MOUNT BRUCE MINING PTY LTD v WRIGHT PROSPECTING PTY LTD & ANOR (S99/2015)

WRIGHT PROSPECTING PTY LTD v MOUNT BRUCE MINING PTY LTD & ANOR (S102/2015)

Court appealed from: New South Wales Court of Appeal
[2014] NSWCA 323 and [2014] NSWCA 425

Dates of judgments: 16 September 2014 and 9 December 2014

Special leave granted: 15 May 2015

In 1969 joint venturers Hancock Prospecting Pty Ltd ("Hancock") and Wright Prospecting Pty Ltd ("Wright Prospecting") (but together, "Hanwright") obtained occupancy and mineral exploration rights over areas of land designated as Temporary Reserves ("TRs") in the Pilbara region of Western Australia. In 1970 Hanwright entered into an agreement ("the Agreement") with Hamersley Iron Pty Ltd ("HI") and Mount Bruce Mining Pty Ltd ("MBM"). That agreement provided that MBM acquire from Hanwright "the entire rights" to some of the TRs, such areas to be known as the "MBM area". Clause 3.1 provided that MBM would then pay royalties to Hanwright on "[o]re won by MBM from the MBM area". The phrase "by MBM" included "all persons or corporations deriving title through or under" MBM.

The ensuing years saw various steps taken by MBM, HI and other companies, involving TRs, mining leases and mineral leases, which altered the rights and interests in the land the subject of the Agreement. Certain areas of the land came to be known as "Channar" and "Eastern Range".

In 2009 Hanwright sued MBM for unpaid royalties on ore that had been obtained from Eastern Range and from (disputed parts of) Channar. MBM contended that arrangements made since the Agreement had the effect that Eastern Range was not part of the MBM area within the meaning of the Agreement. MBM also contended that the companies obtaining ore from Channar (one of which was loosely related to MBM) did not have title that could be characterised as having been derived through or under MBM.

On 30 May 2013 Justice Hammerschlag ordered MBM to pay Hanwright more than $130 million (comprising royalties and interest), upon finding in favour of Hanwright in respect of both Eastern Range and Channar. His Honour found that the "MBM area" referred to the physical areas of land delineated by the TRs referred to in the Agreement, not to the rights in respect of such land. Justice Hammerschlag held that the companies obtaining ore from Channar had in effect derived title "through or under" MBM, due to a close practical connection between the rights exercised by those companies and the rights obtained by MBM from Hanwright under the Agreement. MBM duly appealed.

The Court of Appeal (Macfarlan, Meagher & Barrett JJA) unanimously allowed MBM's appeal in relation to Channar but dismissed it in relation to Eastern Range. Their Honours found that references in the Agreement to "land" and to

"rights" were plainly to two distinct concepts and that it was the former which applied to the "MBM area" in clause 3.1, despite the latter's role in the meaning of "royalty". The Court of Appeal held that the title (being usage rights, in the context of mining) to Channar held by the companies obtaining ore from that land could not be traced to any title once held by MBM. This was due to a 3½ year hiatus in mining rights, between a cancellation of TRs held by MBM and an acquisition of new TRs by another company, without evidence of any transaction connecting the acquisition with the cancellation. The Court of Appeal then ordered MBM to pay Hanwright $89 million in royalties and interest, being the amount that had been determined by Justice Hammerschlag in relation to Eastern Range.

In matter number S99/2015 (the MBM appeal), the grounds of appeal include:

- The Court of Appeal erred in finding that, on the proper construction of the Agreement, MBM is liable to pay royalty to Hanwright on ore won from the land known as Eastern Range.

In matter number S102/2015 (the Wright Prospecting appeal), the grounds of appeal include:

- The Court erred [54] – [63] *MBM (No.1)* in construing the phrase "all persons or corporations deriving title through or under the Purchaser to any areas of land……" incorporated by reference into clause 3.1 of the agreement between Wright Prospecting, Hancock, HI and MBM dated 11 March 1970:

  a) without having regard to the commercial object and purposes of that agreement; and

  b) without having regard to the text and commercial context of the Agreement, including the terms as incorporated.

In matter number S102/2015 (the Wright Prospecting appeal) Hancock also filed a Notice of Cross-Appeal, the grounds of which include:

- The Court of Appeal should have held that the fact of subsequently holding a mineral exploration or mining tenement over any part of the areas described as the *"MBM area"* in the Agreement, together with a status of being part of the same corporate group as MBM in the circumstances found by the trial judge, was a sufficient relationship or connection to meet the description "*successors ……or ……deriving through or under [MBM]".*

On 19 June 2015 Perron Iron Ore Pty Ltd filed a summons, seeking leave to intervene in both matters.