# Construing commercial contracts

Talitha Fishburn reports on *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited; Wright Prospecting Pty Limited v Mount Bruce Mining Pty Limited* [2015] HCA 37.

This case involved two separate but related proceedings. Both involved construing terms of a commercial contract. The contract in question was a mining royalty agreement entered into by Wright Prospecting Pty Limited, Hancock Prospecting Pty Limited (together, Hanwright), Hamersley Iron Pty Ltd and Mount Bruce Mining Pty Limited (MBM) and others in 1970. Under the agreement, MBM acquired iron ore mining rights in relation to 'temporary reserves' granted under the *Mining Act 1904* (WA) (the MBM Area) in exchange for royalties for iron ore won from the area. The obligation to pay royalties extended to 'all persons or corporations deriving title through or under' MBM to the 'MBM Area'.

At issue were two central questions. First, whether the areas the subject of claims for royalties by Hanwright were within the MBM Area, a question which turned on whether the term 'MBM Area referred to the area of land occupied by MBM, or the mining rights. Secondly, and if so, whether entities deriving title to the land 'through or under' MBM were mining the iron ore in that area. In S99 of 2015, the court construed the term 'MBM Area' in clause 2.2 of the contract in answering the first question. In S102 of 2015, the court construed the term 'through or under' in clause 3.1 in answering the second.

## S99 of 2015

The first issue before the court was whether the term 'MBM Area' refers to an area of land fixed with existing boundaries and documented on a map appended to the agreement (Hanwright's case) or was a reference to present and future rights in relation to temporary reserves (MBM's case). The court rejected MBM's case and upheld the New South Wales Court of Appeal's finding that properly construed, the term 'MBM Area' was a reference to the parcels of land identified in the contract, not the rights held under those reserves.

The plurality (French, Nettle and Gordon JJ) restated the applicable legal principles for construing a commercial contract. The rights and liabilities of parties under a provision of a contract are determined objectively[1] by reference to its text, context and purpose.[2] In relation to a commercial contract, it is necessary to ask what a 'reasonable businessperson' would have understood those terms to mean.[3] That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.[4]

Further, ordinarily the process of construction is possible by reference to the contract alone. If a term of a contract is ambiguous or capable of more than one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract, which may include its history, background, context and the market in which the parties were operating) can be adduced to contradict its plain meaning. However, evidence of parties' statements and actions reflecting their actual intentions and expectations is inadmissible.[5] Recourse to the events, circumstances and things external to the contract may be necessary in identifying the commercial purpose or objects of the contract, and in determining the proper construction where there is constructional choice.

In deciding that the 'MBM Area' refers to the area of land fixed by the boundaries and which is indicated on a map appended to the agreement, the plurality considered the text, context and purpose of the agreement and applied the ordinary and unambiguous meaning of the relevant words of the definition of 'MBM Area'.[6] Their Honours also considered the commercial circumstances which the agreement addressed and the purpose and object of the transaction it was intended to secure, namely to effect a division of the temporary reserves between Hanwright and MBM.[7] Moreover, reading the contract as a whole other terms supported the term 'MDM Area' being referable to the physical areas identified in the contract.[8]

Kiefel and Keane JJ (with whom Bell and Gageler JJ agreed) also dismissed MBM's appeal. They held that the agreement gave MBM the opportunity to obtain iron ore from land affected by the existing temporary reserves, but did not confine it to the rights which existed under those reserves at the time. Their Honours referred to the fact that temporary reserves are rights of temporary occupancy. In their Honours' view, it would have been 'obvious' to the parties that the temporary reserves would be replaced by other tenements (such as leases) for the site to be exploited.[9]

## S102 of 2015

The ore in relation to one of the areas the subject of the claim was being won by a joint venture pursuant to mining leases obtained conditional on surrender of earlier rights held by MBM. In these proceedings, the court considered whether the term 'through or under' in the phrase 'persons or corporations deriving title through or under' was limited to succession, assignment or conveyance (MBM's case) or whether it was sufficiently broad to cover a close practical or causal connection between the rights exercised by the joint venturers and the rights which MBM obtained from Hanwright under the agreement (*Hanwright's case*). The court unanimously overturned the New South Wales Court of Appeal's construction of 'through or under' and accepted Hanwright's submission. Namely, that 'through or under' did not mean the same thing as 'from', was not limited to formal succession, assignment or conveyance,

and did not require proof of an 'unbroken chain of title'.

The plurality examined the language of the contract and the surrounding circumstances to support its construction. In the text of the agreement, they identified indications that the phrase 'through or under' is broader than formal succession, assignment or conveyance.[10] For instance, the agreement contemplated changes in the 'MBM Area' over time. The term 'though or under' was used (c.f. 'from'). The plurality also stated that the expression, 'through or under' has been acknowledged to be a relatively flexible one.[11]

Their Honours also found that the surrounding circumstances support the wider construction, including the fact that the agreement was drafted on the basis that it was unlikely that title, in a legal sense, to the temporary reserves included in the MBM Area would remain static.[12] Further, the wider construction accords with commercial reality, namely, that the extent of an iron ore body is unknown and work on one area is often dependent on work undertaken on an area adjacent to or near another area the subject of current exploration. The plurality held that those circumstances make clear that the wider construction is consistent with the purpose or object of the agreement and commercial reality.[13]

The plurality identified the error of the Court of Appeal as confining its analysis of the term 'through or under' by reference to its decision in *Sahab Holdings Pty Ltd v Registrar-General (No 2)*, construing an equivalent phrase in legislation,[14] when the construction identified in that case would not necessarily arise on the construction of an agreement reached in a different context.

Justices Kiefel and Keane stated the issues as follows: 'The real question is whether [the Mining lease] affects an area of land title to which was a title deriving 'through or under' MBM.'[15] Their Honours concluded that because it was a condition of the grant of a mining lease that MBM surrender certain sections, it was correct to say that title to the mining lease was derived 'through or under' MBM. Their Honours identified some extrinsic factors in support of this construction. This included the indefinite duration of the agreement and the parties' mutual knowledge that the temporary reserves would need to be converted into different tenure to enable further development.[16] Kiefel and Keane JJ made reference to comments made in the course of reasons for the refusal of special leave in *Western Export Services Inc v Jireh International Pty Ltd*,[17] to the effect that it was a requirement that there be an identified ambiguity before recourse may be had to the surrounding circumstances and the object of the transaction. Comments were also made by Bell and Gageler JJ.[18] Kiefel and Keane JJ observed:

> There may be differences of views about whether this requirement arises from what was said in *Codelfa*. This is not the occasion to resolve that question. It should, however, be observed that statements made in the course of reasons for refusing an application for special leave create no precedent and are binding on no one. An application for special leave is merely an application to commence proceedings in the court. Until the grant of special leave there are no proceedings inter partes before the court [footnotes omitted].

The question whether an ambiguity in the meaning of terms in a commercial contract may be identified by reference to matters external to the contract does not arise in this case and the issue identified in *Jireh* has not been the subject of submissions before this court. To the extent that there is any possible ambiguity as to the meaning of the words 'deriving title through or under', it arises from the terms of cl 24(iii) itself. Thus, in the face of an agreed ambiguity in the terms of the contract under consideration by the High Court, the scope of the circumstances in which recourse may be had to surrounding circumstances remains under question.

## Endnotes

1. *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7.
2. *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24.
3. *Electricity Generation Corporation v Woodside*.
4. Ibid.
5. *Codelfa*.
6. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [58]–[61].
7. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [62].
8. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [63]–[67].
9. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [92]–[94].
10. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [75]–[76].
11. *Tanning Research Laboratories Inc v O'Brien* [1990] HCA 8; *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* (2014).
12. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [77]–[78].
13. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [79]–[80].
14. [2012] NSWCA 42; (2012) 16 BPR 30,353 at 30,360 [28]; *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [81].
15. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [103].
16. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [104]–[106].
17. [2011] HCA 45; (2011) 86 ALJR 1 at 2 [2]; *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [111].
18. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [118]–[122], their Honours otherwise agreeing with the reasons of Kiefel and Keane JJ at [123].