

IN THE SUPREME COURT OF WESTERN AUSTRALIA
HELD AT PERTH
COMMERCIAL AND MANAGED CASES LIST

CIV 1582 of 2022

B E T W E E N:

KYM MINING PTY LTD
(ACN 632 846 694)

Plaintiff

and

NEX METALS EXPLORATIONS LIMITED
(ACN 124 706 449)

Defendant

DEFENCE

Date of document: 20 July 2022

Date of filing: 20 July 2022

Filed on behalf of: Defendant

Prepared by:

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Reference: 20521

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1. The defendant admits paragraphs 1 and 2 of the statement of claim and says further that the defendant is also the registered holder of the Tenements.
 2. The defendant admits paragraphs 3 and 4 of the statement of claim, and says further that the JVA also included the following express terms:
 - (a) “Approved Programmed and Budget” means a programme and budget relating to Joint Venture Activities for a particular period which has been approved or deemed to have been approved by the Management Committee under this Agreement: clause 1;

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**CENTRAL OFFICE
SUPREME COURT**

- (b) “Joint Venture Activities” means all Exploration activities involved in the acquisition, use, development, operation and maintenance of Joint Venture Property and all other activities, undertakings, and operations engaged in by the Joint Venturers under this Agreement, but do not, unless otherwise agreed in writing, include Development, Mining, Treatment or other marketing or sale of Minerals: clause 1;
- (c) “Joint Venture Expenditure” means all costs reasonably and properly incurred by the Manager on behalf of the Joint Venture in connection with Joint Venture Activities pursuant to an Approved Programme and Budget or incurred in an Emergency or as a permitted cost overrun or as otherwise approved by the Management Committee: clause 1;
- (d) If the Management Committee for any reason fails to approve a Proposed Programme and Budget prior to the commencement of the year to which it relates, the Management Committee must use reasonable efforts to adopt an Approved Programme and Budget, and in the meantime the Manager must:
- (i) continue to do whatever is necessary to maintain the Tenements in good standing and other Joint Venture Property in good condition; and
 - (ii) perform and discharge all its existing obligations under the Agreement: clause 16.2(f);
- (e) the Manager:
- (i) must not undertake any Joint Venture Activities which are not substantially in accordance with an Approved Programme and Budget except in the case of an Emergency, a cost overrun in carrying out an Approved Programme and Budget, or if otherwise permitted by the Agreement or by the Management Committee: clause 16.3(a); and
 - (ii) must report to the Joint Venturers as soon as reasonably practicable any unbudgeted Expenditure incurred by the Manager for whatever reason: clause 16.3(b).

3. As to paragraph 5, the defendant admits that on 19 May 2021 the plaintiff gave notice in writing purporting to verify the Stage 1 Project Expenditure, but does not admit that the notice actually verified the Stage 1 Project Expenditure.
4. As to paragraph 6, the defendant admits that the plaintiff and defendant are and have been joint venturers, but does not admit that the joint venture was formed on 19 May 2021.
5. The defendant denies that the plaintiff sent the defendant a copy of the proposed joint venture programme and budget pleaded in paragraph 7 of the statement of claim and says that on 16 July 2021 Metalicity Limited (“Metalicity”) sent the defendant a copy of a proposed joint venture and budget. A copy may be inspected at the defendant's solicitors offices.
6. The defendant denies that the plaintiff gave the defendant a notice of meeting for the first Management Committee meeting pleaded in paragraph 8 of the statement of claim and says that on 20 August 2021 Metalicity sent the defendant a purported notice of meeting for the first Management Committee meeting. A copy of the purported notice may be inspected at the defendant's solicitors offices.
7. The defendant admits paragraphs 9, 10 and 11 of the statement of claim.
8. The defendant denies that the plaintiff gave the defendant a notice of meeting for the second Management Committee meeting pleaded in paragraph 12 of the statement of claim and says that on 11 February 2022 Metalicity sent the defendant a purported notice of meeting for the second Management Committee meeting. A copy of the purported notice may be inspected at the defendant's solicitors offices.
9. The defendant admits no representative of the defendant attended the Management Committee meeting on 28 February 2022 and there was no quorum as pleaded in paragraph 13 of the statement of claim and otherwise denies the paragraph and repeats paragraph 8 herein.
10. The defendant denies that the plaintiff gave the defendant a notice of meeting reconvening the second Management Committee meeting pleaded in paragraph 14 of the statement of claim and says that on 28 February 2022 Metalicity sent the

defendant a purported notice of reconvened second Management Committee meeting and says further that:

- (a) The plaintiff was at all material times and is the Manager under the JVA;
- (b) the Manager had responsibility for convening Management Committee meetings to approve Proposed Programme and Budget: clause 13.4(b) JVA;
- (c) within 60 days of the Joint Venture Commencement Date the Manager must provide the Joint Venturers with a proposed Programmed and Budget which must include details of the programme of Joint Venture Activities for the next year (and in the case of the first Proposed Programme and Budget) the current year: clause 16.1(a) JVA;
- (d) As at 28 February 2022 being the date of the Management Committee meeting, if properly convened by the plaintiff which is denied, the plaintiff had not complied with clause 16(a) of the JVA.

11. The defendant admits no representative of the defendant attended the Management Committee meeting on 28 February 2022 but otherwise denies each and every allegation in paragraph 16 and repeats paragraph 10 herein and says further that if, which is denied, the Management Committee was properly convened:

- (a) the JVA provided that it was a condition precedent to the commencement of any litigation by a Party in respect of a dispute under, or in relation to the JVA that the Party has complied fully with the agreed process of resolving the dispute under clause 27 of the JVA: cl 27.1;
- (b) that each other Party must within seven days after receipt of a Dispute Notice nominate by notice to the other Parties a representative authorised to negotiate and settle the Dispute on its behalf: cl 27.2(b) JVA;
- (c) the Parties' representatives must negotiate in good faith resolving the Dispute within 21 days after receipt of the Dispute Notice, failing which the Dispute must be immediately referred to a senior representative of the Parties: cl 27.2(c) JVA.

- (d) as at 8 March 2022 the date of the (purported) reconvened Management Committee meeting, the Manager (plaintiff) had not provided to the defendant a Proposed Programme and Budget of the programme of Joint Venture Activities for the current year as required by clause 16.1(a) JVA;
- (e) on 25 February 2022 the defendant by its solicitors wrote to Metalicity referring to the absence of a programme of exploration works and stating that details of targets to be tested and by what methods was customary so that the technical merit can be assessed when considering to contribute to the exploration programme and requesting a postponement of the Management Committee meeting to be postponed for 7 to 14 days until a programme was provided and an informed decision could be made. A copy of the letter may be inspected at the defendant's solicitors officers;
- (f) On 27 February 2022 the defendant by its solicitors sent to Metalicity a Dispute Notice pursuant to clause 27.2 of the JVA for the postponement of the Committee meeting because no detailed programme of exploration had been provided, and any programme of exploration required consideration by the plaintiff as a joint venture partner which had not been provided and was refused by Metalicity. The plaintiff sought a 7 day postponement of the meeting to obtain the programme of exploration as described in its letter dated 25 February 2022. A copy of the letter may be inspected at the defendant's solicitors officers.
- (g) on 28 February 2022 the defendant's solicitors wrote to Metalicity stating that pursuant to clause 27 of the JVA Metalicity was required to notify the defendant of its authorised representative and within 21 days, in good faith with the view of resolving the dispute, negotiate with the defendant to resolve the dispute, and that to proceed to resolve the dispute the defendant requested a detailed programme of exploration to be provided by Metalicity prior to the Committee meeting and for Metalicity to postpone the Committee meeting seven days after providing the requested programme to the defendant. A copy of the letter may be inspected at the defendant's solicitors officers;
- (h) on 3 March 2022 the defendant's solicitors wrote to Metalicity, amongst other matters, stating that it had activated the dispute resolution in clause 27 of the JVA

and that the defendant refused to pay the Called Sum of \$188,618 on the basis that Metalicity not proven to a reasonable degree that the Total Funding Amount incurred was to be regarded as being necessary to maintain the Tenements in good standing, the other Joint Venture Property in good condition or to perform all Metalicity's existing obligations as manager under the agreement, the Tenements or to Third Parties, that the Manager provide substantive documents to outline the exact works undertaken, and how it reached the determination the works were considered as "necessary" pursuant to clause 16.2(f), that Metalicity nominate a representative with the view to resolving the Dispute within 21 days, and that the Manager pursuant to clause 16.1 provide the defendant with a sufficient Proposed Programme and Budget which included a programme of Joint Venture Activities for the next year and an itemised budget specify all estimated Expenditure to be charged by the Manager on a monthly basis. A copy of the letter may be inspected at the defendants solicitors offices;

- (i) on 4 March 2020 Metalicity's solicitors wrote to the defendant's solicitors stating that the Called Sum needed to be paid, notwithstanding the issue of the Dispute Notice. A copy of the letter may be inspected at the defendant's solicitors' offices;
 - (j) on 4 March 2022 the defendant's solicitors wrote to the plaintiff's solicitors (who were the same solicitors as for Metalicity, the 2 directors of the plaintiff also being 2 of the 3 directors of Metalicity) stating, amongst other matters, that the defendant would not be paying the Called Sum of \$188,618. A copy of the letter may be inspected at the defendants solicitors offices;
 - (k) The plaintiff did not negotiate in good faith or at all in relation to the defendant's Notices of Dispute of of 27 February 2022 and 3 March 2022 prior to holding the Management Committee on 8 March 2022 and approved the Approved Budget.
12. By reason of the failure of the plaintiff to negotiate in good faith in relation to the defendant's Notices of Dispute of 27 February 2022 and 3 March 2022 as required by cl 27.2(c) or at all:
- (a) the Approved Budget was void and of no effect;

- (b) the condition precedent in clause 27.1 of the JVA to the commencement of the present litigation proceedings have not been satisfied.
13. The defendant admits that on 3 March 2022 the plaintiff issued a billing statement in for the amount of \$188,618 to be paid by 11 March 2022, but otherwise denies each and every allegation in paragraphs 17 and 18 of the statement of claim and repeats paragraphs 8 to 12 herein and says further that:
- (a) if (which is denied) the Approved Budget was not void and of no effect the First Called Sum related to costs and expenses incurred prior to the Approved Budget, was therefore not a matter which concerned the performance or discharge of an existing obligation within the meaning of clause 16 (g) of the JVA;
- (b) the only sums which could properly be the subject of the first Called Sum were funds necessary for the Manage to maintain the Tenements in good standing and other Joint Venture Property in good condition and for the Manager to perform its existing obligations under the JVA: cl 16(f) (i) and (ii) JVA, and in respect of those matters no details, including expenditures incurred have been provided to the defendant.
14. The defendant admits that on 11 March 2022 the plaintiff issued a billing statement to the defendant for the sum of \$989,712.22 to be paid by 11 March 2022 but otherwise denies each and every allegation in paragraphs 19 and 20 of the statement of claim and repeats paragraphs 8 to 12 herein and says further that:
- (a) if (which is denied) the Approved Budget was not void and of no effect the second Called Sum related to costs and expenses incurred prior to the Approved Budget, was therefore not a matter which concerned the performance or discharge of an existing obligation within the meaning of clause 16 (g) of the JVA;
- (b) the only sums which could properly be the subject of the second Called Sum were funds necessary for the Manager to maintain the Tenements in good standing and other Joint Venture Property in good condition and for the Manager to perform its existing obligations under the JVA: cl 16(f) (i) and (ii) JVA, and

in respect of those matters no details, including expenditures incurred have been provided to the defendant.

15. The defendant admits that on 11 March 2022 the plaintiff issued a billing statement to the defendant for the sum of \$101,464.04 to be paid by 18 March 2022 but otherwise denies each and every allegation in paragraphs 21 and 22 of the statement of claim and repeats and repeats paragraphs 8 to 12 herein.
16. In the premises the defendant denies that the plaintiff is entitled to the relief sought or to any relief.

PP George Papamihail

Solicitors for the Defendant