

39/85

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME
COURT OF WESTERN AUSTRALIA

B E T W E E N :

HAMERSLEY IRON PTY. LIMITED (Respondent)
(Plaintiff) Appellant

-and-

10. LANGLEY GEORGE HANCOCK
ERNEST ARCHIBALD MAYNARD WRIGHT
HANCOCK PROSPECTING PTY. LTD.
WRIGHT PROSPECTING PTY. LTD.
L.S.P. PTY. LTD. and
THE NATIONAL MUTUAL LIFE ASSOCIATION
OF AUSTRALASIA LIMITED (Appellants)
(Defendants) Respondents

CASE FOR THE APPELLANT

Record

20. Proceedings in the Supreme Court

1. On 2nd September 1982 the Appellant caused an originating summons to be issued in the Supreme Court of Western Australia seeking the determination of a question of construction arising under an agreement dated 12th December 1962 between, among other parties, the Appellant of the one part and the Respondents or their predecessors in title of the other part ("the Agreement"). The summons came on for hearing before Olney J. for fifteen days in November 1983. His Honour reserved judgment and published his reasons on 23rd December 1983. On 9th January 1984, after hearing submissions as to the form of the orders that should be made, his Honour pronounced judgment in favour of the Appellant.

30. pp. 1-2
pp. 974-1001
pp. 1002-1004

2. The Respondents appealed from that judgment by two separate appeals which came on for hearing before the Full Court (Wallace, Kennedy and Rowland JJ.) for five days in August 1984. Their Honours also reserved judgment and published their reasons on 27th November 1984. Those reasons were, by majority, favourable to the Respondents. After hearing submissions as to the form of the orders that should be made, the Full Court pronounced judgments in favour of the Respondents on 29th November 1984. On 6th March 1985 the Full Court granted final leave to the Appellant to appeal as of right to Her Majesty in Council. Their Honours also directed that the appeals be consolidated.
10. pp. 1063-1135
pp. 1076-1104
pp. 1105-1135
pp. 1064-1075
pp. 1136-1139
pp. 1140-1144
pp. 1148-1149
pp. 1146-1147

The Agreement

3. In the Agreement the Respondents or their predecessors in title were called "the Vendors" and the Appellant was called "the Purchaser". The main object of the Agreement appears from clause 1, whereby the Vendors agreed to sell and the Purchaser agreed to purchase all the right, title and interest of the Vendors in, to and in respect of certain Temporary Reserves of iron ore, the land comprised therein and all associated rights to prospect or mine. The principal consideration for the sale was a royalty to be paid by the Appellant equivalent to 2½% of the amount received on sale or other disposal of iron ore produced by it from the Temporary Reserve land in unrefined and unmanufactured form f.o.b. the first port of shipment thereof.
20. p. 1020-p. 104:
plus pp.1179-1192
as to which see
p.1176, 1.39-42
p. 1022
- 30.
4. The Vendors' entitlement to royalties is set out in clause 9, which (omitting one immaterial provision) reads as follows: pp.1025-1027

- "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:
- 40.
- 50.

- (a) If iron ore is upgraded before shipment by crushing and/or screening then the Vendors shall receive an amount equivalent to $2\frac{1}{2}\%$ of the amount received on sale or other disposal of the iron ore so upgraded f.o.b. the first port of shipment thereof.
10. (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.
20. (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.
30. (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:-
40. (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.

10. (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."

The Tom Price Beneficiation Plant

20. 5. The Appellant began working the iron ore mine at Tom Price, which is approximately 1000 kilometres north of Perth, in 1966. The ore is a mixture of hematite and shale. The shale contains the bulk of certain non-ferrous elements which reduce the purity of the ore and therefore its effectiveness in steel-making. The most important impurities are alumina, silica and phosphorus. Most of the iron ore sold by the Appellant which comes from Tom Price is known as "High Grade Ore" (sometimes called "Direct Shipping Ore"). Whilst this ore contains some small proportions of impurities it is of sufficient purity to be sold without having been treated other than by crushing and screening. The ore is crushed until it does not exceed 30mm (say 1½") and is then screened and sold as lump ore (6mm to 30mm, say ¼" to 1½") or finer (-6mm). The screening is dry screening, because water is expensive in the hot dry Pilbara, and Pilbara ores can be screened perfectly well without being wetted. The only water used in connexion with High Grade Ore is for the purpose of dust control. In the case of this High Grade Ore the whole of the ore is sold. For reasons which appear below the proportion of iron (the "iron content") of the lump ore will exceed that of the fines, but since all of the ore brought for crushing and screening is sold, the iron content of the whole of what is sold is necessarily the same as that of the whole of the ore that came for crushing and screening. Conversely, the proportion of impurities in the fines will exceed that in the lump ore; but again all impurities in the material that came for crushing and screening will be present somewhere in the ore which is sold. For the first twelve years or so this was the only Tom
- p. 989, 1.20
p. 1085, 1.3
p. 1086, 1.1
p. 1158, 1.5
p. 1159, 1.4
30. 40. p. 456, 1.42
-p. 457, 1.2:
p. 739, 1.40
p. 769, 1.8-1
- 50.

Price ore sold or otherwise disposed of by the Appellant and therefore the only ore the subject of royalty.

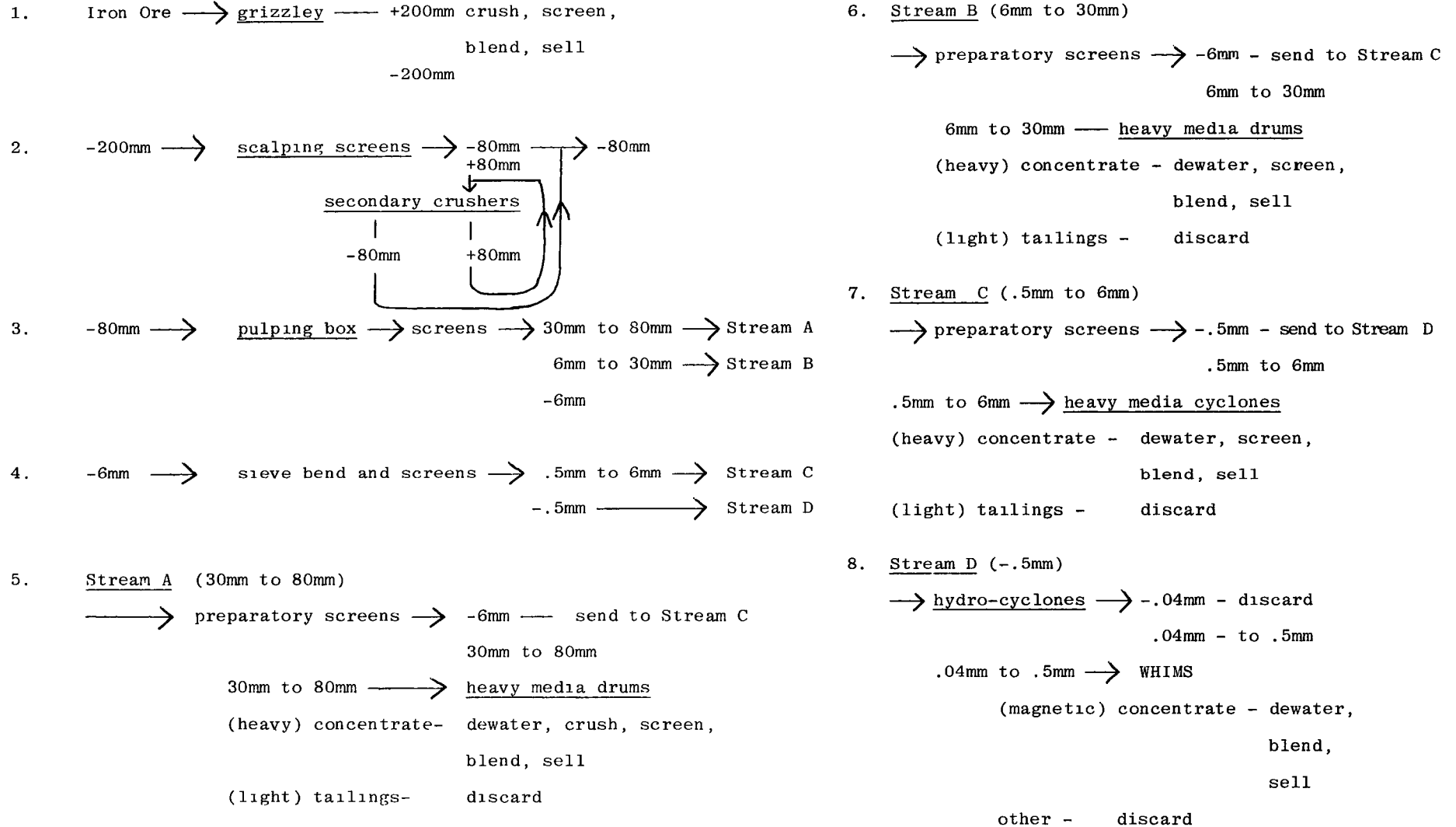
6. The necessities of open-cut mining frequently compel the extraction of materials other than the material the miner primarily seeks. Material which is simply rubbish will be put to one side and eventually dumped in an exhausted part of the pit. At Tom Price, as in other iron ore mines, there is also what is referred to as Low Grade Ore. This is material which cannot be sold on prevailing markets after just crushing and screening. Putting it another way, it is material the whole of which cannot be sold; material of which, in its unseparated form, none can be sold. But it is material such that if some of its impure components can be removed from it (and dumped as rubbish) then what remains will be suitable for blending into a saleable product (and will in that sense, used herein, be "saleable"). It will be obvious that where that is done the quantity of ore sold at the end of the process will be less than the quantity of feed which entered the process. But because the material removed as rubbish was low in iron content and high in impurities, the proportion of iron in the whole of the retained material will exceed, and the proportion of impurities in that material will be less than, the respective proportions in the feed which entered the process. Such ore is said in the industry to have been "beneficiated" in the sense of having been made saleable by the removal of low grade contaminants. In the case of Tom Price more than 30,000,000 tons of Low Grade Ore was mined during the years in which only High Grade Ore was sold. This Low Grade Ore was stockpiled pending the establishment of means to make it saleable.
10. p. 644, 1.15
-p. 645, 1.10
20. p. 651, 1.12
-p. 652, 1.10
30. p. 130, 1.3
40. 7. The system of separation of impurities at Tom Price depends on three features of the mined material.
- First, the impurities are mainly in the shale. The shale is more friable than iron ore, and decomposes more readily. In general the finer the material the greater will be the proportion of shale, the higher the proportion of impurities, and the lower the iron content.
50. Secondly, the shale is lighter than the iron ore. Under appropriate conditions particles of similar size can be separated on the basis of weight.
- p. 458, 1.1-9
p. 723, 1. 6-8
p. 725, 1.51
-p. 727, 1.4

Thirdly, iron ore does, and shale does not, respond to magnetic forces. Under appropriate conditions particles can be separated by the use of magnetic forces.

8. A beneficiation plant or concentrator (the terms are interchangeable) was designed on the basis of these principles, and was commissioned on 1st April 1979. Its cost was in excess of \$100,000,000. The plant increases the purity of Low Grade Ore by separating and removing material containing a high proportion of impurities. The remaining product so purified is then suitable for blending with High Grade Ore from Tom Price and ore from the Appellant's other mining tenements at Paraburdoo to form a saleable commodity. The removed material is dumped as rubbish. p. 974, 1.11
p. 992, 1.9
p. 114, 1. 2
10. 8. A beneficiation plant or concentrator (the terms are interchangeable) was designed on the basis of these principles, and was commissioned on 1st April 1979. Its cost was in excess of \$100,000,000. The plant increases the purity of Low Grade Ore by separating and removing material containing a high proportion of impurities. The remaining product so purified is then suitable for blending with High Grade Ore from Tom Price and ore from the Appellant's other mining tenements at Paraburdoo to form a saleable commodity. The removed material is dumped as rubbish. p.1080, 1.1-5
9. The processes which took place at material times in the plant are best described in Kennedy J.'s reasons for judgment. The essential steps are shown on diagram A. The critical points are- p. 1080, 1.9-
-p. 1085, 1.33
20. 9. The processes which took place at material times in the plant are best described in Kennedy J.'s reasons for judgment. The essential steps are shown on diagram A. The critical points are-
- (a) where the ore enters the beneficiation plant, a point which the Appellant would locate at the grizzly;
- (b) where the ore, still in one stream but crushed to -80mm, enters the pulping box and begins to be subjected to the effects of water; and
30. (c) four separate points where the ore, in four separate streams, enters the heavy media drums, heavy media cyclones and hydro-cyclones.
10. The parties have disagreed as to the amount of royalty (if any) to be paid by the Appellant in respect of this Low Grade Ore. In particular they have disagreed as to the point at which the iron ore is to be valued. An arbitrator has been appointed pursuant to sub-paragraph (e) (ii) of the proviso to clause 9 of the Agreement, to determine the "assumed f.o.b. price". He has not proceeded further in the arbitration. Paragraph (c) of the proviso links the assumed f.o.b. price to the point of disposal of the ore, and paragraph (b) provides that the ore is deemed to be disposed of "at the time beneficiation...begins but crushing or screening shall not be deemed to be beneficiation or any part thereof". The purpose of these proceedings has been to obtain an authoritative determination of the point at which beneficiation begins within the meaning of that paragraph, so that the arbitration can proceed. p. 1027, 1.7-17
p. 1159, 1.19-2
40. 10. The parties have disagreed as to the amount of royalty (if any) to be paid by the Appellant in respect of this Low Grade Ore. In particular they have disagreed as to the point at which the iron ore is to be valued. An arbitrator has been appointed pursuant to sub-paragraph (e) (ii) of the proviso to clause 9 of the Agreement, to determine the "assumed f.o.b. price". He has not proceeded further in the arbitration. Paragraph (c) of the proviso links the assumed f.o.b. price to the point of disposal of the ore, and paragraph (b) provides that the ore is deemed to be disposed of "at the time beneficiation...begins but crushing or screening shall not be deemed to be beneficiation or any part thereof". The purpose of these proceedings has been to obtain an authoritative determination of the point at which beneficiation begins within the meaning of that paragraph, so that the arbitration can proceed.
50. 40. 10. The parties have disagreed as to the amount of royalty (if any) to be paid by the Appellant in respect of this Low Grade Ore. In particular they have disagreed as to the point at which the iron ore is to be valued. An arbitrator has been appointed pursuant to sub-paragraph (e) (ii) of the proviso to clause 9 of the Agreement, to determine the "assumed f.o.b. price". He has not proceeded further in the arbitration. Paragraph (c) of the proviso links the assumed f.o.b. price to the point of disposal of the ore, and paragraph (b) provides that the ore is deemed to be disposed of "at the time beneficiation...begins but crushing or screening shall not be deemed to be beneficiation or any part thereof". The purpose of these proceedings has been to obtain an authoritative determination of the point at which beneficiation begins within the meaning of that paragraph, so that the arbitration can proceed.

DIAGRAM A

OUTLINE OF STEPS IN APPELLANT'S BENEFICIATION
PLANT AS PRESENTLY ORGANIZED



Record

p.1080, 1.9
-p.1085, 1.33
p.1153, 1.16
-p.1156, 1.13
p.1177, 1.11-15

10. 11. The learned primary Judge, who had the advantage of listening to expert witnesses testify and be cross examined as to their credit and otherwise for ten days, decided that beneficiation began in the relevant sense when the ore entered the pulping box, i.e. at the second of the points identified in paragraph 9 above. Because there had been some dispute at the trial as to whether that piece of equipment should be called a "pulping box" or by some other description, his Honour called it "the feed chute of the wet screening plant" in his reasons for judgment and order. Nothing turns in this appeal on the appropriateness of the description "pulping box", which the Appellant uses for convenience only. p. 995, 1.40
p. 1003,1.14
20. 12. The learned presiding Judge in the Full Court (Wallace J.) agreed with Olney J., but the majority of the Full Court (Kennedy and Rowland JJ.) held that beneficiation began at the third group of points identified in paragraph 9 above, namely- pp.1064-1075
pp.1076-1104
pp.1105-1135
30. (a) in relation to the two larger sizes of ore (Streams A and B), on entry to the heavy media drums;
- (b) in relation to the ore between 6mm and .5mm (Stream C), on entry to the heavy media cyclones; and
- (c) in relation to the smallest size of ore (Stream D), on entry to the hydro-cyclones.

The Issues

40. 13. There are two issues. The first is whether the point at which the deemed disposal occurs is in fact tied to the point of commencement of the first process within the beneficiation plant which is neither crushing nor screening, so that the point of deemed disposal can be determined only by examination of the processes from time to time taking place in the plant in order to determine for the time being the point of commencement of the first process which is neither crushing nor screening. The second issue is whether, if that link does exist and that examination is necessary, under the existing arrangements the first process which is neither crushing nor screening begins on entry of the feed to the pulping box or on entry of the feed to the heavy media drums, heavy media cyclones and hydro-cyclones. All the Judges below considered that such an examination was necessary but they were
- 50.

equally divided as to the first process which was neither crushing nor screening within the meaning of paragraph (b) of the proviso to clause 9.

14. The points identified in paragraph 9 above relate to the issues in the following way:

10. (a) The Appellant's primary submission is that it is not necessary (or desirable) to examine the processes that take place within the beneficiation plant in order to determine the first process which is neither crushing nor screening. In the Appellant's primary submission the point at which beneficiation of ore which is beneficiated begins is when the ore enters the beneficiation plant. The witnesses were practically unanimous that that was at the grizzley. p. 1080, 1.32 That of course is relevant only to ore which is in fact eventually beneficiated. It does not apply to ore which comes through the grizzly but is withdrawn from the beneficiation plant without being beneficiated: see paragraph 18 below.
- 20.
30. (b) If it is necessary to examine the processes that make up beneficiation to determine the first of those processes which is neither crushing nor screening -
40. (a) the Appellant's alternative submission is that the first of those processes begins when water is added to the single stream of ore in the pulping box, and the process of "cleaning" or "washing" or "scrubbing", and the decomposition of the clayey shale, begin; and
- (b) the Respondents' submission is that the first of those processes does not begin until the separate streams of ore enter the heavy media drums, heavy media cyclones and hydro-cyclones.

Appellant's Submissions on the First Issue

15. Clause 9 should be read as a whole and a construction should be preferred which is harmonious between its component parts and which makes business sense. Cf. Australian Broadcasting Commission v. Australasian Performing Right Association Ltd. (1973) 129 C.L.R. 99, at pp. 109-110 per Gibbs J.;
10. L. Schuler A.G. v. Wickman Machine Tool Sales Ltd. [1974] A.C. 235, at p. 251E per Lord Reid; and Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, at pp. 200H-201D per Lord Diplock.
16. There are basically five ways in which Low Grade Ore can be dealt with. The first is to treat it as waste, and dump it. In those circumstances no royalty would ever be payable. The second is to stockpile it, in the hope of utilization in the future. That is what
20. happened until the beneficiation plant was built. In those circumstances no royalty was payable. The third possibility is of bona fide sale to a third party. In that event a royalty would be payable equivalent to 2½% of the amount received on the sale of the unseparated material. The results of any subsequent upgrading, beneficiation or other treatment by the buyer would be irrelevant (though of course the buyer's expectations in this regard could be
30. relevant in his determination of the price he was willing to pay for the unseparated ore).
17. The fourth possibility is of sale or other disposal to a subsidiary of the Appellant. That is expressly dealt with in paragraph (d) of the proviso in clause 9. The ore is deemed
40. to be sold at the assumed f.o.b. price. In such a case the assumed f.o.b. price would be determined in respect of the unseparated ore as at the time of sale or other disposal. Again the result of any subsequent upgrading, beneficiation or other treatment by the subsidiary would be irrelevant, (though the suitability of such ore for upgrading, beneficiation or other treatment by the assumed f.o.b. purchaser could likewise be relevant in determining the assumed f.o.b. price of the unseparated ore). The basal intention is clear,
50. that the royalty payable when paragraph (d) applies should match that which would have been payable had the unseparated ore been the subject of a bona fide sale to a third party. The Appellant's submission is that paragraphs (b) and (c) are intended, and should be construed, to produce the same result in the fifth case, namely where the Appellant beneficiates the Low Grade Ore itself instead of selling or otherwise disposing of it to a subsidiary for beneficiation. p. 1026

18. That result follows if beneficiation begins, within the meaning of paragraph (b), when the ore enters the beneficiation plant. As Kennedy J. said:

p. 1080, 1.32

10. "It was generally accepted that, on its passing through the grizzly, 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 [ore between 200mm and 80mm withdrawn before or at the scalping screens], 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."

20. The reason for excluding ore which is withdrawn before or at the scalping screens is that paragraph (b) is concerned only with iron ore which "is beneficiated". Iron ore withdrawn before or at the scalping screens is not beneficiated even in part and therefore the paragraph does not apply to it. Ore which is withdrawn at any of the later points at which withdrawal is possible is beneficiated, albeit to a lesser extent than ore which goes through the whole plant.

30. 19. That construction appealed to at least three of the learned Judges in the Courts below. The main obstacle to its acceptance was seen as being the words "but crushing or screening shall not be deemed to be beneficiation or any part thereof" at the end of paragraph (b), and especially the words "or any part thereof".

p.984, 1.29
-p.985, 1.7,
p.996, 1.53-
-p. 997, 1.40
p.1073, 1.20-
p.1122, 1.12-3

40. It is submitted that the purpose of those 15 words is simply to prevent overlap between paragraphs (a) and (b). Paragraph (a) has provided for the case where ore is upgraded by crushing or screening or (as is usual) both; paragraph (b) now provides for the case where ore is beneficiated or otherwise treated; but, because crushing and screening are themselves forms of beneficiation in the wider of the two senses in which that word is used in mineral dressing, the last 15 words expressly provide that that is not the sense in which "beneficiated" is being used in paragraph (b).
50. It is as if the draftsmen had said, "But don't construe 'beneficiated' in that wide sense which would include the three cases we have already dealt with in paragraph (a)."

The last 15 words refer only to the case of beneficiation, because there was no risk that "other" treatment might be so misinterpreted.

10. 20. In the Appellant's respectful submission the words "or any part thereof" were given far too much significance in the Courts below. On one view they are just a slip, of an understandable kind, on the part of the draftsmen of the Agreement and a good illustration of the kind of language that is not allowed to control the rest of a clause and produce an unreasonable, inconvenient result. Qui haeret in litera haeret in cortice. Cf. Hogarth v. Miller, Brother & Co. [1891] A.C. 48, at p. 53 per Lord Halsbury L.C. and p. 63 per Lord Bramwell. On another view the words do in fact fulfil a logical purpose. The draftsmen have said that crushing shall not be deemed to be beneficiation and that screening shall not be deemed to be beneficiation; the words "or any part thereof" prevent it being said that crushing and screening together constitute beneficiation because each of them is part of beneficiation. cf. p. 1057, l.24
-31
30. 21. Reference has been made to the two senses in which "beneficiation" is commonly used in mineral dressing. They were discussed by the learned primary Judge in his reasons. The Appellant respectfully adopts his Honour's conclusion that paragraph (a) of the proviso refers to ore the quality of which has been improved by the ore being broken into smaller particles and/or separated into different size fractions (which improve its suitability for sale and therefore constitute a form of beneficiation in the wider sense), and that paragraph (b) refers to ore which has been enriched by a process or processes involving the removal of unwanted constituents. The latter is a form of beneficiation in the narrower sense, which is also called "concentration". In the Appellant's submission the concluding words of paragraph (b) are there to show that that is the sense in which "beneficiated" is being used in that paragraph. p. 985, l. 26
-p.989, l. 12
40. 22. As the learned primary Judge said, immediately after quoting the dictionary meanings: p. 989, l.11-19
p. 986, l.17-19
50. "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

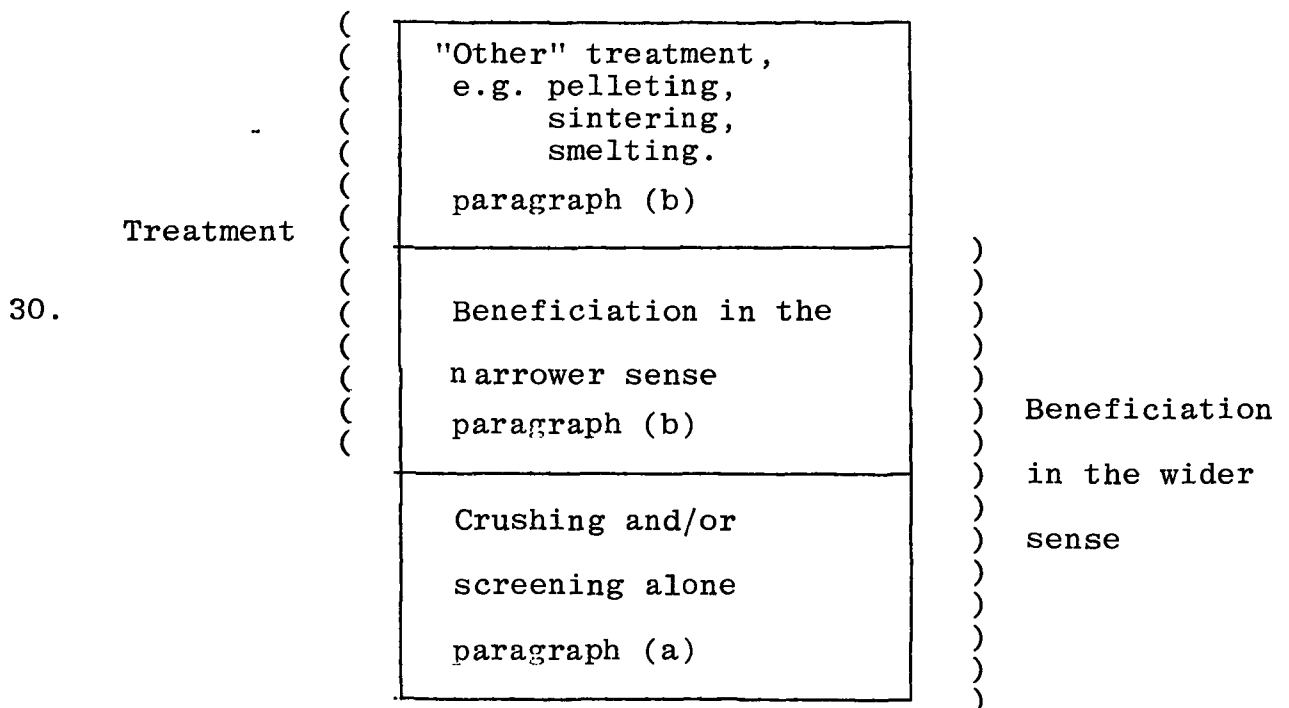
10. and/or screening' might be confused with that of iron ore which is 'beneficiated or otherwise treated' if the first and more general meaning of beneficiation is used although the element of removing unwanted constituents distinguishes beneficiation from that form of upgrading which involves merely 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."

His Honour later found that the dictionary meanings substantially accorded with industry usage. The Appellant also refers to Wallace J.'s reasons for judgment in this regard.

p. 989, 1.9
p. 1070, 1.29
-p. 1071, 1.13

20. 23. The relationship between "upgrading by crushing and/or screening", "beneficiation" in the wider and narrower senses and "other treatment" in paragraphs (a) and (b) of the proviso is illustrated on diagram B.

DIAGRAM B



24. The construction for which the Appellant contends not only reconciles the various provisions of the clause and makes sense, but also facilitates the arbitrator's task and makes the point at which beneficiation begins independent of unilateral decisions by the Appellant as to the legal structure through which it conducts its activities or the order in which processes take place within the beneficiation plant. The Respondents' contention on the first issue makes the entitlement to royalties dependent on the order in which processes take place in the beneficiation plant, and means that the Appellant could alter the entitlement to royalties either-

10. (a) by transferring the beneficiation plant to a subsidiary and selling the unseparated ore to the subsidiary with a term that property, title and risk would pass at the grizzly;
20. or
- (b) by rearranging the order in which processes take place within the plant, as for example by locating a process which is clearly neither crushing nor screening at an earlier point in the flow chart.

25. In the Appellant's submission it is inconceivable that the parties desired either result or intended the words they used in the Agreement to achieve them. Moreover, as Rowland J. pointed out, the parties thought that any difficulty in applying paragraph (b) would relate to valuing the ore. It is that question for which they provided in the two branches of paragraph (e). They assumed that the place at which beneficiation begins would be readily ascertainable. It is, if the Appellant's submission on the first issue is correct. It is not, if one has to go inside the beneficiation plant and identify the first process that is neither crushing nor screening. It is to be remembered that this contract continues indefinitely. The parties cannot have intended their rights and obligations to be determined by the order of events in whatever process of beneficiation might be in use from time to time, including perhaps a process unknown at the date of the contract. By contrast it was perfectly sensible to provide for those rights and obligations to be determined immediately before the start of whatever process of beneficiation might from time to time be in use.

p. 1121, 1.19
-p. 1122, 1.11

Appellant's Submissions on the Second Issue

26. The learned primary Judge found that the definition applied to the term "screening" by the expert witnesses was the process of presenting particles to apertures and that more than just screening occurred when water was applied to the ore in the pulping box. The physical characteristics of the ore were altered at that point by the removal of fine particles of both ore and gangue from the larger pieces of ore and by the initiating of the process of breaking down water active clayey shales contained in the ore stream. Those alterations to the ore's physical characteristics constituted something over and above screening, more than separation by size of the ore by means of screens. The Appellant adopts his Honour's findings, reasoning and conclusions on the second issue, for all of which there was ample support in the evidence including the evidence of the Respondents' witnesses.
10. p. 990, 1.29
p. 998, 1.30-1.53
p. 997, 1.41-
-p. 998, 1.53
E.g. p. 667, 1.1-13
1.22-26
p. 670, 1.29
p. 673, 1.48
20. 27. All the members of the Full Court concurred in the finding made by the learned primary Judge as to what took place in the pulping box. Where Kennedy and Rowland JJ. departed from him was rather as to the significance of what occurred there. Their Honours said that, since no more was done to the ore in the pulping box than was necessary for the wet screening which in fact immediately followed the pulping box, what was done was to be excluded from the concept of beneficiation. Kennedy J. treated as irrelevant the question of why what was being done was being done.
30. p. 1099, 1.10-1.26
p. 1100, 1.39
p. 1128, 1.8-1.24
p. 1102, 1.32-1.35
p. 1131, 1.29-
p. 1132, 1.26
p. 1102, 1.9-11
40. 28. In the Appellant's respectful submission it begs the question to characterize the processes that begin in the pulping box as "wet screening". It is true that the ore is screened almost immediately after the first application of water but additional processes occur. Those processes are not only different in kind; they also have a different purpose. Screening is concerned with sizing the ore; the addition of water is concerned with removing impurities. The addition of water therefore begins the first of the processes in the beneficiation plant which is neither crushing nor screening. That process, whether it is called
- p. 675, 1.11-13

"scrubbing", "washing" or "cleaning" or by some other name, continues thereafter. It is not an essential part of the Appellant's case on the second issue that physical changes occur before the ore hits the first screen, although that is in fact what happens.

p. 999, 1.1
-p.1001, 1.5

29. Accordingly it is fallacious to draw any conclusion from the mere fact that wet screening occurs. It is of course true, that
10. for material to be wet screened it must be wet. It is also true that that will normally require that the material be positively wetted, to make it very wet. Screening must be very dry or very wet. But to say that material is wet screened does not say why the material was wetted. There are occasions where water is added to facilitate the process of screening, as for example where the material is already so damp that it cannot satisfactorily be dry screened. That is not why
20. water is added here. The vast bulk of Direct Shipping Ores (from all mines) is crushed and screened dry. In particular, Pilbara ores can satisfactorily be screened dry. But the sale of Low Grade Ore requires more than mere crushing and screening. It requires that rubbish be separated and removed from the better ore. That in turn requires that the feed undergo separation processes in the heavy media drums and heavy media cyclones and hydro-cyclones and
30. WHIMS. Everything that is done in the beneficiation plant is done to get the best possible separation at those devices, all of which use wet processes. Those devices will not achieve satisfactory separation if in the course of their operation fines are washed off lumps to which the fines were adhering, and lumps of clayey shale break down to much smaller particles. The nature of the separation processes requires that the materials falling for separation in each device be and
40. remain of the same size. That will be achieved if and only if fines are washed off lumps before reaching those devices, so that each may go to its appropriate device; and if disintegration of clayey shales is substantially complete before the material reaches the devices. Decomposed particles should go into a device suited for their small size, not into a device suitable for lumps which they will cease to be soon after they make contact with the water in the device. It is these end processes that
50. require the addition of water at all, and their satisfactory functioning requires that the water be added well before the final separation devices are reached. The ore is not wetted in the pulping box in order that the material may be
- p.642, 1.19
- p. 642, 1.12 -22
- p.117,1.37,p.119,1.15
p. 642, 1.23-28
p. 456, 1.43
-p. 457, 1.22
p. 739, 1.40
p. 769, 1.11-12
- p. 655, 1.1-
p. 656, 1.7
p. 713, 1.11
-p. 714, 1.47
- p. 732, 1.7-10

wet screened. The material is wet screened because it has been wetted for purposes quite distinct from screening, namely to ensure the proper operation of the end devices in which there will occur the essential feature of beneficiation in the sense that word has in paragraph (b) of clause 9, namely the separation of rubbish from better ore.

10. 30. The Appellant also respectfully submits that the majority of the Full Court gave insufficient weight to the findings and conclusions of the learned primary Judge and erred in rejecting his Honour's conclusions as to the appropriate meaning of "screening" having regard to industry usage and his findings of fact in the Record at p. 997, 1.41,-p. 1001, 1.1. This was a case where very substantial weight should have been attached to the advantage of listening to the witnesses and seeing them cross
20. examined. That applies especially to Dr. Batterham, whose evidence was challenged by Senior Counsel for the first five Respondents in his address but accepted by his Honour and preferred to that of other witnesses. This is not a case of a kind to which the observations of the High Court in Warren v. Coombes (1979) 142 C.L.R. 531, at p. 551, were directed. Cf. Federal Commissioner of Taxation v. Nixon (1979) 30 A.L.R. 400, at pp. 405-406.

30. Submissions on Subsidiary Points

40. 31. The Respondents have from time to time contended that the later the point at which beneficiation begins within the meaning of paragraph (b), the more reasonable or equitable the result. If that were so, it would not be a sufficient basis on its own for so construing the words of the Agreement, but in fact reason and equity lie the other way. The whole purpose of paragraph (b) of the proviso is to give the Vendors a fair return on the unbeneficiated ore disposed of, whilst at the same time preserving to the Appellant the benefits flowing from the construction of a beneficiation plant-just as, if the Appellant sold the unbeneficiated ore to a third party or to a subsidiary, the Respondents' royalty entitlement would be based on the value of the unbeneficiated ore. The later the point at which beneficiation is held to begin, the more the Respondents gain an unintended benefit from
50. the Appellant's having at its own expense built and operated the beneficiation plant. The contention disregards the difference between an output royalty of the kind provided for in paragraph (a) and an input royalty of the kind provided for in paragraph (b), and runs counter to commercial sense and fair expectation.

32. Another part of the Respondents' case, which found favour with Kennedy J., is that if the initial part of a process of beneficiation consists only of crushing and screening, it is reasonable for the Respondents to take the benefit of that crushing and screening because that is consistent with paragraph (a). In the Appellant's submission that again overlooks the difference between an input royalty and an output royalty. Nor would it in fact achieve harmony between paragraphs (a) and (b), because further crushing or screening could (and in fact both do) take place even after the heavy media drums, heavy media cyclones and hydro-cyclones. More fundamentally, there is no reason why the fact that the royalty entitlement for unbeneficiated ore is calculated on the actual price received on the actual sale of such ore in the state in which it is invariably sold (i.e. crushed and screened into lump ore and fines) should lead to the conclusion that, in the case of ore beneficiated by the Appellant itself, the royalty entitlement is to be calculated not against the value of unseparated ore, as it would be if that ore were sold to a third party or a subsidiary, but on the value of separate streams of ore in a form in which such ores are not sold - in the present case, as Kennedy J. indeed realized, as slurry.
10. p. 1097, 1.6-15
20. p.1156, 1.5-7
30. 33. The Respondents have from time to time suggested that as the essence of beneficiation in the narrow sense (or "washing" or "scrubbing" or "cleaning") is the separation and discarding of impurities, no beneficiation occurs until such discarding takes place. One might with equal force say that as the essence of cleaning shoes is putting a shine on them, one is not cleaning shoes when applying the boot-polish. The question here is the point at which the process of beneficiation begins; not the point at which it ends; and not the point at which there occurs the event which makes the whole process one of beneficiation. The Appellant observes additionally that discarding of impurities in fact occurs, so far as Stream A is concerned, at the first screen below the pulping box; and so far as Stream B is concerned, at the next screen; and so on.
- 40.
50. 34. The Respondents also submitted in the Courts below that the issues should be resolved contra proferentem and that the Appellant was proferens notwithstanding that the Respondents were the Vendors. The submission is in the teeth of the evidence of the second Respondent to the effect that the Agreement was prepared jointly by the solicitors on both sides with input from the parties. The Appellant respectfully adopts the relevant part of Kennedy J.'s reasons for judgment.
- Esp.p.966, 1.10
-p.967
- p.1092, 1.5
-p.1094, 1.6

35. The scheme of clause 9 as put forward by the Appellant is consistent with the concept of "direct shipping ore" in the Iron Ore (Hamersley Range) Agreement Act 1963 (W.A.) and similar legislation, sc.:

10. "'direct shipping ore' means iron ore which has an average pure iron content of not less than sixty per cent (60%) which will not pass through a one half ($\frac{1}{2}$) inch mesh screen and which is sold without concentration or other beneficiation other than crushing and screening;"

20. Paragraph (a) contemplates High Grade Ore that is ready for shipping, subject only to being crushed and screened. The kind of crushing and screening to which that paragraph refers, which is picked up by the last 15 words of paragraph (b), is the crushing and screening appropriate to such ore, i.e. (dry) crushing and screening simpliciter. "Direct shipping ore" at Tom Price is described by Olney J. at p. 989, 1.20 - p. 990 1. 11 and Kennedy J. at p. 1086, 1. 1-13.

30. 36. The rules of the Supreme Court of Western Australia in relation to costs are unusual. For that reason special orders were made pursuant to Order 66 rule 12 in respect of the appeals to the Full Court and the applications for conditional leave to appeal to Her Majesty in Council. (Olney J. also reserved liberty to the Appellant to apply for a special order as to costs at first instance.) The Appellant therefore asks that, if their Lordships consider that the appeal should be allowed, there be in respect of costs in the Courts below orders in favour of the Appellant similar to those in paragraphs 5, 6 and 7 of the judgments pronounced by the Full Court on 29th November 1984.

pp.1137 -1139
pp.1142 -1144
p.1147
p.1004
pp.1137-1139
pp.1142-1144

40. 37. The Appellant respectfully submits that the judgments pronounced by the Full Court were wrong, that this appeal should be allowed with costs (including costs in the Courts below) and that, in lieu of the declarations made by the Full Court, there should be a declaration either-

50. (a) if the first issue is determined in favour of the Appellant, that, in respect of iron ore to which paragraph (b) of the proviso to clause 9 of the Agreement applies and which is not withdrawn from beneficiation before or at the scalping screens 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 in the Supreme Court of Western Australia, beneficiation for the purpose of that paragraph (b) begins each time such iron ore passes through the grizzly referred to in paragraph 8 of that affidavit; or

10. (b) if the first issue is determined adversely to the Appellant, that, in respect of iron ore to which paragraph (b) of the proviso to clause 9 of the Agreement applies, beneficiation for the purpose of that paragraph (b) begins each time such iron ore is fed into the feed chute of the wet screening plant of the Appellant's concentrator at Tom Price in the State of Western Australia,
20. for the following amongst other

REASONS

- (1) BECAUSE the Full court erred in dismissing the Appellant's cross appeals.
- (2) BECAUSE the Full Court should have allowed the Appellant's cross appeals and made declarations to the effect of the first declaration set out in paragraph 37 above.
30. (3) BECAUSE, without limiting the generality of (1) and (2) -
- (a) the learned Judges who comprised the majority in the Full Court erred in their application of the principles of construction referred to in paragraph 15 above;
- (b) their Honours gave insufficient weight to the difference between the output royalty payable pursuant to paragraph (a) of the proviso and the input royalty payable pursuant to paragraph (b) thereof;
- 40.

10. (c) their Honours gave insufficient weight to the provisions of clause 9 relating to disposal of iron ore to a third party or a subsidiary, to the methods of valuation in paragraph (e) and to the likelihood that the parties to the Agreement intended its provisions to be harmonious and practical;

(d) their Honours erred in rejecting the Appellant's submissions that "beneficiation" in paragraph (b) is used in the narrower sense and that the last 15 words thereof are simply to prevent overlap with paragraph (a);

20. (e) their Honours erred in holding, in so far as they did so hold, that their construction of paragraph (b) was consistent with the Respondents' taking the benefit of any increased value arising from crushing or screening of the kind referred to in paragraph (a);

30. (f) their Honours erred in holding that it was necessary to look into the processes comprising beneficiation to determine the first of those processes which was neither crushing nor screening.

40. (4) BECAUSE, alternatively to (1), (2) and (3), the Full Court erred in setting aside the declaration made by the learned primary Judge and making the declarations in paragraph 3 of the judgments pronounced on 29th November 1984.

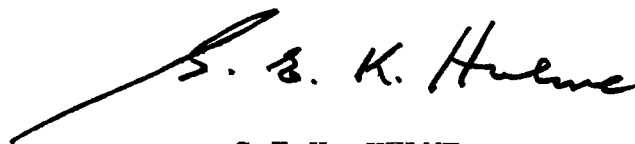
p. 1137
p. 1141

(5) BECAUSE the Full Court should have affirmed the declaration made by the learned primary Judge.

p. 1003

(6) BECAUSE, alternatively to (4) and (5), the Full Court should only have varied that declaration so that it was to the effect of the second declaration set out in paragraph 37 above.

- (7) BECAUSE, without limiting the generality of (4), (5) and (6) -
10. (a) the learned Judges who comprised the majority in the Full Court gave insufficient weight to the findings of fact and other conclusions of the learned primary Judge;
- (b) their Honours erred in rejecting the learned primary Judge's finding and conclusion that screening is the process of presenting particles to apertures and that in paragraph (b) it means the separation by size of the ore by means of such screens;
20. (c) their Honours erred in holding that the addition of water did nothing to make the process other than a screening process for the purpose of paragraph (b) and in particular that the physical alteration referred to by the learned primary Judge was no more than a part of screening.
30. (8) BECAUSE the Full Court erred in ordering the Appellant to pay the costs of the appeals and cross appeals and of proceeding no. 2313 of 1982.
- (9) BECAUSE the Full Court should have ordered the Respondents to pay the costs of the appeals and cross appeals and of that proceeding and made similar orders to those in paragraphs 5, 6 and 7 of the judgments pronounced on 29th November 1984 in favour of the Appellant.



S.E.K. HULME



F.H. CALLAWAY