SUPREME COURT OF QUEENSLAND

CITATION:	*Genuity Pty Ltd v IG Power (Callide) Ltd* [2026] QSC 194
PARTIES:	**GENUITY PTY LTD** ACN 128 655 096 (applicant) **v** **IG POWER (CALLIDE) LTD** ACN 082 413 885 (respondent)
FILE NO:	3050 of 2025
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 August 2026
DELIVERED AT:	Brisbane
HEARING DATE:	8 June 2026, 9 June 2026, 10 June 2026
JUDGE:	Muir J
ORDER:	**1. The answer to question one is “no”: clause 5 of the Loan Agreement does not oblige IGPC to reimburse Genuity for the amounts of interest paid by Genuity pursuant to the OUK/Genuity Loan Agreements.** **2. If I am wrong and the answer to question one is “yes”, then the answer to question two is also “no”: the amount sought to be recovered by Genuity from IGPC as Interest Charges are not “necessary and reasonable” within the terms of clause 5 of the Loan Agreement.** **3. It is unnecessary to answer questions three and four.** **4. I will hear from the parties as to the appropriate directions to be made for the determination of question five, the second tranche trial listed on 7 and 8 December 2026 and as to costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – CUSTOM AND USAGE – INCORPORATION INTO CONTRACT – CONSISTENCY WITH EXPRESS TERMS – where the applicant advanced money to the respondent pursuant to two

loan agreements – where the applicant submits that the respondent is liable for the interest charges incurred for the maintaining of the first loan agreement – whether, on the proper construction of the first loan agreement, the respondent is liable to pay the interest charges claimed by the applicant – where evidence of the objective factual background known to the parties at the time of contracting may be considered in construing the loan agreement – where the factual background includes the complex corporate structure of the entities associated with the project and the circumstances under which the loan agreement was made

INTEREST – RECOVERABILITY OF INTEREST – IN GENERAL – where the applicant seeks to recover from the respondent approximately $24 million in interest charges – whether, on the proper construction of clause 5 of the first loan agreement, the interest charged sought to be recovered are "necessary and reasonable" within the meaning of that clause – where determination of that question requires consideration of factual findings and an assessment of whether it was necessary and reasonable for the applicant to incur the interest charges

INTERPRETATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – GIVING EFFECT TO MANIFEST INTENTION – where the applicant submits that the loan agreement permits the interest charges to be passed on to the respondent – whether that construction is consistent with the express language and clear intention of the loan agreement

Civil Proceedings Act 2011 (Qld), s 58
Income Tax Assessment Act 1997 (Cth), s815-B, s 815-C, s 815-D

Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd (2019) 1 QR 392
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99
Cherry v Steele-Park (2017) 96 NSWLR 548
Colquhoun v Brooks (1888) 21 QBD 52
Consolidated Fertilisers v DCT (1992) 36 FCR 1
Electricity Generation Corporation (trading as Verve Energy) v Woodside Energy Ltd (2014) 251 CLR 640
HNA Irish Nominee Ltd v Kinghorn (No 2) (2012) 290 ALR 372
Houssein v Under Secretary, Department of Industrial Relations & Technology (NSW) (1982) 148 CLR 88
Jireh International Pty Ltd v Western Exports Services Inc [2011] NSWCA 137

LCA Marrickville Pty Ltd v Swiss Re International SE (2022) 290 FCR 435
Masterton Homes Pty Ltd v Palm Assets Pty Ltd (2009) 261 ALR 382
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104
Plenary Research Pty Ltd v Biosciences Research Centre Pty Ltd [2013] VSCA 217
PMT Partners Pty Ltd v Australian National Park & Wildlife Service (1995) 184 CLR 301
S.C.N. Pty Ltd v Smith [2006] QCA 360
Santos Ltd v Fluor Australia Pty Ltd [2025] QSC 184
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165
Vision Super Pty Ltd v *Poulter* (2006) 154 FCR 185
Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522
Yume Group Holdings Pty Ltd v *Ashthorn CA Pty Ltd* [2024] VSCA 134

COUNSEL: B W Wacker for the applicant
N M Bender SC, with W LeMass, for the respondent

SOLICITORS: Johnson Winter Slattery for the applicant
Quinn Emanuel Urquhart & Sullivan for the respondent

Introduction

[1] The Callide Power Station is a coal-powered electricity generator located near Biloela in central Queensland. This power station is comprised of the Callide B and Callide C power plants, each with two generating units. Until October 2024, Callide C was operated by an unincorporated joint venture between the respondent, IG Power (Callide) Ltd (**IGPC**); a subsidiary of the applicant Genuity, and Callide Energy Pty Ltd (**CEPL**), with each of IGPC and CEPL having a 50 per cent interest (**Callide Power Project**). CEPL is owned by CS Energy Limited (**CSE**), a Queensland Government State-owned enterprise.

[2] In May 2021, an explosion tripped the C3 and C4 generating units at Callide C, impairing the production of electricity to the grid and causing critical damage to the C4 unit. Approximately $70 million in remedial work was required to return the power plant to service (the **Callide C4 Rebuild Project**), but a dispute arose between IGPC and its insurer, so the process was delayed.

[3] In the meantime, Genuity and IGPC were unable to raise sufficient external funds to pay for the rebuild with the looming potential that the value of Callide C would be significantly reduced. So, by a written Loan Agreement dated 1 April 2022, Genuity (formerly OzGen Holdings Australia Pty Ltd (sometimes referred to as (**OHA**)) agreed to lend IGPC $60 million. Clause 4 of the Loan Agreement provided that "The Loan shall not bear interest". To fund the Loan to IGPC, Genuity borrowed $60 million from its parent company, OzGen (UK) Limited (**OUK**) pursuant to three loan

agreements (together, the **OUK/Genuity Loan Agreements**). OUK obtained the funds to lend to Genuity by way of equity contributions from shareholders. Under the OUK/Genuity Loan Agreements, Genuity was required to repay the $60 million, together with interest at 10 per cent per annum, by 15 June 2026. The principal balance was repaid by Genuity to OUK on 5 June 2026, and the interest of about $24,395,890.42 (**Interest Charges**) was repaid in full on 10 June 2026.

[4] Between April and June 2022, IGPC drew down $59,285,888 pursuant to the Loan Agreement. But IGPC was unable to repay the funds advanced under the Loan Agreement and was placed into administration by its directors on 24 March 2023. By transactions on 16 October 2024 and 24 March 2025, Sev.en Global Investments a.s (**7GI**) acquired 100 per cent of the shares in in IGPC's immediate parent company, IG Power Holdings Ltd (**IGPH**) and so, from around March 2025, 7GI has controlled IGPC. The result is that IGPC is no longer a subsidiary of Genuity and the Callide Power Project is effectively now a joint venture between CSE and 7GI.

[5] By proceedings commenced in July 2025, Genuity claims that IGPC is liable for the Interest Charges under clause 5 of the Loan Agreement as "necessary and reasonable fees, costs, charges and expenses" it incurred to OUK in funding the Loan to IGPC. There is also an offsetting debt claim by IGPC, but that issue is listed for trial before me later in the year.

Questions for determination

[6] The following five separate questions were identified for determination:

Question one: Whether on its proper construction, clause 5 of the Loan Agreement obliges IGPC to reimburse Genuity for the amounts of interest paid by Genuity pursuant to the OUK/Genuity Loan Agreements. The answer to this question turns on the construction of that clause as it appears in the Loan Agreement.

Question two: If the answer to question one is yes, whether the amount sought to be recovered by Genuity from IGPC are "necessary and reasonable" within the terms of clause 5 of the Loan Agreement. The answer turns not only on the proper construction of clause 5, but on the factual findings and an objective assessment as to whether it was necessary and reasonable for Genuity to have incurred the Interest Charges.

Question three: If the answer to question two is yes, whether "necessary and reasonable" fees, costs, charges and expenses are only recoverable on demand (that is, is a demand a necessary condition to reimbursement)? It is unnecessary to answer this question as, despite a denial in the pleading, IGPC now accepts that a demand for payment of the Interest Charges has been made both by letter and the commencement of the proceeding.

Question four: Whether interest incurred but not paid under the OUK/Genuity Loan Agreements is recoverable. It is unnecessary to answer this question as all of the Interest Charges have now been paid to OUK, with the last tranche of about $8 million paid by Genuity on 10 June 2026.

Question five: The calculation of the amount due by IGPC to Genuity pursuant to the Loan Agreement. The parties agreed that the answer should be deferred until questions one and two have been answered with the parties to be given the opportunity to make further submissions.

[7] These reasons address questions one and two. As the answers to both turn on the proper construction of the Loan Agreement, it is convenient to start by setting out that document in full.

The terms of the Loan Agreement

[8] The Loan Agreement defines Genuity as the "Lender" and IGPC as the "Borrower" and otherwise states:

> "…
>
> This agreement records the terms of an agreement between the Lender and the Borrower where the Lender agrees to lend an amount of up to A$60,000,000.00 to the Borrower on the terms set out in this agreement.
>
> **1. Timing**
>
> At the discretion of the Lender, and upon receipt of a written request from the Borrower, the Lender will lend to the Borrower an amount of up to A$60,000,000.00 ("the **Loan**"). The Loan may be drawn down in a single draw down request or over multiple draw down requests as requested at the Borrower's discretion provided always that the aggregate of all draw down requests made by the Borrower do not exceed A$60,000,000.00.
>
> **2. Purpose**
>
> The purpose of this Loan is to enable the Borrower to provide liquidity support to the Borrower to enable the Borrower to pay costs and other obligations approved in the Callide Rebuild Commitment Agreement dated 28 December 2021 between Union Star Development Limited, InterGen Australian Holdings (UK) Limited and OzGen (UK) Limited. The Borrower must apply the proceeds of the Loan for this purpose.
>
> **3. Repayment**
>
> This Loan is repayable on demand by the Lender and in any event within 12 months from the date of this Loan Agreement unless otherwise agreed between the Lender and the Borrower in writing. The Borrower must repay any amount so demanded by the Lender forthwith after receipt of the demand.

4. Interest

The Loan shall not bear interest.

5. Fees and Costs

The Borrower must reimburse the Lender on demand for all necessary and reasonable fees, costs, charges and expenses which the Lender may incur in funding and maintaining the Loan.

6. Governing Law

This agreement is governed by the laws of Queensland and the Lender and the Borrower submit to the non-exclusive jurisdiction of the Courts of Queensland.

…"

[9] The parties contend for alternative constructions of clause 5. Genuity submitted that the Interest Charges amount to "necessary and reasonable fees, costs, charges and expenses which Genuity…incur[red] in funding and maintaining the Loan to [IGPC]" but IGPC submitted that the express provisions of clause 4 provide for an interest-free Loan and are otherwise not necessary or reasonable.

[10] How then should the Court approach the construction of the Loan Agreement?

How are commercial agreements to be construed?

[11] The proper construction of a commercial contract is to be determined from the text and the commercial context at the time in which the agreement was made; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]. That context includes construing the terms as a reasonable businessperson would have understood them to mean; *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]. In doing so, it is necessary to consider the language used, the surrounding circumstances known to the parties at the time of the contract and the commercial purpose or objects to be secured by the contract; *Electricity Generation* at [35].

[12] Ordinarily, a commercial contract is to be construed on the assumption that the parties intended to produce a commercial result unless a contrary intention appears; *Electricity Generation* at [35].

[13] The commercial purpose or objects of the agreement may be informed by an understanding of the background to the transaction and the context and market in which the parties are operating; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [49]. This is the case despite how clear the "ordinary words" of the agreement may be; *Yume Group Holdings Pty Ltd* v *Ashthorn CA Pty Ltd* [2024] VSCA 134 at [53]. There is no requirement to establish ambiguity before the surrounding circumstances can be considered; *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382 at [3].

[14] The necessary analysis of the objective facts and circumstances relevant to the construction of the Loan Agreement is informed firstly by a more detailed

understanding of the complex corporate structure of the entities associated with the Callide Power Project.

Detail of the corporate structure of the Callide Power Project

[15] At the time of the various loan agreements the subject of these proceedings:

(a) Genuity was the head of the Australian OUK subsidiaries; collectively referred to as Genuity Group. It controlled joint-venture interests in Callide C (50 per cent) and another power station at Millmerran (65 per cent). As stated earlier, IGPC held the interest in Callide C with the other 50 per cent in Callide C owned by an entity associated with CSE;

(b) Genuity was owned by OUK, a company registered in England and Wales;

(c) OUK was owned by two companies: InterGen Australian Holdings (UK) Limited (**IAHUKL**) and Union Star Development Limited (**USDL**) in equal shares (the **OUK Shareholders**);

(d) USDL was effectively controlled by China Hua Neng Group Hong Kong Limited (**CHG**); and

(e) IAHUKL was owned by interests related to 7GI (50 per cent) with the balance held by entities controlled by CHG and others.

[16] Mr Tengdahl is the chief financial officer of the Genuity Group. He has over 35 years' experience in tax and finance and has worked at Genuity since 2002. He has been the CFO of the Genuity Group since 2008 and has been and remains since 2010, a director of all the Genuity Group companies. Mr Tengdahl resigned as a director of IGPC (and the other companies sold to 7GI) in April 2025. He was therefore a director of both Genuity and IGPC at the time of the Loan Agreement and the OUK/Genuity Loan Agreements. Mr Tengdahl swore several affidavits and was cross-examined before me. I found Mr Tengdahl to be an honest witness but for the reasons stated below (at [94]) he was not a particularly reliable historian and his evidence as it concerned the issue of the Interest Charges being necessary and reasonable was unconvincing and unreliable.

[17] Mr Tengdahl and Mr d'Emden were the main individuals involved (for both Genuity and IGPC) in the execution of the Loan Agreement. Mr d'Emden is the head of treasury and financial planning and analysis of Genuity. He reports to Mr Tengdahl and has over 12 years' experience as a financial analyst at Genuity. Mr d'Emden drafted the Loan Agreement and has prepared various reconciliations of the amounts due under the various loans.

[18] The subjective intentions of these witnesses as the relevant minds of both sides of the agreement are of course irrelevant. The objective purpose of the Loan Agreement is to be determined by the Court in the light of what was known to the parties at the time; *HNA Irish Nominee Ltd v Kinghorn (No 2)* (2012) 290 ALR 372 at [261]–[264].

[19] What then were the circumstances in which the Loan Agreement came about?

Objective factual background at the time the Loan Agreement was executed

[20] Following the explosion in May 2021, IGPC made a claim on its insurance, with the proceeds expected to be received in September 2021. But that did not occur. So, in September 2021, Mr Tengdahl started exploring options for IGPC to obtain funding for the Callide C4 Rebuild Project. Mr Tengdahl also asked Mr d'Emden and an external consultant (Mr Livingston) to explore IGPC's options.

[21] On 14 September 2021, Mr Livingston sent an email to Mr Tengdahl and Mr d'Emden estimating that C4 would be returned to service in February 2022 and that IGPC would require funding of about $117 million to meet the rebuild costs and other cashflow requirements to November 2022. Mr Livingston proposed various options involving "'external' liquidity support" through a third-party financier.

[22] Mr Tengdahl did not consider IGPC would be successful in obtaining funding from a third party such as a bank, and together with Mr d'Emden, decided to seek funding from OUK Shareholders. I accept (as both logical and reasonable), Mr Tengdahl and Mr d'Emden's evidence about the difficulties in obtaining funding from a third party.

[23] First, in 2017 and 2018, IGPC had approached around 36 banks for external bank funding. This process was slow and not particularly fruitful. Over 18 months, only two banks provided funding and for much lower amounts than had been sought.

[24] Second, there was urgency in obtaining the funding. Mr Tengdahl considered that the process to obtain external bank funding would take many months. Time that IGPC did not have.

[25] Third, the banks had developed environmental, social and governance policies which discouraged financing projects in the coal industry or those associated with the coal industry.

[26] Fourth, the financial position of IGPC was worse in late 2021 than it was in 2018. The C4 explosion had reduced IGPC's revenue.

[27] Fifth, the fact of the C4 explosion was likely to dissuade third party lenders from providing finance to IGPC.

[28] The most suitable option was therefore to raise funds directly from OUK Shareholders.

November 2021 – Genuity request to OUK Shareholders for funding approval

[29] On 1 November 2021, the managing director of Genuity, Mr Gunther sent a "liquidity update and request" for OUK Shareholder approval:

(a) for the Callide C4 Rebuild Project at an estimated cost of $70 million (excluding the contingency); and

(b) for the rebuild to be funded by insurance proceeds (if received), available Callide Project cashflow and from Millmerran distributions or other equity provided by shareholders (at shareholders' election), which was forecast to be required from December 2021.

[30] On 10 November 2021, Mr Gunther sent a "Shareholder Liquidity Support" memorandum to OUK Shareholders. The memorandum noted that Callide C had funded margin calls of $19 million in September and October 2021 which had "changed Callide's liquidity" such that additional funding would be required in January 2022.

[31] The memorandum further noted:

(a) that if the insurance proceeds were not received by 31 December 2021, the Callide Project required additional liquidity support to continue its operations and return to service;

(b) without insurance, the Callide Project required funds totalling $117 million to meet operating costs, rebuild costs, debt payments and, for the period November 2021 to March 2023, cash support for the project to operate;

(c) Genuity had sought potential options about finance with its financial advisers and consultants, but for various reasons there was no solution identified that would attract liquidity to support Callide, so this was not a viable option;

(d) Callide could draw $20 million from an existing working capital facility to meet margin calls that had been paid, but a draw on that facility would not be possible without the provision of liquidity support from the OUK Shareholders; and

(e) the directors were seeking approval from the OUK Shareholders "to provide the necessary liquidity support to the Callide project...over the next 9 months...".

December 2021: Callide Rebuild Commitment Agreement

[32] On 28 December 2021, OUK and the OUK Shareholders executed the Callide Rebuild Commitment Agreement (**CRCA**). Genuity was not a party to this agreement nor was it involved in its negotiation. Although Mr Tengdahl was provided a copy of the agreement on 29 December 2021.

[33] Pursuant to the CRCA:

(a) (clause 2.1) the OUK Shareholders acknowledged that the Callide C4 Rebuild Project was expected to be completed within the budget of $117 million and would be funded "to the extent possible by any combination of funds" from:

(i) the proceeds of insurance;

(ii) the current or future cash reserves of the Callide Project; and

(iii) the available proceeds of any debt financing of the Callide Project;

(b) (clause 2.2) to the extent funding was not available from those sources, OUK undertook to the OUK Shareholders to contribute, and procure its subsidiaries to contribute, any available cash reserves to the C4 rebuild;

(c) (clauses 2.3 and 2.4) the OUK Shareholders undertook to each other to each support 50 per cent of any shortfall between the sources in clauses 2.1 and 2.2 and the C4 rebuild costs (the **Funding Gap**), up to $30 million each; and

(d) (clause 2.5) the funding provided by the OUK Shareholders to OUK "shall be provided by way of equity subscription or loan as agreed" between the OUK Shareholders and, absent agreement, by equity.

March 2022 – funding is required

[34] In late March 2022, there were significant increases in forward market electricity prices. This resulted in Mr d'Emden preparing a cashflow forecast for the Callide Project. It showed that IGPC required immediate funding of $20 million to meet anticipated margin calls.

[35] On 28 March 2022, Mr Tengdahl sent an email to Mr Teague (a director of OUK) with the subject line "Callide Liquidity—Shareholder Funding". It stated:

> "Hi Paul
>
> Fyi, the forward curve has continued to increase over the past few weeks with the largest increase coming today (see below email). This is just a heads up to let you know I expect to send an email to you, Di [Zhang] and 7E, tomorrow with a general Callide liquidity update and a request for $20m (IG share GBP 5.7m) of the $60m shareholder funding to be provided asap but no later than Monday April 11, with another $20m in May. We are still working through a few issues that I will discuss with Brent [Gunther] but I believe that is where we will end up so wanted to give you some advance notice..."

[36] In response, Mr Teague stated:

> "Thanks Brett - will need a cash update (inc forecast summary). **Propose going in as debt or equity? Ease of return of insurance proceeds a factor?**"
>
> (emphasis added)

[37] In response, on 30 March 2022, Mr Tengdahl wrote: "We would inject the funds as a loan from OzUK to OHA..."

[38] On 31 March 2022, Mr Tengdahl sent a request to OUK Shareholders for $20 million of funding in April 2022, with a further $23 million in May 2022. The email further stated:

> "Accordingly, OzGen management requests that as soon as possible but no later than April 15, OzGen shareholders each transfer A$10m (total of A$20m) to OHA of the A$60m funds which has been previously approved as part of the Shareholder funding in the Equity Commitment Deed,[1] for the following purposes..."

Many balls in the air on 1 April 2022

[39] In an exchange of emails between Mr Tengdahl and Mr Graves and Mr Teague (from OUK) on 1 April 2022:

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1 This appears to be a reference to the CRCA.

(a) Mr Graves asked: "I was wondering if you have heard from CHG regarding form of funding into OzGen UK - equity or utilising the existing loan structure that was used to fund Millmerran?";

(b) Mr Tengdahl responded: "No I have not discussed this directly with Di [Zhang] but I would expect it would follow the existing loan structure used for Millmerran".

[40] Mr Zhang is a representative of CHG. He was a director of OUK and USDL. He was not called, nor did he give evidence at the hearing. Nothing turns on this.

[41] On 1 April 2022, Mr d'Emden prepared a draft loan agreement between OUK and Genuity. The draft provided for interest to be paid by Genuity to OUK at 10 per cent per annum. This agreement was based on a template Mr d'Emden obtained from a prior loan between OUK and Genuity for Millmerran (required due to a shortfall in the debt provided to Millmerran) (the **Millmerran Loan**). The rate of 10 per cent in the Millmerran Loan took into account that OUK had borrowed the funds at 8.75 per cent from the OUK Shareholders and "grossing up" that amount for Australian withholding tax (or 10 per cent). It was also based on advice Genuity received from Mr Bona, a partner of PwC Global Tax. That advice, dated 29 June 2021, was that an arm's length range would be 8.5 per cent to 12.9 per cent, with the median in the order of 10 per cent.

[42] At the time, Mr Tengdahl was conscious that any interest payable by Genuity to OUK had to comply with the transfer pricing requirements of the *Income Tax Assessment Act 1997* (Cth). Mr Tengdahl explained those obligations require cross-border loans to comply with arm's length principles (that is, a loan that would be expected between independent entities dealing at arm's length).

[43] As things transpired, the OUK Shareholders elected not to lend moneys to OUK (which was a departure from the Millmerran funding structure).

[44] On 1 April 2022, shareholders of 7GI and other related shareholders resolved to provide $30 million of funding to IAHUK "to allow for the contribution of funds to OzGen to meet IAHUK's obligations under the Callide Commitment Agreement" and "that such funds may be provided and contributed by any combination of (i) loans and (ii) subscription for new shares of the Company and/or in OzGen". Mr Tengdahl was not aware by 1 April 2022 it had been agreed that the funds under the CCRA were to be provided to OUK through an equity injection by the OUK Shareholders. He initially thought he became aware of this fact by March 2023. But as discussed in more detail below (at [94]), Mr Tengdahl belatedly accepted that he knew of that much earlier. Indeed, Mr Tengdahl realised that he was told on 14 April 2022 that the funding from the OUK Shareholders was by way of equity in return for shares.

[45] It is within this factual construct that the Loan Agreement (drafted by Mr d'Emden) providing for Genuity to lend $60 million to IGPC was executed by Mr Tengdahl on 1 April 2022.

What happened after the Loan Agreement was executed on 1 April 2022

[46] The following factual matrix is not relevant to the first issue of whether the Interest Charges fall within the definition of fees and costs under clause 5. But it forms part

of the ongoing narrative and is otherwise relevant to the second issue as to whether Interest Charges (as may be captured by clause 5) are necessary and reasonable.

[47] By early April 2022, IGPC was clearly in urgent need of funding. In April 2022, Genuity advanced $12.88 million to IGPC by way of a Gap Loan. This amount was sourced by Genuity from its own cash resources and those of its Australian subsidiaries. The Gap Loan was repaid by IGPC to Genuity once the loan from OUK to Genuity became available.

April 2022: The drawdown on the Working Capital Facility Agreement is denied

[48] On 5 April 2022, IGPC gave notice to its banker, Bank of China, seeking to draw down $20 million from the WC Facility Agreement. But on 6 April 2022, Bank of China gave notice to IGPC that the financiers under the WC Facility Agreement were "not comfortable" proceeding with the request and IGPC subsequently withdrew the drawdown request.

Subsequent preparation of the Loan Agreements between OUK and Genuity

[49] On 4 April 2022, Mr Svoboda, the Chairman of the board of 7GI, sent an email to the OUK Shareholders' representatives, OUK directors and Mr Gunther and Mr Tengdahl stating that:

> "…At the same time OzGen Shareholders should provide the $60m of liquidity to Callide as part of the Equity Commitment Deed in order to fund the reconstruction of C4. I also understand from Brett [Tengdahl] that this should be done ASAP. Again, we are ready to do so and will ask Jim and Paul [of OUK] **to prepare the appropriate loan agreements.**"
>
> (emphasis added)

[50] On 8 April 2022:

(a) Mr Slechta of 7GI asked Mr Teague: "In which form will IGNV/IAHUK be providing the funding to OzGen [OUK]? Simple loan, right?";

(b) in response, Mr Slechta was informed by Mr Teague that the form of funding from the OUK Shareholders to OUK would "more likely" be equity and OUK to Genuity "is likely debt" and then "equity down to project"; and

(c) following that email, Mr Slechta sent an email to Mr Tengdahl confirming that debt from OUK to Genuity "sounds good".

[51] On 13 April 2022, Mr Zhang advised that CHG was "ready to review and approve the loan docs...before contributing cash under CRCA. We understand that this need[s] both OZGEN and IG board approval and ask IG and OZGEN to provide us the Docs this week".

19 April 2022: First OUK/Genuity Loan Agreement

[52] On 19 April 2022, the OUK Shareholders resolved that OUK and Genuity could enter into the First OUK/Genuity Loan Agreement and that Genuity may draw down funds up to the Commitment amount under the OUK/Genuity Loan Facility.

[53] The First OUK/Genuity Loan Agreement was executed by Mr Tengdahl on behalf of Genuity and provided:

(a) (clause 2.1) for OUK to make an advance to Genuity of up to $20 million;

(b) (clause 3) for Genuity to pay interest at the rate of 10 per cent per annum, which accrues daily and is payable in arrears every six months;

(c) (clause 4) for the advance and all accrued and outstanding interest to be paid by 15 June 2026 (the "Final Maturity Date"); and

(d) (clause 5) that Genuity could elect to defer the payment of interest and could elect to pay amounts of deferred interest.

[54] The commitment of $20 million was advanced to Genuity by payments made of $10 million each directly by the two OUK Shareholders on 19 and 20 April 2022, respectively.

May 2022: Second OUK/Genuity Loan Agreement

[55] On 6 May 2022, Mr Tengdahl sent an email to the OUK directors and OUK Shareholders seeking further funding of $25 million. Each of the OUK Shareholders was requested to contribute $12.5 million each to OUK by 15 May 2022.

[56] On 17 May 2022, OUK and Genuity entered into the Second OUK/Genuity Loan Agreement. Again, this agreement was executed by Mr Tengdahl and is in the same terms as the first agreement, except the commitment was $25 million.

[57] The commitment of $25 million was advanced to Genuity by payments made of $12.5 million each directly by the two OUK Shareholders on 17 and 18 May 2022. respectively.

June 2022: Third OUK/Genuity Loan Agreement

[58] On 1 June 2022, Mr Tengdahl sent an email to the OUK directors and OUK Shareholders seeking further funding of $15 million. Each of the OUK Shareholders was requested to contribute $7.5 million each to OUK by 8 June 2022.

[59] On 7 June 2022, the directors of OUK and the OUK Shareholders resolved that OUK would lend $15 million to Genuity on the same terms of the Second OUK/Genuity Loan Agreement. The Third OUK/Genuity Loan Agreement was in the same terms as the earlier two agreement except that the commitment was $15 million.

[60] IGPC submitted that the Third OUK/Genuity Loan Agreement was "backdated" by Mr Tengdahl. Genuity accepted that the agreement was executed by Mr Tengdahl "albeit belatedly" but argued that this was due to a simple administrative oversight. It is unnecessary to resolve what exactly happened. The real issue is one of the proper construction of clause 5 of the Loan Agreement. Regardless, what is clear is that Genuity:

(a) confirmed its assent to the terms of this third agreement by sending a draft to OUK and OUK Shareholders for execution;

(b) performed its terms, including obtaining the benefit of the loan and in repaying interest and, most recently, the whole of the principal due; and

(c) is bound by its terms.

[61] The commitment of $15 million was advanced to Genuity by payments made of $7.5 million each directly by the two OUK Shareholders on 9 and 10 June 2022, respectively.

The advances by Genuity to IGPC under the Loan Agreement

[62] Between 20 April 2022 and 21 June 2022, Genuity advanced $59,285,888 over 11 payments to IGPC pursuant to the Loan agreement.

[63] The moneys were "drip fed" to IGPC as IGPC required funding to meet its payment obligations and to ensure there was not a significant cash balance in IGPC which may have been a catalyst for lenders to act more aggressively to the detriment of IGPC and its shareholders. The consequence of the drip feeding of money was that Genuity incurred interest on the whole of the $60 million advanced to it, but which was not necessarily advanced to IGPC at the same time (or at all). However, the $60 million advanced to Genuity was held in an interest-bearing account pending it being on-lent to IGPC. In calculating its costs of providing the funding, Genuity has deducted the interest received by it in respect of the $60 million (or so much of it as was not on-lent) held in that interest-bearing account.

The Second Loan Agreement

[64] On 20 December 2022, Genuity and IGPC entered into a Second Loan Agreement in relatively the same terms as the first one between them. That same day, Genuity advanced $11.4 million to IGPC pursuant to the Second Loan Agreement. As those moneys were not "on lent" from moneys borrowed by Genuity from OUK, Genuity does not claim in respect of the costs of funding or maintaining the second loan. The claim is simply for the recovery of the principal, which is part of question 5; to be determined after these reasons have been delivered.

Question one: does clause 5 of the Loan Agreement oblige IGPC to reimburse Genuity for the Interest Charges

[65] The Court is entitled to look at evidence of the objective factual background known to the parties at the time of the contract to assist in the interpretation of a written agreement if the language is ambiguous or susceptible of more than one meaning – as has been submitted in this case. As stated earlier, the meaning of a commercial contract is to be determined objectively according to what a reasonable businessperson would have understood its term to mean. This approach proceeds on the assumption that the parties intended to produce a commercial result and to avoid the contract making commercial nonsense or working commercial inconvenience.

Commercial context

[66] At the time of the Loan Agreement, both lender and borrower were members of the same corporate group. Mr Tengdahl was a director of both (with other common directors). In late November 2021, and in the time leading up to the Loan Agreement being signed on 1 April 2022, IGPC was facing intense liquidity issues arising from margin calls and the C4 rebuild costs. Mr Tengdahl and Mr d'Emden were working quickly to sure up finance for IGPC. That context at the time was that Genuity and

IGPC were unable to raise sufficient external funding to fund the cost of Callide C. To address the funding gap, Genuity looked to the shareholders of its parent company, OUK, to supply the necessary funds. Unless Callide C was repaired, its value was estimated to reduce from $300 million to $30 million.

[67] On 28 December 2021, OUK's Shareholders entered into the CRCA each agreeing to provide to OUK the sum of $30 million, for a total of $60 million, in order to assist in financing the cost of the Callide C4 Rebuild Project. Under the CRCA, in return for the $60 million in funding, the OUK Shareholders were to receive further shares in OUK. The CRCA provides that, unless agreed otherwise, the funds provided under the CRCA would be provided in return for shares in OUK. There was no other agreement, and as things transpired, the funds advanced under the CRCA were provided as equity, not debt.

[68] The purpose of the funding from OUK, which was to be on-lent to IGPC, was for the costs of rebuilding the C4 unit following the incident. That is evident from the November 2021 emails and the terms of the CRCA itself. It is also evident from the purpose of the loan as recorded in clause 2 of the Loan Agreement was to provide liquidity support to IGPC to enable IGPC to pay costs and other obligations approved in the CRCA. The parties anticipated at the time that the insurance proceeds would be up to $138 million but there was uncertainty as to the timing of payment. The repayment of the Loan (due on 1 April 2023, 12 months from the date of the Loan Agreement) was anticipated to align with repayment of the insurance proceeds and C4 being returned to service.

[69] Genuity submitted that the fact the parties were members of the same corporate group explains why $60 million was lent on the back of such a short agreement. I accept that. But this submission cuts both ways. The parties are part of a sophisticated corporate structure in a highly complex industry. Those behind the corporate face are very experienced businessmen who, at the time, had been involved in the industry and in the formulation of loan agreements for some time. Objectively speaking, the drafting of such a short concise document is also consistent with the objective likelihood that the parties wanted to record what was to be a simple and speedy transaction to fill a gap pending the receipt of insurance monies. This was done through a short-term loan which, by clause 3, was repayable on demand and, in any event, within 12 months.

[70] Genuity submitted that the construction for which IGPC contends produces "a commercial nonsense or [works] a commercial inconvenience" because it "traps" the liability to pay interest within Genuity where Genuity:

(a) did not derive any meaningful revenue and had no means to pay the interest, absent support from other companies in the group;

(b) was not the ultimate beneficiary of the funding, which was for IGPC to meet its obligations towards the C4 rebuild; and

(c) did not derive the revenue from the Callide Power Project, or stand to receive the insurance proceeds, to which the funding was directed to filling a "gap" pending receipt of those moneys.

[71] I do not accept the above submission. Rather, I am satisfied that it was objectively in the mutual interests of IGPC, Genuity, OUK and OUK Shareholders that the funding

gap was met. In this context, whether IGPC repaid the Loan with or without interest was of no commercial significance, particularly given that all relevant transactions occurred within a single corporate group. In these circumstances, there was nothing commercially unsurprising about Genuity incurring interest on funding which it provided to its ailing subsidiary (IGPC) on an interest-free basis during a time of crisis. Mr Teague did not propose an interest obligation on IGPC down the line (at [50(b]) above). This is unsurprising, given the fact that in contrast to IGPC's dire financial predicament, Genuity's other asset was a 65 per cent interest in the Millmerran Power Station which had earned a profit for the year ending December 2021 of about $104 million. It is also instructive that clause 2.2 of the CCRA provided that OUK and OUK Shareholders committed to procuring their subsidiaries to contribute any available cash reserves to the C4 rebuild, with Genuity being one of those subsidiaries.

What language was used?

[72] While a court will have regard to the commercial context, the start and end point, of course, is the language chosen by the parties to record their agreement: *Cherry v Steele-Park* (2017) 96 NSWLR 548 at [72].

[73] The court must give effect to the language of the contract, unless to do so would give the contract an absurd operation: *Jireh International Pty Ltd v Western Exports Services Inc* [2011] NSWCA 137 at [55]. There is nothing absurd or uncommercial in giving effect to the clear terms of the Loan Agreement.

[74] The Loan Agreement is only two pages long. Clauses 4 and 5 appear immediately after one another as set out (again) below:

> "…
>
> **4 Interest**
>
> The Loan shall not bear interest.
>
> **5 Fees and Costs**
>
> The Borrower must reimburse the Lender on demand for all necessary and reasonable fees, costs, charges and expenses which the Lender may incur in funding and maintaining the Loan.
>
> …"

[75] The plain meaning of the words "the loan shall not bear interest" in clause 4 are clear. They mean that IGPC is not liable to pay interest on the Loan. The commercial object of this Loan (concerning interest) is that it was to be interest-free.

[76] The clauses of a contract are to be construed in a way that is harmonious and achieves congruency to the various parts: *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [16]; *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109.

[77] Under clause 5 of the Loan Agreement, IGPC is required to reimburse Genuity on demand for all necessary and reasonable "fees, costs, charges and expenses". Clause 5 does not refer to "interest", notwithstanding that interest is expressly referred to

immediately above in clause 4. This strongly suggests that the objective intention underlying clause 5 was that it would not permit Genuity to pass interest on to IGPC. The fact that the issue of interest is expressly and specifically mentioned in one clause rationally tends to exclude the implication of it arising in another clause; *Expressio unius est exclusio alterius*; *S.C.N. Pty Ltd v Smith* [2006] QCA 360 at [7].

[78] I am not satisfied that the omission of a reference in clause 5 to interest is the result of inadvertence; *Houssein v Under Secretary, Department of Industrial Relations & Technology (NSW)* (1982) 148 CLR 88, 94. Rather, the intention of the parties is plainly discoverable on the face of the Loan Agreement; *PMT Partners Pty Ltd v Australian National Park & Wildlife Service* (1995) 184 CLR 301, 320.

[79] Genuity submitted that a construction that finds that clause 5 does not permit the recovery of interest it incurred is to render that clause redundant or surplusage because the only "fees, costs, charges and expenses" in the contemplation of the parties that Genuity might incur in funding and maintaining the loan was interest under the OUK/Genuity loan agreements. But this submission overlooks two things.

[80] First, that clause 5 is not expressed in mandatory terms and, by its use of "may" rather than "will", contemplates that such items may not be incurred.

[81] Second, IGPC's ailing financial position and the difficult circumstances facing the Callide C Rebuild Project. In those circumstances, the expression "necessary and reasonable fees, costs, charges and expenses" in clause 5 when construed objectively may be seen to contemplate any relatively modest transactional expenses such as bank fees, legal and accounting fees that might arise in funding and maintaining the loan. But having regard to the mutually known factual background to the Loan (including that it was repayable within 12 months), it would be uncommercial for "costs" and "expenses" to include some $24 million in Interest Charges.

[82] Genuity sought to distinguish between interest by way of "return or compensation"; *Vision Super Pty Ltd* v *Poulter* (2006) 154 FCR 185 at [71], and the interest incurred by Genuity in borrowing the monies from OUK. The first being interest as a method of making profit (covered by clause 4) and the other as the mere recovery of interest paid (said to be included in clause 5). Assuming that such a distinction exists and makes a difference, this submission overlooks that at the time of entering into the Loan Agreement, it was objectively known to the parties, through Mr Tengdahl and Mr d'Emden, that the OUK/Genuity Loan Agreements were going to include a provision for interest to be paid by Genuity to OUK at the rate of 10 per cent. Such a rate was expressly specified in the draft agreement prepared by Mr d'Emden on 1 April 2021. That is, the actual "cost" was known.

[83] If the parties had intended that a considerable amount of interest incurred by Genuity was to be passed on to IGPC as a "cost" or "expense" of funding and maintaining the Loan, it is reasonable to expect that they would have expressed this in clear and unambiguous terms in the Loan Agreement. It would have been very easy to do so, as the notion that interest at a rate of 10 per cent was being contemplated and was known to parties at the time. But the parties chose not to include any reference to the passing on of interest in clause 5 or anywhere else in the Loan Agreement.

[84] What Genuity claims as a cost or expense under clause 5 is the interest on the money that it was lent by OUK. The passing on of this type of "cost" to IGPC falls squarely

within the various definitions of "interest" discussed in *Consolidated Fertilisers v DCT* (1992) 36 FCR 1 at page 6, including an obligation to pay money as a charge for the use of borrowed money expressed as a percentage per time unit of the sum used.

[85] Viewed in context, the omission of "interest" from the phrase "fees, costs, charges and expenses" in clause 5 cannot be regarded as an omission or oversight by the parties. The parties expressly turned their mind to the issue of interest and addressed it in clause 4. If it had been intended that, notwithstanding the clear effect of clause 4, Genuity could nonetheless pass on Interest Charges (it was liable to OUK for) to IGPC under clause 5, the parties would have made some reference to that (for instance, by adding the words "fees, costs, charges, <u>interest incurred</u>, and expenses").

[86] In the absence of a reference to interest in clause 5, and in the context of interest being addressed specifically in clause 4, the proper construction of clause 5 is that the Interest Charges are not contemplated as "fees, costs, charges and expenses" that may be passed on from Genuity to IGPC. Such a finding is consistent with the maxim of contractual interpretation that a specific provision within a contract is to prevail over a general provision covering the same subject matter in the same contract; *generalia specialibus non derogant: LCA Marrickville Pty Ltd v Swiss Re International SE* (2022) 290 FCR 435 at [58].

[87] I find that on a proper construction of the Loan Agreement, IGPC is not obliged to reimburse Genuity for Interest Charges incurred (and now paid) by Genuity pursuant to the OUK/Genuity Loan Agreements.

[88] The answer to the first question for determination is therefore: "no".

Question two: are the Interest Charges "necessary and reasonable" within the terms of clause 5

[89] In case I am wrong about my answer to the first question, I will answer question two.

[90] The onus is on Genuity to establish that the Interest Charges were necessary and costs (or expenses) it incurred were reasonable in funding and maintaining the Loan.

[91] The Interest Charges were incurred by Genuity pursuant to the OUK/ Genuity Loan Agreements. IGPC does not quibble with the rate of 10 per cent as being necessary and reasonable. But rather submitted that Genuity has not established that the Interest Charges of themselves necessary and reasonable costs.

[92] The starting point is that at the time that each of the OUK/ Genuity Loan Agreements were entered into, Genuity (through Mr Tengdahl) knew that the funding under the CCRA was coming from the OUK Shareholders by way of equity in return for shares. This, of course, was a very different situation to the Millmerran Loan, where OUK had borrowed the funds at 8.75 per cent from the OUK Shareholders and then on-lent those monies to Genuity at an interest rate of 10 per cent.

[93] Mr Tengdahl only realised he knew of the equity funding from OUK on 14 April 2022 after he had been cross-examined (and re-examined) at the hearing. The correction to his initial evidence (that he did not know about the equity injection until sometime later) only came about after Mr Slechta apparently emailed Mr Tengdahl

the night he finished giving his evidence, warning him that he may have perjured himself because there was documentary evidence by way of an email dated 14 April 2022 that revealed that Mr Tengdahl knew that the funds were coming from OUK by way of equity and not debt. I accept Mr Tengdahl's frank and immediate acknowledgment about this as expressed in the form of a further affidavit. But the difficulty with this late and otherwise unexplained concession is that it infects all of Mr Tengdahl's evidence on this issue, making it both confusing and unreliable. For example, his earlier evidence was that when he found out (much later) he was surprised "that they did that" because it "introduces an inefficiency" in the structure, and for an internal transaction that created a "UK tax liability which is completely unnecessary" is difficult to understand in light of his actual knowledge of the true position prior to entering into the OUK/Genuity Loan Agreements.

[94] The difficulty is that Genuity knew that the funds it was receiving to be on lent to IGPC for the Callide C4 Rebuild Project were not coming from a debt incurred by OUK; yet chose to enter into an agreement to pay 10 per cent interest on those equity funds. The fact it had done this for the Millmerran Loan is irrelevant, as it was a different funding circumstance.

[95] Genuity pointed to it being a decision by OUK to charge interest and appeared to contend that, even though it was a party to the OUK/Genuity Loan Agreements, it effectively had no say in the matter of interest. I found this submission unconvincing and raised more questions than answers. I accept that there is evidence from OUK Shareholders that approved the notion of debt from OUK to Genuity, but none of those emails make any reference to interest being charged. Although the draft loan agreement of 1 April 2022 includes interest, that is on the basis that it was an arrangement like the Millmerran Loan – which Mr Tengdahl now accepts he knew it was not.

[96] On the evidence, there is no cogent or reasonable explanation as to why it was necessary for the equity injected funds to be on lent to Genuity with interest. It follows that Genuity has not satisfactorily established why the incurring of Interest Charges were necessary and reasonable costs.

[97] That is particularly so in circumstances where Mr Tengdahl accepted that none of the reasons he had identified in his affidavits which favoured the funds being provided by OUK to Genuity as a loan would have prevented those funds from being advanced to Genuity as equity. That is, there was nothing preventing the funds that were the subject of the Loan Agreement being provided to Genuity as a non-interest-bearing capital contribution.

[98] Genuity have not proved why it was necessary and reasonable for the Interest Charges to have been incurred in funding and maintaining the Loan to IGPC

[99] The answer to question two is therefore: "no".

Answers to the questions stated

[100] The answer to question one is "no": clause 5 of the Loan Agreement does not oblige IGPC to reimburse Genuity for the amounts of interest paid by Genuity pursuant to the OUK/Genuity Loan Agreements.

[101] If I am wrong and the answer to question one is “yes”, then the answer to question two is also “no”. The amount sought to be recovered by Genuity from IGPC as Interest Charges are not “necessary and reasonable” within the terms of clause 5 of the Loan Agreement.

[102] It is unnecessary to answer questions three and four.

[103] I will hear from the parties as to the appropriate directions to be made for the determination of question five, the second tranche trial listed on 7 and 8 December 2026 and as to costs.