SUPREME COURT OF QUEENSLAND

CITATION:	*Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd* [2012] QSC 182
PARTIES:	**WRIGHT PROSPECTING PTY LTD (ACN 008 677 021)** (Plaintiff) v **HANCOCK PROSPECTING PTY LIMITED (ACN 008 676 417)** (Defendant)
FILE NO/S:	BS 3078 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	9 July 2012
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2012
JUDGE:	McMurdo J
ORDER:	**1. Application for summary judgment dismissed** **2. Paragraphs 21(d), 21(e), 21(f), 21(g), 22, 23, 29, 30, 31 and 32 of the statement of claim be struck out and the plaintiff have leave to amend its statement of claim consistently with these reasons.**
	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where the parties carried on business in partnership and at one stage, the property of the partnership included a mineral tenement – where the parties signed a deed of assignment under which the plaintiff assigned the whole of its estate and interests in the mineral tenement to the defendant – where the plaintiff claims that, although it assigned its interests in the tenement to the defendant, the parties agreed that they would share any royalties with respect to coal mined and sold from the mine - whether there is relevant ambiguity in the interpretation of related documents signed by the parties which must be resolved at trial
	PARTNERSHIP – RIGHTS AND DUTIES OF PARTNERS

INTER SE – CAPITAL, ADVANCES AND SHARE OF PROFIT OR LOSS – where the plaintiff claims that the defendant had a duty to deal with the tenement in the interests of the partnership at all times – whether the defendant was under a continuing obligation to deal with the tenement for the benefit of the partnership after the assignment of the tenement to the defendant

Mineral Resources Act 1989 (Qld) s 181(4)(c)

Western Export Services Inc & Ors v Jireh International Pty Ltd [2011] HCA 45; (2012) 86 ALJR 1, cited

COUNSEL: D J Jackson QC with M F Johnston for the plaintiff respondent

S Finch SC with C Bova for the defendant applicant

SOLICITORS: Clayton Utz Lawyers for the plaintiff respondent

Ashurst Australia for the defendant applicant

[1] Since 1958 the parties have carried on business in partnership under the name "Hancock and Wright". At one stage at least, the partnership property included a mineral tenement, known as Kevin's Corner, in the Galilee Basin, Queensland. By a deed between the parties dated 1 June 1998, the plaintiff assigned the whole of its estate and interest in Kevin's Corner, which was then described as Mineral Development Licence 190, and by that assignment, the defendant apparently became in all respects its owner. In October 2009, the defendant transferred its interest in the tenement to a related company, Hancock Galilee Pty Ltd. In September 2011, the defendant, or at least the group of which it is a member, announced a transaction for the acquisition by an unrelated third party of "a 100% shareholding in the Kevin's Corner Coal Project", which includes this mining tenement. The mine has yet to be developed.

[2] According to that announcement, no part of the consideration to be paid by the new owner will be in the nature of any royalty with respect to coal mined and sold from Kevin's Corner. That is at the heart of the plaintiff's complaint. It says that although it assigned to the defendant its interest in the mining tenement, the parties agreed that they would share any royalties from the production of the mine. Further, the plaintiff alleges, they agreed that the defendant would not do anything "having the effect of reducing or disposing completely of any royalties to which the Partnership shall otherwise be entitled", so that if the tenement is to be or has been sold with no provision for a royalty, the defendant is in breach of that agreement and of its general law duties as a partner.

[3] The plaintiff has sought information from the defendant as to the transaction announced last September, as well as information as to the likely production and sale of coal from Kevin's Corner. It claims that the defendant, as its partner, is obliged to provide that information which the defendant has wrongfully failed to do. The plaintiff seeks declarations as to its entitlement to be paid royalties from Kevin's Corner and to what it says are the obligations of the defendant to provide it

with relevant information and not to conclude a transaction which affects the potential to receive royalties.

[4] The defendant says that the plaintiff has no right or entitlement at all in respect of Kevin's Corner, having assigned all of its interest in 1998. As from that assignment, Kevin's Corner ceased to be partnership property and became in all respects the property of the defendant. As at the date of the assignment, there was no entitlement of the partnership to receive any royalty from mining this tenement. Therefore, the defendant argues, there was nothing which could have been the subject of an agreement that an entitlement to royalties would remain with the partnership, notwithstanding the assignment of the tenement itself. Moreover, once the tenement was assigned to Hancock Galilee Pty Ltd, the alleged obligation of the defendant in respect of the development of Kevin's Corner as a mine, specifically to exploit it on terms which would yield a royalty, could not have continued to have any effect.

[5] The plaintiff's case is pleaded entirely upon the basis of certain documents signed by the parties from 1983 through 1998. There is no dispute as to the execution of those documents or as to the fact that the parties intended them to have effect. The plaintiff pleads no oral term or claim for rectification.

[6] The defendant says that unambiguously, the documents disprove the plaintiff's case. By this application it applies for summary judgment or alternatively to strike out a substantial part of the statement of claim. The plaintiff argues that the interpretation of the documents must be assisted by evidence and that there is a need for a trial.

[7] The Defence pleads other matters in the alternative[1] upon which the defendant does not rely on this application. Therefore, the present questions involve the interpretation of the documents upon which the plaintiff's case is pleaded and, in particular, whether there is a relevant ambiguity within those documents. If the documents are unambiguous, then evidence of the kind which is said to require a trial would not be admissible: *Western Export Services Inc & Ors v Jireh International Pty Ltd*.[2] According to the plaintiff's submission, there should be evidence at a trial as to the commercial purpose of the contracts and the genesis of the transactions, the background, the context and the market in which the parties were operating.[3]

[8] The first of the documents pleaded by the plaintiff is a partnership agreement dated 24 May 1983 ("the 1983 agreement"). There had been earlier partnership agreements but these are not relied upon by either side. This 1983 agreement was stated to be in substitution for its predecessor which was made in 1978. Clause 2 of this agreement provided as follows:

> "2. THE ASSETS of the Partnership shall include the assets of the Partnership at the date of this Agreement together with such further assets as may be from time to time acquired by the Partners to carry on the business of the Partnership and such assets have been or shall be deemed to have been or shall be contributed by the Partners equally and subject to

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1 Defence, paragraph 65 to 105.

2 [2011] HCA 45; (2012) 86 ALJR 1.

3 Plaintiff's written submissions, paragraph 58.

> subpara (a) hereof all losses profits and liabilities of the Partnership will be shared equally.
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> It is hereby acknowledged that all Mineral Titles Authorities to Prospect Exploration Licences Prospecting Licences Mineral Claims Patents for Manganese any other permits or licences whether held by HPPL or WPPL or subsidiary companies under any Mining Act of any State of Australia at the date of this Agreement are held in trust for and comprise assets of the Partnership.
>
> The Partners shall contribute to the capital of the Partnership equally.
>
> (a) Notwithstanding the above if in regard to any Financial Year the Partners acting together agree in writing that net profits or losses in that particular year be shared in specified proportions not being equally then such specified proportions will apply for that particular year."

In that clause, as well as in the remainder of this document and the other relevant documents, the plaintiff is described as "WPPL" and the defendant as "HPPL". This agreement also contained provisions requiring the parties to be just and faithful to each other in all transactions relating to the partnership business, to give a true account of the same and to inform each other of all things coming to its attention concerning the business of the partnership.

[9] The next document is an agreement between the parties dated 15 February 1984 ("the 1984 agreement"). It was in terms of a variation of the 1983 agreement. It recited that the parties had agreed "that each partner shall assume individual control over certain of the assets and interests of the Partnership to the exclusion of the other Partner and shall have the option to require the division of such assets between the Partners …". Clause 1 of this agreement provided as follows:

> "1. AS FROM 1 JANUARY 1984 and notwithstanding Clause 12 of the [1983 agreement]:
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> (a) HPPL shall assume sole control over and responsibility for the administration, development and disposal of the assets and interests of the Partnership set out in Schedule 1 hereof other than royalties in respect thereof or premiums referred to in Clause 5 hereof (hereinafter called the 'HPPL interests').
>
> (b) WPPL shall assume sole control over and responsibility for the administration, development and disposal of the assets and interests of the Partnership set out in Schedule 2 hereof other than royalties in respect thereof or premiums referred to in Clause 5 hereof (hereinafter called the 'WPPL interests').

> (c) Without reference to the other Partner, HPPL in respect of the HPPL interests and WPPL in respect of the WPPL interests shall be entitled to conclude any negotiations and make any agreement having the effect of reducing or disposing completely any of the said royalties or premiums to which the Partnership may or shall be entitled PROVIDED THAT the making of such agreement shall not be undertaken other than as a last resort to ensure that any relevant mining venture can proceed IT BEING AGREED that during the lifetimes of the present Governing Directors of HPPL and WPPL any decision to make such agreement as a last resort shall be at the sole and unfettered discretion of the relevant Governing Director."

The assets described in Schedule 1 as the HPPL interests included "Kevin's Corner".

[10] Clause 4 of the 1984 agreement conferred options to purchase in these terms:

> "4. EACH PARTNER SHALL HAVE the option exercisable at any time during the continuation of the Partnership to require the transfer of the HPPL interests to HPPL and the transfer of the WPPL interests to WPPL."

It appears that in other proceedings, the parties are in dispute about, amongst other things, whether that clause enabled a partner to elect to acquire some but not all of its interests. There is also an issue, in other proceedings, as to whether the 1998 assignment of Kevin's Corner was in consequence of an exercise by the defendant of the option conferred by this clause. Again, those issues need not be resolved here, because the plaintiff's case pleads that the assignment occurred either in consequence of the exercise of the option or by the plaintiff's agreeing to a transfer as requested by the defendant in 1997.

[11] The 1984 agreement contained further provisions as follows:

> "6. IN THE EVENT OF A PARTNER organising full scale major development and commencement of substantial mining activities in respect thereof of any of the HPPL or WPPL interests such Partner shall to the best of its ability keep the other Partner fully informed on the progress of all negotiations and other matters pertinent to such development and commencement and shall offer to such other Partner one half of its own right to participate in such mining venture at a cost equal to one half of all costs as recorded in the accounts of the Partnership in relation to any such interests reduced by all premiums paid by other parties upon their becoming members of such mining venture, subject to the acceptance of such offer within one month of the making of such offer.
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> 7. IN THE EVENT of any offer referred to in Clause 6 hereof being made by HPPL to WPPL in respect of the McCamey joint venture WPPL shall be entitled to receive one half of any premiums paid or to be paid in respect of such joint venture whether or not such offer shall be accepted by WPPL.

8. IN THE EVENT of any offer referred to in Clause 6 hereof being made by HPPL to WPPL in respect of the Marandoo joint venture or by WPPL to HPPL in respect of the Rhodes Ridge joint venture WPPL and HPPL shall respectively be entitled to receive one half of any premiums paid or to be paid in respect of the relevant joint venture upon acceptance of the said offer by WPPL or HPPL respectively but neither Partner shall be entitled to any part of any such premiums in other circumstances.

9. THE INTENT of this Agreement and clauses 6, 7 and 8 in particular is that upon commencement of mining activities both HPPL and WPPL (as near as is practical and equitable) should be in the same position as they would have been if the Partnership had continued in its present form until the date of such commencement and on the assumption that the other Partner had concurred in each and every decision that HPPL or WPPL had made under Clause 1 hereof in the intervening period.

10. BOTH PARTNERS SHALL at all times be free to undertake any type of prospecting, mining or other activity on its own account excluding any activity previously undertaken by the Partners and for any reason (including the loss of any mining or prospecting right or tenement) not proceeded with or abandoned but shall offer such interests it may determine in any venture resulting from such activity to the other Partner on a 'Best Friends' basis."

[12] The parties made a further agreement dated 12 June 1987 ("the 1987 agreement"), which was expressed to be supplementary to and not in substitution for the 1983 and 1984 agreements. It contained this clause 1, which it is necessary to set out in full:

"Notwithstanding the provisions of the Second Partnership Agreement and the 1984 Agreement, the Partners hereby acknowledge and agree that on and from 12 April 1987:

(a) neither HPPL in respect of the HPPL interests nor WPPL in respect of the WPPL interests shall be entitled to conclude any negotiations or make any agreement having the effect of reducing or disposing completely of any royalties to which the Partnership shall otherwise be entitled for the purpose of proceeding with any relevant mining venture;

(b) subject to sub-clause (d) hereof, WPPL relinquishes in favour of HPPL its interest in Hope Downs;

(c) HPPL relinquishes in favour of WPPL all of its interest in Temporary Reserve 5623H (Marandoo);

(d) HPPL and WPPL shall be entitled to any contributions of capital to be made by joint venture participants in respect of the area comprised in the project covered by the Wittenoom Agreement in the proportions of 25% to HPPL and 75% to WPPL;

(d) royalties received from third parties by the Partnership in respect of iron ore produced and sold by them from the following tenements or projects shall be divided equally between the Partners, namely:

(i) Rhodes Ridge;
(ii) Hope Downs;

(f) WPPL shall be entitled to all royalties payable by third parties in respect of the said Marandoo and the areas known as Western Ridge and Prairie Downs;

(g) HPPL shall be entitled to all royalties payable by third parties in respect of the areas comprised in the said project covered by the Wittenoon Agreement, with the exception of the said Marandoo;

(h) HPPL shall do all things necessary to ensure that WPPL shall at all times be entitled to receive from the participants in the Joint Venture known as 'McCamey's' (other than HPPL or any company associated with HPPL, including Hancock Mining Limited) a royalty at the rate of 1¼% of the f.o.b. revenue received on iron ore produced and sold from McCamey's by such participants;

(i) to the extent not otherwise covered elsewhere in this Agreement, the Partners shall share equally all royalties payable to the Partnership, namely at the rate of 1¼% each of the f.o.b. revenue received on the iron ore or other minerals produced and sold; and

(j) each of HPPL and WPPL is hereby released from the obligation to offer to the other one half of its own right to participate in any mining venture undertaken in respect of HPPL interests and WPPL interests respectively or in respect of any areas allocated to each party under this Agreement."

[13] The 1987 agreement contained a further term as follows:

"5. Future Exploration

Each Partner shall be entitled to prospect for minerals of any type and take up any type of mining or other tenement (whether or not previously owned by the Partnership) without being obliged to offer to the other Partner any opportunity to participate in such activity or tenement and in no circumstances shall one Partner be liable to pay any royalty to the other in respect of iron ore or any other mineral produced from such activity or tenement."

[14] The remaining document pleaded by the plaintiff is the 1998 assignment deed. By cl 3, it provided that in consideration of the execution of the deed, the plaintiff (described as the Vendor) agreed to assign to the defendant (described as the Purchaser) "the whole of the Vendor's interest". That term was defined to mean

"the whole of the Vendor's estate and interest in the Mining Property", which itself was defined to mean "Mineral Development Licence 190 (formerly known as Exploration Permit (Coal) 244)". Settlement was to take place seven days from the date of the deed. The defendant was to provide an instrument of assignment of the Vendor's Interest, duly executed by the defendant, to the plaintiff at least three days prior to settlement. The plaintiff was to hand the defendant at settlement all certificates of registration or other documents of title relating to the Mining Property and the instrument of assignment executed by the plaintiff. The instrument of assignment is not in evidence. But there is no suggestion from either side that this agreement was not duly completed.

[15] Clause 6 of the deed of assignment provided as follows:

> "6. PURCHASER'S RIGHTS
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> The Vendor hereby represents and warrants to the Purchaser that on and from settlement under clause 4 (and notwithstanding that the title to the Vendor's Interest will still be in the name of the Vendor), the Purchaser is, subject to the Act, and will continue to be entitled to:
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> (a) exclusive possession of the Mining Property;
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> (b) have full and exclusive control and discretion in the prospecting and investigation of the Mining Property; and
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> (c) take away such amount of minerals, ores and samples as the Purchaser may consider necessary or desirable from the Mining Property and the Purchaser shall not be accountable to the Vendor with respect to any minerals, ores or samples so removed and all minerals, ores, samples, assays and survey results thus obtained shall be and remain the sole property of the Purchaser."

[16] The plaintiff's case is that, upon their proper interpretation, the 1984 and 1987 agreements had the effect of preserving for the benefit of the partnership, even beyond the assignment of the mining tenement, any future entitlement to a royalty in respect of Kevin's Corner or what might be described as the opportunity to obtain such a royalty. The plaintiff's case as to the interpretation of those agreements is pleaded in paragraph 21 of its statement of claim, which it is necessary to set out in full:

> "21. On the proper construction of the 1984 Agreement and the 1987 Agreement (the Partnership Agreements):
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> (a) Kevin's Corner was an 'HPPL interest';
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> (b) the term 'HPPL interests' excludes any royalties payable to the Partnership in respect Kevin's Corner by reason of clause 1(a) of the 1984 Agreement;
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> (c) the transfer of Kevin's Corner (as an HPPL interest) to HPPL did not include the transfer of the right to any royalties payable to the Partnership in respect of that interest;

(d) it was agreed that the Partnership would be entitled to be paid royalties at the rate of 2.5% of the free on board revenue received on any minerals (including coal) produced and sold from Kevin's Corner by reason of clause l(i) of the 1987 Agreement (the Partnership's Royalty Entitlement);

(e) WPPL is entitled to share equally with HPPL in the Partnership's Royalty Entitlement - being an entitlement of WPPL to 1.25% of the free on board revenue received on any minerals (including coal) produced and sold from Kevin's Corner - by reason of clause l(i) of the I987 Agreement (WPPL's Royalty Entitlement);

(f) HPPL is not entitled to conclude any negotiations or make any agreement which would have the effect of reducing or disposing completely of the Partnership's Royalty Entitlement or WPPL's Royalty Entitlement by reason of clause 1(a) of the 1987 Agreement;

(g) The Partnership's Royalty Entitlement, WPPL's Royalty Entitlement and the obligation of HPPL as pleaded in sub-paragraph (f) above continued to apply notwithstanding the transfer of WPPL's interest in Kevin's Corner to HPPL pursuant to the option in clause 4 of the 1984 Agreement or pursuant to any other agreement."

Unquestionably, Kevin's Corner was an HPPL interest. But after that point the defendant disputes the pleaded case.

[17] As to the exclusion of royalties by cl 1(a) of the 1984 agreement, the plaintiff is correct to plead that excluded from, in particular, Kevin's Corner as an HPPL interest were "royalties in respect thereof". By its pleading, the plaintiff limits that expression to "any royalties *payable to the Partnership* in respect of Kevin's Corner …". Still the defendant denies paragraph 21(b), and pleads that the 1984 and 1987 agreements excluded only a royalty which became payable in respect of Kevin's Corner prior to its transfer to the defendant (in 1998).

[18] I accept the defendant's submission that the 1984 agreement affected the *control* of certain interests (by specifying them as HPPL interests or WPPL interests) but that it did not affect the ownership of those interests, which therefore remained partnership property. Clause 4 had the potential to affect the ownership of such interests. But it was not an agreement to change that ownership, except in the sense that an option to purchase is a conditional agreement for sale. Therefore, Kevin's Corner remained a partnership asset, but one over which the defendant was given effectively management powers and responsibilities which were qualified in relation to royalties by cl 1(c).

[19] It can be seen from the terms of the plaintiff's pleading set out above that its case is heavily reliant upon cl 1(i) of the 1987 agreement. This provided that:

> "… the Partners shall share equally all royalties payable to the Partnership, namely at the rate of 1¼% each of the f.o.b. revenue received on the iron ore or other minerals produced and sold …"

In paragraph 21(d) of the statement of claim, it is alleged that this was an agreement "that the Partnership would be entitled to be paid royalties at the rate of 2.5% …". The defendant says that this allegation is unsustainable, because any entitlement to be paid a royalty would derive from an agreement with a third party rather than an agreement between the partners. That point is valid. But as was made clear in the plaintiff's submissions, the pleading should not be understood in that way. Rather, the parties made their agreement upon the premise that any royalty agreed with a third party would be at the rate of 2.5 per cent of the f.o.b. revenue. Upon that premise, they agreed that the royalty, if and when agreed and paid, would be shared equally between the partners.

[20] As the defendant's argument emphasised, paragraph 21(d) does not accurately plead the content of cl 1(i) of the 1987 agreement, because it omits the words "payable to the Partnership" after the word "royalties". (The same omission appears in paragraph 1 of the claim.) The plaintiff concedes that these words should be added by an amendment to paragraph 21(d). These words are critical, the defendant argues, because they qualify what might otherwise be the right of each party to receive half of any royalty. Clause 1(i), the defendant argues, would be engaged only where there was a royalty which was payable to the partnership and as that has not occurred with Kevin's Corner, it cannot be relevant. That submission is persuasive. The circumstance which would provide the plaintiff with a cause of action, namely a royalty being payable (immediately or in the future) is not alleged to exist.

[21] To make out its case, the plaintiff must then identify some obligation on the part of the defendant to procure the payment of a royalty to the partnership in respect of Kevin's Corner. Putting on one side the 1998 assignment, in my view that obligation of the defendant can be identified in the 1983, 1984 and 1987 agreements although not as pleaded by the plaintiff. As the defendant concedes, the mining tenement known as Kevin's Corner was a partnership asset on the date of each of those agreements. Its ownership was unaffected by the 1984 agreement, save for the potential impact of the option provision (cl 4). And unlike some other specific interests referred to in its cl 1, the 1987 agreement contained no provision which affected the ownership of this tenement. Therefore the rights and responsibilities for Kevin's Corner, as an HPPL interest, were still to be enjoyed and discharged by the defendant in the interests of the partnership. Accordingly, if it was in the interests of the partnership that a royalty be negotiated with a third party, the defendant was obliged to pursue it.

[22] But such an obligation came from the general law of partnership, as well as from cl 7 of the 1983 agreement, by which each partner agreed to be just and faithful to the other in all transactions relating to the Partnership business. It did not derive from cl 1 of the 1983 agreement or any part of cl 1 of the 1987 agreement. In cl 1(a) of the 1987 agreement, each party agreed that it would not be "entitled to conclude any negotiation or make any agreement having the effect of reducing or disposing completely of any royalties to which the Partnership shall otherwise be

entitled …". That was an agreed restriction upon a partner's powers in relation to its HPPL or WPPL interests to operate in a circumstance where the partnership was otherwise entitled to a royalty. In other words, it precluded some negotiation or agreement which would diminish or remove an existing entitlement of the partnership to a royalty. That clause would be relevant here only if the partnership had become entitled to a royalty in relation to Kevin's Corner. The plaintiff does not plead that by any dealing with a third party, there arose an entitlement to a royalty expressly. Further, the terms of the agreements upon which the plaintiff relies are in my view, unambiguous.

[23] I come then to the 1998 assignment. The question becomes whether it removed the tenement known as Kevin's Corner together with any opportunity to exploit the tenement from that property which belonged to the partnership. The defendant submits that this 1998 deed was unambiguous in providing for "the whole of the [plaintiff's] estate and interest in the tenement" then described as Mineral Development Licence 190 to be transferred to the defendant.

[24] The plaintiff's response is to say that its interest from any mining on the land the subject of that tenement, coming from the specific terms of the 1983, 1984 and 1987 agreements which it pleads, was a distinct interest which was not affected by the 1998 assignment because that was an assignment only of the mining tenement. However, I have concluded that the agreements made in the 1980s did not provide for a distinct entitlement to potential royalties for which the plaintiff contends. Rather, any opportunities for royalties had to be exploited for the benefit of the partnership because they could arise only from the ownership of the mining tenement and it was partnership property.

[25] Thus once the ownership of that tenement passed entirely to the defendant, there was no basis for imposing an obligation upon the defendant to deal with its rights and benefits from that tenement for the benefit of the partnership. It might have been possible for the parties to agree, within this 1998 deed, that the plaintiff would have some ongoing interest arising out of the defendant's dealing with the tenement or any mining lease or other interest which was derived from the ownership of Mineral Development Licence 190. But clearly they did not do so within this deed and the plaintiff does not suggest that they did so elsewhere.

[26] By this deed the parties plainly intended that the defendant, to the exclusion of the plaintiff, would be able to exploit Mineral Development Licence 190. That included, for example, the right of the defendant, as the holder of that tenement, to have considered for grant, in priority to all other persons, a mining lease in respect of any of the relevant land.[4] The 1998 deed is unambiguous in its expressed intention to make that mineral development licence and any opportunity to commercially exploit it, together with any statutory or other entitlement deriving from it, the property of the defendant.

[27] Therefore no evidence could be admitted to affect that interpretation. But it should also be noted that the plaintiff's submissions did not describe the intended nature and particular relevance of that evidence, in relation to this deed, other than to refer to it as evidence of "the genesis, background and commercial context" of the deed and of whether it was made pursuant to the exercise of an option within cl 4 of the

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4 *Mineral Resources Act 1989* (Qld), s 181(4)(c).

1984 agreement. In that last respect, however, the plaintiff's submissions did not explain how it would be relevant that the document did or did not result from the exercise of that option. The statement of claim does not seem to attribute any significance to that matter, because it pleads that the 1998 deed arose either from the exercise of the option or otherwise, without pleading the relevance of the former to the proper interpretation of the deed. In any case, assuming for the moment that this deed was in consequence of the exercise of the option in cl 4 of the 1984 agreement, that would be consistent only with what I have said is the unambiguous meaning of the 1998 deed.

[28] Therefore the plaintiff's claim cannot succeed upon the facts pleaded by it. It is unnecessary to discuss the impact of the transfer of the mining tenement by the defendant to its related company.

[29] The question then is whether there should be summary judgment for the defendant or instead there should be an order, as it seeks in the alternative, for the striking out of certain paragraphs of the statement of claim. I am not persuaded to give summary judgment. Obviously there is a longstanding and complex dispute between these parties of which this litigation is but a part. I am concerned that a judgment might have some unintended consequence for issues in other proceedings. It might also preclude the plaintiff pursuing an alternative case for the same relief here.

[30] It follows from these reasons that the alternative application to strike out paragraphs 21(d), 21(e), 21(f), 21(g), 22, 23, 29, 30, 31 and 32 of the statement of claim should succeed. Those paragraphs will be struck out and the plaintiff will have leave to amend its statement of claim consistently with these reasons.