IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P59 of 2011

BETWEEN

NEWCREST MINING LIMITED

Appellant

and

MICHAEL EMERY THORNTON

Respondent

APPELLANT'S REPLY

PART I: Internet publication

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

PART II: Reply

2 *RS [5]*: The appellant accepts that there is a typographical error in paragraph 6 of its submissions in chief at line 12. The reference to 2004 should be to 2007. The remainder of the appellant's submissions in chief and its chronology proceed on the basis of the correct date. Indeed, one of the central arguments of the appellant is that it had no opportunity to be heard or avoid the result as it was not on notice of the claim, let alone the consent judgment, against Simon Engineering. The agreement to settle, the filing of the writ and the indorsement of claim and the consent judgment all occurred in May 2007, with the terms of the consent judgment arrived at before the writ was even filed.

3 *RS [9(c)], [11(a)]*: The respondent relies on proportionate liability statutes as an analogy, by indicating that the concern of such legislation is for "the proper distribution of tortfeasor accountability". The respondent sets up that legislation as a straw man to assert that the appellant's criticisms can be also made of that legislation, and so the argument goes, since legislatures all over Australia are enacting that legislation, the interpretation given to para 7(1)(b) below must be a good thing. Whether or not that reasoning is sound, on the assumption it is, it is an analogy that plainly supports the appellant. The appellant's primary complaint in this appeal is that there can never be a "proper distribution of tortfeasor accountability" if it is held liable to the respondent, as it will, by operation of para 7(1)(c) of the Act as explained in *James Hardie*, never be able to pursue Simon Engineering for contribution for its just and equitable share. The underlying concern of proportionate liability legislation is expressly frustrated in this context.

Filed on behalf of the appellant
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4 *RS [11(b)]*: As the respondent accepts at [16], and as the appellant has pointed out in chief, that was not the view of the Court below. The assertion made at *RS [11(c)]* is unsupportable. First, there would be no such "compulsion". If a tortfeasor believes it is settling for its just and equitable share of the damage it caused in the context of other strategic concerns and the plaintiff is content with the sum then there will be no necessity for a suit from the plaintiff. Secondly, if the cause of action arises out of the same incident there is no reason for the length of trials or their complexity to be increased, indeed, the current construction could yield more than one suit where the first settles. As to *RS [11(d)] and [11(e)]* it is the drive for multiple litigation to force multiple settlements that the construction below promotes.

5 *RS [13(a)]*: There are a number of responses to this submission. Three presently suffice to demonstrate that it is fallacious. First, there is no relevant injustice because both defendants consented to the situation that occurred in the example and the plaintiff did as well, so that the tortured example is arrived at by the will of all the relevant actors. Secondly, the example wrongly assumes that the consent judgment for dismissal validly operates against the world but the respondent abjures the possibility in the present case of a consent judgment operating in the same fashion. Thirdly, the example is one far removed from the question presently for decision. In the example provided, the plaintiff is irrelevant as its situation in the example would be unchanged by any of the available interpretations as it consented to a dismissal and whatever the magnitude of the first defendant's settlement, it also consented. In the present case, the appellant has been hoisted on someone else's petard – not its own.

6 *RS [13(b)]*: It is no part of the appellant's case that this Court's decision in *James Hardie* be reconsidered. The whole of the appellant's case is premised on seeking a just result in the context of the continued applicability of *James Hardie*. Further, any reversal of *James Hardie* is of no interest to the respondent in that if that case had been decided the other way in respect of para 7(1)(c), and the reasoning below was held to apply to para 7(1)(b), the respondent's position would be unaltered.

RS [13(d)]: It is not clear what "decision of the High Court of Australia" or "equivalent legislative intervention" the respondent is alluding to. If the submission is to be understood as being that the appellant's concerns could be addressed by some other decision of this Court or by legislative change, the obvious answer is that such a concept is not a concern of the Court in determining the present question. Also, the fact that "prudent litigants in the position of the appellant may also interrogate plaintiffs as to the fact and content of previous settlements" is of little use when that litigant cannot sue another tortfeasor for contribution.

7 *RS 15*: Of course in one sense the work done by the different sub-paragraphs is different. They do, however, appear in the one section of the same Act. The appellant is contending for the most harmonious interpretation of their relationship.

8 *RS 19:* The point of the appellant's submission was simply that the previous interpretation of sub-paragraph 7(1)(b) and its analogues must have been seen by the inferior (in its non-pejorative sense) courts and the parties that appeared before them of not working any injustice in the common situation.

9 *RS [3], [20], [21]*: All that the appellant contends (including by Grounds 4 and 5) is that the Court below and the Court in *Nau v Kemp* erred in the construction they gave to para 7(1)(b) and its NSW analogue. It may be an interesting jurisprudential and potentially philosophical question, but presently immaterial, as to whether a Court errs in law when it reaches a wrong decision on a question of statutory construction but has been compelled to do so by a decision of this Court that requires it to follow another intermediate Court unless convinced that such decision is "plainly wrong" and not just "wrong". The answer probably is that it is correct on one question of law and, as in this case, commits an appealable error on another. It is of no moment. The appellant simply raised the fact that the Court below (quite properly) felt compelled by *Farah v Say-Dee* to follow *Nau v Kemp*, so that it therefore did not consider the question entirely as one in which it had a clean slate. No question of the appropriateness in some *stare decisis* sense of that course is presented by this case. The appellant contends that the construction given to the provision by the NSW Court of Appeal in *Nau v Kemp* was wrong, and therefore the construction given to the analogue by the Court below, in following *Nau v Kemp*, is equally wrong. That is the question before this Court for its resolution.

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