SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Nickel Sales Pty Ltd & Ors v Mount Isa Mines Limited* [2019] QCA 32
PARTIES:	**QUEENSLAND NICKEL SALES PTY LTD** ACN 009 872 566 (first applicant) **QNI RESOURCES PTY LTD** ACN 054 117 921 (second applicant) **QNI METALS PTY LTD** ACN 066 656 175 (third applicant) **v** **MOUNT ISA MINES LIMITED** ACN 009 661 447 (respondent)
FILE NO/S:	Appeal No 5 of 2018 SC No 7515 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 285 (Atkinson J)
DELIVERED ON:	26 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2018; 30 August 2018
JUDGES:	Fraser and Gotterson and McMurdo JJA
ORDERS:	**1. Time to appeal is extended to 1 March 2018.** **2. The appeal is allowed to the limited extent for which these orders provide.** **3. The appeal is otherwise dismissed.** **4. The proceeding commenced by the respondent on 24 July 2017 is to continue as if started by claim in respect of the defence advanced by the appellants claiming relief against forfeiture and the arguments raised by Ground k in the appellants' revised proposed notice of appeal, only.** **5. The proceeding is remitted to the Trial Division for determination of those matters at a trial on pleadings.**

6. **Orders 1, 4 and 5 made in the proceeding on 20 November 2017 are set aside.**

7. **The parties are to file and serve written submissions not to exceed three pages each as to the costs of the application for extension of time to appeal and of the appeal, within seven days of the publication of these reasons.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – where the respondent brought an originating application seeking a declaration that the respondent could lawfully remove the appellants' equipment – where the appellants argued that the matter was not appropriate for determination by originating application and should proceed by way of pleadings – where the learned primary judge found the arguments advanced by the appellants were "clearly unarguable" – where the appellants appealed against the dismissal of their application to have the matter proceed by way of pleadings – whether the primary judge erred in determining that the appellants' arguments could be determined summarily

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN GRANTED – where the notice of appeal was not filed in time – where the application for extension of time is dependent upon the prospects of success of the proposed grounds of appeal – whether the application for extension of time is granted

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – GENERALLY – REASONS FOR JUDGMENT – ADEQUACY OF REASONS – where the appellants argue that the learned primary judge dismissed the appellants' application without considering the essential ground or grounds upon which the decision was made – whether the learned primary judge gave a final determination of the issues raised by the appellants – whether the learned primary judge gave adequate reasons for dismissing the appellants' arguments

REAL PROPERTY – LICENCES – TERMINATION – where the respondent granted a licence for non-exclusive access to a berth at the Port of Townsville (the Premises) for the purposes of berthing vessels, unloading and loading nickel ore and refined products and for the construction, installation and maintenance of certain works – where the licence agreement contained an essential term to punctually pay all harbour dues – where the respondent alleges that harbour dues were not paid – where the respondent alleges that the licence agreement was terminated because of failure to pay the harbour dues – whether the licence agreement was terminated – whether the purported termination of the licence was void by reason of

s 440B(b) of the *Corporations Act* 2001 (Cth) – whether the appellants can rely upon relief against forfeiture of the licence – whether the right of termination purportedly exercised by the respondent was void as a penalty

TORTS – TRESPASS – TRESPASS TO LAND AND RIGHTS OF REAL PROPERTY – REMEDIES – where the respondents were awarded damages for trespass to property because of equipment belonging to the appellants trespassing on the premises – whether the learned primary judge correctly calculated an award of damages for trespass

Corporations Act 2001 (Cth), s 440B
Uniform Civil Procedure Rules 1999 (Qld), r 14

Andrews v ANZ Banking Group Ltd (2012) 247 CLR 205; [2012] HCA 30, considered
Barbagallo v J & F Catelan Pty Ltd [1986] 1 Qd R 245; [1985] QSCFC 134, considered
Creswick v Creswick; Tabtill Pty Ltd v Creswick [2011] QCA 66, followed
Di Iorio v Norris [2010] QCA 191, followed
Paciocco v Australia & New Zealand Banking Group Ltd (2016) 258 CLR 525; [2016] HCA 28, considered

COUNSEL: D B O'Sullivan QC, with J P O'Regan, for the applicants
R N Traves QC, with S J Webster, for the respondent

SOLICITORS: Alexander Law for the applicants
Allens for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

[2] **GOTTERSON JA:** Mount Isa Mines Ltd ("MIM"), respondent to the application presently before the Court, has since 23 December 1992, been the assignee of the lessee's interest in two leases originally entered into on 11 June 1974 and 6 November 1987 respectively. The latter lease,[1] which is relevant for present purposes, was of an area known as "No 2 Wharf". This area is adjacent to No 2 Berth at the Port of Townsville. The lease is due to expire on 11 June 2024. By a deed entered into on 20 June 1996,[2] the lessor, Townsville Port Authority ("TPA"), and MIM agreed to an expansion of the leased area at No 2 Wharf.

[3] On 23 August 1994, MIM and Queensland Nickel Pty Ltd ("QNPL") entered into a licence agreement ("Licence Agreement") to which TPA consented. At this time, QNPL was the manager of the Queensland Nickel Joint Venture ("Joint Venture"), which was established under a Joint Venture Agreement ("JVA") dated 17 September 1992[3] in order to operate the nickel refinery at Yabulu near Townsville.[4]

[4] By the Licence Agreement, MIM granted a licence to QNPL, relevantly, to enter upon its leased area at No 2 Wharf for the purposes of the berthing of vessels, the unloading

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1 AB131-146.
2 AB123-130.
3 AB490-576.
4 Clauses 5.1, 5.2.

or loading of *inter alia* nickel ore and refined product from the Yabulu Refinery, the storage on and conveyance over the surface of the licence area of nickel ore and refined product, and the construction, installation and maintenance of certain works thereon. The licence was to continue until 10 June 2024. It is convenient to refer to the leased area over which the licence was granted as the "licence area".

[5] Pursuant to the terms of the Licence Agreement, QNPL installed infrastructure, being two rail mounted hoppers, a magnetic separator and a wharf conveyor belt, and certain mobile equipment, on the licence area. These facilities had been used to import feedstock ore for the refinery. By use of them, nickel ore was unloaded from bulk carriers moored at No 2 Berth, then, via large hoppers, transported to the adjoining wharf area on a conveyor system and thereafter railed to the refinery for processing.[5]

[6] Since 31 January 1995, the joint venturers under the JVA have been QNI Resources Pty Ltd ("QNR") and QNI Metals Pty Ltd ("QNM"). They beneficially own the Joint Venture Property, as defined therein,[6] as tenants in common and all liabilities of the Joint Venture are severally borne by them.[7] It is uncontroversial that the infrastructure and mobile equipment to which I have referred are Joint Venture Property.

[7] QNPL was placed into voluntarily administration on 18 January 2016. Another company, Queensland Nickel Sales Pty Ltd ("QNS"), was appointed manager of the joint venture in lieu of QNPL on 3 March 2016 pursuant to clause 5.6 of the JVA. The refinery ceased operating in March 2016 and has been in caretaker mode ever since.[8] On 22 April 2016, the creditors of QNI resolved that it be wound up and liquidators were appoint to it.[9]

[8] Pursuant to clauses 14.1 and 14.2 of the lease, TPA appointed MIM its agent and required it to collect, and then pay to TPA, all harbour dues payable under the provisions of its By-Laws in respect of cargo passing over No 2 Wharf from vessels berthed at No 2 Berth or in its vicinity.[10] A complementary provision in the Licence Agreement, clause 12.1(k), obliged QNPL to duly and punctually pay all harbour dues to MIM as agent of TPA.[11] Clause 14.5 of the lease entitled MIM to a service fee of 20 per cent of amounts paid to TPA under clause 14.2.

[9] Significantly, QNPL and MIM expressly agreed that clause 12.1(k) was an essential term of the Licence Agreement.[12] They further agreed, in effect, that MIM might treat any breach by QNPL in observance of this clause as a repudiation by it of the Licence Agreement.[13]

[10] By written notice dated 28 January 2016,[14] MIM notified QNPL that it was in material breach of clause 12.1(k) by failing to pay harbour dues of $1,215,435.32 "which [was] overdue for payment". The notice required that the default be remedied within 28 days of receipt of the notice.

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5 Affidavit of IM Ferguson filed 11 August 2017 at [26], [32]: AB702-704.
6 At clause 1.1.
7 Clause 3.1.
8 Affidavit of IM Ferguson filed 11 August 2017 at [26], [27]; AB 702.
9 Affidavit of DP Zammitt sworn 19 July 2017 at [11]; AB 119.
10 AB137.
11 AB157.
12 Clause 36.1; AB681.
13 Ibid.
14 AB229.

[11] Later, on 14 March 2016, MIM wrote a letter[15] to the voluntary administrator of QNPL noting that the material default had not been remedied. MIM thereby gave notice pursuant to clause 21.2 of the Licence Agreement terminating that agreement. The letter contained the following statement:

> "MIM accepts that, pursuant to section 440B of the *Corporations Act* 2001, MIM cannot, without the administrators' consent or leave of the Court, take possession of the property of the subject of the Licence Agreement or otherwise recover it whilst QNI remains in voluntary administration. However, that prohibition does not prevent MIM from taking the action which it has taken, by this letter, to terminate the Licence Agreement".[16]

[12] The infrastructure and mobile equipment to which I have referred remained at No 2 Wharf. A question arose as to whether QNPL, which subsequently entered into liquidation, claimed any interest in them. On 21 December 2016, solicitors for the liquidators confirmed that no such interest was asserted by their clients.[17] The confirmation had been prompted by a written demand from MIM, dated 15 December 2016, that QNS and the liquidators agree as to ownership of the infrastructure and mobile equipment and remove them from the former licence area at No 2 Wharf within 14 days.[18] QNS did not comply with the request. They remain at No 2 Wharf.

[13] QNPL has not challenged the validity of the termination of the Licence Agreement. Its liquidators are prepared to abide the decision of the court on that issue.[19] The joint venturers, however, have disputed the termination.[20]

The proceeding

[14] It was in these circumstances that MIM commenced a proceeding in the Supreme Court of Queensland by an originating application filed on 24 July 2017.[21] The respondents to the proceeding are QNS, QNR and QNM as first, second and third respondents respectively. Those parties are the applicants in the application before the Court. For clarity, I shall refer to them collectively as the "QN Companies" in these reasons.

[15] The substantive relief sought by paragraph 1 of the originating application was:

> "A declaration that, if the respondents or any of them do not remove the things listed in Schedule 1 to this application (the Equipment) from Berth 2 at the Port of Townsville within 35 days, the applicant may lawfully:
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> (a) remove, or cause any person to remove, the Equipment from Berth 2;
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> (b) sell and/or scrap the Equipment, or cause any person to do so, on terms the applicant considers fit;

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15 AB233.
16 Ibid.
17 AB708-710.
18 AB707.
19 Email dated 11 August 2017; AB 931.
20 Letter dated 31 January 2017; AB 469.
21 AB1361-1366.

(c) apply any proceeds from the sale of the Equipment:

(i) first, to the applicant's costs of removing, selling and/or scrapping the Equipment;

(ii) second, to the applicant's costs of this application; and

(iii) third, to the extent of any surplus, to the first, second and third respondents."

Schedule 1 listed some seven items of mobile equipment, two rail mounted hoppers, a magnetic separator and a wharf conveyor system. I adopt the collective description of it as "the Equipment" in these reasons.

[16] The originating application was returnable on 11 August 2017. At that time, leave was granted by the judge of the Trial Division by whom it was heard, to add a further paragraph 1A relating to MIM's costs of removing, selling and/or scraping the Equipment in the event of a deficiency in the sale proceeds.[22] The originating application was further amended by leave on 20 November 2017 to include a claim for damages for trespass to land in the amount of $270,215 or, alternatively, $87,615;[23] and an order for costs on the indemnity basis or, alternatively, the standard basis.[24]

The hearing of the proceeding

[17] The application was heard over several hours on 18 August 2017. MIM submitted that whilst the Equipment might have been brought lawfully onto the licence area, the Licence Agreement had been terminated. The continued presence of the Equipment on the former licenced area was a trespass. The QN companies, the owners of Equipment, had been asked to remove it. They had not done so. The principles of the law of trespass permitted the court to make the orders sought.[25]

[18] The QN Companies submitted that the learned primary judge should make an order pursuant to r 14 of the *Uniform Civil Procedure Rules* ("UCPR") that the proceeding continue as if commenced by claim. A summary determination was not appropriate.[26] They intimated that three different cases would be developed to resist MIM's claims for relief.

[19] One case would involve a challenge to the legal efficacy of the termination of the licence on the footing that s 440B *Corporations Act* 2001 rendered the notice of termination void. A second case would propose that by operation of clause 5.6 of the JVA, QNS was entitled to exercise a right to relief against forfeiture of the licence that, in the circumstances, QNPL had acquired. The third case would contend that the right to terminate the licence was a penalty and that QNS was entitled to exercise QNPL's right to assert an entitlement to equitable relief on that account.

[20] Senior Counsel for the QN Companies pressed that these cases were "well arguable" and should go to pleadings so that they could be advanced in a "structured way".[27] As oral submissions in support of them were being made, the learned primary judge

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22 AB1368.
23 By addition of para 1AA; AB1390.
24 By addition of para 3; AB1390.
25 AB7 Tr1-7 ll4-11.
26 Outline of Submissions at [28]; AB 1386.
27 For example, at AB55 Tr1-55 ll19-21.

indicated that she was not persuaded that any of the proposed defence cases was viable.[28] Accordingly, her Honour declined to make an order under r 14.

[21] Later, in the course of argument, and without abandoning the r 14 submission, Senior Counsel for the QN Companies informed the learned primary judge that he had instructions that "there is an intention (on his clients' part) to remove" the Equipment, but no undertaking to do so was offered.[29] Her Honour was informed that some 60 days would be required to carry out the removal.[30]

[22] The hearing concluded that day on the footing that the parties would prepare orders to the effect that if within 63 days the QN Companies had not removed all of the Equipment, then MIM would be at liberty to provide a quote for the removal of what remained and the respondents would be required to pay the amount of the quote within 14 days. If the amount was not so paid, the application would be re-listed before her Honour on 20 November 2017.[31]

[23] Orders to that effect were formally made at a brief hearing on 28 August 2017.[32] The nominated date by which the Equipment was to have been removed was 27 October 2017. A provisional order for costs on the standard basis was made in favour of MIM. Notwithstanding an invitation from her Honour to request formal reasons for these orders, no request was made. There was no appeal from them.

[24] It appears that the parties conferred regarding access by the QN Companies to No 2 Wharf for the purpose of removal of the Equipment. An impasse was reached over indemnities requested by MIM in relation to access and removal of the Equipment. No agreement was reached.

[25] On 28 September 2017, the QN Companies communicated a change of mind. Their solicitors, by letter,[33] disputed that MIM had any right "to occupy Berth 2" or "to use or retain [their clients'] assets". They demanded that MIM "immediately vacate the Berth" and allow the QN Companies to occupy it.

[26] The application returned before the learned primary judge on 20 November 2017. The QN Companies, who were represented by different counsel, sought a stay of the orders made on 28 August 2017. They renewed their request for the matter to proceed by way of pleadings. Their counsel advanced two arguments for why that was an appropriate course and a stay should be granted. These arguments are different from those that had been advanced earlier on their behalf.

[27] At this hearing, no reliance was placed by the QN Companies on the three "arguable defences". They made no submissions about the application of the law of trespass. They did not challenge MIM's quantification of damages for trespass.

[28] After the conclusion of submissions, her Honour delivered reasons for judgment *ex tempore* in which she rejected as "clearly unarguable", the new arguments advanced for the QN Companies.[34] Her rejection of those arguments is not challenged on appeal.

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28 AB54 Tr1-54 ll25-35, AB56; Tr1-56 ll40-47.
29 AB68 Tr1-68 ll4-13.
30 AB40 Tr1-40 ll32-36.
31 AB70 Tr1-70 l35 – AB71 Tr1-71 l37.
32 AB1387-1388.
33 AB952-954.
34 Reasons at [31]; AB1427.

[29] The learned primary judge then made a declaration and orders. Some only of the orders are now challenged by the QN Companies. Two orders that are unchallenged are a dismissal of the stay application (Order 3) and a vacation of the provisional order for standard costs (Order 6).

[30] The declaration made is in the following terms:

> "1. The applicant may lawfully cause the equipment set out in Schedule 1 to the Application (the ***Equipment)*** to be dismantled, removed from its current location and delivered to the first respondent's premises at 1 Greenvale Street, Yabulu Qld 4818 (the ***Premises***)."[35]

The challenged orders are:

> "4. The respondents pay the applicant damages of $270,215.
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> 5. Provided the applicant gives the first respondent 3 clear days' notice in writing of the weekday date or dates on which the Equipment will be delivered to the Premises, the first respondent must accept delivery of the Equipment (whether dismantled or not) at the Premises immediately on the expiry of the notice period, between the hours of 8am and 5pm.
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> …
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> 7. The respondents pay the applicant's costs of the Application on the indemnity basis."[36]

[31] The QN Companies did not file a timely notice of appeal. On 5 January 2018, they filed an application in this Court in which they seek an extension of time for appealing pursuant to r 748 of the *UCPR*.[37] The application states that the QN Companies seek to have Orders 1, 4, 5 and 7 made on 20 November 2017 set aside.

[32] At the same time, the QN Companies filed a proposed notice of appeal.[38] A revised proposed notice of appeal[39] is Annexure A to the QN Companies' written Outline of Submissions dated 1 March 2018. It is the relevant point of reference for the application before this Court. It identifies the judgment appealed from as "20 November 2017 (*ex tempore* reasons)" and seeks to have Orders 1, 4 and 5 only set aside. Apart from the setting aside of these orders, the QN Companies seek orders that the proceeding continue in the Trial Division as if started by a claim. Alternative orders that would limit the proceeding by way of claim to the Equipment infrastructure only are also sought.

The application for an extension of time

[33] The date by which a timely notice of appeal could have been filed was 18 December 2017. Allowing for the intervening court holidays when the Registry was closed, the

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35 AB1428.
36 AB1429.
37 AB1430-1432. This application also seeks leave to appeal. The matter has, however, proceeded on the footing that no such leave is required.
38 AB1433-1434.
39 AB1438-1444.

application and the proposed notice of appeal were filed some six working days after that date.

[34] The solicitor for the QN Companies has deposed that his clients always intended to appeal. He delegated the task of preparing a notice of appeal to an employed solicitor on his staff. She became quite unwell and was unable to work. By oversight, this was not relayed to him and preparation of the document was overlooked. That task was ultimately undertaken during the Christmas period. Arrangements were made for the Registry to open on a court holiday but the notice of appeal was rejected for filing as it was out of time. Immediately after the court holiday period had concluded, the application for an extension of time and the proposed notice of appeal were filed.[40]

[35] In written submissions, MIM has proposed that some of the facts deposed to by the solicitor must have been "on information", yet he has not disclosed the sources of the information or sworn to grounds for a belief on his part that it is correct. As well, MIM has invited this Court to infer that the account given by the solicitor of "administrative oversight" is unsupported by facts to which he has deposed. The solicitor was not required for cross-examination. The suggested inference was not pursued in that way; nor was it addressed in oral submissions.

[36] In these circumstances, I am prepared to proceed on the basis that the solicitor's evidence provides an adequate account of why there was a delay in filing. Significantly, the period of the delay is very short. MIM has not put on evidence deposing to any prejudice suffered by it in consequence of the delay.

[37] Decisions of this Court have consistently held that the prospects of success of the proposed appeal are relevant to the grant of an extension of time to appeal.[41] They are highly relevant here given that the proposed grounds of appeal were fully argued on this application. In the circumstances, I intend to defer determining whether an extension of time ought to be granted until I have stated my conclusions as to their prospects of success.

The grounds of appeal

[38] The revised proposed notice of appeal contains some 12 grounds of appeal, Grounds a to l. A number of them contained detailed particulars. Ground k, for example, contains 11 particulars. I do not propose to set out the grounds in full at this point. They are grouped according to the following subject matter:

Ground a	A failure to give adequate reasons
Grounds b to i	Error of law in proceeding to determine the matter summarily, without pleadings or a trial – defences advanced on 11 August 2017
Ground j	Errors in damages awarded
Ground k and l	Error of law in proceeding to determine the matter summarily, without pleadings or a trial – new matters not argued at first instance

40 Affidavit of SM Iskander sworn 5 January 2018 at [5], [8], [9], [11] and [12]; AB1447-1448.

41 *Di Iorio v Norris* [2010] QCA 191 per Muir JA at [4]; *Creswick v Creswick*; *Tabtill Pty Ltd v Creswick* [2011] QCA 66 per Fraser JA at [15].

[39] I propose to consider these grounds in the above order.

Ground a

[40] **QN Companies' submissions:** The QN Companies provide context to this ground in the following way. They contend that no determination of the parties' rights was made on 11 August 2017; that the reasons for judgment delivered on 20 November 2017 ought to have, but did not, provide reasons for rejecting the QN Companies' submissions made on the 11 August 2017; that the fact that no party asked for them when invited to do so on 11 August 2017 did not relieve the learned primary judge from an obligation to provide reasons on 20 November 2017 for rejecting those submissions; and that no sufficient reasons for finding that the QN Companies were trespassers or quantifying damages for trespass by reference to future estimated costs of dismantling and removing the Equipment were given.

[41] In written submissions, the QN Companies set out a number of principles with respect to the obligation to give reasons and the sufficiency of reasons where they are required to be given.[42] They concede that lengthy or elaborate reasons were not required here. What was necessary, they submit, was for the learned primary judge to have articulated the essential ground or grounds on which her decision rested.[43]

[42] That did not occur, the QN Companies further submit, with regard to the rejection of their submission that this was an appropriate case for pleadings. Nor was any explanation given for why the three "defences" were so unarguable that they could be disposed of summarily and without pleadings. Those "defences" were unaddressed in the reasons delivered on 20 November.[44] They ought to have been addressed then because they were never abandoned and it was at that point that the court made final orders determining MIM's application.[45]

[43] As to trespass, the QN Companies criticise the reasons delivered on 20 November 2017 for failing, in particular, to explain whether the basis of the finding of trespass was by virtue of a breach of clause 21.4 of the Licence Agreement, which required removal of moveable improvements and other "Approved Works" upon determination of the licence, or by virtue of an absence of authority to continue to locate the Equipment on the former licence area.[46] The QN Companies further submit that had it been the former, there was an insufficiency of evidence that the Equipment, or some of it, was "Approved Works" as defined, or that the requisite prior approval for its removal had been obtained from the TPA.[47] On the other hand, had it been the latter, no explanation was given as to why a trespass was found in the absence of an express contractual provision requiring removal of the Equipment upon termination of the licence and of a submission by MIM that there was an implied term in the Licence Agreement to that effect.[48]

[44] **MIM's submissions:** MIM submits that the reasons given on 20 November 2017 adequately dealt with the substance of the controversy before the learned primary judge on that date. At the hearing on that occasion, two bases were advanced for

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42 Outline of Submissions at [28].
43 Ibid at [27].
44 Ibid at [29], [30].
45 Ibid at [32], [33].
46 Ibid at [36].
47 Ibid at [37].
48 Ibid at [38], [39].

continuing the proceeding as if started by a claim. They were that QNR and QNM, rather than QNPL, were the true licencee parties to the Licence Agreement,[49] and, alternatively, that the QN Companies had rights to have MIM's lease resumed by the State Government under the *Queensland Nickel Agreement Act* 1970 (Qld) and that that was a reason not to grant the relief sought by MIM.[50]

[45] The learned primary judge dealt with both of these bases in the reasons delivered on 20 November 2017, concluding that each of them was "clearly unarguable". MIM submits that this rejection was the substantive reason why an order under r 14 UCPR was not made. It was unnecessary for her Honour to have said so in so many words.[51]

[46] As to the three "defences" advanced at the hearing on 18 August 2017, MIM accepts that the learned primary judge did not give reasons for rejecting them but submits that there was no obligation upon her to have done so. That it is because the arguments made on 11 August 2017 were dealt with and disposed of by the formal orders made on 28 August 2017; the invitation to request reasons was not taken up; and, significantly, the QN Companies did not invoke those "defences" orally or in writing on 20 November 2017. Moreover, the first of the two new arguments that were made on that date was inconsistent with the three "defences".[52]

[47] With regard to trespass, MIM notes that the QN Companies made no submissions about the substantive law of trespass at the hearing on 20 November 2017. Thus, there was no occasion for the learned primary judge to have had to consider in detail the law of trespass or clause 21.4. The Licence Agreement had been terminated and the QN Companies did not identify any legal right on their part to continue to locate their Equipment on the former licence area.[53]

[48] MIM argues that there was evidence before the learned primary judge as to the quantum of damages for trespass.[54] No objection was taken to it by the QN Companies. Nor did they put in issue that this evidence reflected the proper basis for assessment of damages. There were, therefore, no competing contentions as to damages which her Honour was required to resolve.[55]

[49] **Discussion:** This ground of appeal raises questions, first, whether a final determination was made by the learned primary judge on either 11 or 28 August 2017 of the three "defences" and the associated issue of the QN Companies' standing to raise them, and, secondly, if not, whether the defences remained alive for determination on 20 November 2017. Before considering these questions, I note that the orders made on 28 August 2017 would appear to have finally disposed of the submission requesting directions under r 14. It is tolerably clear that that submission was disposed of because her Honour thought that none of the three "defences" was viable. No additional consideration or considerations which required reasons informed the rejection of the submission.

[50] As to the first question, I am unpersuaded that the formal orders made on 28 August 2017 conclusively determined the three "defences". The directions made at that time reflected the intimation given by the QN Companies that they would remove the

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49 As had been contended in a new proceeding, BS 12172 of 2017, commenced on 11 November 2017, in which QNR and QNM sought specific performance of the Licence Agreement; AB980-994.

50 QN Companies' Outline of Submissions dated 20 November 2017 at [15]-[24], [25]-[32]; AB1412-1416.

51 Outline of Submissions at [21].

52 Ibid at [22].

53 Ibid at [24], [25].

54 Affidavit of D Zammitt sworn 20 November 2017 at [15] and Exhibit DZ – 17 thereto; AB1015, 1068-1070.

55 Outline of Submissions at [26].

Equipment. The directions were not final in the sense of being determinative of pre-existing rights or obligations with respect to the Equipment.

[51] Nor do I consider that the fact that reasons were not requested, notwithstanding the offer made by the learned primary judge to give them on 11 August 2017, has a significant role to play in the resolution of this ground of appeal. A review of the transcript of the hearing on that day[56] suggests that the offer made was to give reasons for the directions that her Honour was proposing to make. It is far from clear that reasons concerning the three "defences" were envisaged.

[52] With regard to the second question, the position is that the "defences" were never formally abandoned. It is, I think, understandable that they were not expressly renewed at the hearing on 20 November 2017 given the disparagement of them by the learned primary judge during the course of the hearing on 11 August 2017. Nor do I regard an inconsistency with one of the two bases advanced on 20 November 2017 as an implicit abandonment of the "defences". It is commonplace for a proceeding to be defended on mutually inconsistent grounds in the alternative.

[53] The above circumstances lead me to conclude that the three "defences" remained live at the time of the November hearing. The orders made on 20 November 2017 had the effect of finally determining these "defences". The making of Orders 1 and 4 in particular, stood as a clear rejection of at least the standing of the QN Companies to raise them. The reasons given on that day did not explain why the "defences" were rejected or why the QN Companies lacked standing to rely upon them.

[54] I consider that, here, the duty to give reasons required that a concise, reasoned explanation for the rejection of the "defences", or of a finding that the QN Companies lacked standing to raise them, ought to have been given. The reasons given on 20 November 2017 were deficient in that they did not contain such an explanation. That is not to say that the deficiency necessarily has any practical consequences for the proposed appeal. It is only if one, at least, of the "defences" is meritorious and one, at least, of the QN Companies has standing to raise the defence or defences, that this ground would avail them. The "defences" and the issue of standing to raise them are considered later in these reasons.

[55] As to trespass and damages, it will be recalled that the claim for relief in that regard was added by leave on 20 November 2017. A claim for damages for trespass was not before the court at either hearing in August 2017. Perusal of the transcript of the hearing on 20 November 2017 and of their written Outline of Submissions[57] reveals that the QN Companies did not substantively put in dispute MIM's submissions concerning trespass and its entitlement to damages or challenge the relevance or accuracy of the evidence as to quantification of damages. No adjudication of competing arguments on those issues was required. There was, therefore, no obligation upon the learned primary judge to have given reasons for the award of damages for trespass.

Grounds b – i

[56] These grounds are centred upon the three "defences" argued by the QN Companies on 11 August 2017. Grounds b and c are reciprocal. They contend that the learned primary judge erred in determining the matter summarily without pleadings or a trial (b),

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56 AB70 Tr1-70 ll11-40.
57 AB2475-2484.

and instead should have directed that the proceeding continue as if started by a claim and made appropriate directions (c). These grounds are otherwise unparticularised.

[57] Grounds d, e and f are also reciprocal. They focus upon the "defences". Ground d contends that the learned primary judge ought to have concluded that arguable defences to MIM's claim for relief existed and made directions for pleadings and a trial accordingly. Ground e alleges error in concluding that the three "defences" were so unarguable that they did not merit pleadings or resolution by trial. Ground f is, in effect, a restatement of Grounds d and e in a summarised form.

[58] Ground g proposes that in the premises of Grounds b to f, Orders 1, 4 and 5 should be set aside and that, in lieu thereof, orders should be made for the matter to proceed by way of pleadings.

[59] Grounds h and i provide for alternative orders. Ground h contends that because of the three "defences", the learned primary judge should have dismissed the originating application. Finally, Ground i proposes that in the premises of Ground h, the judgment at first instance should be set aside and judgment entered for the QN Companies dismissing the originating application.

[60] As may be expected, the submissions made by the QN Companies on these grounds are directed towards the three "defences" which, on their case, her Honour should have been satisfied are fairly arguable. I now turn to those "defences". It is convenient to consider each of them separately.

The s 440B "defence" – Ground e(i)

[61] Section 440B of the *Corporations Act* 2001 (Cth) enacts certain restrictions that are to apply in relation to the exercise of the rights of a person, in that section denoted as the "third party", in the property of a company under administration or other property used or occupied by, or in the possession of, such a company.[58] The restrictions are set out in a table in s 440B(3). They do not apply if the rights are exercised with the administrator's written consent or with the leave of the Court.[59]

[62] Relevantly, Item 3 in the table applies if the third party is "a lessor of property used or occupied by, or in the possession of, the company, including a secured party (a ***PPSA secured party***) in relation to a PPSA security interest in goods arising out of a lease of the goods". There are three restrictions which apply for Item 3. One of them has potential relevance for present purposes. It is restriction (b) which provides that "the third party cannot take possession of the property or otherwise recover it".

[63] For Item 4, the third party is "an owner (other than a lessor) of such property". This item contains a similar restriction (b) on taking possession and recovery of the property.

[64] It will be recalled that QNPL was under administration when the notice of termination was served on it on 14 March 2016. It was a company to which s 440B applied.

[65] **QN Companies' submissions:** The QN Companies submit that, on the proper construction of Item 3, first, the term "lessor of property" includes a licensor of real property, and, secondly, restriction (b) prevents termination of a licence; and it is not

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58 Section 440B(1).
59 Section 440B(2).

limited to taking possession of property or otherwise recovering it. Thus, they further submit, the learned primary judge erred in acting upon the view she expressed in the course of oral submissions that Item 3 applies only to a lessor according to ordinary legal concepts, and not to a licensor.[60]

[66] As to the first construction point, the QN Companies rely on the decision in *Re Rhodes & Beckett Pty Ltd*[61] as authority for assimilating a licensor with a lessor in the application of s 440B.[62] In addition, they contend that a "non-technical" meaning for "lessor" better accommodates the operation of Item 3 in relation to property used or occupied by the company in contrast with property within its possession.[63] Further, they suggest, such a meaning assists in giving Items 3 and 4 together a comprehensive operation in relation to property meeting that description.[64]

[67] Allied to that contention is a further submission that the rationale for s 440B in providing "a breathing space for the company" until the creditors can make a decision about its future, is better fulfilled by such a non-technical meaning. In elaborating the contention, they suggest that terminating a licence to occupy premises or to use equipment may disable a business and remove its "breathing space" just as much as terminating a lease might.[65]

[68] In respect of the second construction point, the QN Companies rely on the decision in *United Petroleum Pty Ltd v Bonnie View Petroleum Pty Ltd (in liq)*.[66] It is artificial, they argue, to characterise a termination of a licence of premises as distinctly different from the effect that a termination has of "recovery" from the licensee of the right to occupy the premises *in futuro*.[67]

[69] In summary, the QN Companies submit that MIM was a lessor of "Berth 2" for the purposes of Item 3 but, if not, it was the owner of "Berth 2" within the meaning of Item 4. The notice of termination infringed restriction (b) in each item. Accordingly, it was of no legal effect.[68]

[70] **MIM's submissions:** MIM submits that it was not a "lessor of property" within the meaning of Item 3. The Licence Agreement did not grant exclusive possession; it was not a lease.[69] A "non-technical" meaning for "lessor" is not required. Section 440B applies to both real property and personalty. The word "used" has a natural application to personal property, "occupied" has a natural application to real property and "possession" has a natural application to both types of property.[70]

[71] MIM also submits that s 440B must be read together with s 441J of the *Corporations Act*, which at 14 March 2016 provided:

> "Nothing in section 437C or 440C prevents a person from giving a notice to a company under an agreement relating to property that is used or occupied by, or is in the possession of, the company."

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60 AB54 Tr 1-54 ll8-35.
61 [2017] VSC 170.
62 Outline of Submissions at [54].
63 Ibid at [55].
64 Ibid at [57].
65 Ibid at [56]-[60].
66 [2017] VSC 185.
67 Outline of Submissions at [51].
68 Ibid at [62].
69 Ibid at [52].
70 Ibid.

MIM further submits that the reference to s 440C in the section should be read as a reference to s 440B. Section 440C was a predecessor of Item 3 in the table in s 440B(3) and was repealed by the *Personal Property Securities (Corporations and Other Amendments) Act* 2010 (Cth), which also substituted a new s 440B in the present form. Evidently, amendment of the reference to s 440C in s 441J was overlooked at that time.

[72] MIM's argument is that when s 440B and s 441J are read together, it is plain that there was no legislative intention to place a moratorium on a third party giving a notice of termination of any agreement with a company under administration. The restrictions are upon the exercise of a third party's rights **in** property; there is no broad overall restriction concerning any rights relating in some way or other to property.[71] That notice of termination of an agreement may be given is confirmed by a number of authorities, including *Re Pan Australia Shipping Pty Ltd (under administration)*[72] and *Strazdins v Birch Carroll & Coyle Ltd*.[73]

[73] MIM also argues that it did not "take possession" of the Berth or "otherwise recover it" by the act of giving notice of termination. The notice itself made that clear. In any event, MIM cannot have **taken**, or **recovered**, possession of the Berth because it never parted with possession in the first place when it entered into the Licence Agreement.[74]

[74] **Discussion:** The term "lessor" has an established legal meaning. In ordinary legal concepts, it denotes a party who has granted a lease of property. The hallmark of a lease is, of course, the grant of exclusive possession of the property. It may be expected that when the legislature uses the word "lessor" in an enactment, it is intended to have this ascertained legal meaning.

[75] I am unable to accept the QN Companies' proposition that, in context, this word was intended to have a "non-technical" meaning. A first hurdle for acceptance of the proposition is that such a meaning is itself undefined. The description "non-technical" is unspecific. It lacks any frame of reference for determination of its content.

[76] Nor do I accept that the legislature intended that the word "lessor" in Item 3 extend beyond its ordinary legal meaning to include a licensor, for several reasons. Firstly, elsewhere in the *Corporations Act*, the legislature has distinguished between leases and licences,[75] indicating a consciousness on its part that the legal concepts are different and a disposition towards recognition of the difference in this legislation.

[77] Secondly, as MIM submits, the application of Item 3 to property used or occupied by the company, as well as in its possession, does not imply that the word "lessor" is to include a licensor. It is significant that s 440B, and hence Item 3, apply to both real property and personalty. The reference to use and occupation, as well as possession, is consistent with a legislative intention that the application of the moratorium in s 440B should not depend upon perceived distinctions between physical possession of property and legal possession of it. This reference precludes argument seeking to limit the scope of the moratorium that might have been available had the word "possession" only been used.

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71 Ibid at [49].
72 (2006) 235 ALR 554; [2006] FCA 1379 at [9]-[11].
73 (2009) 178 FCR 300; [2009] FCA 731 at [110].
74 Outline of Submissions at [52].
75 Section 258B.

[78] Thirdly, the decision in *Rhodes & Beckett* does not contain a judicial determination that the word "lessor" includes a licensor in this context. In that case, the convening period for the second creditors meeting was extended in order to prolong the period of protection given by s 440B in relation to premises occupied by the company under both leases and licences. It is clear from the reasons that the Court and the parties accepted, without argument, that the provision protected the tenancies held by the company under licences as much as it protected those that were the subject of leases.[76]

[79] Nor do I accept that restriction (b) prevents a third party to whom it applies from giving a notice terminating an agreement relating to property. To interpret the restriction as having that effect would create a direct conflict with s 441J.[77] Section 440B, when read with s 441J, established a moratorium upon the exercise of proprietary rights in property; it did not establish a moratorium upon giving notice of termination of an agreement, including a licence.

[80] I acknowledge that in *United Petroleum*, Kennedy J concluded that the purported termination of a lease was also invalid by reason of s 440B. His Honour observed that "the act of determining the lease purported to take away the corporate tenant's right to possession".[78] However, no reference is made in the reasons to s 441J. The conclusion appears to have been reached without the benefit of argument as to the operation of that provision.

[81] By contrast, in *Pan Australia Shipping*, where reference was made in argument to s 441J, Finkelstein J held that that provision permitted the giving of a notice of termination of a charterparty.[79] To similar effect, in *Strazdins*, Lander J observed that, by virtue of s 441J, a lessor might give notice of termination of a lease during a period in which a lessee company was under administration.[80]

[82] Since restriction (b) is common to Items 3 and 4, it would not prevent a third party who is either a lessor, or owner other than a lessor, of property from giving notice terminating an agreement relating to the property. Had MIM been either in this case, the restriction would not have prevented it from giving a termination notice. It is therefore unnecessary to consider MIM's alternative argument that it never ceded possession of the Berth with the consequence that it could not take or recover possession of it.

[83] For these reasons, I conclude that the "defence" that the QN Companies have raised in reliance upon s 440B has no prospects of success. That conclusion is arrived at by a process of statutory interpretation. It is not dependent upon an anterior conclusion about contentious fact for the resolution of which pleadings and a trial would have been the appropriate vehicle.

[84] I hasten to say that I have reached this conclusion without consideration of whether any of the QN Companies had standing to raise this as a defence. Since it is legally flawed, it could not have been availed of by any of them in any event.

[85] The learned primary judge was, in my view, correct to regard the "defence" as without legal merit. It did not warrant pleadings to fairly litigate it.

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76 At [29]-[31], [34], [35] and [38].
77 I accept MIM's submission that the reference to s 440C in s 441J is to be read as a reference to s 440B.
78 At [233].
79 At [10].
80 At [110].

The relief against forfeiture "defence" – Ground e(ii)

[86] **Contractual provisions:** As noted, the joint venturers appointed QNS manager of the joint venture pursuant to clause 5.6 of the JVA on 3 March 2016. Clause 5.6(d) of that agreement provides:

> "When a Manager ceases to be such it shall deliver to the Successor Manager all Joint Venture Property and all documents, books, accounts and records relating to the Joint Venture which it was the responsibility of the outgoing Manager to maintain. An audit shall be conducted by a registered company auditor appointed by the Successor Manager of all such books, accounts and records. If title to any Joint Venture Property is held in the name of the outgoing Manager, it shall promptly transfer such title to the Successor Manager at the cost of the Joint Venture. If the outgoing Manager shall fail to transfer title to any Joint Venture Property to the Successor Manager as aforesaid, the Joint Venturers shall have the power to execute, in the name of the outgoing Manager, all instruments necessary to effect such transfer of title to the Successor Manager."[81]

The interest that QNPL held under the Licence Agreement was Joint Venture Property as that term is defined in clause 1.1 of the JVA, at the date of appointment of QNS as its successor.

[87] At no time after the appointment of QNS did QNPL purport to transfer or assign its interest in the Licence Agreement to QNS. By orders made on 29 September 2016, a judge of the Trial Division dismissed an application by the joint venturers and QNS for leave to proceed against QNPL for relief including an order that it transfer or deliver Joint Venture Property to QNS, or alternatively, to the joint venturers. The dismissal was affirmed on appeal.[82] A significant reason for the refusal of leave was the applicant's pleaded negation of any right on the part of QNPL to be indemnified out of the property for liabilities which it incurred while it acted as manager, as a condition of a transfer of assets under clause 5.6(d).

[88] By a letter dated 21 December 2016, solicitors for the general purpose liquidators of QNPL indicated that their clients were ready, willing and able to transfer the interest in the Licence Agreement and property identified as "Berth 2 Assets" as directed by the joint venturers.[83] The solicitors noted that up to that time any transfer had been prevented by, amongst other things, a failure of the joint venture parties to cooperate with the liquidators in arranging a transfer of the Berth 2 Assets. That aside, the joint venturers did not at any time purport to act under clause 5.6(d) by executing an assignment of QNPL's interest under the Licence Agreement in the name of that company.

[89] Relevantly, clause 24.1 of the Licence Agreement at all times provided:

> "Neither Party may assign the benefit of this Agreement to any other Party, whether a Related Body Corporate or not, without the prior written consent of the other Party, such consent not to be unreasonably withheld. For the purposes of this Clause 24 assignment includes sub-licence."[84]

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81 AB526.
82 [2017] QCA 167.
83 Affidavit IM Ferguson filed 11 August 2017, exhibit "IMF-2"; AB708-710.
84 AB163.

MIM at no time consented to an assignment by QNPL of its interest under the Licence Agreement to QNS. It may be accepted that by the time this proceeding was commenced, its consent had not been requested.

[90] **The decision at first instance:** The transcript of argument before the learned primary judge on 11 August 2017 indicates that her Honour rejected this defence for two reasons. One related to standing. Her Honour appears to have taken the view that because there had been no consent given under clause 24.1, and no request for it made, the QN Companies, including QNS, had no standing to seek relief in respect of the Licence Agreement.[85] A second reason was that an undertaking to pay the outstanding harbour dues was not offered by the QN Companies.[86]

[91] **QN Companies' submissions:** The QN Companies' ultimate submission is that this "defence" is sufficiently arguable so that pleadings should have been directed for its determination at a trial. The learned primary judge erred in not making such a direction.

[92] In relation to an undertaking, they submit that it was not fatal to an application for relief that the default in payment of the harbour dues had not been remedied before relief was sought or that an undertaking to remedy it had not been given. Relief may be granted upon the offering of an undertaking to remedy and conditioned upon the subsequent performance of the undertaking.[87] By its written submissions, the QN Companies affirmed their willingness to give such an undertaking at trial.[88]

[93] The QN Companies made a number of submissions relevant to standing. They did so in circumstances where MIM had filed a notice of contention in which it contends that those companies lacked standing to advance any of the three "defences" raised on 11 August 2017 because they had not shown that MIM had consented to an assignment of the benefit of the Licence Agreement to QNS as required by clause 24.1.[89] Four arguments are advanced by the QN Companies in response to that contention.

[94] First, at an evidential level, it is submitted that the solicitors' letter to which I have referred indicated a prospect that the general purpose liquidators would be prepared to execute an assignment. There were further prospects that, when the matter came to be pleaded, they would have done so and that MIM would have refused consent to the assignment. A refusal was quite possible given MIM's willingness to negotiate terms for a new licence expressed in its letter dated 14 March 2016 to the voluntary administrators of QNPL.[90] In the event of a refusal, a factual issue for trial would be the reasonableness of the refusal.[91]

[95] Secondly, as to the construction of clause 24.1, it is submitted that it is arguable that a legal assignment made in breach of that provision would give MIM merely a right to damages for breach of contract against the assignor. The assignment would not necessarily be ineffective against MIM as a matter of law. The meaning and effect of the clause in this respect was not appropriate for summary determination.[92]

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85 AB26 AT 1-26 l1 – AB28 Tr 1-28 l28.

86 AB14 Tr 1-14 l47 – AB18 Tr 1-18 l30.

87 Reliance was placed upon the observations of Brereton J in *International Business College Pty Ltd v Alphacrucis College Ltd* [2009] NSWSC 1088 at [40]-[42] and cases cited therein, namely, *Chandler-Chandless v Nicholson* [1942] 2KB 321 and *Starside Properties Ltd v Mustapha* [1974] 2 All ER 567.

88 Outline of Submissions at [78].

89 Notice of Contention filed 1 May 2018.

90 AB 233.

91 Appeal Transcript ("AT")1-15 l2 - AT1-53 l8; Outline of Submissions at [76]-[78].

92 AT1-53 ll10-29; Reply at [15].

[96] Thirdly, the QN Companies submit[93] that there are good reasons for concluding that an equitable assignment would not breach clause 24.1. Such an assignment, they argue, operates by way of creation of a trust of the interest in question, rather than a transfer of it. In support of this proposition, they rely on the observations of Dixon CJ in *MacDonald v Robbins*[94] with respect to a covenant against transfer or assignment in a lease.[95] Where it is necessary that QNPL in liquidation be a party to the litigation, it could be joined as a respondent if it declined to lend its name to the proceeding.

[97] The fourth argument seeks to analogise this licence with a lease. The QN Companies submit that the Licence Agreement operated to vest a proprietary interest in the licensee. Clause 5.6(d), when triggered, would vest a proprietary interest in a successor manager in the way that a like provision in a lease would vest a lessee's interest in an assignee. On the authorities, the assignee has standing at least to sue for relief against forfeiture.[96]

[98] More generally, the QN Companies submit that the granting of relief against forfeiture in the case of this Licence Agreement is not restricted, as MIM contends, to instances of accident or mistake, or where the conduct of the terminating party led to, caused or contributed to the breach.[97] Further, they argue that whether relief from forfeiture is to be granted requires consideration of a range of factual issues including the gravity of the breach in question, whether the breach was inadvertent or wilful, the damage to the covenantee and the relevant loss to the covenantor if relief is not granted. These are matters that require factual examination and would not have been appropriately resolved on the hearing of an originating application in the applications list.[98]

[99] **MIM's submissions:** As to the absence of an offer to pay the outstanding harbour dues, MIM submits that if the QN Companies are correct in submitting that QNS had an immediate right in equity to seek relief against forfeiture, it did not apply for such relief in a timely way. It delayed in doing so for some 16 months.[99]

[100] Moreover, at the hearing on 11 August 2017, when the learned primary judge enquired whether an offer to pay was being made by the QN Companies, they did not do so. They did no more than accept that as a condition of obtaining any eventual relief against forfeiture, they would have to tender the outstanding harbour dues.[100]

[101] It is further submitted that the attitude of indifference on the part of QNS towards this defence, and the failure to make an offer to pay, were matters that the learned primary judge was entitled to have taken into account in deciding whether to make an order under UCPR r 14 in respect of this defence. The offer made on appeal has come far too late.[101]

[102] As I have noted, MIM submits that, as a matter of legal principle, none of the QN Companies has standing to seek relief against forfeiture. The submission relies upon the absence of a legal assignment and of their consent to any assignment. MIM takes issue with the arguments advanced by the QN Companies with respect to standing.

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93 AT1-53 l31 – AT 1-56 l23.
94 (1954) 90 CLR 515 at 520.
95 Reliance is also placed upon the acknowledgement of this view of the operation of an equitable assignment by the authors, J Edelman and S Elliott in an article titled *Two Conceptions of Equitable Assignment*, published at (2015) 131 LQR 228.
96 *Old Papa's Franchise System Pty Ltd v Camisa Nominees Pty Ltd* [2003] WASCA 11.
97 Reply at [26]-[36].
98 Outline of Submissions at [79].
99 Outline of Submissions at [53]-[55].
100 Ibid [56].
101 Ibid [57], [58].

[103] Further, as to legal principle, MIM submits that the QN Companies have erroneously assumed that cases and principles that apply to relief against forfeiture of leases apply equally to contractual licences. MIM argues that of the two categories of cases in which equity would relieve against forfeiture that were identified by Lord Wilberforce in *Shiloh Spinners Ltd v Harding*,[102] the first category where the right to forfeit is essential to secure the payment of money, is apt to include leases and mortgages, but not contracts which do not convey property rights.[103]

[104] The second category, which includes such contracts, is one in which equity will intervene to relieve against forfeiture in limited circumstances only, namely instances of fraud, accident, mistake or surprise, but not of mere inadvertence or of wilful default.[104] Notwithstanding, the QN Companies have failed to identify any evidence or arguable case to suggest that the failure to pay the harbour dues occurred by way of accident or mistake or that MIM in any way contributed to the breach. It is submitted that in absence of such evidence, there can be no entitlement to relief against forfeiture.[105]

[105] MIM also notes that the failure to pay the harbour dues did prejudice it. It did not receive the 20 per cent of the dues that the TPA was to remit to it.[106]

[106] **Discussion:** The learned primary judge, in effect, determined this "defence" summarily. The correctness of the summary determination that was made is dependent upon the correctness of the reasons adopted by her Honour for the decision and also upon their having justified conclusively a rejection of the "defence".

[107] In my view, the facts that consent under clause 24.1 had not been requested, or given, were insufficient, in themselves, to establish conclusively that none of the QN Companies had standing to seek relief against forfeiture. The competing arguments on the construction of this clause with respect to the consequence of an absence of consent, are sufficient to demonstrate that a finding as to the operation of the clause was necessary before those facts could have been regarded as conclusive. No such finding appears to have been made by her Honour. Moreover, the potential operation of equitable principles to confer standing appear not to have been considered.

[108] Nor do I consider that the fact that an undertaking to pay the harbour dues had not been offered, itself, disentitled the QN Companies to relief against forfeiture. The offering of an undertaking was not essential to an entitlement to such relief; nor does MIM submit that it was.

[109] Accordingly, I conclude that the summary rejection by the learned primary judge of this "defence" for the reasons indicated by her in oral argument, was erroneous.

[110] I have given consideration to whether the summary rejection of the "defence" might otherwise had been justified. I have come to the conclusion that it would not. The "defence", even as intimated to her Honour, required resolution of issues of construction of contractual terms and the identification of applicable legal and equitable principles. Further, for the application of such principles, factual matters beyond those of which

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102 [1973] AC 691 at 722.
103 Outline of Submissions at [59], [60].
104 Ibid at [61], citing *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; [2003] HCA 57; at [24], [26], [36], [39], [55] and [58].
105 Outline of Submissions at [62].
106 Ibid at [63].

there was evidence before the learned primary judge, needed to be considered and, if in dispute, resolved.

[111] For these reasons, I would accept the QN Companies' ultimate submission with respect to this "defence". Orders for determination of it at a trial on pleadings ought now be made.

The penalty "defence" – Ground e(iii)

[112] **QN Companies' submissions:** The QN Companies submit that the right of termination purported to have been exercised by MIM was void as a penalty.[107] As developed, the submission is one that a right to terminate for non-payment of harbour dues was arguably a penalty in circumstances where the licence was for 30 years; the licence fee over that period totalled $10 million; clause 6.1 of the Licence Agreement required that that fee be paid in advance; and the harbour dues were not to be received by MIM for its benefit, but as agent for TPA.[108]

[113] The QN Companies argue that those factors suggest that the right to terminate for non-payment of harbour dues might have been "exorbitant or unconscionable" particularly given, on the one hand, the significant detriment that the licensee might suffer upon termination when it had pre-paid the licence fee in its entirety, and the resultant disruption to the operation of the refinery; and, on the other hand, the absence of any apparent financial loss to MIM as a result of a failure by the licensee to pay the harbour dues to it.[109]

[114] The QN Companies further argue that had there been a trial, evidence could have been led as to the contemplation of the parties when the Licence Agreement was entered into, the prejudice suffered by them upon the termination and the extent of the losses, if any, to be incurred by MIM in the event of a breach. An appraisal of that evidence would inform a decision as to whether the right of termination was penal.[110]

[115] **MIM's submissions:** MIM submits that the termination of the Licence Agreement was pursuant to clause 21.2 thereof, there having been a material breach in terms of clause 21.1. These provisions afforded a contractual right to terminate for breach. Such a right is not a penalty.[111]

[116] MIM contends that while the penalty doctrine is not limited to contractual provisions that require a party to pay a sum of money, the decision of the High Court in *Andrews v ANZ Banking Group Ltd*[112] confirms that for there to be a penalty, there must be a secondary stipulation which imposes an additional or different liability or detriment on a party. MIM argues that the right to terminate for breach is not a secondary stipulation. There is, therefore, no penalty in clauses 21.1 and 21.2.[113]

[117] In the absence of a secondary stipulation, the descriptors "exorbitant and unconscionable" used by the QN Companies have no potentially relevant subject matter to which they might apply. MIM submits that to adopt a contractual right to

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107 Outline of Submissions at [82].
108 Ibid at [85].
109 Ibid at [86], [87].
110 Ibid at [88].
111 Outline of Submissions at [65].
112 (2012) 247 CLR 205, 216 at [9]-[10]; [2012] HCA 30 at [9]-[10].
113 Outline of Submissions at [66].

terminate a contract as a point of reference for application of the penalty doctrine would expose every contractual right to terminate a contract to the possibility of avoidance as a penalty.[114] Such an approach is unsupported by the cases.

[118] Finally, MIM contends that a declaration that clauses 21.1 and 21.2 are void as a penalty would not invalidate the termination on 14 March 2016. Clause 36.1 permitted it to treat a breach of the obligation in clause 12.1(k) to pay harbour dues as a repudiation of the Licence Agreement on which it might have relied to terminate at common law, notwithstanding the reference to clause 21.2 in the letter of that date.[115]

[119] **Discussion:** In speaking of the penalty doctrine in *Andrews*, the High Court (French CJ, Gummow, Crennan, Kiefel and Bell JJ) observed:

> "[9] Mason and Deane JJ observed in *Legione v Hateley*[116] that, as the term suggests, a penalty is in the nature of a punishment for non-observance of a contractual stipulation and consists, upon breach, of the imposition of an additional or different liability.
>
> [10] In general terms, a stipulation *prima facie* imposes a penalty on a party (the first party) if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and *in terrorem* of the satisfaction of the primary stipulation. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation." (footnotes omitted)

[120] These observations identify, as the hallmark for penalty, the imposition of an additional or different liability by way of a contractual stipulation upon a party who fails to observe a primary stipulation. The issue raised here is whether clauses 21.1 and 21.2 are collateral stipulations which impose an additional or different liability upon the QN Companies for breach. These clauses provide as follows:

> "21.1 In the event that one Party commits a material breach and/or makes a material default in any of its material obligations hereunder the other Party (in addition to all other rights remedies, reliefs, actions and claims which it may have at law in consequence of that breach) shall have the express additional right at its election to cause the term of this agreement to be brought to an end in the manner and subject to the provisions of Clause 21.2.
>
> 21.2 A notice shall be given to the Party which is alleged to have committed the material breach of (sic) alleged material default

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114 Ibid at [68].
115 Ibid at [69], citing *Shepherd v Felt and Textiles of Australia Limited* (1931) 45 CLR 359, 377-8.
116 (1983) 152 CLR 406, 445.

> and requesting that it be remedied or action taken to commence to remedy same within twenty-eight (28) days thereafter. The Party to which such notice is given shall remedy the material breach or material default within the said twenty-eight (28) days where practical to do so, or take all reasonable action to commence to remedy same within the said twenty-eight (28) days. Alternatively, within that period the Party to which such notice is given may give a counter-notice to the other Party denying or explaining the material breach or material default or otherwise responding to such notice. If the material breach or material default is not so remedied or reasonable action taken to commence to remedy same or the counter-notice is not so given then the Party giving the notice of material breach or material default may give a further notice terminating this agreement, but without prejudice to any accrued rights or liabilities by the Parties. If the Parties resolve their differences following giving of the counter-notice or the matter has not been referred to arbitration within twenty-eight (28) days of the date of service of the counter-notice, the Party giving the notice of material breach or material default shall be deemed to have waived that notice."[117]

[121] These clauses do not have the character of collateral stipulations. They are not auxiliary to other contractual provisions. They provide a means by which MIM may terminate the Licence Agreement in the event of an unremedied material breach or material default by the QN Companies. More significantly, they do not impose any additional or different liability upon the QN Companies in the event of such a breach or default. They permit MIM to terminate the Licence Agreement. Termination takes effect without prejudice to accrued rights or liabilities but without the imposition of any additional or different liability on those companies.

[122] It follows that these clauses are not penalty provisions for the purpose of the penalties doctrine. As a matter of legal principle, it is clear that the doctrine has no application to them.

[123] Here, there was no need for pleadings or a trial to examine the factors which the QN Companies suggest render the right to termination for a breach of clause 12.1(k) "exorbitant or unconscionable". As MIM points out,[118] those descriptors are drawn from the decision of the High Court in *Paciocco v Australia & New Zealand Banking Group Ltd*[119] where the issue was whether "a provision for the payment of a sum of money on default"[120] was penal. The provision in question was evidently a collateral one and it imposed an additional obligation to pay money.

[124] The learned primary judge was correct in concluding that the penalty "defence" had no prospects of success and that r 14 directions were unnecessary in respect of it. It remains for me to note that I have reached this conclusion also without consideration of whether any of the QN Companies had standing to raise as this a defence. It is unnecessary to consider that because the "defence" would not have availed them even if they had standing. It is also unnecessary for me to form a view with respect to MIM's alternative common law-based argument in favour of a lawful termination.

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117 AB161-162.
118 Outline of Submissions at [68].
119 (2016) 258 CLR 525, 547 at [29], 611 at [268], 612 at [270]; [2016] HCA 28 at [29], [268], [270]
120 Ibid 547 at [29].

Ground j

[125] This ground of appeal seeks to challenge the basis on which the award of damages for trespass of $270,215 was made. The challenge is structured on arguments that were not advanced by the QN Companies before the learned primary judge, orally or in writing, on 20 November 2017. MIM objects to their being raised on appeal. As will appear from the submissions on this ground, those arguments concern the application of legal principles relating to the basis upon which damages for trespass are awarded. They do not involve factual controversy. That being so, I consider it appropriate to consider the arguments.

[126] **QN Companies' submissions:** The QN Companies contend that the damages claim was founded upon an alleged continuing trespass. The learned primary judge accepted that there was such a trespass and held that damages should be awarded in an amount equal to the estimated prospective costs of dismantling and removing the Equipment.[121] This, they submit, was an error.

[127] Citing the decision of the Full Court of Queensland in *Barbagallo v J & F Catelan Pty Ltd*,[122] the QN Companies submit that it is a well-established principle of the common law that damages for prospective loss, such as the costs of reinstating land, are not available in respect of a continuing wrong.[123]

[128] The QN Companies criticise certain authorities on which MIM relied before the learned primary judge and which her Honour accepted as being applicable. The authorities included the Full Court of Queensland decision in *Hansen v Gloucester Developments Pty Ltd*.[124] They are criticised as having been "inapposite and misleading" because they were concerned with completed, rather than continuing, wrongs.[125]

[129] Lastly, in anticipation of an issue foreshadowed by a notice of contention attached to MIM's Outline of Submissions dated 30 April 2018, the QN Companies advance a number of arguments concerning s 8 of the *Civil Proceedings Act* 2011 (Qld) ("CP Act"). These arguments are directed towards a submission that that statutory provision was not an available alternative basis for awarding the damages.[126]

[130] **MIM's submissions:** MIM takes issue with the ambit of the principle concerning the non-recoverability of prospective loss for a continuing trespass on which the QN Companies rely. MIM submits that it is not a principle which holds that costs of reinstatement of land are never recoverable where there is a continuing trespass.

[131] To illustrate that submission, MIM refers to decision of the House of Lords in *West Leigh Colliery Co Ltd v Tunnicliffe & Hampson Ltd*[127] which was referred to by the Full Court in *Barbagallo*. In *West Leigh*, a referee had awarded damages for a continuing nuisance causing subsidence which affected buildings near a mine. The damages were awarded under two heads: first, the cost of all the repairs necessary to remediate the damage caused by the subsidence; and, secondly, the diminution in value of the

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121 Reasons at [30].

122 [1986] 1 Qd R 245, 262-263 per Thomas J, subsequently approved in *D'Aquino v Trovatello* (2015) 47 VR 31, 44 at [58].

123 Outline of Submissions at [97].

124 [1992] 1 Qd R 14.

125 Outline of Submissions at [99].

126 Ibid at [102]-[106].

127 [1908] AC 27.

premises attributable to the risk of future subsidence. The second head of damage, not the first, was held to be misconceived. It was held that damages could not be recovered for future apprehended injury.[128]

[132] Similarly, *Barbagallo* did not involve the reinstatement of land to its original condition after damage by a nuisance. It concerned the recoverability of the cost of new works to protect land from threatened damage which had yet to be caused by a continuing nuisance.[129]

[133] MIM's principal submission on this issue is that damages for the costs of removal of the Equipment were not damages for a prospective loss as that term is used in the cases. The loss itself had been incurred. It was an existing loss for which MIM would have to incur expense prospectively in order to remedy it.[130]

[134] MIM further submits,[131] in the alternative, that damages quantified by the costs of removal of the Equipment were properly available in equity under s 8 of the CP Act and in accordance with the principles affirmed in *Barbagallo*.[132]

[135] **Discussion:** From the perspective of principle, *Barbagallo* confirms that the cost of remedial action to prevent damage threatened by a continuing nuisance is not recoverable at common law. In that case, the court was required to resolve whether, in the absence of any physical damage, the plaintiffs were entitled to common law damages quantified by reference to the cost of drainage works designed to prevent prospective physical damage to their land. The issue was resolved against the plaintiffs.

[136] In the course of his reasons, McPherson J observed:

> "Neither erosion nor subsidence having occurred on the plaintiffs' land, the cost of constructing the drain is an expense necessary for the purpose of preventing damage that will arise only in the future if the process of installing it is not undertaken. … It is not in my view possible to regard any loss from that quarter … as arising from a present interference with the plaintiffs' property rights."[133]

[137] This observation also serves to highlight the importance, for present purposes, of determining whether or not the damages awarded here were for harm that is prospective in the sense that it is yet to be sustained by MIM. If the loss is of that character, then under the principle, damages for it were and are not recoverable.

[138] To my mind, the harm for which the damages were awarded to MIM was not harm to be incurred prospectively by it. The relevant harm is the imposition on MIM of the burden of having to incur expenditure in removing the Equipment in the face of the refusal of its owners, QNR and QNM, to do so. The burden was imposed on MIM at, or shortly after, the termination of the Licence Agreement and the imposition of it continued thereafter. Thus this harm has already been incurred; its occurrence is in no sense prospective.

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128 Outline of Submissions at [73], [74].
129 Ibid at [75]-[77].
130 Ibid at [71], [78].
131 Ibid at [79].
132 Per McPherson J at 250-259 and Thomas J at 265-270.
133 At 250.

[139] It is true that the trespass has interfered with MIM's right to enjoy its leasehold interest in and about Berth 2. It may be that the interference has also harmed MIM in an additional way, namely, by means of the physical presence of the Equipment in and about Berth 2. It may also be that the interference may continue to harm MIM in that way in the future until the Equipment is removed. Even if MIM has or will be harmed in that way, it is significant for present purposes that it is not harm of that kind for which the damages were sought. The damages sought were quantified by reference to costs of removal of the Equipment and not for financial or other loss attributable to interference with MIM's own operations at Berth 2 in the past or in the future.

[140] For these reasons, I conclude that the challenge to the award of damages at common law cannot succeed. It is unnecessary to consider whether the award could have been sustained on the alternative basis under s 8 of the CP Act.

[141] Finally, I note that it is questionable whether the award of damages against QNS was appropriate, given that it has never owned any of the Equipment. However, in absence of any appeal by it on that ground, the award of damages against it must stand.

Grounds k and l

[142] By these grounds, the QN Companies seek to raise, for the first time, a number of arguments which are specific to three large items in the list of Equipment in Schedule 1 to the originating application. They are the two rail mounted hoppers, the magnetic separator and the wharf conveyor system. I shall refer to them collectively as the "installations". Ground k elaborates arguments to the effect that Order 1 should not have been made in respect of the installations and hence, on appeal, judgment ought to be entered for the QN Companies dismissing the originating application insofar as it relates to the installations. Ground l is reciprocal. It ventures an alternative order on appeal, namely, that pleadings be directed in respect of the installations.

[143] Put shortly, the arguments are to the following effect:

(i) the installations are not "Approved Works" within the meaning of that term as defined in the Licence Agreement and hence they were not works which QNPL was contractually required to remove on termination of the Licence Agreement pursuant to clause 21.4 thereof;

(ii) the installations are properly characterised as "Development Works" (as defined in the Nickel Ore Agreement between TPA and QNPL dated 23 August 1994,[134] an agreement ancillary to the Licence Agreement), which pursuant to clause 5.2 thereof, QNPL was obliged to remove upon termination of the Licence Agreement within a reasonable time of a request in writing by TPA that it do so; and there had been no evidence before the learned primary judge that such a request had been made;[135] and

(iii) the installations are properly characterised as fixtures and, hence, they are the property of TPA pursuant to the common law doctrine of fixtures; alternatively, they are the property of TPA pursuant to clause 18 of the lease between MIM and TPA; accordingly, no claim by MIM for trespass was capable of being maintained by it in respect of the installations.

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134 AB267-360.

135 It is acknowledged by the QN Companies that such a request was made on 27 September 2017; however, it was not before the learned primary judge – Grounds k(viii), (ix).

[144] These are not purely legal arguments which can be resolved within a framework of uncontroverted fact of which there was evidence before the learned primary judge. Whether the installations are fixtures is a conclusion to be drawn from a consideration of a range of factual issues concerning the degree and object of their annexation. Those issues were not canvassed in the evidence adduced at first instance.

[145] Secondly, the obligation under clause 21.4 of the Licence Agreement was to remove "all moveable improvements and other of the Approved Works" upon termination. The expression "moveable improvements" is undefined. Resolution of the issue whether the installations fall within the scope of that expression properly construed is dependent upon evidence concerning the physical attributes of the installations that was not before the learned primary judge.

[146] Thirdly, clause 5.2 of the Nickel Ore Agreement requires removal of "QNPL Plant" which is defined to mean those parts of the Works which became fixtures at law. Accepting that the installations were Development Works they would become QNPL Plant only if they became fixtures at law. Whether they did or not is to be resolved by consideration of the range of factual issues to which I have referred.

[147] In view of the factual dependency of each of these arguments and the absence of an adequate foundation of established uncontroverted fact necessary to resolve any one of them, it is clear that this Court cannot decide them. The relief sought by Ground k cannot be granted.

[148] Ground l raises the question as to whether pleadings ought to be directed in respect of the installations. I accept that the arguments encapsulated in Ground k were not developed at the hearing in August 2017; nor were they advanced at the November 2017 hearing. There is no good reason why they could not have been raised at either hearing. There is, therefore, validity in the proposition that, in the interests of finality in litigation, the directions sought by Ground k ought not be made.

[149] That is a proposition to which I would have acceded but for one countervailing consideration. It is this. Directions will be made for litigation of the relief against forfeiture "defence". There is a likelihood that that litigation will involve resolution of the question whether the installations are fixtures at law or not.

[150] In view of that likelihood, I consider that the interests of justice are balanced in favour of permitting the appellants to advance the arguments in respect of the installations in the litigation that is to take place. I would favour the making of directions to that effect.

Disposition

[151] Consistently with these reasons, I would extend time to appeal until 1 March 2018 and allow the appeal to a limited extent in order to accommodate the appellants' success with respect to Grounds e(ii) and l. I would order that the relief against forfeiture "defence" and the arguments raised by Ground k of the appellants' revised proposed notice of appeal be determined on pleadings in the Trial Division. It is appropriate that Orders 1, 4 and 5 made 20 November 2017 be set aside.

[152] The parties should be invited to make brief submissions as to the costs of the proceeding in this court in light of the Court's published reasons.

Orders

[153] I would propose the following orders:

1. Time to appeal is extended to 1 March 2018.

2. The appeal is allowed to the limited extent for which these orders provide.

3. The appeal is otherwise dismissed.

4. The proceeding commenced by the respondent on 24 July 2017 is to continue as if started by claim in respect of the defence advanced by the appellants claiming relief against forfeiture and the arguments raised by Ground k in the appellants' revised proposed notice of appeal, only.

5. The proceeding is remitted to the Trial Division for determination of those matters at a trial on pleadings.

6. Orders 1, 4 and 5 made in the proceeding on 20 November 2017 are set aside.

7. The parties are to file and serve written submissions not to exceed three pages each as to the costs of the application for extension of time to appeal and of the appeal, within seven days of the publication of these reasons.

[154] **McMURDO JA:** I agree with Gotterson JA.