IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S99 of 2015**

BETWEEN: **MOUNT BRUCE MINING PTY LIMITED ACN 008 714 010**
Appellant

and

WRIGHT PROSPECTING PTY LIMITED ACN 008 677 021
First Respondent

HANCOCK PROSPECTING PTY LTD ACN 004 558 276
Second Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S102 of 2015**

BETWEEN: **WRIGHT PROSPECTING PTY LIMITED ACN 008 677 021**
Appellant

and

MOUNT BRUCE MINING PTY LIMITED ACN 008 714 010
First Respondent

HANCOCK PROSPECTING PTY LTD ACN 004 558 276
Second Respondent

PROPOSED INTERVENER'S SUBMISSIONS

Part I: Publication

1. Perron Iron Ore Pty Ltd (**Perron Iron Ore**) certifies that these submissions are in a form suitable for publication on the internet.

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Part II: Basis for Intervention

2. Perron Iron Ore seeks leave to intervene for the purpose of making written and oral submissions in support of aspects of the contentions of Wright Prospecting Pty Ltd (**WPPL**) and Hancock Prospecting Pty Ltd (**HPPL**) in Appeal No. S99 of 2015 and in Appeal No. S102 of 2015.[1]

Part III: Leave to intervene should be granted

3. Perron Iron Ore is the legal assignee of a 15% interest in all of the benefits and entitlements of HPPL, WPPL, EA Wright, LG Hancock (together, **the Vendors**), under an agreement made by those parties, Hamersley Iron Pty Limited (**Hamersley Iron**) and others, dated 12 December 1962 (**1962 Agreement**), including the royalties payable by Hamersley Iron pursuant to cl.9 thereof.[2] Perron Iron Ore has received substantial royalties from Hamersley Iron under the 1962 Agreement, and continues to receive monthly royalties.[3]

4. The principal issues in the appeals concern two aspects of the proper construction of an agreement dated 5 May 1970 (**1970 Agreement**) made between HPPL, WPPL, Hamersley Iron and Mount Bruce Mining Pty Ltd (**MBM**). Those issues have been referred to as the "*MBM area*" point and the "*deriving through and under*" point.

5. Directly or indirectly, the 1962 Agreement is relevant to both issues. That is because the resolution of each issue necessitates consideration of the words of the 1962 Agreement that are incorporated into the 1970 Agreement by cl.3.1 of the latter agreement.

6. As the holder of a 15% interest in the 1962 Agreement, Perron Iron Ore has an interest in the proper construction of that instrument and thus a direct interest in

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1 Summons filed on behalf of Perron Iron Ore dated 19 June 2015.

2 Affidavit of Michael Grant Lundberg sworn 18 June 2015 at [10].

3 Affidavit of Michael Grant Lundberg sworn 18 June 2015 at [12] and [28].

the proceedings: *Levy v State of Victoria* (1997) 189 CLR 579 at 600-605; *Roadshow Films Pty Ltd v iiNet Limited (No 1)* (2011) 248 CLR 37 at 38, [2]-[6]; and *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 3)* [2015] FCA 542 at [11]–[14] and [21]-[22].[4]

7. Leave to intervene should be granted to enable Perron Iron Ore to make submissions (oral and written) as to matters of construction concerning or affecting the 1962 Agreement. Perron Iron Ore does not seek to make submissions in relation to matters of construction of the 1970 Agreement.

Part IV: Applicable constitutional provisions, statues and regulations

10 8. None applicable.

Part V: Argument

Only the 1970 Agreement need be construed

9. It is uncontroversial that the operative phrase in cl.3.1 (*"on the same conditions as apply to"*) has the effect of picking up particular words of the 1962 Agreement and incorporating them into the 1970 Agreement. However, there has been no precise identification of the incorporated text nor consideration of whether the incorporation was confined to the text alone or whether the incorporation included the context, purpose and intention of the 1962 Agreement.

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4 In *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 3)* [2015] FCA 542, Edelman J granted leave to intervene to the State of Western Australia, to make submissions concerning the construction of contractual provisions of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA), to which the State of Western Australia was a party. Leave was granted on the basis that the construction of the State Agreement would be an important part of the trial (at [21]) and the consequences of the construction adopted in the proceedings might have a significant practical effect on the rights of the State of Western Australia under the State Agreement (at [22]).

10. The initial task is to determine what words or parts of the 1962 Agreement are in fact incorporated into the 1970 Agreement by the operative phrase in cl.3.1. That is a matter of construction of the of the 1970 Agreement: *Skips Nordheim v Syrian Petroleum* [1984] 1 QB 599 (***Skips Nordheim)*** at 618H (Oliver LJ).

11. The next task is to determine the meaning of the words or parts that are referentially incorporated.

12. The ordinary purpose of referential incorporation is to transplant the *words* of one document into another document, not both the *words* and *intention* of the first document. The purpose of incorporation by reference is expediency: it avoids "the necessity of writing [the clauses] out verbatim": *Skips Nordheim* at 619C, cited with approval in *Homestake Australia Ltd v Metana Minerals NL* (1991) 11 WAR 435 (***Homestake***) at 442 (Ipp J). Thus the meaning ascribed to expressly incorporated words is ordinarily determined by treating those words as if they were set out in full in the incorporating document and by construing them in the context of that document. That is, in the case of a written contract, the incorporated words of one contract are taken to be transplanted into the other contract and that contract is then construed as a whole in accordance with the ordinary rules of contractual interpretation: *Admastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133 at 152 (Viscount Simonds).

13. There can be circumstances where a later contract adopts both the terms and the intention of an earlier contract. However the general assumption, absent a contrary textual indication, is that incorporation of words, but not their meaning, is intended: *Homestake* at 442. Here there is no contrary textual indication.

14. Further, cl.3.1 does not incorporate into the 1970 Agreement all the terms of the 1962 Agreement, nor even all of its provisions concerning the obligation to pay royalties. It incorporates only part of the text concerning that obligation. So much is apparent, for example, from the fact that cl.3.1 itself specifies the rate of the royalty that is to apply. And cl.3.1 plainly does not incorporate from cl.9 either the expression "*the Temporary Reserve land*" or recital (g), which defines

that expression. The 1970 Agreement contains (in cl.2.2) its own defined expression as to the source of iron ore, the winning of which is to carry a royalty ("the MBM area").

15. An incongruity would be generated were such a confined and limited importation of the text of the 1962 Agreement to bring with it the overall intention of the entire agreement. Nor can any discrete intention in respect of any particular provision be discerned, still less an intention in respect of parts of a provision.

16. Accordingly, the meaning of the text incorporated into the 1970 Agreement is to be determined by construing the 1970 Agreement, rather than by ascertaining the meaning of that text as it appeared in the 1962 Agreement in the light of the intention, purpose and context of the 1962 Agreement. The principle is stated in *Skips Nordheim* at 619D:

> "The meaning and effect of the incorporated clauses has to be determined as a matter of construction of the contract into which it is incorporated having regard to all the terms of that contract." (Emphasis added.)

17. The Courts below proceeded on the basis that cl.3.1 of the 1970 Agreement incorporated words from the 1962 Agreement: TJ [21], [97], [113], [116]; CA [3(2)], [7], [51], [54], [102], but the Courts did not identify the incorporated words, and in addressing the meaning of the incorporated subject matter did not advert to the distinction between adopting words from another instrument and adopting both the words and intention of the other instrument. The submissions of MBM impermissibly slide from construction of the 1970 Agreement to construction of the 1962 Agreement.[5]

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[5] See, in particular, at [76]-[82] of MBM's submissions as Appellant in No S99 of 2015, where the "operation", including the proper construction of various clauses, of the 1962 Agreement is analysed as though it were a matter of context.

The 1962 Agreement as context

18. MBM contends that terms of the 1962 Agreement have contextual relevance to the 1970 Agreement and seeks to rely on the meaning it ascribes to those terms.[6] The existence of the 1962 Agreement is no doubt part of the surrounding circumstances of the 1970 Agreement as a mutually known fact, but the meaning and true operation of particular terms are not (or are not shown to have been) commonly understood matters. The differing submissions of the appellants and respondents in this Court evince a continuing want of commonality. But assuming that it is permissible to refer to the meaning and operation of the royalty provisions of the 1962 Agreement as part of the surrounding circumstances of the 1970 Agreement, the meaning of those provisions is to the contrary of MBM's contentions.

The 1962 Agreement in outline

19. By the 1962 Agreement, the Vendors agreed to sell and transfer to Hamersley Iron, subject to Ministerial consent, their interests in 24 specified Temporary Reserves and in the land comprised therein and in all rights to prospect or mine granted thereby or flowing therefrom (which interests and rights they held jointly with Rio Tinto Southern Pty Ltd, a company related to Hamersley Iron). They also agreed, during a specified period, to disclose only to Hamersley Iron the location of any iron ore deposits known to them and being in certain districts in Western Australia and if requested to assist Hamersley Iron to obtain iron ore mining rights in respect thereof (cll.12, 13).

20. The consideration for the Vendors' promises included promises by Hamersley Iron to pay a royalty to the Vendors in certain circumstances (cll.9, 10, 14, 15) and, unless prevented by circumstances beyond its control, to commence active preparations for the working of an iron ore deposit, being a deposit in respect of

[6] See [36]-[38], [74]-[82] of MBM's submissions filed as Appellant in No S99 of 2015.

which a royalty payment obligation had arisen or may arise under cll.9, 14 or 15 (cl.17).

21. If Hamersley Iron decided not to proceed with iron ore mining operations in respect of which a royalty payment obligation had arisen or may arise under cll.9, 14 or 15 and so notified the Vendors in writing, Hamersley Iron was to be thereafter under no obligation to the Vendors pursuant to the 1962 Agreement, but should offer to transfer (and, if so required, transfer) to the Vendors, without payment, all its then Temporary Reserves and other titles and rights to mine such iron ore (cl.18).

10 22. As well, if Hamersley Iron sold or otherwise assigned its title to any areas of land in respect of which a royalty payment obligation had arisen or may arise under cll.9, 14 or 15, Hamersley Iron promised at its option either to obtain from the buyer or assignee a covenant to pay royalty to the Vendors under such of those clauses as were relevant or pay to the Vendors one-third of Hamersley Iron's net profit on such sale, after deducting certain expenditure (cl.19).

Royalties under the 1962 Agreement

23. Clause 9 obliges Hamersley Iron to pay the Vendors a 2.5% royalty "*in respect of all iron ore produced by the Purchaser (whether operating alone or in association with or by licence to others) from the Temporary Reserve land and*
20 *sold or otherwise disposed of by*" Hamersley Iron or by Hamersley Iron and such associate or by such licensee.

24. Clause 9 is to be construed as employing the defined meaning of the expression "*the Temporary Reserve land*" and as applying to the deemed extension of that expression in cl.10.

25. When so read, cl.9 operates to oblige Hamersley Iron to pay the Vendors a 2.5% royalty in respect of all iron ore produced by Hamersley Iron (whether alone or with others) "*from the land comprised in the Temporary Reserves for iron ore listed in the Second Schedule, and from any other land as described in the Third*

Schedule", provided that in respect of the latter, Hamersley Iron (itself or with certain others) obtains Temporary Reserves or other titles or rights to mine iron ore prior to a specified time.

26. Plainly, this royalty obligation is not imposed by reference to incorporeal legal rights. The royalty obligation is not tied to the production of iron ore by means of the exercise of rights conferred by the Temporary Reserves. Rather, the royalty obligation is imposed by reference to iron ore produced from "*the land comprised in*" those Temporary Reserves (cl.9) and from the land described in the Third Schedule (cl.10). In both instances, the words identify geographical areas of land, from which iron ore produced and sold by Hamersley Iron and others carries royalty.

27. The royalty obligations that are imposed by cll.14 and 15 have a similar focus upon areas of land. Clause 14 operates where Hamersley Iron (alone or with certain others) obtains Temporary Reserves or other titles or rights to mine any or all of the iron ore deposits which were disclosed to Hamersley Iron by the Vendors under cl.12. By cl. 14 Hamersley Iron is obliged to pay the Vendors in respect of all iron ore produced by Hamersley Iron (whether alone or with certain others) "*from such of those deposits in respect of which rights to mine are obtained as aforesaid*" and sold or otherwise disposed of.

28. The royalty obligation imposed by cl.15 applies where, during a specified period, Hamersley Iron obtains any Temporary Reserves or other title or rights to mine iron ore in certain specified areas "*being outside the Temporary Reserve land*" and relates to all iron ore produced "*from such of those areas in respect of which Temporary Reserves or other titles or rights to mine iron ore...*" are obtained.

29. When read with cl.24(iii), cl.9 obliges Hamersley Iron to pay a royalty on iron ore produced from the land comprised in the Second Schedule Temporary Reserves, and (where certain conditions are met) the land described in the Third Schedule, even where the iron ore is produced by a successor or assign or person

or corporation deriving title through or under Hamersley Iron to any areas of land the subject of royalty obligations under cll.9, 14 or 15.

Clause 9 royalties imposed by reference to land

30. The *discrimen* of the obligation to pay the cl.9 royalty is the production of iron ore from that land, not the production of iron ore by means of the exercise of mining rights (whether the rights were obtained from the Vendors or not) or some combination of that land and those rights.

31. The obligation under cl.9 to pay the royalty attaches to iron ore produced "from" the Temporary Reserve land. The word "from" denotes removal, abstraction or separation, and indicates the place whence something comes (meanings 4 and 7, Shorter Oxford English Dictionary). Thus the word naturally relates to physical subject matter, rather than abstract or intangible things. A construction of cl.9 which recognises that the royalty obligation is imposed by reference to a geographical location, rather than an exercise of rights, therefore gives a coherent and harmonious operation to all the words in the expression *"... from the Temporary Reserve land"*.

32. Three other provisions of the 1962 Agreement provide context for the proper construction of the cl.9 royalty obligation.

33. ***First***, recital (g) records the Vendors' intention to sell, and Hamersley Iron's intention to buy, the Vendors' right, title and interest in and to and in respect of:

> "the said Temporary Reserves and the land comprised therein (hereinafter called "the Temporary Reserve land") and all rights to prospect or mine granted thereby or flowing therefrom".

34. The defined term "*the Temporary Reserve land*" in recital (g) refers only to the *land* comprised in the 24 Temporary Reserves set out in the Second Schedule to the 1962 Agreement, not the Temporary Reserves as well, as Meagher JA correctly observed at CA [102]. So much is evident from recital (f) which defines *"the said Temporary Reserves"* as *"the Temporary Reserves for iron ore*

listed in the Second Schedule hereto", and from recitals (h) and cl.3, both of which refer to "*the said Temporary Reserves and the Temporary Reserve land*", thus making clear that the former are separate and distinct from the latter. The same distinction is made in cl.1, where the words *"the land comprised therein"* are used rather than the defined term *"the Temporary Reserve land"*.

35. Contrary to MBM's argument,[7] that which is signified by the defined expression *"the Temporary Reserve land"* in recital (g) does not include any rights to prospect or mine. The concluding words of the recital, which refer to such rights, relate back to the opening phrase *"all the right title and interest of the Vendors and each of them in and to and in respect of the said Temporary Reserves"*.

36. ***Secondly***, for the purposes of cll.9, 14 and 15, the term "*the Temporary Reserve land*" is deemed by cl.10 to include, in addition to the land comprised in the said Temporary Reserves, any other land as described in the Third Schedule (being *"All those pieces of land delineated and coloured blue on the plan attached hereto and comprising in all an area of approximately 1218 square miles"*) in respect of which Hamersley Iron or certain other companies or parties obtain Temporary Reserves or other titles or rights to mine iron ore prior to a specified time. Clause 10 both confirms that the Temporary Reserve land in cl.9 describes geographical areas of land, and adds a description of other geographical areas of land which may be deemed to be included in *"the Temporary Reserve land"* for the purpose of cl.9. MBM's submissions do not address or even mention cl.10.

37. Furthermore, the Vendors did not hold rights over the land in the Third Schedule (and by virtue of the operation of cl.13 were not permitted to do so within the time specified in cl.10) and so could not transfer or assign any rights in respect of the land in the Third Schedule to Hamersley Iron. MBM argues that a royalty is only payable in respect of iron ore produced from the Temporary Reserve land (which includes the land deemed to be Temporary Reserve land, by cl.10) where

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7 See [38], [76]-[81] of MBM's submissions filed as Appellant in No S99 of 2015.

the iron ore is won by Hamersley Iron pursuant to the exercise of present or future rights acquired from the Vendors, or alternatively, to the extent that the Temporary Reserve land is subject to the present or future rights of the Vendors. But, on that construction, there could be no royalty applicable to the deemed Temporary Reserve land because the Vendors held no present or future rights over it.

38. ***Thirdly***, cl.24(iii) provides that the expression "*the Purchaser*" includes (except in one case under cl.19):

> "its successors and assigns and all persons or corporations deriving title through or under the Purchaser *to any areas of land in respect of which an obligation to pay an amount has arisen or may arise* pursuant to Clause 9, 14 or 15 ..." (Emphasis added.)

and thus confirms that the criterion by reference to which the royalty obligation is engaged is a geographical area of land, not an incorporeal right.

Part VI: Time required for oral argument

39. Perron Iron Ore estimates that 15 minutes will be required for the presentation of its oral argument.

Dated 17 July 2015

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