IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No S 102 of 2015

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES, COURT OF APPEAL

WRIGHT PROSPECTING PTY LIMITED (ACN 008 677 021)

Appellant

10

and

MOUNT BRUCE MINING PTY LIMITED (ACN 008 714 010)

First Respondent

HANCOCK PROSPECTING PTY LIMITED (ACN 008 676 417)

Second Respondent

20 **SECOND RESPONDENT'S SUBMISSIONS (IN SUPPORT OF APPEAL)**

Part I: Certification

1. The second respondent (**HPPL**) certifies that these submissions are suitable for publication on the internet.

Part II: Issues

2. This appeal (and HPPL's corresponding application for special leave to cross appeal) raises the proper construction of the term "*MBM*", which has a bespoke expanded meaning, in the contract between the parties to the appeal and Hamersley Iron Pty Limited (**HI**) dated 5 May 1970 (**1970 Agreement**). The precise issue is whether the companies presently winning ore

30 from the area, which the Court of Appeal referred to as "*Channar A*", derived their interest in

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the mineral lease over that area "*through or under*" the first respondent (**MBM**) and, consequently, are "*MBM*" as defined in the 1970 Agreement.

Part III: s.78B *Judiciary Act 1903* (Cth)

3. No notice is required under s.78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations

4. The reasons of the trial judge (**J**) in *Wright Prospecting Pty Limited v Hamersley Iron Pty Limited* [2013] NSWSC 536 have not been reported.
5. The reasons of the Court of Appeal (**CA**) in *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2014] NSWCA 323 have not been reported.

Part V: Relevant Facts

Introduction

6. This appeal and MBM's related appeal concern the proper construction of the 1970 Agreement, the parties to which are MBM and HI on the one part and the partners in the partnership known as "*Hancock & Wright*" or "*Hanwright Iron Mines*" (**Hanwright**), HPPL and Wright Prospecting Pty Limited (**WPPL**), on the other.
7. On 5 May 1970 Hanwright held mineral exploration rights, referred to below as "*temporary reserves*", over areas of land in the Pilbara region of Western Australia. Broadly speaking, the relevant "*temporary reserves*" were over areas south-east of Mount Tom Price and east of Paraburdoo. The appeals concern two of those areas which are presently being mined, referred to in the Court of Appeal as **Eastern Ranges** and **Channar A**. The relevant tenement histories of each of Eastern Ranges and Channar (including both Channar A and "*Channar B*"), from the time MBM obtained rights to explore those areas pursuant to the 1970 Agreement, are summarised in the table in Part II Section A of the "*Parties' Agreed Facts and Diagrams*" document (**Agreed Facts**).
8. The 1970 Agreement provides for, in effect, (a) the transfer of the relevant "*temporary reserves*" by Hanwright to MBM and (b) the imposition of corresponding obligations on MBM and HI, including an obligation imposed on MBM to pay a royalty on iron ore won by "*MBM*" from the "*MBM area*". The Court of Appeal held that the "*MBM area*" was, in effect, the area subject to the "*temporary reserves*" which were "*acquired*" by MBM pursuant to the 1970 Agreement. MBM's appeal is directed to that issue. On that issue HPPL submits that the Court of Appeal was correct.

9. There is a degree of imprecision in identifying the content of Hanwright's promise in the language used in the previous paragraph, although that language corresponds with the commercial effect of the 1970 Agreement. That imprecision arises because of the statutory setting. Temporary reserves were areas of land which were reserved from the grant of other mineral tenements pursuant to a power created by s.276 of the *Mining Act 1904* (WA). The rights which Hanwright held were rights of occupancy (limited in terms of time) over the areas within the temporary reserves, which were granted pursuant to a power conferred by s.276 and s.277 of the *Mining Act 1904*. The rights of occupancy conferred on Hanwright the exclusive right to explore the land, contained in the temporary reserves, for iron ore. Rights
10 of occupancy of that character were, soon after the date of the 1970 Agreement, held not to be transferrable: *Delhi International Oil Corp v Olive* [1973] WAR 52 at 54. The character of the temporary reserves is not altered by the fact that the "*temporary reserves*" referred to in the 1970 Agreement were also subject of the agreement between Hanwright and the State of Western Australia, which was "*approved*" by s.3 the *Iron Ore (Hanwright Agreement) Act 1967* (WA). That act was in a form which did not amend other statutes including the *Mining Act 1904*: a construction foreshadowed in *Margetts v Campbell-Foulkes* (unreported WA Full Court 29 November 1979) and held to be correct in *Re Michael; ex parte WMC Resources Limited* [2003] WASCA 288 at [26]. Consequently the rights of occupancy could not be transferred to MBM by way of an assignment.

20 10. Nonetheless, the commercial effect of the 1970 Agreement is readily apparent. Prior to entry into the 1970 Agreement, Hanwright held the exclusive right to explore the area of the identified "*temporary reserves*" for iron ore. Subject to consent of the State (1970 Agreement, cl 10), Hanwright agreed to transfer that right, or do that which was necessary to cause or allow the grant of an identical right, to explore those areas to MBM. MBM's corresponding promises included the promise to pay the royalty imposed by cl 3.1 of the 1970 Agreement. HPPL submits that, on the proper construction of cl 3.1 of the 1970 Agreement, the royalty was payable on ore won from the area over which Hanwright, in effect, transferred its exclusive right to explore for iron ore to MBM provided that the ore was won by, relevantly and *inter alia*, a company in the corporate group of which MBM was a member.

30 11. Clause 3.1 of the 1970 Agreement provides "*Ore won by MBM from the MBM area will be subject to the payment to Hanwright of a base Royalty of 2½% on the same conditions as apply to the existing Agreement between Hanwright and Hamersley...*". Subject to the exception appearing in the fourth

and fifth lines of cl 3.1, the "*existing Agreement*" is an agreement entered into in 12 December 1962 by Hanwright, HI and related companies (**1962 Agreement**).

12. The effect of cl 3.1 of the 1970 Agreement is that there are two conditions on the obligation to pay the royalty: ore must be won (a) from the "*MBM area*" and (b) by "*MBM*". "*MBM*" is a term which includes MBM, and is expanded by cl 24(iii) of the 1962 Agreement as incorporated into the 1970 Agreement.

13. MBM's appeal concerns the first condition, the ore must be won from the "*MBM area*". It is common ground (and was at trial) that if Eastern Range is within the "*MBM area*" then "*MBM*", as defined by the expanded definition, is winning ore from Eastern Range. WPPL's appeal and HPPL's cross appeal does not concern Eastern Range.

14. Both conditions are relevant to whether a royalty is payable on the ore presently being won from Channar A. These submissions proceed on the basis of the Court of Appeal's finding that Channar A is within the "*MBM area*".

15. WPPL's appeal and HPPL's corresponding application for special leave to cross appeal concern the second condition, in respect of the ore being won from Channar A. The issue is whether the companies presently winning ore from Channar A, the Channar Joint Venturers[1], are "*MBM*" within the expanded meaning of MBM.

16. HPPL adopts WPPL's submissions in this appeal, and advances a further sufficient connection between MBM and the companies presently winning ore from Channar A. As WPPL also argues, HPPL submits that Channar Joint Venturers have derived title "*through or under*" MBM, within the meaning of that phrase incorporated into the 1970 Agreement and, consequently, are "*MBM*" as defined.

Factual and statutory background prior to 5 May 1970

17. In the mid to late 1950's HPPL and the WPPL formed Hanwright, which continued earlier exploration in the Pilbara undertaken by Mr Hancock (of HPPL) and Mr Wright (of WPPL): J[9]-[10].

18. By 1959 the State had granted to Hanwright rights of occupancy over certain temporary reserves (**1959 TRs**). Those rights of occupancy conferred on Hanwright the exclusive right to explore for iron ore over the areas of land subject of the 1959 TRs, but did not permit mining. To mine ore Hanwright had to surrender the right of occupancy and be granted a mining tenement (usually a mineral lease) over the land: CA[5], J[7]-[8], s.48 of the *Mining Act*

[1] Including Channar Mining Pty Limited, a wholly owned subsidiary of Hamersley Holdings: CA[22]

1904; as to mineral leases under the *Mining Act 1904*, see *TEC Desert Pty Limited v Commissioner of State Revenue (Western Australia)* [2010] HCA 49 (2010) 241 CLR 576 at [28]-[33].

19. By an agreement entered into in 1959 between Hanwright and Rio Tinto Management Services (Australia) Pty Limited (**RTMS**), Hanwright granted to RTMS an option to acquire the 1959 TRs: J[11]. RTMS was a subsidiary of the company now known as Rio Tinto Limited: J[11]-[12].

20. Prior to April 1961 RTMS, in effect, transferred its interest in the option over the 1959 TRs to a related company, Rio Tinto Southern Pty Ltd (**RTS**): 1962 Agreement, recital (c).

21. HI and Hamersley Holdings were formed in October 1962 with a view to HI being the operating company which operated the Hamersley Group's Pilbara iron ore mines: J[13]. Rio Tinto has been the ultimate majority shareholder in Hamersley Holdings since the incorporation of Hamersley Holdings.

22. By the 1962 Agreement between Hanwright, Mr Hancock and Mr Wright, on the one part, and RTMS, RTS and HI, on the other, the parties to that agreement, in effect, rescinded the 1959 Agreement: CA[7]-[9]. Also by the 1962 Agreement Hanwright sold all its right and interest in the temporary reserves listed in the 1962 Agreement "*and the land comprised therein*" (**1962 TRs**). In consideration for that sale HI agreed to pay Hanwright a royalty of 2½% of the value of ore won from the 1962 TRs and from other identified areas: 1962 Agreement cl 9, cl 10. Parts of the 1962 Agreement relating to the royalty are incorporated into the 1970 Agreement: CA[9].

23. Whether incorporated into or as extrinsic evidence relevant to construing the 1970 Agreement, the 1962 Agreement demonstrates the following. *First*, the parties treated the rights and correlative obligations created by the 1962 Agreement as referable to areas of land, and ore won from those areas. The areas were defined by the boundaries of the 1962 TRs and by other areas identified in blue on an attached map: recital (g), cl 1, 3, 10, 15, 19, 24(iii). That is important, although more directly in answer to MBM's appeal. Clause 3.1 of the 1970 Agreement adopts the conditions on the royalty contained in the 1962 Agreement, which is a royalty payable on ore won from physical areas. *Second*, the 1962 Agreement records the transfer of the rights under the 1959 Agreement between the companies ultimately owned by Rio Tinto: recital (c). The potential for intra-group transfers was objectively apparent. *Third*, the 1962 Agreement uses the nomenclature of a "*sale*" of the 1962 TRs, which is the commercial but not legal effect of the transaction: recital (g), cl 1-4. That conventional means

of describing the transaction was continued in the later agreements. *Fourth*, the 1962 Agreement is in terms which recognised the statutory background, particularly that rights of occupancy did not permit mining and that a mineral lease was required before ore could be won (the commercial point of the agreement): cl 17. The parties objectively knew that they were not dealing with an uninterrupted title.

24. On 30 July 1963 HI entered into an agreement with the State of Western Australia which was "*approved*" by the *Iron Ore (Hamersley Range) Agreement Act* 1963 (WA) (**1963 Hamersley State Agreement**): J[15]. That agreement conferred on HI (a) rights of occupancy over, in substance, the land subject to the 1962 TRs and (b) conferred on HI a right to convert parts of those and other areas of land (initially up to 300 square miles) into a mineral lease.

25. After a series of surrenders and grants to HI pursuant to the 1963 Hamersley State Agreement, the rights of occupancy over most of the land subject of the 1962 TRs were surrendered and HI was granted ML 4.

26. On 11 August 1967 Hanwright entered into an agreement with the State, which was "*approved*" by the *Iron Ore (Hanwright Agreement) Act 1967* (WA) (**1967 Hanwright State Agreement**): CA[10]. Pursuant to cl 2 of the 1967 Hanwright State Agreement rights of occupancy over certain temporary reserves were granted to Hanwright, including over the Paraburdoo area, Eastern Ranges and Channar: J[16], also CA[14]. The 1967 Hanwright State Agreement provides part of the context in which the 1970 Agreement is to be construed. The 1967 Hanwright State Agreement was subsequently amended to allow the parties to give effect to the 1968 Agreement, referred to in the next paragraph. The parties objectively knew the rights granted by the State were not fixed, and the State was amenable to varying the State agreements (see also cl 2.3 of the 1970 Agreement).

27. On 31 January 1968 Hanwright and HI entered into an agreement (**1968 Agreement**) in respect of the land which was subject to the temporary reserves and rights of occupancy identified in the 1967 Hanwright State Agreement (**1968 TRs**): CA[11]. The parties described the 1968 TRs as being in respect of "*areas*", a definition expanded to "*include*" certain "*rights*": Preamble to the 1968 Agreement.

28. There are two parts to the 1968 Agreement. The first effected the "*transfer*" to HI of the right of occupancy over the Paraburdoo area, which is not in dispute: J[17]. By "*Part II*" of the 1968 Agreement, Hanwright granted HI an option to require the rights of occupancy over the other 1968 TRs to be "*transferred*" to a company which the parties promised to

incorporate (which became MBM): Part II cl D3, D5. The areas comprised in the 1968 TRs, other than the Paraburdoo area, were substantially the same as the areas the subject of the 1970 Agreement. Pursuant to the 1968 Agreement MBM, when incorporated, was to be owned 75% by HI and 25% by Hanwright: Part II cl A1, A2. Ultimately, MBM was incorporated but was, in effect, wholly owned by Hamersley Holdings. The 1968 Agreement contained an obligation that a royalty be paid to Hanwright on ore won from the areas subject of the 1968 TRs: Part II cl A5. The object of the 1968 Agreement, in addition to the transfer of the rights of occupancy over the 1968 TRs, included to allow for the exploration and the evaluation of those areas, prior to transfer to MBM: Part II clause B.

29. By an agreement between Hanwright and the State, approved by the *Iron Ore (Hanwright Agreement) Act 1968* (WA), the Hanwright State Agreement was amended to give effect to the 1968 Agreement: J[18]. The area of the Paraburdoo temporary reserve was excluded from the Hanwright State Agreement. The balance of the temporary reserves the subject of the 1968 Agreement remained subject to the Hanwright State Agreement. The Hanwright State Agreement was also amended to add MBM as a party to that agreement, and to confer on MBM an option to take the place of Hanwright under that agreement: cl 5. At the same time, the 1963 Hamersley State Agreement was amended, an amendment approved by the *Iron Ore (Hamersley Range) Agreement Act 1968* (WA): J[18]. Relevantly, HI was granted the right to take up a further mineral lease over a 50 square mile area, which included Paraburdoo: cl 6(2)(a). Pursuant to that right HI applied for and was granted ML 246SA (**ML 246**). ML 246 had an area of about 50 square miles and substantially covered the area "*transferred*" by Hanwright to HI under Part I of the 1968 Agreement.

30. By the 1970 Agreement Hanwright and HI varied and in effect replaced the executory part of the 1968 Agreement, including by bringing to an end the option created by the 1968 Agreement and dividing between Hanwright and MBM, then a subsidiary of Hamersley Holdings, the rights of occupancy the subject of Part II of the 1968 Agreement. By cl 3.1 Hanwright was granted a royalty on ore won from the reserves acquired by MBM. Necessarily the 1970 Agreement required amendment to the Hanwright State Agreement.

Hamersley Group

31. By May 1970 Hamersley Holdings was a listed company, majority owned by Rio Tinto. Hamersley Holdings carried on its iron ore business through subsidiaries (each of which was in effect wholly owned) including HI and MBM. In September 1971 Hamersley Exploration

Pty Limited (**HamEx**) was incorporated as another, in effect, wholly owned subsidiary of Hamersley Holdings (as further identified in the agreed statement of facts).

Post 5 May 1970

32. The subsequent history of the Channar area is set out in CA[18]-[24] and J[38]-[54].

33. It is common ground that Channar B has, since 5 May 1970, been relevantly subject of exploration or mining tenements held by Hanwright or "*MBM*", initially rights of occupancy over TR 4965 and TR 4966, then ML 252 sections 18 and 19 and now ML 265. There is no issue in relation to that area. The following is directed to Channar A, and omits the parts of the history relevant only to Channar B.

34. Two of the "*temporary reserves*" the subject of the 1970 Agreement were TR 4965 and TR 4966: shown in the diagram between J[23] and [24].

35. On 16 June 1972 the State ratified two State agreements which replaced the Hanwright State Agreement. Those agreements are ratified by the *Iron Ore (Mount Bruce) Agreement Act 1972* (WA) (the agreement, **Mount Bruce Agreement**) and the *Iron Ore (Wittenoom) Agreement Act 1972* (WA). Pursuant to the Mount Bruce Agreement MBM was entitled to the grant of rights of occupancy over, *inter alia,* TR 4965 and TR 4966 and, subsequently, to the grant of a mineral lease over an area of up to 300 square miles over the land which was, in 1972, subject of the temporary reserves referred to in the 1970 Agreement: cl 4(1) and (2).

36. On 30 August 1972, pursuant to its obligations under the 1970 Agreement, Hanwright surrendered its rights of occupancy over, *inter alia*, TR 4965 and TR 4966. The next day MBM applied for rights of occupancy over TR 4965 and TR 4966. In point of fact, rights of occupancy over TR 4965 and TR 4966 were granted by the State to MBM on 18 April 1973, but were expressed to be effective from 30 August 1972: CA[18], J[28].

37. On 17 October 1974 MBM was granted mineral lease ML 252. Sections 18 and 19 of ML 252 cover Channar B: CA[19], J[29], diagram following J[29]. The rights of occupancy (held by MBM) over *inter alia* TR 4965 and TR 4966 expired by operation of the Mount Bruce Agreement and the grant of MBM's application for a mineral lease.

38. From 17 October 1974 to 21 April 1978 no tenement was held by a Hamersley Group company over Channar A: CA[20]. HamEx applied for and, on 21 April 1978, was granted rights of occupancy over TR 6663, which is over part of Channar A. On 2 May 1979 HamEx was granted rights of occupancy over TR 6982 and TR 6983, which are over the balance of Channar A: CA [21], J[44]-[45] and the diagrams immediately following each paragraph.

39. By letter dated 19 April 1982 HamEx applied to surrender its rights of occupancy over TR 6663, TR 6982 and TR 6983 and HI applied for the grant of a mineral lease over Channar A: J[46][2]. On 8 December 1982 HI was granted ML 4 section 238 over Channar A, and HamEx's surrender of the rights of occupancy was accepted on 18 December 1982: CA[21], J[47] and the following diagram.

40. During 1988 MBM surrendered ML 252 sections 18 and 19 (Channar B) and HI surrendered ML4 section 238 (Channar A). The Channar Joint Venturers were granted ML 265 over the whole of Channar: CA[22], J[51]-[53].

Part VI: Second Respondent's/Cross-Appellant's Argument

10 Introduction

41. Contrary to the conclusion of the Court of Appeal, in respect of Channar A the Channar Joint Venturers are "*MBM*" for the purpose of cl 3.1 of the 1970 Agreement. That is for either of two reasons.

42. *First*, the surrender by MBM of ML 252 sections 18 and 19 and by HI of ML4 section 238 was a necessary condition to the grant of ML 265 and, by cl 24(iii), the Channar Joint Venturers are "*MBM*" as defined. In relation to this argument HPPL adopts WPPL's submissions.

43. *Second* but engaging at an earlier point in the chronology, on the proper construction of cl 24(iii) of the 1962 Agreement, as incorporated into the 1970 Agreement, HamEx, on obtaining rights of occupancy over Channar A, derived "*title*" to Channar A "*through or under*"
20 MBM. HamEx is consequently "*MBM*", as defined in the 1970 Agreement, for the purpose of Channar A. If that submissions is correct, it is common ground that each holder of a tenement over Channar A subsequent to HamEx is also "*MBM*" for the purpose of the 1970 Agreement.

Argument

44. The phrase "*through or under*" is a relational or connecting phrase, identifying sufficient relationships or connections between MBM and the person or company later holding "*title*" (meaning a mineral exploration tenement or mineral lease) over the relevant area. The connections or relationships which are sufficient to constitute that required by the phrase "*through or under*" are to be determined applying the principles of construction identified in

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[2] On 1 January 1982 the *Mining Act 1978* (WA) came into operation. The transitional provisions continued those temporary reserves which existed prior to 1 January 1982 until cancelled by the Minister: see the description of the effect of the transitional provisions in *Hancock Prospecting Pty Limited v Wright Prospecting Pty Limited* [2012] WASCA 216 (2012) 45 WAR 29.

Electricity Generation Corporation v Woodside Energy Limited [2014] HCA 7 (2014) 251 CLR 640 at [35]. That is, ascertaining the proper construction requires consideration of the language used, the circumstances known to the parties and the commercial object of the contract. Specifically, a relational phrase, such as "*through or under*", takes its content from the context and the purpose of the 1970 Agreement (and the 1962 Agreement as incorporated into the 1970 Agreement), read as a whole, and the clause in which the phrase appears: *R v Khazaal* [2012] HCA 26 (2012) 246 CLR 601 at [31] per French CJ.

45. In cl 24(iii) of the 1962 Agreement a sufficient connection or relationship between MBM and the subsequent tenement holder may be status based (for example, parent and subsidiary companies or companies with a common parent) or fact based, or a combination of status and fact. Accepting that the sufficiency of the connection or relationship is determined by context, the authorities considering the phrase "*through or under*" in commercial arbitration acts demonstrate that a sufficient relationship may be status based: *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 341-2 per Brennan and Dawson JJ; *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* [2014] VSCA 166 (2014) 289 FLR 30 at [74] per Nettle JA; *Roussel-Uclaf v GD Searle & Co Limited* [1978] 1 Lloyds Rep 225 at 231 which is cited with apparent approval in each of *Tanning Laboratories* and *Flint Ink*.

46. The relationship between MBM and the rights of occupancy subsequently held by HamEx is (a) that MBM voluntarily undertook an act the consequence of which was cancellation of MBM's rights of occupancy, which was a necessary condition to the grant of the relevant rights of occupancy to HamEx and (b) in 1978 and 1979 another company in the Hamersley Group, HamEx, obtained rights of occupancy over, *inter alia*, Channar A. The reasons that relationship or connection is sufficient for HamEx (and its successors) to be "*MBM*" for the purpose of the 1970 Agreement are as follows.

Language of the 1970 Agreement/1962 Agreement

47. *First*, the language of cl 24(iii) demonstrates that the expanded definition of "*MBM*" includes persons other than MBM's successors and assigns. Persons "*deriving title thought or under*" is expansionary on successors and assigns. The Court of Appeal considered a transaction was necessary, or perhaps important, to the subsequent tenement holder being "*MBM*" as defined: CA[63]. It may be accepted that an assign generally (if not always) will have that status through a transaction, but that is to identify one only of the sufficient relationships or connections. In contrast the relationships or connections which are sufficient to meet the

relational phrase "*deriving title through or under*" are not or not necessarily dependent on a transaction. That phrase is expansionary on a transaction based connection.

48. *Second*, cl 24(iii) is given content by the other conditions in the 1962 Agreement which relate to the royalty: the contract is to be construed as a whole, *Wilkie v Gordian Runoff Limited* [2005] HCA 17 (2005) 221 CLR 522 at [16]. Clause 24(iii) has a different field of operation to each of cl 9 and cl 19 of the 1962 Agreement, each of which expands the obligation to pay the royalty on ore won by MBM. By cl 9 (when incorporated into the 1970 Agreement) the royalty is payable on ore won by "*MBM*" "*whether operating alone or in association with or by licence to others*". The effect of cl 9 is that the arrangement by which "*MBM*" chose to win ore is irrelevant to the obligation (similarly in relation to sales, cl 9(d)). Clause 19 of the 1962 Agreement is directed to an arm's length sale of MBM's rights to any part of the land comprised in the "*MBM area*", and in effect requires MBM to procure the purchaser to enter into a royalty agreement in the same terms as the 1962 Agreement or pay part of the sale price to Hanwright. Clause 24(iii) operates in relation to events other than those engaging cl 9 and cl 19. Clause 24(iii) is intended to capture changes in the company winning ore from the "*MBM area*", other than those changes the subject of cl 9 and cl 19. One readily apparent type of change is where, for any number of possible corporate reasons, a different company in the Hamersley Group applied for the subsequent tenement in place of MBM.

Context

49. *Third*, the factual context to the 1970 Agreement was that MBM and HI were both subsidiaries of Hamersley Holdings. The Hamersley Group generally carried on mining operations by HI. It was objectively possible that the "*MBM area*" may be exploited in whole or part by other companies in the Hamersley Group. As demonstrated by the events preceding the 1962 Agreement, and recited in that agreement, changes in which company in the group was to explore for and win ore had previously occurred. Further, "*corporate reorganization is to be expected within a complex like* [the Hamersley Group – reading Hamersley Group for BP]": *BP Refinery (Westernport) Pty Limited v Shire of Hastings* (1977) 180 CLR 266 at 278, similarly at 284. The expectation of corporate restructure is increased due to the likely very long life of any iron ore mine. Whether as a means of avoiding the inconvenience of potentially committing the Hamersley Group to a corporate structure that became outmoded, or as an anti-avoidance provision, the context of cl 24(iii) demonstrates that it is directed to (at least) a company in the Hamersley Group other than MBM winning ore from the "*MBM area*".

50. *Fourth*, the statutory context informs the construction. The analogy adopted by the Court of Appeal, to the use of "*through or under*" in a real property context, is inapt as that is a context in which there is necessarily continuity of title. There was no necessary continuity of tenements granted under the *Mining Act 1904*. Because ore could not be won from the rights of occupancy held by MBM, necessarily those tenements had to be cancelled and the area subject of a different tenement before ore could be won. As the Agreed Facts show, tenements held by the parties had been surrendered and cancelled from time to time. Other tenements, sometimes over different areas and conferring different rights, had been subsequently, but not always contemporaneously, granted. Surrender was not necessarily followed immediately by a fresh grant.

51. The Court of Appeal erred in construing "*through or under*" by reference to the use of that phrase in a real property context: CA[55]-[63]. The Court of Appeal recognized the distinction between "*title*" in a real property sense and the interests granted (CA[57]), but erred in not giving effect to the consequences of that distinction. The final sentence of CA[58] may be accepted as identifying some events which meet the connection required by cl 24(iii), but that sentence does not identify the universe of sufficient connections or relationships. The final sentence of CA[70] is also wrong. That sentence overlooks the fact that giving effect to the 1970 Agreement necessary involved the fresh grant of rights by the State to MBM. To similar effect, when the 1970 Agreement was entered into a surrender by Hanwright of the rights of occupancy over the "*temporary reserves*" immediately followed by a grant of rights of occupancy to MBM was possible, but was not necessarily to occur. In point of fact, MBM did not apply for rights of occupancy over the "*temporary reserves*" until a day after the surrender and, although expressed to be retrospective, the grant was not made until about 7½ months later. Later part of the area was subject to overlapping tenements (paragraph 39 above). For good reason MBM does not suggest those facts defeat Hanwright's right to a royalty.

52. The context demonstrates that the parties objectively intended that neither a period of time between the existence of tenements, nor the method chosen by the companies in the Hamersley Group to effect grant of a new tenement, was to defeat Hanwright's right to the royalty. The expanded definition of "*MBM*" gives effect to that intention.

53. The statutory context also included the Hanwright State Agreement and the Hamersley State Agreement. Consistent with the then recent dealings between each and the State, the parties

objectively knew that the State Agreements may be amended, including by substitution of parties: 1970 Agreement cl 1.3, cl 2.3 and cl 10; 1968 Agreement. Objectively, the parties knew there may be changes in the company in the Hamersley Group entitled to win ore, and that the State had a demonstrated willingness to grant rights to companies in the Hamersley Group. A consensual change in the company within the Hamersley Group exploring for or wining ore is apt to be described as the later "*deriving title through or under*" MBM.

Object

54. *Fifth*, the purpose or object of the 1970 Agreement was, in effect, the sale by Hanwright of its rights to explore the land the subject of the 1970 Agreement. A substantial part of the consideration payable by MBM was the royalty. That form of consideration aligned the interests of Hanwright and the Hamersley Group. Each was enriched if ore was won from the areas over which Hanwright's exploration rights were, in effect, transferred to MBM. The promise by MBM to pay a royalty was made in the context that control of exploration and mining of the areas subject of the 1970 Agreement, and thus obtaining that benefit, vested exclusively in MBM and the Hamersley Group.

55. The object of the expanded definition of "*MBM*" includes to give effect to the 1970 Agreement (a) in the context already described that a company in the Hamersley Group other than MBM may subsequently hold tenements over parts of the "*MBM area*" and win ore from parts of the "*MBM area*" and (b) to effect an anti-avoidance provision or to secure Hanwright's right to a royalty in that context. The later part of that object or purpose was recognised by the Court of Appeal in an earlier part of Macfarlan JA's reasons directed to the meaning of "*MBM area*": CA[53], reasoning which applies with equal force to the expanded definition of "*MBM*".

56. That the phrase "*through or under*" includes a status relationship, relevantly the tenement holder being a company in the Hamersley Group, has the consequence that the 1970 Agreement achieves by express term the same result achieved by an implied term in *BP Refinery (Westernport)*. There the Privy Council held that a reference to "*company*" in the relevant contract meant, in effect, any assignee in the group of companies of which the appellant was part: *BP Refinery (Westernport)* at 286. Accepting the context differs, it is consistent with *BP Refinery (Westernport)* to construe "*deriving title through or under*" MBM as bringing within the definition of "*MBM*" another company in the Hamersley Group which subsequently holds a tenement over part of the "*MBM area*". That construction gives effect to the consideration

bargained for by the parties, without restricting the corporate structure adopted by the Hamersley Group over the likely long life of the iron ore mines in the "*MBM area*".

Conclusion

57. In entering into the 1970 Agreement Hanwright was dealing with a successful and reputable group of companies, Hamersley Holdings and its subsidiaries. The company in the group which operated the mines, HI, was a party to the 1970 Agreement. There are many possible commercial reasons why one or other company in the group may hold and exploit the areas from time to time, and reasons why for a period of time parts of the land may not be subject of any tenement. Reasonable business people, in that circumstance and knowing the relevant character of mineral exploration and mining tenements, would consider that the royalty was payable irrespective of the commercial choices made by the Hamersley Group as to which company in the group was to hold the tenements and win the ore from time to time.

58. Membership of the Hamersley Group, together with the fact that MBM had to cause to be cancelled the "*temporary reserves*" it held over Channar A before a tenement to explore for or win ore could be granted to another company in the same corporate group, is a sufficient relationship or connection for the subsequent tenement holder to have "*deriv[ed] title through or under*" MBM.

59. In contrast, the construction which the Court of Appeal adopted has the consequence that a choice within the Hamersley Group that one wholly owned subsidiary, HamEx, instead of another, MBM, apply for the later in time rights of occupancy over Channar A defeated Hanwright's right to a royalty on ore won from Channar A. That construction is wrong. It is improbable that commercial parties intended that a significant part of the consideration payable by MBM to Hanwright for, in effect, the transfer of the "*temporary reserves*" be defeasible by a choice of that character, solely in the control of the Hamersley Group.

Part VII: Constitutional and Statutory Provisions

60. *Iron Ore (Hanwright Agreement) Act 1967* (WA), s.3

61. *Mining Act 1904* (WA), s.48, s.276, s.277

Part VIII: Orders Sought

62. Special leave to cross-appeal be granted and the cross-appeal be allowed with costs.

63. Set aside the orders made by the Court of Appeal (paragraphs 1 to 6 of the judgment) and in lieu thereof order that the appeal to the Court of Appeal be dismissed with costs.

64. Judgment for each of the appellant and second respondent against the first respondent in the sum of $41,419,165 plus interest (at the rate provided for in New South Wales Supreme Court Practice Note SC Gen 16) from 19 September 2014.

65. Judgment for each of the appellant and second respondent against the first respondent in the sum of $3,365,732 plus interest (at the rate provided for in New South Wales Supreme Court Practice Note SC Gen 16) from 17 December 2014.

Part IX: Time Estimate

66. HPPL estimates that it will require 30 minutes for the presentation of the appeal.

Dated: 18 July 2015

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ANNEXURE

PART VII LEGISLATION

Mining Act 1904 (WA)

Section 48

48 The Governor may, subject to this Act and the regulations, grant to any person, not being an Asiatic or African alien, a lease of any Crown land, not exempted by the next following section, for any or all of the undermentioned purposes, that is to say-

(1) for mining, and for all purposes necessary to effectually carry on mining operations therein or thereon for any mineral other than gold;

(2) for cutting and constructing thereon water races, drains, dams, reservoirs, tramways and roads to be used in connection with such mining;

(3) for erecting thereon any buildings and machinery to be used in connection with such mining;

(4) for boring or sinking for, pumping, or raising water;

(5) for residence thereon in connection with any or all such purposes.

Sections 276 and 277

276. The Minister and, pending a recommendation to the Minister, a warden, may temporarily reserve any Crown land from occupation, and the Minister may at any time cancel such reservation: Provided that if such reservation is not confirmed by the Governor within twelve months, the land shall cease to be reserved.

The Minister may, with the approval of the Governor, authorise any person to temporarily occupy any such reserve on such terms as he may think fit, but subject to the provisions of section two hundred and seventy-seven.

277. (1) In this section-

"deep alluvial gold" means alluvial gold below a depth of thirty feet from the natural surface of the ground.

(2) A right to occupancy granted under the preceding section for the purposes of prospecting for gold, other than for deep alluvial gold, shall not exceed three hundred acres of area.

(3) A right of occupancy may be granted for a fixed period in excess of one year, but in that event the Minister shall cause the terms and conditions relating thereto to be laid on the Table of each House of Parliament within fourteen days of the granting.

(4) A right of occupancy granted for any fixed period may be renewed from time to time for any term not exceeding twelve months on each occasion of renewal, but if any such renewal is granted then the provisions of subsection (3) of this section shall apply, and the terms and conditions of such renewal shall be tabled in each House of Parliament accordingly.

(5) The provisions of section thirty-six of the Interpretation Act, 1918, relating to the disallowance of regulations by either House shall apply to all intends and purposes as if the terms and conditions of the right of occupancy as tabled under this section were regulations tabled under that section.

Iron Ore (Hanwright Agreement) Act 1967 (WA)

Section 3

3. The Agreement is approved.