other contracts was very limited. The state of that evidence did not facilitate any meaningful or decisive comparison with the Imbalance Charges the subject of the GTA. The contract dated 20 December 2002[164] revealed a lower tariff for the imbalance charges when compared to the GTA but had a less generous imbalance tolerance, namely 10% of the MDQ. That agreement was amended in 2005, a time more proximate to the GTA, to provide for an imbalance charge that was calculated at 200% of the transportation tariff.[165] There was very limited oral evidence about the imbalance charges paid by AGL-Arrow.[166] This evidence appears to have been directed to a point in time after the GTA. There was no evidence (including expert evidence) which purported to identify and analyse the imbalance charges payable within the relevant market at the time of the GTA. The evidence as to other contractual arrangements was not sufficiently probative to suggest that the Imbalance Charges were distinctly punitive in nature.

[114] In my view, objectively construed, the fixing of the amount of the Imbalance Charges by reference to 200% of the transportation tariff was not distinctly punitive in its character. Rather, that fixed amount payable in respect of positive or negative imbalances represented the parties to the GTA having settled for themselves the contractual allocation of burdens and benefits in respect of imbalances. That settlement occurred in circumstances where an imbalance was known to be an event that would occur on demand and without notice, and might occur in combination with imbalances caused by other users of the Pipeline, and where the costs and losses that might arise from the event were conceivably diverse and would be extremely difficult to prove and calculate. This was not a case where there were readily ascertainable limits to the conceivable damage that might be sustained and where the burden imposed could be demonstrated to be out of all proportion to the protection of the relevant interest.

[115] The appellants have failed to establish that clause 14.7 of the GTA was a penalty.

The Third Ground of Appeal

[116] The appellants contend that the GTA contained an implied obligation which was breached by the Pipeliners. The implied obligation was expressed in terms of an obligation to "act in good faith by acting reasonably and with fair dealing to take all reasonable steps available to [the Pipeliners] under the GTA to eliminate or correct the QNI imbalance before seeking to charge the Imbalance Charge".[167]

[117] The obligation was said to have been breached in circumstances where, in respect of the invoices the subject of the proceeding, the Pipeliners had charged the Imbalance Charge but had not:

(a) offered QNI an ancillary service under clause 14.3;

(b) taken steps to correct the imbalance under clause 14.9; or

---

164 AB2 Vol 3 p 1043 and ff.
165 AB2 Vol 2 pp 857-953; Vol 3 pp 1097-1098.
166 AB2 Vol 3 p 1189, ll 7-8.
167 AB1 Vol 1 p 122 [75] (Second Further Amended Defence).

(c) offered QNI storage of gas in the Pipeline for a fee;

when they were aware that the nickel refinery had ceased operation, and it was no longer possible for Queensland Nickel or the appellants to increase the amount of gas taken at the receipt point in order to reduce the imbalance.[168]

[118] The primary judge found that the GTA did not contain any such implied obligation and, alternatively, found that the evidence did not establish a breach of any such obligation.[169] On this appeal, the appellants argued that an obligation of good faith was either implied by law into the GTA or by fact into clause 14 of the GTA.

An implied term of good faith in all contracts or all commercial contracts

[119] The appellants accepted that there was no binding decision of this Court or of the High Court to the effect that a term obliging good faith is to be implied into all contracts or all commercial contracts.[170] The appellants, however, contended that the primary judge should have recognised a generally applicable implied obligation of good faith in commercial contracts as a matter of law.[171] That submission principally relied on the reasoning of Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*.[172]

[120] In *Renard Constructions*, the New South Wales Court of Appeal was concerned with a contractual power conferred upon a principal to suspend payment under a building contract.[173] Priestley and Handley JJA found that the power was required to be exercised by reference to an implied term to act reasonably.[174] Priestley JA was careful to make clear that the *ratio decidendi* of his reasons was limited to the implication of a term to act reasonably.[175] What was said by his Honour concerning good faith was *obiter dicta* which was not expressly adopted by the other members of the Court.

[121] The statement of Priestley JA concerning good faith which is seized upon by the appellants was as follows:[176]

> "The result is that people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations."

[122] That statement has not been interpreted by subsequent decisions of the New South Wales Court of Appeal as warranting or requiring the implication of a good faith obligation as a general incidence of commercial contracts. In *Alcatel Australia Ltd*

---

168 AB1 Vol 1 p 122 [71(a)] and [76] (Second Further Amended Defence); AB1 Vol 1 p 3 [4].
169 Reasons [267].
170 Reasons [240]; Appellants' outline of argument [44].
171 T 1-34 ll 1-5; Appellants' outline of argument [44].
172 (1992) 26 NSWLR 234, 268.
173 Clause 44.1, general conditions of contract, NPWC Ed 3 (1981).
174 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 263C (Priestley JA), 279 (Handley JA).
175 Ibid 271B-C.
176 Ibid 268F-G.

v Scarcella,[177] Sheller JA (with whom Powell and Beazley JJA agreed) relevantly said:

> "If a contract confers power on a contracting party in terms wider than necessary for the protection of the legitimate interests of that party, the courts may interpret the power as not extending to the action proposed by the party in whom the party is vested or, alternatively, conclude that the powers are being exercised in a capricious or arbitrary manner or for an extraneous purpose, which is another way of saying the same thing. Thus, a vendor may not be allowed to exercise a contractual power where it would be unconscionable in the circumstances to do so … [t]he decisions in *Renard Constructions* and *Hughes Bros*[178] mean that in New South Wales a duty of good faith, both in performing obligations and exercising rights, may by implication be imposed upon parties as part of contract."

[123] In *Burger King Corporation v Hungry Jack's Pty Ltd*,[179] the New South Wales Court of Appeal recognised an implied term of good faith in a franchise contract. Relevantly the Court observed:[180]

> "A review of cases since *Alcatel Australia* indicates that courts in various Australian jurisdictions have, for the most part, proceeded upon an assumption that there may be implied, as a legal incident of a commercial contract, terms of good faith and reasonableness … obligations of good faith and reasonableness will be more readily implied in standard form contracts, particularly if such contracts contain a general power of termination. Clearly, however, the cases where these terms are to be implied are not limited to standard form agreements. *Alcatel Australia* itself, which involved a 50 year lease agreement of commercial premises, provides an example of a one off contract where such terms were implied."

[124] Three years later in *Vodafone Pacific Ltd v Mobile Innovations Ltd*,[181] Giles JA (with whom Sheller and Ipp JJA agreed) relevantly said:[182]

> "As I have said, referring to *Alcatel Australia Ltd v Scarcella* and *Burger King Corporation v Hungry Jack's Pty Ltd*, an obligation of good faith and reasonableness in the performance of a contractual obligation or the exercise of a contractual power may be implied as a matter of law as a legal incident of a commercial contract. *In Burger King Corporation v Hungry Jack's Pty Ltd*, however, the Court said only that courts had 'for the most part proceeded on the assumption' that there may be such an implication in a commercial

---

177 (1998) 44 NSWLR 359, 368-9.

178 *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91 (a case concerned not with an implication of good faith but with the implied term of reasonableness in connection with a related provision in the same general conditions under consideration in *Renard Constructions*).

179 (2001) 69 NSWLR 558.

180 Ibid 568 [159], 569 [163] per Sheller, Beazley and Stein JJA.

181 [2004] NSWCA 15.

182 Ibid [189]-[191].

> contract (at [159]). It said that the contract there in question 'does not fall into any of the traditional class of cases where terms have been implied as an incident of the contract' (at [166]), and went on to consider by the test of what was reasonable and necessary whether the term should be implied at law as a new class of case (at [167–186]). This fell short of, indeed rejected, treating commercial contracts as a class of contracts carrying the implied term as a legal incident."

[125] *CGU Workers Compensation (NSW) Ltd v Garcia*[183] involved an insurance policy in respect of which the respondent worker contended that the appellant insurer was subject to an implied contractual duty to "deal fairly and in good faith". Mason P (with whom Hodgson JA agreed) said:[184]

> "The [respondent] points to decisions of this Court recognising that some commercial contracts contain terms implied as a matter of law imposing an obligation of good faith and reasonableness in the performance of contractual obligations (*Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 at 369; *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558 at 568 [159], 569 [164]; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 at [125]).
>
> These cases do not establish that such an implied term is to be inserted into every contract or even into every aspect of a particular contract.
>
> The putative implied term goes beyond the duty of co-operation recognised in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607–8. It presents as an affirmative obligation. As Gummow J pointed out in 1993, '[t]he implication of a term by operation of law, applicable across the whole spectrum of the law of contract, is a major step' (*Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84 at 97). He held that Australian law had not yet taken this step as regards an implied term of good faith and fair dealing in performance. This remains the situation (see *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228; JW Carter, *Carter on Contract*… Vol 1, Ch 11, §11–170)."

[126] In the same case, Santow JA (with whom Hodgson JA agreed) said:[185]

> "Thus while the duty to act in good faith may be implied in certain contractual contexts, such as employment, there is as yet, as the law currently stands, no general contractual term, implied in law, requiring the exercise of good faith in contractual performance."

[127] The Victorian Court of Appeal has rejected the duty of good faith as being generally implied by law in commercial contracts.[186] The Full Court of the Tasmanian

---

183 (2007) 69 NSWLR 680.

184 Ibid 704 [131]-[133].

185 Ibid 710 [168].

186 *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228, [3]-[4] (Warren CJ) [25] (Buchanan JA) (Warren CJ and Osborn AJA agreeing); *Specialist Diagnostic*

Supreme Court has also rejected the duty of good faith as being generally implied by law in commercial contracts.[187] The Court of Appeal of Western Australia has observed that "the necessity for the implication of a duty of good faith, both in performing obligations and exercising rights has not been accepted universally in Australia".[188] The Full Federal Court has observed "… whether an implied duty of good faith is implied by law into contracts generally has not been resolved".[189]

[128] As to relevant decisions of this Court, in *Laurelmont Pty Ltd v Stockdale & Leggo (Qld) Pty Ltd*,[190] Dutney J (with whose reasons McPherson JA and Williams JA agreed) refused to recognise, as a matter of fact or law, an implied term of good faith in a franchise agreement. I read his Honour's reasons as having rejected, at least implicitly, the contention that there is a generally implied obligation of good faith in commercial contracts. More recently in *Gramotnev v Queensland University of Technology*,[191] a case involving an employment contract, Jackson J (with whom McMurdo P and Holmes JA agreed) left open for further debate "… the subject matter of the possible scope of or existence of a generally expressed implied term of good faith, either in this or other contexts."

[129] In 2002, in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*,[192] the High Court made observations about the questions as to the existence and content of an implied obligation or duty of good faith and fair dealing in contractual performance and the exercise of contractual rights and powers. Before the High Court, each side accepted that, on the facts, the lessor was subject to an implied obligation of good faith and fair dealing in the exercise of a rental determination power contained in the subject lease. The joint judgment said "… whilst the issues respecting the existence and scope of a 'good faith' doctrine are important, this is an inappropriate case to consider them."[193] Kirby J said:[194]

> "The Court was taken to case law both in this country and overseas as well as to academic commentary to demonstrate a growing tendency to imply into private contractual dealings a covenant of good faith and fair dealing … However, in Australia, such an implied term appears to conflict with fundamental notions of caveat emptor that are inherent (statute and equitable intervention apart) in common law conceptions of economic freedom. It also appears to be inconsistent with the law as it has developed in this country in respect of the introduction of implied terms into written contracts which the parties have omitted to include. In the present appeal, it is unnecessary to explore this question further." (footnotes omitted)

Services Pty Ltd v Healthscope Ltd (2012) 41 VR 1, [85]; *Androvitsaneas v Members First Broker Network Pty Ltd* [2013] VSCA 212 [108].

187 *Tote Tasmania Pty Ltd v Garrott* (2008) 17 Tas R 320, 326 [16].

188 *Trans Petroleum (Australia) Pty Ltd v White Gum Petroleum Pty Ltd* (2012) 268 FLR 433, 459 [151] (Buss JA, with whom Murphy and Pullin JJA agreed).

189 *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd* (2015) 237 FCR 534, 557 [122].

190 [2001] QCA 212 [41], [43]-[44].

191 (2015) 251 IR 448, 480 [167].

192 (2002) 240 CLR 45.

193 Ibid 63 [40] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

194 Ibid 75-76 [87]-[88].

[130] Callinan J considered that it was unnecessary to answer the questions "whether both in performing obligations and exercising rights under a contract, all parties owe to one another a duty of good faith; and, the extent to which, if such were to be the law, a duty of good faith might deny a party an opportunistic or commercial exercise of an otherwise lawful commercial right."[195]

[131] In *Commonwealth Bank of Australia v Barker*,[196] Kiefel J said:

> "The question whether a standard of good faith should be applied generally to contracts has not been resolved in Australia."

[132] From this brief review of the authorities, it is apparent that a number of intermediate appellate courts have refused to recognise an implied term to act in good faith as a general legal incidence of commercial contracts. There are no intermediate appellate court decisions which countenance such a general implication. The state of intermediate appellate authority does not support the implication of an implied term to act in good faith as a general legal incidence of commercial contracts.

[133] In *Barker*, although the question as to whether there was a general obligation to act in good faith was not before the High Court,[197] the High Court did observe that to create a new normative standard for contractual behaviour by implication of a term at law was not a step to be taken lightly.[198] Given the state of intermediate appellate and High Court authority, the primary judge was correct in not taking that step. Nor should this Court take that step. The appellants did not make any submissions to the effect that the intermediate appellate authorities which have rejected the implication of a duty of good faith in all contracts or all commercial contracts are plainly wrong. There are cogent arguments available to suggest they are not.[199] In my conclusion, until such time as the High Court recognises the existence as a matter of law of a generally implied term of good faith, this Court should proceed on the basis that such a term is not to be generally or universally implied into all contracts or all commercial contracts.[200]

A more particular basis for implication at law

[134] That leaves for consideration whether the implied term of good faith might be implied into the GTA as a matter of law by reason of a rule of construction or because of the particular class of contract to which the GTA belonged.[201] Before considering this question, it is helpful to advert to the differences between terms to be implied as a matter of law and terms to be implied as a matter of fact.

[135] In *Renard Constructions*,[202] Priestley JA observed:

---

195 Ibid 94 [156].
196 (2014) 253 CLR 169, 214 [107].
197 Ibid 195-196 [42].
198 Ibid 185 [20].
199 See by way of example *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, 75-76 [88]; *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* (2015) 329 ALR 1, 160 [1006] (Edelman J); Perry Herzfeld and Thomas Prince, *Interpretation* (LawbookCo, 2nd ed, 2020) 554.
200 In this regard, I respectfully agree with the view expressed in Perry Herzfeld and Thomas Prince, *Interpretation* (LawbookCo, 2nd ed, 2020) 554.
201 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 187 [25]-[29].
202 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 255-256.

> "In recent years terms implied in contracts have been said to fall into two classes the first of which has come to be called, somewhat misleadingly, implication in fact, the second, implication by law. The so-called implication in fact is really implication by judge based on the judge's view of the actual intention of the parties drawn from the surrounding circumstances of the particular contract, its language, and its purposes, as they emerge from the language and in the circumstances. This has been called implication *ad hoc* ….
>
> It has become accepted that the rules governing implication ad hoc are those stated by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20; 16 ALR 363, and the High Court in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. Those rules are that the implied term must be reasonable and equitable; necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; so obvious that 'it goes without saying'; capable of clear expression; and must not contradict any express term of the contract….
>
> The other kind of implication I have mentioned is that which is said to be implied by law. This was analysed by Hope JA, with whom Samuels JA and I agreed, in *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468 at 486-490. Hope JA pointed out that implication of this kind is different from implication *ad hoc* in that the latter occurs in the circumstances of particular individual contracts, whereas implication by law is based on imputed intention as opposed to actual intention, and implies a term as a legal incident of a particular class of contract."

[136] In *Barker*, the High Court explained the meaning of necessity in the separate context of implication of terms at law and in fact. The joint judgment observed:[203]

> "The requirement that a term implied in fact be necessary 'to give business efficacy' to the contract in which it is implied can be regarded as a specific application of the criterion of necessity. The present case concerns an implied term in law where broad considerations are in play, which are not at large but are not constrained by a search for what 'the contract actually means.'
>
> In *Byrne v Australian Airlines Ltd*, McHugh and Gummow JJ emphasised that the 'necessity' which will support an implied term in law is demonstrated where, absent the implication, 'the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined' or the contract would be 'deprived of its substance, seriously undermined or drastically devalued'. …. It is a necessary condition that they are justified functionally by reference to the effective performance of the class of contract to which they apply, or of contracts generally in

---

203 Ibid 189 [28]-[29] per French CJ, Bell and Keane JJ.

> cases of universal implications, such as the duty to co-operate. Implications which might be thought reasonable are not, on that account only, necessary. The same constraints apply whether or not such implications are characterised as rules of construction."

[137] Later in *Barker*, Gageler J observed:[204]

> "Contractual terms implied in fact are 'individualised gap fillers, depending on the terms and circumstances of a particular contract'. Contractual terms implied in law, of the kind in issue in the present case, are 'in reality incidents attached to standardised contractual relationships' operating as 'standardised default rules'. The former are founded on what is 'necessary' to give 'efficacy' to the particular contract. The latter are founded on 'more general considerations', which take into account 'the inherent nature of [the] contract and of the relationship thereby established'.
>
> Determination by a court of whether or not a new term should be implied in law into a particular class of contracts has often itself been described as involving the application of a 'test' of 'necessity'. The sense in which 'necessity' is used in this context is that of 'something required in accordance with current standards of what ought to be the case, rather than anything more absolute'. The requisite inquiry is informed by a consideration of what is needed for the effective working of contracts of that class. But the inquiry is not exhausted by that consideration; it does not exclude considerations of justice and policy. Couching the ultimate evaluation in terms of necessity serves usefully to emphasise this and no more: that a court should not imply a new term other than by reference to considerations that are compelling."

[138] In order to make out an implication at law, it was not sufficient for the appellants to merely demonstrate that the proposed term was reasonable. Rather, the proposed term had to satisfy the broad concept of necessity, which fell to be addressed by reference to what the nature of the GTA implicitly required. That inquiry was not concerned with, or constrained by, the actual intentions of the parties but was rather concerned with the effective performance of the GTA at a functional level. The appellants were required to demonstrate compelling reasons why the GTA could not effectively operate absent the implication of the proposed term.

[139] Some reference should be made to how this part of the case was pleaded. The implied obligation was expressed in terms that the Pipeliners were obligated to take "all reasonable steps available to [them] under the GTA to eliminate or correct the QNI imbalance before seeking to charge the Imbalance Charge".[205] The implied obligation was said to be required as a matter of law or fact to reflect the manifest agreement of the parties. The pleaded expression "the QNI imbalance" was not defined. As I read the appellants' pleading, "the QNI imbalance" was meant to encompass either any imbalance that arose where the Absolute Imbalance exceeded the Imbalance Limit on any Day or any Imbalance which QNI had not corrected in accordance with clause 14.5. Although the GTA expressly obliged QNI to take

---

204 Ibid 215-6 [113]-[114].

205 AB1 Vol 1 p 122 [75] (Second Further Amended Defence).

reasonable steps to avoid, and after receiving notice reasonable endeavours to correct, an imbalance, the implied obligation was said to have required the Pipeliners to take steps to eliminate or correct an imbalance before they could charge in respect of it.

[140] In oral argument, the appellants accepted that the implied term "imposes a constraint on the Pipeliners' ability to levy the [I]mbalance [C]harge under [cl] 14.7 until they have exercised or, at least, considered exercising other rights under the [GTA], namely the power within [cl] 14.9, their unilateral power to themselves correct the imbalance."[206] Hence, the implied obligation was said to qualify the entitlement of the Pipeliners to charge for an imbalance by recognition of a precondition that was not expressed in the GTA. In oral argument, clause 14.9 became the appellants' focal point on this ground[207] and was said to "operate for [the appellants'] benefit to avoid [them] incurring the [imbalance] charge".[208]

[141] Clause 14.9 opened with the words "Without limiting any of their other rights or powers, the Pipeliners may correct, in whole or in part, an Imbalance which QNI has not corrected in accordance with clause 14.5…".[209] One such "other right" was the right conferred upon the Pipeliners pursuant to clause 21.1 to give QNI a bill on or before the 20th day of each month charging for, *inter alia*, Imbalance Charges. The implied term sought to avoid the functional effect of these opening words. There was no necessity for that term to be implied in order to ensure the effective performance of the GTA at a functional level. Clause 14.9, properly construed, contemplated that, without limiting any of their other rights, the Pipeliners might decide to correct an Imbalance which QNI had not corrected in accordance with clause 14.5. That was a discretionary decision for the Pipeliners which, as the language of clause 14.9(b) made clear, depended upon whether the Pipeliners' "wished" to correct such an Imbalance. The GTA provided that if the Pipeliners did wish to correct such an Imbalance then they had to give notice of that correction within three days after QNI's failure to correct the Imbalance. The implied term sought to significantly disturb that proper functioning of the GTA by characterising the power to correct conferred upon the Pipeliners as a power to be exercised for the benefit of all parties, presumably at any time, and as limiting the rights of the Pipeliners to charge the Imbalance Charge.

[142] Further, as a matter of substance, the implied term sought to subordinate the Pipeliners' interests in being able to charge for imbalances to the appellants' interests in not being liable to pay for imbalances. The usual content of the implied obligation to act in good faith does not require the interests of one party to be subordinated to the interests of the other. What is usually called for is good faith or fair dealing between arm's length commercial parties by reference to their bargain and its terms.[210] In *Sentinel*, Sofronoff P observed about the usual content of the obligation of good faith:[211]

---

206 T 1-28 ll 43-46.

207 T 1-41 l 40 to T 1-42 l 10.

208 T 1-38 ll 40-41.

209 AB2 Vol 1 p 453 cl 14.9(a).

210 *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* (2020) 383 ALR 577, 583 [12]-[13] (Allsop P); *Sentinel Robina Office Pty Ltd v Clarence Property Corporation Ltd* [2019] 3 Qd R 159, 164 [16] (Sofronoff P, with whom Philippides JA and Davis J agreed); *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* (2015) 329 ALR 1, 160 [1005] (Edelman J).

211 *Sentinel Robina Office Pty Ltd v Clarence Property Corporation Ltd* [2019] 3 Qd R 159, 164 [16] (Sofronoff P, with whom Philippides JA and Davis J agreed).

> " … the duty of good faith is directed towards the bargain between the parties and their mutual contractual objectives. The very subject matter of the protection afforded by the duty of good faith is the contract between the parties. Unless the impugned conduct is directed towards the bargain, or has an effect upon the bargain, or was intended to have an effect upon the bargain, it is contractually irrelevant."

[143] The appellants did not submit that the GTA fell within any recognised class of contract that made it an appropriate vehicle for the implication of a term at law. They did however call in aid the reasoning in *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd*.[212] Relevantly, that case was concerned with a clause within a building contract which materially provided that, notwithstanding that a subcontractor was not entitled to or had not claimed an extension of time, the head contractor might at any time, and from time to time before the issue of the final certificate, extend the time for practical completion for any reason. McColl JA expressed the view that this type of clause was "capable of operating for the [subcontractor's] benefit, by enabling an extension of time to be granted and thus meaning the [subcontractor] is not exposed to a liquidated damages claim."[213] The appellants focused upon this interpretation of a different clause in a different type of contract for the purpose of submitting that "so too… clause 14.9 operates for [the appellants'] benefit to avoid [them] incurring the [Imbalance Charge]".[214] That argument ignored the express language of clause 14.9 which, as I have indicated, provided that the discretion conferred upon the Pipeliners did not limit the Pipeliners' other rights, which relevantly included the right to charge the Imbalance Charge.

[144] The appellants have failed to establish any compelling reason why the implied term was to be implied as a matter of law. To the contrary, in my consideration, the implied term would have substantially derogated from the parties' bargain.

Implication in fact

[145] The rules governing the implication of a term *ad hoc* or in fact are settled.[215] An implied term must be reasonable and equitable, necessary to give business efficacy to the contract, so that no term will be implied if the contact is effective without it, so obvious that "it goes without saying", capable of clear expression and must not contradict any express term of the contract.

[146] The implied term contended for is contradictory of the express language of clause 14.9 to the extent that, contrary to the opening words of that clause, it attempts to make the discretionary power conferred upon the Pipeliners to correct an Imbalance a constraint upon the right to charge for an Imbalance. It also tends to transform the discretionary power into an obligation, such that the word "may" is to be read as "must" in certain circumstances. As to this later point, a similar observation can be made in relation to clause 14.3.

---

212 (2017) 95 NSWLR 82.
213 Ibid 110 [119].
214 T 1-38 ll 40-42.
215 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596; *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337.

[147] I also consider that the implied term was not so obvious that it went without saying within the meaning of that concept. The parties to the GTA had given express consideration to the obligation to act in good faith and had incorporated that obligation into certain parts of the GTA.[216] The fact there was no mention of an obligation to act in good faith in clauses 14.3 and 14.9, in contrast to other provisions where the parties had expressly agreed to that obligation, tends to militate against the implication of the alleged term as a matter of fact to give effect to the parties' actual intentions.

[148] The primary judge made no error in declining to recognise the existence of the implied term in the GTA, as a matter of fact or law.

[149] The orders that should be made on this appeal are as follows.

1. The appeal is dismissed.
2. The notice of contention is dismissed.
3. The appellants pay the respondents' costs of and incidental to the appeal.

---

[216] By way of example see AB2 Vol 1 p 430 cl 2.8(c)(ii), p 446 cl 10.2A(c), p 486 cl 21.6(a), p 473 cl 27.3(a), p 480 cl 32.2.