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

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and

MOUNT BRUCE MINING PTY LIMITED (ACN 008 714 010)
First Respondent

HANCOCK PROSPECTING PTY LIMITED (ACN 008 676 417)
Second Respondent

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SECOND RESPONDENT'S REPLY (IN SUPPORT OF APPEAL AND CROSS APPEAL)

Part I: Certification

1. HPPL[1] certifies that these submissions are suitable for publication on the internet.

Part II: Reply to the argument of the First Respondent

2. The submissions of MBM (**MS**) rely on two propositions about the characteristics of the rights of occupancy the subject of the 1970 Agreement, and develop two submissions based on those propositions. Each of those propositions and submissions is wrong.

[1] HPPL adopts the abbreviations used in its and WPPL's submissions in support of the appeal

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3. *First*, MBM repeatedly asserts that the parties to the 1970 Agreement knew, on 5 May 1970, that MBM would not be able to obtain the grant of a mineral lease over an area of greater than 300 square miles. For the reasons identified in [9] of HPPL's submissions in MBM's appeal and in [11] to [13] of WPPL's submissions in MBM's appeal, that proposition is wrong in point of fact. When the 1970 Agreement was entered into the parties knew (a) there was to be a renegotiation of the area over which Hanwright was entitled to a mineral lease under the 1967 Hanwright State Agreement and (b) the State was amenable to increasing the area over which companies owned by Hamersley Holdings held mineral leases. The former follows from cl 2.3 (also cl 4 and cl 10) of the 1970 Agreement, and that the right to a mineral lease was to be split between MBM and Hanwright. The latter is proved by the amendments to the Hamersley State Agreement and the Hanwright State Agreement entered into and approved in 1968. The first premise to MBM's submission is erroneous.

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4. *Second*, MBM repeatedly says that the rights that MBM acquired under the 1970 Agreement were transferrable. To the extent that submission is directed to the rights of occupancy held by Hanwright that submission is wrong. For the reasons identified in [9] of HPPL's submissions in support of this appeal, the rights of occupancy were not transferrable, a characteristic not altered by the approval of the Hanwright State Agreement in the *Iron Ore (Hanwright Agreement) Act 1967* (WA). There is a further flaw in MBM's analysis. If it be assumed that the rights of occupancy were transferrable that assumption does not assist MBM. The prior dealings between the parties and the State, for example the then relatively recent surrender and grant of the rights of occupancy over Paraburdoo[2], did not involve assignment or transfer of rights of occupancy. The State permitted surrenders followed – often not immediately – by a new and often different grant. The rights of occupancy also had to be surrendered or cancelled before the grant of a mineral lease. The parties knew that there would not be, or may not be, an uninterrupted continuum of rights held by Hanwright and then MBM or anyone "*deriving title through or under*" MBM.

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5. To the extent the rights (or rights and obligations) are those under the 1968 Hanwright State Agreement, MBM's submission is incomplete as the transfer of those rights required the consent of the State, and necessarily involved a renegotiation of some of the rights and obligations: as addressed by cl 4 and cl 10 of the 1970 Agreement. It was objectively likely that, or at least a real possibility that, the State would not agree to the assignment of rights

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[2] Agreed chronology items 21 to 23

but require (or agree) termination or rescission of the 1967 Hanwright Agreement and enter into a new agreement with MBM[3].

6. Contrary to MS[20] there was by 5 May 1970 no established pattern of assignment of rights of occupancy or rights conferred by agreements with the State. There was no occasion on which either had occurred. Instead the State from time to time created new rights or agreed to vary agreements. The second factual premise to MBM's submission is erroneous.

7. *Third*, MBM's argument is dependent on its contention that the royalty payable under the 1970 Agreement is only payable on ore won from areas subject, at the time ore is won, to rights transferred by Hanwright to MBM or rights derived from those transferred rights. That construction is wrong for the reasons identified in HPPL's submissions, and in WPPL's submissions, in response in MBM's appeal. Those reasons are given further support by the language of the clause subject of this appeal, and a related clause.

8. MBM focuses its argument on the words "*deriving title*" in cl 24(iii) of the 1962 Agreement. Title in that phrase includes at least holding mineral exploration and mining tenements and rights created by the *Mining Act 1904* (WA). MBM's argument overlooks the balance of the sentence in which that phrase appears. The effect of cl 24(iii), as incorporated into the 1970 Agreement, is that the term "*MBM*" includes "*all persons or corporations deriving title through or under* [MBM] *to any areas of land in respect of which an obligation to pay any amount has arisen or may arise pursuant to* [cl 3 of the 1970 Agreement]". That is, the "*title*" (in the sense explained) is to or over areas of land. The parties agreed the royalty was payable in respect of ore won from areas of land. That language is inconsistent with MBM's construction in referring to title to areas of land, not to rights. The language does demonstrate the commercial bargain struck: MBM was to acquire the right to explore the area delineated by the boundaries of the enumerated temporary reserves and, in exchange, MB agreed to pay a royalty on ore won by "*MBM*" from that area.

9. Clause 19 of the 1962 Agreement is also incorporated into the 1970 Agreement: CA[9] is consistent with that proposition, and cl 19 is a "*condition*" in the same sense cl 24(iii) is "*condition*" which is incorporated. Clause 19 is directed to a sale or assignment by MBM on commercial terms. The field of operation of cl 24(iii) is complementary to cl 19, including those changes in title (in the sense identified) to which cl 19 does not apply. The opening words of cl 19 are inconsistent with MBM's construction as the interest to which cl 19 is

[3] Which in point of fact occurred. In making that point HPPL does not seek to rely on post contractual conduct to

directed is MBM's "*title to any area of land in respect of which an obligation to pay any amount has arisen or may arise…*". As in cl 24(iii), the language of cl 19 directs attention to areas of land not to a changing bundle of rights.

10. *Fourth*, MBM contends that "*through or under*" has the same construction as those words have when appearing in legislation relating to real property. MBM's construction requires derivation of title through an unbroken chain of title, which MBM translates to an unbroken chain of rights and rights derived from the original rights. It is only if one makes the counter-factual assumption of continuity of title (or rights) that "*through or under*", as defined by MBM, can apply to the statutory concepts dealt with. If that counter-factual assumption is rejected,
10 because it is wrong or does not identify the universe of potential changes in tenement, there is no support for importing a fiction of a chain of title in the language used or the apparent purpose of cl 24(iii).

11. The outer limits of the phrase "*though or under*" as incorporated into the 1970 Agreement do not need to be explored. Both as a matter of language and as a matter of giving effect to the object of cl 24(iii), to say that HamEx "*deriv[ed] title… through or under*" MBM includes the present connection between MBM and the subsequent tenement holders. MBM caused the rights of occupancy it held over Channar A to be cancelled, and another company in the corporate group, HamEx, later applied for rights of occupancy over those areas. Although not exhaustive of the connections or relationships which meet the phrase "*through or under*",
20 those facts and the status of HamEx (like MBM, a subsidiary of Hamersley Holdings) are sufficient to have the effect that, for the purpose of Channar A, "*MBM*" includes HamEx and, consequently, the later holders of tenements over Channar A.

12. The construction may be tested as follows. Let it be assumed that on the day MBM's rights of occupancy were cancelled (by MBM's action) HamEx applied for and was granted rights of occupancy over Channar A. Objectively the parties did not intend that, by the Hamersley Group's choice of applicant for the subsequent rights of occupancy, Hanwright lost its right to the consideration payable under the 1970 Agreement. It is apt to describe, in the postulated circumstance, HamEx as "*deriving title through or under*" MBM. If assuming continuity of title is neither correct nor relevant, then it matters not in that example whether
30 HamEx made its application the day of, or the day after, or the week after or three years after MBM's rights of occupancy were cancelled.

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construe the contract, but instead to evidence that the event was objectively likely or possible.

13. There are subsidiary points advanced in MBM's submissions. Most have been addressed in HPPL's submissions in this appeal and in MBM's appeal, but there is one new point. MS[9] is to the effect that, if the parties had intended the meaning for which HPPL and WPPL contend, the parties could have used different language. That submission is to identify the object of cl 24(iii) too narrowly by assuming it is directed only to the present circumstance. The parties intended many relationships or connections were sufficient to engage cl 24(iii), as shown by their use of a relational phrase apt to capture many different relationships or connections. They could have used a list, and risked the list being inadequate, but instead adopted a connection described at a higher level of generality. As Mance LJ said[4], in dismissing an argument to the same effect as MBM's submission, in *Dodson v Peter H Dodson Insurance Services* [2001] 1 WLR 1012 at [40] "*it is almost always possible on any point of construction to say after the event that the point could have been put beyond doubt, either way, by express words*". In this case MBM's submission merely points to the choice of one drafting technique, expressing the sufficient connection at a level of generality, instead of another, for example a list.

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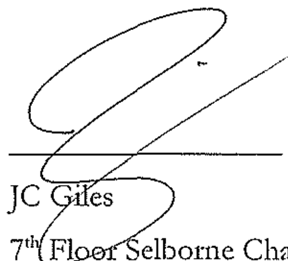

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[4] For the Court, Schiemann and Mance LJJ and Smith J