

**THE EIGHTH ANNUAL  
HON. MICHAEL KIRBY CONTRACT LAW MOOT**

**MELBOURNE, AUSTRALIA**

**JULY – SEPTEMBER 2018**

**THE MOOT PROBLEM**

WITH CLARIFICATIONS – 1 AUGUST 2018

Organised by the College of Law and Justice,  
Victoria University, Melbourne Australia



IN THE AUSTRALIAN ARBITRATION CENTRE  
B E T W E E N

No. **MKM8** of **2018**

**ROCKHOUND LTD**

Claimant

and

**NIVUNICONUU PEOPLES CORPORATION**

Respondent

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**ROCKHOUND LTD**

Claimant

and

**NIVUNICONUU PEOPLES CORPORATION**

Respondent

### **JOINT REFERRAL TO ARBITRATION**

1. By a written agreement dated 1 March 2012, Rockhound Limited (**Rockhound**) and the Nivuniconuu Peoples Corporation (**NPC**) contracted for NPC to provide certain services to Rockhound in exchange for payment (**Agreement**).
2. By clause 11 of the Agreement, the parties agreed:
  - 2.1. To refer any dispute arising from or in connection with the Agreement to expert determination; and
  - 2.2. That, if either party was dissatisfied with the expert determination, it would have the right to apply to an arbitral tribunal for the dispute to be dealt with *de novo*.
3. A dispute in relation to the Agreement was referred to expert determination. A copy of the determination made on 1 July 2018 is attached hereto.
4. Both parties are dissatisfied with the conclusions reached in the determination and therefore and hereby refer the dispute to arbitration by the Tribunal as now constituted.

5. The determination correctly recites the facts<sup>1</sup> and the parties' respective claims. The parties agree that they are not bound by arguments put to the expert in the course of his determination.
6. Neither party intends to produce any further evidence. The parties will jointly answer any questions for clarification put to them by the Tribunal.
7. No procedural issue arises in respect of the determination.
8. Both parties accept the jurisdiction of the Tribunal as now constituted.
9. The issues are as follows.
  - 9.1. Is the Agreement illegal? If so, what is the effect of such illegality?
  - 9.2. Should the Agreement be rectified?
  - 9.3. Is the Claimant entitled to damages as sought or at all?
  - 9.4. Is the Respondent entitled to the outstanding contract price in accordance with its counterclaim?

**Rockhound Limited**  
Claimant

**Nivuniconuu Peoples Corporation**  
Defendant

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<sup>1</sup> In respect of agreed facts and findings of fact.

**Expert Determination**

**1 July 2018**

In respect of a dispute arising between

**Rockhound Limited**

and

**Nivuniconuu Peoples Corporation**

Richard Styilks

## Facts

1. For tens of thousands of years, the Nivuniconuu people lived a culturally rich life on their island home, Raed. Raed is located around 1,850 kilometres southeast of the nearest point of mainland Australia. Its topography is dominated by a large plateau known as Tripulah.
2. In 1769, the British explorer Captain Ron Morgan came across Raed, annexed it for Great Britain and named it Lord Brinkhoff Island. Morgan wrote to his patron, Lord Brinkhoff, of the great mineral wealth of his new namesake.
3. Raed/Lord Brinkhoff Island is an Australian external territory which owes its existence to the *Tasman Sea Territories Act 1958* (Cth). Pursuant to that Act, the laws of New South Wales apply to Raed/Lord Brinkhoff Island.
4. Raed/Lord Brinkhoff Island is Crown land within the meaning of the *Crown Lands Act 1989* (NSW), and is subject to that Act.
5. The Nivuniconuu continue to live on Raed/Lord Brinkhoff Island, together with a small population of mainland settlers and a modest tourist population. The Nivuniconuu are generally autonomous and independent of the Australian administration, managing their affairs through the Nivuniconuu Peoples Corporation (**NPC**).
6. In February 2012, Rockhound Limited (**Rockhound**) was granted four licences pursuant to section 45 *Crown Lands Act 1989* authorising it to mine parts of Raed/Lord Brinkhoff Island (**Licences**).
7. The Licences provided a scheme for mining by which Rockhound would consecutively mine four separate areas on the slopes of Tripulah (**Mine Land**). The four areas of the Mine Land were referred to as Sectors 1 to 4.

8. The terms of the Licences made Rockhound's authority to mine each of Sectors 2, 3 and 4 contingent on it having re-established natural ground levels within the Sector it had most recently mined. That is, before Rockhound could mine Sector 2, it was required to re-establish natural ground level within Sector 1, and so on for Sectors 3 and 4.
9. The Licences each made provision for their expiry six months after the completion of re-establishment of each Sector.
10. Rockhound obtained all other permissions and approvals necessary for it to mine the Mine Land. Most are irrelevant. An environmental approval issued by the Commonwealth government required Rockhound to remediate the Mine Land by planting indigenous vegetation in accordance with an approved plan (**Remediation Plan**), and provided that the planting required by the Remediation Plan had to be carried out within 12 months of the conclusion of mining activities including re-establishment works.
11. Shortly after obtaining the Licences, Rockhound entered into an agreement with NPC (**Agreement**). The Agreement provided as follows:
  - 11.1. the Nivuniconuu living within the Mine Land would vacate and abandon their homes (clause 2);
  - 11.2. Rockhound was to pay NPC \$240,000 for each month (or part of a month) that it occupied any of the Mine Land (clause 3); and
  - 11.3. NPC would propagate the vegetation required by the Remediation Plan, and to begin planting it in each Sector in accordance with the Remediation Plan within fourteen days of receiving notice that Rockhound had completed re-establishment of that Sector (clause 4).

12. Between February 2013 and September 2017, in accordance with the Agreement:
  - 12.1. The Nivuniconuu vacated their homes within the Mine Land;
  - 12.2. At the completion of re-establishment of each of Sectors 1, 2 and 3, Rockhound gave NPC the notice required by the Agreement; and
  - 12.3. Rockhound paid NPC a total of \$13,440,000 in accordance with the terms of the Agreement.
13. However, shortly after Rockhound completed the re-establishment of Sector 3 on 9 September 2017, it discovered that NPC had not planted any vegetation within Sectors 1 or 2.
14. Rockhound served NPC with a notice demanding that it immediately commence planting on all three of Sectors 1, 2 and 3, failing which it would withhold any further payments pursuant to the Agreement.
15. In a letter in reply to Rockhound's notice, NPC admitted that it had not commenced planting and that no vegetation had yet been propagated for planting at that time. It was unable to commence any planting any earlier than January 2018.
16. Between 12 January 2018 and today, NPC has caused some planting to be carried out. Planting is limited to the grasses and some of the shrubs required by the Remediation Plan. No trees have been planted and, at the time of writing, are still fifteen months and more from reaching plantable maturity.
17. Rockhound continued to occupy the Mine Land until it completed re-establishment of Sector 4 in April 2018.



18. Rockhound has sought alternative supply of the plants and trees still required. Being indigenous to Brinkhoff Island, they are in rare supply. To obtain the necessary plants at the necessary maturity to allow planting by April 2019 as required by Rockhound's environmental licence, it will be necessary to obtain plants from a range of suppliers across the world. The total cost of purchasing, shipping, and planting the required plants would be \$13,204,000.

### **Claim**

19. Rockhound claims against NPC for \$13,204,000, which it says is the cost of remedying NPC's breach of the Agreement. In doing so, Rockhound relies on the decision in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; 253 ALR 1; [2009] HCA 8.

20. In response, NPC says:

20.1. First, that the Agreement is void and illegal, because it requires NPC to "clear, dig up or cultivate public land" within the meaning of section 155 *Crown Lands Act 1989*. Accordingly, the Agreement is not enforceable, and Rockhound is not entitled to any damages.

20.2. Second, if the contract is enforceable, Rockhound should only be awarded damages reflecting that portion of the money paid to NPC for the time that NPC was engaged in its own activity instead of undertaking work for Rockhound (citing *Zomojo Pty Ltd v Hurd (No 4)* [2014] FCA 441).

### **Counterclaim**

#### Rectification

21. NPC seeks an order rectifying the Agreement.

22. Clause 6, as it appears in the executed Agreement, reads:

*Rockhound will use its best efforts to ensure that mining does not result in any unnecessary impact on Nivuniconuu spiritual sites. If it fails to do so, NPC will be released from performing its obligations under this Agreement.*

*For the avoidance of doubt, the provisions of this clause do not affect any entitlement of NPC to payment pursuant to clause 3 of this Agreement or claim for damages in respect of any breach of it.*

23. It is common ground that blasting carried out within Sector 3 in June 2017 resulted in an impact on a Nivuniconuu spiritual site immediately on the border of the Mine Land. It is also common ground that that impact was “unnecessary” within the meaning of Clause 6.

24. NPC contended that I should rectify the Agreement to exclude the words “use its best efforts to”, having regard to:

24.1. the final draft of the agreement as exchanged two days prior to its conclusion, which reads:

*Rockhound will ~~use its best efforts to~~ ensure that mining does not result in any unnecessary impact on Nivuniconuu spiritual sites. If it fails to do so, NPC will be released from performing its obligations under this Agreement.*

*For the avoidance of doubt, the provisions of this clause do not affect any entitlement of NPC to payment pursuant to clause 2 3 of this Agreement or claim for damages in respect of any breach of it.*

(reproduced here including the parties’ original hand annotations);

and

24.2. evidence which establishes that:

24.2.1. at the time of producing the final draft, representatives of each party expressed an intention to exclude the words

“use its best efforts” from Clause 6 on the basis that they were ambiguous; and

24.2.2. NPC did not depart from that intention, understanding the document which it signed to be identical to the annotated final draft document.

25. Rockhound accepted that the final draft and evidence to which I refer in paragraph 24 above are genuine and truthful, but said I should not have regard to them because:

25.1. The evidence is excluded by clause 12, a ‘whole agreement’ clause;

25.2. the Agreement is clear on its face; and

25.3. the parties have acted in accordance with the Agreement in its final form.

26. The parties agree that if the Agreement is not rectified as NPC seeks, Rockhound is not in breach of Clause 6 by reason of its creation and implementation of its “Managing Impacts Plan”. That is, the parties agree that by producing that Plan, Rockhound used “its best efforts” to avoid unnecessary impacts.

27. However, the situation is less clear in the event that I find that I should rectify the Agreement. The parties agree that Rockhound did not “ensure that mining [did] not result in any unnecessary impact” within the meaning of Clause 6 as rectified. However, where NPC says the effect of such a breach of Clause 6 is to entitle NPC to the full extent of payment contemplated by Clause 3 and release it from all past, present and future obligations (and, thus, leave it free of any liability to Rockhound pursuant to its present claim), Rockhound says that a breach of

Clause 6 could only go so far as to release NPC from future obligations and does not affect its entitlement to seek damages for any failure to perform prior to such a breach.

### Damages

28. NPC counterclaims for payment of \$1,680,000, being the amount it says reflects proper compensation for the Nivuniconuu's vacation and abandonment of their homes between October 2017 and April 2018. The amount is calculated based on the Clause 3 payment rate, and nothing else.

### **Conclusion**

29. I conclude that Rockhound is properly entitled to nominal damages only. Rockhound produced no evidence, and indeed made no suggestion, that it intends to plant vegetation in accordance with the Remediation Plan.
30. Indeed, in April 2018, Ansari Observatories Pty Ltd was granted a 99 year lease over land generally within Sectors 3 and 4 of the Mine Land. It intends to construct an observatory on that land, which will necessitate altering natural ground levels and removing whatever vegetation is found.
31. In keeping with the decision in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344; [1995] 3 All ER 268, it would be unreasonable to award any substantial damages in circumstances where the Claimant has no intention to employ those damages in putting itself in the position it would have been in had the contract been performed. It has suffered no loss for which damages can compensate.
32. Having regard to that conclusion, little turns on the resolution of the rectification argument made by NPC. I agree that the Agreement should be rectified as sought.

However, I agree with Rockhound that such rectification does not affect NPC's earlier breaches of the Agreement.

33. As to NPC's counterclaim, I conclude that it would be inequitable that NPC should recover any money in light of its persistent breaches of the Agreement over a period of some years.

34. Accordingly, I order that NPC pay Rockhound \$1.

**Richard Styilks**

Island Mining Chambers

Sydney

## Agreement

### BETWEEN:

**Rockhound Limited** ACN 616 260 256

and

**Nivuniconuu Peoples Corporation**

(together **Parties**)

### WHEREAS:

- A Rockhound Limited holds licences permitting it to exploit the traditional lands of the Nivuniconuu people;
- B The Nivuniconuu Peoples Corporation represents the interests of the Nivuniconuu people, administers their traditional lands, and has their agreement to deal with Rockhound Limited in respect of same;
- C Rockhound Limited wishes to engage in constructive and respectful discourse with the Nivuniconuu people to ensure the protection of matters of spiritual importance and connection whilst exploiting their traditional lands;

### THE PARTIES AGREE AS FOLLOWS:

#### 1 Definitions and Interpretation

##### 1.1 Definitions

In this Agreement:

**Agreement** means this contract and includes all enclosures and annexures.

**Handover Date** means the day thirty-one days after the completion of re-establishment of Sector 4 pursuant to Licence 12-2204 dated 13 February 2012 issued to Rockhound pursuant to the *Crown Lands Act 1989* (NSW).

**Licences** means Licences 12-2201 dated 13 February 2012, 12-2202 dated 13 February 2012, 12-2203 dated 13 February 2012 and 12-2204 dated 13 February 2012 issued to Rockhound pursuant to the *Crown Lands Act 1989* (NSW).

**Mine Land** means the whole of the area described in the Licences together and in which Rockhound is entitled, by those Licences, to carry out mining operations and associated works and activities.

**NPC** means the Nivuniconuu Peoples Corporation.

**Nivuniconuu** means the traditional owners and inhabitants of Raed/Lord Brinkhoff Island.

**Remediation Plan** means the document titled *Raed Mining: Remediation Plan*, Rockhound/GFS Consulting Environmentalists, 2012.

**Rockhound** means Rockhound Limited ACN 616 260 256.

**Sector** means each area individually identified in each of the Licences and otherwise has the meaning defined in the Licences.

## 1.2 Interpretation

In this Agreement:

1.2.1 a reference to:

- (a) any legislation or legislative provision includes any statutory modification or re-enactment of, or legislative provision substituted for, and any statutory instrument issued under, that legislation or legislative provision;
- (b) the singular includes the plural and vice versa;
- (c) an individual or person includes a corporation, firm, authority, government or government authority and vice versa;
- (d) any gender includes the other genders;
- (e) a party to this Agreement includes that party's executors, administrators, successors and permitted assigns; and
- (f) a condition, annexure or schedule is a reference to a condition, annexure or schedule of this Agreement.

1.2.2 including and singular expressions are not words of limitation;

1.2.3 headings are for convenience and reference only and do not affect the meaning or interpretation of this Agreement;

1.2.4 if the whole or any part of a provision of this Agreement is invalid or unenforceable, the validity or enforceability of the remaining provisions will not be affected; and

1.2.5 any obligation on the part of two or more persons under this Agreement binds all of them jointly and each of them severally, unless expressed to be only several.

1.3 The obligations imposed and the benefits conferred under this Agreement on each of the parties are binding upon and enure for the benefit of the respective parties and each of their respective successors in title, legal personal representatives and permitted assigns.

1.4 If an act must be done on a specified day which is not a Business Day, the act must be done on the Business Day immediately after that specified day.

1.5 If the whole or any part of a provision of this Agreement is held to be illegal, invalid, void, voidable or unenforceable, that provision (or part thereof) must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable.

1.6 If it is not possible to read down a provision (or part thereof) as required in clause 1.5, that provision (or part thereof) is severable without affecting the validity or enforceability of the remaining part of that provision or the other provisions in this Contract.

## **2 NPC Obligations**

- 2.1 The NPC will use its best endeavours to ensure that the Nivuniconuu living within the Mine Land will vacate and abandon their homes.
- 2.2 Neither the Nivuniconuu nor NPC will restrict or seek to restrict access by Rockhound to the Mine Land.

## **3 Rockhound Obligations**

In consideration for the Nivuniconuu vacating and allowing Rockhound unfettered access to the Mine Land, Rockhound will pay NPC \$240,000 for each month (or part of a month) that it occupies the Mine Land or any part of it.

## **4 Propagation and planting**

NPC will propagate, or cause to be propagated, the vegetation required by the Remediation Plan, and will begin planting said vegetation in each Sector in accordance with the Remediation Plan within fourteen days of receiving notice that Rockhound has completed re-establishment of the relevant Sector.

## **5 No assignment**

Rockhound acknowledges that NPC's obligations under clause 4 of this Agreement do not supplant, substitute for, or constitute an assignment of, any of its obligations at law or in respect of any approval Rockhound holds in respect of the Mine Land including the Licences.

## **6 Best efforts to avoid impact**

Rockhound will use its best efforts to ensure that mining does not result in any unnecessary impact on Nivuniconuu spiritual sites. If it fails to do so, NPC will be released from performing its obligations under this Agreement.

For the avoidance of doubt, the provisions of this clause do not affect any entitlement of NPC to payment pursuant to clause 3 of this Agreement or claim for damages in respect of any breach of it.

## **7 Inspection**

NPC shall have the right to inspect the Mine Land at any time before the Handover Date, subject always to:

- (a) 30 days' notice being given to Rockhound; and
- (b) the priority of measures and restrictions required to ensure the protection of human life and property as may be in place from time to time.

## **8 Acceptance of condition**

Subject to any provision to the contrary in this Agreement, the Nivuniconuu resuming occupation of the Mine Land following the Handover Date shall be taken to represent



acceptance by NPC of the condition of the Mine Land to the exclusion of any claim against Rockhound in respect of its condition.

## **9 Indemnity**

Subject to any provision to the contrary in this Agreement, NPC must indemnify and keep indemnified Rockhound against all Claims of any nature whatsoever which Rockhound may suffer, sustain or incur on or subsequent to the Handover Date or from events or occurrences happening or arising on or subsequent to the Handover Date out of or in respect of the Mine Land or any act, matter or thing occurring on the Mine Land.

## **10 Capacity of Signatories**

Each party acknowledges and agrees that if an attorney has executed this Agreement as its attorney (**Attorney**):

- (a) the Attorney executes the Agreement as attorney of the party, and not in its personal capacity, and does not assume personal liability under any warranty or obligation of the party in the Agreement;
- (b) it releases the Attorney from any personal liability whatsoever, and covenants with the Attorney not to seek to bring proceedings against the Attorney in its personal capacity;
- (c) it waives all rights in relation to the matters raised in this clause; and
- (d) it will indemnify the Attorney against any claim against the Attorney or that the Attorney may suffer as a result of a breach of this clause.

## **11 Disputes**

- 11.1 Any dispute arising from or in connection with this Agreement shall be referred to expert determination by the Australia-Raed Dispute Resolution Centre (ARDRC) in accordance with ARDRC's Expert Determination Rules. If the parties are unable to agree upon the identity of an expert within five (5) working days from the date of referral of the dispute for determination, an expert shall be appointed by ARDRC.
- 11.2 The parties shall each have the right to reject the determination of the expert and to instead apply to have the dispute determined by arbitration.
- 11.3 If no referral to arbitration pursuant to clause 11.2 is made by the expiry of 28 days after the production of a determination pursuant to clause 11.1, the determination shall be binding on the parties in all respects and there shall be no rights of appeal or review.

## **12 Whole agreement**

The covenants provisions terms and agreements contained in this Agreement expressly or by statutory implication cover and comprise the whole of the agreement between the parties and the parties expressly agree and declare that no further or other covenants agreements provisions or terms are deemed to be implied in this Agreement or to arise between the parties by way of collateral or other agreement by reason of any promise representation warranty or undertaking given or made by either party to the other on or before the execution of this Agreement and the existence of any such implication or collateral or other agreement is hereby expressly negated.

**EXECUTED AS AN AGREEMENT**

**This 1<sup>st</sup> day of March 2012**

**By Rockhound Limited**

The Common Seal of Rockhound Limited  
was hereunto affixed in the presence of



ALEXANDRA ROCKHOUND  
Director



MATHEW ROCKHOUND  
Secretary

**For and on behalf of Nivuniconuu Peoples Corporation**



ANTHONY YONGE  
Attorney

# Tasman Sea Territories Act 1958

(Relevant Extracts as relevantly in force)

## 4 Interpretation

- (1) In this Act, unless the contrary intention appears:

*Lord Brinkhoff Island* means the Island of that name situated in the Tasman Sea in or about latitude 48°01' south and longitude 165°58' east.

*the Territory* means the Territory of Lord Brinkhoff Island.

## Division 1—Laws of the Territory

### 5 The laws of the Territory

On and after 1 July 1999, the laws in force in the Territory from time to time are:

- (a) Acts as in force from time to time in or in relation to the Territory on and after that day; and
- (b) Ordinances made on or after that day as in force from time to time; and
- (c) laws as in force in the Territory in accordance with section 6; and
- (d) the laws of New South Wales as in force in the Territory in accordance with section 7.

### 6 Operation of existing laws etc.

The law as in force in the Territory immediately before 1 July 1999 continues to be in force in the Territory on and after that day.

### 7 Application of the laws of New South Wales

- (1) Subject to this section, the provisions of the law of New South Wales (whether made before or after this section's commencement) as in force in New South Wales from time to time are in force in the Territory.
- (2) An Act in force in or in relation to the Territory may suspend the operation in the Territory of a law in force in the Territory under subsection (1) for such period as is specified in the Act.
- (3) In this section:  
*provision of the law of New South Wales:*
  - (a) includes a principle or rule of common law or equity; and
  - (b) includes an Act or a provision of an Act and any Ordinance made under any Act; that is part of the law of New South Wales.

**ROCKHOUND LTD**

Claimant

and

**NIVUNICONUU PEOPLES CORPORATION**

Respondent

### **FURTHER AGREED FACTS**

Following the Tribunal's Requests for Clarification, the parties submit the following further agreed facts.

1. The Tribunal is asked to determine liability, including identifying what is properly awarded by way of remedy. The precise quantum of any award of damages (or otherwise), including the effect of any steps taken or not taken in mitigation of loss and damage on such quantum, is to be determined at a later hearing in the absence of agreement between the parties.
2. All relevant extracts from the *Tasman Sea Territories Act 1958* (Cth) are provided to the Tribunal at TB-17.
3. The only relevant law of the Territory within the meaning of section 5(a)–(c) inclusive of the *Tasman Sea Territories Act 1958* (Cth) is the Territory's *Act of Convenience 2018*. The *Act of Convenience* provides that:
  - a. the provisions of the *Crown Lands Act 1958* (NSW) continue to apply within the Territory as the law of the Territory until 1 July 2020; and

- b. the operation of the *Crown Land Management Act 2016* (NSW) is suspended within the Territory such that it does not come into operation until 1 July 2020.
4. While they had force and effect, the Licences (as defined in the Agreement) conferred “lawful authority” within the meaning of section 155 *Crown Lands Act 1989* on Rockhound and NPC as its contractor for the clearing, digging up and cultivation of the Mine Land as necessary for mining activities and planting of vegetation in accordance with the Remediation Plan.
5. Nothing other than the Licences at any time constituted or conferred “lawful authority” within the meaning of section 155 *Crown Lands Act 1989* for any relevant activity. The Licences were not transferred within the meaning of section 48 of that Act and no sublicence was issued pursuant to section 48A of that Act.
6. The Remediation Plan required the planting of specific numbers of specific species of plant. It does not contain any requirement for plants to be grown in any particular place.
7. At the date of writing:
  - a. the Nivuniconuu people have not obtained native title or entered into any agreement in respect of their occupation of their traditional lands; and
  - b. the NPC is in negotiation with the relevant New South Wales Minister in respect of an Aboriginal Land Agreement within the meaning of section 36AA *Aboriginal Land Rights Act 1983* (NSW). The terms of the negotiation are confidential.
8. The lease to Ansari Observatories comes into effect in October 2018. The rights of possession and use granted by that lease are expressed to be subject to any Aboriginal

Land Agreement within the meaning of section 36AA *Aboriginal Land Rights Act 1983*. Ansari Observatories was invited to join negotiations in respect of the Aboriginal Land Agreement between NPC and the Minister.

9. The discrepancy between the final draft and executed Agreement first came to the parties' attention on referral of their dispute for expert determination.
10. The parties take issue with the legal conclusions reached in the expert determination. They accept the findings of fact and will not adduce any further evidence.

**Rockhound Limited**  
Claimant

**Nivuniconuu Peoples Corporation**  
Defendant