39/85

IN THE PRIVY COUNCIL NO. 28 of 1985

ON APPEAL
FROM THE COURT OF THE SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N :

HAMERSLEY IRON PTY LIMITED	Appellant (Respondent) (Plaintiff)
- and -	
1. THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED, 2. LANGLEY GEORGE HANCOCK, 3. ERNEST ARCHIBALD MAYNARD WRIGHT, 4. HANCOCK PROSPECTING PTY LTD, 5. WRIGHT PROSPECTING PTY LTD AND 6. L.S.P. PTY LTD	Respondents (Appellants) (Defendants)

RECORD OF PROCEEDINGS

PART I
VOLUME V

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SOLICITORS FOR THE RESPONDENTS (APPELLANTS) (DEFENDANTS)

IN THE PRIVY COUNCIL NO.

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 AND L.S.P. PTY LTD AND THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED	Respondents (Appellants) (Defendants)

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INDEX OF REFERENCE

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OLNEY J.

The plaintiff owns and operates an iron ore mine and concentrator at Tom Price in the Pilbara region of Western Australia. To be strictly correct, it is more accurate to say that the plaintiff holds a lease from the Crown issued pursuant to a statute of the State under which it is entitled to mine iron ore on the subject land and for that purpose, pursuant to obligations entered into by it under an agreement with the State ratified by an Act of Parliament, it has, inter alia, installed on the land mining plant and equipment and also other plant and equipment which latter can conveniently be called a concentrator or beneficiation plant - the two terms for the purposes of this judgment being synonymous.

The Tom Price iron mine is one of the biggest of its type in the world and as one would expect it is not something that just happened overnight. One of the things that did happen as a preliminary to its establishment was the execution on 12th December 1962 of a contract ("the contract") between the plaintiff and a number of other parties including the first four defendants (hereafter referred to as "the vendor defendants") whereby the vendor defendants sold to the plaintiff their right, title and interest in certain temporary reserves for iron ore then enjoyed by them pursuant to a grant made by the Government of Western Australia. As part of the consideration for the rights acquired pursuant to the contract the plaintiff agreed to pay to the vendor defendants a royalty on such iron ore produced from the land in question (and certain other land) as the plaintiff may sell or dispose of. By reason of certain transactions that occurred subsequent to the contract the six defendants are presently entitled to the benefit of the royalty and as such are clearly persons interested in the contract. As the parties are unable

to agree as to the proper construction of the provision in the contract relating to the payment of the royalty, the plaintiff has commenced these proceedings by way of originating summons pursuant to Order 58 Rule 10 of the Rules of the Supreme Court seeking the determination of the construction of the relevant part of the contract.

Before setting out the text of the contested clause I wish to make a number of comments in relation to the form of the proceedings.

Order 58 Rule 10 of the Rules of the Supreme Court provides:

> "Any person claiming to be interested under a deed, will, or other instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested. "

Rule 12 of the same Order provides that the Court shall not be bound to determine any such question of construction if, in the opinion of the Court, it ought not to be determined on originating summons.

The jurisdictional basis for the procedure envisaged by Order 58 Rule 10 is to be found in s.25(6) of the Supreme Court Act which recognises in statutory form that the Supreme Court may make a binding declaration of right without granting consequential relief. Order 58 Rule 10 cannot and does not purport to confer jurisdiction on the Court but rather it facilitates the exercise of a particular aspect of the jurisdiction conferred by the Supreme Court Act. Ordinarily a declaration of right would be sought by way of writ, but in certain limited cases particularly those requiring the determination of a question of construction arising under a deed, will, or other written instrument a person claiming to be interested therein may proceed by way of originating summons for a declaration of the rights

of the persons interested unless the Court is of the opinion that the question ought not to be determined on originating summons. The procedure contemplated by the rule is one appropriate to cases where there is no disputed question of fact and where the Court has before it an instrument the construction of which is capable of determination by reference to the instrument itself. In my view, the authority of the Court is to make a declaration of right and not to declare the construction of the instrument. If it were otherwise, the Court's order would be in the nature of an advisory opinion. The rule contemplates that the Court will determine the construction of the instrument as a preliminary to it declaring the rights of the parties. I make these comments for two reasons. First, the manner in which this matter has proceeded involving as it has the taking of a very substantial amount of evidence both in affidavit form and viva voce, each accompanied by extensive and far ranging cross-examination, suggests to me that to proceed by way of originating summons was inappropriate. The more appropriate action would have been for the plaintiff to seek a declaration of right by way of a writ of summons in the ordinary manner. My second reason for raising the matter is that but for an assurance given on affidavit by the solicitor for the first five defendants that he believed on information from senior counsel for those defendants that as a result of consultations between counsel for all parties it had been agreed that

> "(a) the central issue is sufficiently defined by the Originating Summons and the Affidavits filed by the parties and that there is no need for the parties to exchange pleadings;
>
> (b) that although the central issue gives rise to differences between the parties as to matters of fact and opinion, that central issue involves essentially the interpretation of a written instrument and is appropriate for resolution by

way of originating summons;

(c) the differences between the parties in regard to matters of fact and opinion relate to complex technical concepts but are narrow in scope and the Court should be able to deal with the same upon the basis of affidavit evidence as supplemented by directions of the kind contemplated by the Summons for Directions and referred to hereafter. "

it is highly likely that upon the hearing of the summons for directions the Master would have directed the parties to exchange pleadings and that the matter proceed in the way of an action. The mode of hearing contemplated in the summons for directions was that the parties be at liberty to file certain affidavits, that each of the deponents to the affidavits be required to attend for cross-examination and that there be liberty to give further evidence orally. In addition, it was contemplated that further evidence may be given either orally or by affidavit on the basis that the substance of any evidence to be adduced be delivered in writing to the opposite party not less than 21 days prior to the commencement of the trial. Such a procedure was not calculated to lead to a precise identification of the issues and this proved to be the result. As it happened I do not believe that the central issue was "sufficiently defined in the originating summons and the affidavits". The differences between the parties in regard to matters of fact and opinion certainly did relate to complex technical concepts but they were far from being "narrow in scope" and in my view the whole of the proceedings would have been better dealt with had there been an exchange of pleadings in order to establish with precision the matters in issue. As it is, the relief sought in the originating summons gives no clue to the view of the party seeking relief as to how the question should be answered. For this, and also for the views of the opposite parties, it is necessary to go to correspondence that passed between them both

before and after the commencement of the proceedings. That this is a highly unsatisfactory manner in which to conduct litigation is highlighted by the fact that at a relatively late stage the plaintiff indicated by correspondence that it would be advocating a different answer to the question from that contemplated at the time the proceedings were initiated.

Notwithstanding all of these difficulties, the issues have now been sufficiently litigated to enable me to determine the construction of the disputed clause of the contract and to make an appropriate declaration of the rights of the persons interested.

Clause 9 of the contract provides:

"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 2½% 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 2½% 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. "

In the foregoing the terms "Vendors" and "Purchaser" should be read as the vendor defendants and the plaintiff respectively.

In the originating summons the plaintiff claims:

"the determination of the following question of construction arising under the Agreement referred to above and in paragraph 2 of the accompanying Affidavit of Colin Roy Langridge and in the events which have happened, that is to say:

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

and such further or other relief, including an order providing for the costs of and incidental to these proceedings, as this Honourable Court thinks fit. "

(The agreement mentioned in the originating summons is the contract already described.)

At an early stage in the hearing, after an objection raised by senior counsel for the plaintiff as to a particular line of cross-examination, senior counsel for the first five defendants submitted that proviso (b) to clause 9 does not apply to iron ore which does not need to be beneficiated or otherwise treated to enable it to be sold or disposed of. He said that if it were otherwise the position would be that the plaintiff could unilaterally and unnecessarily beneficiate ore which does not need it and thereby deprive the defendants of royalties. I was invited to rule as a threshold question what ore proviso (b) applies to. I do not need, nor do I intend, to canvass the arguments for and against the defendants' proposition. The ruling which I made at the time and to which I adhere is that the question raised by the originating summons is narrowly defined and does not include the broader issue raised by counsel. The matter proceeded on the basis that my ultimate decision would be confined to answering the question asked and for that purpose it would not be necessary to rule upon the defendants' proposition that proviso (b) applies only to ore which needs to be beneficiated in order to be sold or disposed of. Having now had the advantage of considering the whole matter in detail I feel that the answer to that question is obvious but I refrain from making any further comment.

To respond to the question posed, an examination will have to be made of "the events which have happened" and it will be necessary to understand what is meant by the low-grade ore referred to in the affidavit of Colin Roy Langridge.

A first reading of clause 9 raises immediately questions as to the definition of terms, particularly the terms "unrefined", "unmanufactured", "upgraded", "crushing", "screening", "beneficiated", "treated" and the derivatives of those terms.

Each is a word having a usage in the English language which can readily be discerned from a dictionary but whether the general usage accords with the accepted usage in the mining industry generally and the iron ore mining industry in particular is a matter for consideration. In the case of industry usage, although in most cases there is no precise universally accepted definition for any of these terms, there is little real disagreement between the experts as to the meaning that should be attributed to them. However, before embarking upon a consideration of the evidence it is appropriate that clause 9 be analysed.

The first thing that can be said about clause 9 (and this does not appear from the clause itself but from a consideration of the whole contract) is that it is the only clause in the contract providing for the payment of royalty. It follows therefore that it should be regarded as a complete expression by the parties of their intention in relation to that subject matter.

The opening portion of clause 9, that is, from the commencement down to the words "provided always that" establishes the general proposition that royalty at the prescribed rate is to be paid on moneys received from the sale or disposal of unrefined and unmanufactured iron ore produced by the plaintiff from the subject land. It is fair to say that it is common cause that the substance being dealt with, that is "iron ore produced .... from the Temporary Reserve land" is the commodity that is brought into existence by the digging up of the ground comprising the subject land and which is subsequently sold as iron ore. It is "iron ore" if it is capable of being sold or disposed of as iron ore and it is "produced" once it is detached from the ground.

The combination of words "sold or otherwise disposed of"

suggests a distinction between iron ore which is produced and sold and iron ore which is produced and otherwise disposed of, but if there is a distinction it is a very fine one the relevance of which escapes me. The clause obviously contemplates the receipt of money upon both sale and other disposal. A disposal of property in exchange for money fits comfortably within the concept of a sale. One suspects therefore that the reference to disposal other than by sale in the opening passage of the clause will be explained by the subsequent provisions. Taken in isolation, and without the aid of the other provisions of the clause, the opening passage of clause 9 establishes the plaintiff's liability to pay a royalty on iron ore which it produces from the subject land and later sells and in respect of which it receives payment. The only qualification to this principle is that it has no application to iron ore which has been either refined or manufactured before it is sold. Obviously, iron ore which has been refined or manufactured before sale is not sold as iron ore and would therefore not come literally within the framework of the clause and it would be inconceivable that the parties should contemplate that royalty at the same rate should be paid on the full value of the refined or manufactured product. In the circumstances contemplated by proviso (d) there is a deemed sale at an assumed price which is deemed to be received, thus attracting liability for royalty provided always that the iron ore which is deemed to have been sold or disposed of is neither refined nor manufactured at the time of the sale or disposal. Thus far, the contract is silent as to the payment of royalty on iron ore produced from the subject land which is either refined or manufactured before it is sold or disposed of by the plaintiff.

I move now to consider proviso (a).

The first, and possibly only, conclusion that can be drawn from this provision is that the plaintiff's liability to pay royalty is unaffected by the upgrading of iron ore by crushing and/or screening prior to sale or other disposal. In the context of the clause as a whole, the proviso seems to be saying that the upgrading of iron ore by crushing and/or screening does not amount to the refining or manufacturing of the ore. Further reference will be made to proviso (a) hereunder.

Proviso (b) to clause 9 is of course central to this dispute. The combination of words "beneficiated or otherwise treated" suggests two things. First, that beneficiation is a form of treatment and, second, that iron ore may be treated without being beneficiated. Leaving aside for the moment the passage "but crushing or screening shall not be deemed to be beneficiation or any part thereof", the deemed disposal of iron ore renders the plaintiff liable to pay royalty on that iron ore at the time of the deemed disposal, namely at the time beneficiation or other treatment begins. Assuming the iron ore which has been refined or manufactured has been subjected to "treatment", it follows that proviso (b) has the effect of rendering the plaintiff liable for royalty in respect of iron ore which it may either by itself or through a subsidiary refine or manufacture. The assumption made in the previous sentence is in my opinion validly made and my reasons for so holding all appear hereafter. Furthermore, it would seem as a matter of logic that in the context of clause 9, upgrading ore by crushing and/or screening cannot properly be regarded as "other treatment" (that is treatment other than beneficiation) as if it were otherwise, there would never be an occasion for proviso (a) to operate because a deemed disposal of the ore would be effected by proviso (b) at the time treatment (i.e. crushing and/or screening) begins.

The scheme of clause 9 begins to emerge. Iron ore which is sold without processing other than crushing and/or screening attracts royalty on the sale proceeds whereas ore which is treated (including refining, manufacture and beneficiation) attracts royalty on the assumed value of the ore at the time the treatment commences irrespective of whether or not the resultant product is subsequently sold. Viewed this way the clause covers all contingencies including the contingency that some ore will be mined but for one reason or another will be neither sold nor treated. In that case no royalty is payable. The clause also adequately takes account of the circumstances that the changing demands of the market may render ore of a grade now readily saleable without treatment, unsaleable unless it is treated. Similarly it prevents the plaintiff avoiding its royalty obligations by treating otherwise readily saleable ore and indeed places a penalty on such conduct in that the liability for royalty would arise irrespective of whether the product is later sold. These comments are of course made without taking account of the last 15 words of proviso (b).

The passage "but crushing or screening shall not be deemed to be beneficiation or any part thereof" is not without its difficulties. For myself I would have thought that in a context where there is no provision deeming something to be beneficiation it is inappropriate to say that something "shall not be deemed to be beneficiation". Unless there is a deeming provision one does not know what it is that the negative provision is detracting from. In my opinion the clear intention of these words is that neither crushing nor screening shall be treated as beneficiation or any part thereof. Looking at the clause as a whole there is reason to think that the parties' intention may have been to make it clear that the consequence of commencing

beneficiation, that is that the plaintiff becomes immediately liable to pay royalty on the value of the ore beneficiated, should not occur if all that is done is to crush or screen the ore. Such a conclusion fits comfortably into the general scheme of the clause as I have outlined it above but ignores the last four words. I will return to this topic in more detail hereunder.

The case put by the plaintiff is that beneficiation is a single and identifiable process, albeit involving on occasions many separate sub-processes within the whole including the sub-processes of crushing and screening. Consistent with such an approach, the plaintiff would have it that once a product is identified as "iron ore which has been beneficiated" one must look to the commencement of the process whereby beneficiation was achieved to establish the point in time when the deemed disposal of that ore occurred and this even though the beneficiation may commence with crushing or screening the ore.

Put at its simplest, the defendants' case is that unless and until beneficiation involves subjecting the ore stream to some process other than crushing or screening there is no deemed disposal for the purpose of the contract. As a corollary to this, the defendants say that it is the ore in its state as it commences to undergo that other process that is then notionally disposed of. This argument has its basis in the final 15 words of proviso (b).

Reference was made earlier to the various technical terms used in clause 9 having ordinary dictionary meanings and it will be helpful before embarking upon a consideration of the evidence as to usage of those terms in the industry, to see exactly what they mean in common usage. The following meanings can all be extracted from the Macquarie Dictionary:

refined - freed from impurities

manufactured - to work up (material) into a form for use

upgrade - to improve

crush - to break into small fragments or particles

screen - to sift by passing through a sieve or riddle

beneficiation - 1. the dressing or processing of ores to regulate the size of the product, remove unwanted constituents and improve the quality, purity or assay grade

2. concentration or other preparation of ore for smelting by drying, flotation or magnetic separation

treatment - to subject to some agent or action in order to bring about a particular result

concentration - the act of separating (ore) from rock sand etc. so as to improve the quality of the valuable portion.

Assuming for the moment that the foregoing meanings are appropriate to clause 9 of the contract it is easy to understand that the concept of iron ore which is "upgraded .... by crushing and/or screening" might be confused with that of iron ore which is "beneficiated or otherwise treated" if the first and more general meaning of beneficiation is used although the element of removing unwanted constituents distinguishes beneficiation from that form of upgrading which involves merely the breaking of the ore into smaller pieces and sifting it through a screen without any part of total mass being discarded. The same confusion would not arise if the second more specific meaning of beneficiation is applied. If that were so, it might readily

be asserted that proviso (b) could have taken the form:

> "If iron ore is concentrated or otherwise treated by the Purchaser it shall be deemed to have been disposed of at the time concentration or other treatment begins. "

It is appropriate now to test the dictionary meanings against the evidence relating to the usage of the same terms in the iron ore industry in Australia in 1962. It can be said at the outset that there is no evidence to suggest that the meaning of any of these terms has changed at any time either before or since 1962 nor that there is or ever has been a peculiar local meaning different from that generally accepted throughout Australia and elsewhere in the world.

Both parties put forward evidence relating to the industry usage of the relevant terms. For the plaintiff, Dr. Alban Jude Lynch was called. Dr. Lynch is the Director of the Julius Kruttschnitt Mineral Research Centre within the Department of Mining and Metallurgical Engineering in the University of Queensland. His academic background and his other experience qualify him to speak with authority on this topic, something which can be said of all of the expert witnesses who were called on both sides. It is not surprising therefore that there is in general little disagreement between the experts. One point upon which they are unanimous is that not all of the terms are used universally nor are they used with a constant meaning.

As to the meaning of beneficiation as used in the Australian mining and mineral processing industry, Dr. Lynch adopted the definition found in E.J. Pryor, Mineral Dressing (London, 1965), namely, treatment of crude ore in order to improve its quality for some required purpose.

When asked by myself whether he regarded beneficiation as being synonymous with upgrading Dr. Lynch replied (transcript pp. 384-385, 386).

"In my opinion (and this is a grey area) 'concentration' would be synonymous with 'upgrading'; 'beneficiation' in that it relates to the improvement of the properties of particles with respect to some particular objective would include concentration and upgrading. "

I then asked him if he would regard a process involving only crushing and screening as an upgrading process to which he replied:

"..... When we speak about the grade of an ore, the grade of a deposit, we very frequently refer to the chemical composition of the deposit, so 'upgrading' very frequently relates to the increasing, by one means or another, the chemical concentration within a particular fraction. Now, in terms of crushing and screening iron ore, as a result of the screening process where it is divided into two size fractions, one size fraction will contain a higher concentration of iron than the other size fraction therefore, in the terminology about which I have spoken, that size fraction would be defined as being upgraded. "

Dr. Lynch expressly agreed with the affidavit evidence of two of the defendants' witnesses dealing with the industry usage of the various technical terms. The two witnesses in question are Niles Earl Grosvenor (Senior vice President of a large firm of professional engineers in the U.S.A. and for 20 years a teacher at the Colorado School of Mines) and Peter Forbes Booth (a consulting engineer in private practice in Perth and formerly Project Engineer responsible for the design and construction of Mt. Newman Mining Company Pty. Ltd's beneficiation plant).

Both witnesses pointed out that beneficiation can be used in both a broad and a narrow sense. Mr. Grosvenor said that used in its broadest sense the word comprehends treating ore to improve its physical or chemical characteristics, which may include the use of physical, chemical, thermal or magnetic processes, so as to upgrade the ore and make it a more commercially usable product. He went on to say that sometimes the term is used in a narrower sense which involves only mechanical or physical processes whereby higher grade ore

materials are separated from lower grade materials or "gangue" - the earth or stoney matter in which the ore is found.

Mr. Booth's evidence was not significantly different. As an example of the narrower sense in which the term is used he referred to the removal of unwanted constituents and the concentration of valuable ores. He defined concentration as the process of ore treatment whereby the valuable minerals are collected as an enriched product.

The conclusion I have reached is that the Macquarie Dictionary meanings quoted above substantially accord with industry usage, and this being the case, I am satisfied that proviso (a) to clause 9 of the contract refers to ore the quality of which has been improved by it being broken into smaller particles and/or separated into different size fractions whereas proviso (b) - insofar as it deals with ore which has been beneficiated - refers to ore which has been enriched by the removal of unwanted constituents by a process or processes other than the mere breaking of the ore or separating it into different size fractions.

The plaintiff began working its iron mine at Tom Price in 1966. The ore which it mines is a mixture of hematite and shale. The shale contains the bulk of certain non-ferrous elements which reduced the purity of the ore and consequently its effectiveness in steel making. The most important impurities are alumina, silica and phosphorus. Until the concentrator began operation in 1979 the practice was to sell only high-grade ore (also called direct shipping ore). High-grade ore is iron ore which is of sufficient natural purity to be sold without processing other than by crushing and/or screening. As the demands of purchasers as to the iron content of ore purchase may, and do, vary from time to time, it follows that the forces

of the market will dictate whether or not at any particular time ore is to be regarded as high-grade. The term "direct shipping ore" (which appears to be more commonly used in the U.S.A.) is a more descriptive term as it directs attention to the ability to ship and consequently to sell the product rather than to its quality. Ore which does not for the time being meet the criteria for direct shipping - that is ore which requires processing other than crushing or screening or both before it is a saleable commodity - is for convenience described as low-grade ore and in these proceedings that is the manner in which that term is used.

To facilitate the better understanding of what follows it is appropriate that some explanation of the terminology used should be advanced.

All references to the dimensions of ore are expressed in millimetres and refer to the nominal dimensions at which material referred to is sized. In this context nominal dimension of sizing means the dimension at which the relevant sizing apparatus is designed to split the oversize material from the undersize material. For example, a screen which is designed to allow material of less than, say, 100 millimetres to pass through would split the material into two fractions one being the oversize described as +100mm and the other the undersize described as -100mm. The further sizing of the latter fraction by a screen which will allow material of, say, less than 50 millimetres to pass through would produce two fractions described as -100mm + 50mm (i.e. less than 100 millimetres but more than 50 millimetres) and -50mm (i.e. less than 50 millimetres).

Mention has already been made of screening. The definition applied to that term by the expert witnesses is the process of presenting particles to apertures. The concept of a screen is

one commonly understood and for the present needs no further amplification. Much has been made of different types of screens and different methods of screening used in the processing of iron ore. The major distinction is between dry and wet screening. With the former the material is screened dry but with the latter water is added either before or during (but usually both before and during) the screening process. To the extent that screening is understood to mean the presentation of particles to apertures I am unable to see any reason to distinguish between the two processes.

One other term that crops up which is not commonly used and is not readily understood is sieve bend. The name suggests something in the nature of a fine screen or sieve but does not give any hint as to the characteristics which distinguish it from any other screen or sieve. For present purposes it is sufficient to say that a sieve bend is a stationary non-vibrating continuously curved concave wedge-bar screen to which material in slurry form is fed which produces particle separation whereby the small particles pass through the openings between the wedge-bars and the oversize continues to flow across the screen and is continuously dewatered as it does so.

The plaintiff's practice with high-grade ore is that before it is railed to the port facility at Dampier for shipment it is crushed to -30mm and then sized by screening into two categories, lump ore (-30mm + 6mm) and fines (-6mm). No part of the high-grade ore is discarded.

The process of mining high-grade ore of necessity involves the extraction of other material which is too impure to sell after merely submitting it to the processes described in relation to high-grade ore. Some of this other material is of no use at all, but it also includes material properly described as

low-grade ore. Before the concentrator was commissioned in 1979 the plaintiff stockpiled a substantial quantity of low-grade ore which was unsaleable without purification, that is, it required processing in such a way as to detach and remove impurities from the hematite so as to produce a product suitable for blending with other ore to form a saleable commodity. To achieve this end substantial investment was necessary to design and build the concentration plant at Tom Price.

The concentrator was commissioned on 1st April 1979. A considerable volume of detailed evidence was given touching upon the processes to which ore is subjected within the concentrator but it is unnecessary to here recite that evidence in detail. I prefer to initially give a brief summary of the operation of the plant and to do this I propose to refer to an article published in Mining and Metallurgical Practices in Australasia - The Sir Maurice Mawbey Memorial Volume (published 1980). This article - which was put in evidence - was written by the plaintiff's witness Colin Roy Langridge shortly after the plant was commissioned at a time he was the plaintiff's General Superintendent - Ore Treatment at Tom Price. I will quote the whole of the article as published.

"IRON ORE CONCENTRATION PLANT OF HAMERSLEY IRON PTY. LIMITED, MOUNT TOM PRICE, W.A.

Colin R. Langridge

INTRODUCTION

During 1979 the total capacity of Hamersley's operations was increased to 46 million t/yr of shipped products. This expansion was achieved through the installation of a concentrating plant in which saleable products are recovered from the low grade ore mined at Mount Tom Price.

PLANT FEED

Low grade ore fed to the concentrating plant is a mixture of hematite and shale. The hematite and shale components of the ore are well liberated, even in the coarsest size ranges treated in the

plant. Testwork indicated that sizing, heavy medium separation, and wet high intensity magnetic separation would provide the most efficient methods of concentrating this ore.

The plant has the capacity to process 13 million t/yr of this low grade ore to produce approximately 10.8 million t/yr of saleable products. A basic flowsheet is shown in Fig.1 and a general view of the plant in Fig.2.

FEED PREPARATION

Low grade ore is delivered by haul trucks to two vibrating, five-step grizzley screens located at the No.2 primary crusher tiphead.

The grizzley oversize (+200mm) does not require concentration. It is crushed in No.2 primary crusher and is then reduced to lump and fines products in existing crushing and screening plants as described earlier. Undersize material (-200mm) is conveyed to a new primary stockpile. Beneath this stockpile twin reclaim conveyors, each fed by three vibrating feeders, convey the ore to scalping screens and secondary crushers.

The scalping screens size the material at 80mm. The oversize (+80mm) does not require concentration and is crushed in the secondary crushers. Secondary crusher product joins tertiary crusher product and is conveyed to product screens. The screen oversize (+30mm) is crushed in tertiary crushers in closed circuit and the screen undersize (-30mm) is conveyed to a new lump stockpile.

The scalping screen undersize (-80mm) is conveyed to the wet screening and washing plant. Screening at 30mm, 6mm, and 0.5mm produces four sized fractions for subsequent treatment.

-80 + 30mm FRACTION

The +30mm material is treated in one 4.3m by 3.7m Wemco heavy medium drum of 600 t/h capacity. Sink product, after being drained and rinsed for medium recovery, is conveyed to the tertiary crushing and product screening circuits.

-30 + 6mm FRACTION

The -30mm + 6mm material is treated in two heavy medium drums, each of 330 t/h capacity. Each module is identical with the one treating the -80mm + 30mm material. The sink product after draining and rinsing is conveyed directly to the new lump stockpile.

-6mm + 0.5 mm FRACTION

The -6mm + 0.5mm material is concentrated in a heavy medium cyclone plant. The plant contains three

modules each designed to treat up to 200 t/h of ore. Sink product, after draining and rinsing, is conveyed to dewatering bunkers and thence to fines stockpiles.

-0.5mm FRACTION

Wet high intensity magnetic separation (WHIMS) is employed in the treatment of the -0.5mm material. This material is first hydrocycloned to remove the ultrafines fraction (approximately -0.063mm), which is then thickened and pumped to a tailings dam. The hydrocyclone underflow is upgraded using two Jones DP 317 magnetic separators. The WHIMS concentrate is dewatered by cyclones and dewatering screens. An oil-fired rotary dryer has been installed and has the capacity to reduce the moisture content of all wet fines concentrate (including the heavy medium cyclone product) to a level which permits efficient materials handling. "

The mode of operation described in this article was followed from the commissioning of the plant until 1st March 1981. Since the latter date an alternative mode has been adopted whereby the +80mm oversize from the scalping screens, after being reduced by secondary crushing to -80mm rejoins the -80mm stream from the scalping screens and is conveyed to the wet screening and washing plant.

Some explanation of the terms heavy medium drum and sink product is warranted. The heavy media drums are revolving drums which contain an unstable suspension of ferrosilicon in water which has a specific gravity that permits the higher density iron ore to sink and the lighter shaley material to float. Hence the sink product is the concentrated ore whilst the "floats" become waste or tailings.

In its original mode of operation (which it is still capable of) the scalping screen oversize went to the product stockpile without being subjected to any process other than screening and crushing. It would therefore, in my opinion, be ore to which proviso (a) applies, it not having been subjected to any treatment contemplated by proviso (b).

The feed for the wet screening and washing plant is conveyed initially into feed bins from which it is fed into a chute. Much time was spent during the hearing debating what label should be attached to this chute. Some witnesses called it a pulping box, others a feeder chute whilst at least one other witness preferred scrubbing box. For myself I am unconcerned and uninfluenced by what various people may call it. It is sufficient for the purpose of this judgment to understand that the three names I have mentioned are synonymous and the use of either one or other is of no particular significance. The reason for the debate over nomenclature is that witnesses supporting the plaintiff's case asserted that one or other of processes described as washing and scrubbing occurred whilst the ore was in the chute. To my recollection no evidence was given as to the relevance of the word pulping but there is evidence on record (notably the glossary from Pryor, Mineral Processing) which defines pulp as a mixture of ground ore and water capable of flowing through suitably graded channels as a fluid. I do not really understand why the parties felt so much importance attached to what this chute was called but in case I have misunderstood the position I will refer to it as the feed chute of the wet screening plant.

The feed chute has enclosed sides and runs vertically between the base of the feed bins and the top deck of a screen. It is about 1.5 metres long. Ore is released from the feed bin and as it falls it is subjected to spraying with water. The fall of the combination of ore and water is arrested by a metal plate at the base of the feed chute from whence it flows as a slurry on to the screen deck where it is subjected to further spraying. This screen sizes the ore into +30mm and -30mm fractions. Immediately below the top deck is another screen -

also subjected to spraying with water - which sizes the -30mm material into +6mm and -6mm fractions. The latter fraction descends as a slurry through pipes to a sieve bend and thence on to another screen where more water is applied. The sieve bend and screen size the material into fractions of -6mm + 0.5mm and -0.5mm. The four streams so created are then dealt with in the manner described in Mr. Langridge's article.

Having now established the particular fractual context in which the issue between the parties has arisen it will be useful to consider the competing submissions as to how the matter should be resolved.

In his final address senior counsel for the plaintiff put two alternative propositions. The first is that beneficiation within the meaning of proviso (b) to clause 9 begins each time iron ore passes through the grizzley. By this I understand that only the undersize ore (-200mm) which is separated at the grizzley is being referred to as the oversize does not pass through the screens that constitute the grizzley. The plaintiff's alternative proposition is that beneficiation relevantly begins at the stage in the whole process when something happens to the ore which is not properly to be regarded as crushing or screening. It was submitted that this occurs at least as early as the feed chute of the wet screening plant or on the screens immediately below it.

The defendants dispute that any process other than crushing or screening occurs until the various streams of ore enter the heavy medium drums (in the case of the -80mm + 30mm and -30mm + 6mm fraction), the heavy medium cyclone (in the case of the -6mm + 0.5mm fraction) or the hydrocyclone (in the case of the 0.5mm fraction).

The plaintiff's primary proposition is appealing because

of its simplicity. There are many practical reasons why it would be a convenient way to resolve the dispute but to accept it would be to disregard the words of the contract, particularly the last four words of proviso (b). If the proviso had concluded "but crushing or screening shall not be deemed to be beneficiation" the argument that beneficiation is a single process from start to finish which goes on in a single plant would have been more appealing. There would have been a strong case to suggest that the negative deeming provision is merely a safeguard against the possibility that someone may think that ore to which proviso (a) applies is swallowed up by proviso (b). But to adopt this view would be to ignore the words "or any part thereof". Those final words must have been intended to have some meaning and in my opinion they recognise that crushing and screening may form part of a total process of beneficiation and they say that in this contract, should the plaintiff choose to beneficiate ore by such process, then there is to be no deemed disposal of the ore until it has been subjected to some process other than crushing or screening. The defendants' case and the plaintiff's alternative proposition are both based on this construction of the contract which in my view is the correct meaning to be assigned to it.

The resolution of the dispute therefore turns upon determining whether or not the processes which I have described as occurring in the wet screening and washing plant involve merely the separation by size of the ore by means of screens. The defendants assert the affirmative of that proposition whereas the plaintiff asserts that initially in the feed chute and then on the screen decks a change in the physical character of the ore is effected by the addition of water which it says is the start of the beneficiation process. It is necessary therefore to consider just what occurs in the feed chute.

The parties and their witnesses have debated at considerable length the question of whether or not the water applied in the feed chute is by way of a jet or a spray. There were as many opinions as to what occurs in the feed chute as there were witnesses. Witness after witness was cross-examined as to his own - and indeed other witnesses' - understanding of terms like scrubbing, washing and wetting. Just as I am unmoved by the names the witnesses choose to attach to that part of the physical structure which I have called the feed chute so am I unmoved by the name they attach to the process which goes on within it. Nor do I have any real concern for the reason the designer has adopted any particular process in the laying out of the plant. My task at this stage is to discern what happens to the material which finishes up as beneficiated iron ore in order to determine when the process of beneficiation as understood in proviso (b) to clause 9 begins. With this task in mind, I am satisfied on the evidence produced that when water is applied to the ore as it falls down the feed chute the physical characteristics of the feed are altered by the removal of fine particles of both ore and gangue from the larger pieces and by the initiating of the process of breaking down water active clay material contained in the ore stream. The extent to which these effects are achieved in the feed chute has not been measured and no doubt, having regard to the very short time the ore is in the chute (about half a second or so) it would only be minimal, but nevertheless it represents the first of a series of steps designed to achieve the ultimate objective of producing beneficiated iron ore; and not being a process involving either crushing or screening the wetting of the ore in the feed chute marks the beginning of beneficiation a defined in proviso (b) of clause 9 of the contract.

The resolution of this question, that is, what goes on in the feed chute has required me to make a finding of fact based upon the evidence. In view of the importance of the question in the ultimate determination of the proceedings and having due regard to the eminence of the witnesses called to testify on this issue I will indicate briefly my reasons for reaching the conclusion I have.

In my opinion the witness best qualified to give evidence not of opinion but of observed fact concerning the operation of the feed chute was Dr. Robin John Batterham, a senior principal research scientist employed as section leader of the chemical engineering section of the CSIRO mineral engineering division. Of all the expert witnesses he has had the closest and most extensive involvement with the plaintiff's plant and this involvement has extended from the original design stage until the present time. I accept his evidence that the Tom Price ore contains water active clay material, that in the feed chute the ore stream is subjected to a deliberate and fairly violent flooding and that this has what the witness described as "a scrubbing effect" on the ore. The passages quoted hereunder from the witness's evidence explains what he means. The witness had just before giving the evidence quoted, demonstrated the affect of water on several pieces of clay extracted from the ore stream and in response to a question from the plaintiff's counsel asking him to explain what chemical processes had caused the disintegration of the clay which had been observed in court he gave a long and detailed answer. He was then asked how long the process that is begun when the water is first put on the clay continues, to which he responded (Transcript pp. 494, 495-6).

> "The process of violent wetting and the subsequent changes has two components to its time scale. The first is the very rapid one, that the penetration of water onto the surface and the subsequent

breaking off or liberation of the adhering fines is as rapid as you can present particles to the water curtain, and it is a violent curtain of water that the particles fall through. It is not spraying water onto particles. It is dropping them through a curtain. So the adhering fines, I suspect, become liberated as long as they are inert material themselves; they will become liberated rapidly. However, the clays, as we saw, whether they are part of adhering fines - and of course some of it is - or whether it is as competent rock, will take a variable time to absorb their water and to lose whatever bonds were between small particles and large or in the structure of the material itself.

It would be my observation that the first process of initial application of water is very rapid in its effectiveness, providing the particles are presented fairly individually. If they are presented as a mass - for example, bringing the water onto a stockpile and spraying it - then the rate of penetration can be quite incredibly slow. This is the, I am sure familiar to Perth people, gardening phenomenon of spraying water onto a sandy soil, which nominally should absorb water at a great rate but if it has not been previously wetted (and even to some extent if it has) you can wet the top part very quickly but then the penetration further down is very slow. We are not talking that, however, in the Hamersley case. We are only, if you like, dropping the surface layer through the water. That is rapid.

That process of breakdown of clay bonds can go on for a long period of time. It is demonstrably still going on when the material is presented to the heavy media drums and the demonstration of that is that you can -- on that basis, by the way, if you want to describe the breaking up of material as being scrubbing, then you are scrubbing from the time the water hits it until it hits the drums, which is an extended period. "

Dr. Batterham's evidence that the falling ore is subjected to a deliberate and violent flooding was tested both in cross-examination and by other testimony but in the result I am satisfied that his description of the sprays and the effect of the water on the material fairly conveys the fact of the situation. In the very distinguished company in which he appeared it would be misleading to say that I found Dr. Batterham a more credible witness than the other experts who testified. In my view he was however better equipped in terms of his knowledge and understanding of the operation of the particular plant to

give evidence both as to his observation and his opinion. For these reasons I have concluded that the wetting of the ore in the feed chute effects an immediate change in the physical characteristics of the ore and it is at that time that beneficiation begins for the purpose of clause 9 proviso (b).

In my opinion, upon the true construction of the contract the plaintiff is obliged to pay to the defendants (as the persons who for the time being constitute the vendors within the meaning of the contract) in respect of iron ore which has been beneficiated, an amount equivalent to 2½% of the assumed f.o.b. price (assessed in accordance with the provisions of the contract) of all low-grade iron ore fed into the feed chute of the wet screening plant of the plaintiff's concentrator at Tom Price.

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

No. 2313 of 1982

IN THE MATTER of an Agreement between LANGLEY GEORGE HANCOCK, ERNEST ARCHIBALD MAYNARD WRIGHT, WRIGHT PROSPECTING PTY LTD, HANCOCK PROSPECTING PTY LTD, two other companies and HAMERSLEY IRON PTY. LIMITED

B E T W E E N :

HAMERSLEY IRON PTY. LIMITED
Plaintiff
- and -
LANGLEY GEORGE HANCOCK
First Defendant
- and -
ERNEST ARCHIBALD MAYNARD WRIGHT
Second Defendant
- and -
HANCOCK PROSPECTING PTY LTD
Third Defendant
- and -
WRIGHT PROSPECTING PTY LTD
Fourth Defendant
- and -
L.S.P. PTY LTD
Fifth Defendant
- and -
THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED
Sixth Defendant

BEFORE THE HONOURABLE MR. JUSTICE OLNEY IN CHAMBERS
THE 9th DAY OF JANUARY, 1984

UPON THE APPLICATION of the Plaintiff by Originating Summons dated the 2nd day of September, 1982 coming on for hearing on the 7th, 8th, 9th, 10th, 11th, 14th, 15th, 16th, 17th, 18th, 21st, 22nd, 23rd, 24th and 25th days of November, 1983 and the 23rd day of December, 1983 AND UPON HEARING Mr. S.E.K. Hulme one of Her Majesty's Counsel with him Mr. F.H. Callaway of Counsel for the Plaintiff and Mr. J. Sher one of Her

Majesty's Counsel with him Mr. P. Heerey of Counsel for the first, second, third, fourth and fifth Defendants and Mr. A.J. Templeman of Counsel for the sixth Defendant and the Judge having ordered that the matter stand for judgment and the same standing for judgment this day IT IS ORDERED AND DECLARED that:

1. upon the true construction of the Agreement a copy of which is set out in the Schedule hereto ("the contract"), the plaintiff is obliged to pay to the defendants (as the persons who for the time being constitute the vendors within the meaning of the contract) in respect of iron ore which has been beneficiated, an amount equivalent to two and one half per centum of the assumed f.o.b. price (assessed in accordance with the provisions of the contract) of all low-grade iron ore fed into the feed chute of the wet screening plant of the plaintiff's concentrator at Tom Price in the State of Western Australia.

2. (a) The first, second, third, fourth and fifth Defendants pay the plaintiff's costs of recalling Colin Roy Langridge to give evidence on the 22nd day of November, 1983;

   (b) The plaintiff's other costs of these proceedings (including reserved costs and the cost of the transcript) be paid by the defendants as in an action on the higher Supreme Court scale, with a certificate for second Counsel;

3. As between the Defendants the costs referred to in sub-paragraph 2(b) hereof be borne in the proportions following: that is to say -

   (a) as to eighty five per centum thereof by the first, second, third, fourth and fifth Defendants; and

(b) as to fifteen per centum thereof by the sixth Defendant.

4. In default of agreement as to the amount of the plaintiff's costs, the plaintiff have liberty to apply for a Special Order as to costs pursuant to Order 66 Rule 12;

5. The time for filing and serving a Notice of Motion to Appeal to the Full Court from this Order be extended to and including the 13th day of February, 1984; and

6. There be liberty to apply generally.

BY THE COURT,

DEPUTY REGISTRAR.

THIS DECLARATION was extracted by J.R. Wood, of 18th Floor, Hamersley House, 191 St. George's Terrace, Perth, Solicitor for the Plaintiff. Tel: 327-2327. Ref: JRW:GJM:2208L.

NOTICE OF APPEAL

TAKE NOTICE that the Full Court of the Supreme Court of Western Australia will be moved by Counsel for the Appellant at the first sittings of the Full Court of the Supreme Court of Western Australia to be held on the expiration of eight weeks from the institution of this Appeal, or as soon thereafter as Counsel may be heard, for an order that the whole of the judgment of His Honour Mr Justice Olney delivered in this action on the 9th day of January 1984 wherein the learned Judge ordered that:

1. Declare that, upon the true construction of the Agreement, a copy of which is set out in the Schedule hereto ("the Contract"), the plaintiff is obliged to pay to the defendants (as the persons who for the time being constitute the vendors within the meaning of the Contract) in respect of iron ore which has been beneficiated, an amount equivalent to 2.5% of the assumed f.o.b. price (assessed in accordance with the provisions of the Contract) of all low-grade iron ore fed into the feed chute of the wet screening plant of the plaintiff's concentrator at Tom Price.

2. (a) The plaintiff's cost of recalling Colin Roy Langridge to give evidence on 22 November 1983 be paid by the first to fifth defendants inclusive.

(b) The plaintiff's other costs of these proceedings

(including reserved costs and the cost of the transcript) be paid by the defendants as in an action on the higher scale with a Certificate for Second Counsel.

(c) In default of agreement on the amount of the plaintiff's costs of these proceedings, the plaintiff have liberty to apply for a special order pursuant to Order 66 Rule 12.

3. The time for serving and filing a notice of motion by way of appeal pursuant to Order 63 Rule 4(1) be extended to the 13th of February 1984.

4. There be liberty to apply.

be set aside.

AND THAT in lieu thereof judgment be entered for the Appellants and orders be made that:

1. Declare that upon the true construction of the agreement a copy of which is set out in the Schedule hereto beneficiation or other treatment of the low grade ore referred to in the affidavit of Colin Roy Langridge sworn the 2nd day of September 1982 begins within the meaning of clause 9(b) after the preparation screens for the feed to the heavy media drum plants and heavy media cyclone

plant and after the seive bins and screens for the feed to the WHIMS plant.

2. The appellants' (defendants') costs of these proceedings (including reserve costs and the costs of the transcript) be paid by the respondent (plaintiff) are to be taxed as in an action on the higher scale with Certificate for Second Counsel.

3. That in default of agreement on the amount of the appellants' (defendants') costs of these proceedings the appellants (defendants) have liberty to apply for a special order as to costs and such allowances as may be just.

4. That there be general liberty to apply.

AND FURTHER TAKE NOTICE that the grounds of appeal are as follows:

GROUNDS OF APPEAL

1. The learned trial judge was wrong in law and in fact in finding

   (a) that the wetting of the ore in the feed chute effects an immediate change in the physical characteristics of the ore and that it is at that

time that beneficiation begins for the purpose of clause 9(b) of the agreement dated 12th December 1962 exhibit "CRL 1" ("the contract");

(b) upon the true construction of the contract the respondent (plaintiff) is obliged to pay to the appellants (defendants) (as the persons who for the time being constitute the vendors within the meaning of the contract) in respect of iron ore which has been beneficiated an amount equivalent to 2½% of the assumed F.O.B. price (assessed in accordance with the provisions of the contract) of all low grade iron ore fed into the feed chute of the wet screening plant of the respondent's (plaintiff's) concentrator at Tom Price.

2. The learned trial judge was wrong in law and in fact in not finding that beneficiation other than crushing or screening begins after the preparation screens for the feed to the heavy media drum plants and heavy media cyclone plant and after the sieve bends and screens for the feed to the WHIMS plant.

3. The learned trial judge erred in failing to apply the principles of construction contended for by the appellants (first to fifth defendants) that is to say that the contract was a commercial document intended by the parties to define their contractual relationship far

into the future and accordingly:

(a) it should receive a fair, broad and practical interpretation;

(b) its true construction and its application to the operations of the respondent (plaintiff) at Mount Tom Price should be ascertained by recourse to objective criteria well known to persons experienced in the practical world of iron ore mining and processing;

(c) it should not be given a construction which would have a capricious, unfair or unreasonable effect, and in particular an effect which would make the point of deemed disposal under clause 9(b) and the consequent rights and obligations of the parties as to the payment of royalties turn on the fortuitous circumstances of the particular nature and characteristics of the ore fed into the concentrator from time to time.

4. The learned trial judge, having found that the term "screening" in clause 9(b) of the contract included wet screening as well as dry screening, should have found that all processes which the uncontradicted evidence showed were an integral part of wet screening or were necessarily or usually involved in wet screening, and in

particular the pre-wetting of ore in a feeder chute, would be comprehended within the term "screening".

5. In finding that "screening" within the meaning of clause 9(b) meant:-

(a) "the presentation of particles to apertures" and/or

(b) "merely the separation by size of the ore by means of screens"

the learned trial judge adopted a meaning which was too narrow and which was contrary to the uncontradicted evidence and as a consequence applied the wrong test in ascertaining whether the process in the feed chute was or was not "screening" within the meaning of clause 9(b).

6. The learned trial judge erred in concluding that because water applied to the ore in the feed chute altered "the physical characteristics of the feed" that therefore what happened was not "screening" or part thereof within the meaning of clause 9(b).

7. In approaching the resolution of the matters in dispute by stating that he was "unmoved by the name (the witnesses) attached to the process which goes on within" the feed chute the learned trial judge erred in disregarding or treating as irrelevant evidence as to the

appropriate characterisation or appellation of the process occurring in the feed chute and in particular evidence:-

(a) of expert witnesses as to the correct or appropriate designation of such process and in particular whether the same was properly to be regarded as part of a screening process;

(b) of the designations of such process adopted by the respondent (plaintiff) itself in plant signs, annual reports and other publications in circumstances where the payment of royalties was not a consideration.

8. The learned trial judge erred in reaching his ultimate conclusion as to the construction of clause 9(b) of the contract by:-

(a) restricting his enquiry as to what happened to the ore in the feed chute to whether or not an alteration in the physical characteristics of the feed took place rather than ascertaining whether what happened in the feed chute properly fell within the meaning of the term "screening" as used in that clause and as understood in the iron ore mining industry in 1962;

(b) assuming that an alteration in the physical characteristics of the feed prevented the conclusion being reached that what happened in the feed chute properly fell within the meaning of the term "screening" as used in that clause and as understood in the iron ore mining industry in 1962.

9. The learned trial judge should have held that the whole of the wet screening process (including pre-wetting in the chute) could properly be referred to or regarded as "screening" and that therefore for the purposes of the application of clause 9(b) of the contract it would not matter that such process or any part thereof might also be:-

(a) properly referred to by some other name and/or

(b) dissected into a number of "sub-processes" some of which did not involve the separation of the ore by size.

10. The learned trial judge erred in finding that the wetting of the ore in the feed chute altered the physical characteristics of the feed by the removal of fine particles of both ore and gangue from the larger pieces and by the initiating of the process of breaking down water active clay material contained in the ore stream and therefore represented the first of a series of steps

designed to achieve the ultimate objective of producing beneficiated iron ore when:-

(a) the uncontradicted evidence showed that -

(i) the plant was deliberately designed to allow the respondent (plaintiff) to divert ore to the high grade stockpile after wet screening without going through the heavy media separation process or being otherwise beneficiated;

(ii) such diversion had in fact occurred;

(b) the respondent (plaintiff) called no evidence from persons responsible for the design of the plant as to the actual design criteria in fact adopted, there being no evidence that such persons were unavailable to give evidence;

(c) the removal of fine particles of both ore and gangue from larger pieces was an inevitable concomitant of feeding ore to a screen;

(d) the presence of water active clay material contained in the ore stream was a fortuitous circumstance arising from the nature of the ore encountered after the plant had been commissioned and not something

for which the feed chute was in fact designed;

(e) the proper inference to be drawn from the evidence was that if maximum wetting of the ore to initiate the process of breaking down was the true purpose or design a quite different form of device would have been installed.

11. The learned trial judge erred in assuming, either contrary to the evidence or alternatively in the absence of any evidence, that the particular characteristics of the ore feed referred to by the witness Batterham and in particular the alleged characteristic of being especially water active;

(a) were those for which the concentrator plant was in fact designed;

(b) were typical of ore fed into the concentrator throughout the period of its past and likely future operation;

(c) represented a constant factor in the operation of the concentrator plant.

12. The learned trial judge erred in reaching an ultimate conclusion which was inconsistent with the following matters which were the subject of uncontradicted evidence

or inferences which should have been drawn from such evidence and to which he gave no or no adequate weight:-

(a) the term "screening" includes wet screening;

(b) one of the well known methods of beneficiation of iron ore available in 1962 was the heavy media separation process subsequently installed at Mount Tom Price;

(c) most methods of beneficiation known in 1962 involved wet screening as part of the beneficiation process;

(d) the heavy media separation process was known in 1962 to include wet screening as an initial step;

(e) wet screening was known in 1962 to necessarily or usually involve pre-wetting in a chute or similar device:

(f) the heavy media separation process would be known in 1962 to involve wet screening (including pre-wetting in a chute) irrespective of the nature of the ores involved and whether the ores were water-active or otherwise;

(g) the concentrator at Mount Tom Price was initially designed for different ores than those subsequently

encountered;

(h) the meaning of the word "screening" in clause 9(b) could not have been intended by the parties to change from time to time depending on whether or not particular ores from time to time were clayed or water-active.

13. The learned trial judge placed undue weight on the evidence of the witness Batterham having regard to:-

(a) his use of the term "scrubbing" to describe what happened in the chute contrary to the weight of evidence of practical mining experts called by both sides;

(b) the ambiguity in his evidence as to the extent of his personal involvement in the design of the wet screening process at Mount Tom Price or in subsequent modifications of that process;

(c) the lack of any evidence that he specifically studied or addressed his attention to the operations of the feed chute other than on the occasion of his visit in March 1983;

(d) his lack of experience and expertise in the practical operation of iron ore mining and the

design of iron ore beneficiation plant compared with other witnesses and in particular the witnesses Langridge, Pritchard, Herkenhoff, Grosvenor, Booth and Beukema;

(e) his failure to demonstrate that samples he had taken were typical of the feed into the concentrator;

(f) the discrepancy between the test conducted by him on ore samples and the test conducted by the witness Grosvenor;

(g) His Honour's error in concluding that the witness was best qualifed to give evidence of observed fact as to the operation of the feed chute.

14. The learned trial judge erred in failing to give any or any adequate weight to the evidence of the second appellant (second defendant) as to the circumstances of the preparation of the contract and that to the extent that the contract contains any ambiguity, such ambiguity should be construed in favour of the appellants (first to fifth defendants).

15. The leared trial judge erred in making a declaration which in terms applied to all ore fed into the concentrator notwithstanding:-

(a) his ruling during the course of the trial that the appellants (first to fifth defendants) might in other proceedings contend that clause 9(b) did not apply at all to ore which did not need to be beneficiated;

(b) his reliance on the nature of the particular ore referred to by the witness Batterham and the fact that the same was water active.

16. The learned trial judge wrongly exercised his discretion under Order 66 Rule 1(2) and/or (3) in failing to order that the respondent (plaintiff) pay the costs of the issue raised by the resondent's (plaintiff's) contention that the term "screening" in clause 9(b) meant dry screening only.

17. The learned trial judge wrongly exercised his discretion in failing to vacate the order made that the appellants (first to fifth defendants) should pay the costs of the re-call of the witness Langridge in any event.

DATED the 10th day of February 1984

Stone James Stephen Legg

Solicitors for the Sixth Appellant
(Sixth Defendant)

DOCUMENT 6* - Notice of Appeal in Appeal No. 59 of 1984 dated 13.2.84

TO: The Respondent
(The Plaintiff)
and its solicitor
A.W. Patterson,
18th Floor,
191 St. Georges Terrace,
PERTH. W.A. 6000

AND
TO: The First to Fifth Appellants
(First to Fifth Defendants)
and their solicitors,
Messrs Keall Brinsden & Co.
150 St. Georges Terrace,
PERTH. W.A. 6000

THIS NOTICE OF APPEAL was filed by Messrs Stone James Stephen Jaques, solicitors for the Sixth Appellant (Sixth Defendant), whose address for service is Law Chambers, Cathedral Square, Perth.
Tel. 325 0431
Ref. PRC
smw.Op4

DOCUMENT 6* - Notice of Appeal in Appeal No. 59 of 1984 dated 13.2.84

1466 - 10/ —

AN AGREEMENT dated December 1962 and made between LANGLEY GEORGE HANCOCK, ERNEST ARCHIBALD MAYNARD WRIGHT and WRIGHT PROSPECTING PTY. LTD. all of 609 Wellington Street, Perth, Western Australia and HANCOCK PROSPECTING PTY. LTD. of 150 Victoria Avenue, Dalkeith, Western Australia (hereinafter together called "the Vendors") of the first part RIO TINTO MANAGEMENT SERVICES (AUSTRALIA) PTY. LTD. of 95 Collins Street, Melbourne (herpinafter called "R.T.M.S.") of the second part RIO TINTO SOUTHERN PTY. LTD. of 95 Collins Street, Melbourne Victoria (hereinafter called "R.T.S.") of the third part and HAMERSLEY IRON PTY. LTD. of 95 Collins Street, Melbourne, Victoria (hereinafter called "the Purchaser") of the fourth part WHEREAS

(a) By an Agreement dated 11th September 1959 (hereinafter called "the First Agreement") made between the Vendors of the one part and R.T.M.S. of the other part the Vendors granted to R.T.M.S. the sole and exclusive option to acquire certain mining titles referred to in the First Agreement on the terms set out in that Agreement;

(b) By an Agreement dated 1st December 1959 (hereinafter called "the Second Agreement") made between the Vendors of the one part and R.T.M.S. of the other part the First Agreement was amended in various respects;

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(c) Prior to 9th April 1961 R.T.M.S. had assigned its rights and obligations under the First and Second Agreements to R.T.S.

(d) By an Agreement dated 9th April 1961 (hereinafter called "the Third Agreement") made between the Vendors of the first part, R.T.M.S. of the second part and R.T.S. of the third part certain matters were recorded and certain other matters were agreed;

(e) There have been made to the Vendors payments totalling Forty two thousand pounds (£42,000) particulars whereof are set out in the First Schedule hereto.

(f) The Western Australian Government has granted to the said Wright Prospecting Pty. Ltd., Hancock Prospecting Pty. Ltd., and R.T.S. certain rights and privileges in or in respect of the Temporary Reserves for iron ore listed in the Second Schedule hereto (hereinafter called "the said Temporary Reserves") those in the First Part thereof for the term of two years from 19th July, 1961 and those in the Second Part thereof for the term of two years from 1st April 1962.

(g) 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.

(h) It is also intended that R.T.S. shall transfer to the Purchaser its interest in the said Temporary Reserves and the Temporary Reserve land and all rights to prospect or mine granted thereby or flowing therefrom and shall at the same time assign to the Purchaser the full benefit of the loans referred to in Clause 3 hereof.

NOW IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:

The Vendors shall sell and the Purchaser shall purchase all the right title and interest of the Vendors in and to and in respect of the said Temporary Reserves and each of them and the land comprised therein and all rights to prospect or mine granted thereby or flowing therefrom.

2. The aforesaid sale shall be subject to the consent of the Minister for Mines of the State of Western Australia and any other necessary governmental or like consents.

R.T.S. shall transfer to the Purchaser its interests in the said Temporary Reserves and the said Temporary Reserve land and all rights to prospect or mine granted thereby or flowing therefrom and shall at the same time assign to the Purchaser the full benefit of the loans totalling Forty thousand pounds (£40,000) already made by R.T.S. and/or R.T.M.S. to the Vendors and being the first four amounts mentioned in the First Schedule hereto.

4. The transfer referred to in Clause 3 hereof shall be subject to the consent of the Minister for Mines of the Government of Western Australia and any other necessary governmental or like consents.

5. The Vendors R.T.S. and the Purchaser shall forthwith apply for and use their best endeavours to obtain the abovementioned consents and the Vendors and R.T.S. will immediately such consents are obtained execute and deliver to the Purchaser such transfers surrenders or other documents as may be necessary to enable the Purchaser to become solely entitled to the full benefit of all rights and privileges granted by the said Government in or in respect of the said Temporary Reserves.

6. Upon receipt of all such documents as are referred to in Clause 5 hereof and upon the Purchaser being solely entitled as aforesaid the Purchaser shall forthwith pay to the Vendors (or as they may direct) the sum of Sixty thousand pounds (£60,000) and shall forthwith pay to R.T.S. the sum of Six thousand four hundred and forty-four pounds (£6,444) as consideration for the transfer of the interest of R.T.S. in the said Temporary Reserves and the sum of Forty thousand pounds (£40,000) as consideration for the assignment of the benefit of the aforesaid loans.

7. Notwithstanding anything herein contained in the event that for any reason (excluding always any default or delay by the Vendors but including

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inability to obtain the necessary Governmental or like consents) the aforesaid sale and the aforesaid transfer are not duly completed as herein provided then

(a) Hamersley Iron Pty. Limited shall cease to be a party to this agreement;

(b) All references to the Purchaser in the operative parts of this agreement shall be deemed to be references to R.T.S.

(c) Clauses 3 and 4 hereof shall be deleted herefrom;

(d) The references to R.T.S. shall be deleted from Clause 5 hereof;

(e) The following shall be substituted for Clause 6 hereof viz:-

"Upon receipt of all such documents as are referred to in Clause 5 hereof and upon the Purchaser becoming solely entitled as aforesaid the Purchaser as consideration for the foregoing shall forthwith pay to the Vendors (or as they may direct) the sum of Sixty thousand pounds (£60,000)".

(f) Clause 22 shall be altered by deleting the phrase "consents referred to in Clauses 2 and 4 hereof not being obtained within three months" and substituting the phrase "consent referred to in Clause 2 hereof not being obtained within

four months".

8. The Vendors acknowledge that of the payments totalling Forty two thousand pounds (£42,000) referred to in Recital (e) hereto payments totalling Forty thousand pounds (£40,000) were payments by way of loan to the Vendors and the Purchaser agrees that the total of such payments shall remain as loans to the Vendors. The payment of Sixty thousand pounds (£60,000) referred to in Clause 6 hereof shall also when made be a payment by way of loan to the Vendors. The total loan amount of One hundred thousand pounds (£100,000) shall not bear interest and shall be repayable out of the first amounts from time to time accruing to the Vendors under Clauses 9, 14 or 15 hereof but not otherwise.

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 2½% 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 2½% 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.

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10. For the purposes of Clauses 9, 14 and 15 hereof the term "the Temporary Reserve land" shall be deemed to include in addition to the land comprised in the said Temporary Reserves any other land as described in the Third Schedule hereto in respect of which the

Purchaser by itself or any subsidiary (within the meaning of that term in the Companies Act 1961 of the State of Victoria) and whether operating alone or in association with or by licence to others obtains Temporary Reserves or other titles or rights to mine iron ore at any time prior to the time of readiness for production.

11. The term "time of readiness for production" in Clauses 10 and 12 hereof shall mean the time by which the Purchaser has made all necessary preparations to enable it to commence the production of iron ore from any part of the Pilbara, the West Pilbara or the Ashburton Goldfields and to move that iron ore to a place of shipment or a place of treatment on the basis that such production will be at the rate of 1,000,000 tons of iron ore per annum.

12. Subject to Clause 13 hereof during the period from the date hereof to the time of readiness for production (hereinafter called "the pre-production period") the Vendors shall disclose to the Purchaser and to the Purchaser only the location of any iron ore deposits known to them or to any of them during that period and being in the Pilbara the West Pilbara or the Ashburton Goldfields.

13. During the pre-production period the Vendors shall if requested by the Purchaser and at its expense assist the Purchaser in obtaining from the Government of Western Australia rights to mine the iron ore deposits

referred to in Clause 12 hereof and shall not obtain or seek to obtain any mining tenement or tenements or other rights or titles thereto or in respect thereof on their own account or for or on behalf of any other person or persons company or companies PROVIDED ALWAYS that should the Vendors at any time during the pre-production period disclose to the Purchaser the existence of any iron ore deposits in the Pilbara, the West Pilbara or the Ashburton Goldfields and being outside the Temporary Reserve land and if within the period of three months after service of notice in writing by the Vendors on the Purchaser delineating the land in which those iron ore deposits are located the Purchaser does not apply for a Temporary Reserve or other title or rights to mine iron ore in respect of the land comprised in such notice then the Vendors shall not be in breach of the foregoing provisions of this clause if they themselves apply for a Temporary Reserve or other title or rights to mine in respect thereof on their own account or for or on behalf of any other person or persons company or companies.

14. Should the Purchaser by itself or any subsidiary (within the meaning of that term in the Companies Act 1961 of the State of Victoria) and whether operating alone or in association with or by licence to others obtain during the pre-production period from the Government of Western Australia Temporary

Reserves or other titles or rights to mine all or any of the iron ore deposits referred to in Clause ~~19~~ 12 hereof (other than any iron ore deposit within the area comprised in the Temporary Reserve referred to in the Fourth Schedule hereto) then 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 such of those deposits in respect of which rights to mine are obtained as aforesaid and sold or otherwise disposed of by the Purchaser or by the Purchaser and such associate or ~~such~~ by such licensee an amount equivalent to 2½% 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 provisos (a) to (f) inclusive of Clause 9 hereof shall apply also to this clause. AND PROVIDED FURTHER THAT if any amount is payable in respect of iron ore from a particular deposit under Clause 9 hereof no additional amount shall be payable under this clause.

Should the Purchaser during the pre-production period obtain from any other person or persons or company or companies any Temporary Reserves or other title or rights to mine iron ore in any areas forming part of the Pilbara the West Pilbara or the Ashburton Goldfields and being outside the

Temporary Reserve land or an option to acquire any such Temporary Reserves or other titles or rights to mine iron ore 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 b licence to others) from such of those areas in respect of which Temporary Reserves or other titles or rights to mine iron ore or an option to acquire the same are obtained as aforesaid and sold or other wise disposed of by the Purchaser or by the Purchase and such associate or by such licensee an amount equivalent to 2½% 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 ther of PROVIDED ALWAYS that:

(a) Subject to paragraph (b) hereof provisos (a) to (f) inclusive of Clause 9 hereof shall also apply to this clause.

(b) Should any such Temporary Reserves or other titles or rights to mine or an option to acquir the same not be obtained through the agency of the Vendors no amount shall be payable to the Vendors pursuant to this clause until the total nett profit obtained by the Purchaser from the iron ore deposit concerned has equalled the capital consideration payable for it from time to time by the Purchaser to such person or persons company or companies the intention bein

that the Purchaser shall recoup such capital consideration from such nett profit before coming under any obligation to make payments to the Vendors pursuant to this clause. For the purposes of this paragraph capital consideration shall not include any amounts payable by way of royalty. For the purposes of this paragraph nett profit shall mean such amount as is certified to by the Purchaser's Auditors as being nett profit who in giving such certificate shall calculate nett profit on the basis of what would then be the difference between the assessable income of the Purchaser for Commonwealth Income Tax purposes and the tax payable on that income if the lastmentioned areas were worked and iron ore were shipped therefrom as a separate operation and

(c) Notwithstanding the foregoing no amount shall be payable to the Vendors pursuant to this clause with respect to iron ore concerning which amounts are or may be payable pursuant to the agreement referred to in the Fourth Schedule hereto.

During the pre-production period the Purchaser will comply with all conditions imposed under the said Temporary Reserves or as a result of any agreement with the Government of Western Australia on the Purchaser in respect of any areas held by it in any

part of the Pilbara, the West Pilbara or the Ashburton Goldfields but the Purchaser shall be under no obligation to the Vendors pursuant to this clause in any case where non-compliance with such conditions is waived acquiesced in or concurred in by or on behalf of the Government of Western Australia or in any case where no positive action is taken by or on behalf of such Government in respect of such non-compliance.

17. The Purchaser shall unless prevented by circumstances beyond its control (which shall include inability of the Purchaser after using reasonable endeavours in that regard to obtain all necessary titles, finance and sales contracts) commence within two years from the date hereof active preparations for the working of an iron ore deposit in some part of the Pilbara, the West Pilbara or the Ashburton Goldfields and being an iron ore deposit in respect of which an obligation to pay an amount has arisen or may arise pursuant to Clauses 9, 14 or 15 hereof provided that whether before or after the expiration of the said two years if by the terms of any agreement made between the Purchaser (either alone or in association with others) and the Western Australian Government or if by any of the terms of issue of any mining titles pursuant to or arising from the said Temporary Reserves or the said agreement the Purchaser is required to assume obligations as to

the incurring of expenditure or the working of iron ore in the areas specified in the said agreement or the said mining titles or the construction of transport or loading facilities or plant in respect of any such operations then and in any of such cases the obligation of the Purchaser under this Clause shall cease, if the assumption of such obligations shall constitute active physical preparation for the working of at least one iron ore deposit in some part of the Pilbara, the West Pilbara or Ashburton Goldfields as aforesaid or active physical preparation for or in relation to the treatment transport or shipment of iron ore therefrom.

18. Notwithstanding the provisions of Clause 17 hereof should the Purchaser at any time hereafter decide not to proceed with operations for or in connection with the winning of iron ore from any part of the Pilbara, West Pilbara or Ashburton Goldfields and being iron ore in respect of which an obligation to make payments under Clauses 9, 14 or 15 hereof has arisen or may arise thereafter and notify the Vendors in writing accordingly it will not thereafter be under any obligation to the Vendors pursuant to this agreement but in that event the Purchaser shall offer to transfer to the Vendors (and if so required by the Vendors will transfer to them) without payment all its then Temporary

Reserves and other titles and rights to mine such iron ore subject always to the Vendors obtaining any necessary consents to such transfer and paying all costs and stamp duty in relation thereto in excess of the first Five thousand pounds (£5,000) thereof which the Purchaser shall pay. At the time of making such transfer the Purchaser will make available to the Vendors all geological topographical and similar information obtained by the Purchaser and relating to the areas the subject of such transfer but all such information shall be made available on the condition that the Purchaser in no way warrants the accuracy or completeness thereof and also on the condition that it shall not without the consent in writing of the Purchaser be attributed to the Purchaser its servants or agents by the Vendors in any negotiation or dealings with or representations to any Government or any third party but such consent shall not be unreasonably withheld.

19. In the event of the Purchaser selling or otherwise assigning its title to any areas of land in respect of which an obligation to pay any amount has arisen or may arise pursuant to Clauses 9, 14 or 15 hereof the Purchaser shall at its option either obtain from the buyer or assignee a covenant binding such buyer or assignee for himself or itself and his or its assigns and other successors in title with the Vendors to make payments to the Vendors in respect

of that land in the terms of such one of those clauses as relate thereto or pay to the Vendors an amount equivalent to thirty-three and one-third percent of the Purchaser's nett profit on such sale after deducting all its expenditure on or in connection with the land concerned up to the date of sale. In this clause "expenditure" shall mean direct expenditure on the land concerned (including salaries and wages of personnel working thereon) plus an amount equivalent to twenty percent thereof to cover indirect expenditure including overheads.

20. Any amounts to be paid to the Vendors hereunder may be paid by bank cheque to The Commercial Bank of Australia Ltd. at Head Office, St. George's Terrace, Perth, to the credit of "Hancock & Wright" and the receipt of that bank for any amount so paid shall be sufficient evidence of payment to the Vendors hereunder.

21. The Vendors acknowledge that no sum is now due to them or any of them pursuant to or arising out of an agreement dated 21st October, 1959, made between the Vendors and Arthur Viveash Barrett-Lennard, Frank St. Aubyn Barrett-Lennard and Edward Guy Barrett-Lennard of the one part and R.T.M.S. of the other part.

22. The First Agreement the Second Agreement and the Third Agreement are hereby cancelled and will cease to have any force or effect PROVIDED ALWAYS that in

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the event of the consents referred to in Clauses and 4 hereof not being obtained within three mont from the date hereof this agreement shall cease t have any further force or effect and the First Agreement the Second Agreement and the Third Agre ment shall thereupon continue to operate and the Purchaser shall continue to be entitled to the options thereby granted upon the terms therein co tained.

23. This agreement embodies the entire agreement and understanding between the parties and supersedes all prior agreements and undertakings relating to the subject matter hereof or of the agreements mentioned in Clause 22 hereof. Neither this agree ment nor any provisions hereof may be changed, waived, discharged or terminated orally but only b an instrument in writing signed by or on behalf of the party against whom enforcement of the change waiver discharge or termination is sought.

24. Except where the context otherwise requires:

(i) All undertakings agreements and obligations expressed in this agreement to be assumed or made by "the Vendors" shall be deemed to be made by them jointly and severally;

(ii) The expression "the Vendors" shall include their respective successors and personal rep- resentatives.

(iii) The expression "the Purchaser" shall (except in the case of a sale or assignment pursuant to Clause 19 hereof on the alternative basis therein provided whereby the Vendors become entitled to the alternative of thirty-three and one third percent of the Purchaser's nett profit on such sale) 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.

(iv) The singular shall include the plural and vice-versa.

IN WITNESS whereof the parties hereto have executed these presents the day and year first hereinbefore written.

THE FIRST SCHEDULE HEREINBEFORE REFERRED TO

Particulars of Payments to the Vendors

By the terms of the First Agreement - under Clause 4 (a) in July 1959	..	£2,000
under Clause 6 (a) on 30th December 1959	..	£8,000
By the terms of the Third Agreement under Clause 15 on 18th September 1961	..	£10,000
On 4th April 1962 by way of loan to the Vendors on the terms of a Receipt dated 4th April 1962 by which (inter alia) the amount then paid by the Purchaser was to be repaid by the Vendors not later than 30th September 1962 unless otherwise agreed. (The present agreement of the parties in relation thereto is referred to in Clause 8 hereof)	..	£20,000

On 12th September 1962 under Clause 3 of the First Agreement as amended by the Second Agreement and the Third Agreement .. £2,000

£42,000

THE SECOND SCHEDULE HEREINBEFORE REFERRED TO

PART I

Temporary Reserve Number	Area (Square Miles)
2074H	49.92
2075H	49. 2
2076H	49.59
2077H	49.95
2078H	48
2079H	50
2081H	50
2082H	50
2085H	50
2086H	42

PART II

Temporary Reserve Number	Area (Square Miles)
2310H	48
2318H	49
2418H	38
2419H	49.5
2420H	50
2421H	50
2425H	50
2426H	50
2427H	48
2428H	36
2435H	50
2437H	20.5
2438H	45
2439H	45.5

THE THIRD SCHEDULE HEREINBEFORE REFERRED TO

All those pieces of land delineated and coloured blue on the plan attached hereto and comprising in all an area of approximately 1218 square miles.

THE FOURTH SCHEDULE HEREINBEFORE REFERRED TO

An agreement made the fourth day of May 1962 between Arthur Viveash Barrett-Lennard, Frank St. Aubyn Barrett-Lennard and Edward Guy Barrett-Lennard of the first part and the Vendors of the second part and R.T.S. of the

third part relating to Temporary Reserve Number 2436H and the land comprised therein.

SIGNED SEALED AND DELIVERED by the said LANGLEY GEORGE HANCOCK in the presence of:

L.G. Hancock

SIGNED SEALED AND DELIVERED by the said ERNEST ARCHIBALD MAYNARD WRIGHT in the presence of:

E.A.M. Wright

THE COMMON SEAL of WRIGHT PROSPECTING PTY. LIMITED was hereto affixed by the Governing Director ERNEST ARCHIBALD MAYNARD WRIGHT in accordance with the Articles of Association:

E.A.M. Wright

THE COMMON SEAL of HANCOCK PROSPECTING PTY. LTD. was hereto affixed by the Governing Director LANGLEY GEORGE HANCOCK in accordance with the Articles of Association:

L.G. Hancock

THE COMMON SEAL of RIO TINTO MANAGEMENT SERVICES (AUSTRALIA) PTY. LTD. was hereto affixed in the presence of:

Director:

Secretary:

THE COMMON SEAL of RIO TINTO SOUTHERN PTY. LTD. was hereto affixed in the presence of:

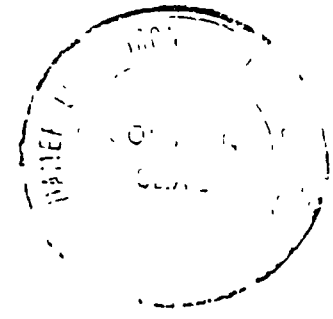
Director:

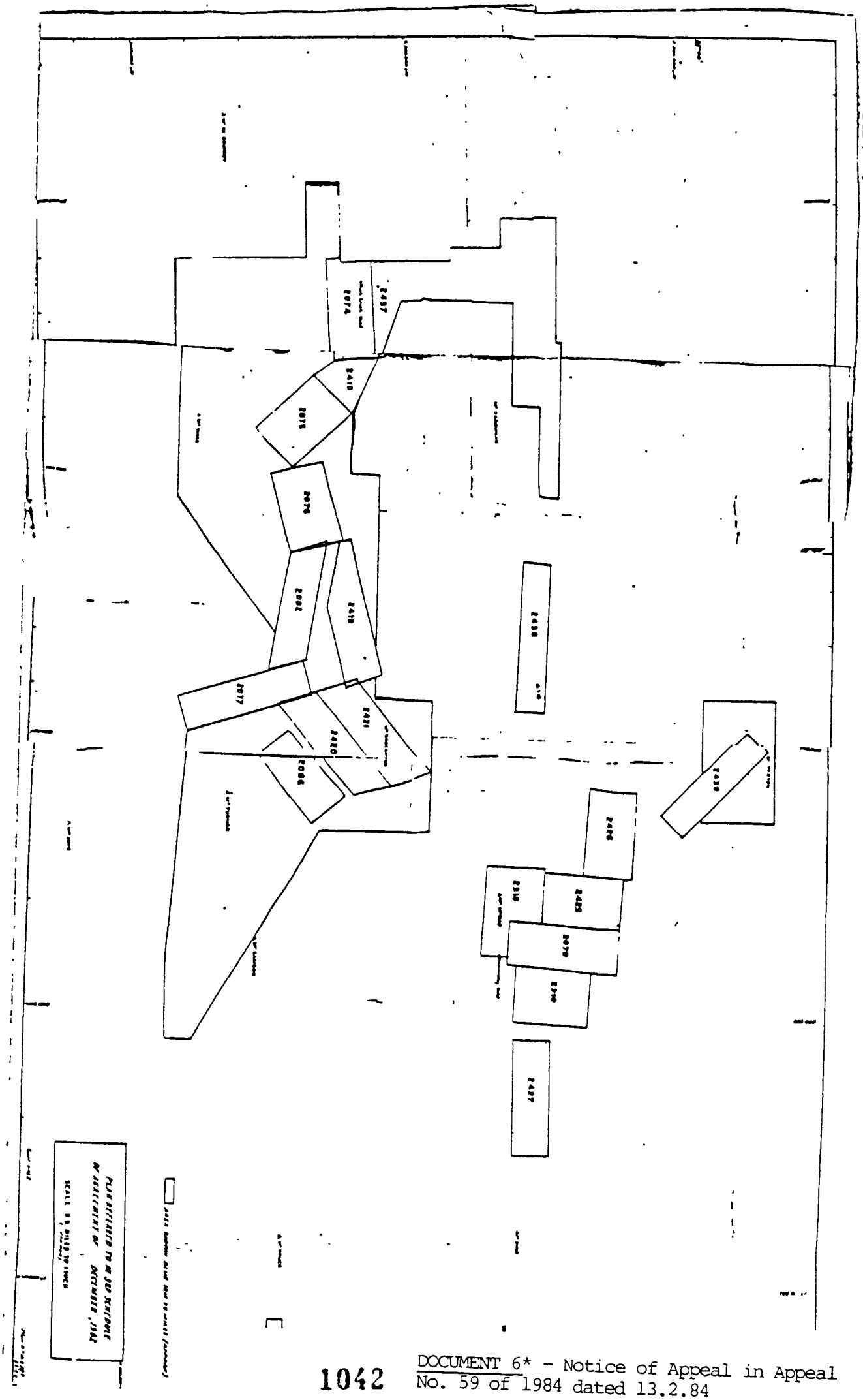
Secretary:

THE COMMON SEAL of HAMERSLEY IRON PTY. LTD. was hereto affixed in the presence of:

Director:

Secretary:





DOCUMENT 6* - Notice of Appeal in Appeal No. 59 of 1984 dated 13.2.84

TAKE NOTICE that the Full Court of the Supreme Court of Western Australia will be moved by way of appeal at the expiration of eight weeks from the date of service of this notice upon you or so soon thereafter as Counsel can be heard for an order that the whole of the Judgment of His Honour Mr. Justice Olney delivered on the 9th January 1984 whereby his Honour made the following orders:

1. Declare that upon the true construction of the agreement a copy of which is set out in the Schedule hereto ("the Contract"), the Respondent (Plaintiff) is obliged to pay to the Appellants (Defendants) (as the persons who for the time being constitute the Vendors within the meaning of the Contract) in respect of iron ore which has been beneficiated, an amount equivalent to 2-1/2% of the assumed F.O.B. price (assessed in accordance with the provisions of the Contract) of all low grade iron ore fed into the feed chute of the wet screening plant of the Respondent's (Plaintiff's) concentrator at Tom Price.

2. Order that:-

(a) the Respondent's (Plaintiff's) costs of the recall of Colin Roy Langridge to give evidence on the 22nd November 1983 be paid by the First to Fifth Appellants (Defendants);

(b) the Respondent's (Plaintiff's) other costs of these proceedings (including reserved costs and the costs of the transcript) be paid by the Defendants to be taxed as in an action on the higher scale with Certificate for Second Counsel;

(c) in default of agreement on the amount of the Respondent's (Plaintiff's) costs of these proceedings the Respondent (Plaintiff) have liberty to apply for a special order as to costs and such allowances as may be just.

3. That as between the Appellants (Defendants) the liability for the Respondent's (Plaintiff's) costs shall be apportioned as follows:-

(a) the first five Appellants (Defendants) - 85%

(b) the Sixth Appellant (Defendant) - 15%

4. The time for filing notice of appeal be extended until the 13th day of February 1984.

5. There shall be general liberty to apply.

be set aside and that in lieu thereof orders be made as follows:

1. Declare that upon the true construction of the agreement, a copy of which is set out in the Schedule hereto beneficiation or other treatment of the low grade ore referred to in the Affidavit of Colin Roy Langridge sworn the 2nd day of September 1982 begins within the meaning of clause 9(b) after the preparation screens for the feed to the heavy media drum plants and heavy media cyclone plant and after the sieve bends and screens for the feed to the WHIMS plant.

2. The Appellants' (Defendants') costs of these proceedings (including reserved costs and the cost of the transcript) be paid by the Respondent (Plaintiff) to be taxed as in an action on the higher scale with Certificate for Second Counsel.

3. That in default of agreement on the amount of the Appellants' (Defendants') costs of these proceedings the

Appellants (Defendants) have liberty to apply for a special order as to costs and such allowances as may be just.

4. That there be general liberty to apply.

The grounds of the appeal are as follows:

1. The learned trial judge was wrong in law and in fact in finding:

(a) that the wetting of the ore in the feed chute effects an immediate change in the physical characteristics of the ore and that it is at that time that beneficiation begins for the purpose of clause 9(b) of the agreement dated 12th December 1962 exhibit "CRL 1" ("the contract");

(b) upon the true construction of the contract the Respondent (Plaintiff) is obliged to pay to the Appellants (Defendants) (as the persons who for the time being constitute the Vendors within the meaning of the contract) in respect of iron ore which has been beneficiated an amount equivalent to 2-1/2 of the assumed F.O.B. price (assessed in accordance with the provisions of the contract) of all low grade iron ore fed into the feed chute of the wet screening plant of the Respondent's (Plaintiff's) concentrator at Tom Price.

2. The learned trial judge was wrong in law and in fact in not finding that beneficiation other than crushing or screening begins after the preparation screens for the feed to the heavy media drum plants and heavy media cyclone plant and after the sieve bends and screens for the feed to the

WHIMS plant.

3. The learned trial judge erred in failing to apply the principles of construction contended for by the First to Fifth Appellants (First to Fifth Defendants) that is to say that the contract was a commercial document intended by the parties to define their contractual relationship far into the future and accordingly:

(a) it should receive a fair, broad and practical interpretation;

(b) its true construction and its application to the operations of the Respondent (Plaintiff) at Mount Tom Price should be ascertained by recourse to objective criteria well known to persons experienced in the practical world of iron ore mining and processing;

(c) it should not be given a construction which would have a capricious, unfair or unreasonable effect, and in particular an effect which would make the point of deemed disposal under clause 9(b) and the consequent rights and obligations of the parties as to the payment of royalties turn on the fortuitous circumstances of the particular nature and characteristics of the ore fed into the concentrator from time to time.

4. The learned trial judge, having found that the term "screening" in clause 9(b) of the contract included wet screening as well as dry screening, should have found that all processes which the uncontradicted evidence showed were an integral part of wet screening or were necessarily or usually involved in wet screening, and in particular the

pre-wetting of ore in a feeder chute, would be comprehended within the term "screening".

5. In finding that "screening" within the meaning of clause 9(b) meant:

(a) "the presentation of particles to apertures" and/or

(b) "merely the separation by size of the ore by means of screens"

the learned trial judge adopted a meaning which was too narow and which was contrary to the uncontradicted evidence and as a consequence applied the wrong test in ascertaining whether the process in the feed chute was or was not "screening" within the meaning of clause 9(b).

6. The learned trial judge erred in concluding that because water applied to the ore in the feed chute altered "the physical characteristics of the feed" that therefore what happened was not "screening" or part thereof within the meaning of clause 9(b).

7. In approaching the resolution of the matters in dispute by stating that he was "unmoved by the name (the witnesses) attached to the process which goes on within" the feed chute the learned trial judge erred in disregarding or treating as irrelevant evidence as to the appropriate characterisation or appellation of the process occurring in the feed chute and in particular evidence:

(a) of expert witnesses as to the correct or appropriate designation of such process and in particular whether the same was properly to be regarded as part of a screening process;

(b) of the designations of such process adopted by the Respondent (Plaintiff) itself in plant signs, annual reports and other publications in circumstances where the payment of royalties was not a consideration.

8. The learned trial judge erred in reaching his ultimate conclusion as to the construction of clause 9(b) of the contract by:

(a) restricting his enquiry as to what happened to the ore in the feed chute to whether or not an alteration in the physical characteristics of the feed took place rather than ascertaining whether what happened in the feed chute properly fell within the meaning of the term "screening" as used in that clause and as understood in the iron ore mining industry in 1962;

(b) assuming that an alteration in the physical characteristics of the feed prevented the conclusion being reached that what happened in the feed chute properly fell within the meaning of the term "screening" as used in that clause and as understood in the iron ore mining industry in 1962.

9. The learned trial judge should have held that the whole of the wet screening process (including pre-wetting in the chute) could properly be referred to or regarded as "screening" and that therefore for the purposes of the application of clause 9(b) of the contract it would not matter that such process or any part thereof might also be:

(a) properly referred to by some other name and/or

(b) dissected into a number of "sub-processes" some of

which did not involve the separation of the ore by size.

10. The learned trial judge erred in finding that the wetting of the ore in the feed chute altered the physical characteristics of the feed by the removal of fine particles of both ore and gangue from the larger pieces and by the initiating of the process of breaking down water active clay material contained in the ore stream and therefore represented the fist of a series of steps designed to achieve the ultimate objective of producing beneficiated iron ore when:

(a) the uncontradicted evidence showed that-

(i) the plant was deliberately designed to allow the Respondent (Plaintiff) to divert ore to the high grade stockpile after wet screening without going through the heavy media separation process or being otherwise beneficiated;

(ii) such diversion had in fact occurred;

(b) the Respondent (Plaintiff) called no evidence from persons responsible for the design of the plant as to the actual design criteria in fact adopted, there being no evidence that such persons were unavailable to give evidence;

(c) the removal of fine particles of both ore and gangue from larger pieces was an inevitable concomitant of feeding ore to a screen;

(d) the presence of water active clay material contained in the ore stream was a fortuitous

circumstance arising from the nature of the ore encountered after the plant had been commissioned and not something for which the feed chute was in fact designed;

(e) the proper inference to be drawn from the evidence was that if maximum wetting of the ore to intitiate the process of breaking down was the true purpose or design a quite different form of device would have been installed.

11. The learned trial judge erred in assuming, either contrary to the evidence or alternatively in the absence of any evidence, that the particular characteristics of the ore feed referred to by the witness Batterham and in particular the alleged characteristic of being especially water active:

(a) were those for which the concentrator plant was in fact designed;

(b) were typical of ore fed into the concentrator throughout the period of its past and likely future operation;

(c) represented a constant factor in the operation of the concentrator plant.

12. The learned trial judge erred in reaching an ultimate conclusion which was inconsistent with the following matters which were the subject of uncontradicted evidence or inferences which should have been drawn from such evidence and to which he gave no or no adequate weight:

(a) the term "screening" includes wet screening;

(b) one of the well known methods of beneficiation of

iron ore available in 1962 was the heavy media separation process subsequently installed at Mount Tom Price;

(c) most methods of beneficiation known in 1962 involved wet screening as part of the beneficiation process;

(d) the heavy media separation process was known in 1962 to include wet screening as an initial step;

(e) wet screening was known in 1962 to necessarily or usually involve pre-wetting in a chute or similar device;

(f) the heavy media separation process would be known in 1962 to involve wet screening (including pre-wetting in a chute) irrespective of the nature of the ores involved and whether the ores were water-active or otherwise;

(g) the concentrator at Mount Tom Price was initially designed for different ores than those subsequently encountered;

(h) the meaning of the word "screening" in clause 9(b) could not have been intended by the parties to change from time to time depending on whether or not particular ores from time to time were clayey or water-active.

13. The learned trial judge placed undue weight on the evidence of the witness Batterham having regard to:

(a) his exaggerated and unreliable evidence as to the pressure of water in the chute;

(b) his use of the term "scrubbing" to describe what

happened in the chute contrary to the weight of evidence of practical mining experts called by both sides;

(c) the ambiguity in his evidence as to the extent of his personal involvement in the design of the wet screening process at Mount Tom Price or in subsequent modifications of that process;

(d) the lack of any evidence that he specifically studied or addressed his attention to the operation of the feed chute other than on the occasion of his visit in March 1983;

(e) his lack of experience and expertise in the practical operation of iron ore mining and the design of iron ore beneficiation plant compared with other witnesses and in particular the witnesses Langridge, Pritchard, Herkenhoff, Grosvenor, Booth and Beukema;

(f) his failure to demonstrate that samples he had taken were typical of the feed into the concentrator;

(g) the discrepancy between the test conducted by him on ore samples and the test conducted by the witness Grosvenor;

(h) His Honour's finding that the witness was no more credible a witness than the other witnesses who testified;

(i) His Honour's error in concluding that the witness was best qualified to give evidence of observed fact as to the operation of the feed chute.

14. The learned trial judge erred in failing to give any or any adequate weight to the evidence of the second Appellant

(second Defendant) as to the circumstances of the preparation of the contract and that to the extent that the contract contains any ambiguity, such ambiguity should be construed in favour of the First to Fifth Appellants (First to Fifth Defendants).

15. The learned trial judge erred in making a declaration which in terms applied to all ore fed into the concentrator notwithstanding:-

(a) his ruling during the course of the trial that the First to Fifth Appellants (first to fifth Defendants) might in other proceedings contend that clause 9(b) did not apply at all to ore which did not need to be beneficiated;

(b) his reliance on the nature of the particular ore referred to by the witness Batterham and the fact that the same was water active.

16. The learned trial judge wrongly exercised his discretion under Order 66 Rule 1(2) and/or (3) in failing to order that the Respondent (Plaintiff) pay the costs of the issue raised by the Respondent's (Plaintiff's) contention that the term "screening" in clause 9(b) meant dry screening only.

17. The learned trial judge wrongly exercised his discretion in failing to vacate the order made that the Appellants (first to fifth Defendants) should pay the costs of the re-call of the witness Langridge in any event.

DATED the 13th day of February 1984

KEALL BRINSDEN & CO
Solicitors for the First to
Fifth Appellants
(First to Fifth Defendants)

DOCUMENT 7* - Notice of Appeal in Appeal No. 60 of 1984 dated 13.2.84

TO: The Respondent (Plaintiff)

AND TO: Its Solicitor
J R Wood
18th Floor
191 St Georges Terrace
PERTH WA 6000

THIS NOTICE OF MOTION BY WAY OF APPEAL is filed by Keall Brinsden & Co, Solicitors for the First to Fifth Appellants (First to Fifth Defendants), 9th Floor, 150 St Georges Terrace, Perth. Tel. 321 8531 Ref: NH:28641 GD:T.300-FGH-D

On appeal from a decision of (the Supreme Court in Action 2313/1982)

IN THE SUPREME COURT)
)
OF WESTERN AUSTRALIA)
)
THE FULL COURT)

Appeal No. 59 of 1984

IN THE MATTER of an Agreement between LANGLEY GEORGE HANCOCK, ERNEST ARCHIBALD MAYNARD WRIGHT, WRIGHT PROSPECTING PTY. LTD., HANCOCK PROSPECTING PTY. LTD., two other companies and HAMERSLEY IRON PTY. LIMITED

B E T W E E N :

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED — Appellant (Sixth Defendant)

and

HAMERSLEY IRON PTY. LIMITED — Respondent (Plaintiff)

NOTICE PURSUANT TO ORDER 63 RULE 9

TAKE NOTICE that the Respondent desires to contend on the appeal that the decision of the Honourable Mr. Justice Olney given on 9th January 1984 should be varied. Particulars of the grounds of its contention and the precise form of the order which it intends to ask the Full Court to make are specified below. In the alternative, the Respondent will contend that his Honour's decision should be affirmed.

Particulars of Grounds

1. The learned Judge was wrong in declaring that, upon the true construction of the Contract (as defined in his Honour's order), the Respondent is obliged to pay to the Appellant and Langley George Hancock, Ernest Archibald Maynard Wright, Hancock Prospecting Pty. Ltd., Wright Prospecting Pty. Ltd. and L.S.P. Pty. Ltd. ("the other

parties") (as the persons who for the time being constitute the vendors within the meaning of the Contract) in respect of iron ore which has been beneficiated, an amount equivalent to 2½% of the assumed f.o.b. price (assessed in accordance with the provisions of the Contract) of all low-grade iron ore fed into the feed chute of the wet screening plant of the Respondent's concentrator at Tom Price.

2. The learned Judge should have declared, in respect of the iron ore (if any) to which paragraph (b) of the proviso to clause 9 of the Contract applies -

(a) that beneficiation begins within the meaning of the said paragraph (b) each time such iron ore passes through the grizzley referred to in paragraph 8 of the Affidavit of Colin Roy Langridge sworn on 2nd September 1982 and filed in proceeding no. 2313 of 1982, being the grizzley referred to at page 24 of his Honour's reasons for judgment published on 23rd December 1983; and

(b) that the Appellant and the other parties (as the persons who for the time being constitute the vendors within the meaning of the Contract) are entitled to have the amount (if any) of their royalties in respect of such iron ore determined in accordance with sub-paragraph (a) of this paragraph 2 and otherwise in conformity with the said clause 9 and the proviso thereto.

3. Without limiting the generality of paragraphs 1 and 2, the learned Judge was wrong in holding that a decision to the effect of the declaration in paragraph 2 would disregard the words of the Contract, particularly the last four words of paragraph (b) of the said proviso.

4. Without limiting the generality of paragraphs 1 and 2, the learned Judge should have held -

(a) that such a decision would be consistent with those words, alternatively not precluded thereby;

(b) that the words "but crushing or screening shall not be deemed to be beneficiation or any part thereof" at the end of the said paragraph (b) are merely a safeguard against the possibility that someone may think that ore to which paragraph (a) applies is swallowed up by paragraph (b); and

(c) that the said words "or any part thereof" mean that "crushing" and "screening" together shall not be deemed to be beneficiation, so making either of them on its own part thereof,

and made a declaration to the effect of the declaration in paragraph 2.

Form of Order

In lieu of the declaration in paragraph 1 of the order made on 9th January 1984, a declaration, in respect of the iron ore (if any) to which paragraph (b) of the proviso to clause 9 of the Contract applies -

(a) that beneficiation begins within the meaning of the said paragraph (b) each time such iron ore

passes through the grizzley referred to in paragraph 8 of the Affidavit of Colin Roy Langridge sworn on 2nd September 1982 and filed in proceeding no. 2313 of 1982; and

(b) that the Appellant and the other parties (as the persons who for the time being constitute the vendors within the meaning of the Contract) are entitled to have the amount (if any) of their royalties in respect of such iron ore determined in accordance with paragraph (a) of this declaration and otherwise in conformity with the said clause 9 and the proviso thereto.

DATED the Second day of March 1984

.....
Solicitor for the Respondent (Plaintiff)

TO: The Appellant
(Sixth Defendant)
and its solicitors
Messrs. Stone James Stephen Jaques
Law Chambers
Cathedral Square
PERTH, W.A. 6000

Ref: PRC

AND TO: Langley George Hancock, Ernest Archibald Maynard Wright, Hancock Prospecting Pty. Ltd., Wright Prospecting Pty. Ltd. and L.S.P. Pty. Ltd.
(First to Fifth Defendants in proceeding no. 2313 of 1982)
and their solicitors
Messrs. Keall Brinsden & Co.
150 St. George's Terrace
PERTH, W.A. 6000

Ref: NH:28641

This notice was filed by J.R. Wood, solicitor for the Respondent (Plaintiff), whose address for service is 18th Floor, 191 St. George's Terrace, Perth, W.A. 6000.
Tel: 327 2327
Ref: JRW.JG

DOCUMENT 8* - Notice pursuant to Order 63 Rule 9 in Appeal No. 59 of 1984 dated 2.3.84

IN THE SUPREME COURT)
)
OF WESTERN AUSTRALIA)
)
THE FULL COURT)

On appeal from a decision of the Supreme Court in Action 2313/1982

Appeal No. 60 of 1984.

IN THE MATTER of an Agreement between LANGLEY GEORGE HANCOCK, ERNEST ARCHIBALD MAYNARD WRIGHT, WRIGHT PROSPECTING PTY. LTD., HANCOCK PROSPECTING PTY. LTD., two other companies and HAMERSLEY IRON PTY. LIMITED

B E T W E E N :

LANGLEY GEORGE HANCOCK, ERNEST ARCHIBALD MAYNARD WRIGHT, HANCOCK PROSPECTING PTY. LTD., WRIGHT PROSPECTING PTY. LTD. and L.S.P. PTY. LTD. — Appellants (First to Fifth Defendants)

- and -

HAMERSLEY IRON PTY. LIMITED — Respondent (Plaintiff)

NOTICE PURSUANT TO ORDER 63 RULE 9

TAKE NOTICE that the Respondent desires to contend on the appeal that the decision of the Honourable Mr. Justice Olney given on 9th January 1984 should be varied. Particulars of the grounds of its contention and the precise form of the order which it intends to ask the Full Court to make are specified below. In the alternative, the Respondent will contend that his Honour's decision should be affirmed.

Particulars of Grounds

1. The learned Judge was wrong in declaring that, upon the true construction of the Contract (as defined in his Honour's order), the Respondent is obliged to pay to the Appellants and The National Mutual Life Association of Australasia Limited ("NML") (as the persons who for the

DOCUMENT 9* - Notice pursuant to Order 63 Rule 9 in Appeal No. 60 of 1984 dated 2.3.84

time being constitute the vendors within the meaning of the Contract) in respect of iron ore which has been beneficiated, an amount equivalent to 2½% of the assumed f.o.b. price (assessed in accordance with the provisions of the Contract) of all low-grade iron ore fed into the feed chute of the wet screening plant of the Respondent's concentrator at Tom Price.

2. The learned Judge should have declared, in respect of the iron ore (if any) to which paragraph (b) of the proviso to clause 9 of the Contract applies -

(a) that beneficiation begins within the meaning of the said paragraph (b) each time such iron ore passes through the grizzley referred to in paragraph 8 of the Affidavit of Colin Roy Langridge sworn on 2nd September 1982 and filed in proceeding no. 2313 of 1982, being the grizzley referred to at page 24 of his Honour's reasons for judgment published on 23rd December 1983; and

(b) that the Appellants and NML (as the persons who for the time being constitute the vendors within the meaning of the Contract) are entitled to have the amount (if any) of their royalties in respect of such iron ore determined in accordance with sub-paragraph (a) of this paragraph 2 and otherwise in conformity with the said clause 9 and the proviso thereto.

3. Without limiting the generality of paragraphs 1 and 2, the learned Judge was wrong in holding that a decision to the effect of the declaration in paragraph 2 would

DOCUMENT 9* - Notice pursuant to Order 63 Rule 9 in Appeal No. 60 of 1984 dated 2.3.84

disregard the words of the Contract, particularly the last four words of paragraph (b) of the said proviso.

4. Without limiting the generality of paragraphs 1 and 2, the learned Judge should have held -

(a) that such a decision would be consistent with those words, alternatively not precluded thereby;

(b) that the words "but crushing or screening shall not be deemed to be beneficiation or any part thereof" at the end of the said paragraph (b) are merely a safeguard against the possibility that someone may think that ore to which paragraph (a) applies is swallowed up by paragraph (b); and

(c) that the said words "or any part thereof" mean that "crushing" and "screening" together shall not be deemed to be beneficiation, so making either of them on its own part thereof,

and made a declaration to the effect of the declaration in paragraph 2.

Form of Order

In lieu of the declaration in paragraph 1 of the order made on 9th January 1984, a declaration, in respect of the iron ore (if any) to which paragraph (b) of the proviso to clause 9 of the Contract applies -

(a) that beneficiation begins within the meaning of the said paragraph (b) each time such iron ore passes through the grizzley referred to in paragraph 8 of the Affidavit of Colin Roy Langridge sworn on 2nd September 1982 and filed in proceeding no. 2313 of 1982; and

DOCUMENT 9* - Notice pursuant to Order 63 Rule 9 in Appeal No. 60 of 1984 dated 2.3.84

(b) that the Appellants and NML (as the persons who for the time being constitute the vendors within the meaning of the Contract) are entitled to have the amount (if any) of their royalties in respect of such iron ore determined in accordance with paragraph (a) of this declaration and otherwise in conformity with the said clause 9 and the proviso thereto.

DATED the Second day of March 1984

.....
Solicitor for the Respondent (Plaintiff)

TO: The Appellants
(First to Fifth Defendants)
and their solicitors
Messrs. Keall Brinsden & Co.
150 St. George's Terrace
PERTH, W.A. 6000. Ref: NH:28641

AND TO: The National Mutual Life Association
of Australasia Limited
(Sixth Defendant in the proceeding
no. 2313 of 1982)
and its solicitors
Messrs. Stone James Stephen Jaques
Law Chambers
Cathedral Square
PERTH, W.A. 6000
Ref: PRC

This notice was filed by J.R. Wood, solicitor for the Respondent (Plaintiff), whose address for service is 18th Floor, 191 St. George's Terrace, Perth, W.A. 6000.
Tel: 327 2327
Ref: JRW:JG

IN THE SUPREME COURT)
)
OF WESTERN AUSTRALIA)

Heard: 6th to 10th August 1984
Delivered: 27th November 1984

THE FULL COURT

CORAM: WALLACE, KENNEDY & ROWLAND JJ.

Appeal No. 59 of 1984

B E T W E E N :

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA
Appellant
(Sixth Defendant)

and

HAMERSLEY IRON PTY. LIMITED
Respondent
(Plaintiff)

AND
Appeal No. 60 of 1984

B E T W E E N :

LANGLEY GEORGE HANCOCK, ERNEST ARCHIBALD MAYNARD WRIGHT, HANCOCK PROSPECTING PTY. LTD., WRIGHT PROSPECTING PTY. LTD., and L.S.P. PTY. LTD.
Appellants
(First to Fifth Defendants)

and

HAMERSLEY IRON PTY. LIMITED
Respondent
(Plaintiff)

Mr. J.L. Sher Q.C., and Mr. D. Williamson Q.C., with them Mr. P.C. Heerey (instructed by Messrs. Keall Brinsden) appeared for the appellants.

Mr. S.E.K. Hulme Q.C., with him Mr. F.H. Callaway (instructed by J.R. Wood) appeared for the respondent.

Cases referred to in Judgments:

Carr v. Finance Corporation of Australia Ltd. (No.1) (1981) 147 C.L.R. 246.
Computer Edge Pty. Ltd. v. Apple Computer Inc. - High Court decision delivered 10th August 1984.
Becker v. Marion Corporation (1977) A.C. 271.
Licul v. Corney (1976) 50 A.L.J.R. 439.
Australian Broadcasting Commission v. Australian Performing Rights Association (1973) 129 C.L.R. 99.

Browning v. Beaton - 1 Plowd 131.
Birrell v. Dryer (1884) 9 App.Cas. 345.
John Lee & Son (Grantham) Ltd. v. Railway Executive (1949) 2 All E.R. 581.
Fowkes v. Manchester and London Life Assurance (1863) 3 B. & S. 917.
Warren v. Coombes (1979) 142 C.L.R. 531.
Sharman v. Evans (1977) 138 C.L.R. 563.
Patterson v. Patterson (1953) 89 C.L.R. 89.
Edwards v. Noble (1971) 125 C.L.R.
Griffin Coal Mining Co. Ltd. v. S.E.C. W.A. - unreported Full Court W.A. Supreme Court - delivered 1st February 1984.

Cases also cited:

Dunstan v. Simmie & Co. Pty. Ltd. [1978] V.R. 669.
Niemann v. Electronic Industries Ltd. [1978] V.R. 431.
Monash University v. Berg [1984] 1 V.R. 383.
Andrijich v. D'Ascanio [1971] W.A.R. 140.
Martin v. Option Investments (Aust.) Pty. Ltd. (No.2) [1982] V.R. 464.
Chalmers Leask Underwriting Agencies v. Mayne Nickless Ltd. (1983) 57 A.L.J.R. 626.
Western Australian Bank v. Royal Insurance Co. (1908) 5 C.L.R. 533.
Tampion v. Anderson (1974) 48 A.L.J.R. 11.
Port of Melbourne v. Anshun (1980) 147 C.L.R. 35.
Codelfa Constructions Pty. Ltd. v. State Rail Authority of New South Wales (1982) 149 C.L.R. 337.
Jones v. Dunkel (1959) C.L.R. 298.
F.C.T. v. Nixon (1979) 30 A.L.R. 400.

WALLACE J.

These appeals arise out of the learned trial Judge's construction of cl.9(b) of an agreement executed on the 12th December 1962. Therein it is recited that the parties representing the appellants as vendors had assigned to the parties representing the respondent as purchaser the vendors' interest in certain mining titles and temporary ore reserves in the Pilbara region of the State. By cl.17 of the agreement the respondent was obliged to commence active preparations for the working of an iron ore deposit upon the subject tenements within two years. Thereafter would follow an obligation to pay royalties in accordance with **inter alia** cl.9 of the

agreement. In fact the respondent began working iron ore deposits at Tom Price in 1966 and thereupon the sale of unrefined and unmanufactured ore of an Fe content of approximately 60 per cent. Ore of poorer quality (low-grade ore) was stockpiled. In 1979 a concentrator or beneficiation plant was commissioned to treat the low-grade ore.

Clause 9 of the parties' agreement is as follows:

" 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 2½% 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 2½% 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 meanig 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 originating summons filed by the respondent sought a declaration of his Honour as to:

> At what time does beneficiation or other treatment of the low-grade ore referred to in the affidavit of Colin Roy Langridge begin within the meaning of cl.9(b) of the agreement?

Langridge was the manager of production control and technical services of the respondent, senior project engineer for the concentrator construction project and from March 1978 until July 1982 general superintendent ore treatment at Tom Price

with responsibility among other things for production at and maintenance of the concentrator. The declaration appealed against is as follows:

> " Declare that, upon the true construction of the Agreement, a copy of which is set out in the Schedule hereto ('the Contract'), the plaintiff is obliged to pay to the defendants (as the persons who for the time being constitute the vendors within the meaning of the Contract) in respect of iron ore which has been beneficiated, an amount equivalent to 2.5% of the assumed f.o.b. price (assessed in accordance with the provisions of the Contract) of all low-grade iron ore fed into the feed chute of the wet screening plant of the plaintiff's concentrator at Tom Price. "

Each the appellants and the respondent seek to differ from his Honour's appreciation as to the point at which ore the subject of beneficiation should be valued for royalty purposes. In order to understand their respective contentions it is necessary to have short regard to the operation of the concentration plant.

When ore is brought from the mine face by truck it is tipped into a grizzley or rough sizing machine from which +200mm and -200mm ore emerges in two streams. The +200mm ore is crushed, screened and stockpiled ready for railing to Dampier for blending and eventual sale. The -200mm ore then proceeds to a secondary crusher and scalping screen where it is reduced to + and -80mm ore. Stage three involves the delivery of the -80mm ore into the feed chute, as his honour found it, or pulping box as described by some witnesses, to the screening and washing plant. There it is subjected to water spray at pressure as it falls on to a metal plate from which it slides in slurry form on to and through a series of screens. Water is jetted on to the ore at high pressure both

in the feed chute and upon the screens for the purpose of separating the ore from clay, shale and other foreign material. The screening produces four sized fractions, -80 +30mm, -30 +6mm, -6 +.5mm and -0.5mm, for subsequent treatment.

The -80 +30mm ore stream is further treated in a wemco heavy medium drum, the -30mm +6mm ore stream is treated in another two heavy medium drums, the -6mm +.5mm ore material is treated in a heavy medium cyclone plant, whilst the fourth stream goes to a wet high intensity magnetic separation (whim) plant.

Until 1st March 1981 +80mm ore emerging from the scalping screens was directed via secondary and tertiary crushers to the product screens. Since March 1st 1981 all ore is directed from the scalping screens to the screening and washing plant. Portion of the ore emerging from the screening and washing plant may be directed to the product stockpile without further treatment in the concentrator plant.

It is the appellants' protest that they are not receiving payment for any low-grade ore processed in the concentrator or beneficiation plant whilst the respondent argues that the low-grade ore as mined has no commerical value. The resolution of that dispute is as the parties' agreement provides, to be determined by arbitration. But the arbitrator requires a commencement point at which a value is to be taken. I can now turn to the grounds of appeal.

The appellants argue that the point at which a value should be placed upon the low-grade ore is after the preparation screens for the ore feed and prior to its entry

into the heavy medium drum plants, heavy medium cyclone plant and whims plant, that is, after emerging from the screening and washing plant and immediately before entering each of the three machines mentioned. By cross-appeals the respondent seeks to establish the commencement point as the ore passes through the grizzley. It is time to consider cl.9 of the parties' agreement.

In the first place it will be observed that the royalty to be paid is upon all iron ore produced by the respondent and sold or otherwise disposed of by the respondent. Then the royalty is 2½ per cent of the amount received on sale or other disposal of iron ore in unrefined and unmanufactured form. Hence if low-grade ore cannot be sold or is not sold it has no value to either party. But regard was had to the upgrading of the ore and so the first proviso entitles the appellants to a royalty of 2½ per cent of the amount received on upgraded ore actually sold if the ore is upgraded by crushing and/or screening - alone. The evidence before the learned trial Judge was that prior to the construction of the concentrator/beneficiation plant all screening was done dry save for that amount of moisture necessary to cope with dust.

In the beneficiation plant however with the exception of the grizzley and scalping screens all sizing is carried out with the aid of added water. The evidence makes it quite clear that the beneficiation process involves the addition of considerable water to the ore feed so as to detach from the metal clay adhesives and any foreign materials. The process of refinement in the cyclones, heavy medium drums and whims demands the receipt of clean ore feed. When one has regard to

the provisions of cl.9(b) of the parties' agreement therefore it is necessary to determine what was intended by the exclusion of crushing and/or screening from its terms. Clearly the ore was to be valued at the time beneficiation began - but can it be said that the use of the term "crushing" or "screening" in the alternative as opposed to the composite in proviso (a) poses a problem? In my opinion that is not the case. It is, of course, necessary to have regard to the process of beneficiation and in so doing to exclude both crushing and screening within the context of the point at which such process commences. It cannot be said, however convenient it may be, that an initial crushing and screening through the grizzley for example, the process to which all ore is subjected, marks the commencement of the beneficiation of low-grade ore. Clause 9(b) excludes such crushing or screening from cost to the appellants notwithstanding that such a process upgrades the ore.

The learned trial Judge's method of tackling the problem involved in the first place ascertaining the dictionary meanings of the technical terms used in the document and in the second place his Honour had regard to the evidence led from a substantial number of well qualified witnesses. Although objection is taken by Mr. Sher to the use of the Macquarie Dictionary by his Honour, that would appear to relate only to the definition of the word "screen" and not to the definition of "beneficiation" which appears in a far more comprehensive form in the Macquarie Dictionary as opposed to that of the Oxford Dictionary. After citing what the expert witnesses had to say about beneficiation his Honour concluded

that he was satisfied that proviso (a) to cl.9 of the contract referred to ore, the quality of which had been improved by being broken into smaller particles and/or separated into different sized fractions, whereas proviso (b) referred to ore which has been enriched by the removal of unwanted constituents by a process or processes other than the mere breaking of the ore or separating it into different sized fractions - all in accord with Part I of the Macquarie Dictionary definition of beneficiation. As I understand the evidence I agree with his Honour's reasoning.

The appellants' major ground is that his Honour was wrong in deciding that the proper definition of "screening" which he obtained from the evidence of the experts involved the presentation of particles to apertures. Interestingly enough the definition in the Macquarie Dictionary to which Mr. Sher takes such strong exception is consistent with that appearing in the Concise Oxford Dictionary which would have been available to those who prepared the document. What really is in issue is as to what is meant by screening as used in proviso (b). For that purpose his Honour had regard to the evidence and reproduced in his reasons the whole of an article written by the respondent's general superintendent - ore treatment at Tom Price. That article clearly identifies the beneficiation process from the delivery of low-grade ore to two vibrating five step grizzley screens located at No.2 primary crusher tip head to completion in greater detail than I have set out herein. As his Honour discovered all ore proceeding from the scalping screens enters the screening and washing plant through equipment variously called "pulping

box", "scrubbing box" or "feed chute" a term adopted by his Honour as the most appropriate and that which appears in his declaration.

Mr. Sher has taken issue with his Honour because of the learned trial Judge's opinion that it mattered not what that particular piece of equipment was called - what was important was its operation. His Honour accurately described the feed chute as having enclosed sides, standing vertical and being 1.5 metres long. When ore is released into it it is subjected to spraying with strong jets of water. Indeed thereafter the reduced low-grade ore never ceases to be subject to water pressure as it progresses in slurry form from screen to screen towards the heavy medium drums, cyclones and whims.

The appellants would have it that the word "screening" appearing in the description of the screening and washing plant, brings that piece of equipment within the term "screening" in proviso 9(b) and it is claimed there was technical evidence to support this proposition. The learned trial Judge did not accept the appellants' argument and when one understands the process of beneficiation he was, in my opinion, perfectly correct in the conclusion he reached. Clearly the evidence supported the argument that as the ore was fed into the feed chute its physical characteristics changed as the water to which it was subjected removed fine particles, both of ore and gangue, and commenced the degrading of the clay material attached to the ore. It is critical in the process of beneficiation that ore entering the heavy medium drums, cyclones and whims be as clean as possible. In reaching his opinion the learned trial Judge relied upon the

evidence of Dr. Robin John Batterham a senior principal research scientist who in his Honour's opinion had the closest and most extensive involvement with the respondent's plant from its original design stage until trial. The appellants would minimize the effect of the initial spray upon the ore in the feed chute whereas his Honour accepted Dr. Batterham's evidence that the falling ore was subjected to a deliberate and violent flooding which had the effect to which I have already referred. In other words it was never intended that screening as used in proviso 9(b) referred to screening in the screening and washing plant.

Initially and logically I was attracted to Mr. Hulme's argument in support of his cross-appeal. On the other hand the crushing and screening which occurred at the grizzley was the process that applied to all ore and could not be said to be confined to low-grade. Then again crushing and screening was repeated at the secondary crusher and scalping screen - why not there? For the very same reason that it should not apply to the area of the grizzley. Rather more importantly, however, was the opinion which his Honour formed that to accept Mr. Hulme's logical argument would be to give no effect to the words "or any part thereof" at the end of proviso (b). I accept his Honour's reasoning that for the purposes of proviso (b) beneficiation shall be deemed to have been commenced at the time that such treatment begins in the feed chute.

The learned trial Judge was called upon to construe a term deliberately inserted in a contract document after considerable negotiation. The parties were agreed upon the

vendors' entitlement to a royalty on all ore sold. To attract a market the ore had to be of sufficient quality. All mining was to the cost of the respondent. The construction of the beneficiation plant was to the cost of the respondent. It had a duty to manage the mine in such a way as to maximise return on capital and prolong the life of the deposit. The parties gave consideration to eventual beneficiation of low-grade ore and resolved that the vendors' entitlement to any royalty thereon would depend upon the value of that ore crushed or screened at the beginning of beneficiation - not in my opinion part of the way through that process.

The appellants have to survive another hurdle however because it is the respondent's argument that the declaration made by his Honour was but an interlocutory order in respect of which no leave had been obtained to enable the appellants to bring this appeal: s.60(1)(f) of the Supreme Court. Mr. Hulme has mounted this argument because of the manner provided in the parties' agreement for a value to be placed upon beneficiated ore. By subpara.(e) the assumed f.o.b. price shall be the average of the f.o.b. price at which the respondent has during a period of six months immediately proceeding the date of sale sold iron ore of the same grade, quality and physical condition for shipment from the State of Western Australia. Should there have been no sales during the previous six months then the price was to be arrived at by agreement and failing agreement by determination by an arbitrator. Hence the argument that any final entitlement to the appellants is subject to further determination. On the other hand s.25(6) of the Supreme Court Act provides that no

action shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief.

If the test is as to whether the court's order represents a final determination of the parties' rights as to which see Gibbs C.J. in Carr v. Finance Corporation of Australia Ltd. (No.1) (1981) 147 C.L.R. 246 at p.248 then I am of the opinion that his Honour's declaration does represent the final determination of the manner in which the appellants' entitlement is to be calculated notwithstanding the fact that such calculation has yet to take place. The parties agreed upon the manner in which their differences as to the construction to be placed upon their agreement should be resolved. There are in effect two stages as to the final determination of the parties' rights and only one - that of the manner in which the ore should be evaluated has been determined - but finally so determined subject to appeal - and the other remains that of the evaluation of the ore by arbitration.

The appellants raised a further argument as to the orders for costs which his Honour made in the court below. This argument was not pressed before us and in my opinion rightly so. His Honour's order was well within his discretion and is not, in my view, appealable.

For these reasons I would dismiss the appellants' appeals - dismiss both the respondent's notices of objection to competency and notice under Order 63 rule 9 of the Supreme Court Rules.

DOCUMENT 10* - Reasons for Judgment of the Honourable Mr Justice Wallace, in Appeals 59 and 60 of 1984

IN THE SUPREME COURT)
)
OF WESTERN AUSTRALIA)

Heard: 6-10 August 1984

Delivered: 27 November 1984

THE FULL COURT

CORAM: WALLACE, KENNEDY & ROWLAND JJ.

Appeal No. 59 of 1984

B E T W E E N :

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA
Appellant
(Sixth Defendant)

and

HAMERSLEY IRON PTY. LIMITED
Respondent
(Plaintiff)

Appeal No. 60 of 1984

B E T W E E N :

LANGLEY GEORGE HANCOCK, ERNEST ARCHIBALD MAYNARD WRIGHT, HANCOCK PROSPECTING PTY. LTD., WRIGHT PROSPECTING PTY. LTD. AND L.S.P. PTY. LTD.
Appellants
(First to Fifth Defendants)

and

HAMERSLEY IRON PTY. LTD.
Respondent
(Plaintiff)

Mr J.L. Sher Q.C., Mr D.G. Williamson Q.C. and Mr. P.C. Heerey (instructed by Messrs Keall Brinsden) appeared for the appellants.

Mr. S.E.K. Hulme Q.C. and Mr. F.H. Callaway (instructed by Mr. J.R. Wood) appeared for the respondent.

KENNEDY J.

By an agreement in writing dated the 12th December, 1962, subject to the consent of the Minister for Mines of the State of Western Australia "and any other necessary governmental or like consents", Langley George Hancock,

Ernest Archibald Maynard Wright, Wright Prospecting Pty. Ltd. and Hancock Prospecting Pty. Ltd. (described as "the Vendors") agreed to sell and Hamersley Iron Pty. Ltd. (described as "the Purchaser") agreed to purchase all the right, title and interest of the Vendors in and to and in respect of certain temporary reserves for iron ore and the land comprised therein and all rights to prospect or mine granted thereby or flowing therefrom. Rio Tinto Southern Pty. Ltd., as the assignee of an option to acquire from the Vendors certain mining titles, comprising, it would seem, some or all of the temporary reserves already referred to, agreed, by the same agreement and subject to the like consents, to transfer to the Purchaser its interests therein.

Clause 9 of the agreement provides for the payment of certain royalties as follows:

> "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 2½% 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 2½% 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 proviso to cl. 9 is incorporated into cl. 14 and, subject to certain limitations, into cl. 15, which deal with the payment of royalties with respect to iron ore produced

from other mining areas in the Pilbara, West Pilbara and Ashburton Goldfields.

On the 30th July, 1963, Hamersley Iron Pty. Ltd. ("Hamersley") entered into an agreement with the State of Western Australia with respect to the development of the iron ore deposits so acquired, which agreement was approved by the Iron Ore (Hamersley Range) Agreement Act, 1963. Subsequent supplementary agreements between Hamersley and the State have since been approved by amendments to the Act.

It appears that, by a deed dated the 22nd October, 1964, made between the Vendors and one Lloyd Stanley Perron, the Vendors assigned to Mr. Perron an interest in their rights to royalties under the 1962 agreement. On the 11th April, 1979, L.S.P. Pty. Ltd. became the owner of Mr. Perron's interest by virtue of certain trust arrangements. Then, by deed dated the 25th October, 1979, L.S.P. Pty. Ltd. assigned to the National Mutual Life Association of Australasia, for a period of seven years and three months, all its right, title and interest in Mr. Perron's interest in the 1962 agreement.

In 1966, Hamersley began working the iron ore deposits at Tom Price which it had acquired under the agreement. In the course of mining its high grade ore, it had to set aside other material, which was too impure to be sold after only crushing and screening. The greater part of that material consisted of low grade ore. Hamersley subsequently constructed a concentrator, in order to improve the Fe content of its low grade ore. It began operating in 1979. The concentrator increases the purity of the low grade ore

by detaching and removing impurities from the hematite. The purified product is suitable for blending with the high grade ore from Tom Price, and from Hamersley's mining tenements at Paraburdoo, so as to form a saleable commodity. The present proceedings are concerned with the royalties payable on ore which enters that concentrator.

The processes through which the iron ore which enters the concentrator passes are conveniently set out in the affidavit of Mr. C. R. Langridge, Hamersley's Production Control and Technical Services Manager, sworn on the 2nd September, 1982. The following statement, in its essential terms, is taken from this affidavit.

Feed for the concentrator is brought by truck from the mine and sized by a grizzley into +200mm and -200mm ore. The +200mm ore then goes through a crushing and screening process, following which it is stockpiled ready for railing to Dampier, where it is blended and further screened prior to export. These proceedings are not concerned with the +200mm ore, that ore clearly falling to be dealt with, for royalty purposes, under the terms of para. (a) of the proviso to cl. 9.

It was generally accepted that, on its passing through the grizzley, the -200mm ore entered the concentrator (or beneficiation plant). Save only with respect to that portion of the ore which may be withdrawn at one of the possible stages shortly to be referred to, everything done in the concentrator is done for the purpose of beneficiation, and it is done as part of what was described as a single industrial process.

Following its passage through the grizzley, the -200mm ore goes, by way of a separate stockpile, to "scalping" screens, where it is sized into +80mm and -80mm ore. The +80mm ore then goes to secondary crushers, which reduce it to -80mm ore.

The two streams of what is now -80mm ore rejoin and go to bins. From each bin, the ore falls down through a pulping box, approximately 1.5 metres in height, during which time water is jetted on to it. This is the part of the process which has assumed critical importance in these proceedings, and to which it will be necessary to return later.

At the bottom of the pulping box, the ore falls on to a metal plate, from which it slides, as a slurry, on to a screen. Additional water is jetted on to the ore immediately over the screen. The effect of this process is to clean as well as to separate the ore, because the water loosens and detaches the clayey shales and other fragments. The screen sizes the wet material into +30mm and -30mm fractions. A further screen, immediately below the first, sizes the -30mm material into +6mm and -6mm fractions. More water is jetted on to the material while it is on this screen, with the same effect as that described earlier. Three streams accordingly emerge at this stage, constituted by material between 80 and 30mm, material between 30 and 6mm and material of less than 6mm.

The -6mm material descends as a slurry through pipes on to a sieve bend, which is essentially a screen, although in the circumstances it also serves a dewatering function, and

thence on to another screen, where it is further jetted with water, again with the same effect as before. The sieve bend and this screen size the material into two fractions, the first between 6mm and .5mm and the other below .5mm. There are now four streams, identified as A, B, C and D, A consisting of material between 80 and 30mm, B consisting of material between 30 and 6mm, C consisting of material between 6 and .5mm and D consisting of material of less than .5mm.

Each of streams A, B and C goes to its own preparatory screens where the material is further cleaned and separated with jets of water. Any material of less than 6mm in stream A or in stream B which has become detached from the larger pieces since the earlier treatment falls through these preparatory screens and joins stream C. The material between 80 and 30mm and the material between 30 and 6mm which is retained on these preparatory screens goes to separate revolving heavy media drums. At the preparatory screen for stream C, material between 6 and .5mm is retained and fed to heavy media cyclones. Material of less than .5mm, which has become detached from the larger pieces, falls through the screen and passes to hydrocyclones, where it is sized into two fractions, the first between .5 and .04mm and the second of less than .04mm. The latter is then discarded. Prior to May, 1982, the size below which the material was discarded was .063mm.

Both the drums and the heavy media cyclones make use of an unstable suspension of ferrosilicon in water with a specific gravity which permits the higher density iron ore

("concentrate") to sink, and the lighter, shaley material ("tailings") to float. The efficiency of the suspension in performing this task is reduced if small particles of clayey shale and other material are not thoroughly removed from the material entering the drums and cyclones, because those particles upset the specific gravity and viscosity of the suspension. The ferrosilicon is itself later retrieved from both concentrate and tailings by further jetting with water on recovery screens.

Stream D material flows into sumps from which it is pumped to hydrocyclones, where it is sized into two fractions, the first between .5 and .04mm and the second of less than .04mm (previously .063mm). The latter is also discarded. The former fraction, together with material of the same size derived from stream C, goes to a wet high intensity magnetic separator ("WHIMS"). The WHIMS extracts the iron ore concentrate by working on its magnetic properties and disposes of the non-ferrous tailings.

After the ferrosilicon has been washed off, concentrate between 80 and 30mm is reduced in size to -30mm by a further separate crushing and screening process before being put on the lump ore stockpile. Concentrate between 30 and 6mm goes directly to a lump ore stockpile after the ferrosilicon has been washed off. Concentrate between 6 and .5mm is "dewatered" in bunkers after the ferrosilicon has been washed off. It then goes to a fines stockpile. Concentrate between .5 and .04mm goes to horizontal pan filters, which extract water from the concentrate by vacuum, and thence to a fines stockpile.

The concentrator is designed to run continuously for 24 hours per day, 7 days per week. It is constructed on a modular basis, so that specific parts of the plant can be isolated and taken off line to effect repairs and maintenance and to control product grades and feed volumes. There are larger numbers of both cyclones and hydrocyclones than there are of drums or WHIMS. If it becomes necessary to close a cyclone, for example, the material which would have gone to it can be distributed amongst the other cyclone modules without significantly interrupting the flow of material through the plant. However, there is only one drum which handles the material between 80 and 30mm, only two drums which handle the material between 30 and 6mm, and only two WHIMS which handle the material between .5 and .04mm. Because it may not be, and, in the case of material between 80 and 30mm, it is not, possible to distribute all the material which would have gone to these modules to a "spare" module, the plant was designed so that the flow of material for these stages can be diverted elsewhere in order to avoid the closure of the whole plant. It is, therefore, possible for stream A to by-pass its preparatory screens and drums and to go straight to the separate crushing and screening process for ore between 80 and 30mm, and thence to the lump stockpile. It is also possible for stream B to by-pass its preparatory screens and drums and to go directly to the lump stockpile, and for the material between .5 and .04mm (being part of the original D stream) to by-pass the WHIMS and, after dewatering, to go straight to the fines stockpile. These by-passes are, it

was suggested, used essentially for short-term maintenance. If lengthier maintenance is required, then either an adjacent module is loaded to full capacity and the total plant throughput reduced, or the whole plant is stopped. It appears, however, that when the grade of the ore has warranted it, the by-passes have been used from time to time, notwithstanding that no maintenance was being undertaken, and the ore sent to product.

A further possibility exists, whereby the ore between 200 and 80mm, which is scalped and crushed to below 80mm in the secondary crushers, need not rejoin the -80mm ore which falls through the scalping screen. Instead, if the reach of the conveyor belt which takes it from the secondary crushers is extended, it can be sent directly to the further crushing and screening processes, and thence to the lump ore stockpile. The design of the plant incorporated this alternative as a further means of controlling the grade and size distribution of ore sent through the treatment processes. From the time when the concentrator was first commissioned until 1st March 1981 this part of the plant was run in that alternative mode.

Accordingly, from four different points, quantities of low grade ore have been taken straight to product, without going through the remainder of the beneficiation process.

The ore which Hamersley mines at Tom Price is a mixture of hematite and shale. The shale contains the bulk of particular non-ferrous elements which reduce the purity of the ore, and consequently its effectiveness in steel making. The most significant impurities which it contains of

are alumina, silica and phosphorus. Most of the iron ore sold by Hamersley which comes from Tom Price is known as "high grade ore" or "direct shipping ore". Whilst this ore contains small proportions of impurities, it is of sufficient natural purity to be sold without treating it other than by crushing and screening. Before being railed to Dampier for shipping, high grade ore is crushed to below 30mm and thereafter sized by screens into lump ore (between 30 and 6mm) and fine ore (below 6mm). No part of it is discarded. No water is used in its processing, except to control dust.

Hamersley has not, since the 22nd September, 1978, sold or disposed of any iron ore of a grade, quality or physical condition the same as, or similar to, that fed into the concentrator.

The appellants claimed royalty payments in respect of the low grade ore which passed through the grizzley and into the concentrator; but the parties have been unable to agree as to the basis upon which any royalty payable under the agreement ought to be calculated. Therefore, on the 2nd September, 1982, Hamersley issued an originating summons, in which the appellants in the two appeals were the defendants, claiming:

> " the determination of the following question of construction arising under the Agreement referred to above "(being the agreement of the 12th December, 1962)" and in paragraph 2 of the accompanying Affidavit of Colin Roy Langridge and in the events which have happened, that is to say:
>
> > At what time does beneficiation or other treatment of the Low Grade Ore referred to in that Affidavit begin within the meaning of Clause 9(b) of the Agreement?

> and such further or other relief, including an order providing for the costs of and incidental to these proceedings, as this Honourable Court thinks fit. "

After a hearing lasting 15 days, Olney J. ordered and declared that:

> " Upon the true construction of the Agreement....the plaintiff is obliged to pay to the defendants (as the persons who for the time being constitute the vendors within the meaning of the contract) in respect of iron ore which has been beneficiated, an amount equivalent to two and one half per centum of the assumed f.o.b. price (assessed in accordance with the provisions of the contract) of all low-grade iron ore fed into the feed chute of the wet screening plant of the plaintiff's concentrator at Tom Price in the State of Western Australia. "

His Honour also made certain orders as to costs, he extended the time for filing and serving a notice of motion to appeal and he reserved general liberty to apply.

The appellants in each of the appeals gave notice of appeal on the 13th February, 1984, the grounds being, for all practical purposes, identical. On the 2nd March, 1984, Hamersley gave notice of objection to the competency of those appeals, on the grounds that the first and principal order appealed from was an interlocutory order, and that the other orders appealed from were orders as to costs only, which by law are left to the discretion of the judge. On the same day, Hamersley gave notice, pursuant to Order 63 Rule 9 of the Rules of the Supreme Court, that it desired to contend on the appeal that the decision should be varied or, in the alternative, affirmed. On the 13th March, 1984, the appellants gave notice of motion for leave to appeal, in the event of it being held by this court that the order of the learned trial judge constituted an interlocutory order, in respect of which leave to appeal was required.

By s. 25(6) of the Supreme Court Act, 1935, it is lawful for the court to make binding declarations of right without granting consequential relief, and no action is open to objection on the ground that a merely declaratory judgment is sought thereby. By Order 58 Rule 10 of the Rules of the Supreme Court, any person claiming to be interested under, inter alia, a written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested. The originating summons in these proceedings was issued pursuant to that rule.

The question whether a decision is final or interlocutory is, as has frequently been observed, notoriously difficult; but the answer is provided in this case, I believe, by the recent decision of the High Court in Computer Edge Pty. Ltd. v. Apple Computer Inc. (judgment delivered on the 10th August, 1984). Gibbs C.J. expressed the position succinctly when he said:

> " The test for determining whether a judgment is final, which has been laid down in a number of cases including Carr v Finance Corporation of Australia Ltd. (No. 1) (1981) 147 C.L.R 246, is whether the judgment finally determines the rights of the parties, and the authorities have held that the Court in applying the test must have regard to the legal rather than the practical effect of the judgment. So that the question in the present case is whether the whole judgment finally determined, in a legal sense, all the rights of the parties that were at issue in these proceedings. And the answer is, plainly, that it did not, because it left undetermined the question whether any, and what, damages were payable. The conclusion that the judgment is not a final judgment is supported by a short passage from the judgment of Dixon C.J. in John Grant & Sons Ltd. v. Trocadero Building and Investment Co. Ltd. (1938) 60 C.L.R 1, at p.35, where his Honour said:

> "The judgment of the Supreme Court did not determine the action, for the demurrers did not affect pleas to or replications in relation to all counts of the declaration. The judgment was, therefore, interlocutory, and this appeal did not lie without leave." "

Carr v. Finance Corporation of Australia Ltd. (supra) concerned an order of the Supreme Court of New South Wales refusing to set aside a judgment obtained upon the default of the defendant in delivering a defence. Such an order does not finally dispose of the rights of the parties for, as a matter of law, it is open to the disappointed defendant to apply again to have the judgment set aside. Although any such application, in practice, might be doomed to failure, the test has regard to the legal rather than to the practical effect of the judgment - see Gibbs C.J. at p.248. The critical question relates to the determination of the rights of the parties in contest in the action.

This view appears to me to accord with the position adopted by the Privy Council in Becker v Marion City Corporation (1977) A.C. 271. At p.282, Lord Edmund-Davies approved the statement of Hogarth J in the Full Court of the Supreme Court of South Australia:-

> " for the purpose of these proceedings, I think that the order of the court was final. It finally determined the question whether or not the plaintiff was entitled to have her plan considered by (the council). That was the lis; and that was finally determined adversely to her. Whichever way the decision went, it was a final decision as between the parties. I think therefore that the judgment is a final judgment. "

See also the comment by Lord Russell, at p.276., in the course of the argument, and the observations by Barwick C.J. in Licul v. Corney (1976) 50 A.L.J.R. 439 at pp 441,442.

The question of whether an order is final and not interlocutory only arises in the context of particular proceedings. The fact that the monetary consequences of any declaration made in the present proceedings can only be resolved by an arbitrator in the future does not, in my opinion, render the present order any the less final. Subject to appeal, the question of construction has finally been concluded, and the order determined, in a legal sense, all the rights of the parties which were in issue in the proceedings. Accordingly, in my opinion, the appeals were competent. The contrary view would lead to the conclusion that, irrespective of the form of order made on the originating summons, it could only be an interlocutory and not a final order, or, in other words, that there could never be a final order in the proceedings. I am unable to accept this view.

As I have already indicated, the order made by the learned trial judge was that, for the purposes of para. (b) of the proviso to cl. 9 of the agreement, beneficiation began when iron ore was fed into the feed chute (described as the pulping box in the affidavit of Mr. Langridge) of the wet screening plant of Hamersley's concentrator. The appellants contend in this appeal, as they contended below, that beneficiation only began after the iron ore had left the preparation screens for the feed to the heavy media drum plants and heavy media cyclone plant and after the sieve bends and screens for the feed to the WHIMS plant. Hamersley, on the other hand, contended that beneficiation began each time iron ore passed through the grizzley

provided only that it was not subsequently withdrawn. In the alternative, Hamersley contended that the decision of the learned trial Judge should be affirmed.

It was accepted by all parties that the applicable principles of construction in this case were those described by Gibbs J. in Australian Broadcasting Commission v. Australasian Performing Right Association Ltd. (1973) 129 C.L.R 99 at pp.109-110:

> " It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, "even though the construction adopted is not the most obvious, or the most grammatically accurate", to use the words from earlier authority cited in Locke v Dunlop (1888) 39 Ch. D. 387 at p.393, which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also Bottomley's case (1880) 16 Ch. D. 681, at p.686. Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid inconsistency between that provision and the rest of the instrument. Finally, the statement of Lord Wright in Hillas & Co. Ltd. v. Arcos Ltd. (1932) 147 L.T. 503, at p.514, that the court should construe commercial contracts "fairly and broadly, without being too astute or subtle in finding defects", should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves

and without legal assistance (cf. Upper Hunter County District Council v. Australian Chilling and Freezing Co. Ltd. (1968) 118 C.L.R 429, at p.437). "

It is convenient at this stage to dispose of one other general matter. The appellants contended that the agreement was Hamersley's document and that it should be construed contra proferentem. This was on the basis, it seemed, that cl. 9 originated in its present form with Hamersley's solicitors and that the engrossment of the agreement was undertaken in their offices. But even accepting these facts, they do not, in my opinion, support the view that, on these grounds alone, the agreement should be construed against Hamersley.

The principle relied upon appears to have originated in the maxim "that every man's grant shall be taken by construction of law most forcible against himselfe" - Co. Litt. 183(a). A similar rule is to be found in Sheppard's Touchstone, at p.87, namely: "That all the words of the deed in construction be taken most strongly against him that doth speak them, and most in advantage of the other party; Verba Chartarum fortius accipiuntur contra proferentem; & quaelibet concessio fortissime contra donatorem interpretanda est." The footnote to this passage reads:

" This rule, from its strictness and rigour, is the last to be resorted to, and is never to be relied upon but where all other rules of construction fail. Bac. Elem. Reg. 3. It must be understood with some restriction too in the case of an indenture which is executed by the grantee as well as the grantor, for there the words are to be considered as the words of both. Plowd. 134. But in the case of a deed poll, being executed by the grantor alone, the words are his only and shall therefore be taken most strongly against him. "

If this rule has any application, it might be suggested that the vendors in this case were the grantors for its purposes and that the provisions of the agreement as to royalty should be taken as the words of the grantors, since they have the effect of a reservation - see Browning v Beston 1 Plowd. 131 at 134.

Although the principle has now been expanded so that, for example, exceptions in a contract are construed against the party for whose benefit they were inserted, I have found no authority, nor did the appellants cite any authority, which justifies the view that it is permissible to investigate whether a particular clause in an agreement originated with a particular party and, if it did, then to adopt a construction in favour of the other party. So to apply the rule would, it appears to me, be quite unrealistic, particularly where, as here, the agreement has been the subject of extended negotiations between the parties through their solicitors and, as Mr. E. A. Wright himself conceded, was accepted by both parties as being satisfactory. The proper view would appear to be that the person against whom the rule operates depends upon the character and substance of the condition itself - Birrell v. Dryer (1884) 9 App. Cas. 345 at p.354 - and not upon its authorship.

It does not appear to me that John Lee & Son (Grantham) Ltd. v Railway Executive (1949) 2 All E.R. 581 assists the appellant because, although, at p.583, Sir Raymond Evershed M.R. referred to one of the parties as having "put forward a clause", this followed immediately upon his observation that

that party had "put forward the document". And see also Fowkes v Manchester and London Life Assurance and Loan Association (1863) 3 B. & S. 917 at p.925.

In any case, however, the rule being only a rule of last resort, I would not have found it necessary to apply it even had I been of the contrary view.

It is necessary now to return to cl. 9 of the agreement of the 12th December, 1962. Reduced to its essential terms, the first part of the clause requires the Purchaser to pay to the Vendors in respect of all iron ore produced by the Purchaser and sold or otherwise disposed of by it an amount equivalent to 2½% of the amount received on sale or other disposition of the iron ore in unrefined and unmanufactured form f.o.b. the final port of shipment thereof.

This part of the clause purports to apply to all iron ore produced and sold or otherwise disposed of; but it contemplates that the ore will be sold or otherwise disposed of in an unrefined and unmanufactured form. Furthermore, although not presently material, it assumes that any other disposition of the ore will be in consideration of the receipt of a sum of money.

Paragraph (a) of the proviso to cl. 9 deals with the case where iron ore is upgraded by crushing and/or screening prior to shipment. In this event, the royalty is calculated upon the amount received on the sale or other disposal of the iron ore so upgraded. It is clear that, when so upgraded, the iron ore is no longer in an unrefined or unmanufactured form within the terms of cl. 9. This paragraph deals only with a sale or other disposal of iron

ore after crushing and/or screening, but after no other beneficiation or other treatment.

Paragraph (b) goes on to deal with a second case where iron ore is not sold or otherwise disposed of in an unrefined and unmanufactured form. It relates to the situation where the iron ore is "beneficiated or otherwise treated". In this case, the royalty is not calculated by reference to the proceeds realised on disposal. It is calculated upon the basis of there being deemed to have been a disposition of the iron ore at the time when the beneficiation or other treatment began.

Paragraph (b), in contrast to the provisions of para. (a), does not itself prescribe the amount of the payment to which the Vendors are entitled. It merely deems there to have been a disposal at a particular time. Paragraph (c) goes on to deem the disposal to have been at the "assumed f.o.b. price", a term which is defined in para. (e). To determine the amount of the royalty it is, it must be assumed, necessary to return to the opening words of cl. 9 and to deem a disposal under para. (b) to be a disposal of iron ore in an unrefined and unmanufactured form so as to justify the royalty being calculated at 2½% of the assumed f.o.b. price.

The special difficulty which para. (b) creates arises out of the final words of the paragraph:

> " but crushing or screening shall not be deemed to be beneficiation or any part thereof. "

It was submitted on behalf of the respondent that these words are merely a safeguard against the possibility that someone might think that the ore to which para. (a) applies

is swallowed up by para. (b) and that the words "or any part thereof" mean that "crushing" and "screening" together shall not be deemed to be beneficiation, so making either of them, on its own, part thereof. In my opinion, such a construction imposes far too considerable a strain on the words which have been used. Had that really been the intention of the draftsman, it would have been a simple matter for him to have effected that intention much more simply and clearly, for example, by expressing para. (b) to be subject to para. (a). Furthermore, if this contention is correct, it means, in effect, that the last fifteen words are to be treated as equivalent to "but crushing and/or screening shall not be deemed to be beneficiation". It might have been expected that the draftsman, having just used the expression "crushing and/or screening" in para. (a), had he intended this, would have repeated that expression in para. (b); but he did not do so. Finally, although not a great deal of weight can be placed upon it, the actual term "beneficiation", which the crushing or screening is not deemed to be, is used in para. (b) in relation only to fixing the time at which the disposal is deemed to have taken place.

With respect to iron ore, other than iron ore which has been sold immediately following crushing and/or screening, and which therefore falls to be dealt with under para. (a), the first question to be asked, in my view, is whether it has been "beneficiated or otherwise treated". If the answer to this question is in the affirmative, then the next question relates to the time at which the beneficiation or

other treatment began, on the basis that crushing or screening shall not be considered to be beneficiation or any part of beneficiation for this purpose, assuming, it might be thought, that it is possible to abstract crushing and screening from a continuous process.

This approach seems to me to be reasonable. If Hamersley were simply to crush and screen the iron ore before sale, the appellants would take the benefit of any increased value arising from the crushing and screening. If the initial part of a process of beneficiation simply consists of crushing and screening, why should they not take a similar benefit? The deeming of crushing or screening not to be beneficiation or any part of beneficiation appears to me to achieve this result.

It follows from the adoption of this approach that it is necessary to look into the beneficiation process in order to ascertain when beneficiation, other than, in this case, screening, takes place, however difficult such a task may be when the beneficiation process is a continuous one. Inevitably, this means that the answer to this question will be determined by the order in which machinery is to be found in the process. It may also lead, and I believe it does lead, in this case, to having to value a slurry for the purpose of calculating the royalty.

Although, initially, it was argued on behalf of the respondent that the term "screening", as used in cl. 9, was limited to dry screening, and that it did not extend to wet screening, the learned trial Judge declined to draw any distinction between the two processes. This may well have

been due to his adoption of a very limited definition of "screening" as being "the presentation of particles to apertures"; but it was not disputed by the respondent during the hearing of this appeal that the term "screening" extended to wet screening as well as to dry screening. This, it should be said, accords entirely with the evidence.

There appears to be no dispute that the basic concept of screening involves presenting material on to a surface which contains apertures of a given size, and which excludes particles larger than that size (oversize) and allows particles of a smaller size (undersize) to pass through.

It is also quite apparent that, in order to screen Pilbara iron ore, it is not necessary to wet screen it. So far as the direct shipping ore is concerned, therefore, only dry screening is employed. Hamersley did not introduce wet screening until 1979, when it was introduced as part of the beneficiation process in the concentrator. However, it was accepted that, in 1962, when the agreement was made, it was appreciated by the parties that any future process of beneficiation was likely to include a process of wet screening, probably as an initial step in the process. The position was well expressed by one of the witnesses who said that the moment you talk about beneficiating low grade ore, you are talking wet screening.

The major process of beneficiation occurs in the heavy media drums, the heavy media cyclones, and the WHIMS, which, for the first time, separate the concentrate from the tailings. Before the ore reaches them, it is essential that it be properly sized, particularly at the lower end, so that

the appropriate sized ore goes through the selected concentrator. It is also crucial from a metallurgical point of view to get rid of contaminants before the ore is presented to the drums and cyclones, in order to prevent interference with the specific gravity of the separation medium and to prevent contamination of the medium, which would hinder its recovery for future use.

Dr. R.J. Batterham, whose evidence was preferred by the learned trial Judge to that of others, described the process which commences with the addition of water to the ore in the pulping box. There is, first, the breaking down of the component rock or mineral which is water active. In particular, it breaks down the water active clayey material. Pilbara ores are now known to contain clayey shales to a far greater extent than was appreciated when the concentrator was built. Secondly, there is the detachment of adhering fines from larger particles. The application of large quantities of water tends to dislodge adhering fines by destroying the capillary forces which hold them to the larger particles. The detachment of fines also takes place with dry screening, but only to a very much smaller extent.

It is self-evident, that in order to wet screen, water must be applied to the ore stream at some point. In my view, the addition of water to the -80mm ore prior to and on the screen did nothing other than make the process a wet screening process. 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

deny the description of wet screening to the critical process. As both Mr. Booth and Mr. Langridge said, a wet screening operation generally requires a wet feeder or wet chute ahead of the screen entry as an integral part of the arrangement. Furthermore, for wet screening, the ore must be thoroughly wet, for in order to wet screen the ore, it must be in a slurry form. It is usually preferable to make the slurry prior to the ore reaching the screen itself, rather to attempt to do all the wetting on the screen surface. The efficiency of screen separation is enhanced by wet screening. More of the undersize particles are removed as undersize and a cleaner oversize material leaves the screen surface. The evidence also was that the passage through the screen of particles which are already separated is accelerated, and the capacity of the screen is increased.

Wet screening inevitably results in some degree of scrubbing (or abrading) and washing (or cleaning), although there was some debate as to the precise meaning of these terms, scrubbing, it was said, requiring the ore to be backed by a rigid surface, which was here absent, and washing requiring the removal of waste, which does not occur in the concentrator at this point, except to the extent that waste is contained in the -6mm stream.

It is unnecessary to resolve these questions of definition, it being clear what in fact happened. A scrubbing effect begins in the pulping box as the ore tumbles down and strikes the plate at the bottom. This assists the detachment of particles and the disintegration of the component shales. There is also a scrubbing effect

as the ore bounces up and down on the screen surface. If, however, scrubbing, strictly so called, had been intended, a different design of pulping box would greatly have improved the scrubbing effect. Here the evidence appears clearly to indicate that any scrubbing which occurred was simply the necessary concomitant of a wet screening process.

The position is similar with respect to washing. Indeed, as Mr. E.C. Herkenhoff said, if someone said he was wet screening, you would assume that he was both washing and screening. The wet process necessarily involves washing on the screen. Accordingly, wet screens are common forms of appliances for washing.

With respect, the learned trial Judge appears to me to have centred his attention too much upon the actual act of screening, without paying sufficient regard to the total process which, in this case, was wet screening. The process of wet screening began, in my view, upon the evidence before his Honour, with the addition of water in the pulping box. Prior to that, beyond any doubt, there had been no beneficiation of the ore, other than by crushing and screening.

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 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.

It was argued on behalf of the respondent that para (b) of the proviso was concerned with an input royalty and that it is the amount of the ore which goes into the beneficiation plant which has to be valued for the purpose of royalty. But that argument appears to me to beg the question. Nor does it appear to me to be helpful to consider the position which would occur if ore were disposed of to another company for beneficiating at its own plant, the suggestion being that the royalty payment should be the same as when Hamersley itself beneficiates its ore. That might well be a desirable situation, although it assumes that the ore so disposed of would necessarily be disposed of after passing through the grizzley. However, para. (b) requires, in my view, a different answer.

Once it is accepted that screening includes wet screening, then everything which is a necessary consequence of wet screening is excluded from beneficiation for the purpose of determining when beneficiation within the meaning of para. (b) of the proviso to cl. 9 begins. Put in the

negative, the question is whether there is anything else occurring which is not a necessary part of the process of wet screening. In my view, nothing has been identified in the course of screening the -80mm ore which is not an integral part of wet screening. Such a conclusion does not, as it appears to me, involve interfering with any finding of primary fact by the learned trial Judge.

The question which then arises is as to when beneficiation for the purpose of para. (b) of the proviso to cl. 9 does begin. On the basis of the foregoing reasoning, it appears to me that it begins in relation to the ore in the respective streams on entry to the heavy media drums, the heavy media cyclones and the hydrocyclones, only wet screening or screening by sieve bends having taken place prior to those points. There is nothing to indicate that the process taking place on the various preparatory screens is other than wet screening. I would allow the appeals accordingly.

The appellants are, in my opinion, entitled to a declaration that, in respect of ore to which para.(b) of the proviso to cl. 9 applies, beneficiation begins at the points which I have indicated. Having regard to the argument before us, it appears to me that it would be desirable to express the declaration in this form rather than by reference to 'Low Grade Ore'. However, it will be necessary to hear counsel as to the precise terms in which the order should be couched.

If the primary question in the originating summons is answered in this way, the only ground of appeal which

remains relates to the costs incurred in recalling Mr. Langridge, which were ordered to be paid by the appellants for the reason that his recalling was at their request. In the end, the appellants did not press the matter. It is right to say, however, that the order which was made resulted from the exercise of a discretion with which this Court should not, in any event, in my opinion, interfere.

Heard: 6th-10th August, 1984
Delivered: 27th November, 1984

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

THE FULL COURT

CORAM: WALLACE, KENNEDY & ROWLAND JJ

APPEAL NO: 59 of 1984

B E T W E E N :

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA
Appellant
(Sixth Defendant)

and

HAMERSLEY IRON PTY. LIMITED
Respondent
(Plaintiff)

APPEAL NO: 60 OF 1984

B E T W E E N :

LANGLEY GEORGE HANCOCK, ERNEST ARCHIBALD MAYNARD WRIGHT, HANCOCK PROSPECTING PTY. LTD., WRIGHT PROSPECTING PTY. LTD. AND L.S.P. PTY. LTD.
Appellants
(First to Fifth Defendants)

and

HAMERSLEY IRON PTY. LTD.
Respondent
(Plaintiff)

Mr. J.L. Sher Q.C., Mr. D.G. Williamson Q.C. and Mr. P.C. Heerey (instructed by Messrs. Keall Brinsden) appeared for the appellants.

Mr. S.E.K. Hulme Q.C. and Mr. F.H. Callaway (instructed by Mr. J.R. Wood) appeared for the respondent.

ROWLAND J.

The appellants in appeal No. 60/1984 were first defendants in the action and the appellant in appeal No.

59/1984 was the sixth defendant in the action in which the respondent was plaintiff.

Both appeals involve substantially the same grounds.

In December 1962 an agreement was executed between the first four defendants as vendors, two other companies who need not concern us further, and the plaintiff as purchaser. The object of this agreement was the sale by the vendors to the purchaser of the vendor's right title and interest in certain temporary reserves and all rights to prospect or mine granted or flowing from such temporary reserves.

Also, in a way that need not concern us, the fifth and sixth defendants obtained an interest in whatever was due to the vendors under that agreement.

As part of the consideration for the sale and purchase the purchaser agreed to pay to the vendors certain sums calculated in a manner rather akin to that of a royalty, on certain ores disposed of or deemed disposed of. Clause 9 of the Agreement sets out the method and the necessary formula. It is the proper construction of that clause in the context of the purchaser's present mining and upgrading processes that gave rise to the dispute between the plaintiff and the defendants.

The dispute came to the Court in the first instance by way of originating summons issued by the plaintiff which claimed "the determination of the following question of construction arising under the agreement...and in the events which have happened; at what time does beneficiation or other treatment of low-grade ore referred to in the

affidavit (of Colin Roy Langridge) begin within the meaning of cl.9(b) of the Agreement."

The affidavit of Langridge sworn 2nd September 1982 gives some detail of the plaintiff's operations and gives a definition of low-grade ore in para. 16 in terms of "the better part of ore mined by it (Hamersley) at Tom Price which is not high-grade ore or direct shipping ore which in general terms was said to be of sufficient natural purity to be sold without treating it other than by crushing and screening" (para. 16 Langridge Affidavit T1104).

During the hearing, this definition gave rise to some argument and in the end it seems that the learned trial Judge reformulated the question when giving his decision and for the purpose of his decision he defined low-grade ore as "ore which does not for the time being meet the criteria for direct shipping - that is ore which requires processing other than crushing or screening or both before it is a saleable commodity." (T.85). No complaint is made at this stage about this definition so I assume that each party understands perfectly what it conveys and hopefully the understanding of each is the same.

The learned trial Judge hearing the matter drew attention to the difficulties of proceeding by way of originating summons to resolve this type of dispute and I will say more of this when considering whether the order made is a final judgment. I mention it now simply to draw attention to the fact that the case at hearing was much concerned with the operation of the plaintiff's beneficiation plant and certain processes within the plant.

The matter of construction arose after certain fact issues defining words had been resolved.

Clause 9 is in the following terms:

"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 2½% of the amount received on sale or other disposal of that iron ore in unrefined and manufactured form f.o.b. the first port of shipment thereof PROVIDED ALWAYS THAT:

(a) If iron is upgraded before shipment by crushing and/or screening then the Vendors shall receive an amount equivalent to 2½% 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. "

Much of the ore which was initially mined and sold was of sufficiently high grade to require no treatment other than perhaps crushing and screening. Naturally, however, in the life of this type of mine during the course of mining much ore is mined that falls into the category of low grade ore. In fact many millions of tons of low grade ore were mined and stockpiled and the purchaser resolved that this required more sophisticated treatment to make it saleable.

In 1979 the purchaser erected a treatment plant known as a concentrator and in order to understand the nature of the present dispute it is necessary to understand what occurs at the site and in the concentrator.

This dispute is said to concern only the low grade ore although there are times when what would normally be regarded as high grade ore is put through the concentrator.

Ore is brought from the mine or from where it has been stock piled, and dumped into what is called a grizzly.

The grizzly can be described as a large screen, consisting of railway line bars spaced at the relevant distance. Here the ore is sized into lumps which are over 200 millimetres and under 200 millimetres. The over 200 mm. sized ore does not require concentration; it is normally high grade ore and it goes to a crushing and screening process and is stock piled and sometimes blended with other ore and no doubt sold with other high grade ore. It is said that we can ignore this ore. The minus 200 mm sized ore goes to another stock pile from whence it is taken to scalping screens where it is again sized into plus 80 mm and minus 80 mm ore. The minus 80 mm ore then goes to a pulping box. The -200 to +80 mm ore originally went to product i.e. it was thought to be of sufficiently high grade not to require concentration. This changed in 1981 probably because of the altered quality of the adhering clays and shales and since that time it now goes to secondary crushers where it is reduced to -80mm ore and this then joins the other stream of -80mm ore going to the pulping box.

Once the minus 80 mm ore reaches the pulping box it

then falls onto a metal plate and slides onto a screen. In the process of falling it passes through a high pressure jet of water the exact pressure of which may be in issue and when the ore is immediately over the screen it is again submitted to water under pressure. The effect of the water is to both clean and to commence the separation of the ore from its clay and dirt adherents. This wet material is then screened into plus 30 mm ore and minus 30 mm ore and a screen below sizes the minus 30 mm ore into plus 6 mm ore and minus 6 mm ore. Three streams of ore then emerge.

Stream A which is plus 30 mm to minus 80 mm

Stream B which is plus 6 mm to minus 30 mm

Stream C which is minus 6 mm.

A further Stream D separates out ore which is less than .5 mm. This stream also catches most of the waste material, being shale, clay etc.

Streams A, B, and C then each go to their own preparatory screens where the material is cleaned and separated again with further jets of water. Streams A and B are broken down further and anything that is less than 6 mm. joins Stream C. The balance of Streams A and B goes to revolving heavy media drums. Stream C goes to heavy media cyclones. Both the drums and cyclones use an unstable suspension of ferro-silicon in water which permits the heavy iron ore to sink and the lighter shaley material to float. Stream D which is less than .5 mm goes to hydra cyclones where it is further sized and goes to whims where a magnetic process separates the non ferrous material. Further crushing and sizing occurs after the ferro silicon is

removed from the larger sizes.

It can be seen from this that the whole process at various stages requires some screening.

Mr. Langridge who was originally the general superintendent of the respondent's plant said in evidence (T203) that streams A, B, C & D contain the same mass of material as that which entered the pulping box but a large percentage that goes out in stream D is waste material. That means, of course, that streams A, B and C have already to some extent been concentrated.

The appellants argue that beneficiation or other treatment begins for the purposes of clause 9(b) as soon as the various streams A, B, C and D leave for or perhaps arrive at the drums, cyclones and whims.

The respondent initially argued that the beneficiation for the purpose of clause 9(b) begins as soon as the ore is wetted in the pulping box. At trial it adopted as an alternative argument, which it then submitted as its main argument, that beneficiation begins as soon as the low grade ore, which is committed to beneficiation, leaves the grizzly.

Before turning to the facts it is helpful to set out the three competing arguments.

1. <u>The respondent's main argument</u>

The respondent says that the word beneficiation can be used in a wide sense or a narrow sense. In its wide sense it includes any physical treatment of the ore that makes the ore more suitable for sale and this will include crushing and also screening. In its narrow sense it involves the

removal from the ore of assorted soils, clays, gangue, shales and other contaminants including alumina.

As I understand the argument the respondent says that beneficiation in cl. 9(b) is used in the narrow sense and the last 15 words are simply definitive of that fact by excluding from the word beneficiation any part of crushing or screening.

Counsel for the respondent argues that cl. 9(a) deals with beneficiation in the wide sense and it it is there called upgrading. Beneficiation in cl. 9(b) is used in the narrow sense, i.e. the concentration of this ore by the removal from it and the disposal of shale and clay etc. By way of example he says that in general terms when you upgrade 100,000 tonnes of ore by crushing and screening you normally start and end with 100,000 tonnes of ore. When, however, it is beneficiated in the narrow sense you start with 100,000 tonnes but you end with only (say) 80,000 tonnes. In the meantime you have extracted clay, shale and other impurities. He put his argument this way:

> " The draftsmen also we say were aware that the word beneficiation can be used in a wider sense and there is plenty of evidence as to that. If they were then taken in 9(b) as using the word beneficiated in a wider sense then two things would happen. Firstly, they would be producing confusion between 9(a) and 9(b) and you could produce an inconsistent result so the draftsmen in our submission aware of these things said we can't simply leave it at 'if iron ore is beneficiated or otherwise treated shall be deemed to have been disposed of at the time it begins' because somebody is going to say 'when you crushed and screened you beneficiated and you are deemed to have disposed of it when that began not when you sold it' - you have a quite different position and the draftsmen for that reason perfectly correctly went on and provided in (b) that crushing or screening shall not be deemed to be beneficiation or any part

thereof. "

The argument continues that it must follow that this beneficiation begins either when the low grade ore is dumped into the grizzly or at latest when it comes out of the grizzly on path for the beneficiation plant. I believe that counsel might also accept that it could also be argued that beneficiation could be said to begin as soon as the ore left the primary stockpile for the secondary and tertiary crushers or even as late as when it entered the pulping box.

The overall argument did not find favour with the trial Judge or perhaps to be more accurate, it found favour as a practical resolution of the dispute but he held that it could not stand grammatically because of the last four words in 9(b).

2. The respondent's alternative argument

This was the argument that the respondent was submitting prior to the commencement of the litigation. It is based on an acceptance beneficiation is widely defined but any part of crushing or screening is to be excluded when finding the beginning of the process; that there is screening occurring within the beneficiation process at various stages but that within the plant itself beneficiation commences by a process that is not screening. He argues that the first wetting of the ore that occurs inside the pulping box commences the degradation process of the lumps of ore and shale by breaking up the lumps before they get to the first of the screens where further water is applied to continue the process. This

process is described variously as scrubbing or washing and it occurs prior to screening. The argument depends for its force on certain findings of fact which were in fact made by the learned trial Judge who accepted that argument.

3. The Appellants' argument

The appellants' argument effectively accepts the alternative construction placed on clause 9(b) by the respondent but finds a later point at which they say beneficiation begins. It is that within the beneficiation process the first part of the process involved screening and it was not until the ore left the plant through Streams A, B, C and D for the drums, cyclones and whims that beneficiation apart from crushing and screening could be said to begin.

This argument depends for its force on two major premises namely that, screening includes wet screening, and the appellants satisfied the trial Judge in this regard, and that, all sub processes that are a necessary part of screening are included in the term screening. The appellants failed to satisfy the Judge in this regard. One of the main issues canvassed at the trial was what was meant by screening, and whether it included wet as well as dry screening and the other main issue was to ascertain what occurred inside the pulping box and whether something commenced in that box, that was separate from and occurred before any screening occurred, that could be said to be the start of the beneficiation process.

The learned trial Judge's finding of fact was that

beneficiation begins with the scrubbing of the ore when it first comes into contact, in the pulping box, with a violent wetting process. The Judge indicated that this was the commencement of the breakdown of the clay and other materials from the ore which is also continued during the screening. The Judge found that the first application of water was deliberate and had an immediate and degrading effect upon the material with which it came into contact.

The appellant attacks the finding but before dealing with that I should deal with the appellants' submission that this Court can reach its own conclusions of fact from the evidence. Counsel said that the learned trial Judge stated that all the experts were distinguished and in deciding to accept one expert rather than another no question of credibility was involved. Counsel argued that in those circumstances this Court could draw its own conclusions and he referred to Warren v. Coombes (1979) 142 C.L.R. 531. That decision is of course binding on this Court but it should not be given operation beyond the principle which it enunciates and which is expressed at pp. 551 and 552 in the following terms. At 551:

> " The established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed are established by the findings of the trial judge. In deciding what is the proper inference to be drawn the appellate court will give respect and weight to the conclusion of the trial judge but once having reached its own conclusion will not shrink from giving effect to it."

At 552:

> " The duty of the appellate court is to decide the

> case - the facts as well as the law - for itself. In so doing it must recognise the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if after giving full weight to his decision they consider that it was wrong they must discharge their duty and give effect to their own judgment."

Put briefly Warren v. Coombes is authority for the proposition that where there are findings of primary fact the appeal Court is in as good a position as the trial Judge to draw inferences from those facts. This is not quite the position here. In the present case several expert witnesses were called by both sides. They were all according to the trial Judge men of eminence and in the end he had to choose between them. He chose to accept the evidence of Dr. Batterham whom he described as "the witness best qualified to give evidence not of opinion but of observed fact concerning the operation of the feed chute". He indicated that that evidence was tested both in cross-examination and by other testimony but in the result he said he was "satisfied that his description of the sprays and the effect of the water on the material fairly conveys the fact of the situation. In the very distinguished company in which he appeared it would be misleading to say that I found Dr. Batterham a more credible witness than the other experts who testified. In my view he was, however, better equipped in terms of his knowledge and understanding of the operation of the particular plant to give evidence both as to his observation and his opinion."

The learned trial Judge was aware that the resolution of the question, concerning what goes on in the feed chute

"has required me to make a finding of fact based upon the evidence."

I am not convinced that Warren v. Coombes has much to say about this situation. One really gets back to the basic rule that I suspect is sometimes glossed over that the resolution of disputes between parties is by trial "it is not a system of resolution by appeal". Barwick C.J., Sharman v. Evans (1977) 138 C.L.R. 563 at 565. It seems to me that the principles set out in Patterson v. Patterson (1953) 89 CLR 89. and Edwards v. Noble (1971) 125 C.L.R. still apply. I apprehend those cases to say that an appeal Court should examine the evidence for itself, consider the advantages that a trial Judge had in assessing the type of evidence given, consider his findings of fact on all the evidence, and consider whether he was wrong so that the appeal Court should substitute its view of the facts for that of the trial Judge. In this case the trial Judge was educated over a period of some three weeks in the intricacies of what was going on inside this particular box or chute. He was being educated by experts who did not always agree. He had the benefit of seeing and hearing those experts giving their evidence. It is my understanding that most educators are of the view that face to face teaching is better than teaching by correspondence. The education of the Judge was by face to face teaching. That is not to say that if, on balance, it appears that the acceptance by the trial Judge of Dr. Batterham's evidence is inconsistent with other cogent evidence and the Judge has overlooked or seemed to overlook some important step in the

argument that this Court should not substitute its own findings. I mention these matters to indicate that I do not believe that this is simply a case for the adoption of the Warren v. Coombes principle.

Before turning to a consideration of the Judge's findings of fact in relation to the evidence I have found it helpful to seek a general overview of cl. 9 accepting the interpretation of certain words that both parties accepted can be open according to context. I accept also that such a general view has its own dangers.

It seems apparent from the document itself that the appellants were to receive a royalty type of payment for all ore that was sold or otherwise disposed of in an unrefined and unmanufactured form and it also seemed to be understood that the parties were aware that from time to time the ore might be sold or dealt with in three different ways. The first paragraph of cl.9 would indicate that the parties contemplated that it might be mined and taken straight to the ship or perhaps stock piled and then taken to the ship and in that event the appellant would receive an amount equivalent to 2½% of the amount received f.o.b. for the ore sold. One assumes that this ore would be of sufficiently high grade not to require any upgrading at all.

The parties then seemed to consider other alternatives stated to be in the form of provisos. Under sub-clause (a) if the ore was upgraded by crushing or screening or both crushing and screening then the appellants were to receive the same equivalent percentage for the ore as mentioned above. That is the purchaser would bear the cost of any

crushing or screening that was required.

Under sub-clause (b) if the upgrading was to be by beneficiation or some other treatment then a different method of calculating or assessing the royalty type payment would be adapted and the ore would be deemed disposed of at the time the beneficiation or other treatment began. There are then two conflicting constructions of the clause if the proposed treatment was beneficiation.

The first construction:

(i) beneficiation is to be interpreted narrowly to mean a process to remove impurities.

(ii) beneficiation is to be distinguished from crushing or screening which is catered for if sub-clause (a) applies.

(iii) sub-clause (b) speaks in terms of ore that has been beneficiated.

(iv) to find the beginning of the process that led to the ultimate beneficiation one looks to the place where the ore was committed to that process.

The second construction:

(i) beneficiation is given a wide interpretation which includes crushing and screening.

(ii) to find the beginning of the process of beneficiation for the purposes of the

sub-clause (b) look to the first place where something that can be said to be other than crushing or screening takes place.

Also, under sub-clause (b) it was understood that it was only the equivalent value of the ore which would be paid for because it was not being sold in its natural state. In this regard two things were then required. The ore was deemed to be disposed of at the time when the beneficiation process began and the ore was deemed to have a value at that time. It is not in dispute that the royalty type payment is 2½% of that value.

The parties might be forgiven for thinking in 1962 that finding the beginning of the beneficiation process would not cause difficulty. They thought the difficulty would be in reaching a formula for ascertaining the value at that relevant stage. They deemed a value. They did that by assuming an f.o.b. price, and that could be assumed by one of two methods. The first was to obtain an average of price actually received for earlier sales of ore of the same grade, quality and physical condition as that which existed at the time that beneficiation began. The second method applied if no such sales had occurred. By that method the parties could either agree or, failing that, an arbitrator would resolve the assumed price.

One consequence from that overall picture is that the first method of assuming an f.o.b. price might be extremely difficult if one had to look inside the beneficiation plant and endeavour to find some ore that was of the same grade,

quality and physical condition as that which was sold earlier which had not had the benefit of any beneficiation.

One assumes that the appellants would argue that that would not pose a difficulty if the respondent had simply built a wet screening plant without any other beneficiation involved, with the ore that came out of Streams A, B, C and D being shipped for sale instead of going into the drums, cyclones and whims. The fact that Stream D contains much of the waste may inhibit this argument to some extent.

Both appellants and respondent accept that the document should be construed so as to give it commercial reality Looked at from the point of view of the parties in 1962 it seems to me that commercial reality favours the respondent's main argument. It is apparent however, that if the respondent's main argument is accepted, it would be a simple matter for the respondent to structure its plant towards beneficiation so as to defeat some of the appellants' expectations. There was certainly a suggestion in the evidence that the appellants believe that this has in fact occurred. There is no doubt that it could occur. There are, in the competing constructions, arguments for both insofar as the commercial realities are involved. It is said, however, that the grammatical construction of the clause favours the argument submitted by the appellant which is effectively also the alternative argument submitted by the respondent. In this regard it is said that the words "or any part thereof" appearing at the end of cl. (b) preclude the construction sought as its main submission by the respondent.

The difficulty that has arisen regarding the proper construction of this clause has, in my view, been caused to some extent by the way in which the question was asked. The question was a narrow one to start with when it was conditioned in its application to low grade ore. An attempt was made on day one of the trial to widen the argument but the respondent who had the running of the originating summons managed to avoid this happening.

The critical matter in my view is that the question was asked in the context of a term that was not used by the parties and which the parties had successfully avoided using back in 1962 when they negotiated the agreement. The Court was asked to construe the document in relation to low grade ore and that seems to me to have distracted all since then.

The draftsmen were both solicitors and each had a wide mining background. I believe that they structured their document so that it would operate no matter what grade ore was being dealt with.

The background fact which to me seems most relevant is that stated by Dr. Lynch at p.1196. He said:

> "I am not aware of any iron ore processing plant in Australia or overseas where a wet process was in use in 1962 or is in use now solely as an adjunct to crushing and screening without some further process in view."

As far as I know no witness took issue with that statement which is true now and was certainly true in 1962.

Counsel for the respondent said that the trial Judge nearly reached the correct decision and I agree but I am not quite sure that I agree with counsel's reasons.

In my view one looks at cl.9 without having a concern

about the grade of ore that you start off with. Neither proviso (a) nor proviso (b) makes mention of the grade of ore. Each is concerned with the end product. Sub-clause (a) is concerned with ore that has been upgraded by crushing or screening or crushing and screening and then sold. Sub-clause (b) is concerned with the ore that has gone to further treatment i.e. beneficiated or otherwise treated. Beneficiation is a process which can include crushing and screening but which the latter part of sub-clause (b) has confined by effectively defining beneficiation as a process that is separate from any part of crushing or screening. The other treatment referred to in sub-clause (b) need not concern us but clearly the draftsmen had in mind a type of treatment that was not a crushing or screening process nor was it a beneficiation process. It was something else.

It seems to me that once one accepts that one is only interested in the end product, i.e. the ore that is either crushed or screened or both under sub-clause (a) or beneficiated which is to be regarded as a process different from sub-clause (a), then it is of no moment what quality the ore posseses when it enters either of those processes even though it may be likely that the ore entering (b) will be low grade ore.

Nor is one concerned with the differences between wet and dry screenings.

If by some chance the respondent had an upgrading plant that consisted of crushing and wet screening only, then sub-clause (a) would apply. Once the ore goes beyond that stage, however, and it is beneficiated using a process that

would not normally be regarded as screening then the ore which results at the end of that process will be dealt with under clause (b).

This line of reasoning is more in keeping with the main argument developed by the respondent but it leads me to a different result and it leads me to undertake the sort of exercise that the appellant required. It also leads me to differ from the learned trial Judge in the result.

The final question, is to determine when the beneficiation process begins. It seems to me that this must on the facts of this case occur when the process which can be called crushing and screening has finished and I place that as where the ore heads for the whims, drums and cyclones in streams A, B, C and D.

The answer to this question will always be dependent upon the facts but in my view it must be answered broadly. I am reasonably convinced that the answer should not have to depend upon making an assessment of which group of experts one should rely upon. The answer should be apparent to someone involved in the industry on a rather broad basis being able to look at various operations and say without much hesitation and without a microscope that within a particular area a particular process is taking place.

Looked at in that way I do not believe that there is any dispute that between the entry to the pulping box and the exit in streams A, B, C and D what has happened has been what could be called in general terms a wet screening process. The mass of the material that entered the pulping box is the same as the mass that left in streams A, B, C and

D and the material had been sized. It is true, of course, that it had also been washed and scrubbed but that happens in every wet screening. As I have said it must be a matter of degree and I accept that if broadly speaking a man in the industry could say that a washing process in general terms was occurring prior to the initial screening then I would reach a different conclusion. I am unable to accept that to be the case. I should indicate that on the view that I take, the differing constructions lead to the same end result mainly because I do not accept the respondent's submission that the starting point is when the ore that is ultimately beneficiated starts that process when it is first committed to that state. If I accepted the respondent's arugment as to the construction of the sub-clause, I would be inclined to place the starting point at the entrance to the pulping box. It is there that beneficiation begins. I suspect that one of the difficulties in this matter may be because the parties did not turn their attention to the fact that screening for the purposes of sub-clause (a) could include wet screening. I appreciate that I am trespassing on an area that was not before the trial Judge for resolution but I believe that such an area cannot be avoided if one is engaged in an exercise of construction. The finding that screening for the purposes of sub-clause (b) includes wet screening, which finding is not challenged, is I believe fatal to the respondent's cause if, as I believe to be the case, one cannot isolate some clearly definable process within the pulping box earlier in time than the screening process. As I differ in result from the trial

Judge I should comment on his findings, and what I believe is simply a differently slanted approach that I have to the question. This difference does not involve overturning findings of fact in the strict sense. I believe the appellant would describe it as a more practical approach.

The trial Judge stated:

> " I am satisfied that proviso (a) to clause 9 of the contract refers to ore, the quality of which has been improved by it being broken into smaller particles and/or separated into different size fractions whereas proviso (b) - insofar as it deals with ore which has been beneficiated - refers to ore which has been enriched by the removal of unwanted constituents by a process or processes other than the mere breaking of the ore or separating it into different size fractions. "

He defined screening as the "process of presenting particles to apertures". He then drew a distinction between dry and wet screening but in the end he said:

> " To the extent that screening is understood to mean the presentation of particles to apertures, I am unable to see any reason to distinguish between the two processes. "

He later said that "the resolution of the dispute turns upon determining whether or not the processes which I have described as occurring in the wet screening and washing plant involve merely the separation by size of the ore by means of screens."

The appellant criticises what he indicated was a rather narrow definition of "screening" and a rather cavalier treatment of the difference between wet and dry screening given by the trial Judge. These matters obviously loomed large between the parties at the hearing and one suspects that the reason for this was that if a screening as used in

the clause could be limited to dry screening then that would assist the respondent because whatever screening occurred after the pulping box was obviously wet screening. In the end, however, because of the way in which he resolved the problem, the trial Judge did not consider that the difference had any relevance.

The learned trial Judge seemed to act on the premise, and there was certainly support for it in the evidence, that crushing and screening are beneficiation processes concerned with size as opposed to beneficiation processes concerned with other characteristics such as the removal of impurities. Dr. Batterham's evidence was that if the object was solely to screen in the sense of sizing the ore then one could use a wet or dry process and it would not really matter. The thrust of the respondent's case was that there was much more than the mere sizing of the ore going on after the pulping box. There was in fact a scrubbing and washing taking place and of course as the trial Judge found the first thing that happened, and that is not really in dispute, is that the ore fell through a curtain of water and this had a scrubbing effect. It was argued that on the sieve bends there was more than one process occurring and it was suggested in the main that the purpose of those bends was not so much a screening process, that is, a presentation of the particles to apertures, but rather a dewatering process.

The appellant's response to this of course is that all of the processes occurring are simply sub-processes that will normally occur, perhaps in varying degrees, during any

wet screening process.

I pause here to consider the evidence and the way in which it is possible to put a slant on the evidence to support either case. It was generally accepted in the industry that screening was the use of one or more screens (sieves) to separate particles of ore into defined sizes (T.1206).

In 1962 as I have already mentioned dry screening was the only method used for the screening of iron ore in the north west although wet screening was a process which was well known in the industry. Dr. Lynch who was called for the respondent concurred with most experts who said that screening included sub-processes but I repeat what he said at (T.1196):

> " I am not aware of any iron ore processing plant in Australia or overseas where a wet process was in use in 1962 or is in use now solely as an adjunct to crushing and screening without some further process in view."

Dr. Batterham spoke of the addition of water to the crushing and screening process and indicated that thereby the beneficiation or upgrading will be improved quite markedly. He said at T490:

> " When we add water we have two additional processes going on on the screen which were not going on before to any significant extent."

I do not believe that anyone would dispute any of those statements but in the end they distract one from what I believe is the true inquiry. It is the emphasis that is placed on the main process that is important. Any water which is necessary for wet screening will have other effects on the ore as well. This was not in issue. Dr. Batterham went further than this at T.493 when considering the first

application of water which he described as:

> " A deliberate and fairly violent flooding of the ore which I would prefer to call scrubbing rather than wetting."

He considered this was separate from the screening process.

The evidence from the respondents then project superintendent, Langridge, who assisted in the design of the plant was at T.193:

> " Once you need water to wet screen it is inevitable that you will get a cleansing effect and you will also get an abrading (scrubbing) effect."

And he agreed that if one wanted to concentrate on one aspect of screening more than another a different plant could be designed and in the case of scrubbing a proprietary scrubbing plant could be acquired. He conceded that this was not the case here. The deliberate and fairly violent flooding referred to by Dr. Batterham was in fact the ore dropping by gravity through jets of water in the box that were being sprayed at what was described as Melbourne suburban household pressure. Much more water was applied at a later stage. The exposure of the ore to the first jets of water as it passed was for a fraction of a second.

It seems to me that it must always be a matter of degree but with the greatest of respect to Dr. Batterham's evidence and the opinion reached by the learned trial Judge I find it extremely difficult to accept that this minute exposure to water in the context of this contract can be classified as being the first step in the beneficiation process as distinct from any screening that could lead to the ultimate beneficiation.

The learned trial Judge said that he was not concerned with nomenclature used by the respondent and, to some extent, I accept that this is correct. I cannot help but feel, however, that if the respondent who built this plant called the particular area the screening plant and itself described the chute or box as the feed chute of the wet screening plant and used similar words in the literature it gave to its shareholders and the public at a time when the parties had not commenced their dispute then one might be pardoned for thinking that it had given these items names that had some relevance to the dominant purposes involved.

In my view the evidence of Mr. Langridge alone which I believe was supported by all of the other evidence disclosed that the object of this initial treatment was to enable the different streams from A, B, C and D to go to their respective destinations in the drums, cyclones and whims as clean as possible but with the fairly vital object of being correctly sized in each stream (Langridge T.210/211). At the time that the four streams leave there has not been any loss of mass, although it is of course true that streams A, B, and C have been upgraded, to use a neutral term, in that they have lost some of their non iron content which has gone to stream D.

One of the issues that the respondent lost at trial was that in the context of this contract, screening includes wet as well as dry screening. That finding is not challenged. It is my view that once it is accepted, as I believe the evidence establishes, that:

1. Wet screening must include to some

extent other processes which involves washing and scrubbing and it is vital to size the ore before it can be beneficiated in the narrow sense.

ii. That it is vital to get the correct sizes into streams A, B, C and D

then one is forced to the conclusion that the whole of this process is a screening process and in my respectful opinion it is unrealistic to try and look inside that process with a microscope, as it were, to see if by chance, or even by design the first addition of water which is also necessary for the screening process, and which occurs in a fraction of a second can be said to have some other effect that can be called by a different name.

I believe that this view can stand with all of the evidence or at least without doing violence to the evidence from any of the experts. It is all a matter of looking at the evidence according to the slant that one takes of the particular contract and I believe in effect that that is the difference between the experts to the extent that they do differ.

It follows that I do not agree with the result arrived at by the learned trial Judge.

I have said nothing earlier in these reasons about the Contra Proferentem Rule. This is not an oversight. Assuming for present purposes that there is such a rule and assuming that the facts relating to the preparation of the document could activate the rule which latter assumption is extremely doubtful, the rule cannot apply to this case. It

is true that the matter of construction is not easy. However, the real difficulty in this case is the application of facts to the proper construction and it need not necessarily follow that a certain construction would favour the grantee if a different set of facts could condition the operation of clause 9. At best the rule is one of last resort and that status has not been achieved. It is for those reasons that I have ignored the rule.

The respondent argues that the order under appeal is an interlocutory order and that leave should not be given to appeal unless this Court is clearly of the view that the trial Judge was wrong and that there would be an injustice if the decision was not corrected.

The respondent argued that the test set out in Carr v. Finance Corporation of Australia Ltd. No. 1 (1981) 147 C.L.R. 246 is the test that applies in Australia and that is whether the order appealed from finally determines the rights of the parties. And in this sense one has regard to the legal rather than the practical effect of the order.

Since I prepared these reasons Kennedy J. has drawn my attention to Computer Edge Pty. Ltd. v. Apple Computer Inc. and Anor. unreported High Court delivered 10th August 1984. The judgment of Gibbs C.J. in that case clarifies a matter about which I had entertained doubts. After referring to Carr the learned Chief Justice said:

> " the question in the present case is whether the whole judgment finally determined, in a legal sense, all the rights of the parties that were at issue in these proceedings. " (my underlining)

In my view the present judgment did determine in a legal sense all the rights that were at issue in these

determine all the matters that are in dispute between the parties but they certainly determine the issues in the present proceedings i.e. the proper application of the contract to a certain set of facts.

In Griffin Coal Mines v. S.E.C. unreported Full Court W.A.S.C. February, 1984, the decision I gave at first instance was overturned. I held that the answers given in an originating summons were at least one step removed from the ultimate answer to the dispute between the parties. The Full Court did not accept that and it seems to me, with respect, and in the light of the Computer Edge case that must be correct. Here the ultimate answer to the dispute between the parties may be several steps away. An arbitration may be required and then perhaps an enforcement of the arbitration and perhaps a dispute as to whether the facts came within the facts in the present case. It seems, however, that this does not matter. The issue in these proceedings has in fact been finally determined in the legal sense.

In my view the order is a final order but even were it not I would be prepared to grant leave to appeal because the matter is not one that is capable of a simple resolution and also because there is a large discrepancy between the starting points for the relevant process between the parties and it seems to me that the discrepancy calculated in terms of money would also be extremely large. For these reasons the justice of the case would demand that leave be granted.

I have read the observations of Kennedy J. relating to the appeal against the order for costs incurred in recalling

Mr. Langridge. I agree with his disposition of that matter.

I also agree with his finding that beneficiation begins at the point he indicates and with his proposals for the terms of the declarations sought under the Originating Summons.

I would allow the appeals.

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)
IN THE FULL COURT)

Appeal No. 59 of 1984
On appeal from Supreme Court Action No. 2313 of 1982

B E T W E E N :

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED

Appellant
(Sixth Defendant)

- and -

HAMERSLEY IRON PTY LTD

Respondent
(Plaintiff)

BEFORE THE HONOURABLE MR JUSTICE WALLACE, THE HONOURABLE MR JUSTICE KENNEDY AND THE HONOURABLE MR JUSTICE ROWLAND THE 29TH DAY OF NOVEMBER 1984

UPON THE APPEAL of the Appellant (Sixth Defendant) by Notice of Motion dated the 13th day of February 1984 coming on for hearing on the 6th, 7th, 8th, 9th and 10th days of August 1984 AND UPON HEARING Mr J.L. Sher one of Her Majesty's Counsel and Mr D.G. Williamson one of Her Majesty's Counsel with them Mr P.C. Heerey of Counsel for the Appellant (Sixth Defendant) and Mr S.E.K. Hulme one of Her Majesty's Counsel with him Mr F.H. Callaway of Counsel for the Respondent (Plaintiff) and the Court having ordered that the matter stand for judgment and the same standing for judgment on the 27th day of November 1984 and again this day IT IS ORDERED AND DECLARED THAT:

1. The Respondent's (Plaintiff's) objection to competency be and is hereby dismissed.

SUPREME COURT WESTERN AUSTRALIA

DOCUMENT 11* - Judgment of the Full Court in Appeal No. 59 of 1984 (excluding Agreement therein referred to) dated 29.11.84

2. The declaration and orders made by the Honourable Mr Justice Olney (in Chambers) on the 9th January 1984 be set aside except for paragraphs 2(a) and 5 thereof.

3. In respect of iron ore to which paragraph (b) of the proviso to clause 9 of the Agreement a copy of which is set out in the schedule hereto applies, beneficiation for the purpose of that paragraph begins -

(a) in relation to ore fed to the heavy media drums referred to in paragraph 11 of the Affidavit of Colin Roy Langridge sworn on the 2nd day of September 1982 and filed in proceeding number 2313 of 1982, on entry to those drums;

(b) in relation to ore fed to the heavy media cyclones referred to in paragraph 11 of the said Affidavit, on entry to those cyclones; and

(c) in relation to ore fed to the hydro-cyclones referred to in paragraphs 11 and 12 of the said Affidavit,

on entry to those hydro-cyclones.

4. The Respondent's (Plaintiff's) cross-appeal be and is hereby dismissed.

5. The Respondent (Plaintiff) pay the costs of the appeal, cross-appeal and objection to competency of the Appellants (Defendants) in Appeal No. 60 of 1984 and the Appellant (Sixth Defendant) herein (including any reserved costs and the costs of transcript) to be taxed as one set of costs with a Certificate for Second (Junior) Counsel only and that there be special orders pursuant to Order 66 Rule 12:

(a) that in the discretion of the Taxing Officer the limit imposed by Rule 16 may be exceeded;

(b) that whilst reserving all proper discretion to the Taxing Officer, the maximum allowances in item 20 of the Fourth Schedule to the Rules of the Supreme Court be increased to the following:

(i) Notice of Appeal and the like - not exceeding $550.00;

(ii) Getting up Appeal for hearing (including settling index to transcript) - not exceeding $7,500.00;

(iii) Counsel fee on first day of the hearing for Queen's Counsel - not exceeding the actual fee charged by Mr J.L. Sher Q.C.;

(iv) Counsel fees for second and each successive day for Queen's Counsel - not exceeding the actual fee charged by Mr J.L. Sher Q.C.;

(v) Counsel fee on hearing for Second Counsel - not exceeding 4/9ths of the allowances in (iii) and (iv);

(vi) Attending on reserved decision - not exceeding $1,000.00

PROVIDED THAT only such amounts shall be allowed as the Taxing Officer considers reasonable.

6. Order that the Respondent's (Plaintiff's) pay the Appellant's (Sixth Defendant's) costs of proceeding number 2313 of 1982 (including reserved costs and the costs of transcript) to be taxed as in an action on the higher scale

DOCUMENT 11* - Judgment of the Full Court in Appeal No. 59 of 1984 (excluding Agreement therein referred to) dated 29.11.84

and that in the discretion of the Taxing Officer the limit imposed by Order 66 Rule 16 may be exceeded provided that only such amounts shall be allowed as the Taxing Officer considers reasonable.

7. Order pursuant to item 30(5) that the Taxing Officer make reasonable allowances to Christian Frederick Beukema, Peter Forbes Booth and Niles Earl Grosvenor as expert witnesses for their attendances at Court in assisting or advising Counsel for the Appellant (Sixth Defendant) during the hearing. 10

BY THE COURT

C. WATT

REGISTRAR

THIS ORDER is filed by Keall Brinsden, solicitors whose address for service is 9th Floor, 150 St Georges Terrace, Perth.
Tel : 321 8531 Ref : 8:PMCC:28641
LH.T.309-GHI

DOCUMENT 11* - Judgment of the Full Court in Appeal No. 59 of 1984 (excluding Agreement therein referred to) dated 29.11.84

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)
IN THE FULL COURT)

Appeal No. 60 of 1984
On appeal from Supreme Court Action No. 2313 of 1982

B E T W E E N :

LANGLEY GEORGE HANCOCK

First Appellant
(First Defendant)

- and -

ERNEST ARCHIBALD MAYNARD WRIGHT

Second Appellant
(Second Defendant)

- and -

HANCOCK PROSPECTING PTY LTD

Third Appellant
(Third Defendant)

- and -

WRIGHT PROSPECTING PTY LTD

Fourth Appellant
(Fourth Defendant)

- and -

L.S.P. PTY LTD,

Fifth Appellant
(Fifth Defendant)

- and -

HAMERSLEY IRON PTY LTD

Respondent
(Plaintiff)

BEFORE THE HONOURABLE MR JUSTICE WALLACE, THE HONOURABLE MR JUSTICE KENNEDY AND THE HONOURABLE MR JUSTICE ROWLAND THE 29TH DAY OF NOVEMBER 1984

UPON THE APPEAL of the Appellants (Defendants) by Notice of Motion dated the 13th day of February 1984 coming on for

hearing on the 6th, 7th, 8th, 9th and 10th days of August 1984 AND UPON HEARING Mr J.L. Sher one of Her Majesty's Counsel and Mr D.G. Williamson one of Her Majesty's Counsel with them Mr P.C. Heerey of Counsel for the Appellants (Defendants) and Mr S.E.K. Hulme one of Her Majesty's Counsel with him Mr F.H. Callaway of Counsel for the Respondent (Plaintiff) and the Court having ordered that the matter stand for judgment and the same standing for judgment on the 27th day of November 1984 and again this day IT IS ORDERED AND DECLARED THAT:

1. The Respondent's (Plaintiff's) objection to competency be and is hereby dismissed.

2. The declaration and orders made by the Honourable Mr Justice Olney (in Chambers) on the 9th January 1984 be set aside except for paragraphs 2(a) and 5 thereof.

3. In respect of iron ore to which paragraph (b) of the proviso to clause 9 of the Agreement a copy of which is set out in the schedule hereto applies, beneficiation for the purpose of that paragraph begins -

(a) in relation to ore fed to the heavy media drums referred to in paragraph 11 of the Affidavit of Colin Roy Langridge sworn on the 2nd day of September 1982 and filed in proceeding number 2313 of 1982, on entry to those drums;

(b) in relation to ore fed to the heavy media cyclones referred to in paragraph 11 of the said Affidavit, on entry to those cyclones; and

(c) in relation to ore feed to the hydro-cyclones referred to in paragraphs 11 and 12 of the said Affidavit,

on entry to those hydro-cyclones.

4. The Respondent's (Plaintiff's) cross-appeal be and is hereby dismissed.

5. The Respondent (Plaintiff) pay the costs of the appeal, cross-appeal and objection to competency of the Appellant (Sixth Defendant) in Appeal No. 59 of 1984 and the Appellants (First to Fifth Defendants) herein (including any reserved costs and the costs of transcript) to be taxed as one set of costs with a Certificate for Second (Junior) Counsel only and that there be special orders pursuant to Order 66 Rule 12:

(a) that in the discretion of the Taxing Officer the limit imposed by Rule 16 may be exceeded;

(b) that whilst reserving all proper discretion to the Taxing Officer, the maximum allowances in item 20 of the Fourth Schedule to the Rules of the Supreme Court be increased to the following:

(i) Notice of Appeal and the like - not exceeding $550.00;

(ii) Getting up Appeal for hearing (including settling index to transcript) - not exceeding $7,500.00;

(iii) Counsel fee on first day of the hearing for Queen's Counsel - not exceeding the actual fee charged by Mr J.L. Sher Q.C.;

(iv) Counsel fees for second and each successive day for Queen's Counsel - not exceeding the actual fee charged by Mr J.L. Sher Q.C.;

DOCUMENT 12* - Judgement of the Full Court in Appeal No. 60 of 1984 (excluding Agreement therein referred to) dated 29.11.84

(v) Counsel fee on hearing for Second Counsel - not exceeding 4/9ths of the allowances in (iii) and (iv);

(vi) Attending on reserved decision - not exceeding $1,000.00

PROVIDED THAT only such amounts shall be allowed as the Taxing Officer considers reasonable.

6. The Respondent (Plaintiff) pay the Appellants' (Defendants') costs of proceeding number 2313 of 1982 (including reserved costs and the costs of transcript) to be taxed as in an action on the higher scale with Certificate for Second Counsel and that there be special orders pursuant to Order 66 Rule 12 -

(a) that in the discretion of the Taxing Officer the limit imposed by Rule 16 may be exceeded;

(b) that, whilst reserving all proper discretion to the Taxing Officer, the maximum allowances in the following items of the Fourth Schedule to the Rules of Supreme Court be increased as follows:

(i) getting up case for trial - to be taxed on the basis of all work and costs reasonably done and incurred by the Appellants (Defendants) reasonably comprising party-party costs without regard to the limit in item 13;

(ii) Counsel fee on first day of the trial for Queen's Counsel - not exceeding the actual fee charged by Mr J.L. Sher Q.C.;

(iii) Counsel fee for second and each successive day for Queen's Counsel - not exceeding the actual fee charged by Mr J.L. Sher Q.C.;

(iv) Counsel fee on trial for Second Counsel - not exceeding four ninths of the allowances in (ii) and (iii);

(v) attending on reserved judgment - not exceeding $1,000.00,

PROVIDED THAT only such amounts shall be allowed as the Taxing Officer considers reasonable.

7. Order pursuant to item 30(5) that the Taxing Officer make reasonable allowances to Christian Frederick Beukema, Peter Forbes Booth and Niles Earl Grosvenor as expert witnesses for their attendances at Court in assisting or advising Counsel for the Appellants (Defendants) during the hearing.

BY THE COURT
REGISTRAR

THIS ORDER is filed by Keall Brinsden, Solicitors whose address for service is 9th Floor, 150 St Georges Terrace, Perth.
Tel : 321 8531 Ref : 8:PMCC:28641
LH.T.309-FGH

SUPREME COURT WESTERN AUSTRALIA WA

DOCUMENT 12* - Judgement of the Full Court in Appeal No. 60 of 1984 (excluding Agreement therein referred to) dated 29.11.84

IN THE SUPREME COURT)
)
OF WESTERN AUSTRALIA)
)
THE FULL COURT)

Appeal No. 59 of 1984

BETWEEN:

HAMERSLEY IRON PTY. LIMITED

Applicant
(Respondent)
(Plaintiff)

and

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED

Respondent
(Appellant)
(Sixth Defendant)

L.S.

Appeal No. 60 of 1984

BETWEEN:

HAMERSLEY IRON PTY. LIMITED

Applicant
(Respondent)
(Plaintiff)

and

LANGLEY GEORGE HANCOCK, ERNEST ARCHIBALD MAYNARD WRIGHT, HANCOCK PROSPECTING PTY. LTD., WRIGHT PROSPECTING PTY. LTD. and L.S.P. PTY. LTD.

Respondents
(Appellants)
(First to Fifth Defendants)

BEFORE THE HONOURABLE MR. JUSTICE WALLACE AND THE HONOURABLE MR. JUSTICE KENNEDY

THE 6TH DAY OF MARCH 1985

DOCUMENT 13* - Order of the Full Court consolidating Appeals Nos 59 & 60 of 1984 and granting conditional leave to appeal to Her Majesty in Council dated 6.3.84

DOCUMENT 14* - Order of the Full Court in Appeals No. 59 & 60 of 1984 granting final leave to appeal to Her Majesty in Council dated 6.3.85

IN THE SUPREME COURT)
)
OF WESTERN AUSTRALIA)
)
THE FULL COURT)

Appeal No. 59 of 1984

BETWEEN:

HAMERSLEY IRON PTY. LIMITED

Applicant
(Respondent)
(Plaintiff)

and

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED

Respondent
(Appellant)
(Sixth Defendant)

Appeal No. 60 of 1984

BETWEEN:

HAMERSLEY IRON PTY. LIMITED

Applicant
(Respondent)
(Plaintiff)

and

LANGLEY GEORGE HANCOCK, ERNEST ARCHIBALD MAYNARD WRIGHT, HANCOCK PROSPECTING PTY. LTD., WRIGHT PROSPECTING PTY. LTD. and L.S.P. PTY. LTD.

Respondents
(Appellants)
(First to Fifth Defendants)

BEFORE THE HONOURABLE MR. JUSTICE WALLACE AND THE HONOURABLE MR. JUSTICE KENNEDY

THE 6TH DAY OF MARCH 1985

DOCUMENT 14* - Order of the Full Court in Appeals No. 59 & 60 of 1984 granting final leave to appeal to Her Majesty in Council dated 6.3.85

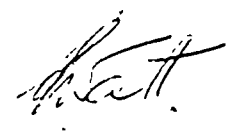
UPON the application of the Applicant (Respondent) (Plaintiff) by Motion dated the 20th day of December 1984 and UPON HEARING Mr. F.H. Callaway of Counsel for the Applicant (Respondent) (Plaintiff) and Mr. M.L. Bennett of Counsel for the Respondents (Appellants) (Defendants)

IT IS ORDERED that:

1. The Applicant (Respondent) (Plaintiff) have final leave pursuant to the Order in Council made by His Majesty King Edward VII on the 28th day of June 1909 to appeal from the judgments of the Full Court pronounced in Appeals 59 and 60 of 1984 on the 29th day of November 1984 to Her Majesty her heirs and successors in her or their Privy Council; and

2. The costs of the applications for final leave to appeal and of this order be costs of the appeal.

BY THE COURT



REGISTRAR

DOCUMENT 14* - Order of the Full Court in Appeals No. 59 & 60 of 1984 granting final leave to appeal to Her Majesty in Council dated 6.3.85

EXTRACTED by J.R. Wood of 18th floor, 191 St. George's Terrace, Perth, W.A. 6000, Solicitor for the Applicant (Respondent) (Plaintiff).
Telephone: 327.2327 Ref: JRW/GJM/2361Y

IN THE PRIVY COUNCIL NO. 28 of 1985

ON APPEAL
FROM THE COURT OF THE SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N :

HAMERSLEY IRON PTY LIMITED	Appellant (Respondent) (Plaintiff)
- and -	
1. THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED, 2. LANGLEY GEORGE HANCOCK, 3. ERNEST ARCHIBALD MAYNARD WRIGHT, 4. HANCOCK PROSPECTING PTY LTD, 5. WRIGHT PROSPECTING PTY LTD AND 6. L.S.P. PTY LTD	Respondents (Appellants) (Defendants)

RECORD OF PROCEEDINGS

PART I
VOLUME V

Ince & Co.
Knollys House
11 Byward Street
LONDON, EC3R 5EN

SOLICITORS FOR THE APPELLANT (RESPONDENT) (PLAINTIFF)

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

SOLICITORS FOR THE RESPONDENTS (APPELLANTS) (DEFENDANTS)