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

MOUNT BRUCE MINING PTY LIMITED
Appellant

WRIGHT PROSPECTING PTY LIMITED
First Respondent

HANCOCK PROSPECTING PTY LTD
Second Respondent

APPELLANT'S REPLY

10 **Part I: Certification**

1. These submissions are in a form suitable for publication on the internet.

Part II: Argument

2. Defined terms in MBM's submissions in chief have the same meaning in this reply.

3. ***Purpose and context of the 1970 Agreement.*** The respondents assert that the 1970 Agreement effectively gave MBM the commercial opportunity to develop the entire area it acquired from Hanwright if it so chose (WPPL [20], [36]; HPPL [41]-[42]). This is incorrect. For the reasons explained in MBM's submissions in chief at [49]-[50], the maximum area of land from which MBM could win ore as a result of the rights it acquired under the 1970 Agreement was an area of 225 square miles (out of a total area of 400.1 square miles which it
20 acquired under clause 2.2). MBM never had the opportunity to develop the entire area as a result of the rights it acquired from Hanwright under the 1970 Agreement.

4. Further, clauses 2.3 and 4 of the 1970 Agreement demonstrate objectively that MBM obtaining a mineral lease over, at most, 225 square miles was all the parties had in contemplation when they made that agreement (c.f., WPPL [34]; HPPL [9]). Clause 4 provides that Hanwright and MBM will seek a variation to clause 5(1) of the 1968 Hanwright State Amendment Agreement limiting MBM's right to take the place of Hanwright under that agreement to temporary reserves 4937H to 4946H and 4963H to 4967H.[1] Thus, the parties contemplated that both Hanwright and MBM would be parties to the 1967 Hanwright State Agreement, Hanwright with rights in relation to temporary reserves 4947H to 4962H and
30 MBM with rights in relation to the remainder. Plainly, that is how they contemplated that MBM would acquire Hanwright's rights in relation to temporary reserves 4937H to 4946H and 4963H to 4967H pursuant to clause 2.2 of the 1970 Agreement.

5. Clause 2.3 then provides that the total area of any mineral lease or leases under clause 8(1)(a) the 1967 Hanwright State Agreement will be divided between the parties, 75% to MBM and 25% to Hanwright. The inclusion of this clause is explained by the fact that as clause 4 shows, when the 1970 Agreement was made, MBM and Hanwright contemplated that they would both be parties to the State Agreement. Thus, the right to a mineral lease or leases of 300 square miles for which clause 8(1)(a) provided would need to be divided between them (MBM's 75% coming to 225 square miles). The final sentence of clause 2.3

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[1] At the date of the 1970 Agreement, clause 5(1) of the 1968 Hanwright State Amendment Agreement gave MBM the right to take Hanwright's place under that agreement in relation to all the Mount Bruce Temporary Reserves; that is, temporary reserves 4937H to 4967H (see MBM [33]).

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obliges Hamersley Iron to use its best endeavours to ensure that *Hanwright* is granted tenure over certain additional areas. In contrast, nothing in the 1970 Agreement evinces any intention that *MBM* would be granted tenure over more than its 75% of the 300 square miles available under clause 8(1)(a) of the 1967 Hanwright State Agreement.

6. Clauses 2.3 and 4 of the 1970 Agreement thus demonstrate submissions, such as WPPL's that, at the time the 1970 Agreement was made, reasonable commercial parties would have viewed MBM's ability to develop the MBM area as relevantly unconstrained (WPPL [36]; see also HPPL [46]), to be worse than baseless supposition. Such submissions are flatly contrary to the objective evidence provided by the terms of the 1970 Agreement itself.

7. For the same reason, a related submission, that there is no reason to tie the royalty entitlement to any extant rights which Hanwright or MBM had under the State Agreements because the parties knew these agreements could be varied to expand the area of any mineral lease beyond the 300 square mile limit under clause 8(1)(a) of the 1967 Hanwright State Agreement (WPPL [11(e)], [33], [44]; HPPL [9], [46]), is equally flawed. Moreover, the observation that the effect of the 1968 Hanwright State Amendment Agreement had been to give the Hamersley Group an entitlement to take up a further 300 square mile lease, in addition to any entitlement to obtain such a lease which it had under the 1963 Hamersley Range State Agreement (WPPL [11(e)]; HPPL [9]), ignores the fact that the two sets of agreements (the Hanwright State Agreements on the one hand and the Hamersley Range State Agreements on the other) dealt with rights over different areas of land. Similarly, the observation that the 1963 Hamersley Range State Agreement was amended by the 1968 Hamersley State Amendment Agreement, with the effect that Hamersley Iron was entitled to a second mineral lease of 50 square miles (WPPL [11(e)]; HPPL [9]) ignores the fact that the latter agreement concerned rights over a new area, Paraburdoo, which had not been the subject of the earlier agreement, since the rights over Paraburdoo were only transferred to Hamersley Iron under the 1968 Agreement ([2013] NSWSC 536 at [17]-[18]).

8. The respondents assert that providing certainty as to the area of land to which a royalty attached was necessary to avoid the right to receive a royalty being modified by matters within the control of the Hamersley Group (WPPL [21]). This too is incorrect. The assertion is based on the suggestion that, on MBM's construction, the obligation could be avoided if MBM surrendered title to an area of land (WPPL [32]; HPPL [43]). However, if the surrender occurred on the strength of a commitment by the State (for example a promise made under a State Agreement) to make a fresh grant, then, consistently with the reasoning of the Court of Appeal at [58], a surrender followed by a fresh grant in this way would fall within the concept of derivation of title for the purposes of clause 24(iii) and the obligation to pay a royalty would remain. If the surrender occurred without any assurance that a fresh grant would be made, MBM would be in a position no different from any other person, and would be exposed to the prospect, which was outside the Hamersley Group's control, that rights over the land might be given to an unrelated third party.

9. WPPL's assertion that the decision to take the risk of an unrelated third party acquiring rights in respect of the land was one for MBM (WPPL [38]) overstates the freedom of choice MBM in fact had. If MBM wished to obtain a mineral lease over any of the land the subject of the temporary reserves it acquired from Hanwright, it was unavoidable that the rights of occupancy it had over the remaining land would expire. This was the effect of clause 2(a)(i) of the 1967 Hanwright State Agreement (as amended).

10. There is no basis for the assertion that, as at May 1970, the prospect that a third party would acquire rights over the land the subject of any temporary reserves formerly held by MBM was not regarded by the parties as a real risk (WPPL [38]; HPPL [43]). Once MBM's

rights of occupancy expired, the land the subject of those rights became open to claim by any person. As such, the prospect of a third party acquiring rights over such land was real.

11. HPPL says that achieving the object of the 1970 Agreement did not involve a continuous uninterrupted chain of changing rights because (a) the rights which Hanwright held at the time of the 1970 Agreement were not transferrable but required a surrender and subsequent fresh grant before they could be used by MBM to win ore; (b) a fresh grant did not follow immediately from a surrender; and (c) Hanwright did not have any right to mine, which was necessary before clause 3.1 could be engaged (HPPL [39]). The analysis falls down at each step. As to (a), Hanwright's rights were transferrable: see clause 14 of the 1967 Hanwright State Agreement. The transferability of the rights is not undermined by the fact that the mechanism used to effect a transfer was surrender of one set of rights followed by the grant of a new set; the latter set of rights was regarded as the same as the former (AB 4/1530, 1532, 1534). As to (b), consistently with the Court of Appeal's reasoning at [59], continuity in title may exist where, in substance, one set of rights is surrendered in order to enable another set of rights to be created in respect of the same area. This may occur notwithstanding a gap in time between the surrender of one set of rights and the creation of another. In this respect, it should be noted that, in attacking MBM's construction on the footing that their entitlement to royalties would be lost by any "gap" in title (WPPL [11], [32]; HPPL [43]), the respondents seek to demolish a straw man, not the true construction put against them. As to (c), Hanwright had an entitlement to obtain a right to mine because it could convert its temporary reserves to a mineral lease pursuant to clause 8(1) of 1967 Hanwright State Agreement.

12. ***The language of the 1970 Agreement.*** The respondents submit that the use of the words "the entire rights thereto" in clause 2.2 of the 1970 Agreement denotes a distinction between the rights acquired under clause 2.2 and the area of land to which the rights pertain (WPPL [24]; HPPL [24]). That overlooks the fact that the "rights" referred to in clause 2.2 are rights in respect of temporary reserves, being rights of occupancy granted under s.276 of the *Mining Act* 1904 (WA). Further, the respondents' submissions ignore clause 1.4, which provides that all references to reserves include rights in respect of those reserves.

13. Similarly, the submission that to construe "blocks" in clause 1.1 as referring to rights in respect of geographic areas of land is contrary to the language used by the parties (WPPL [27]; HPPL [25]) and overlooks the fact that clause 1.4 specifically provides that all references to blocks include rights in respect of those blocks. So too, it overlooks the reference, at the end of clause 1.1, to those "blocks" being subject to the exercise of an option by MBM. As explained at MBM [41], that option was one MBM had over Hanwright's *rights* in relation to the relevant blocks, not the blocks themselves. Thus, in clause 1.1 "blocks" must refer to those rights, not mere geographic areas of land.

14. The respondents seek to overcome the effect of clause 1.4 by asserting that it "expands" the definition of "MBM area" to include certain present and future rights (WPPL [25]; HPPL [26]). That is inaccurate. Clause 1.4 is an interpretative provision which must be applied wherever the words "blocks or reserves" appear. So much is clear from the clause's opening words, "*All references* to blocks or reserves include..." (emphasis added). Clause 1.4 must be applied to clause 1.1, and to the definition of "MBM area" in clause 2.2 because that definition includes the word "reserves".

15. The respondents also suggest that clause 3.1 makes no sense if "MBM area" is construed to mean rights in respect of land, because clause 1.4 refers only to the present and future rights of *Hanwright*, and these would cease to exist once clause 2.2 was given effect to (WPPL [26]; HPPL [27]). That ignores the language used in clause 2.2, which specifically refers to MBM acquiring the rights of Hanwright. It also ignores the fact that, at the time of

the 1970 Agreement, Hanwright already had, under clause 8(1)(a) of the 1967 Hanwright State Agreement, a right to be granted a mineral lease or leases over no more than 300 square miles of the land the subject of the Mount Bruce temporary reserves.

16. HPPL argues that the phrase "extensions of ore bodies located therein" in clause 1.4 indicates the parties were referring to land and not rights in respect of land (HPPL [26]). That argument misreads the clause. Properly construed, clause 1.4 provides that all references to blocks or reserves include all present and future rights of Hanwright, *including all such rights to any extensions of the ore bodies contained in the blocks*.

17. HPPL also asserts that MBM's construction involves reading words into the 1970 Agreement (HPPL [28]). That is not so. MBM's construction simply requires full effect to be given to the language of the relevant provisions of the agreement which affect the definition of "MBM area", such as the expression "present and future rights" in clause 1.4. HPPL's submission that the concept of rights "deriving" from other rights does not appear in the 1970 Agreement (HPPL [28]) is obviously wrong. It is common ground that the parties incorporated into the 1970 Agreement clause 24(iii) of the 1962 Agreement. And, in referring to persons "deriving title" ("title" being a bundle of rights), clause 24(iii) refers expressly to the concept which HPPL says is missing from the 1970 Agreement. A similar vice attends WPPL's criticism that MBM's construction interposes "an intellectual construct based on the continuity or derivation of incorporeal rights" which "[t]here is no reason to suppose ... the parties intended" (WPPL [44]). Both the language of clause 24(iii) and the incorporation of clause 1.4 into the definition of "MBM Area" reflect the parties' capacity and intention to deal with each other on just such a basis.

18. ***Submission of the proposed intervener and the 1962 and 1968 Agreements.*** MBM does not oppose the proposed intervener (**Perron**) being granted leave to intervene. There is considerable force in Perron's submissions as to the limits on the relevance of the 1962 Agreement to the proper construction of the 1970 Agreement (Perron [9]-[17]). Similar considerations apply regarding the relevance of the 1968 Agreement. As MBM submitted in chief, "[t]he language of [those] earlier agreements is not to be substituted for the language of the 1970 Agreement" (MBM [37]). Nor, it might be added, is the intention of those earlier agreements to be substituted.

19. However, to the extent that Perron is critical of the emphasis MBM has placed on the 1962 and 1968 Agreements, it has singled out the wrong party. As the order of MBM's written submissions indicates, it attributes only limited significance to those earlier agreements. The respondents, on the other hand, depend on them. Indeed, both WPPL and HPPL make detailed submissions which emphasise the terms of clauses 10 to 14 of the 1962 Agreement (WPPL [7]-[8], [31]; HPPL [35]-[36]). Those submissions amount to an attempt to substitute the text of a different agreement about different rights for the text of the 1970 Agreement, and should be disregarded for the further reason that the 1970 Agreement contains *no* counterpart to *any* of those clauses.

20. Nonetheless, to the extent that it is necessary to address Perron's submissions as to the construction of the 1962 Agreement, MBM submits that in important respects they are incorrect. First, Perron states that the language of clause 9 of the 1962 Agreement, which refers to ore being won "from" geographical areas of land, indicates the royalty obligation in that agreement is imposed by reference to land and not rights over land (Perron [27], [31]). That disregards the circumstance that the precise expression used in clause 9, "ore produced ... from the Temporary Reserve land", operates by reference to a defined expression, "the Temporary Reserve land". The proper construction of clause 9 depends on the meaning of that expression, which is defined in recital (g).

21. Perron's construction of recital (g) proceeds from an assumption that the defined expression "the Temporary Reserve land" refers only to the immediately preceding words "the lands comprised therein" (Perron [34]). That drives Perron to construe the words "thereby and "therefrom" as referring to the "right title and interest" mentioned at the beginning of the recital (Perron [35]), to the exclusion of the immediately preceding words. That approach is both ungrammatical and contrary to the natural reading of the clause, which is to relate "thereby" and "therefrom" to the noun which immediately precedes them, being the defined term "Temporary Reserve land". Hence, "thereby" and "therefrom" refer to the composite concept of rights in respect of Temporary Reserves and the land comprised therein.

22. Secondly, the other clauses to which Perron refers fail to support its contention that the royalty under clause 9 is imposed by reference to land rather than rights. Contrary to Perron [36], the fact that clause 10 might result in additional reserves being added to the reserves that attract a royalty obligation is not significant. The function of the clause is to add to the land identified in recital (f) as being the subject of temporary reserves certain other land that the Third Schedule identified as prospective, but only if Hamersley acquired similar rights to that land by a stipulated date. Contrary to Perron [38], the reference in clause 24(iii) to land "in respect of which an obligation to pay an amount has arisen" causes no difficulty. It is perfectly sensible to speak of an obligation to pay an amount of royalty "in respect of" land where the royalty is payable as a result of ore being won from the exercise of rights in relation to the land.

23. ***Reference to the defined term "MBM area" as an aid to construction.*** WPPL and HPPL seek to distinguish *Owners of "Shin Kobe Maru" v Empire Shipping Co Ltd* (1994) 181 CLR 404 and *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 on the basis that the issue in the present case is not one of statutory interpretation but contractual construction; and in such cases a court must have regard to the language of the contract as a whole (WPPL [40]; HPPL [48]). There is no basis for such a distinction. A statute too must be construed by reference to the language of the instrument viewed as a whole: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

24. ***Extension of ore bodies claim.*** The respondents submit that even if MBM's appeal succeeds then, assuming WPPL's appeal and HPPL's cross-appeal also succeed, they would be entitled to a royalty in respect of Channar A on the basis of the extensions of ore bodies provision in clause 1.4 of the 1970 Agreement; and seek to have the orders of the Court of Appeal varied and the matter remitted to the trial judge for determination of the royalty amount (WPPL [47]-[48]; HPPL [54]). This contention should have been the subject of a separate appeal ground and reflected in the orders sought WPPL's notice of appeal and HPPL's notice of cross-appeal. In answer to the substance of it, however, MBM seeks to rely on a notice of contention which contends that the trial judge's findings in respect of the extension of ore bodies claim were incorrect. MBM's arguments in support of the proposed notice of contention are set out in separate submissions prepared by MBM. The short point is that clause 1.4 applies only to ore bodies lying outside the boundaries of the temporary reserves referred to in clause 1.1 of the 1970 Agreement; and Channar A does not meet this requirement as it lies wholly within what was originally temporary reserves 4965H and 4966H (see [2013] NSWSC 536 at [141]).

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