

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES
EQUITY DIVISION IN PROCEEDINGS 1691 OF 1979

B E T W E E N :

NEWMONT PROPRIETARY LIMITED
I.C.I. AUSTRALIA LTD.
H.C. SLEIGH RESOURCES LTD.

Appellants
(Plaintiffs)

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- and -

LAVERTON NICKEL N.L.
NICKEL MINES LIMITED
LEONORA NICKEL N.L.
ESSO EXPLORATION & PRODUCTION
AUSTRALIA INC.

Respondents
(Defendants)

CASE FOR THE APPELLANTS

This Appeal is brought to Her Majesty in Council pursuant to final leave to appeal granted by order of the Supreme Court of New South Wales dated 26 June 1981 and entered 2 July 1981.

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INTRODUCTION

1. The Appeal arises from proceedings brought by the appellants as plaintiffs in the Supreme Court of New South Wales (Equity Division) upon an agreement in writing entered into on 3 November 1978 between the plaintiffs and the first and second defendants ("the Newmont Agreement").

p.221-291

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2. The agreement set out the terms upon which the parties agreed to carry out as a joint venture the exploration evaluation and, if warranted, development of any mineral deposits discovered within certain mining leases at Liontown, near Charters Towers, Queensland, of which one or other of the first or second defendants was and is the registered lessee. The third defendant

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was joined because some of the mining leases were claimed to belong beneficially to it.

p.987-1056

3. The fourth defendant's interest in the proceedings arises by virtue of a conditional agreement ("the Esso Agreement") made on 10 April 1979 between the first, second and third defendants of the one part and the fourth defendant of the other part, providing for a joint venture between those parties for the exploration and possible working of the same Mining Leases. This agreement was made after the Newmont Agreement and with notice of it.

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p.206-207

4. The proceedings were heard before Needham J. on 16, 17, 18 April, 11, 12 and 13 June 1980. On 3 March 1981 Needham J. ordered that the proceedings be dismissed and judgment be entered for the defendants on the plaintiffs' claim.

THE LEGAL ISSUES IN THE APPEAL

1. Whether upon a condition precedent in a contract being unfulfilled due to the default of the defendant a plaintiff can only accept the repudiation and sue at law for damages and is denied any right to specific performance which he would have had if the condition was fulfilled.

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2. Whether inability to order specific performance of all obligations in a contract prevents an order for a transfer of title to property agreed to be transferred.

3. Whether upon a promise to transfer property being broken an injunction against disposing of it elsewhere may issue even if specific performance is not available.

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4. Whether upon it being declared that property is held upon trust to transfer it as required by an agreement an order to transfer the same can be refused upon the basis that specific performance of other obligations in the agreement cannot be ordered.

5. Whether the so-called doctrine of mutuality is a bar to specific performance

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- (a) in all cases
- (b) in cases only where there is no remedy for the defendant at law
- (c) specifically in this case because of provisions for future management of the

project or any other provisions in the agreement

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6. Whether the fact that future supervision by or future applications to the court may be necessary is a bar to specific performance in modern times.

7. Whether the agreement does require "continual co-operation" of the parties and, if so, whether that is a bar to relief.

10 THE FACTS

A. Principal Terms of the Agreement

The Newmont Agreement provided that the plaintiffs and the first and second defendants did thereby associate in a joint venture upon the terms and subject to the conditions provided for in that agreement. The Mining Leases upon which the exploration was to be done were described in a schedule. The first and second defendants warranted that they were the registered holders and/or beneficial owners of them and covenanted that no later than 15 days from the date upon which certain consents were obtained they would deliver to Newmont executed documents of transfer in relation to each of the leases in such a form as would effect a transfer of the interest in each lease to the other parties in proportion to the parties, respective interests as fixed by the agreement. Those interests were Newmont - 36%, ICI - 18%, HCS - 6%, Laverton - 20%, and Nickel Mines - 20%.

The Newmont Agreement also provided:-

"8.3 Dealings with Mining Titles

Each of the parties will hold the mining titles upon trust for the parties entitled at law and/or in equity thereto pursuant to this agreement and will transfer or deal with the same in such a manner as may be required or permitted pursuant to this agreement and not otherwise."

p.265

B. Other Terms

The Newmont Agreement contained provisions for payments to be made by the plaintiffs to the first and second defendants, provisions for calculating contributions by the parties to the costs of exploration and mining, provisions for

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the appointment of a manager (Newmont was appointed) which was to prepare programmes for the proposed prospecting, exploration, investigation, development and exploitation of the area and also budgets of the estimated expenditure for submission to a committee of representatives, appointed by each of the parties, for their approval. The manager had certain other duties including the collection and disbursement of funds necessary to carry out the project and was to act only in accordance with programmes approved by the committee of representatives. Each of the parties was entitled to appoint one representative to that committee, which could operate with a quorum of two. Its deliberations were to be controlled by votes given by the representatives in proportion to the holdings in the project of each participant. There were ancillary provisions relating to the making of feasibility studies prior to the entry upon any mining and provision for withdrawal of participants in whole or in part from the project. Various ancillary powers and facilities were granted to the participants by the agreements.

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C. Conditions Precedent

As has been said the requirement that the first and second defendants should transfer the mining leases to the participants was dependent upon the granting of certain consents. Those consents were referred to in clause 3.1.2 of the agreement.

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p.228

"3.1.2 This agreement is conditional on the following:-

3.1.2.1 the approval of the Reserve Bank of Australia;

3.1.2.2 the Treasurer not making an order under Part II of the Foreign Takeovers Act, 1975;

3.1.2.3 the approvals or consents of the Equity Division of the Supreme Court of New South Wales;

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3.1.2.4 the approval or consent of the Hon. Minister for Mines and Energy in the State of Queensland.

If any one of such consents or approvals is not granted or if the

Treasurer shall make an order as aforesaid within twelve (12) months of the date hereof, this Agreement shall cease to have any force or effect, provided always however that any payments made pursuant to Clause 5.4 hereof shall remain the property of Laverton and Nickel Mines."

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D. Fulfilment of the Conditions Precedent

10 The first and second defendants refused to execute transfers of the mining leases and contended, amongst other things, that the conditions precedent referred to above had not been fulfilled.

In the course of the proceedings it was conceded by the defendants, as the trial Judge found in his judgment, that the conditions 3.1.2.1 (the approval of the Reserve Bank) and 3.1.2.2 (no order by the Treasurer under Part II of the Foreign Takeovers Act 1975) had been fulfilled. So far as condition 3.1.2.4 (the approval or consent of the Minister for Mines and Energy) was concerned the trial Judge found that the first and second defendants were in breach of the agreement in not complying with the obligation to furnish transfers of the mining leases, that they could not rely upon the asserted beneficial interest of the fourth defendant in some of the mining leases (numbered 602 - 607), because they had warranted that they were the registered holders and/or the beneficial owners of those leases, and that it was the default of the defendants which prevented the Minister's consent being obtained.

p.193P
Line 19

p.193V
Lines 3-17

40 In relation to the condition numbered 3.1.2.3 (the approval or consent of the Equity Division of the Supreme Court), the power to give such approval depended upon the pendency at the time of the making of the agreement and thereafter of winding up proceedings, which had been brought by the Attorney-General against Laverton and by Laverton against Nickel Mines, in which proceedings the grant or withholding of approval was contemplated. Before the Court had ruled upon an application for approval, which had in fact been lodged, the petitions to wind up both Laverton and Nickel Mines Limited were dismissed upon the application of the petitioners and with the knowledge and consent of both companies. Thus the condition of the Court's approval became incapable of fulfilment as a consequence of the actions of the first and second defendants.

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5. The Plaintiffs' Submissions in Respect of the Conditions Precedent Made in the Court Below

The plaintiffs submitted that the conditions precedent had either been fulfilled or their fulfilment was to be treated as if it had occurred by reason of the actions of the first and second defendants in rendering it impossible for the approvals of the Equity Court or the Minister for Mines to be obtained.

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The plaintiffs claimed that damages were not an adequate remedy and urged, in addition, that having regard to the fact that no exploration or mining work had been carried out by the participants and might never be carried out the true damage which they would suffer as a result of the breach of the agreement was incapable of proof and might never be capable of proof. The plaintiffs claimed that they were entitled to the relief sought in the statement of claim.

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6. The Claims Made by the Plaintiffs

The plaintiffs sought in their statement of claim so far as is relevant to this appeal:-

p.7
Line 24-p.9

- (a) A declaration that the first and second defendants were bound by the Newmont Agreement and that it was valid and subsisting.
- (b) A declaration that no party was then bound or entitled to obtain the approval or consent of the Equity Court.
- (c) A declaration that the Newmont Agreement had priority over the Esso Agreement.
- (d) An order pending completion of the Newmont Agreement restraining the first and second defendants from alienating or dealing with the mining leases.
- (e) Specific performance of the Newmont Agreement.

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7. The Trial Judge's Decision

A. The Judge found that the first and second defendants were in breach of the agreement in not complying with their obligation to transfer the leases. He concluded that it was no answer for them to say that such obligations did not arise until the last of the consents referred to in

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p. 193V
Lines 4-12

clause 3.1.2.3 was obtained, because it was their default which ensured that the approvals could not be obtained. Nonetheless, he refused to order specific performance and dismissed the action.

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10 B. The trial Judge found that there was inherent in the agreement an implied term that the first and second defendants and the other parties would do whatever was reasonably necessary to ensure that the contractual terms would be fulfilled and, further, that it could be said that there was an express obligation on the first and second defendants to ensure that occurred. Yet he concluded that all that the plaintiffs could do was to treat the breach by the defendants as a repudiation and to sue for damages. In such an action, he suggested, the Court would for the purpose of adjudicating upon the claim for damages treat the conditions precedent as if they had been fulfilled. He expressed the view that it was not the case that, where there is a conditional contract made unenforceable according to its terms by default of one party relating to that condition, the other party is entitled to specific performance of the contract with that condition removed; because the Court cannot upon default of one party in respect of a condition to which the contract is subject make a new contract for the plaintiff and order specific performance of it. It followed, in His Honour's opinion, that specific performance of the agreement could not be ordered.

p.193T
Lines 13-21

p.193U
Lines 14-20

p.193U
Lines 10-14

40 C. The Judge gave as an additional reason for his refusal of an order of specific performance that the obligations in the contract were manifold and dependent one upon the other and that the Court would not grant specific performance of the obligations upon the first and second defendants to transfer the leases because it could not make a similar order in respect of all the other obligations in the agreement. The agreement, said His Honour, required continual co-operation of the parties.

p.193V
Line 22
p.193U
Line 24

50 D. The Judge made no finding in respect of the issue as to whether or not the third defendant, Leonora, had the beneficial interest in some of the mining leases but said that so far as the plaintiffs were concerned that was of no matter to them because of the warranties given by the first and second defendants as to beneficial ownership of the leases. The plaintiffs in fact had submitted, in the alternative, that they were entitled to a transfer of such of the mining

p.193X
Line 1

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leases as the first and second defendants beneficially owned in any event whatever might be the interest of Leonora in the remaining leases.

p.193X
Line 27

E. The Judge further observed that if he had had to consider whether it was right to approve the Newmont Agreement he would, if the evidence remained as it was, have approved of the Esso Agreement rather than of the Newmont Agreement. He did not, however, turn his attention, it seems, to the fact that at the time at which through the actions of the first and second defendants the condition precedent of the Equity Court's approval (3.1.2.3) became impossible of fulfilment the Esso Agreement had not been made. Thus at the time when, upon the appellants' submission and the Judge's finding, that condition was to be taken as fulfilled there was no agreement competing with the Newmont Agreement for approval.

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8. Appellants' Submissions on the Judge's Reasons

A. Conditions Precedent

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The appellants submit that the Judge was correct in finding that the lack of approval of the Equity Court and of the unqualified consent of the Minister for Mines was attributable to the defaults by the first and second defendants in respect of their express and implied obligations under the agreement.

Consequently, the conditions precedent represented by the requirement of those consents are to be treated as having been fulfilled or, put another way, the appellants are dispensed or excused from compliance therewith (Fry on Specific Performance 6th Edition para. 923; Dougan v. Ley 71 C.L.R. 142 at 154; Mehmet v. Benson 113 C.L.R. 295 at 315; Price v. Strange (1978) 1 Ch. 337 at 368; Maynard v. Good 37 C.L.R. 529 at 540; Southern Foundries Limited v. Shirlaw (1940) A.C. 701 at 717; Mackay v. Dick 6 App. Cas. 251 at 263; Peter Turnbull & Co. Pty. Limited v. Mundus Trading Co. Australasia Pty. Limited 90 C.L.R. 235; Suttor v. Gundowda Pty. Ltd. 81 C.L.R. 418 at 441).

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The appellants submit that the Courts of Law and the Courts of Equity see no distinction to be drawn in their approach to the prevention of fulfilment of a condition of a contract by the action or omission of a defendant. The consequence is the same both at law and in equity.

The conditions precedent to the Newmont

Agreement having been fulfilled, or being treated by the law as having been fulfilled, the plaintiffs were entitled to have the trust of the mining leases declared by the agreement enforced by transfer of the leases into their names pursuant to the requirements of the agreement, to an injunction restraining disposition of the mining leases or any interests therein contrary to their rights under the agreement and to specific performance of the first and second defendants' obligation to transfer the mining leases as required by the agreement. The trial Judge's principal reason for dismissing the plaintiffs' action was, it is submitted, erroneous.

B. Whether Specific Performance Was Available

The trial Judge's additional reason for refusing an order for specific performance was that the contract was not such as could be the subject of an order for specific performance in Equity. It is accepted that Equity will not order specific performance of some contracts, such as contracts for the sale of goods where there is a ready market or contracts for employment, and that there can be other contracts where although there is plainly jurisdiction to order specific performance such an order will, as a matter of discretion exercised upon more or less well established principles, be refused. The present contract is not, however, one which plainly cannot be the subject of specific performance. The trial Judge thought that where obligations in a contract are manifold and depended one upon the other the Court will not grant specific performance of one obligation unless it could make a similar order in respect of them all. In this he was in error. In support of his conclusion he referred to the decision of the High Court in J.C. Williamson Limited v. Lukey v. Mulholland 45 CLR 282. He particularly referred to the judgment of Starke J. at page 294 of that report.

The Williamson Case

Whilst it is true that there are some passages in some of the judgments in the Williamson case which would support a view contrary to the appellants' submissions, the particular part of the judgment of Starke J. upon which the trial Judge relied, when properly understood in the context of the facts of that case, does not support His Honour's conclusion. Williamson's case was concerned with a contract granting a licence between a theatre proprietor and a purveyor of confectionery under which a right to sell sweets in the theatre for a

period extending beyond one year had been granted subject, to put it shortly, to a right in the theatre proprietor to control the behaviour and dress of the sellers of sweets and the type of confectionery which would be sold. The confectioner exercised his rights under the licence for some time but subsequently the proprietor of the theatre repudiated the agreement and revoked the licence. The confectioner sought an injunction and damages and relied upon part performance as a substitute for the lack of writing the contract, at that time, being unenforceable by reason of the Statute of Frauds. Starke J. concluded that the only matter for consideration was whether or not the licensee should have the exclusive right to sell sweets in the theatre and whether, therefore, an injunction should be granted restraining any other person from being engaged so to sell by the proprietor. He recognised, at the page of the judgment referred to by the trial Judge, that a Court of Equity might in a proper case enforce separable and distinct parts of an agreement and leave the parties to their remedies at law as to the rest of the agreement, especially where those remedies would be adequate and just. But, he concluded, that it was contrary to principle to enforce part of an agreement and leave the parties without any remedy whatever as to all other obligations of that agreement. In that case as Starke J. pointed out, the respondents would have no redress at all because the agreement was quite unenforceable at law because of the lack of writing.

The trial Judge also referred to the judgment of Starke J. in Williamson's case at pages 292-293 where, in particular, Starke J. said that a Court of Equity will not compel one party to perform his part of the contract unless justice can be done as regards the other party nor would it, as a rule, enforce contracts of personal service or any other contract the execution whereof would require continued superintendence by the Court. His Honour then turned to the remarks of Dixon J. at pages 297 - 298 of the report.

It is true that at page 297 of Dixon J.'s judgment in Williamson he observed that the remedy of specific performance is not available unless complete relief can be given, and the contract carried into full and final execution, so that the parties are put in the relation contemplated by their agreement. He went on to say that the remedy is inapplicable when the continued supervision of the Court is necessary in order to ensure the fulfilment of the contract and that it

was not a form of relief which could be granted if the contract involved the performance by one party of services to the other or requires their continual co-operation and, further, that the doctrine of the Court was against decreeing specific performance if it was unable to secure to the defendants the performance by the other party of the conditions upon which the obligations which were ordered to be performed depended and could only leave him to his action of damages at law in the event of the conditions being unperformed.

In relation to those observations by Dixon J. the appellants submit that if an order were made requiring the first and second defendants to transfer the leases as required by the contract, it would be doing no more than putting the parties in the relation contemplated by their agreement and carrying the contract into execution. Furthermore, no continued supervision of the Court would be necessary to ensure fulfilment of the contract and, it is submitted, the obligation to transfer the leases if ordered to be specifically performed is not an obligation dependent upon other conditions to be performed by the plaintiffs. When properly understood the future relationship between the parties once the leases have been transferred does not require their continual co-operation and the obligations of the manager under the agreement are not properly called the provision of services to the defendants but at most the provision of a service to the defendants (and to the plaintiffs).

The appellants submit that the contract to which the remarks in Williamson's case were being addressed was vastly different from the contract in this case.

The Doctrine of Mutuality

Furthermore, the appellants submit that the so-called doctrine of mutuality does not require that the Court be enabled to grant a decree of specific performance in favour of a defendant of all the conditions remaining unperformed by a plaintiff. If the so-called doctrine does so require the appellants submit that Your Lordships will re-examine the doctrine.

There is not, the appellants submit, really a rule or doctrine of mutuality. It is accepted that an Equity Court will consider and weigh-up the circumstances of each case before it to ensure that injustice is not done to a defendant by granting a decree of specific performance in favour of a plaintiff. But this does not mean

that a defendant who has entered into a bargain which of its nature only gives him a right to damages in the event of breach by the plaintiff can prevent a plaintiff obtaining specific performance of the defendants' promise if there are no other reasons why that most perfect form of justice should not be awarded to a plaintiff.

The fact that some service or task is to be carried out for a party by another party pursuant to a promise to do so and as part, no doubt, of the consideration bargained for does not always result in specific performance being refused (see e.g. Paxton v. Newton 2 Sm & Giff 437; 65 E.R. 470, Fortescue v. Lostwithiel and Fowey Railway Company (1894) 3 Ch. 621 and the reference at 639 - 40 in the latter case to sequestration as a substitute for supervision by a court appointed receiver and C.H. Giles & Co. Ltd. v. Morris (1972) 1 A.E.R. 960 at 969; (1972) 1 W.L.R. 307).

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In the present case the only effective remedy open to the plaintiff is an order for the transfer of the mining titles in accordance with the agreement or at the very least an injunction to restrain the defendants disposing of those mining titles elsewhere. Damages are impossible of assessment and, in a real sense, the plaintiff is as much devoid of remedy as if the agreement were unenforceable at law through lack of writing. The application of the so-called mutuality doctrine, which is said to be justified by a concern of Equity to avoid injustice to a defaulting defendant, results in this case in the injured plaintiff obtaining no redress whatever or, at best, totally inadequate redress. And this simply because the defaulting defendants who will, of course, exploit the mining titles for their own benefit elsewhere, assert that the outstanding obligations of the plaintiff for which they bargained are not such as can be the subject of specific orders by the Equity Court. In short, the dismissal of the plaintiff's case works against an innocent plaintiff the very sort of injustice which the High Court in Williamson's case said should not be imposed upon a defaulting defendant.

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C. Transfer of Leases to Accord with Trust -
Even if Specific Performance of Contractual
Promise Unavailable

The appellants further submit that the mining leases, being held in trust by the first and second defendants to transfer them as required by the agreement to themselves and the plaintiffs in common, the promise and obligation to transfer

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cannot be subject to considerations such as whether or not the Equity Court could specifically enforce other provisions of the agreement in favour of those defendants. So to do would be to absolve the first and second defendants of their trust, or at all events that part of their duty which requires them to make the transfer, simply because the rights which they have under the agreement are not susceptible of specific orders for fulfilment.

10 D. Injunction Against Disposal of Leases

The appellants also submit that even if they were not entitled to orders for specific performance or for transfer of the mining titles to them they were entitled under the principle of Lumley v. Wagner 42 E.R. 687 to injunctions restraining the first and second defendants from disposing of the mining leases elsewhere. Given that the conditions precedent have been fulfilled or are to be treated as having been fulfilled the reasons, if they are valid, for refusal of a specific order for transfer to the plaintiff do not justify a refusal of an injunction because, as has several times been observed by the Courts, any future breach by the plaintiffs of their outstanding obligations under the agreement can be dealt with by a dissolution of the injunctions upon application by the defendants.

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30 The appellants submit that their Appeal should be allowed for the following, amongst other, reasons.

BECAUSE

1. The conditions precedent to the obligation of the first and second defendants to transfer the mining leases as required by the agreement had either been performed or ought to have been treated as fulfilled.
2. The agreement was not one of which a Court of Equity could not decree specific performance.
- 40 3. The agreement was one of which a Court of Equity could and should decree specific performance.
4. The first and second defendants, being in breach of the agreement and having by reason of entering into the Esso Agreement threatened to dispose of the mining leases elsewhere, an injunction should have been granted to restrain the disposition of those mining leases in breach of the agreement.

5. The mining leases being held in trust by the first and second defendants for the purpose of dealing with them in accordance with the requirements of the agreement an order should have been made requiring the obligations under that trust to transfer the said mining leases to be performed by the said defendants.

ORDERS SOUGHT BY APPELLANTS IF THEIR APPEAL SUCCEEDS

1. A declaration that the first and second defendants are bound by the Newmont Agreement which is now valid and subsisting and unconditionally binding upon them. 10
2. An order that the first and second defendants do all things necessary to transfer the mining leases in the second schedule to the Newmont Agreement held by them in accordance with the said Agreement.
3. In the alternative to paragraph 2, an order that the first and second defendants do all things necessary to transfer such of the said mining leases as are not held beneficially by the third defendant in accordance with the Newmont Agreement. 20
4. An order remitting the proceedings to the Supreme Court of New South Wales Equity Division to determine whether the third defendant beneficially owns any of the said leases and, if so, to fix and determine the amount of compensation payable to the plaintiffs by reason of the first and second defendants' lack of title thereto. 30
5. An order that pending the transfer of the said mining leases pursuant to the said Agreement the first and second defendants be restrained from selling, mortgaging, alienating or otherwise dealing with the said mining leases otherwise than with the leave of the Supreme Court of New South Wales or the consent of the plaintiffs. 40
6. In the alternative to Orders 2, 3 and 5 a perpetual injunction restraining the first and second defendants from selling, mortgaging, alienating or dealing with the said mining leases otherwise than pursuant to the terms of the Newmont Agreement.
7. An order that the defendants pay the plaintiffs' costs of these proceedings here

and below.

D.E. ~~HORTON~~

C.R. EINSTEIN

COUNSEL FOR THE APPELLANTS

IN THE PRIVY COUNCIL

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(Defendants)

CASE FOR THE APPELLANTS

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