IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S102 of 2015

BETWEEN:

WRIGHT PROSPECTING PTY LIMITED
Appellant

and

MOUNT BRUCE MINING PTY LIMITED
First Respondent

HANCOCK PROSPECTING PTY LTD
Second Respondent

APPELLANT'S SUBMISSIONS

Part I

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

Part II

2. Two issues arise on this appeal. First, the proper construction of one clause of a commercial agreement entered into in May 1970 between Wright Prospecting Pty Ltd (**WPPL**) and Hancock Prospecting Pty Ltd (**HPPL**) (together referred to as **Hanwright**) on the one hand, and Mount Bruce Mining Pty Limited (**MBM**) and Hamersley Iron Pty Limited (**Hamersley Iron**) (both of which were at that time, and are, subsidiaries of Hamersley Holdings Pty Ltd (**Hamersley Holdings**) and within the Hamersley group of companies (**Hamersley Group**)) on the other (**1970 Agreement**). The clause goes to the circumstances in which a royalty is payable to Hanwright by MBM in respect of iron ore won from land which was the subject of the 1970 Agreement, and in respect of which, under the 1970 Agreement, Hanwright gave up, and MBM acquired, present and future rights to prospect for and mine iron ore.

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3. The relevant clause, clause 24(iii) (**cl 24(iii)**) of an earlier agreement (entered into in December 1962 between Lang Hancock, Ernest Wright, WPPL, HPPL, Rio Tinto Management Services (Australia) Pty Ltd (**RTMS**), Rio Tinto Southern Pty Ltd (**RTS**) and Hamersley Iron (**the 1962 Agreement**)) is incorporated by reference into the 1970 Agreement, and provides as follows:

> *"The expression 'the Purchaser' shall ... include 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 any amount has arisen or may arise pursuant to Clause 9, 14 or 15 hereof"* (emphasis added)

4. Clause 24(iii), as incorporated, has the effect that a royalty is payable by MBM to Hanwright under the 1970 Agreement where ore is won from the relevant area of land by a person who derived title to the land from which ore is being won through or under MBM. The key issue is the proper construction of the expression "deriving title through or under" in the context of the 1970 Agreement.

5. The Court of Appeal erred in its construction of cl 24(iii), adopting a narrow and technical, and uncommercial, construction derived from case law arising in the vastly different context of the Torrens system of registration of title in New South Wales, rather than having regard to the commercial object and context of the 1970 Agreement. The words "through or under" should be given their ordinary meaning.

6. Second, whether having regard to the resolution of construction issue, a royalty is payable by MBM to Hanwright in respect of ore won from the area in dispute (referred to as **Channar A**). More particularly, whether ore is being won from Channar A by a person who derived title to win ore through or under MBM. WPPL's primary submission is that where, as here, an agreement with the Western Australian Government provided that a necessary condition of obtaining the mining lease, pursuant to which ore is able to be won from Channar A (**ML265SA**), was that MBM surrender sections of a mining lease which it then held, that suffices for the derivation of title to be through or under MBM. Moreover, and in any event, WPPL submits that the circumstances leading to the grant of ML265SA are sufficient for that derivation of title to be through or under MBM within the meaning of that expression in cl 24(iii).

Part III

7. The appellant certifies that it has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act* 1903 (Cth). No notice needs to be given.

Part IV

8. The decisions of the Court of Appeal below are not reported in the authorised reports, but the medium neutral citations are:

   Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2014] NSWCA 323 (**CAJ**)

   Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (No 2) [2014] NSWCA 425

9. The decision of the primary judge is not reported in the authorised reports, but the medium neutral citation is:

   Wright Prospecting Pty Ltd v Hamersley Iron Pty Ltd [2013] NSWSC 536 (**TJ**)

Part V

10. A factual chronology is set out in the agreed statement of facts.

11. Under s 276 of the *Mining Act* 1904 (WA) (***Mining Act***), the Minister for Mines in Western Australia could temporarily reserve Crown land (referred to as a Temporary Reserve) and authorise persons to occupy that land (referred to as a right of occupancy) on terms as set by the Minister. Section 48 of the *Mining Act* permitted the Governor to grant mining leases.

12. Throughout the 1950s and 1960's, Hanwright identified bodies of iron ore in the Pilbara in Western Australia. In 1962 Hanwright was granted rights of occupancy (which included rights to explore) over certain Temporary Reserves (**1962 Hanwright TRs**). The 1962 Hanwright TRs became the subject of the 1962 Agreement, in which Hamersley Iron was the "Purchaser", however, as is clear from the preamble to the 1962 Agreement, there had previously been dealings between Hanwright and RTMS and RTS as regards mining interests in the Pilbara and there had also been dealings as between RTS and RTMS in respect of those interests. Recital G to the 1962 Agreement provided that:

"It is intended that the Vendors shall sell and the Purchaser shall purchase all the right title and interest of the Vendors and each of them 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".

13. The 1962 Agreement provided for a royalty to be payable to Hanwright if ore was won from the area of the 1962 Hanwright TRs or from additional identified areas of land (which included the area which became the Mount Tom Price mine) over which, at that time, Hanwright did not hold any rights of occupancy (cll 9 & 10 and the Third Schedule to the 1962 Agreement). Cl 24(iii) extended the definition of Purchaser for the purpose of areas of land over which a royalty may become payable.

14. In 1963 Hamersley Iron entered into an agreement with the State of Western Australia as regards an area which included what subsequently became the Mount Tom Price mine (**1963 Hamersley State Agreement**). This agreement was approved by the *Iron Ore (Hamersley Range) Agreement Act 1963 (WA)*.

15. Hanwright later obtained rights of occupancy over Temporary Reserves across other areas in the Pilbara. These areas of land became the subject of an agreement between Hanwright and the State of Western Australia in 1967 (**1967 Hanwright State Agreement**). This was approved by the *Iron Ore (Hanwright Agreement Act) 1967 (WA)*. In March 1968, rights of occupancy over new Temporary Reserves covering the same areas of land were granted to Hanwright under the 1967 Hanwright State Agreement (**1968 Hanwright TRs**). On 31 January 1968, Hanwright and Hamersley Iron entered into a written agreement concerning the areas of land covered by the 1968 Hanwright TRs (**1968 Agreement**). The 1968 Agreement provided for the formation of MBM to exploit those areas. Hanwright and Hamersley Iron were, under that agreement, to divide the shareholding in MBM with Hamersley Iron holding 75% and Hanwright holding 25%.

16. The 1967 Hanwright State Agreement was amended in 1968 (**1968 Hanwright State Amendment Agreement**). The 1968 Hanwright TRs were then cancelled and new rights of occupancy were granted to Hanwright over new Temporary Reserves covering similar areas (**MBM TRs**) to the 1968 Hanwright TRs. The areas of land covered by the MBM TRs (**MBM TR Land**) became the subject of the 1970 Agreement, entered into on 5 May 1970.

17. As at May 1970, the parties to the 1970 Agreement were well aware that:

a. MBM was a part of the Hamersley Group, the companies within which there were many common directors across those companies;

b. in the past, entities within the Hamersley Group had assigned interests in potential mining areas as between themselves, as occurred prior to the 1962 Agreement;

c. Hamersley Holdings and Hamersley Iron had been formed in 1962 with a view to Hamersley Iron being the operating company for the Hamersley project;

d. MBM would not be the only member of the Hamersley Group involved in the mining of iron ore in the Pilbara as Hamersley Iron was already mining at the Mount Tom Price mine and had amended its agreement with the WA Government to provide for proposed mining, and a further mining lease, at the Paraburdoo area;

e. corporate vehicles could readily be established within the Hamersley Group for the purpose of undertaking a specific mining project or a specific role within a mining project, including as a joint venture company, as had been intended under to the 1968 Agreement the intent of which was subsequently modified by the time of 1970 Agreement, as MBM was formed not as a 75/25 company but was formed as a wholly owned subsidiary of Hamersley Holdings; and

f. agreements with the State in relation to the exploration for and mining of iron ore in Western Australia were capable of being amended by agreement with the Western Australian Government, as they included variation clauses, including to vary the areas to which the agreement related (as had happened in the 1968 Hanwright State Amendment Agreement) or to provide for the grant of a further mining lease to the mining company (as had happened in the **1968 Hamersley State Amendment Agreement**).

18. The commercial bargain effected in the 1970 Agreement was that:

a. Hanwright agreed to relinquish its rights of occupancy over the MBM TR Land, that it had previously identified as containing iron ore deposits which could potentially be exploited,

b. the Hamersley Group, through MBM, obtained the opportunity to develop that land and to exploit it for iron ore if it so chose, but that

c. if it did so chose, it was to pay a royalty to Hanwright in respect of the resulting ore.

19. Clause 3.1 of the 1970 Agreement provided:

"Ore won by M.B.M from the M.B.M. area will be subject to the payment to Hanwright of a base Royalty of 2 ½% on the same conditions as apply to the existing Agreement between Hanwright and Hamersley Iron [i.e. the 1962 Agreement]..."

20. The royalty was thus payable to Hanwright when two conditions were satisfied:

a. the ore was won from within the MBM area; and

b. the ore was won by MBM or by an entity within the extended definition in cl 24(iii) which includes the successors and assigns of MBM and all persons or corporations deriving entitlement to win ore through or under MBM.

21. The arrangements provided for in the 1970 Agreement required governmental approval and implementation as was expressly recognised in clause 10. There was, however, no certainty as to what if any conditions would be agreed as between MBM and the Western Australian Government when the time came to implement the arrangements provided for in the 1970 Agreement. Moreover, as it was likely that any development of the areas covered by the MBM TRs would take place over many decades, there was no certainty as to how such development would be regulated by the Western Australian Government, nor as to the proportion of that area that would ultimately be permitted to be mined.

22. On 10 March 1972 the Iron Ore (Mount Bruce) Agreement was executed between the State of Western Australia and MBM (**1972 Mount Bruce State Agreement**), the Iron Ore (Wittenoom) Agreement was executed between the State of Western Australia and Hanwright (**1972 Wittenoom State Agreement**) and the Iron Ore (Hamersley Range) Variation Agreement was entered into between the State of Western Australia and Hamersley Iron. All three agreements were approved by Acts of the Western Australian Parliament on 16 June 1972. Under the 1972 Mount Bruce State Agreement MBM was entitled to apply for a mining lease over the MBM TRs to a maximum area of 300 square miles, and under the 1972 Wittenoom State Agreement Hanwright were entitled to apply for a mining lease over areas which were allocated to Hanwright under the 1970 Agreement to a maximum area of 100 square miles. The Iron Ore Hamersley Range variation agreement made consequential amendments to

the 1963 Hamersley State Agreement including to vary the infrastructure obligations to be undertaken by Hamersley Iron under that agreement having regard to the role of MBM under the 1972 Mount Bruce State Agreement.

23. On 30 August 1972, pursuant to the 1970 Agreement, Hanwright surrendered its rights of occupancy over the MBM TRs and MBM was granted rights of occupancy over the land covered by MBM TRs, which included Channar A.

24. On 17 October 1974, a mining lease, ML252SA, was granted by the Western Australian Government to MBM. This was for an area of 210.91 square miles which was less than the 300 square mile maximum area for the first mineral lease to be granted over that area that had been agreed between MBM and the Western Australian Government in the 1972 Mount Bruce State Agreement. As had also been agreed in the 1972 Mount Bruce State Agreement, upon the grant of ML252SA the rights of occupancy held by MBM over the MBM TRs expired. Sections 18 and 19 of ML252SA were the areas that comprise what is referred to in this case as Channar B, which is the area within the Channar mining area over which Hamersley Iron pays royalties to Hanwright (and there is no dispute as to Hanwright's entitlement to royalties over Channar B).

25. Channar A was not covered by any sections of ML252SA.

26. On 21 April 1978, Hamersley Exploration Pty Ltd (**Hamex**), also a subsidiary of Hamersley Holdings and part of the Hamersley group, was granted rights of occupancy over TR 6663H which covered part of Channar A and was within the MBM TR Land. The application by Hamex for TR 6663H identified that the area was on the boundary of ML252SA, that the proposed work was to *continue* structural and stratigraphic studies on existing data, and that the applicant was a wholly owned subsidiary of Hamersley Holdings and adequate funds were available for the program.

27. On 2 May 1979, Hamex was granted rights of occupancy over TRs 6982H and 6983H which also covered part of Channar A. Together, TRs 6663H, 6982H and 6983H covered the entirety of Channar A. The applications for each of TRs 6982H and 6983H identified that the area was on the boundary of ML252SA, that the proposed work was to *continue* structural and stratigraphic studies on existing data, and that the applicant was a wholly owned subsidiary of Hamersley Holdings and adequate funds were available for the program.

28. In effect, through the applications for, and granting of, ML252SA, and TRs 6663H, 6982H and 6983H (and TR6603H which covered the Eastern Range area and was acquired for the Hamersley Group by MBM), the Hamersley Group held (whether through a mineral lease or a right of occupancy over a TR) the entirety of the Eastern Range area and the Channar area (which included Channar A and Channar B) albeit that this was done through two companies within the Hamersley Group, namely MBM and Hamersley Iron, and it was effected through stages enabling staged exploration, from 1974 through to May 1979.

29. In 1982, the 1963 Hamersley State Agreement was further varied, to provide that Hamersley Iron could vary its existing mining lease ML4SA (which covered the Mt Tom Price area and other areas and had been granted pursuant to the 1963 Hamersley State Agreement) to cover a number of new areas including Channar A, subject to Hamex surrendering its rights of occupancy over TRs 6663H, 6982H and 6983H (**1982 Hamersley State Amendment Agreement**). This was approved by the *Iron Ore (Hamersley Range) Agreement 1982 (WA)*. On 19 April 1982, Hamex surrendered its rights of occupancy over those TRs and Hamersley Iron was granted new sections, including section 238 of ML4SA.

30. The internal Hamersley Group memorandum dated 31 August 1981 considered the approach to mine additional areas and recommended that additional mineral leases be obtained and:

a. identified that the areas be taken up as "*additional mineral leases to our main ore bodies*";

b. stated that it was important to stress that the new areas were "*really areas flanking our main ore bodies and have come to light by our continuing investigation of the mineralisation in the area and therefore should come within our present State Agreements*";

c. stated that the new areas would not support a venture in their own right and would be left unmined, and that the only way to mine these areas would be in conjunction with current operations; and

d. proposed that the areas in the vicinity of ML252SA be included under the 1972 Mount Bruce State Agreement between MBM and the State of Western

Australia as new areas within ML252SA, and discussed the merits of MBM being selected as the vehicle for the development.

31. Whilst Hamersley Iron and not MBM was ultimately selected by the Hamersley Group as "*the vehicle for the development*" and the area of Channar A was ultimately added as a new section into Hamersley Iron's lease, ML4SA, this memorandum illustrates what would have been known to commercial parties entering into the 1970 Agreement, namely that the manner of development of the MBM TR Land by the Hamersley Group would be a matter within the control of the Hamersley Group (subject to negotiation and agreement with the Western Australian Government) both as to the timing of the development, whether it was staged or continuous, whether for some periods some areas were left without any extant mining interest, and as to the corporate vehicle selected to undertake the development. Hanwright would have no control over this after the 1970 Agreement was entered into.

32. On 16 November 1987, CMIEC (Channar) Pty Ltd and Channar Mining Pty Ltd (**Channar Joint Venturers**) entered into a joint venture agreement (**Channar Joint Venture Agreement**). Channar Mining is a wholly owned subsidiary of Hamersley Holdings and part of the Hamersley Group. As at 1987, there were also a number of common directors between MBM, Hamersley Iron, Hamersley Holdings and Channar Mining.

33. Relevantly, Preamble E of the Channar Joint Venture Agreement records that Hamersley Iron represented and warranted in that agreement that the areas proposed to be mined (comprising Channar A and Channar B) contained *"reserves of 200 million tonnes of mineable/recoverable iron ore"*.[1] Further, the majority of the iron ore for the Channar Joint Venture occurred within ss 18 and 19 ML252SA (being Channar B) and only approximately 10% occurred within Channar A.[2] That is, the majority of the iron ore for the proposed area to be mined by the Channar Joint Venturers fell within the areas covered by the sections of ML252SA held by MBM, which had to be surrendered by MBM to enable a new mining lease to be granted to the Channar Joint Venturers over that area.

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[1] Channar Mining Joint Venture Agreement, Preamble E.

[2] See letter from HI to Minister for Minerals and Energy dated 5 October 1984.

34. In 1987, the Channar Joint Venturers entered into a state agreement with the State of Western Australia (**1987 Channar State Agreement**), which was subsequently approved by the *Iron Ore (Channar Joint Venture) State Agreement 1987 (WA)*. Clause 15(1) of the 1987 Channar State Agreement provided that the State would grant the Channar Joint Venturers a mining lease over both Channar A and Channar B on the condition that MBM surrender ss 18 and 19 of ML252SA (covering the Channar B area) and HI surrender s 238 of ML4A (covering the Channar A area). That is, MBM was required to surrender its mining title over Channar B for the Channar Joint Venturers to obtain title to the whole of the Channar area. On 22 March 1988, HI surrendered s 238 of ML4SA and MBM surrendered ss 18 and 19 of ML252SA.

35. There are two important findings of fact made by the Trial Judge, and not challenged on appeal, about these events. First that *"it may be safely inferred that MBM's surrender of secs 18 and 19 of ML 252SA and Hamersley Iron's surrender of sec 238 of ML 4SA were by arrangement between themselves and the Channar Joint Venturers"*: TJ [128]. Second that the surrenders by MBM and HI were both necessary for the grant of ML265SA: TJ [128]. This finding is indisputably correct because of the terms of clause 15(1) of the 1987 Channar State Agreement.

36. Finally, on 8 May 1988, the Channar Joint Venturers were granted ML265SA for a term of 30 years as a mining lease over the combined areas of Channar A and Channar B. Ore is being won from the Channar Area, comprising both Channar A and Channar B, by the Channar Joint Venturers, but a royalty is paid (by Hamersley Iron to Hanwright) only in respect of the Channar B area.

37. As to this, the entitlement which the Channar Joint Venturers have to mine the Channar Area as a whole:

    a. comes from one undivided mineral lease, ML265SA, the grant of which was conditional upon MBM surrendering ss 18 and 19 of ML252SA and was thus clearly derived through or under MBM;

    b. derived through or under MBM because the lion's share of the 200 Mt of iron ore upon which the Channar Joint Venture Agreement upon which the 1987 Channar State Agreement is in turn based, comes from ML252SA held and surrendered by MBM; and

c. was in any event obtained by exploitation of the commercial opportunity which the Hamersley Group derived though MBM by the 1970 Agreement and the commercial bargain struck thereby.

Part VI

Issue 1 – the construction question

38. The issue of contractual construction is as to the meaning of cl 24(iii) to the extent that it expands the definition of MBM to include a corporation or person who derived title through or under MBM to win iron ore from land over which a royalty obligation potentially arose under the 1970 Agreement (i.e. to land within the MBM Area). Given that cl 24(iii) provides for a number of potential means of expanding the definition of MBM, including also assignment and succession, derivation of title "through or under" must mean something broader than, or different from, succession or assignment.

39. The words "through or under" in the context in which they are used bear the ordinary meaning of those words. They have the sense of "by means of" or "by reason of".

40. In ascertaining what the parties are taken to have intended by the phrase *"through or under"* it is necessary to have "*an appreciation of the commercial purpose or objects ... facilitated by an understanding of the genesis of the transaction, the background, the context and the market in which the parties are operating*": *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]. Further, a commercial contract should be construed to avoid it making commercial nonsense or producing commercial inconvenience: *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 559 [82] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ).

41. As would have been readily appreciated by a person in the position of the parties to the 1970 Agreement as at May 1970:

a. through the 1970 Agreement, it was intended that the opportunity to develop that land was transferred from Hanwright to the Hamersley Group, through MBM;

b. as had by then become apparent through the development of the Mount Tom Price mine, the potential commercial benefit to the Hamersley Group of developing an iron ore mine over such an area was enormous, and the royalty entitlement to

Hanwright similarly was potentially highly valuable, with such value being realised over many decades;

c. the 1970 Agreement was likely to govern the obligation (if any) of MBM to pay a royalty to Hanwright over many decades covering many changes of Government, and a variety of different circumstances including changes affecting the economics of mining for iron ore on the land to which it related;

d. once entered into, control over when, how and through what stages the Hamersley Group chose to develop and exploit that land rested entirely with the Hamersley Group of which MBM was a wholly owned subsidiary, subject only to agreement with the Western Australian Government;

e. which corporate vehicle within the Hamersley Group was chosen to explore, develop or exploit that land was a matter entirely for the Hamersley Group, subject only to agreement with the Western Australian Government; and

f. it was possible that there may be periods of time during which the Hamersley Group may not have been able to hold an exploration or mining interest over some of the land, for example if, as in fact happened, there were administrative or other delays in the grant of such interests or the Western Australian Government determined that the grant should not be permitted at that particular time for reasons of expedience, policy, or to strengthen its commercial negotiating position.

42. Given these factors, a commercial person in the position of the parties would not have intended MBM to be able, through such vagaries as the timing of taking up interests or the identity of the entity within the Hamersley Group that went on to win ore, all matters within the Hamersley Group's control and over which Hanwright had no control, to defeat Hanwright's entitlement to a royalty.

43. Further, one purpose or object of the 1970 Agreement, discerned from the text (in particular the inclusion of the extended definition of MBM in cl 24(iii)) and context, including the matters set out above, was to oblige MBM to pay Hanwright a royalty if the Hamersley Group mined the areas of land that Hanwright had given up, and MBM had acquired, in the 1970 Agreement. That is so even if, as turned out to be the case, the Hamersley Group chose for its own reasons not to seek to hold mining or exploration rights (which of course themselves required payment of money to the

Western Australian Government and the undertaking of continuous obligations) over the whole of the land at all times. A construction of the 1970 Agreement which predicates Hanwright's entitlement to a royalty upon the Hamersley Group holding title continuously to the whole of the area that it ultimately mines would readily defeat this object and purpose of the 1970 agreement.

44. Further, the language chosen by the parties in cl 24(iii) accommodates a degree of flexibility and practicality in determining whether ore has or has not been won by a person in the position of the Purchaser. In *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* [2014] VSCA 166, the Victorian Court of Appeal examined the expression "*through or under*" and Nettle JA (as his Honour then was) noted that *"claiming through or under a party"* is a *"relatively flexible concept"* and that the meaning of the phrase is to be determined by reference to text and context rather than authority: at [57] and [63]. Later at [64] and [72], Nettle JA endorsed and applied the earlier observation of Brennan and Dawson JJ in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 (***Tanning***) at 341-2 that: *"[t]he meaning of the phrase 'through or under a party' must be ascertained not by reference to authority but by reference to the text and context"*. This approach, albeit in the context of legislation governing commercial arbitration, is consistent with the principles of contractual construction developed in this Court, which emphasise that the meaning of the contract should be discerned having regard to the contract as a whole[3] and having regard to the commercial context.

45. Further support for the flexibility inherent in the language of "*through or under*" comes from the decision of Graham J in *Roussel-Uclaf v Searle* [1978] 1 Lloyd's Rep 225 at 231 in which his Honour held that "*The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is claiming "through or under" the parent to do what it is in fact doing*".

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[3] See: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 (Gibbs J); *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [16] (Gleeson CJ, McHugh, Gummow and Kirby JJ).

46. The Trial Judge in this case (correctly) adopted a commercial and practical approach to the meaning of "*through or under*" in cl 24(iii) consistent with the textual and contextual approach set out above (see *Tanning* at 342).

47. The Court of Appeal,[4] however, adopted a narrow and rigid construction of the words *"through or under"*, and contrary to the guidance in *Tanning*, discerned the meaning of that expression by reference to authority rather than text and context. In particular, the Court of Appeal construed that expression as invoking continuity of a chain of title (CAJ [56]), reasoning in this regard by analogy with the judgment of the NSW Court of Appeal in *Sahab Holdings Pty Ltd v Registrar-General (No 2)* [2012] NSWCA 42[5] (***Sahab***), a case arising in the context of the legislation governing registration of Torrens title in New South Wales (s 12A(3) of the *Real Property Act 1900 (NSW)*. The legislative expression "*through or under*" was considered in *Sahab* in the context of a submission before the Court that title under the Torrens system of land registration was not derived through or under the previous title holder, as such title was derived instead by the act of registration itself (at [25]-[26]). It is in that context that the Court of Appeal in *Sahab* held that the expression "*through or under*" in s 12A(3) of the *Real Property Act 1900 (NSW)* required a focus upon the history through which rights have been acquired (Campbell and Tobias AJA (McColl JA agreeing at [1]) at [28]). So understood, *Sahab* says nothing as to the proper construction of cl 24(iii) in the present case.

48. The centrality of *Sahab* in the reasoning of Macfarlan JA is clear as his Honour observed (by reference to *Sahab*) that *"[t]he approach emphasises the continuity of a chain of title that a reference to a derivation of title 'through or under' in my view invokes"*. Macfarlan JA did not seek to support his construction of "*through or under*" in cl 24(iii) as requiring a continuous chain of title by anything beyond *Sahab*, and the analysis is stark in its absence of reference to text (beyond the words through or under), context or the commerciality of the construction adopted. In so reasoning, the Court of Appeal erred.

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[4] Macfarlan JA delivered the reasons of the Court of Appeal allowing the appeal on this issue, with Meagher JA (at CAJ[87]) and Barrett JA (at CAJ[104]) agreeing.

[5] On appeal, in *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* (2013) 247 CLR 149, Gageler J noted at [51] that his Honour agreed with the Court of Appeal on the issue of construction and that a successor in title to a person given notice in accordance with s 12A(1) is a person claiming "*through*" that person. Justice Gageler took

49. Macfarlan JA elaborated upon the elements required for there to be a continuous chain of title (itself derived from *Sahab*), imposing in effect a series of prerequisites for derivation of title within the meaning of clause 24(iii), none of which find any support in the text, context, or commerciality of the 1970 Agreement. First, Macfarlan JA identified (CAJ [58]) that, under the *Mining Act*, one precondition for the grant of a mining interest may be the surrender of title by a previous holder of an interest over that land. His Honour then held that that constituted the means by which title was derived for the purposes of the 1970 Agreement. Whilst it may well be that that is one means by which one person's title can be derived through or under that of another (as in fact happened in this case in the 1987 Channar State Agreement), there is no basis for excluding other means of derivation of title from the ambit of cl 24(iii).

50. Second, and reflecting the rigidity inherent in Macfarlan JA's approach, at CAJ [60] his Honour rejected WPPL's claim as regards Channar A on the basis that no "*unbroken chain of 'title' exists*" in respect of Channar A. There is, however, nothing in the text or context of the 1970 Agreement to support such a narrow reading of this clause. Nor did Macfarlan JA seek to support his reasoning by reference to any such considerations.

51. Third, Macfarlan JA at CAJ [63] imposed an additional prerequisite for derivation of title to mine "through or under" within the meaning in cl 24(iii), namely that there must be some "*transaction*" between two persons which leads to one acquiring the rights of the other. Again, there is nothing in the text or context of the 1970 Agreement to support the imposition of such a requirement for there to be derivation of title through or under for the purposes of cl 24(iii). Further, the requirement of a transaction creates the opportunity to avoid a royalty obligation by a non-contemporaneous surrender by one member of the Hamersley Group and later acquisition by another. The parties should not be taken to have intended such a result.

52. Finally, at CAJ [67] & [69] Macfarlan JA, imposed a yet further requirement for derivation of title "*through or under*" within the meaning of cl 24(iii) in holding that the Channar Joint Venturers did not derive title to Channar A "*through or under*" MBM because MBM did not have any rights over Channar A "*to pass on to the Joint Venturers*" at the time that ML265SA was granted by the Western Australian

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the analysis of the Court of Appeal no further.

Government to the Channar Joint Venturers, and the Channar Joint Venturers did not, therefore, "*acquire*" Channar A from MBM. Thus, according to Macfarlan JA, derivation of title "*through or under*" required not merely a continuous chain of title between MBM and the Channar Joint Venturers, but also that continuous chain of title must involve MBM holding rights to the whole of the area of what became ML265SA such that it could be said that the rights to the whole were "acquired" from MBM.

53. The requirement imposed by Macfarlan JA that the Channar Joint Venturers' title be derived from the "rights" of MBM is, however, contrary to the language of cl 24(iii) which uses the language of derivation of title "*through or under [MBM]*". Clause 24(iii) does not speak of derivation of title "from" one person to the other. Moreover, cl 24(iii) speaks of deriving title through or under an entity, and not of derivation of title through or under rights held by an entity. Such distinction, that is between derivation of title through or under a person, and derivation of title from a person's rights, reflects the practical arrangements effected by the 1962 Agreement which provided, for example, for a royalty to be payable by Hamersley Iron to Hanwright in respect of the area covering the Mt Tom Price mine notwithstanding that Hanwright did not have any rights over that land at the time of the 1962 Agreement.

54. Further, Macfarlan JA did not examine whether such an acquisition or "*transaction*" through a continuous chain of title, as he held was required for derivation of title through or under in cl 24(iii), fell within the expression *"successor or assigns"* such as to leave the words "*and all persons or corporations deriving title through or under the Purchaser*" with no work to do in cl 24(iii). That is a further, textual, basis to reject the Court of Appeal's construction of cl 24(iii) and to find that the parties must have intended cl 24(iii) to enable a broader range of potential circumstances to fall within its ambit.

55. The construction adopted by Macfarlan JA provides the opportunity for MBM to avoid paying a royalty to Hanwright by leaving a gap in title, by taking up titles by a different commercial entity (as happened here in Channar B as opposed to Channar A and Eastern Range) or by avoiding a transaction as such. There is no commercial reason for the parties to have intended that such devices be available as a means of defeating Hanwright's royalty entitlement. Indeed, given that the future development of the area lay entirely in the control of the Hamersley Group and the Western

Australian Government, it is highly unlikely that commercial parties would have intended cl 24(iii) to have the meaning as held by the Court of Appeal.

56. The narrow construction adopted by Macfarlan JA also leads to an uncommercial result in this case that was unlikely to have been intended. The Court of Appeal's conclusion that such facts could not satisfy the requirements of cl 24(iii) clearly demonstrates the uncommerciality of the Court of Appeal's construction, and the Court of Appeal's failure to give due regard to text and context. WPPL submits that the parties must have intended that the phrase "*through or under*" included an arrangement whereby MBM surrendered ss 18 and 19 of ML252SA so that the grant of ML265SA could be made to the Channar Joint Venturers.

Issue 2 – the factual question

57. Under the 1987 Channar State Agreement the surrender by MBM was a necessary condition of the grant of a single mining lease (ML265SA) to the Channar Joint Venturers. ML265SA was the Channar Joint Venturers' title to mine that area. That title was derived "*through*" and "*under*" the surrender by MBM of ss 18 and 19 of ML252SA. Moreover, as set out above:

    a. the Channar Joint Venture Agreement required the availability of 200 Mt of iron ore, and that in turn required that the areas previously held by MBM, i.e. ss 18 and 19 of ML252SA, be included within the mining area of ML265SA and thus required surrender of those interests by MBM; and

    b. MBM's surrender of ss 18 and 19 of ML252SA were by arrangement between themselves and the Channar Joint Venturers.

58. It is difficult to image a clearer example of a derivation of title through or under another entity, once it is appreciated, as it must be, that derivation of title through or under must encompass something beyond succession and assignment. WPPL says (as it did at the trial and on appeal) that the Channar Joint Venturers derived their title to Channar A "*through or under*" MBM upon this basis. The Court of Appeal erred in not so finding.

59. The Trial Judge also found that there was historical continuity between the exploration of the Channar area done by MBM and the opportunities which that exploration created for later applications by Hamex and HI and the ultimate surrenders and application that led to the grant of ML265SA (TJ [68] for WPPL's submission as to

this and [129] for the Trial Judge's finding). Such historical continuity is clearly established by the factual history leading to the grant of ML265SA, as set out above. Whilst WPPL's primary submission is that the terms of the 1987 Channar State Agreement clearly suffice for derivation of ML265SA to be through or under MBM, the derivation of title is also through or under MBM in that the exploitation by the Hamersley Group of the area of land which was the subject of the 1970 Agreement was derived from the surrender of rights by Hanwright and the acquisition of rights by MBM as effected by the 1970 Agreement. That is a further basis upon which the Trial Judge correctly found that the Channar Joint Venturers had derived title to mine through or under MBM within the meaning of cl 24(iii).

60. The Court of Appeal erred in three further respects in its analysis of the factual issues. First, at CAJ [67] Macfarlan JA said that Hanwright had not referred to any evidence that established the assumption underlying the proposition that the Channar Joint Venturers would not have been able to obtain ML265SA if MBM had not surrendered ss 18 and 19 of ML252SA. But, of course, the only evidence required as to this was the Channar State Agreement, which in its terms provided precisely that.

61. Second, the Court of Appeal erred at CAJ [68] – [69] in finding that an arrangement between MBM and the Channar Joint Venturers, such that MBM should surrender ss 18 and 19 of ML252SA in order that the Channar Joint Venturers could be granted ML265SA, did not support the Trial Judge's conclusion that derivation of title to mine Channar A was through or under MBM. Macfarlan JA's criticism of the Trial Judge's conclusions (but not his factual finding as to the arrangement) is tainted by his Honour's unduly narrow construction of cl 24(iii) and his failure to have regard to text and context.

62. Third, the Court of Appeal found at CAJ [70] that even if historical continuity existed as found by the Trial Judge (and the Court of Appeal did not overturn the Trial Judge's finding as to this, albeit that Macfarlan JA said that it was "by no means clear") that did not amount to derivation of title from MBM. Macfarlan JA here mis-states the terms of cl 24(iii), which require derivation of title "through or under" but not "from" MBM. Moreover, as set out above, Macfarlan JA errs in finding that derivation of title for the purpose of cl 24(iii) requires that there be an acquisition of rights by the Channar Joint Venturers of rights then held by MBM. The summary rejection by Macfarlan JA of the prospect that the facts as found by the Trial Judge

could amount to derivation of title through or under MBM again reflects the inappropriately narrow and rigid approach to construction adopted by the Court of Appeal, without reference to the text and context of the 1970 Agreement.

Part VII

63. *Mining Act* 1904 (WA), ss 3 (in part), 48, 276 and 277 (see annexure).

Part VIII

64. Appeal allowed with costs.

65. Set aside orders made by the Court of Appeal in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (No 2)* [2014] NSWCA 425 and in lieu thereof order appeal dismissed with costs.

66. Judgment for each of the appellant and second respondent against the first respondent in the sum of $41,419,165 plus interest (at the cash rate published by the Reserve Bank of Australia plus 4%) from 19 September 2014.

67. Judgment for each of the appellant and second respondent against the first respondent in the sum of $3,365,732 plus interest (at the cash rate published by the Reserve Bank of Australia plus 4%) from 17 December 2014.

Part IX

68. The appellant estimates it will need 2 hours to present its oral argument.

Dated: 19 June 2015

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ANNEXURE TO APPELLANT'S SUBMISSIONS

Part VII: Statutory Provisions

1. Extracts of *Mining Act 1904* (WA), ss 3 (in part), 48, 276 and 277 (reprint authorised on 20 January 1969).

3. In this Act, unless the context otherwise indicates, the following terms have the meanings set against the same respectively, that is to say:-

...

"Crown land" - All land of the Crown which has not been dedicated to any public purpose, or reserved, or which has not been granted in fee or lawfully contracted to be so granted, or which is not held under lease for any purpose except pastoral and timber purposes. The term includes commons, State forests, reserves for public utility, timber reserves, and any reserve declared by the Governor to be subject to mining, and all land between high and low-water mark on the seashore and on the margin of tidal rivers, and below low-water mark.

...

"Lease" - Any lease granted or approved under the provisions of this Act or of any repealed Act.

...

"Minerals" - All minerals other than gold, and all precious stones.
"Mining" or "to mine" - All modes of prospecting and mining for and obtaining gold or minerals.

...

"Minister" - The responsible Minister of the Crown for the time being charged with the administration of this Act.

...

"Reserve" - Any street or road or any land which for the time being is set apart for any public purposes or which is a reserve within the meaning of any Act relating to Crown lands and in force for the time being, and not 10 being Crown land within the meaning of this Act, and any land which for the time being is excepted from occupation for mining purposes under the provisions of this Act or otherwise.

...

"Warden" - A warden appointed or deemed to have been appointed under the provisions of this Act, and in the case of private land outside a proclaimed goldfield or mineral field , includes the resident magistrate of the magisterial district within which such private land is situated.

48. The Governor may, subject to this Act and the regulations, grant to any person, not being an Asiatic or African alien, a lease of any Crown land, not exempted by the next following section, for any or all of the undermentioned purposes, that is to say –

(1) for mining, and for all purposes necessary to effectually carry on mining operations therein or thereon for any mineral other than gold;

(2) for cutting and constructing thereon water races, drains, dams, reservoirs, tramways and roads to be used in connection with such mining;

(3) for erecting thereon any buildings and machinery to be used in connection with such mining;

(4) for boring or sinking for, pumping, or raising water;

(5) for residence thereon in connection with any or all such purposes.

276. The Minister and, pending a recommendation to the Minister, a warden, may temporarily reserve any Crown land from occupation, and the Minister may at any time cancel such reservation: Provided that if such reservation is not confirmed by the Governor within twelve months, the land shall cease to be reserved.

The Minister may, with the approval of the Governor, authorise any person to temporarily occupy any such reserve on such terms as he may think fit, but subject to the provisions of section two hundred and seventy-seven.

277. (1) In this section –

"deep alluvial gold" means alluvial gold below a depth of thirty feet from the natural surface of the ground.

(2) A right of occupancy granted under the preceding section for the purpose of prospecting for gold, other than for deep alluvial gold, shall not exceed three hundred acres in area.

(3) A right of occupancy may be granted for a fixed period in excess of one year, but in that event the Minister shall cause the terms and conditions relating thereto to be laid on the Table of each House of Parliament within fourteen days of the granting.

(4) A right of occupancy granted for any fixed period may be renewed from time to time for any term not exceeding twelve months on each occasion of renewal, but if any such renewal is granted then the provisions of subsection (3) of this section shall apply, and the terms and conditions of such renewal shall be tabled in each House of Parliament accordingly.

(5) The provisions of section thirty-six of the Interpretation Act, 1918, relating to the disallowance of regulations by either House shall apply to all intents and purposes as if the terms and conditions of the right of occupancy as tabled under this section were regulations tabled under that section.