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No. 31 of 1981

IN THE PRIVY COUNCIL

ON APPEAL

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

BETWEEN:

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

- and -

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

CASE FOR THE FOURTH RESPONDENT
(ESSO EXPLORATION & PRODUCTION AUSTRALIA INC.)

INTRODUCTION RECORD

1. The Appellants (hereinafter called "Newmont") principally claim specific performance of an agreement made on the 3rd November, 1978 (hereinafter called "the Newmont Agreement") for the exploration, evaluation and potential development of minerals at Liontown, near Charters Towers, in Queensland. The other parties to the 218
agreement were the first two Respondents (hereinafter respectively called "Laverton" and "Nickel"). The third Respondent (hereinafter called "Leonora") is a party to the proceedings as a claimant to the beneficial interest in mining leases which are the subject of the Newmont Agreement. The fourth Respondent (hereinafter called "Esso") is a party affected by the proceedings in that it subsequently entered into an agreement with the other Respondents for the exploration of the same areas and, accordingly, its rights under such agreement will be adversely affected if Newmont are entitled to the relief which they claim.

2. By his Judgment Needham J. held that Laverton and Nickel were in breach of the Newmont

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Agreement, in a manner which will subsequently be described, but that neither the nature of the breach nor the character of the agreement entitled Newmont to specific performance. Newmont abandoned its claim for damages in these proceedings and, accordingly, its claim was dismissed. It will be the submission of the Fourth Respondent that the learned Judge was wrong in holding that the first two Respondents were in breach of agreement but correct in determining that it would be inappropriate to grant relief by way of specific performance. In addition, Esso further disputes the submission of Newmont in this Appeal that in the alternative they should be granted an injunction restraining the first two Respondents from acting otherwise than in accordance with the Newmont Agreement.

The Issues.

3. The first two issues are relevant to determining if there was any breach of the Newmont Agreement:-

(i) Whether the Newmont Agreement, which was entered into by provisional liquidators of the first two Respondents, was beyond their power as being a long-term agreement not designed to ensure the beneficial winding-up of either company and, accordingly, is void or has been validly avoided.

(ii) Alternatively whether the non-fulfilment of certain conditions of the Newmont Agreement was caused by breach on the part of the first two Respondents.

The remaining issues are as to the nature of the remedy of Newmont if they succeed on each of the first two issues :

(iii) Whether, having regard to the nature of the breach, Newmont are entitled to specific performance as if the conditions of the agreement had been fulfilled or are entitled solely to damages for such breach as prevented fulfilment of such conditions.

(iv) Whether the agreement is one which calls for continuous co-operation between the parties or is otherwise of such a character as makes an order for specific performance inappropriate.

(v) Whether the injunction claimed by Newmont would be tantamount to an order of specific

performance in all the circumstances or, alternatively, should appropriately be granted in the discretion of the Court in all the circumstances of the case.

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Tne Facts.

4. The background facts are of importance, since they were all known or must be taken to have been known by all parties to the Newmont Agreement. They thus provide illuminating evidence of the background and object of the transaction, in the light of which the relevant conditions must be construed : see Prenn v. Simmonds [1971] 1 W.L.R.1381; Reardon Smith Line Ltd. v. Hansen-Tangen [1976] 1 W.L.R. 989.

5. Laverton and Nickel are, and at all material times were, the holders of the Liontown leases being Mining Leases Nos. 233, 317, 320 to 345, 402 and 602 to 607, and Miner's Homestead Perpetual Lease No. 11436, Charters Towers, Queensland pursuant to the Mining Act, 1968 (Qld.). Laverton, Nickel and Leonora claim that leases numbered 602 to 607 are held in trust for Leonora. 643

6. On 22nd May, 1978 the Attorney General of New South Wales petitioned for the winding up of Laverton. The ground for the petition was that an inspector appointed under Part VIA of the Act had reported that it was in the interests of the public and of the shareholders of the company that Laverton should be wound up (s.222(1)(g)). 455 456.11

7. An order was made by Needham J. appointing Mr. W.J. Hamilton as provisional liquidator. He was given power to carry on the company's business and to exercise the powers set out in s. 236(2)(a) to (j). 193B.24

8. On 20th June, 1978 the provisional liquidator of Laverton petitioned for the winding up of Nickel. The grounds for the petition were that the company was insolvent, unable to pay its debts (s.222(1)(e)) and that it was just and equitable that the company should be wound up (s.222(1)(h)). Mr. L.B. Hunter was appointed provisional liquidator of Nickel. 461 462.17 193C.1

9. In the course of his duties as provisional liquidator, Mr. Hamilton conducted negotiations with a number of companies with respect to the possible exploitation of the Liontown leases. Ultimately, agreement was reached on the terms of a proposed agreement between Laverton and Nickel and Newmont.

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10. On or shortly after 9th October, 1978 Newmont became aware that, subject to a number of conditions being satisfied, the Attorney General
896-899 would consent to the withdrawal of his winding up
121 petition.

11. On 3rd November, 1978 Mr. J.J. Lynch, the largest shareholder of Nickel, and a person who had at various times been a director of both companies, and in a position to control them, made
1938.9 application to the Supreme Court of New South Wales in its Equity Division for an injunction restraining the provisional liquidators from entering into an agreement with Newmont.

218 12. The agreement, which is dated 3rd November,
126 1978, but may not have been executed until 9th November, contained the following conditions precedent to its operation :

228 "3.1.2 This Agreement is conditional on the following :-

3.1.2.3 the approvals 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;".

Clause 3.1.2.3 was appropriate to a sale in a liquidation, since without a liquidation there would be no facility for seeking the approval of the Court.

13. At the time other companies, including Esso Australia, were interested in competing with the
631 Newmont Group to reach agreement with respect to the Liontown leases. It was partly the interest of these other companies which was the basis of
1930.17 Mr. Lynch's application. The application, before
323.14 Needham J., was dismissed. The Judge's principal

basis for refusing the application was that the proposed contract was, as is expressed to be, conditional upon its approval by the Court. Therefore, the Court could consider any other offers at the time the application for approval was brought before the Court and determine whether it was in the interests of the companies that the agreement proceed.

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14. His Honour said, in his reasons for judgment, that the provisional liquidators should continue to pursue interested parties, despite the execution of the agreement. The liquidators duly did so.

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15. The next development was that on the 17th November, 1978, the provisional liquidators of Laverton sought directions from the Court as to whether they should ascertain the intentions of other interested parties by forwarding to them invitations to tender. Mr. Lynch was heard upon that application and, in the event, reached agreement with the liquidators as to the best manner of approach and, accordingly, Needham J. was able to give directions that such agreement was justified. Thereupon, Newmont began proceedings against the first two Respondents seeking a declaration that the Newmont Agreement was binding upon the parties and an injunction restraining the provisional liquidators from calling further tenders. If such application had been successful, the ground upon which Mr. Lynch had been refused his injunction would have been an illusory protection to him. However, on 6th December 1978, Needham J. rejected the submission of Newmont that the Court had no jurisdiction to grant approval of the agreement and held that the Court had power to control the exercise of the powers of the provisional liquidators or to give directions. He also held that the actions taken by the provisional liquidators in accordance with the directions of the Court to seek alternative offers were not in conflict with their obligations under the agreement. Thereby he correctly, as Esso submits, reflected the fact that the Newmont Agreement in no way impeded the performance by the liquidators of their general duties to the first two Respondents. Newmont appealed from the decision of Needham J. In that appeal Newmont asserted that the Court did not have jurisdiction to entertain an application by Laverton and Nickel through its provisional liquidators for approval of the Newmont agreement. The appeal was partly heard. During the course of the hearing before Needham J. from which this appeal is taken Newmont indicated that it would not proceed with

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that appeal. The appeal was subsequently dismissed by consent.

16. On the 21st December, 1978, the provisional
341 liquidators issued summonses seeking approval of
342 the Newmont Agreement. On the following day Newmont wrote to the Queensland Minister for
304 Mines seeking his approval of the agreement. The liquidators were obtaining, as they disclosed to Newmont, interest from other potential exploration companies including Esso.

17. The return date of the summonses was 5th
438 February, 1979. On that day the summonses were
439 adjourned to 19th February, 1979, on which day
450 they were further adjourned to the 22nd February,
193L.20 1979. Both winding up petitions were listed for that day.

18. On the 19th February the solicitors for the provisional liquidators wrote to the solicitors for the Newmont Group informing them that an agreement was to be exchanged with Esso and, therefore, application would be made to Needham J.
193L with a view to approval of one or other agreement.
432 This letter also advised that it was likely that application would be made for the dismissal of the winding up petitions on Thursday, 22nd February, 1979 and that the applications should be heard as soon as possible.

19. On the 22nd February the provisional liquidator of Laverton issued a summons seeking
437 advice whether he should execute an agreement with Esso. In the affidavit in support he expressed the view, which he stated was also the view of his mining expert, that the Esso agreement was "the best commercial proposition for the development
94 of Liontown which has been forthcoming". At that
193M.31 time the Esso agreement was in draft.

20. On the 22nd February, 1979, the Attorney
193M General sought to withdraw his petition for the
193N winding up of Laverton. All matters were adjourned to the following day. On that day Needham J. dismissed the petition. He held, inter alia, that he had no power to refuse the application of the Petitioner nor any power to postpone the dismissal of the petition until after he had heard the applications for approval. He further expressed the view that the provisional liquidator of Laverton necessarily vacated his position upon the dismissal of the petition and that, as he no
438 longer had power to act for the company, his
440 summons must be dismissed.
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21. On the 28th February, 1979 the solicitors for the Newmont Group wrote to the solicitors acting for Laverton, which was then under the control of its former management, requiring the company to comply with the Newmont Agreement. Those solicitors replied on the 2nd March, 1979 that Laverton did not consider itself bound by any purported agreement. On the 5th March 1979 the petition to wind up Nickel Mines was dismissed. 193N 96 97 451

22. On 10th April, 1979 Laverton and Nickel Mines, through their restored management, and Leonora, executed an agreement in terms which were not identical with, but were not dissimilar to, the draft agreement with Esso to which reference has been made. The agreement was subject to, inter alia, 987

> "Any suit, action or appeal brought by Newmont Proprietary Limited, I.C.I. Australia Limited and H.C. Sleigh Resources Limited in respect of the agreement between those companies and Laverton and NML dated the third day of November, 1978 in the Supreme Court of N.S.W. being withdrawn or dismissed or a decision in respect thereof being made in favour of the Companies."

The foregoing facts indicate the context of the Newmont Agreement. It was at all times known by all parties thereto that the agreement was being made by provisional liquidators on behalf of the first two Respondents, pursuant to a winding up petition. It must necessarily have been contemplated that an agreement entered into by the liquidators would be pursuant to their general obligations, and it was for this reason that Condition 3.1.2.3 required the approval of the Court. It would clearly be incumbent upon the liquidator, when seeking such approval, to show that he had taken all proper steps to obtain the best terms for the disposition of the assets of the company. This was clearly contemplated when Mr. Lynch's application for an injunction was refused on the 3rd November. Moreover, it was always known to Newmont that the winding up petition could be withdrawn or dismissed. Such a possibility is inherent in the process, but in fact there had been correspondence in September and October, 1978 in which an indication had been given on behalf of the Attorney General that he might consent to the withdrawal of the petition on the basis of satisfactory negotiations. Newmont were sent a copy of the letter dated 21st September, which stated this position, on the 9th November, 1978. Thus, as the learned Judge held: 360 323 899.24 896

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> "Newmont was aware, even before the execution of the agreement, that the withdrawal of the petition to wind up Laverton was a risk which it had to accept."

Further, since cases such as Re Union Accident Insurance Co. Ltd. [1972] 1 W.L.R.640 are authority for the proposition that it is the directors only and not the liquidators who can represent the company on the hearing of a winding-up Petition, Newmont must be taken at all times to have been aware that the directors of the companies, who were not in favour of the Newmont agreement, would welcome the dismissal of the Petitions. It was thus at all times clear to the parties that Condition 3.1.2.3 was inserted because of the existence of a winding up petition. It would follow that, unless such petition were withdrawn or dismissed, the liquidators would be under an obligation to ensure that the Court had full information about alternative offers and that the Court would approve the offer which it considered to be most favourable. If, however, as was known by all parties to be a potential outcome the winding up petition were to be withdrawn or dismissed, then necessarily the condition requiring the approval of the Court became incapable of fulfilment.

23. There is one other aspect of the facts which should be mentioned. The learned Judge held that, in the event that the winding up petition had not been dismissed and he had been required to consider the Newmont Agreement and the draft Esso agreement, he would on the evidence before him have approved
1934.26 the Esso agreement as being more beneficial to the first two Respondents.

The Judgment

24. The claim of Newmont in the Amended Statement of Claim alleged that by failing to press for the approval of the Newmont Agreement by the Court and by the other factual allegations the first two Respondents had waived the fulfilment of the condition relating to such approval and consequently that the Newmont Agreement was absolutely and unconditionally binding or, alternatively, that it was similarly unconditionally
620 binding because the Court had no jurisdiction or
7.1 power to grant or withhold approval. The learned Judge held, however, that Laverton had been in breach of agreement by consenting to the withdrawal
1937.6 of the petition for winding up. He held that such "consent made it impossible for the condition to be satisfied, and there is, inherent in every

agreement, an obligation, implied by the necessity of the case, on each party to do whatever is reasonably on its part to ensure that the contractual terms are fulfilled." He held however, that the effect of such breach was not to entitle Newmont to specific performance of the agreement with the condition removed. It was impossible for the Court to make a new contract as if the breached condition had not been present in the agreement and then order specific performance of such new agreement. He therefore held that any remedy available to the Plaintiffs would be a remedy in damages which they did not claim. The learned Judge also held that the first two Respondents were in breach of Condition 3.1.2.4 of the agreement, but that for similar reasons the only remedy available to the Appellants was damages. He went on, however, to hold further that in any event specific performance could not be ordered even if the conditions had in fact been fulfilled. This was because the agreement required the "continuing co-operation of the parties." The terms of the agreement are relatively fully summarised in the Judgment and, accordingly, will only be briefly narrated here.

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The Agreement.

25. The objects of the agreement were to prospect, explore and, if warranted, to develop and exploit any mineral deposits within the leased areas by means of a joint venture between the Appellants and the first two Respondents : see clause 1.3. The interests were to be held in the proportions specified in clause 3.3.1. The agreement provided for the appointment of a manager and that Newmont should be the first manager : clause 4.1. The manager was, subject as otherwise expressly provided in the agreement, to have exclusive control and supervision of the carrying out of the operations of the joint venture. The nature of the duties are specified in clause 4.2.

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26. In addition, each party was to have a representative to attend meetings with the manager : clause 4.3 and clause 4.4. Work was to be carried out in accordance with programmes and budgets prepared by the manager and approved by the representative : clause 5.1. The parties were to be required to contribute towards the works, but Laverton and Nickel were not to be required to contribute until Newmont had contributed $2,800,000 : clause 5.2. There was also provision for payment to Laverton and Nickel for the establishment of the joint venture : clause 5.4.

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246 27. After Newmont had contributed $2,800,000 Laverton and Nickel were entitled to elect between a number of alternative courses. These elections depended upon, and were intended to result in, the issuing of various notices and left alternative courses open to the manager. The elections open to Laverton and Nickel related substantially to postponing the time of commencement of contribution by them. Provision was made for payment, in certain events of a contribution, to be calculated in accordance with a complicated
248 formula, by Laverton and Nickel. The agreement also contained detailed and complex provisions relating to development and exploration and the
250 contributions then to be made. There was also
265 provision with respect to withdrawal and default
271 and with respect to assignment.

SUBMISSIONS OF THE FOURTH RESPONDENT

The power of the Liquidators

28. In the course of his Judgment, the learned Judge affirmed a previous decision made by him that the agreement was within the power of the liquidators. Esso submits, however, that the
193x.10 agreement was beyond the powers of the liquidators.

29. The object of both petitions was the winding up of the companies. If the petitions had been
456 prosecuted successfully winding up orders would
462 have been made.

30. The consequences of a winding up order is the winding up of the affairs of the company and its ultimate dissolution. The liquidator cannot carry on the business of the company except for the beneficial winding up of the company, and from four weeks after the date of the winding up order, only with the authority of the Court or committee of inspection (s.236(1)(a)).

31. The powers of a liquidator appointed provisionally could not exceed the powers of a liquidator appointed to wind up the company, even where the provisional liquidator is given power to carry on the business of the company.

32. The principal duty of a provisional liquidator is to take into his custody and control all the property of the company, with a view to protecting and preserving it for the ultimate benefit of those who will share in the proceeds of its realisation if a winding up order is made (Re Dry Docks Corporation (1888) 39 Ch.D.306, per Cotton L.J. at p.312; Re Carapark Industries Pty.

Limited (1967) 86 W.N. (pt. 1) (N.S.W.) 165 at p.171; Re Codisco Pty. Ltd. [1974] Australian Company Law Cases (CCH) 40-126). The primary function of a provisional liquidator is to maintain the status quo pending the determination of the proceedings for a winding up order (Re Carapark Industries Pty. Ltd. (supra); Re Stewden Nominees No. 4 Pty. Ltd. [1975] 1 A.C.L.R.185 at p.188; Re Codisco Pty. Ltd. (supra); Re Chateau Hotels Ltd. [1977] 1 N.Z.L.R.381.

33. It is submitted, therefore, that the principles both as to the nature of a winding up and also as to the nature of a provisional liquidation show that the Newmont Agreement was beyond power. The Court would not authorise a provisional liquidator to enter into a long-term agreement such as the Newmont Agreement, the premise of which is that the company will not be wound up.

34. These submissions are reinforced by an examination of the actual powers of the provisional liquidators. The powers granted were the power to carry on business and those powers set out in s.236(2)(a)-(j) of the Act. None of these permits an agreement such as the Newmont Agreement. The powers are limited to the running of the day to day business of the company.

35. The Newmont Group was aware of all the relevant circumstances relating to the execution of the agreement. Esso submits that the agreement is null and void or was voidable at the instance of Laverton and Nickel Mines and was subsequently avoided, at the least, by the letter of 2nd March, 1979, referred to in paragraph 21 herein. 360 97

THE CONDITIONS OF THE NEWMONT AGREEMENT

36. It is common ground that condition 3.1.2.3 was not satisfied, in that the approval or consent of the Equity Division of the Supreme Court of New South Wales was not obtained. It is equally not in dispute that after the dismissal of the winding up petition no such approval or consent could be sought or obtained. It is for this reason that the learned Judge held that Laverton was in breach of agreement. The breach consisted of consent to the withdrawal of the winding up petition, which, so he held, was a breach of an implied term that each party would do whatever was reasonably necessary to ensure that the contractual terms could be fulfilled. If this is right, the liquidators and the directors were unable from the date of the Newmont Agreement to determine that it was

appropriate for the winding up petition to be dismissed without the company committing a breach of contract.

37. Esso submits that no such term should be implied into the agreement. The relevant facts are that the agreement was negotiated and executed by the provisional liquidators, who were the relevant management of the companies until the petitions were dismissed with a duty to manage the affairs of the company in its beneficial interest. They were not, however, in a position to do other than adopt a neutral stance in the dismissal applications. Moreover, Newmont knew before the date of their agreement that the petitions might be dismissed. They were fully informed of all the relevant facts at all times, and knew that an application for the dismissal of the petitions was imminent, a week or more before it was made.

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38. Esso submits that the provisional liquidators would not have been competent to make an express provision in the Newmont Agreement that the companies would oppose the withdrawal of the petitions until an application for the approval of the Newmont Agreement had been made. If no such express provision could be made, none will be implied. It would, having regard to the duties of the liquidator, be contrary to public policy to imply a term that the company acting through such liquidator was obliged to oppose the withdrawal of a winding up petition : such opposition would potentially be contrary to the best interests of the creditors and shareholders. Moreover, as the Judge held, the liquidator had no power to represent the company on the hearing of the petition.

39. The tests for the implication of a term are well known and were recently re-stated in BP Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council (1978) 52 A.L.J.R.20; see also Liverpool City Council v. Irwin (1977) A.C. 239. It cannot be suggested that the proposed term is either reasonable or necessary to give effect to the agreement. In every commercial agreement parties may take a risk. In the present agreement, as the learned Judge appeared to recognise, Newmont took the known risk that the winding up petition might be withdrawn and that, accordingly, the relevant condition would become incapable of fulfilment. Esso will rely upon the following authorities in support of their submission that the learned Judge was in error in concluding that a party is always bound to do everything reasonably within his power to prevent the terms of the agreement becoming

impossible of further performance :-

Rhodes v. Forwood (1876) 1 App.Cas.256
Luxor (Eastbourne) Ltd. v. Cooper [1941] A.C.108
Mona Oil Equipment & Supply Co. Ltd. v. Rhodesian Railway [1949] 2 All E.R.1014.
Lonhro Ltd. v. Shell Petroleum Ltd. and BP Ltd. [1981] 3 W.L.R.33.

40. It is also submitted, even if a term is to be implied, that the companies were not in breach. The parties present at the hearing of the application for the withdrawal of the petition were the provisional liquidator and a director. The provisional liquidators were bound to adopt a neutral stance. Strictly they had no standing : see General International Agency Co. Ltd. (1865) Beav. 1 55 E.R.1056; Re Union Accident Insurance Co.Ltd. (1972) 1 W.L.R.640. Indeed, the Judge, whilst hearing their submissions, declined to permit the liquidator to appear. The director of the company was not representing or acting on behalf of the company, certainly prior to the withdrawal of the petition. Accordingly it is unclear what acts can be said to be a breach by the company, and in the submission of Esso there was no such breach. Moreover, there is no indication that, had the liquidators opposed the petition, the Court would have declined to permit the petitioner to withdraw. In such circumstances, it would be wholly inappropriate for Newmont to obtain specific performance of the agreement because of an alleged breach which did not affect the substantive outcome.

41. The second condition relied upon is the obligation to obtain approval from the Queensland Minister of Mines (3.1.2.4.). The duty to obtain such approval lay upon Newmont. Application for approval was made by letter dated 22nd December 1978; the Minister's reply was dated 19th January, 1979. It is submitted that such reply does not amount to a consent, but rather to a statement of present intention, subject to conditions, to consent in the future. It is also submitted that the terms of the letter did not bind the Minister even if the conditions were satisfied. Alternatively, it is submitted that the conditions specified by the Minister were not satisfied within the three months period limited. In particular, transfer documents were not lodged with the Warden (Condition (a)) and the written consent of Leonora as an interested party was not obtained (Cond.(b)).

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42. There is no doubt that the first condition

was not satisfied. The claim of Newmont is that failure to lodge the transfer documents arose from breach by Laverton and Nickel. However, the Minister limited a period of three months within which his requirements could be satisfied. By this time, the winding up petitions had been dismissed. Whilst the Newmont Group asked the
428 provisional liquidators to furnish transfers, the provisional liquidators properly replied that the
430 application was premature. The agreement provided (see clause 11.11.2) that the transfers need not be delivered until fifteen days after the last of
280 the consents referred to in clause 3.1.2 were obtained. Accordingly there was no evidence to support the finding of breach of agreement. In essence, the events which led to the withdrawal of the winding up petition necessarily had the effect that such transfers would not be supplied. This allegation of breach is a further attempt by Newmont to rely upon the dismissal of the winding up petition. Newmont took the risk of such dismissal, which had the necessary consequence that the conditions specified in clause 3.1.2. could not all be fulfilled. There is a further issue in relation to this consent. As previously indicated, Leonora were joined as a party because of a claim to beneficial interest in certain of the mining leases concerned. The learned Judge made no finding as to whether, in fact, they had
193W.25 such an interest. It is submitted, however, that
130-134 the evidence, and in particular the oral evidence
147-157 of Mr. Lynch, of Mr. Palmer, of Miss Mathews, of
135-147 Mr. Doolan and of Mr. Brown and Exhibits 3A-3AB
171-173 show that Leonora had the interest in the mining
174-182 leases claimed by it. The Minister required as a
182-192 condition of his approval of the transfer of
671-899 leases the written consent of any person having a beneficial interest : there is no doubt that Leonora did not consent to the Newmont Agreement or such transfer.

43. This point cannot be met by saying that Laverton and Nickel are estopped by any terms of the Newmont Agreement from raising the interests of Leonora. Leonora is not estopped: nor is Esso. Moreover, the question of estoppel is irrelevant to this issue. The Minister for Mines would not approve the agreement unless all persons having a beneficial interest in the leases consented. Leonora did not consent. The fact that Laverton and Nickel warranted that no other person had an interest, and might accordingly be in breach of such warranty, in no way affects the position of the Minister for Mines nor prevents the argument being raised that, in fact, the consents were not obtained and accordingly the

conditions were not fulfilled.

44. Thus it is submitted that there were two conditions of the agreement which were not fulfilled : Condition 3.1.2.3, requiring the approval or consent of the Court, and Condition 3.1.2.4, requiring the approval or consent of the Minister for Mines. It is further submitted that the non-fulfilment of these conditions was not attributable to default on the part of Laverton or Nickel. In particular, the non-fulfilment arose because of the dismissal of the winding up petition and, in any event, would have arisen because the Court would have approved the Esso agreement rather than the Newmont Agreement. Esso also submits that by adopting the stance that the Court did not have power to give approval to the Newmont Agreement, which ~~id not~~ it did before Needham J. on 6 December, 1978 and in its appeal to the Court of Appeal from that decision, Newmont could not be heard to complain that Laverton and Nickel did not apply for such approval. At the time Newmont is now complaining that Laverton and Nickel should have been making application to the Court for approval of the Newmont agreement, Newmont was asserting that the Court had no right to give such approval. Newmont was continuing to make this assertion, by its appeal to the Court of Appeal at the time the Petition was dismissed.

THE REMEDY OF SPECIFIC PERFORMANCE

The claim for specific performance

45. The case for the Appellant depends upon findings of breach. Accordingly, if Esso is right in submitting that there is no breach, no claim for specific performance now arises.

46. The Appellants submitted that by reason of the breaches of agreement alleged against Laverton and Nickel the conditions of the agreement were to be treated as having been fulfilled. It is submitted that the learned Judge was correct in rejecting those submissions. It was fundamental to the Newmont Agreement that it should not have effect until a number of conditions were satisfied. The agreement could only be carried out if, for example, it was approved by the Court and the consent of the Minister was granted. The reason why there was no such approval or no such consent was irrelevant : consent was an essential requisite. Thus the learned Judge was right in concluding that any remedy of Newmont for breaches of contract which made the agreement incapable of

fulfilment was to be in damages. Alternatively, the Court approval contemplated by the parties was not a mere rubber stamp, but involved, as a pre-requisite, a judicial determination that the agreement in question was the best that could be obtained. A decree for specific performance would enforce what may well not have been the best available contract and, thus, the enforcement of a radically different contract.

47. Esso submits further that, in any event, a court would not order specific performance of this agreement. Its provisions are complex. They depend upon co-operation. Many issues in question would arise in the performance of the agreement which could last for fifteen years. It was conceded by Newmont before Needham J. that many such questions could arise, but suggested that the parties could return to Court and obtain particular
1937.6 orders for compliance with particular parts of the agreement. Esso submits that this is illustrative of the fact that the agreement would require the continual supervision of the Court, and that the Judge was correct in declining to decree specific performance.

48. There are the following further additional reasons against specific performance :

(i) The Esso agreement was more advantageous to Laverton and Nickel than the Newmont Agreement. The fact that at the date when the application for approval would have been heard the Esso agreement was in draft does not detract from this advantage : there was no suggestion that Esso was unprepared to enter into an agreement in effectively these terms as, in fact, they subsequently did. Thus, even if the application for approval of the Newmont Agreement had been heard, it would have been dismissed. It would have been inappropriate, as inequitable, to grant the Appellants specific performance of an agreement which would not in fact have been approved and was contrary to the best interests of the company. To accede to the submission of the Appellants that the condition as to the approval of the Court should be treated as having been fulfilled would be to grant them relief on a hypothetical basis more favourable to them than the facts warrant.

(ii) If the liquidators were in breach of an implied term of the Newmont Agreement, it remained likely that the petitions would in

any event be dismissed. The agreement was not supported by the management of the companies and the petitioner was seeking to withdraw the petition. Thus the petition would probably have been dismissed irrespective of any consent of the liquidators. It would be inequitable to grant Newmont specific performance of an agreement because of a breach was was immaterial to the outcome. Moreover, if a winding-up order were made, it would have been open to another liquidator, if appointed, simply to wind up the company and in that way to avoid the agreement. A Court would not have forced the company, in liquidation, to continue the contract by decreeing specific performance of it.

(iii) The provisional liquidators supported the agreement with Esso which, on the evidence, was favourable to the companies. In all the circumstances, it would have been inequitable for the company to have been required to perform an agreement negotiated by the provisional liquidators which was not the most beneficial agreement available. The Court would not in the circumstances have deprived the company of the opportunity of entering into the more advantageous Esso agreement. This is particularly so having regard to the factors by reference to which the Judge refused to grant Mr. Lynch an injunction restraining the parties to the Newmont Agreement from entering into such agreement. In particular, the learned Judge stated:

> "I think that one of the matters which will be of importance when the application is made to approve of the contract is the likelihood of any other company making a better offer than Newmont have made in respect of the proposed joint venture. In that respect it would be unlikely that this contract would be approved unless evidence was produced of the efforts which had been made to get better offers, particularly in the light of the evidence as it now appears, and whilst the liquidators are not seeking any directions from me at this stage I think it would be not out of place for me to say that I think that even though I am certainly not going to stop Mr. Hamilton or Mr. Hunter executing

324.33

this agreement today, it is my view that the other interested parties should be pursued, despite the execution of the agreement."

It would be inequitable for Newmont to be able to obtain the advantage of performing this agreement in the light of the entire history, including the learned Judge's reasoning and decision on this application.

(iv) There were doubts as to whether Leonora had an interest in the leases. In fact, in so far as it did, a remedy by way of specific performance affecting its interest would be inappropriate.

49. It is further submitted that Newmont cannot obtain in effect specific performance by reference to the doctrine of trusts or by obtaining an injunction. It is not accepted that a trust existed and, in any event, the obligation to transfer the leases was inseparably related to the entire obligations under the agreement for exploration and was dependent upon the fulfilment of those conditions which it is accepted are in fact incapable of fulfilment. The effect of the grant of an injunction would be, quite apart from its adverse effect on the interests of Leonora, to give the first two Respondents the option between a sterilisation of the exploration potential of the leases or the fulfilment of the agreement with Newmont. This would be tantamount to a decree of specific performance or, at very least, would be putting inequitable pressure on the first two Respondents to perform the agreement. In any event, to restrain the other Respondents from fulfilment of the agreement with Esso would be inequitable for the same reasons mutatis mutandis as those submitted in regard to specific performance. It thus would be inequitable to prevent them from acting under the agreement with Esso in the best interests of the company. No submissions were put at the hearing on behalf of the Appellants that there should be declaratory and injunctive relief in lieu of specific performance. It is submitted that they should not be permitted to put the submissions in the appeal. Esso submits that the Appeal should be dismissed for the following, amongst other,

R E A S O N S

(a) BECAUSE the agreement sued upon was beyond power of the provisional liquidators of Laverton and Nickel and was not binding on those companies;

(b) BECAUSE, alternatively, the agreement, if otherwise valid, failed by reason of the non-fulfilment of conditions set out in it;

(c) BECAUSE it is no answer to the above for Newmont to claim that Laverton and Nickel were in breach of the agreement;

(d) BECAUSE, in any event, Laverton and Nickel were not relevantly in breach of the agreement;

(e) BECAUSE, alternatively, the agreement is not such as a Court of Equity would grant specific performance of it;

(f) BECAUSE the Appellants are not entitled to obtain transfer pursuant to the doctrine of trusts;

(g) BECAUSE the Appellants are not entitled to an injunction as claimed or at all.

R. S. ALEXANDER Q.C.

M. J. R. CLARKE Q.C.

G. K. DOWNES

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 1691 OF 1979

B E T W E E N :

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

- and -

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

CASE FOR THE FOURTH RESPONDENT (ESSO EXPLORATION & PRODUCTION AUSTRALIA INC.)

Cutler Hughes & Harris,
53 Martin Place,
Sydney

By their Agents:

Bircham & Co.,
1 Dean Farrar Street,
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Solicitors for the Fourth Respondent