44/82

IN THE PRIVY COUNCIL No. 31 of 1981

ON APPEAL

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

BETWEEN:

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 FIRST, SECOND AND THIRD RESPONDENTS

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THE NATURE OF THE APPEAL

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1. 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.

2. The Appeal is brought against a decision of Needham J. sitting in the Equity Division of the said Court dismissing a suit brought by the Appellants seeking declarations and orders against the Respondents with respect to an alleged joint
40 venture agreement relating to the exploration and possible development of certain mineral leases near Liontown in Queensland. The agreement was dated "as at" 3 November, 1978 and is called herein "the Newmont agreement".

THE ISSUES

3. The questions in this Appeal are:-

(1) Whether the provisional liquidators of the first two respondents had power to enter into

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the agreement, pending the hearing of petitions for their winding up, when the agreement could last for 15 years and involve the respondents in the expenditure of large sums of money?

(2) Whether there was implied in the Newmont agreement a term that the first two respondents would do whatever was reasonably necessary to ensure that the terms of agreement were fulfilled? 10

(3) Whether, by consenting to the dismissal of the winding up petitions before the Court had approved the conditional agreement entered into by the provisional liquidator, which agreement required the approval or consent of the Court, the first two respondents were in breach of that implied term?

(4) Whether, when the agreement had not obtained the consent of the Supreme Court, the failure of the first two respondents to deliver transfers of title was a breach of a condition which required them to deliver the transfers "no later than 15 days from the date on which the last of the consent" required by the agreement was obtained? 20

(5) Whether the agreement, if within the provisional liquidator's powers, failed by reason of the nonfulfilment of certain conditions of the agreement including the conditions requiring the approval or consent of the Supreme Court and of the Queensland Minister for Mines and Energy? 30

(6) Whether, because the first two respondents had warranted that they were the beneficial owners of the leases they were precluded from asserting that the Minister for Mines would not have consented to the transfers of title upon the ground that the third respondent was in fact the beneficial owner of certain leases? 40

(7) Whether the appellants were in the circumstances of the case entitled to specific performance of the Newmont agreement?

THE PROCEEDINGS

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4. In 1979 the Appellants Newmont Proprietary Limited (Newmont), I.C.I. Australia Ltd., (ICI) and H.C. Sleigh Resources Ltd. (HCS) commenced

proceedings against the respondents in the Equity Division of the Supreme Court of New South Wales.

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5. The appellants claimed that the Newmont agreement was made between themselves and the first respondent (Laverton) and the second respondent (Nickel Mines).

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6. The third respondent (Leonora) was joined as a defendant because it claimed to be the owner of certain of the leases. The fourth respondent (Esso) was joined as a defendant because the first three respondents of 10th April, 1979 entered into a conditional joint venture agreement with it for the exploration and development of the same leases (the Esso agreement).

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7. The appellants' claims, for present purposes, were as follows:-

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(1) A declaration that Laverton and Nickel Mines were bound by the Newmont agreement and that that agreement was and is now valid and subsisting.

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(2) A declaration that no party to the Newmont agreement was or is now bound to seek, or was or is now entitled to obtain, the approval or consent of the Supreme Court to the said agreement.

(3) A declaration that the Newmont agreement had priority over the Esso agreement.

(4) An order that the respondents and each of them be restrained from entering into any agreement with one another or with any other person relating to the property the subject of the Newmont agreement in any manner inconsistent with or detrimental to any right title or interest held by the appellants under that agreement.

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(5) An order for the specific performance of the Newmont agreement.

(6) An order that in addition to or in lieu of specific performance of the Newmont agreement Laverton and Nickel Mines pay to the appellants the damages which the appellants have sustained by reason of Laverton and Nickel Mines' refusal and neglect to perform the same.

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8. The proceedings were heard on 16th, 17th and 18th April, and 11th, 12th and 13th June, 1980

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before Needham J. On 3rd March, 1981 His Honour ordered that the proceedings be dismissed and entered judgment for the respondents on all the appellants' claims.

THE FACTS

9. Laverton and Nickel Mines were at all material times the holders of mining leases Nos. 233, 317, 320-345, 402 and 602-607 (all inclusive) and Miners Homestead Perpetual Lease No. 11436 Charters Towers in the State of Queensland (the Liontown leases). Leonora claims that it was at all material times the beneficial owner of the said Leases Nos. 602-607 (inclusive) and Laverton and Nickel Mines concede but the appellants contest that they hold those leases for Leonora. 10

193B.9-11 10. Mr J.J. Lynch was at all material times the largest shareholder in Nickel Mines. He was also at various times a director of both Laverton and Nickel Mines.

193B.20 11. On 22nd May, 1978 the Attorney-General petitioned the Equity Division of the Supreme Court of New South Wales for the winding up of Laverton on the ground that it was in the interests of the public and the shareholders that it be wound up. Shortly thereafter Mr. W.J. Hamilton was appointed provisional liquidator of the company. 20

193B.24

12. On 20th June, 1978 Mr. Hamilton, as provisional liquidator of Laverton, petitioned the Equity Division of the Supreme Court of New South Wales for the winding up of Nickel Mines on the ground that it was insolvent and unable to pay its debts as they fell due. Shortly thereafter Mr. Hamilton was appointed provisional Liquidator of Nickel Mines but was subsequently and prior to 13th August, 1978 replaced in that office by Mr. L.B. Hunter. 30

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193C.1

13. Negotiations took place on Laverton and Nickel Mines' behalf with a number of parties for the disposal of their interests in the Liontown leases. These negotiations were conducted principally by Mr. Hamilton. Negotiations were carried out in the first place with the appellants, but by October 1978 negotiations were also taking place with the Shell Company of Australia Limited (Shell) and with Esso. 40

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14. On or shortly after 9th October, 1978 the appellants became aware that, subject to a number of conditions being satisfied, the Attorney-

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	General would consent to the withdrawal of his winding up petition against Laverton.	896-9,121
	15. Prior to 3rd November, 1978 it became apparent to all concerned (including Newmont) that, whilst the terms offered by Shell were not more advantageous to the first three respondents than were those offered by Newmont, the terms proposed by Esso were more advantageous.	
10	16. On 3rd November, 1978, Mr. Lynch applied to Needham J. sitting in the Equity Division of the Supreme Court of New South Wales for an injunction restraining the provisional liquidators from entering into the Newmont agreement on the ground that a more favourable agreement could be obtained.	193C.14-18
20	17. His Honour dismissed that application because the proposed contract was expressed to be conditional upon its approval by the Court and that that approval would not be forthcoming if the terms of the proposed Esso agreement were more advantageous to Laverton. His Honour specifically said in his reasons for judgment that the provisional liquidators should continue to negotiate with interested parties despite the execution of the agreement.	193C-193D 325.11
30	18. The Newmont agreement was dated "as at the 3rd day of November, 1978". It does not bear a date purporting to be the date of execution and may not have been executed until 9th November, 1978.	126
	19. The objects of the agreement were expressed to be "to prospect and explore for and if warranted to develop and exploit any mineral deposits within the Designated Area which are determined by the parties ... to be capable of economic exploitation."	223.17 230.1
	20. A joint venture was constituted among the parties for this purpose of implementing the objects of the agreement.	223.22 228.10
40	21. Clause 3.1.2, which is central to the proceedings, provided as follows:	228.14
	"This agreement is conditional on the following:- 3.1.2.1 the approval of the Reserve Bank of Australia;	228.14

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

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

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." 10

22. Clause 3.1.5 provided:

229.20 "Newmont covenants to make all applications for approval which it considers necessary pursuant to Clauses 3.1.2.1, 3.1.2.2 and 3.1.2.4 and Laverton and Nickel Mines covenant to make all applications for approval and do all such other acts and things related thereto which they, Newmont, ICI, or HCS consider necessary pursuant to Clause 3.1.2.3 as soon as practicable but not later than two (2) months after the date hereof and they shall advise the other Parties in writing as soon as practicable after the receipt of any consent so applied for." 20 30

230.10 23. The interest of the parties in the joint venture were specified to be Laverton 20%, Nickel Mines 20%, Newmont 36%, ICI 18% and HCS 6% (3.3.1).

243.19 24. The key date is defined in 5.2.3.1 to be the date on which the last of the approvals and consents referred to in 3.1.2.3. is obtained.

231.1 25. Section 4 of the agreement provided for the management of the joint venture by a manager and its control by a committee of representatives. 40

231.6-232.5 232.16 26. The manager was to continue in office until its resignation, withdrawal from the joint venture, forfeiture, assignment or cesser of its interest therein or its winding up. Newmont was appointed first manager but upon its ceasing to be manager

"the manager shall thereafter be such willing one of the Contributing Parties as is from time to time chosen by" the party or parties holding the majority interest. — Record

27. The functions of the Manager included the exclusive control and supervision of the operations of prospecting for and developing and exploiting any mineral occurrences. The Manager had imposed on it the obligation of conducting those activities in an efficient and workmanlike manner and in compliance with the terms of the mining titles and in accordance with statutory requirements; to keep the other parties fully informed on all matters relating to the activities of the joint venture; and to keep up to date records of all geological work; to keep and have audited in the books of account and other records of the same joint venture; and to maintain appropriate insurance policies. — 232.26-233.6; 233.9; 233.17; 233.27; 234.15

28. Provision was made for the appointment of a representative for each of the joint venturers. Detailed provision was made for their meeting and decisions. — 235.20; 236.23

29. The agreement also provided that all activities of the joint venture should be carried out pursuant to and in compliance with approved programmes; that these should be prepared by the manager in respect of each period of 6 months and submitted for consideration at meetings of the representatives and that the particulars of the programme or budget should be determined by a majority of the representatives. — 239.20; 239.21; 240.18

30. Each of the joint venturers was to contribute to the expenditure on the approved programmes but Laverton & Nickel Mines were not required to contribute until the appellants had contributed $2,800,000 over a period of 60 months. — 241.8,243.3

31. The cash consideration for Laverton and Nickel Mines entering into the agreement was $37,500 no later than 14 days after the key date; $37,500 on or before the first anniversary thereof; and $50,000 on each subsequent anniversary until the date of commencement of "commercial scale mining". — 245.12

32. The appellants were to notify Laverton and Nickel Mines when they had expended $2,800,000. The latter then had an option under cl. 6.1.2 to give notice within 30 days that they did not intend to contribute to joint venture expenditures until the issue of a notice by the manager pursuant — 246.1; 246.3; 246.14

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	to cl. 7.2.1 of a decision to proceed with development of a mine. By clause 6.1.3 Laverton & Nickel Mines, in the event of the issue of such a notice, could elect within 90 days not to contribute to joint venture expenditures until the date of commencement of commercial scale mining operations. By clause 6.1.5. if Laverton or Nickel	
247.29	Mines gave notice under clause 6.1.2. but not under 6.1.3 then it was obliged to make a makeup payment to the appellants of an amount computed in accordance with a complicated formula.	10
250.24	33. Section 7 of the Agreement dealt with the development and operating phase. Provision was made for the preparation of a feasibility study if any contributing party considered a mineral occurrence to warrant it. Provision was also	
252.17	made for participation in mine development.	
265.15	34. Section 9 of the Agreement dealt with withdrawal and default. Its provisions in general terms provided that, on withdrawal or default by one of the appellants prior to the expenditure of $2,800,000 under the agreement, the party's interest should be distributed to the other appellants, but that otherwise the party's interest should be distributed among all the contributing parties proportionately to their interest in the joint venture.	20
271.26 272.1,272.11	35. Under certain conditions a party's interest should be assigned.	
	36. To render the agreement a joint venture rather than a partnership, the agreement contained the conventional provisions for the distribution of the mine product in specie to the parties. The agreement also stated that it did not create a	30
259.14 274.23	partnership.	
279.18	37. The joint venture was to continue until the expiry of the last of the mining title, some 15 years off.	
280.5	38. Laverton and Nickel Mines warranted that they were the registered holders and/or beneficial owners of the mining titles and that except for mining leases Nos. 603-7 the titles were in good standing.	40
	39. Laverton and Nickel Mines also covenanted to deliver to the manager executed documents of transfer in respect of the mining titles in such form as would subject to the approval of the Queensland Minister for Mines and Energy effect a transfer of interest in each of the mining titles	

to the other parties in proportion to their respective interests under the new agreement. Record 280.24

40. In November 1978 the appellants commenced proceedings in the Equity Division of the Supreme Court against Laverton and Nickel Mines seeking a declaration that the Newmont agreement was binding upon the parties and an injunction restraining the provisional liquidators from calling further tenders. Those proceedings were heard by Needham J. on 6th December, 1978. His honour held that the Court had power to control the exercise of the provisional liquidator's powers and to give directions in the matter including an expression of the Court's view as to whether a conditional contract should be carried into effect by the provisional liquidators. His Honour further held that once it was accepted that the Newmont agreement was conditional on the Court's approval it could not be said that the proposed actions of the provisional liquidators in seeking tenders from other interested parties in accordance with the Court's directions was in conflict with their obligations under the agreement. For those reasons His Honour dismissed the proceedings with costs. 10 193K 339.32-340.24 20

41. From that order an appeal was taken to the Court of Appeal of the Supreme Court of New South Wales where it came on for hearing on 14th June, 1979. The Court of Appeal was of opinion that a decision on the issue tendered by the plaintiffs in those proceedings might not necessarily resolve all questions between the parties. The appeal was stood over and ultimately dismissed by consent. 30

42. On 21st December, 1978 the provisional liquidator applied by summons to the Equity Division of the Supreme Court for approval of the Newmont agreement. The summonses were made returnable on 5th February, 1979. Ex 4J 1059, 190 193 p.4 Ex S.341

43. On the 22nd December, 1978 Newmont wrote to the Queensland Minister for Mines and Energy seeking his approval of the Newmont agreement. 40 ExH.304

44. On 5th February, 1979 the summonses for approval of the Newmont agreement were adjourned to 19th February and on that day to 22nd February, 1979, a day on which the petitions for the winding up of both Nickel Mines and Laverton were again in the list of the Equity Division. 193L18-20

45. On 19th February, 1979 the solicitors for the provisional liquidators wrote to the 50

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	solicitors for the appellants advising that a draft of the Esso agreement had been received from Esso and was being perused and that it was anticipated that agreements would be exchanged on 21st February and that application would then immediately be made to Needham J. with a view to having one or other of the agreements approved by
193L.22-194 M.28 ExH 432-3	the Court. They further advised that on Thursday 22nd of February application would be made for dismissal of the winding up petition against Laverton. (10)
	46. On 22nd February the provisional liquidator of Laverton took out a summons in the liquidation of Laverton returnable on 23rd February, 1979 seeking directions as to whether he would be justified in entering into the Esso agreement.
	47. On 22nd February all matters before the Court on that day were adjourned to 23rd February, 1979.
	48. On 23rd February, 1979 the Attorney-General, (20) upon certain undertakings being given to the Court as to the constitution thereafter of the board of directors of Laverton, applied to have his petition for its winding up dismissed. This was said to be by consent of the company expressed by counsel retained by the directors rather than by the provisional liquidator.
442	49. His Honour held that, although a provisional liquidator had been appointed, the directors continued to have power to retain counsel to (30) resist the winding up and that, conversely, the provisional liquidator had no right to appear to support the petition or resist its dismissal.
96.13	50. On 28th February, 1979 the appellant's solicitors wrote to Laverton's solicitors, requiring compliance with clause 11.11.2 of the Newmont Agreement by the delivery of executed documents of transfer in relation to the mining titles.
97.10	51. On 2nd March, 1979 Laverton's Solicitors (40) replied that Laverton did not consider itself bound by the terms of any purported agreement made with the appellants.
451.18	52. On 5th March, 1979, on the application of Laverton as petitioner, the petition to wind up Nickel Mines was dismissed.
	53. On 10th April, 1979 Laverton, Nickel Mines and Leonora entered into the Esso agreement. The

terms in which it was finally made differed, but not materially, from the draft agreement referred to in paragraph 45 above. Record

54. The subject matters dealt with by the Esso agreement were much the same in outline as the subject matters dealt with by the Newmont agreement but, as Needham J. held the Esso agreement was more favourable to the first three respondents in the matters set out below. 193X.26

10 55. The participating interests retained by the first three respondents total 49% under the Esso agreement (cl 5(1)) as opposed to 40% retained by Laverton & Nickel Mines under the Newmont agreement. 997.15

56. So far as cash payments are concerned the Esso agreement provides for an initial payment of $200,000 and payment of $100,000 on the 2nd anniversary of the first payment and on each subsequent anniversary until the mine production
20 date. This compares with an initial payment under the Newmont agreement of $37,500, a further $37,500 on the first anniversary and $50,000 on each subsequent anniversary until the date of commencement of commercial scale mining operations.

57. The amount to be expended in exploration by Esso under the Esso agreement before contribution by the first three respondents is $3,000,000 as against the corresponding sum in the Newmont
30 agreement of $2,800,000. 990.30, 1004.27

58. Furthermore, whereas both agreements provide for the first three respondents' contributions to be carried by Esso or the appellants at their election during the development phase against reimbursement out of cash flow from the mine if and when such occurs, the Esso agreement gives them an additional right to elect after the expenditure of $3,000,000 by Esso not to contribute further but to convert
40 their interest in the agreement and joint venture to a "net profits interest" whereby they give up their equity in the joint venture but receive in return a right to receive 2.5%, 2.25% and 0.5% respectively of the net profits of the venture as defined in clause 34 of this agreement. 1013.36

59. It should also be noted that the Esso agreement appoints Esso the operator under the joint venture (cl.4(4)) and it is contemplated that it can be replaced only in the event of its
50 insolvency (see definition of "operator" in cl.1(o)

Record

so that there can be no question except in that case of any of the first three respondents ever becoming the operator under the agreement.

HIS HONOURS REASONS

60. His Honour, after the hearing and before making orders on 3rd March, 1981, delivered 3 judgments concerning various aspects of the matter on 3 different days, namely, 8th September, 1980, 17th February, 1981 (omitted from record) and 3rd March, 1981.

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FIRST JUDGMENT

61. His Honour first rejected an alternative submission of the appellants that breach by the first and second respondents of their obligations allowed the appellants to treat the Newmont agreement as being no longer conditional. His Honour said that the inference from this submission was that the court could order specific performance of the agreement, as if the requirement of the Court's approval was no longer in the agreement. He also rejected the submission that an order for specific performance would itself signal the Courts approval of the agreement. He held that the Court, by its order, could not make an agreement capable of being performed if, prior to the order, it was not capable of being performed.

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193S.8-20

62. Next, His Honour held that Laverton was in breach of the agreement by consenting to the withdrawal of the petition against it. He said:

193T.4

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> "There is, inherent in every agreement, an obligation, implied by the necessity of the case, on each party to do whatever is necessary on its part to ensure that the contractual terms are fulfilled."

His Honour held that such a term was implied in the circumstances of this case and was breached and that so whether or not there was also a breach of some express obligation to the same general effect contained in the agreement.

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63. His Honour then rejected the submission that, since there was a breach of that condition, the appellants were entitled to specific performance of the contract with that condition removed. His Honour said that the Court could not, because of the default of one party in respect of a condition, make a new contract for another party and order specific performance of it. In such a

192T.22

case the wrong party's right was to treat the breach by the other party as a repudiation and sue for damages.

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64. His Honour then turned to the condition relating to the consent of the Minister and held that Laverton and Nickel Mines were in breach of the agreement. It was their default that ensured that the approvals could not be obtained. Because of their warranty that they were the registered holders and/or beneficial owners of those leases, they could not rely upon the asserted beneficial interest of Leonora in some of the Mining Leases.

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65. His Honour then said:

> "It follows that my opinion is that specific performance of the agreement cannot be ordered."

66. In addition, His Honour said that, even if those conditions had been fulfilled, specific performance could not be ordered because the agreement, being not unlike an agreement for a partnership, was one which required "continual co-operation" of the parties. Where obligations in a contract are manifold and dependant one upon the others, the Court will not grant specific performance of one obligation unless it can make a similar order in respect of them all.

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67. His Honour also rejected the submission that the Newmont agreement was beyond the power of the provisional liquidators.

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68. His Honour dealt next with the defence that, in any event, if the petitions had not been withdrawn, the Court would not have approved the Newmont agreement because the Esso agreement was more beneficial to Laverton. His Honour said that this was largely a matter of commercial judgment but that, on the evidence as it was before him he would have given approval to the Esso agreement rather than the Newmont agreement. He said, however, that this did not become important so far as the question of specific performance was concerned as he had already refused that relief on other grounds.

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69. His Honour then stood the matter over for further consideration of the issues of damages.

SECOND JUDGMENT

70. In his judgment of 17th February, 1981 (not included in the Record) His Honour ruled that no

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claim for equitable damages arose and that the only basis on which the plaintiff could claim damages was that it had accepted Laverton and Nickel Mines' repudiation of the contract and was entitled to damages for that repudiation. He stood the matter over further to permit the appellants to consider whether they wished to discontinue their claim for damages in the existing proceedings.

THIRD JUDGMENT

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71. His Honour further dealt with the matter on 3rd March, 1981. He said that there were three possible claims for damages open to the plaintiff.

72. The first was for equitable damages but that the refusal of the order for specific performance put that out of the question.

73. The second was for common law damages for breach of contract which were available to be claimed in the current proceedings but the appellants had elected not to claim them.

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74. The third was for common law damages based on a rescission of thecontract by the appellants for the breach or repudiation by the first and second respondents. This claim was not open in these proceedings because the appellants in seeking specific performance, had been careful to maintain the contract was in existence.

75. His Honour said that the last mentioned course still remained open to the appellants if they chose to follow it but that an end ought to be put to the other courses in the existing proceedings. The appropriate order was that the proceedings ought be dismissed and judgment entered for the respondents upon the appellants claim for damages.

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HIS HONOUR'S ORDERS

76. His Honour's orders were:-

(1) That the proceedings be dismissed and that judgment be entered for the defendants on the plaintiffs' claim.

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(2) That certain cross-claims of the respondents stand over generally with liberty to restore on 7 days' notice.

(3) The Plaintiffs pay the defendants' costs.

SUBMISSIONS

Record

I. THE NEWMONT AGREEMENT WAS BEYOND THE POWER OF THE PROVISIONAL LIQUIDATORS

77. The function of a liquidator is to wind up the affairs of a company so that the assets may be distributed among the contributories and the company's existence brought to an end by dissolution. The powers of even a finally appointed liquidator to conduct business of a
10 company are limited. The purpose of the appointment of a provisional liquidator is to preserve the assets of the company and maintain the status quo so far as possible pending the determination of the winding up proceedings: In re Dry Docks Corporation of London, (1888) 39 Ch D 306; Re Motor Terms Co. Pty. Ltd.,(1966) 84 WN (Pt 1) (NSW) 302; Re Carapark Industries Pty. Ltd. (In Liquidation), (1967) 86 WN (pt 1) (NSW) 165; Re Stewden Nominees No. 4 Pty. Ltd., (1975) 1 ACLR
20 185 Re Codisco Pty. Ltd., (1974) CCH - ACLC par 40-126; Re Chateau Hotels Ltd., (1977) INZLR 381; Re ABC Coupler & Engineering Co. Ltd. (No. 3), (1970) 1 WLR 702. The simple statement of these clear principles is sufficient to demonstrate that it is beyond the powers of a provisional liquidator to enter into a complex agreement which involves the company in multifarious obligations, which may involve the company in the expenditure of very large sums of money and which may endure
30 for 15 years, precluding the function of the final liquidator, if appointed, of winding up the affairs of and procuring the dissolution of the company within that period.

II. LAVERTON WAS NOT GUILTY OF A BREACH OF CONTRACT BY ANY PARTICIPATION IN ITS RELEASE FROM PROVISIONAL LIQUIDATION

78. For Laverton to have been guilty of a breach of contract there must have been a term or obligation of the Newmont agreement to which its
40 actions were contrary. There is plainly no express term of the Newmont agreement that Laverton would not permit or participate in its release from provisional liquidation. The term relied on must therefore be an implied term.

79. Every contract, even a complex written contract must be construed in the light of the "matrix of facts" within which it is brought into existence: Prenn v. Simmonds, (1971) 1 WLR 1381 per Lord Wilberforce at p. 1383H.

50 80. The relevance of this principle to the

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question of whether or not a term should be implied in the contract was recently emphasised by the majority of your Lordships' Board in BP Refinery (Westernport) Pty. Ltd. v. President, Councillors and Ratepayers of the Shire of Hastings, (1977) 16 ALR 363, 52 ALJR 20, by Viscount Dilhorne, Lord Simon of Glaisdale and Lord Keith of Kinkel, ALR at p. 377, ALJR at p. 27.

81. In that case the majority, after reviewing the well known authorities, held that for a term to be implied the following conditions must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it goes without saying; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract. 10

82. The application of these criteria to the facts of this case demonstrates that they have not been met and that no appropriate term was implied into the Newmont agreement. 20

193T.4

83. Needham J. held that the term implied was that each party would do whatever was necessary on its part to ensure that the contractual terms are fulfilled and that such a condition is implied in every contract.

84. We submit that there is no obligation in those terms implied in every agreement and that no authority exists (as none was cited by His Honour) for a proposition of that breadth. 30

85. The conclusion that a condition of the generality and nature of that specified by His Honour ought not be implied is supported by decisions such as Luxor (Eastborourne) Ltd. v. Cooper, (1941) AC 108 and Mona Oil Equipment & Supply Co. Ltd. v Rhodesia Railway Ltd., (1949) 2 All E.R. 1014. In the latter case Devlin J. (as he then was) emphasised that except, perhaps in the rarest circumstances, a party could not rely upon a term not to prevent or obstruct the performance by the other party to a condition to a contract but only upon a breach of an express or implied term of the contract. 40

86. The term required to be implied as contended for by the appellant is one the substance of which (whatever may be its precise formulation) is that the company would not (by any of its organs) seek to have itself released from provisional 50

liquidation so as to remove the jurisdiction of the Supreme Court to grant approval as contemplated by Cl. 3.1.2.3.

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87. His Honour held, we submit correctly, that the provisional liquidator had no standing upon an application to release the company from provisional liquidation. It may be that the directors did, by reason of a residual power left to them after the appointment of a provisional liquidator, have standing to continue to oppose liquidation of the company. Indeed, it may be that the directors have a duty to seek to maintain the continued corporate existence of the company if this be within their power.

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88. The "matrix of facts" include the fact that all parties were aware at the time the Newmont agreement was entered into that the Attorney-General was prepared, on conditions, to withdraw the petition and that directors were desirous of keeping the company in existence. They include the fact that the directors had opposed, and did oppose the making of the Newmont agreement. Thus it could not be regarded as just and equitable that a term be implied that the company would forego an opportunity, if it arose, to have itself released from provisional liquidation for the purpose of the agreement.

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89. Similarly it could hardly be said that it "goes without saying" that the term would have been included by the parties had they turned their mind to it at the time; the famous "officious bystander" would hardly have uttered the appropriate exclamation.

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90. Similarly, the implication of such a term could hardly be said to be necessary for the business efficacy of the agreement. The agreement was one hedged about with conditions. It was an agreement which the parties, at all times, contemplated might never come into operation, particularly bearing in mind the course of the earlier litigation before Needham J. It could hardly be said that it was necessary to give "business efficacy" to such a contract that one of the parties should be obliged to ensure that one of the pre-conditions was fulfilled, the fulfillment of which was always a matter of doubt.

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III. EVEN IF THERE WERE A RELEVANT IMPLIED TERM, THERE WAS NO BREACH OF IT BY THE COMPANY

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91. In any event, how can it be said that there was a breach of the company of any relevant implied

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term? The provisional liquidator was not entitled to oppose the withdrawal of the petition. It is highly doubtful whether any opposition by the organ of the company could have precluded dismissal of those proceedings once sought by the Attorney-General. The petition was not on the ground of insolvency. There was no question of the interest of other outstanding creditors. No-one but the petitioner really had any relevant interest in having the proceedings maintained. No individual member of the public had standing to intervene. Those proceedings were at the Attorney-General's disposal alone and the Court was in effect obliged to dismiss them at his request without reference to other persons including even the company itself.

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92. The breach, therefore, would have to be sought in any action by Laverton in complying with the conditions on which the Attorney-General had indicated that he was prepared to seek the withdrawal of his petition. But so far as the evidence goes the relevant acts were not acts of the company but acts of certain of its directors on a personal basis in giving undertakings. One director undertook to resign and remain absent from the board of directors. The other directors undertook to resign and seek re-election to ensure that their continuance in office was with the approval of the shareholders. These cannot be characterised as actions of the company in breach of contract even if the agreement had implied in it a relevant term.

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IV. <u>ONCE THE CONDITION OF APPROVAL BECAME IMPOSSIBLE OF FULFILLMENT THERE COULD BE NO BREACH BY NON TENDER OF THE TRANSFERS</u>

93. Once the condition imposed by 3.1.2.3. of approval of the Newmont agreement by the Supreme Court became impossible of performance there was no longer any obligation on the first three respondents to continue to comply with the agreement. Accordingly, there was no breach of the agreement by any of them in declining or failing, after request, to furnish transfers for submission to the Minister for Mines. It is not possible, and does not appear to be contended by the appellants, that any act or omission on the first three respondents' part before the dismissal of the petition could be characterised as a breach of any obligation under the Newmont agreement.

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94. It flows from the above that there should be a finding by your Lordships, contrary to the

views expressed by Needham J., that there was no breach of the Newmont agreement by any of the first three respondents and we respectfully seek that finding.

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V. EVEN IF THERE WERE A BREACH OF CONTRACT BY LAVERTON OR NICKEL MINES THE FAILURE TO OBTAIN APPROVAL OF THE NEWMONT AGREEMENT DID NOT FLOW FROM THAT BREACH BUT WOULD HAVE OCCURRED IN ANY EVENT

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95. The failure to obtain approval flowed from the removal of the provisional liquidator which was caused by the Attorney-General's withdrawal of his petition. The company could not prevent, and ought not have prevented, the Attorney-General from withdrawing his petition: paras 87 and 91 above.

96. Secondly, if the approval application of the Newmont agreement had been heard in the Equity Division, it must in any event have failed because of the availability to the first three respondents of the Esso agreement. As set out in paragraphs 54 to 58 above, the Esso agreement was considerably more advantageous to the first three respondents than was the Newmont agreement. No Judge could raionally have approved the Newmont agreement in face of that fact. Needham J. specifically said that he would have found the Esso agreement preferable.

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VI. THE NEWMONT AGREEMENT ALSO FAILED BECAUSE THE MINISTER FOR MINES DID NOT GIVE AND WOULD NOT HAVE GIVEN HIS CONSENT TO THE TRANSFER OF THE MINING LEASES

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97. Cl. 3.1.2.4 provided that the agreement was conditional upon obtaining the approval or consent of the Hon. Minister for Mines and Energy in the State of Queensland.

98. It is submitted that no consent was obtained. Application for approval was made by letter dated 22nd December, 1978. The Minister answered that application by letter dated 19th January, 1979.

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99. It is submitted that the letter was not a consent or approval; it was no more than a statement of what the Minister believed he would do upon the conditions, stated in the letter, being fulfilled.

100. If, however, the letter from the Minister is construed as a consent or approval, the conditions

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specified in the letter were not fulfilled. The transfers of title were not lodged. Nor was the written consent of Leonora obtained.

101. The appellants concede that the transfers of title were not lodged. But they claim, as Needham found, that this was because of a breach by the first two respondents of their obligation to lodge the necessary documents.

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102. The Newmont agreement, however, provided (cl. 11.11.2) that the transfers need not be delivered until 15 days after the last of the consents mentioned in cl. 3.1.2 was obtained. The Minister gave three months for the documents to be lodged. So the first two respondents had until 19th April, 1979 to do this. Their failure to lodge their transfers before Needham J. had approved the Newmont agreement (which was heard in February 1979) could not be a breach of any express or implied obligation to lodge the transfers.

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130-134, 147-167, 135-147, 171-182, 182-192

103. Further, it is plain that Leonora did have a beneficial interest in certain of the mining leases. The evidence of Mr. Lynch, Dr. Palmer, Miss Mathews, Mr. Doolan and Mr. Brown together with Exhibits 3A-3B demonstrate this fact.

104. Leonora did not give its consent to the transfer of the leases of which it was the beneficial owner. So an essential requirement of the Minister's letter of the 19th January, 1979 was not fulfilled.

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VII. THE FIRST TWO RESPONDENTS WERE NOT PRECLUDED FROM ASSERTING THAT THE MINISTER FOR MINES WOULD NOT HAVE CONSENTED TO THE TRANSFERS OF TITLE ON THE GROUND THAT LEONORA WAS IN FACT THE BENEFICIAL OWNER OF CERTAIN LEASES

280-24-281.9

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105. Central to appellants' case is the claim that the Newmont agreement is in force and ought to be specifically performed. But basic to the bargian was the transfer of titles which could only be done with the consent of the Minister for Mines. Unless Leonora, the beneficial owner of certain leases, consented, the Minister would not give his consent to the transfer. It is nothing to the point that the first two respondents had warranted that no other person had an interest in the leases. If Leonora would not consent, the Minister would not consent. The warranty of the first two respondents might possibly give rise to some claim for damages. But it could not convert

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a conditional agreement into an unconditional agreement or one which could be specifically enforced. No Court, for example, could compel the Minister for Mines to consent. Nor could any Court rewrite the bargain for the parties so that the transfer of titles with their rights and duties would remain with their first two respondents.

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VIII. SINCE THE FAILURE OF THE APPROVAL OF THE SUPREME COURT AND OF THE MINISTER FOR MINES DO NOT FLOW FROM ANY BREACH OF CONTRACT ON THE PART OF THE FIRST TWO RESPONDENTS THE NON FULFILMENT OF EITHER OF THOSE CONDITIONS BROUGHT THE NEWMONT AGREEMENT TO AN END

106. The matters set out in paragraphs 78-105 above demonstrate that the non fulfilment of conditions 3.1.2.3 and 3.1.2.4 of the Newmont agreement did not flow from any breach of contract on the part of Laverton or Nickel Mines. It follows that the Newmont agreement was brought to an end by the terms of 3.1.2 itself.

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IX. IN ANY EVENT SPECIFIC PERFORMANCE MUST BE REFUSED BECAUSE THE AGREEMENT IS OF A TYPE OF WHICH THE COURT WILL NOT ORDER SPECIFIC PERFORMANCE BEING ONE WHICH REQUIRES " CONSTANT SUPERVISION"

107. Needham J. found the agreement would require "constant supervision", and refused specific performance. He relied on J.C. Williamson Pty. Ltd. v. Lukey and Mulholland, (1931) 45 CLR 282. His Honour's finding was correct. In view of what was involved in the Newmont agreement, particularly as set out in paragraphs 25 to 37 above, this was a classic case for the application of that doctrine: see also Ryan v. Mutual Tontine Westminster Chamber Association (1893) 1 Ch. 116; Blackett v. Bates (1865) L.R. 1 Ch. 117; Miotti v. Belford 79 WN (NSW) 98; Pakenham Upper Fruit Co. v. Crossley 35 CLR 386; Powell Duffryn Steam Coal Co. v. Taff Vale Railway (1874) L.R. 9 Ch. 331.

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X. SPECIFIC PERFORMANCE MUST ALSO BE REFUSED IN THIS CASE FOR WANT OF MUTUALITY

108. The doctrine of mutuality has been the subject of considerable recent discussion, both academic and judicial, particularly as to the time at which mutuality is required; see Hanbury & Maudsley, Modern Equity (11th Edn) 61-4; Spry, Equitable Remedies (2nd Edn) 89-95; Price v. Strange (1978) Ch. 337. In that case it was held

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by the Court of Appeal that the only relevant time was the time of the hearing, contrary to the view espoused by Sir Edward Fry in 1858 and maintained until the last edition of his classic work (6th Edn) par. 463.

109. But whatever is the appropriate time for determining mutuality, this is a clear case in which that doctrine precludes the grant of specific performance. This is so whether mutuality is regarded as going to power or only to discretion. It is closely analogous to such a classic case as Ogden v. Fossick, (1862) 4 De G.F. & J. 426; 45 ER 1249 where the Court of Appeal in Chancery declined specifically to enforce the grant of a lease of a coal wharf where part of the consideration therefor was the employment of the defendant as manager, which promise clearly could not be specifically enforced. In this regard we draw attention again to the detailed promises made by the appellants in the Newmont agreement as set out in paragraphs 25 to 37 above. To fail to apply the doctrine in this case would really be to throw out the whole doctrine of mutuality as entrenched in English and Australian jurisprudence. (See the cases referred to in para. 108 herein.)

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CONCLUSIONS

110. The first three respondents, therefore, respectively submit that the Appeal should be dismissed with costs.

REASONS

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1) BECAUSE the Newmont Agreement was not within the power of the Provisional Liquidators to make it.

2) BECAUSE none of the Respondents were involved in any breach of any term, express or implied, of the Newmont Agreement.

3) BECAUSE if the Newmont Agreement was validly made, it came to an end upon the failure to obtain the approval of the Supreme Court to the agreement and/or the consent of the Minister to the transfer of the mining leases.

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4) BECAUSE the Newmont Agreement was not an agreement of which the Court would order specific performance.

M.H. McHUGH

JOHN P. HAMILTON
Counsel for the first 3 Respondents

No. 31 of 1981

IN THE PRIVY COUNCIL

O N A P P E A L

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

- and -

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

(Respondents)
(Defendants)

CASE FOR THE FIRST, SECOND AND THIRD RESPONDENTS

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