CITATION:	*Gold Valley Iron Ore Pty Ltd v FE Accommodation Pty Ltd & Anor* [2021] NTCA 2
PARTIES:	GOLD VALLEY IRON ORE PTY LTD (ACN 618 094 634) v FE ACCOMMODATION PTY LTD (ACN 160 943 082) and G & C PASTORAL CO PTY LTD (ACN 008 039 405)
TITLE OF COURT:	NORTHERN TERRITORY COURT OF APPEAL
JURISDICTION:	APPEAL from SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	No. AP 10 of 2020 (21830728)
DELIVERED:	16 August 2021
HEARING DATES:	22 February 2021
JUDGMENT OF:	Grant CJ, Barr and Brownhill JJ

CATCHWORDS:

CONTRACTS – Construction — Principles – Commonsense approach

Whether purchaser's purported termination constituted repudiatory breach of contract – Whether vendor liable for third party's interference in purchaser's rights to chattels under the contract and whether such interference constituted repudiatory breach of contract – Commercial purpose and surrounding circumstances of the contract relevant to construction – Unlikely commercial purpose of a contract would involve a contracting

party placing itself in immediate breach upon execution – A reasonable business person aware of surrounding facts would understand the term 'encumbrance' to exclude the claims or demands of the third party – A reasonable business person aware of surrounding facts would understand the terms 'possess' and 'possession' as entitlements to physical and legal control and dominion vendor held and could give – Meaning of term 'quiet possession' dependent on surrounding circumstances – Vendor not liable for third party interference in the purchaser's rights to chattels – Purchaser's purported termination constituted a repudiatory breach of contract – Vendor was entitled to terminate – Grounds of appeal asserting error in the finding of repudiation dismissed.

Whether a particular chattel, a drilling rig, was included in Chattels the subject of the contract – Trial Judge erred in finding the drilling rig was not a Chattel included in the contract because it was not a listed item – Grounds 19 and 20 of the appeal allowed.

Mineral Titles Act 2010 (NT)

Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd [1976] 2 NSWLR 15; *Microbeads AG v Vinhurst Road Markings Ltd* [1975] 1 WLR 218; *Niblett v Confectioners' Materials Co Ltd* [1921] 3 KB 387, applied.

B&B Constructions v Brian A Cheeseman (1994) 35 NSWLR 227; *Branir v Owston Nominees (No 2)* (2001) 117 FCR 424; *Cherry v Steele-Park* (2017) 96 NSWLR 548; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1981-82) 149 CLR 337; *CSR v Della Maddalena* (2006) 80 ALJR 458; *Ecosse Property Pty Ltd v Wright Prospecting Pty Ltd* (2017) 261 CLR 544; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; *Federal Commissioner of Taxation v Trustee for the Michael Hayes Family Trust* (2019) 273 FCR 567; *Fox v Percy* (2003) 214 CLR 118; *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* [2020] NSWCA 296; *HWE Contracting Pty Ltd v Young* (2007) 20 NTLR 83; *Macdonald v Longbottom* (1859) 1 E&E 977; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; *Nosic v Zurich Australian Life Insurance Ltd* [1997] 1 Qd R 67; *Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd* (2012) 37 VR 486; *Technomin v Xstrata Nickel* (2014) 48 WAR 261, referred to.

REPRESENTATION:

Counsel:

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Respondent	A Harris QC with N Floreani

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Judgment category classification:	B
Number of pages:	46

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gold Valley Iron Ore Pty Ltd v FE Accommodation Pty Ltd & Anor [2021] NTCA 2
No. AP 10 of 2020 (21830728)

BETWEEN:

GOLD VALLEY IRON ORE PTY LTD (ACN 618 094 634)
Appellant

AND:

FE ACCOMMODATION PTY LTD (ACN 160 943 082)
First Respondent

AND:

G & C PASTORAL CO PTY LTD (ACN 008 039 405)
Second Respondent

CORAM: GRANT CJ, BARR and BROWNHILL JJ

REASONS FOR JUDGMENT
(Delivered 16 August 2021)

THE COURT:

[1] This appeal concerns the construction of a Contract of Sale entered into on 16 August 2017 ('the Contract') between the respondents as vendor ('the vendor') and the appellant as purchaser ('the purchaser') of chattels comprising a mining camp known as 'the Sawfish camp' ('the Camp') and plant and equipment known as 'the Ex WDR Plant & Equipment' ('the Plant

and Equipment') (together, 'the Chattels') located on mineral leases held and operated by a third party, Western Desert Resources Ltd ('WDR'), which was then in liquidation. After execution of the Contract, the mineral leases were transferred to another third party, Britmar (Aust) Pty Ltd ('Britmar'), which refused the purchaser permission to enter the mineral leases and sought to impose conditions upon the purchaser's removal of the Chattels from the mineral leases. Without complying with Britmar's conditions, the purchaser removed some of the Plant and Equipment from the mineral leases. The vendor then obtained injunctive relief restraining the purchaser from removing further Chattels from the mineral leases, requiring the purchaser to disclose the location of the Chattels it had removed, and restraining the purchaser from further removing those Chattels from that location.

[2] On 9 August 2018, the purchaser purported to terminate the Contract alleging repudiatory breach by the vendor. The vendor denies that allegation and alleges that the purchaser's purported termination constituted a repudiatory breach of the Contract by the purchaser, entitling the vendor to terminate the Contract. Both sides claim damages for the other's breach of the Contract.

[3] Whether there was a repudiatory breach by the purchaser turns on the proper construction of the Contract. The purchaser argued that interference in its access to and removal of the Chattels by Britmar, and by the vendor's injunction, were breaches by the vendor of the purchaser's rights to the

Chattels under the Contract. The vendor argued that the Contract did not make it liable to the purchaser for such interference. The parties on both sides accept that, if they are wrong in their construction of the Contract, they have repudiated the Contract and the other side was entitled to terminate and is entitled to damages.

[4] The other issue in the appeal is whether or not a drilling rig located on the mineral leases was included in the Chattels the subject of the Contract.

The decision below

[5] The trial Judge gave judgment for the vendor on the question of liability, with damages to be assessed, finding that the purchaser was liable to the vendor for a wrongful repudiation of the Contract.[1]

[6] There is a complex factual matrix surrounding the parties' entry into the Contract and their conduct thereafter. The following facts are not in dispute.

[7] WDR conducted the WDR Mine between 2012 and 2014 on six mineral leases, four exploration licences and two access authorities granted under the *Mineral Titles Act 2010* (NT). On 28 August 2013, the first respondent purchased the Camp for $12 million and then leased it back to WDR for five years at a rent of $3.815 million per year. This transaction was effected by a Chattel Sale and Hire Back Agreement ('CSHBA'). The CSHBA permitted the first respondent, at all reasonable times upon giving WDR reasonable

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1 *FE Accommodation Pty Ltd v Gold Valley Iron Ore Pty Ltd* [2020] NTSC 61 ('Reasons') at [195].

notice, and without unduly interfering with WDR's operations, to enter the mineral leases and inspect the state of repair of the Camp. The CSHBA also provided that, if the first respondent is required to remove the Camp or some of it from the mineral leases, then, subject to WDR bearing the costs of removal, the first respondent must remove the Camp as soon as possible but in any event within three months, provided that WDR is responsible for ensuring any consequential rehabilitation of the site of the Camp.

[8] On 5 September 2014, WDR was placed into receivership by its secured creditor, Macquarie Bank Ltd. On 9 April 2016, it was placed into liquidation and Duncan Powell appointed liquidator. On 7 September 2016, the second respondent purchased the Plant and Equipment located on the mineral leases from the liquidator for $450,000 (plus GST).

[9] In March 2017, Mr Xie (the directing mind and will of the purchaser) pursued an interest in purchasing the mineral leases from Macquarie Bank, and the Camp and the Plant and Equipment from the vendor, which were represented by Mr Oldfield. On 29 March 2017, Mr Xie inspected the Chattels at the mineral leases. Mr Xie pursued negotiations with the vendor even though, by then, he was no longer pursuing negotiations with Macquarie Bank to purchase the mineral leases. On 6 April 2017, agreement in principle was reached for the purchaser to purchase the Camp and the Plant and Equipment for a total sum of $7 million.

[10] On 20 July 2017, Mr Oldfield provided Mr Xie with a draft Sale Agreement. On 16 August 2017, Mr Xie and Mr Oldfield met with Mr Langshaw, a representative of the liquidator, to discuss access rights to the Chattels on the mineral leases. The liquidator confirmed his position at the meeting in a letter to Mr Xie dated 17 August 2017, to the effect that he expected the mineral leases to be sold to a new owner in the near future, and that it had been agreed in principle with the prospective new owner that it would permit the vendor or its nominee to access the Chattels and to remove them from the mineral leases.

[11] After the meeting, Mr Oldfield and Mr Xie finalised the Contract, making an amendment to cl 15, and then signing the Contract as amended.

[12] On 30 August 2017, Britmar and the liquidator of WDR entered into the Mineral Titles Sales Agreement ('MTSA') for the sale of the mineral leases to Britmar. The MTSA included a clause by which Britmar granted to the first respondent or its nominee in relation to the Camp and to Mr Oldfield or his nominee in relation to the Plant and Equipment, permission to access and inspect the relevant assets through and across the mineral leases in order to facilitate their removal, and that Britmar would, at the request of the first respondent or Mr Oldfield (or their nominees), co-operate and co-ordinate with them to allow the assets to be inspected and removed.

[13] The purchaser was late in paying the first two instalments (totalling $1 million) under the Contract. The Contract was varied to accommodate these late payments on 28 September 2017.

[14] In November 2017, Britmar pressed Mr Oldfield and Mr Xie to remove the Chattels from the mineral leases. On 30 November 2017, it was agreed that Mr Xie could have until the end of March 2018 to remove the Plant and Equipment in return for Britmar having use of the Camp in the meantime.

[15] On 16 February 2018, Britmar's lawyers wrote to the second respondent and the purchaser effectively asserting that the purchaser had no right to access and would not be permitted to access the mineral leases, and that only Britmar had the right to, and would be permitted to, remove the Chattels, which would be at the cost of the other party, to be paid in advance.

[16] The purchaser then claimed that, by reason of Britmar's position, the vendor was in breach of the Contract. The vendor denied it was in breach, and claimed that it was the purchaser's responsibility to deal with Britmar and that, by cl 15 of the Contract, the purchaser could not remove the Chattels from the mineral leases until it paid the remaining $6 million of the purchase price. The vendor obtained the interlocutory injunctive relief referred to above. In reliance on these matters, the purchaser purported to terminate the Contract. In reliance on the purchaser's removal of some of the Chattels and the purchaser' purported termination, the vendor purported to terminate the Contract.

The Contract

[17] The Contract recites that the first respondent is the owner of 'the Camp' 'currently situate at Mineral Lease 28267'.[2] The Camp is defined[3] by reference to the description in the Third Schedule, which refers to Annexure A, which is essentially a plan depicting the layout of the Camp and its constituent facilities, including accommodation units, a mess, a recreation room, a shed and other facilities.

[18] The Contract recites that the second respondent is the owner of 'the Ex WDR Plant & Equipment' 'currently situate at the Mineral Lease'.[4] The Plant & Equipment is defined[5] by reference to the description in the Fourth Schedule, which refers to Annexure B, which is a list of various infrastructure headed 'G&C Pastoral Pty Ltd – Ex WDR Iron Ore Assets'.

[19] The Contract provides[6] that the vendor shall sell and the purchaser shall purchase, free from encumbrances, 'the Chattels' at the price and subject to the terms and conditions hereinafter contained and/or implied. The term 'encumbrance' is defined[7] to mean a mortgage, charge, bill of sale, lien, pledge, writ, warrant, caveat, registered agreement or dealing 'or any other

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2 Recital A. The parties agree that this erroneously fails to refer to all of the mineral leases upon which the Camp is situated.

3 Cl 1.0(h).

4 Recital B. Again, the parties agree that this erroneously fails to refer to all of the mineral leases upon which the Plant and Equipment is situated.

5 Cl 1.0(i).

6 Cl 2.1.

7 Cl 1.0(a).

interest, right, claim or demand whatsoever'. The term 'Chattels' is defined[8] to mean the Camp and the Ex WDR Plant & Equipment.

[20] The purchase price for the Camp is $2 million and for the Plant & Equipment is $1.5 million.[9] The price was to be paid in instalments, as follows:[10]

(a) on the Execution Date,[11] ie 16 August 2017, $500,000 for the Camp and $500,000 for the Plant & Equipment; and

(b) one year after the Execution Date, ie 16 August 2018, $500,000 for the Plant & Equipment;

(c) on the Settlement Date for the sale and purchase of the Plant & Equipment,[12] ie 16 August 2019, $500,000 for the Plant & Equipment; and

(d) on the Settlement Date for the sale and purchase of the Camp,[13] ie 16 August 2021, $1.5 million for the Camp.

[21] The Contract provides[14] that:

(a) property in the Camp shall pass to the purchaser on the Settlement Date for the sale and purchase of the Camp (ie 16 August 2021);

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8 Cl 1.0(j).

9 Cl 2.2.

10 Cll 2.3, 2.4.

11 Defined by cl 1.0(k) to mean the date on which the parties executed the Contract.

12 Defined by cl 1.0(g) to mean two years after the Execution Date.

13 Defined by cl 1.0(f) to mean the date falling on the commencement of the fifth year after the Execution Date.

14 Cl 2.6.

(b) property in the Plant & Equipment shall pass to the purchaser on the Settlement Date for the sale and purchase of the Plant & Equipment (ie 16 August 2019); and

(c) risk in the Chattels shall pass to the purchaser on the Execution Date.

[22] The Contract provides[15] that the purchaser 'shall be entitled to possession of the Chattels under licence from the Execution Date' and that, from the Execution Date to the Settlement Date, the purchaser shall:

(a) pay to the first respondent the licence fees for the Camp set out in the Fifth Schedule, which comprise a total sum of $3.5 million, with $750,000 payable one year and two years after the Execution Date and $1 million payable three and four years after the Execution Date;

(b) 'use, operate and possess the Chattels at the purchaser's risk';

(c) comply with all applicable laws regarding the safe and lawful operation of the Chattels;

(d) maintain and service and keep the Chattels in good repair including seeking to minimise any fair wear and tear;

(e) if the Chattels are damaged or destroyed other than as a result of an act or omission of the vendor, repair or reinstate or replace the Chattels at the purchaser's cost;

(f) not remove the Chattels from the current location without the prior written consent of the vendor;

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15 Cl 2.7.

(g) take out and maintain all insurances reasonably required by the vendor;

(h) permit the vendor, at all reasonable times, to enter the Mineral Lease and inspect the state of repair of the Chattels.

[23] The Contract provides that the vendor warrants that:

(a) as at the Execution Date and Settlement Date:

(i) each has full and proper title to the Chattels;[16]

(ii) each has the power, without any further consent of any other person, to enter into and perform its obligations under the Contract and the Contract does not breach any other document which is binding on the vendor;[17]

(b) as at the Execution Date, the purchaser 'shall have and enjoy quiet possession of the Chattels';[18]

(c) as at the Settlement Date for the sale and purchase of the Camp, the Camp will be free from any charge or encumbrance in favour of any third party;[19] and

(d) as at the Execution Date and Settlement Date for the sale and purchase of the Plant & Equipment, the Plant & Equipment will be free from any charge or encumbrance in favour of any third party.[20]

[24] The Contract provides that the purchaser acknowledges that:

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16 Cl 3.1(a).

17 Cl 3.1(b).

18 Cl 3.1(c).

19 Cl 3.1(d).

20 Cl 3.1(e).

(a) the description of the Chattels 'has been given by way of identification thereof only and the use of such description shall not constitute this a contract of sale by description';[21] and

(b) that it is aware that the Camp comprises a collection of chattels and that the vendor has no legal or beneficial interest in the mineral lease or any part of the mineral lease upon which it is situate.[22]

[25] The Contract provides[23] that, subject to the due performance of the purchaser's obligations under the Contract, the vendor shall 'at the respective settlements' execute all such transfers, assurances, declarations, assignments and notices and do all such acts and things as the purchaser may reasonably deem necessary to effectually vest the respective Chattels in the purchaser free from encumbrances and enable the purchaser to have the full benefit of the Contract.

[26] The Contract provides[24] that, in consideration of the vendor not requiring guarantees of the purchaser's directors, the purchaser agrees not to remove the Chattels from the mineral lease prior to payment in full of all monies payable under the Contract 'or otherwise only with the vendor's consent'.

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21 Cl 4.1(b).

22 Cl 4.1(c).

23 Cl 6.01.

24 Cl 15.

The appeal

[27] The Notice of Appeal identifies 19 grounds of appeal, some of which have numerous sub-grounds. Grounds 2(a), 9, 14 and 18 were not pressed.

[28] To succeed, the appellant purchaser must establish an error of law or fact or mixed law and fact. This Court is obliged to give the judgment which, in its opinion ought to have been given in the first instance, following 'a real review of the trial' and the trial Judge's reasons, including weighing conflicting evidence and drawing its own inferences and conclusions, bearing in mind that that the appeal court has neither seen nor heard the witnesses and making due allowance in that respect.[25]

Proper approach to construction of the Contract

[29] There was little significant difference between the parties as to the proper approach to construction of the Contract. The following propositions were accepted by the parties, without the need for this Court to resolve any of the divergences of views about the 'admissibility of' (that is, the use to be made of) surrounding circumstances and matters external to the terms of a contract in its construction:[26]

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25 *Fox v Percy* (2003) 214 CLR 118 at [23], [25] per Gleeson CJ, Gummow and Kirby JJ. See also *CSR v Della Maddalena* (2006) 80 ALJR 458 at [14]-[15] per Kirby J (Gleeson CJ agreeing) and noting the similarities between the Western Australian provisions referred to and ss 54-55 of the *Supreme Court Act 1979* (NT).

26 A helpful summary of the status of the debate is set out by McLure P in *Technomin v Xstrata Nickel* (2014) 48 WAR 261 at [33]-[45]. Her Honour notes (at [45]), in relation to the 'ambiguity gateway' (ie the need for ambiguity in the terms of the contract), the manifest 'aridity of this debate at the intermediate appellate court level'.

(a) The rights and liabilities of the parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.[27]

(b) The meaning of the terms of a commercial contract is to be determined by what a reasonable business person would have understood those terms to mean, which requires consideration of: (i) the language used by the parties; (ii) the surrounding circumstances known to them; and (iii) the commercial purpose or objects to be secured by the contract, which is facilitated by an understanding of the genesis of the transaction, the background, the context and the market in which the parties are operating.[28]

(c) Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances or things external to the contract) cannot be adduced to contradict its plain meaning.[29]

(d) However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract. It may be necessary

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27 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46] per French CJ, Nettle and Gordon JJ.

28 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35] per French CJ, Hayne, Crennan and Kiefel JJ; *Ecosse Property Pty Ltd v Wright Prospecting Pty Ltd* (2017) 261 CLR 544 at [16] per Kiefel, Bell and Gordon JJ.

29 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [48] per French CJ, Nettle and Gordon JJ.

in determining the proper construction where there is a constructional choice between two different legal meanings.[30]

(e) Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction; what is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.[31]

(f) Construing a contract in accordance with the meaning which the parties intended as ascertained in accordance with the above principles may reveal that its literal meaning is quite different from the meaning it was intended to bear, and the latter is to prevail.[32]

[30] The purchaser argued that, while the surrounding circumstances of the Contract may be potentially relevant to the question of construction, when the language of the Contract is clear, unequivocal and unable to bear any alternative meaning consistent with the context and purpose provided by

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30 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [49] per French CJ, Nettle and Gordon JJ, at [108] per Kiefel and Keane JJ. That events, circumstances and things external to the contract may be referred to where there is a constructional choice between two different legal meanings is accepted in *Cherry v Steele-Park* (2017) 96 NSWLR 548 at [75]-[76] per Leeming JA (Gleeson and White JJA agreeing) and *Federal Commissioner of Taxation v Trustee for the Michael Hayes Family Trust* (2019) 273 FCR 567 at [28]-[32] per Steward J. The purchaser accepts for the purposes of the appeal the application of this reasoning (see Appellant's Summary of Submissions, footnote 66).

31 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [50] per French CJ, Nettle and Gordon JJ.

32 *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* [2020] NSWCA 296 at [49] per Meagher JA and Ball J.

those circumstances, it is not possible to construe the Contract otherwise than in accordance with its terms.[33] The vendor argued that, properly understood, the surrounding circumstances and commercial purpose of the Contract gave rise to constructional choices in the terms of the Contract which the trial Judge had correctly adopted.

Commercial purpose of the Contract

[31] The purchaser argued, essentially by reference to the substantial sum of money to be paid under the Contract (a total of $7 million), that the commercial purpose of the Contract was to convey to it, ultimately, full title to, and in the meantime, full possession of, the Chattels, including the unrestricted capacity to access, use and remove the Chattels. It was said that the risk of any interference in the purchaser's use and enjoyment of the Chattels lay with the vendor as the party with the legal entitlement to keep the Chattels on and remove them from the mineral leases.

[32] The vendor argued, essentially by reference to the ownership of the mineral leases by a third party, that the commercial purpose of the Contract was to give the purchaser only such title to, and possession of, the Chattels as accommodated the three possible outcomes presenting at the time the Contract was executed, namely: (1) that Britmar would not become the owner of the mineral leases and the purchaser would buy them, thereby enabling it to possess and use the Chattels in operating the mine; (2) that

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33 Relying on *Cherry v Steele-Park* (2017) 96 NSWLR 548 at [91]-[93], [109]-[110], [113]-[116] per Leeming JA (Gleeson JA agreeing).

Britmar would become the owner of the mineral leases and the purchaser would on-sell or lease the Chattels to Britmar; or (3) that Britmar would become the owner of the mineral leases and require the purchaser to remove the Chattels from the mineral leases. It was said that the risk of interference in the purchaser's use and enjoyment of the Chattels on the mineral leases lay with the purchaser because that risk was one of the three possibilities the Contract was meant to provide for, which it did by requiring, under cl 15, the purchaser to pay for the Chattels in full before removing them from the mineral leases.

[33] In essence, the choice between these two commercial purposes is whether:

(a) the vendor contracted to give the purchaser what they did not have at the time of execution of the Contract, and were not certain to get, namely future unimpeded access to and use of the Chattels on the mineral leases for the purchaser[34]; or

(b) the purchaser contracted to pay a substantial sum of money for what turned out to be a little, namely qualified access to the Chattels in order to remove them from the mineral leases[35], but which had, at the time of execution of the Contract, the potential to be much more, namely

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34 At the time of execution of the Contract, the Chattels were the subject of the CSHBA (which applied to the Camp) and the liquidator's position as contained in the letter to the purchaser's representative dated 17 August 2017. The letter indicated the liquidator's agreement to give the purchaser the same access rights to the Camp and the Plant and Equipment that the first respondent had under the CSHBA, and an agreement in principle with Britmar permitting access to allow the Chattels and the Camp to be removed.

35 After the Contract was executed, cl 9 of the MTSA confirmed the agreement in principle referred to in the liquidator's letter, but Britmar subsequently purported to place further conditions upon the purchaser's access to and removal of the Chattels from the mineral leases.

unimpeded access to and use of the Chattels on the mineral leases, either for itself or by granting the same to the new mineral lease owner.

[34] On either view, one party would have taken a significant commercial risk in the hope of making significant commercial gain. On balance, it is more likely than not that the commercial purpose of the Contract is that identified by the vendor. It would seem unlikely that the commercial purpose of a contract would involve a contracting party placing itself in immediate breach of the contract upon its execution (because it did not then have the entitlements it purported to give) with the prospects of alleviating the breach dependent on the whim of a third party over which it had no control. That would be the effect of the commercial purpose identified by the purchaser.

[35] Ground 3(b) of the Notice of Appeal contends that the trial Judge misconceived the circumstances surrounding the Contract and its commercial objects and purposes by failing to acknowledge and place weight on the fact that, under the Contract, the purchaser agreed to pay the vendor $7 million for the rights in the Chattels set out in the Contract.

[36] Some contextual facts are necessary to appreciate the significance of the sum of $7 million. Between 2012 and 2014, WDR developed the WDR Mine at a cost of $240 million.[36] In August 2013, the first respondent paid $12 million for the Camp under the CSHBA. In 2014, iron ore prices fell.[37] In

36 Reasons, [19].

37 Reasons, [22].

September 2016, the second respondent paid $450,000 (plus GST) for the Plant and Equipment.[38] In 2016-2017, iron ore prices rebounded.[39]

[37] In the circumstances, the $7 million which the purchaser agreed to pay under the Contract can rationally be seen, consistently with the commercial purpose identified by the vendor, as the amount the purchaser was prepared to pay to secure to itself what it perceived as the potential commercial gain if the first or second potential outcomes described above eventuated, and was prepared to risk if the third potential outcome eventuated.

[38] It follows that no error is demonstrated and ground 3(b) is not made out.

Encumbrance

[39] Ground 1 of the Notice of Appeal contends that the trial Judge erred in failing to construe the Contract by reference to the meaning of the words used in it. Grounds 1(a), (b), (f) and (g) focus on the use of the term 'encumbrance' in cll 1(a), 2.1, 3.1(d) and 3.1(e) of the Contract respectively. Ground 2(b) contends that the trial Judge erred in placing weight on the circumstances surrounding the Contract and its commercial objects and purposes, without first concluding that in light of the circumstances, objects and purposes, the words in the Contract did not have their ordinary meaning but were ambiguous and/or gave rise to a constructional choice.

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38 Reasons, [27].

39 Reasons, [29].

[40] Clause 2.1 of the Contract provided that the Chattels were to be sold and purchased ‘free from encumbrances’. Clause 3.1(d) provided the vendor’s warranty that, as at the Settlement Date for the Camp, the Camp will be free from ‘any charge or encumbrance in favour of any third party’. Clause 3.1(e) provided similarly, but in respect of both the Execution Date and the Settlement Date for the Plant and Equipment. ‘Encumbrance’ is defined to mean, relevantly, ‘any other interest, right, claim or demand whatsoever’.

[41] There are two bases upon which to reject the purchaser’s arguments. First, Britmar’s claims were not founded upon any interest or right it held in the title to the Chattels, or in relation to possession of the Chattels, or upon any entitlement to limit or condition the use of the Chattels. Britmar’s claims were founded upon its ownership of the mineral leases and its entitlements to control access to them. Properly construed in context (as to which see further below), the term ‘encumbrance’ in the Contract refers to interests, rights, claims or demands in or made by third parties in or over the Chattels themselves, and does not extend to interests, rights, claims or demands founded otherwise.

[42] Secondly, it was an undisputed surrounding fact that the Camp and the Plant and Equipment were, prior to and at the time of execution of the Contract, situated on mineral leases in which neither vendor nor purchaser held any right or interest. It was also an undisputed surrounding fact that, prior to and at the time of execution of the Contract, both parties were aware they had no

rights or interests in the mineral leases. This is confirmed by cl 2.7(f) and cl 15 of the Contract (which are dealt with further below).

[43] If the term 'encumbrance' included the capacity of the owner of the mineral lease(s) on which the Plant and Equipment was situated to impede the purchaser's access to the mineral leases and thereby to interfere with the purchaser's access to the Plant and Equipment, cl 3.1(e) would have put the vendor in breach of the Contract immediately upon its execution. So much was accepted by the purchaser, which argued that the breach could have been cured, but was not, by Britmar agreeing to accept the rights the purchaser said it had under the Contract, or by the vendor removing the Chattels to a place where the rights could be provided to the purchaser. As already stated, it is highly unlikely that a contracting party would, by executing a contract, place itself in immediate breach which could only be alleviated at the whim, or with the cooperation, of a third party.

[44] In its terms, cl 3.1(e) requires that the Plant and Equipment be 'free from any … encumbrance in favour of any third party', which would on a literal reading be broad enough to capture any interest or right in favour of the owner of the mineral leases from which the Plant and Equipment was not 'free'. However, the surrounding facts described in paragraph [42] above give rise to a constructional choice between that broad reading, and one which would exclude from the formulation 'any…interest [or] right … whatsoever' the capacity of the owner of the mineral lease(s) on which the Plant and Equipment was situated to impede the purchaser's access to the

Plant and Equipment. Given the consequence of the former construction (ie immediate breach), a reasonable business person aware of the surrounding facts would understand and intend the term ‘encumbrance’ to be used in the latter narrower sense.

[45] Similarly, if the term ‘encumbrance’ included a claim or demand, whether valid or spurious, by the owner of the mineral lease(s) on which the Plant and Equipment was located to impede the purchaser’s access to the Plant and Equipment, cl 3.1(e) would mean the vendor was, from the time of execution of the Contract, at risk of being in breach due to the act, even an unreasonable or unlawful act, of a third party beyond their control.

[46] Again, reference to the surrounding facts gives rise to a constructional choice between that broad reading, and one which would exclude from the formulation ‘any…claim or demand whatsoever’ a claim or demand by the owner of the mineral lease(s) on which the Plant and Equipment was situated which impeded the purchaser’s access to the Plant and Equipment. Again, given the consequence (immediate risk of breach), a reasonable business person aware of the surrounding fact would understand the term ‘encumbrance’ in the latter narrower sense.

[47] If the term ‘encumbrance’ is properly construed to exclude rights, interests, claims or demands of the owner of the mineral leases to interfere with the purchaser’s access to the Plant and Equipment, it must equally exclude such rights, interests, claims or demands in relation to the purchaser’s access to

the Camp, because the same words appear in cl 3.1(d) in relation to the Camp. It should be noted, however, that the Settlement Date for the sale and purchase of the Camp had not arisen at the time the purchaser purported to terminate the Contract on 9 August 2018. It follows that the effect of cl 3.1(d) does not strictly arise, other than incidentally to the construction of cl 3.1(c).

[48] Ground 3(a) of the Notice of Appeal is dealt with in paragraphs [58] to [60] below. Ground 3(b) has already been dealt with in paragraphs [35] to [38] above. The conclusions there expressed also bear on the proper construction of the Contract terms relating to 'encumbrance'.

[49] Ground 5 of the Notice of Appeal asserts error in the trial Judge's finding that the Contract permitted the vendor to provide the Chattels subject to a 'disturbance' or 'claim' by a third party.[40] Ground 10 asserts error in the trial Judge's failure to find that Britmar's claims were an 'encumbrance' within the meaning of the Contract. For the reasons set out in paragraphs [40] to [46] above, on proper construction the term 'encumbrance' in the Contract does not include a claim of the owner of the mineral leases to interfere with the purchaser's access to the Chattels, or an act by which it does so, including Britmar's claims.

[50] Ground 8 of the Notice of Appeal asserts error in the trial Judge's finding that, to fall within the term 'encumbrance', a claim or demand had to be

40 Referring to Reasons at [189].

valid at law.[41] Given the conclusions reached above, it is unnecessary to determine this ground. It is immaterial whether the claim or demand of the owners of the mineral lease is valid at law or spurious and without any legal foundation.

Possession

[51] The general substance of grounds 1 and 2(b) of the Notice of Appeal is set out in paragraph [39] above. Ground 1(c) focuses on the use of the words 'possession' in the chapeau to cl 2.7 and 'possess' in cl 2.7(b) of the Contract.

[52] Clause 2.7 of the Contract provides that, from the Execution Date, the purchaser is entitled to possession of the Chattels under licence and cl 2.7(b) provides that, from the Execution Date to the Settlement Date, the purchaser shall use, operate and possess the Chattels at the purchaser's risk.

[53] In addition to the contextual fact referred to in paragraph [42] above, it was an undisputed surrounding fact that the Camp was, prior to and at the time of execution of the Contract, the subject of the CSHBA. Under the CSHBA, the then owner of the mineral leases, WDR, had rights to use, operate and possess the Camp and, if those rights came to an end, the first respondent had obligations to remove the Camp from the mineral leases at WDR's cost. The impact upon the CSHBA of the appointment of a liquidator to WDR was

41 Referring to Reasons at [191].

unclear, but there is no basis to assume that WDR (or the liquidator) had forgone its rights under the CSHBA.

[54] Reference to these surrounding facts gives rise to a constructional choice about the legal meaning of the words ‘possess’ and ‘possession’ in cl 2.7. They could mean, in the fullest sense of the words, unlimited entitlements to exert physical and legal control and dominion over the Chattels, or they could mean the entitlements to physical and legal control and dominion which the vendor held and could give, those being subject to the then existing and future rights of the owner of the mineral leases. There is no inconsistency between the latter construction and the purchaser’s entitlement to ‘possession under licence’ if the ‘licence’ is understood to be the licence which the vendor was then capable of granting, which was subject to the rights of the owner of the mineral leases. Further, what the purchaser calls an ‘entitlement’ to use, operation and possession in cl 2.7(b) could be read as acknowledgement of the purchaser’s entitlement to use, operate and possess the Chattels, with the qualification, that the purchaser’s use, operation and possession (to the extent it can do so, given the rights of the owner of the mineral leases) is *at its risk*.

[55] If the words are construed in the former broad sense, the existence of WDR’s or the liquidator’s rights under the CSHBA to use, operate and possess the Camp would place the vendor in breach of the Contract upon its execution. Again, it is highly unlikely that a contracting party would, by executing a contract, place itself in immediate breach which could only be

alleviated at the whim or with the cooperation of a third party. Again, a reasonable business person aware of the surrounding facts would understand the terms ‘possess’ and ‘possession’ in the latter narrower sense.

[56] The vendor submitted in addition that an indication that the words in cl 2.7 are not used in the former broad sense is found in cl 2.7(f), which prohibits the purchaser removing the Chattels from the mineral leases without the vendor’s consent. The purchaser argued in response that cl 2.7(f) only regulated its use, operation and possession of the Chattels, but did not qualify or condition the obligation on the vendor to provide possession in the first place. This argument appears to rest on the structure of cl 2.7, which provides in its chapeau that the purchaser shall be entitled to possession under licence, and provides in cl 2.7(b) that the purchaser shall use, operate and possess the Chattels at the purchaser’s risk. The proper construction of the words in the chapeau and cl 2.7(b) have already been addressed. To construe cl 2.7(f) as a qualification on the obligation on the vendor to provide the plaintiff with ‘possession’ is consistent with that proper construction.

[57] It is noteworthy that cl 2.7(h) of the Contract provides that the purchaser shall permit the vendor at all reasonable times on reasonable notice to the purchaser to enter the mineral leases and inspect the Chattels. Where the mineral leases are owned by a third party, this clause either gives rise to an obligation on the purchaser which is subject to the rights of the owner to refuse entry on the mineral leases, or to an obligation on the purchaser to

ensure the owner's consent, with the purchaser being liable to the vendor for any failure by the owner to give it. Again, the assumption of a contractual liability of the latter kind seems unlikely. It is another example in the Contract of the need to construe its terms in light of, and consistently with, the location of the Chattels upon mineral leases owned by a third party.

[58] Ground 3(a) the Notice of Appeal contends that the trial Judge erred in failing to acknowledge and give weight to the surrounding fact that the vendor, not the purchaser, had the legal entitlement to keep the Chattels on and remove them from the mineral leases, and had the legal authority to challenge any claim by Britmar as the owner of the mineral leases which was adverse to the use, enjoyment, possession and operation of the Chattels by the vendor or anyone with whom it contracted.

[59] There are a number of difficulties with both the accuracy of that proposition and the submission made concerning its effect upon the construction of the Contract. First, the vendor's legal entitlement to keep the Chattels on and remove them from the mineral leases, as existed under the CSBHA (which applied only to the Camp), was subject to the rights it had, by the CSBHA, granted to the owner of the mineral leases. For the reasons described in paragraph [55] above, those rights are inconsistent with the purchaser's construction of the Contract. Secondly, the vendor's legal entitlement to keep the Camp on and remove it from the mineral leases only existed by virtue of the CSBHA, entered into with WDR. Once the mineral leases became owned by Britmar, the rights of both the vendor and the purchaser in

respect of the Chattels were potentially affected by Britmar's rights as owner, and they were each capable of negotiating with Britmar in relation to them. Thirdly, the proposition that only the vendor had the legal authority to challenge any claim by Britmar adverse to the rights of anyone with whom the vendor contracted is inconsistent with the purchaser's claim that, by the Contract, it had an unqualified entitlement to possession of the Chattels. If it did, there is no reason why it could not have protected that right (or any other right under the Contract, whatever it might be) from unlawful interference by a third party. Fourthly, the underlying basis for the 'fact' of the vendor's legal entitlement and authority as it relates to the Plant and Equipment is not disclosed. Fifthly, by cl 9 of the MTSA, which took effect from the date Britmar became the registered owner of the mineral leases, Britmar granted permission to the first respondent or nominee in respect of the Camp and to Mr Oldfield or nominee in respect of the Plant and Equipment to access and inspect the Camp and Plant and Equipment respectively in order to facilitate their removal. Neither the purchaser nor the vendor were parties to the MTSA.

[60] For these reasons, there was no erroneous failure by the trial Judge to acknowledge and give this 'fact' weight.

[61] Ground 3(b) of the Notice of Appeal is dealt with in paragraphs [35] to [38] above. The conclusions there expressed also bear on the proper construction of the Contract terms relating to 'possession…under licence'.

[62] Ground 7 of the Notice of Appeal contends that the trial Judge erred in construing the Contract as permitting the vendor to provide no enjoyment, use or operation of the Chattels while they remained on the mineral leases.[42] His Honour held that there was no enjoyment, use or operation of the Plant and Equipment which could be had while it remained on the mineral leases. It is clear from the last sentence of the relevant paragraph of his Honour's reasons that his Honour was describing the circumstances existing at the time of the execution of, and outside the operation of, the Contract. His Honour said:

> This was a known immutable feature of the surrounding circumstances in which the Contract of Sale was executed. It does not mean that the plaintiffs failed to provide the defendant with quiet possession.

This is a finding not as to the effect of the Contract, but as to the existence of a circumstance which denied the purchaser's construction of the Contract.

[63] Ground 11 of the Notice of Appeal contends that the trial Judge erred in failing to conclude that the Contract placed the risk of claims by third parties, particularly Britmar as owner of the mineral leases, adverse to the possession, use, operation and quiet enjoyment of the Chattels by the purchaser on the vendor, not the purchaser. This ground is a corollary of the grounds already addressed. It falls with them.

[64] Ground 13 of the Notice of Appeal contends, by way of corollary to the grounds already addressed, that the trial Judge erred in concluding that the

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42 Referring to Reasons at [190].

interlocutory relief obtained by the vendor did not constitute an interference with the purchaser's rights to the use, enjoyment, possession and operation of the Chattels.[43] The purchaser argued that the interlocutory relief prevented it from removing the Chattels from the mineral leases, which it was permitted to do to obtain the possession conferred on it by the Contract. It similarly argued that the interlocutory relief prevented it from exercising the benefit of its possession of the Chattels it had already removed from the mineral leases. The purchaser's argument that the prohibition in cl 2.7(f) against it removing the Chattels from the mineral leases without the vendor's consent 'regulated' its use, operation and possession of the Chattels, but did not qualify or condition the obligation on the vendor to provide possession in the first place has already been rejected. It is also inconsistent with the proper construction of cl 15, which is dealt with below.

Quiet possession

[65] The general substance of grounds 1 and 2(b) of the Notice of Appeal is set out in paragraph [39] above. Ground 1(e) focuses on the use the term 'quiet possession' in cl 3.1(c) of the Contract.

[66] Clause 3.1(c) of the Contract provides that the vendor warrants that, as at the Execution Date, the purchaser shall have and enjoy quiet possession of the Chattels. The purchaser relied on three authorities to demonstrate the

43 Referring to Reasons at [193].

effect of a warranty of quiet possession in a contract for the sale of goods or a commercial lease.

[67] *Niblett v Confectioners' Materials Co Ltd* [1921] 3 KB 387 ('*Niblett*') concerned a contract of sale of tins of condensed milk. The purchaser paid for the tins and when they arrived in the purchaser's location, they were detained by the Commissioner of Customs because the tins bore a mark which infringed the registered trade mark of a third party. In order to get possession of the tins, the purchaser was required to remove the mark, and could only sell them at a loss without the mark. The Court of Appeal held that the vendor was in breach of an implied condition under the *Sale of Goods Act 1893* that the goods be of marketable quality. Atkin LJ also held (at 403) the vendor was in breach of the implied warranty of quiet possession under that Act because the purchaser had to strip off the labels before they could have possession of the goods. Thus, a sale of goods which were the subject of rights of a third party which interfered with the purchaser's possession of the goods was in breach of the vendor's warranty of quiet possession.

[68] *Microbeads AG v Vinhurst Road Markings Ltd* [1975] 1 WLR 218 ('*Microbeads*') involved the sale of road marking machines. The purchaser claimed damages for breach of contract on a number of grounds including breach of the *Sale of Goods Act 1893* warranty of quiet possession because the machines could not be used by the purchaser after publication of a patent specification for the machines some seven months after the sale. The Court

of Appeal held that the warranty was breached even though, as at the date of the sale, the patent specification had no effect on the purchaser's possession and enjoyment of the machines. Lord Denning MR held (at 223) that the third party could sue for infringement of the patent and stop the buyer using the machines, and this was a clear disturbance of the quiet possession which the seller impliedly warranted he shall have. Lord Denning MR held that:

> …when a buyer has bought goods quite innocently and later on he is disturbed in his possession because the goods are found to be infringing a patent, then he can recover damages for breach of warranty against the seller. It may be that the seller is innocent himself, but when one or other must suffer, the loss should fall on the seller: because, after all, he sold the goods and if it turns out that they infringe a patent, he should bear the loss.

[69] *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15 ('*Martins*') concerned a lease of a shop and damage to the lessee's stock caused by water damage from a blocked drain which a plumber engaged by the lessor failed to properly address. It was held by Yeldham J that the lessor would be in breach of the covenant of quiet enjoyment if the lessee's ordinary and lawful enjoyment of the premises was substantially interfered with by the negligent acts or omissions of the lessor. Yeldham J held (at 23F) as follows:

> I take the relevant law in relation to the covenant for quiet enjoyment to be correctly set out in *Halsbury's Laws of England*, 3rd ed, vol 23, pp 605, 606, pars 1298, 1299 in these terms: "The covenant for quiet enjoyment operates according to its terms to secure the tenant, not merely in the possession, but in the enjoyment of the premises for all usual purposes; and where the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts or omissions of the landlord or those lawfully claiming under him, the

> covenant is broken, although neither the title to, nor the possession of the land may be otherwise affected…

[70] In this appeal, the purchaser argued that the parties to the Contract had selected a legal term of clear meaning, and the words ‘quiet possession’ must be construed as embracing the legal effect of those words.

[71] The cases of *Niblett* and *Microbeads* do not assist the purchaser. They involved third party claims of rights limiting possession (in the case of *Niblett*) and use (in the case of *Microbeads*) of the goods themselves. As set out in paragraph [41] above, Britmar’s claims had a different foundation which did not depend upon any right or interest in the Chattels themselves.

[72] The case of *Martins* does not assist the purchaser either. It did not involve any act or omission by a third party; it involved an act or omission by the lessor. It has nothing to say about whether a warranty of quiet possession is breached by an act or omission of a third party.

[73] Furthermore, in *Microbeads*, both Roskill LJ (at 227-228) and Sir John Pennycuick (at 227) made specific mention of the opening words of the statute applying the implied warranty, which were to the effect that the warranty applied unless the circumstances of the contract are such as to show a different intention. In *Martins*, Yeldham J approached (at 23E, 24D, 26D, 27D) the effect of the clause in the lease about quiet enjoyment as being subject to the other provisions of the lease.

[74] These authorities confirm, therefore, that the legal meaning of the term ‘quiet possession’ is, like any other term of a contract, dependent on context. Consistently with the principles of construction set out in paragraph [29] above, these authorities require that the term ‘quiet possession’, as it appears in the Contract, be construed subject to the operation and effect of its remaining terms properly construed in light of the surrounding circumstances. When that is done, the term ‘quiet possession’ in cl 3.1(c) can and should, for the reasons referred to above, be construed consistently with the other references to ‘possession’ as addressed in paragraphs [52] to [64] above.

[75] Ground 3(a) of the Notice of Appeal is dealt with in paragraphs [58] to [60] above. Ground 3(b) is dealt with in paragraphs [35] to [38] above. The conclusions there expressed also bear on the proper construction of the Contract terms relating to ‘quiet possession’.

[76] Ground 6 of the Notice of Appeal contends that the trial Judge erred in construing the Contract as permitting the vendor to provide ‘no meaningful’ possession to the purchaser of the Chattels while they remained on the mineral leases.[44] As set out in paragraph [61] above in relation to ground 7, it is clear from the relevant passage of his Honour’s reasons that his Honour was describing the circumstances existing at the time of the execution of, and outside the operation of, the Contract.

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44 Referring to Reasons at [190].

[77] Ground 15 of the Notice of Appeal contends that the trial Judge erred in concluding that the purchaser was granted quiet possession of the Chattels by the vendor.[45] Again, this appears to be anabout how the trial Judge construed the Contract, rather than recognising the finding for what it was, namely a finding about the circumstances existing outside of the Contract. It is clear from the paragraph preceding the paragraph referred to in ground 15[46] that his Honour was describing the effect of: (i) the agreement reached at the meeting with the liquidator's representative, Mr Langshaw, on 16 August 2017 about the purchaser's access to the Chattels; (ii) cl 9.2 of the MTSA; and (iii) the vendor notifying Britmar that the purchaser was its nominee for the purposes of the operation of cl 9.2 of the MTSA.

Power to enter into and perform obligations

[78] The general substance of grounds 1 and 2(b) of the Notice of Appeal is set out in paragraph [39] above. Ground 1(d) focuses on cl 3.1(b) of the Contract.

[79] Clause 3.1(b) of the Contract provides that the vendor warrants that, as at the Execution Date and the Settlement Date, the vendor had the power, without any further consent of any other person, to enter into and perform their obligations under the Contract.

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45 Referring to Reasons at [194].

46 Reasons at [193].

[80] The effect of cl 3.1(b) turns on what are determined to be the vendor's obligations under the Contract. Clause 3.1(b) does not assist the purchaser in its arguments about the vendor's obligations under the Contract.

Do things to effectively vest the Chattels

[81] The general substance of grounds 1 and 2(b) of the Notice of Appeal is set out in paragraph [39] above. Ground 1(h) focuses on cl 6.01 of the Contract.

[82] Clause 6.01 of the Contract provides that the vendor shall, at the respective settlements (relevantly) 'do all such things as the Purchaser may reasonably deem necessary to effectually vest the respective Chattels in the Purchaser free from encumbrances and enable the Purchaser to have the full benefit of' the Contract.

[83] Like cl 3.1(b), the effect of cl 6.01 turns on the proper construction of the term 'encumbrance', what is conferred under the Contract by way of 'possession' of, or rights in, the Chattels, and the purchaser's benefits under the Contract. Whatever is required to *effectually vest* the Chattels in the purchaser turns on what the Contract confers on the purchaser. Clause 6.01 does not assist the purchaser in its arguments about the purchaser's benefits and entitlements under the Contract.

Clause 15

[84] Ground 4 of the Notice of Appeal contends that the trial Judge erred in construing cl 15 as qualifying and permitting the vendor not to comply with the terms of the Contract construed as alleged in ground 1. Ground 4 stands

or falls with ground 1. Given the conclusions above regarding ground 1, ground 4 must fail.

[85] Ground 16 of the Notice of Appeal contends that the trial Judge erred in concluding that, in spite of the claims by Britmar and the interlocutory injunction obtained by the vendor, the vendor was entitled to require the purchaser to pay $1 million being the outstanding instalments payable for the Plant and Equipment.[47]

[86] Clause 15 provides that, in consideration of the vendor not requiring guarantees of the purchaser's directors, the purchaser agrees not to remove the Chattels from the mineral lease prior to payment in full of all monies payable under the Contract, or otherwise only with the vendor's consent.

[87] The purchaser argued that cl 15 did not confine the rights it said were otherwise conferred on the purchaser by the Contract in relation to the Chattels. It argued that cl 15 did not address the failure of the vendor to comply with their obligations under the Contract.

[88] The vendor argued in response that cl 15 was an 'accelerated payment provision' included for the protection of the vendors if the third of the three potential outcomes referred to in paragraph [32] above eventuated. The vendor argued that, except for that scenario, there was no other commercial situation in which the purchaser would remove the Chattels from the mineral

47 Referring to Reasons at [194].

leases, which means that was the only situation in which cl 15 had any scope for operation.

[89] Read with cl 2.7(f), cl 15 gives the vendor the power to demand payment in full or to otherwise give consent for the removal of the Chattels from the mineral leases. By giving the vendor the option of requiring the purchaser to pay for the Chattels in full before removing them from the mineral leases, cl 15 confirms that the risk of being unable to access and use the Chattels on the mineral leases is on the purchaser. Contrary to its terms, which disclose that it was inserted for the vendor's benefit, the clause would have no benefit to the vendor if the purchaser could remove the Chattels from the mineral lease without payment.

[90] Ground 3(a) is dealt with in paragraphs [58] to [60] above. Ground 3(b) is dealt with in paragraphs [35] to [38] above. The conclusions there expressed also bear on the proper construction of cl 15.

Britmar's claims were result of purchaser's conduct

[91] Ground 12 of the Notice of Appeal contends that the trial Judge erred in concluding that Britmar's claims arose as a result of the purchaser's conduct.[48]

[92] The trial Judge explained the relevance of this finding by saying that the purchaser's case is contingent on two primary factors, the first of which was

48 Referring to Reasons at [191].

that if Britmar's claims are invalid or arise as the result of the purchaser's conduct, then they do not constitute an 'encumbrance' under the Contract.[49]

[93] For the reasons set out above, the claims by Britmar to impede or condition the purchaser's access to the mineral leases do not constitute an 'encumbrance' under the Contract. As is observed above, it is immaterial to that conclusion whether the claims are validly made, or whether they arise as the result of the purchaser's conduct or not. It is therefore unnecessary to determine this ground.

Drilling rig within Plant and Equipment

[94] Grounds 19 and 20 of the Notice of Appeal involve the issue of whether or not a drilling rig located on the mineral leases was included in the Chattels the subject of the Contract. Ground 19 contends that the trial Judge erred in approaching the determination on the basis that this question of construction 'ends with the text' of the Contract. Ground 20 contends that the trial Judge ought to have approached and determined the issue on the bases that:

(a) the text of the Contract was ambiguous and gave rise to a constructional choice as to whether or not the drilling rig was part of the Plant and Equipment;

(b) the ambiguity and constructional choice arose from the text itself or, alternatively, from considering the text in light of matters of background and the commercial object and purpose of the Contract;

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49 Reasons at [191].

(c) the resolution of the ambiguity and constructional choice required reference to matters extraneous to the Contract, including those listed in the Reasons at [203]; and

(d) in the light of those matters, the ambiguity and constructional choice ought to be resolved by concluding that the Plant and Equipment included the drilling rig.

[95] The Contract defines the Plant and Equipment as the Chattels described in Recital B and the Fourth Schedule (cl 1.0(i)). Recital B provides that the second respondent is the owner of the Plant and Equipment 'a full description of which is set forth in the Fourth Schedule and currently situate at the Mineral Lease'. On p 9 of the Contract, under the heading 'Fourth Schedule (Ex WDR Plant & Equipment)', are the words 'Refer Annexure B'. Two pages over are two pages containing a numbered list of 94 items, headed 'G&C Pastoral Pty Ltd – Ex WDR Iron Ore Assets'. Under that heading appear the following:

> WDR – Inventory of Plant and Equipment (Not all infrastructure, items or additional sundry items listed)
>
> NOTE: Other Plant and Equipment on Remote Locations included, not listed

[96] None of the items listed is a drilling rig.

[97] The trial Judge observed (at [204]) that there was some force in the purchaser's submission that the commercial purpose of the Contract and matters arising during the course of the parties' negotiations support the

inclusion of the drilling rig in the Plant and Equipment the subject of the Contract. However, the trial Judge held that: (a) it was important 'to start and end with the text' of the Contract; (b) the effect of Recital B and the definition of the Plant and Equipment in the Contract was that what was included was the plant and equipment set forth in the Fourth Schedule and currently situated on the mineral lease; and (c) all major items of plant and equipment are listed with only ancillary items being unlisted. Given that the drilling rig was a major piece of plant and equipment which would have been specifically listed if it was included, the trial Judge found that the drilling rig was not included.

[98] Evidence of the parties' mutually manifested agreement or understanding of the subject matter of a contract, including their pre-contractual negotiations, is admissible and may be used to identify the subject matter of a contract.[50]

[99] The words 'Not all infrastructure, items or additional sundry items listed' and the words 'NOTE: Other Plant and Equipment on Remote Locations included, not listed' suggest that some unlisted piece(s) of infrastructure, item(s) or additional sundry item(s) of plant and equipment which was (or were) located on the mineral leases at the time of execution of the Contract

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50 See *Macdonald v Longbottom* (1859) 1 E&E 977 at 984; 120 ER 1177 at 1179 per Lord Campbell CJ, cited with approval in many authorities, including *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1981-82) 149 CLR 337 at 348-350, 352 per Mason J (Stephen, Wilson JJ agreeing); *Branir v Owston Nominees (No 2)* (2001) 117 FCR 424 at [417] per Allsop J (Drummond and Mansfield JJ agreeing); *Nosic v Zurich Australian Life Insurance Ltd* [1997] 1 Qd R 67 at [79]-[80] per McPherson JA (Pincus JA agreeing); *B&B Constructions v Brian A Cheeseman* (1994) 35 NSWLR 227 at 234-235 per Kirby P, at 245 per Mahoney JA (Priestly JA agreeing with both); *Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd* (2012) 37 VR 486 at [97]-[99] per Warren CJ, Harper JA and Robson AJA).

was (or were) included within the Plant and Equipment the subject of the Contract.

[100] Given these words, the trial Judge's conclusion that it is clear from Annexure B that all major items of plant and equipment which are included in the Contract are listed in Annexure B, and that the only unlisted items to be included in the sale are those which are ancillary to the major items of plant and equipment, cannot be sustained.

[101] Recourse can and should therefore be had to evidence of the parties' mutually manifested agreement or understanding of the subject matter of the Contract.

[102] It is accepted by both sides that the commercial purpose of the Contract included the possibilities of the purchaser acquiring the mineral leases and operating the WDR Mine itself, or acquiring the Chattels to lease them to the new owner of the mineral leases to use in operating the WDR mine. It may be inferred, in the absence of evidence to the contrary, that the drilling rig would be a necessary or advantageous piece of infrastructure in both those circumstances.

[103] The heading to Annexure B, 'Ex WDR Assets', suggests that what was included was the items of plant and equipment which the second respondent purchased from the liquidator of WDR. That plant and equipment included, as Lot 84, 'Drill Rig UDR – not running', purchased for a price of

$11,500.[51] That the drilling rig was 'not running' may be evidence to the contrary of the inference referred to in paragraph [102] above. Further, given the finding below that some of the plant and equipment which had belonged to WDR was removed or being removed when Mr Xie attended the WDR Mine site (ie prior to execution of the Contract), it cannot be inferred from the heading to Annexure B that the drilling rig was intended to be included under the Contract.

[104] The trial Judge appears to have made the following findings of fact, which are unchallenged:[52]

(a) On 23 March 2017, Mr Oldfield sent an email to Mr Xie in which he referred to the plant and equipment as 'ex WDR Assets and Equipment' and stated he would be prepared to 'look at selling/leasing the infrastructure, Assets and Equipment' at the WDR mine.

(b) On 23 March 2017, Mr Xie asked Mr Oldfield for a 'schedule of ex wdr equipment'. However, none was provided for some time. Arrangements were then made for Mr Xie to attend the WDR Mine site and inspect the Camp and the plant and equipment before a schedule was provided.

(c) While at the WDR Mine site, Mr Xie met with Mr Oldfield Jnr who was removing some of the plant and equipment from the site. Mr Oldfield Jnr told Mr Xie the equipment he was removing was all of the plant and equipment that was being removed.

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51 Appeal Book, p 452.

52 Reasons, [203(3)-(9)].

(d) At a meeting on 6 April 2017 between Mr Oldfield and Mr Xie, Mr Oldfield variously referred to the plant and equipment which he was interested in selling as 'the plant and equipment on the WDR tenements' and the 'plant and equipment inspected by Mr Xie'. In Mr Oldfield Jnr's words, this was described as 'the remaining plant and equipment'.

(e) On 20 July 2017, Mr Oldfield sent Mr Xie for the first time a schedule of the plant and equipment which was to be subject to the Contract. It may be noted that the schedule was in the same form as Annexure B, ie the drilling rig was not listed and the words set out in paragraph [99] above were included.

(f) The Contract was intended to give effect to the terms of the agreement negotiated on 6 April 2017.

(g) At no time before the Contract was executed, did Mr Oldfield tell Mr Xie that he was retaining some of the plant and equipment beyond that which was being removed by Mr Oldfield Jnr in March 2017.

[105] There is, however, no express finding as to whether or not the drilling rig was present on the mineral leases when Mr Xie went there and inspected the plant and equipment, or was by then removed, or in the process of being removed, by Mr Oldfield Jnr. Despite the lack of any express finding in that respect, there was evidence received at trial which establishes that the drilling rig was on the mineral leases at the time of inspection and at the time of execution of the Contract.

[106] Mr Oldfield Jnr attested by affidavit that, in October 2016 and March 2017, he was at the WDR Mine site, where he loaded various items of equipment to be transported to Alice Springs.[53] No reference is made to the drilling rig.

[107] Mr Oldfield Jnr attested by affidavit that, in March 2017, Mr Xie took photos of the equipment Mr Oldfield Jnr had loaded and asked if that was all Mr Oldfield Jnr was going to take, and Mr Oldfield Jnr's response was that was all he would take if Mr Xie was going to purchase the rest of the plant and equipment.[54]

[108] Mr Oldfield Jnr attested that he and Mr Xie had inspected the drilling rig during the March 2017 visit to the WDR Mine site.[55] Mr Oldfield Jnr attested that in a meeting he had with Mr Xie in April 2018, more than 12 months later, Mr Xie told Mr Oldfield Jnr that excluding the drilling rig from the sale was 'not good business', but that he should have read the asset list better.[56] Mr Oldfield Jnr attested that, at the meeting in April 2018, Mr Xie had asked about buying the drilling rig. Mr Oldfield Jr told him that the plan was to take it to Alice Springs to work on it, and that once the drilling rig was working, his father might be prepared to sell it.[57]

[109] Mr Oldfield attested by affidavit that, during the dinner on 6 April 2017, he and Mr Xie were negotiating 'the price for the plant and equipment which

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53 Appeal Book, p 270.

54 Appeal Book, p 271.

55 Appeal Book, pp 271-272. See also Appeal Book, p 115-116.

56 Appeal Book, p 272.

57 Appeal Book, p 272.

had been the subject of Mr Xie's recent inspection'.[58] Mr Oldfield attested that his position was that he wanted $1.5 million for the plant and equipment remaining on the mineral leases.[59] Mr Oldfield attested that his discussions with Mr Xie always proceeded on the basis that what Mr Xie was buying was what was on the WDR Mine site.[60]

[110] Mr Oldfield accepted, in cross-examination, that the drilling rig was not loaded for transport when Mr Xie went to the WDR Mine site and inspected the plant and equipment, and that it was still on site on 16 August 2017.[61]

[111] It follows that, at the time the Contract was executed, the drilling rig was situated on the WDR Mine site. Coupled with the unchallenged findings to the effect that the parties negotiated on the basis that the subject of the Contract was whatever plant and equipment had been purchased by the second respondent from the liquidator of WDR and was situated on the WDR Mine site at the time the Contract was executed, it must follow that the drilling rig was part of the subject of the Contract. This is consistent with the commercial purposes of the Contract referred to above, notwithstanding the position concerning the status of the drilling rig which would appear to have been adopted by the Oldfields in April 2018.

[112] Grounds 19 and 20 of the Notice of Appeal are made out.

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58 Appeal Book, p 247.

59 Appeal Book, p 248.

60 Appeal Book, p 249.

61 Appeal Book, pp 103-104.

Disposition

[113] For the reasons set out above:

(a) The appeal is dismissed save for grounds 19 and 20. Consequently, the trial Judge's conclusion at [195] of the Reasons should stand and the purchaser is liable to the vendor for the wrongful repudiation of the Contract, with damages to be assessed.

(b) The appeal is allowed in respect of grounds 19 and 20. There will be a declaration that the term 'Ex WDR Plant & Equipment' as used in the Contract includes the drilling rig.

[114] We will hear the parties as to the appropriate form of orders, including as to costs.
