39/85

IN THE PRIVY COUNCIL

No. 28 of 1985

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N :

HAMERSLEY IRON PTY. LIMITED

Appellant
(Respondent)
(Plaintiff)

- and -

LANGLEY GEORGE HANCOCK, ERNEST ARCHIBALD MAYNARD WRIGHT, HANCOCK PROSPECTING PTY. LTD., WRIGHT PROSPECTING PTY. LTD., L.S.P. PTY. LTD., AND THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED

Respondents
(Appellants)
(Defendants)

CASE FOR THE RESPONDENTS

WALTONS & MORSE
PLANTATION HOUSE
31-35 FENCHURCH STREET
LONDON, EC3M 3NN

SOLICITORS FOR THE RESPONDENTS
(APPELLANTS) (DEFENDANTS)

CASE FOR THE RESPONDENTS

Record (page and line)

The Agreement

1. By an Agreement dated 12th December 1962 ("the Agreement") the first four Respondents sold to the Appellant rights held by them to mine ore from large areas of land in the Pilbara, a region in the north-west of Western Australia. In consideration of the sale the Appellant promised to pay certain royalties on iron ore produced by the Appellant from the land. Subsequently some of the rights to receive royalties under the Agreement were assigned to the fifth and sixth Respondents. For present purposes only the provisions of the original Agreement need to be considered. 1020 - 42; 1021.12, 1039.8, 1221

Development of the Mine

2. In 1966 at Mount Tom Price the Appellant commenced to work deposits the subject of the Agreement. Ore was won by open cut mining, and after crushing and screening was carried 180 miles along the Appellant's railway to the coast at Dampier for shipment overseas. In terms of output the mine at Mount Tom Price soon became one of the largest ore mines in the world. 1153.15

Construction and operation of the Concentrator Plant

3. In the mid 1970s the Appellant commenced the design and construction of a concentrator plant at Mount Tom Price to improve the iron content of lower grade ore produced from the mine. The plant commenced operation in April 1979. The Appellant continued to produce and ship high grade ore 1158.22

(sometimes called direct shipping ore) which did not receive any treatment other than crushing and screening. However lower grade ore, including ore which had been stockpiled previously, was passed through the concentrator plant and blended with high grade ore from Mount Tom Price and another mine of the Appellant (at Paraburdoo) before shipment. 1158.27 1159.4

4. The concentrator plant increases the iron content of the ore by separating and removing impurities, and in particular clayey shales, from the haemetite which is the iron bearing mineral. The methods adopted are known as the heavy media separation process and the wet high intensity magnetic separation ("WHIMS") process. In the heavy media separation process the ore is fed into the media, a suspension of ferrosilicon and water. The media has a specific gravity which permits the higher density and therefore iron bearing material ("concentrate") to sink and the lighter, shaley material ("tailings") to float. The former is then separated out as a higher grade product and the latter discarded. In the WHIMS process the WHIMS machines extract the iron ore concentrate by working on its magnetic properties and getting rid of the non-ferrous tailings. 1155.13 1156.3

5. The Respondents respectfully adopt the summary of the evidence as to the operation of the concentrator plant at Mount Tom Price set out in the judgment of Kennedy J. in the Full Court. 1080.19 - 1086.13

The Royalty Clause

6. Clause 9 of the Agreement provides as follows:- 1025.15 - 1027.23

"9. As further consideration for the foregoing the Purchaser shall pay to the Vendors 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 sold or otherwise disposed of by the Purchaser or by the Purchaser and such associate or by such licensee an amount equivalent to 2 1/2% of the amount received on sale or other disposal of that iron ore in unrefined and unmanufactured form f.o.b. the first port of shipment thereof PROVIDED ALWAYS THAT:

(a) If iron ore is upgraded before shipment by crushing and/or screening then the Vendors shall receive an amount equivalent to 2 1/2% of the amount received on sale or other disposal of the iron ore so upgraded f.o.b. the first port of shipment thereof.

(b) If iron ore is beneficiated or otherwise treated by the Purchaser it shall be deemed to have been disposed of at the time beneficiation or other treatment begins but crushing or screening shall not be deemed to be beneficiation or any part thereof.

(c) Iron ore deemed to be disposed of as provided in paragraph (b) hereof shall be deemed to be disposed of at the assumed f.o.b. price and that price shall be deemed to have been received by the Purchaser.

(d) Iron ore sold or otherwise disposed of to a company which is a subsidiary of the

Purchaser (within the meaning of that term in the Companies Act 1961 of the State of Victoria) or iron ore sold or otherwise disposed of in any way that does not amount to a bona fide sale shall be deemed to be sold or disposed of and payment therefor shall be deemed to be received at the assumed f.o.b. price.

(e) "The assumed f.o.b. price" shall for the purposes of this clause be:-

(i) the average of the f.o.b. price at which the Purchaser whether operating alone or in association with or by licence to others has during the period of six months immediately preceding the date of sale or other disposal sold iron ore of the same grade quality and physical condition for shipment from the State of Western Australia.

(ii) If the Purchaser alone or in association or by licence as aforesaid has not during that period sold iron ore as aforesaid such price as the parties agree or failing agreement

as is determined by arbitration in accordance with the Arbitration Act 1895 of Western Australia as representing the then price f.o.b. from such port as that from which the Purchaser alone or in association or by licence as aforesaid has usually shipped or proposes to ship iron ore won from the Temporary Reserve land.

(f) For the purposes of this clause a sale of iron ore C.I.F. shall be deemed to be a sale F.O.B. at a price equal to the difference between the C.I.F. price and the sum of insurance freight and other charges taken into account in determining such C.I.F. price."

The Issues

7. It is common ground that ore which passes through the concentrator plant without diversion at some intermediate point is "beneficiated" within the meaning of clause 9(b) of the Agreement. In the circumstances, no question of "other treatment" arose for consideration in these proceedings. The Respondents' rights to royalty on such ore are based on a deemed disposal of the ore "at the time beneficiation begins" (clause 9(b)), at the "assumed f.o.b. price" (clause 9(c)) as determined pursuant to clause 9(e).

8. The Originating Summons referred to the Agreement and to the description of the concentrator plant in the affidavit of Colin Roy Langridge, and posed the following question: 1 - 2 1150

"At what time does beneficiation or other treatment of the Low Grade Ore referred to in the Affidavit begin within the meaning of Clause 9(b) of the Agreement?" 2

9. The question raised two substantial issues:

(a) the true construction of clause 9(b) with respect to the expressions "beneficiation" and "screening" and the operation of the provisions excluding crushing and screening from beneficiation;

(b) the determination of the point of deemed disposal for iron ore beneficiated at the concentrator plant.

The Contentions of the Parties

10. The Appellant's original contention, formally stated in a letter dated 11th September 1981 to the Respondents'solicitors, was that beneficiation within the meaning of clause 9(b) begins at "the wetting stage in the wetting and screening house", i.e. where the ore is first wetted in the feed chute for the wet screens. At this point the ore is in one stream of -80mm. The Appellant further contended that, since there was allegedly then no available market for ore in that condition, the assumed f.o.b. price was nil with the consequence that no royalty was payable. In fact the Appellant has paid no royalty to the Respondents on ore beneficiated in the concentrator plant since it commenced operation in 1979. 1174 49.12 - 25 48.27

11. On 2nd September 1982 the Appellant commenced these proceedings by issuing the Originating Summons referred to in paragraph 8 above pursuant to 0.58 r.10 of the Rules of the Supreme Court of Western Australia. 1 - 2

12. Shortly before the trial in November 1983 the Appellant by letter dated 30th August 1983 to the Respondents' solicitors raised for the first time the possibility of an alternative contention. The Respondents' solicitors by letter dated 16th September 1983 sought clarification. By letter dated 23rd September 1983 the Appellant stated that "it may well be" that the relevant point was where the ore is sized by the grizzley. The grizzley is a screen at the No. 2 primary crusher plant. At the trial, and on appeal to the Full Court, this contention was put as the Appellant's primary case, its original contention being put only as an alternative. 1838, 1839, 1841

13. The Appellant's primary contention (beneficiation begins at the grizzley) was rejected by the learned trial judge (Olney J.) and by every learned judge of the Full Court (Wallace, Kennedy and Rowland JJ.). 996.53 - 997.40, 1073.20 - 39 1095.32 - 1096.30, 1125.11 - 15

14. The Appellant's alternative contention (beneficiation begins with wetting in the feed chute) was adopted by the learned trial judge, but rejected by a majority of the learned judges of the Full Court (Kennedy and Rowland JJ., Wallace J. contra). 1001.2, 1103.11, 1132.19 1072.20 - 1073.19

15. The Respondents' contentions are that beneficiation within the meaning of clause 9(b) begins at the time when some form of beneficiation other than crushing or screening occurs, and that in the circumstances of the concentrator plant this occurs when the several streams of screened ore enter

the respective heavy media drums, heavy media cyclones, and hydro-cyclones in which the ore is concentrated and the waste material discarded.

16. The Respondents' construction of clause 9(b) was accepted by the learned trial judge, and by all of the learned judges of the Full Court. The Respondents' contention as to where beneficiation actually begins in the concentrator plant was rejected by the learned trial judge and by Wallace J. on appeal, but was accepted by the majority in the Full Court, Kennedy and Rowland JJ.

17. The Respondents' contentions are reflected in the declaration made by the Full Court. 1137

18. The reasons for judgment delivered by Kennedy and Rowland JJ. as to the proper construction and application of clause 9(b) encapsulate the arguments advanced by the Respondents before the Full Court.

The Respondents' Arguments

19. The arguments of the Respondents upon the construction of clause 9(b) and its application to ore processed in the concentrator plant may be summarized as follows:-

(a) "Beneficiation" as used in clause 9(b) contemplates the occurrence of processes beyond crushing and screening.

(b) The last 15 words in clause 9(b) have the effect that beneficiation for the purposes of clause 9(b) does not begin until some process other than crushing or screening occurs.

(c) "Screening" as a technical mining term can comprehend both wet and dry screening.

(d) In 1962 a likely future means of beneficiation was heavy media separation.

(e) When used in the context of beneficiation by heavy media separation "screening" in practice will include wet screening.

(f) The wetting of ore in the feed chute to the screens as well as on the screens is a normal and integral part of wet screening.

(g) The application of water makes it inevitable that sizing by wet screening will be accompanied by some degree of washing, scrubbing and degradation of the ore, both in the feed chute and on the screens.

(h) Wet screening is properly characterised as "screening" notwithstanding the fact that the inevitable concomitant effects of that process may serve some later purpose.

The arguments summarized above are developed more fully hereafter.

Screening includes wet screening

20. At first instance the Appellant contended that "screening" in clause 9(b) meant dry screening only. Much of the Appellant's affidavit evidence was directed towards establishing that proposition. Such evidence appears in the affidavits of Dr. Lynch, Mr. Pritchard, Mr D.E. Wright, Mr. Horseman and Mr. Herkenhoff. 1356.1 - 17, 1409.20 - 23, 1534.18, 1585.26, 1590.32

21. In cross-examination the Appellant's witnesses Langridge, Lynch, Pritchard, Batterham, Horseman and Herkenhoff all readily conceded that, in substance, the term "screening" was very commonly used to comprehend both 76.2 - 77.16, 80.6, 235.19 - 24, 237.30, 241.14, 328.19 - 39

wet and dry screening. An example is the following passage in the cross-examination of the Appellant's witness Pritchard, an expert in the marketing of mining plant and equipment including screens, whose employer, Allis-Chalmers Ltd, had supplied the screens in question: 353.17, 437.2, 438.1 - 37, 537.3 - 44, 547.1, 588.1-595.20

> "Some people in this case are saying the word "screening" does not include wet screening. Are you one of those? .... No. I believe screening applies to wet screening, dry screening and the whole lot." 353.17

The Respondents' evidence was to the same effect. 1783.15 - 20

22. The contention that "screening" meant dry screening only was abandoned by the Appellant on appeal to the Full Court. 1098.3

Available technology in 1962

23. At the time the Agreement was made there was no iron ore mining in the Pilbara. It was clear that mining on a vast scale would take place extending far into the future. The world market was demanding increasingly higher grades of ore, which meant that beneficiation was likely to be required. 537.9 - 22, 463.30 - 466, 580.27 - 581

24. The technology available in 1962 for beneficiation included the heavy media separation process, which had been well known in the world iron ore industry since the late 1930s or early 1940s. Magnetic concentration was also known in 1962. 580.10 - 581, 1787.17

25. Most of the known beneficiation processes in 1962, including the heavy media separation process, involved wet screening as an initial or early stage in the process. The Appellant's witness Mr. Herkenhoff, a man with 1787.17 - 17

almost 50 years experience in mining and mineral processing, put it in these terms -

> "The moment you start talking about beneficiating low-grade ore, in my book you are talking wet screening". 581.10

What wet screening includes

26. Both Appellant's and Respondents' witnesses agreed that wet screening -

(a) involves the application of copious quantities of water onto the ore, and 92.39 - 41, 256.1-9 356.10,1715.15, 1782.20

(b) usually and desirably involves pre-wetting the ore in a chute or similar device immediately before the screen itself. 92.25 - 36,255.40 - 256.9,290.45 - 291.18 , 336.46 - 337.5, 603.20 - 28,1715.13 1767.13 -15, 1783.10

27. Further, wet screening inevitably involves what was sometimes referred to as "sub-processes". Washing, some degree of scrubbing, separation of fines and degradation of clays and other materials will be included. Nevertheless in the context of iron ore beneficiation the process is properly referred to as "screening" or "wet screening". 262.42 93.1 - 94.25, 255.27 - 39, 341.9 - 46, 492.9 - 29,582.9 613.1 - 13,93 -94.25 255.27 - 39 278.2-8,341.9 - 46 582.9-584.11,613.11, 1716.8-24,1783.20

28. Some of the witnesses expressed differing views as to the relative importance of the several "sub-processes" involved in the wet screening at Mount Tom Price. For example, the Appellant's production control manager, Mr. Langridge, said that the sizing function was "number one". Dr. Lynch, at least in his affidavit, regarded degradation of the clayey material as more important, while Mr. D.E. Wright accepted that this particular effect was "of minor importance". — 110.30 - 41 1357.7 489.14 - 16

There was also evidence that the respective importance of the "sub-processes" might vary from day to day depending on the nature of the ore being fed through. But the whole process is nevertheless properly referred to as wet screening. One would not say that a screening process that involves washing is not called screening. 488.20 - 35 583.31 - 42 587.29 - 40

29. Conversely, it would not seem possible to have wet screening of iron ore without some degree of washing, separation of fines and degradation of clays and other materials. None of the witnesses suggested that any such form of wet screening existed, either in 1962 or at the present time. However, once it is accepted that "screening" in clause 9(b) includes wet screening, the Appellant's feed chute argument necessarily involves the unlikely proposition that the wet screening referred to is a form which does not involve any other "sub-process" such as washing or degradation, and is confined to the presentation of particles to apertures.

Presentation of particles to apertures

30. The learned trial judge accepted evidence that screening is the "process of presenting particles to apertures". On that basis his Honour saw no reason to distinguish between dry screening and wet screening. 990.30 991.7

31. Without doubt screening (wet or dry) involves the presentation of particles to apertures.

However, it is respectfully submitted that the learned trial judge fell into error by taking an unduly narrow view of what is meant by "screening" in clause 9(b). Screening as a process involves more than the mere presentation of particles to apertures. It is axiomatic that the

particles need to be delivered to the screens, they need to be moved over the screens and, in the case of wet screening, the ore needs to be made wet. The evidence is clear that in wet screening the ore is usually made wet both in the feed chute and on the screens (see paragraph 26 above).

To deny that the wetting of ore in the feed chute is part of wet screening is to deny that the wetting of ore on the screens is part of wet screening.

32. It is respectfully submitted that it is beside the point that there is no presentation of particles to apertures in the wet feed chute.

The true question is whether the wetting of ore in the feed chute is part of the wet screening process, and whether that process is "screening" within the meaning of clause 9(b).

The Appellant's "scrubbing" argument

33. As an alternative to its argument that "screening" meant only dry screening (abandoned before the Full Court), the Appellant argued that if the term did include wet screening, then the process in the wet feed chute was really "scrubbing" and not screening, and thus beneficiation other than crushing or screening commences when the ore is first wetted in that process.

34. This contention plainly failed also. The conclusion to be drawn is that practical mining men would not have referred to that process as "scrubbing". 342.1 - 3, 490.3 - 24, 601.5 - 603.5, 1772.12 - 1773.9, 1786.23 - 1787.7,

An authoritative definition of scrubbing is stated in Taggart's "Handbook of Mineral Dressing" (see Record 1594-5). Scrubbing properly so called, where water jets are used,

involves jetting the ore against a rigid or semi-rigid backing. The wet screening at Mount Tom Price is not scrubbing in any real sense. If it were intended to scrub, a quite different device would be used. The Appellant itself, in contexts unaffected by royalty considerations, did not refer to the wet screening process as "scrubbing". Indeed the term "scrubbing" does not appear in the original affidavit sworn by Mr. Langridge describing the operation of the concentration plant.

341.1 - 12, 602.34 - 43

35. Examples of the Appellant's own usage of terms in relation to the wet screening at its Mount Tom Price concentrator included the following -

(a) the Appellant's 1976 Annual Report shows a model of the then proposed concentrator plant and refers to the equipment in the washing and screening plant as "screens",

75.1 - 76.9, 1232

(b) the same Annual Report refers to the proposed wet screens as a means of "separat(ing) (ore) into four basic size fractions for subsequent treatment",

76.10 - 77.4, 1232.42

(c) the 1978 Annual Report refers to the building in which the wet screens are housed as the "screening plant",

77.6 - 16, 1272

(d) the Mount Tom Price concentrator control room mimic panel describes the wet screens as "primary screens" and "secondary screens",

73.8 - 74.4, 1217

(e) the title "wet screening" on the mimic panel comprehends the bins, the vibrating feeders, the feed chutes and the wet screens,

1844

(f) the plant lookout display panel refers to the "crushing and screening plants", "primary wet screens","secondary wet screens" and "wet screening". 74.5 - 19, 1218 - 9

This evidence (which was admitted without objection at the trial) does not offend the principles discussed in cases such as F.L. Schuler A.G. v Wickman Machine Tool Sales Ltd. [1974] AC 235. The evidence was not tendered to prove an admission by one party as to the construction of the contract, but as showing usage of technical terms and the proper appellation and characterisation of the plant and processes in question. Direct evidence was given by witnesses on both sides as to what the Appellant's processes are properly called. The evidence under consideration here constitutes admissions by the Appellant itself on the same issue, which is a question of fact and not a question of construction.

36. One contention advanced in support of the "scrubbing" argument was founded on Dr. Lynch's assertion in his affidavit that the feed chute would not have been designed in the way it was had it not been designed to maximise the scrubbing effect of the water before the feed moves on to the screen deck. The Respondents called evidence from Mr. Booth, who had been responsible for much of the development of the Mount Newman iron ore mine, township, railway and port, which was to the effect that the feed chutes in the wet screening at Mount Newman involved much more wetting, tumbling and rubbing of the ore than those at Mount Tom Price but were never described or referred to as scrubbers or as having a scrubbing effect. Mr. Booth also produced a conceptual design of a chute within the same space constaints as the Mount Tom Price chute but with a different internal layout for use if it had been desired to

1358.1 - 5

1772.13- 1773.9, 1776

1772.6 - 12, 1775

maximise the scrubbing effect. The Appellant attempted to counter this response by arguing that the original assertion really meant "optimising" the scrubbing effect, and this was said to be dependent on the nature of the ore. However, it appeared that Dr. Lynch had not been told about the specific nature of the ore on which the original design of the feed chute was based. In any event, as a matter of ordinary language the original contention clearly referred to getting the most scrubbing effect possible during the initial wetting of the ore, without regard to any particular properties of the ore.

603.3 - 5
302.19 - 22
182.22 - 33
184.6 - 20
222.2 - 224.43
602.44 - 603.5

The Appellant's degradation argument

37. The fact that wet screening inevitably involves "sub-processes" is relevant to consideration of the way in which the learned trial judge treated the evidence of Dr. Batterham as determinative. In so doing, his Honour failed to address the question whether what happened in the feed chute and on the wet screens ought still to be regarded as part of wet screening whether or not the changes described by Dr. Batterham were taking place, and irrespective of the speed or magnitude of those changes. The question is not whether the process of degradation involves crushing or screening. It is rather the reverse; whether the screening involves or might involve degradation.

38. There are legitimate grounds for criticism of the evidence of Dr. Batterham in any event. For example there was his emphasis on the pressure of the water sprayed into the feed chute, which he said was 7 to 10 times that of a domestic garden hose, whereas it subsequently appeared from the unchallenged evidence of Mr. Booth that the pressure quoted by Dr. Batterham (450 kilopascals) was well within the range of ordinary domestic

390.20 - 391.20
698.7 - 699.14

water pressures and indeed lower than some. Another example was his use of the expressions "washing and scrubbing plant" and "washing, scrubbing and screening plant" - terms which were not used by the Appellant itself. In addition it appeared that on only one of the occasions when Dr. Batterham visited the plant was he primarily concerned with examining wet screening. There was no evidence that the ore he then examined was typical of the ore passing through the plant. The shaley material he subjected to a wetting test while giving evidence performed very differently to that tested in a similar way by Professor Grosvenor.

449.22 - 451.22

436.20 - 31

396.3 - 397.37

629.4 - 631.2

39. Nevertheless the acceptance of the Respondents' argument in no way requires a rejection of Dr. Batterham's evidence as to "observed fact" (to use the words of the learned trial judge) concerning what happened in the feed chute. The Respondents rely upon the principle enunciated in Warren v. Coombes (1979) 142 CLR 531, 538, 551, 552. But in any case the issue as to where beneficiation or other treatment begins within the meaning of clause 9(b) involves mixed fact and law, turning as it does on the construction of the Agreement. It was therefore even more readily open to the Full Court to draw a different conclusion from the evidence of Dr. Batterham, even if everything he said is to be accepted.

999.19

40. As Kennedy J. said in the Full Court -

> "Undoubtedly, by adopting a wet screening process the benefit of degradation was achieved at an early stage of the beneficiation process, and certain other advantages were secured; but nothing was done which would

1099.32 - 1100.2

deny the description of wet screening to the critical process."

The Appellant's "purpose" argument

41. The Appellant constructed an argument around Dr. Lynch's "purposive" theory. In essence this argument was that the primary purpose of the wet screens was to prepare the feed for the drums, cyclones and WHIMS and in particular to get rid of contaminants which might interfere with the process in those pieces of equipment. It was then said to follow that the wet screening was not the sort of screening contemplated by clause 9(b). The Respondents submit that the argument fails for a number of reasons outlined below. 1357.4 - 25

42. The Agreement plainly contemplates that screening which would normally be regarded as part of a beneficiation process is nevertheless not to be treated as such for the purpose of clause 9(b). Screening is not to be deemed beneficiation "or any part thereof." Thus there seems little reason to analyse the wet screening and ask whether there was some beneficiation oriented purpose or whether it was part of a "series of steps" directed towards beneficiation. Ex hypothese, screening which would otherwise be part of a beneficiation process must have some purpose connected with beneficiation.

43. It is respectfully submitted that Kennedy J. correctly dealt with this point as follows :-

> "The fact that wet screening was chosen in preference to dry screening by reason of there being some later process in view, appears to me to be quite immaterial. Wet screening is naturally adopted when wet processes follow. It may 1101.32 - 1102.12

readily be accepted that, when water is added to the -80mm ore, a form of beneficiation results which is quite independent of any upgrading resulting from screening according to size alone; but it occurs as an inevitable consequence of wet screening. It may also be accepted that by adding water in the pulping box, Hamersley is maximising the time during which the ore is subject to water and thereby allowing the optimal breakdown of water active shales and the separation and cleaning of fine particles. But again that is the consequence of employing wet screening at that stage. It is, in my view, misleading to have regard to the purpose for which a process has been incorporated into the concentrator. That purpose appears to me to be irrelevant to the factual inquiry which para. (b) requires."

44. The "purposive" argument was said to gain weight from the evidence of Dr. Batterham and in particular his assessment of the effect of water on the ore in the chute. But the evidence showed that the nature of the ore has varied considerably since the plant was commissioned. It is not reasonable to treat the parties as having intended that the term "screening" was to have a subjective and variable application depending on the precise nature of the ore that might from time to time be fed into some future beneficiation plant. Nor can the parties be credited with an intention that what would otherwise be "screening" might cease to be so regarded because particular ore from time to time happens to experience some degradation or a lot of degradation, or because some particular "sub-process" within wet screening might from time to time be regarded by some as more important than other sub-processes.

79.20, 81.27, 147.14 - 17, 149.15 - 21

45. Still less is it reasonable to suppose that the parties in 1962 are to be taken as intending that rights and obligations as to royalty might depend on the subjective and variable intentions of the Appellant in the design and subsequent operation of some future beneficiation plant, particularly when these were matters in which the Respondents would be unlikely to participate. 46.28 - 45

46. If the purpose that the Appellant's wet screening was designed to achieve was a relevant fact, then evidence as to the actual design objectives would have been admissible, but -

(a) No witness from the actual designer (Mitchell Cotts/Minenco) was called, and no explanation was advanced as to the absence of such evidence. See Jones v. Dunkel (1954) 101 CLR 298. 31.31 - 32.6

(b) Although the Appellant's argument centred around Dr. Lynch's "purposive" theory, the evidence disclosed that by-pass facilities were consciously designed into the plant, and were in fact used, to enable feed to go from the wet screens to product stockpiles without entering the drums and WHIMS at all. It appeared that Dr. Lynch was not aware of these diversion facilities at the time he swore his affidavit. 40.12 - 42.20 271.1 - 272.9

There is no ambiguity

47. The Respondents submit that because, as a technical term, "screening" in clause 9(b) includes wet screening, then what happens in the feed chute and on the wet screens at Mount Tom Price is wet screening and no

ambiguity exists. Indeed it would not matter that some might refer to the process in the feed chute and on the wet screens by some other term such as "washing" or "washing and screening", provided (as it is submitted the evidence clearly established) that process can also be properly regarded or referred to as screening or wet screening.

48. In the absence of ambiguity the words of clause 9(b) are to be given effect according to their tenor: Australian Broadcasting Commission v. Australasian Performing Rights Association Ltd. (1973) 129 CLR 99, 109 per Gibbs. J.

Resolution of ambiguity (if any)

49. The Appellant's alternative contention (Paragraph 14 above), which was upheld by the learned trial judge and rejected by the majority of the learned judges of the Full Court, necessarily involves the conclusion that the term "screening" in clause 9(b), while it may include wet screening, does not include wet screening where there is some process other than separation by size taking place in the course of the wet screening. Such a conclusion is inconsistent with the uncontested evidence that wet screening, of necessity, must involve other processes (paragraphs 27 to 29 above). But to the extent that it is argued that clause 9(b) may use "screening" in a narrow sense (i.e., as only including wet screening where no more than separation by size is taking place, or as only including the sizing "sub-process" of wet screening) or may use the term in a broader sense (i.e., as comprehending wet screening whether or not other "sub-processes" are taking place) there may be an ambiguity. Any such ambiguity should be resolved in favour of the Respondents because where

technical terms are used it is less difficult to show that a word has a wider meaning than it is to establish a specialised use : Herbert Adams Pty. Ltd. v. F.C.T. (1932) 47 CLR 222, 228.

The Appellant's "front door of the concentrator" argument

50. The primary argument put by the Appellant before the learned trial judge was that beneficiation begins when the ore passes through the grizzley or, as it was sometimes described, at "the front door of the concentrator". This argument was rejected by the learned trial judge and all of the learned judges of the Full Court.

51. In developing this argument, the Appellant laid some stress on the fact that the term "beneficiation" can be used in either a broad or narrow sense. The broad sense is wide enough to include any physical treatment of the ore that makes it more suitable for sale, and therefore a process of crushing and screening and nothing more would suffice. The narrow sense is confined to a process in which unwanted constituents are removed, for example by concentration. The Appellant contended that clause 9(b) is concerned only with beneficiation in the narrow sense, and that once ore is identified as having been beneficiated in that sense, the enquiry is simply as to when that process begins.

52. However it is submitted that a finding that "beneficiation" in clause 9(b) means only beneficiation in the narrow sense is not determinative. Such a finding is still consistent with a construction of clause 9(b) which leads to the selection of the first point within the beneficiation which is not crushing or screening (that is to say, in accordance with both the Respondents' contention and the Appellant's alternative contention).

This is illustrated by the judgments of the learned trial judge and Wallace J. who both held that "beneficiation" was used in clause 9(b) in the narrow sense, but nevertheless rejected the Appellant's primary argument. Whether one uses the broad or narrow sense, a beneficiation process may involve crushing and screening. In the broad sense there may be a process which involves crushing and screening but nothing else. In the narrow sense there may be a process which includes crushing and screening but also other processes. In either case, the last 15 words of clause 9(b) tell one that crushing and screening are to be ignored when looking for the point where beneficiation begins.

989.15 - 19, 1071.1 - 18

53. At the outset the Appellant's primary argument faces the difficulty that the very point chosen - the grizzley - is undeniably a screen. It serves no function other than the separation of ore by size.

330.8

54. The Appellant has argued that the last 15 words of clause 9(b) are no more than a reminder to the reader - who presumably has just finished reading clause 9(a) - that the ore to which paragraph (a) applies is not swallowed up by paragraph (b). That eventuality seems somewhat remote. In the absence of the last 15 words, a reader would still regard (b) as referring to different circumstances than (a). As Kennedy J. pointed out, this supposed drafting objective could have been achieved much more simply.

1061.10

1096.10

55. The Appellant has also argued that the last 4 words of clause 9(b) have the purpose of ensuring that crushing and screening taken individually as well as together are each excluded from the concept of beneficiation. Again this supposed objective could be met by simpler drafting more consistent with the language used in clause 9(a).

1061.19

56. Before the Full Court the Appellant argued in effect that the last four words could simply be ignored so as not to destroy what would be "otherwise an entirely rational structure". The Respondents submit that this counsel of despair should only be adopted if it appeared that those words - included in a heavily negotiated contract drafted by experienced mining lawyers - were totally meaningless. Plainly this is not the case. The words have a clear meaning which all judges so far concerned with this case were able to discern. 1850.11 - 1851.14

57. The construction of clause 9(b) adopted by the learned trial judge and the Full Court is much more consistent with the fact that clause 9(b) assumes that there has been beneficiation, and looks for a particular point or time in the process to constitute a deemed disposal. One can follow the progress of the ore from the mine face until it has been subjected to beneficiation other than crushing or screening. The point of deemed disposal is then reached. The objective of clause 9(b) is to identify that point rather than characterise a particular process. One does not worry about whether something is beginning until one can say that it is not crushing or screening.

58. Further, the Appellant has been constrained to modify the form of declaration initially sought by it from the Full Court (see its 0.63 r.9 notice). That declaration would have applied to all ore passing through the grizzley. However, the form of declaration sought was modified subsequently so that it applied only to ore "which is not withdrawn from beneficiation before or at the scalping screens", i.e., at the screens subsequent to the grizzley which size the ore into +80mm and -80mm. The evidence showed that at this point the 1060.12

ore could be diverted direct to product stockpile save only for further crushing and (dry) screening. Such ore would not go through the heavy media process at all and would not be regarded as beneficiated ore within clause 9(b). Moreover there were in addition subsequent points before the actual heavy media process, at which ore could be, and from time to time was in fact, diverted to product stockpile. Thus the "front door of the concentrator" argument loses much of the attraction of apparent simplicity because it necessarily involves opening the front door of the concentrator and later "retrieving" some of the ore that passes through it. Put another way, at the point where the Appellant contends there is a deemed disposal, the ore can only be deemed to be disposed of on a provisional basis.

40.12 - 29

59. The Appellant has sought to distinguish the concepts of beneficiation applicable to clauses 9(a) and 9(b) upon the basis that the former is concerned with an "output royalty" (i.e., on the quantity of ore sold) and the latter is concerned with an "input royalty" (i.e., on the quantity of ore put into the concentrator). The Respondents submit that this distinction is unhelpful. The terms are not used in the Agreement itself, and the suggested distinction does, as Kennedy J. said, beg the question - the question being at what time does beneficiation begin for the purpose of the Agreement? The true distinction between (a) and (b) is a much simpler one.

1102.19

60. The starting point to clause 9 as a whole is the concept of a royalty on price, not quantity. Because it is unlikely that ore would be sold for export without at least some crushing and screening, clause 9(a) provides that the cost of crushing and/or screening is to be to the account of the Appellant. But when the cost of

464.27, 466.26 - 31

beneficiation beyond crushing and screening is added, the f.o.b. price would be too generous a basis for royalty since the Respondents would not have contributed to meeting that additional cost. Hence the understandable and practical solution of a deemed disposal as the equivalent of an actual sale - a deeming in the fictitious rather than the factitious sense : Hunter Douglas Australia Pty. Ltd. v. Perma Blinds (1970) 122 CLR 49, 65-55 per Windeyer J.

61. The Appellant has also argued that the parties must have intended the deemed disposal provisions of clause 9(b) to operate in the same way as the deemed disposal provisions of clause 9(d) which apply to a non-arm's length sale. However, this takes the matter no further. In such a case there is an actual sale or disposal at an identifiable point or time, and the only thing to be deemed is the price, i.e. "the assumed f.o.b. price".

The fixing of that price by an arbitrator would depend upon what ore was actually sold or disposed of, and would be governed by the terms of the sale or disposal, and in particular by any provisions of the contract of sale or disposal relating to the passing of property in the ore. There is no reason why a clause 9(d) sale or disposal should take any particular form, or why it should somehow involve some fixed point of reference with which the beginning of beneficiation for the purposes of clause 9(b) must be consistent.

Practical and commercial considerations

62. The respondents submit that their arguments for the construction and application of clause 9(b) are not only grammatically and technically correct, but also make commercial sense.

63. The wet screening process is much less expensive in capital and operating terms than the subsequent parts of the beneficiation process in the drums, cyclones and WHIMS. Therefore the Respondents' contention is consistent with the underlying policy of clause 9, viz, that the cost of crushing and/or screening is to be to the account of the Appellant. The reasoning by Kennedy J. in this regard is relied upon. 779.11 - 45 1097.7 - 15

64. At the point where the Respondents contend beneficiation other than crushing or screening begins the ore is irrevocably committed to beneficiation other than crushing or screening. At the Appellant's points (either the first wetting in the feed chute or, as later contended, at the grizzley) the ore need not be, and sometimes is not, subjected to any further treatment (other than crushing or screening). Specifically, it need not proceed to the heavy media drums, cyclones and WHIMS machines which are the heart of the whole plant. 40.12 - 29

65. If the consequences of a particular construction are capricious, unreasonable, inconvenient or unjust, that may support an argument against such a construction in cases where an ambiguity exists : Australian Broadcasting Commission v. Australasian Performing Rights Association (1973) 129 CLR 99, 109. From 1979 until August 1983 the Appellant's only contention was one which necessarily involved opening the front door of the concentrator - albeit that entry into the concentration plant did not proceed as far as the Respondent's contention required. The evidence does not suggest that the Appellant made any complaint during this period that any particular caprice, unreasonableness, inconvenience or injustice would result from the point of deemed disposal being

beyond the front door of the concentrator. The inference to be drawn is that none would in fact result.

Summary

66. The Respondents respectfully submit that the judgments pronounced by the Full Court were correct, and that this appeal ought to be dismissed with costs. The Respondents refer to and rely upon the arguments set out more fully in the preceding paragraphs of this Case, and rely (inter alia) upon the following reasons for dismissal of the appeal which are extracted from those arguments.

Reasons

(1) Because the Full Court was correct in setting aside the declarations and orders made by the learned trial judge.

(2) Because the Full Court was correct in dismissing the Appellant's cross appeals.

(3) Because the learned trial judge erred in holding that beneficiation for the purpose of clause 9(b) of the Agreement begins when iron ore is fed into the feed chute of the wet screening plant of the Appellant's concentrator plant.

(4) Because the full Court was correct in declaring that beneficiation for the purpose of clause 9(b) begins when iron ore enters the heavy media drums, the heavy media cyclones and the hydro-cyclones at the Appellant's concentrator plant.

(5) Because the time when beneficiation begins for the purpose of clause 9(b) is when some form of beneficiation other than crushing or screening occurs. This construction of clause 9(b) is grammatically and technically correct, is consistent with the Agreement as a whole, and makes commercial sense having regard to an underlying policy of clause 9 that the Respondents are to have the benefit of crushing and screening.

Further, this construction of clause 9(b) is consistent with the fact that at various points in the concentrator plant the iron ore may be diverted to a product stockpile after only crushing and screening and without entering the drums and WHIMS at all.

(6) Because consistently with the construction referred to in sub-paragraph (5) above the learned trial judge and all of the learned judges of the Full Court were correct in holding that beneficiation for the purpose of clause 9(b) does not begin when iron ore passes through the grizzley screen (or "the front door of the concentrator" as the Appellant has termed it).

(7) Because the learned judges comprising the majority in the Full Court were correct in holding that -

(a) in the Appellant's concentrator plant wet screening is "screening" for the purpose of clause 9(b);

(b) the wetting of iron ore in the feed chute is a normal and integral part of the wet screening process and thus constitutes "screening" for the purpose of clause 9(b);

(c) all beneficiation processes at the Appellant's concentrator plant which occur prior to the entry of iron ore into the heavy media drums, heavy media cyclones and hydro-cyclones are either "crushing" or "screening" for the purpose of clause 9(b);

(d) beneficiation other than "crushing" or "screening" occurs for the first time when the several streams of crushed and screened iron ore enter the respective heavy media drums, heavy media cyclones and hydro-cyclones, in which the ore is concentrated and waste material discarded.

(8) Because the reasoning expressed by Kennedy and Rowland JJ. in their Honours' Reasons for Judgment in the Full Court was correct, and is respectfully adopted by the Respondents.

(9) Because the declarations and orders made by the Full Court in appeals numbered 59 and 60 of 1984 were correct.

D.G. WILLIAMSON

6th September 1985

P.C. [illegible]