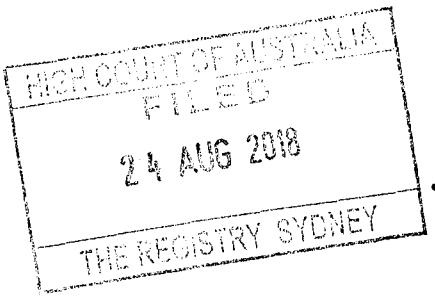
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S144 of 2018**

BETWEEN



BIANCA HOPE RINEHART
First Appellant

JOHN LANGLEY HANCOCK
Second Appellant

AND

GEORGINA HOPE RINEHART (IN HER PERSONAL CAPACITY AND AS TRUSTEE OF THE HOPE MARGARET HANCOCK TRUST AND AS TRUSTEE OF THE HFMF TRUST) AND OTHERS NAMED IN THE SCHEDULE
Respondents

APPELLANTS' SUBMISSIONS IN REPLY

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Part 1: Certification

1. These submissions are in a form suitable for publication on the Internet.

Part 2: Argument

2. Capitalised terms in these submissions have the same meaning as in the appellants' submissions in chief filed 6 July 2018 ("**AS**").

3. Like the Full Court, the respondents do not attempt to identify any particular meaning of the word "under" which might be thought to support the proposition that the phrase "any dispute under this deed" should, as a matter of ordinary English, be construed as including a dispute about the validity of the deed in question. Instead, the focus of their submissions is the assertion that the term "dispute" in each of the relevant arbitration clauses should be taken as referring to the entirety of a litigated controversy (see the submissions of the first and second respondents in S144 of 2018 ("**GRS**") at [80]-[83] and of the first to eighth respondents in S143 of 2018 ("**HPPLRS**") at [81]-[83]). This is deployed in aid of the submission that because part of the litigation between the parties concerns the operation of the impugned deeds (specifically the releases contained therein), the whole of the litigation is a dispute under those deeds.

4. Clause 20 of the Hope Downs Deed, on which cl 9 of the 2007 HD Deed is modelled, is directed to the notification, mediation and arbitration of "any dispute under this deed". The word "dispute" is there used to denote differences that have to yet to be refined or consolidated by the process of pleading. Indeed, by providing that "[i]n the event that there is any dispute under this deed ... the parties ... shall attempt to resolve such difference in the following manner", cl 20 treats the words "dispute" and "difference" as synonyms. The latter term is more apt to describe a matter in issue or a single claim than a controversy comprising several such issues or claims.

5. Contending otherwise leads to the conclusion that a proceeding concerned with the construction of a contract, in which a plea of *non est factum* is also pressed, is nonetheless a "dispute under" that contract. This is at odds with the Full Court's reservations with respect to claims of *non est factum* (FC [204]). That tension might explain the proposition, advanced at GRS [78], that even though a dispute embraces the entirety of a controversy, including "matters of substantive defence and reply" (GRS [73]), had the appellants pleaded a claim of *non est factum*, that may have been "susceptible of settlement as a discrete controversy" and so may have constituted "a separate dispute". In the appellants' submission, the internal inconsistency in that proposition is illustrative of how the meaning given by the Full Court and the respondents to the term "dispute" breaks down under the weight of its own expansiveness. Their Honours thus erred in concluding (at FC [204]) that the phrase "any dispute under this deed" can be said to cover the entirety of a controversy in which the Hope Downs Deed is pleaded by way of defence and its invalidity asserted in reply. And shifting attention towards that conclusion and away from the "illustration of a liberal reading" given at FC [193] does nothing to improve the respondents' argument (GRS [54], [67]; HPPLRS [40]-[42], [52]).

6. It is also incorrect to suggest that such cases as *Paper Products*[1] may be distinguished on the basis that the appellants' challenge to the validity of the impugned deeds is accompanied by claims, the defence to which might be said to arise *ex contractu* (HPPLRS [67]-[71]). For the reasons already given, those different claims are different "disputes". The logical conclusion of asserting otherwise merely because both sets of claims are brought in the one proceeding is that if the appellants had sought no more than a declaration that the Hope Downs Deed was invalid, any such dispute would not have been "under this deed". But why is a question concerning the validity of a deed any more "under this deed" because some additional claim is pressed in the same proceeding? The approach of the respondents thus does not avoid turning on "the legal character of individual issues" (HPPLRS [79]) – in this case, the character of any issues additional to the validity of the impugned deeds.

7. The respondents are similarly incorrect in their embrace of the proposition that the "validity claims" are disputes "under this deed" by reason of a sustainable argument that those claims are "challenges to the rights of Hancock Group members to Hancock Group Interests and so can be seen to be themselves in breach of and controlled by the Hope Downs Deed" (FC [249]). That proposition conflates the content of the validity claims with the Appellants' conduct in advancing those claims. The latter might be controlled by the Hope Downs Deed (if it were valid), but the validity claims themselves do not depend on the terms or operation of that deed for their resolution. Whether the Hope Downs Deed is invalid is a question separate from, and anterior to, whether an assertion of its invalidity constitutes a breach of its terms. It is, in other words, a discrete dispute, one that, for the reasons developed in chief, falls outside the scope of the expression "any dispute under this deed". Contrary to GRS [86], then, what is said at FC [249] is incapable of surviving acceptance of the appellants' argument.

8. Nor is there substance in the contention that because a challenge to the validity of an agreement will determine its "operation or "effect", such a challenge "is indistinguishable from a dispute about its construction" (HPPLRS [74]). This is presumably said in support of a broader submission that a dispute about the validity of a deed is a "dispute under this deed", regardless of how one reads the word "dispute". However, beyond pejorative references to "the logic of 'subordination'" (HPPLRS [75]), the submission does not address the ordinary meaning of the word "under". It exemplifies the atextual quality of the respondents' approach to construction. More importantly, a dispute about the validity of an agreement is ultimately concerned with whether there is, at law, an agreement at all, not with its operation or effect. The submission to the contrary at HPPRLS [77] is no more than a bare assertion, advanced without any engagement with the proposition, put at AS [39], that if the distinction between "void" and "voidable" is functionally without any difference, then there is nothing, in the present context, to distinguish the "validity claims" from a plea of *non est factum* or even forgery. This is what distinguishes those "validity claims" from an assertion that the operation or enforceability of a contractual right, the existence of which is uncontested, is nonetheless qualified by, say, an

[1] (1993) 43 FCR 439 at 448.

estoppel or unclean hands. Contrary to HPPRLS [76], the appellants' argument does not depend on whether it is a particular clause or the entire agreement that is said to be unenforceable. Rather, the relevant question is whether the dispute is concerned with whether there was, in the eyes of the law, an agreement at all, one of the essential elements of which is the freely given consent of the parties to the terms of that agreement. This is not to insist upon the significance of a legal distinction so fine that it would elude the comprehension of men and women of commerce. Implicit in the respondents' submissions is an assumption that commercial parties, in their ruthless pragmatism, are so inattentive to the precise legal effect of language that they should be permitted some leeway in the drafting of arbitration clauses that they would not be permitted for any other provision. That needs only to be stated to be rejected.

9. As for the matters of context emphasised by the respondents, three points may be made. First, emphasis is placed at HPPLRS [49]-[50] on the Full Court's finding that "[o]ne of the fundamental purposes of the Hope Downs Deed was the quelling of disputes about the title to ... assets in a context where at least one sibling had expressed the view that he was not bound by an earlier deed" (FC [203]). The point, which is also made at GRS [63], appears to be that at the time of executing the Hope Downs Deed, the parties were mindful of the possibility of future disputes about its validity, and that this should inform the construction of the phrase "any dispute under this deed". The Appellants embrace that proposition. It must be recalled that the Hope Downs Deed was executed before the House of Lords had decided *Fiona Trust*, at a time when, having regard to what was said in *ACD Tridon*[2] and *Paper Products*, any competent legal practitioner in Australia would have been conscious of the reasonable likelihood that the phrase "any dispute under this deed" might be construed as referring only to matters arising *ex contractu*. In other words, despite an apprehension that a dispute concerning the validity of the Hope Downs Deed might arise, the parties adopted a form of words that, on what was then the current understanding of the law, likely excluded any such dispute from the scope of cl 20, even though it would have required no effort to substitute "in connection with" for "under". This goes some way towards displacing any assumption that the parties intended all disputes howsoever connected with the impugned deeds to be resolved by arbitration.

10. At the very least, one might ask why rational commercial parties, armed with legal advisers, should not also be assumed to have some awareness of the existing state of the law when drafting contracts, and why that assumption should not given the same regard as that which animated the reasoning of the Full Court. In this context, the two assumptions would appear to favour opposing conclusions. Which assumption is to be given primacy, and according to what criterion? In the appellants' submission, that question rather demonstrates that construing a legal instrument by reference to assumptions, drawn in the absence of any firm empirical or evidentiary basis, concerning the state of mind of commercial parties can be a fraught exercise.

11. Secondly, contrary to GRS [69] and HPPLRS [50], it does not cut across the Full Court's findings on commerciality to suggest that the Hope Downs Deed should be construed having

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[2] [2002] NSWSC 896 at [155].

regard to the pre-existing trust relationship between Mrs Rinehart and the Appellants. The implication of the respondents' submission – namely, that trusts necessarily stand outside the realm of commerce – would be cause for universal surprise. And as the Full Court observed, "the dispute is capable of being described as one between a mother and her children ... about the alleged maladministration of family trusts" (FC [134]). Those trusts are significant in a further respect. Mrs Rinehart executed the Hope Downs Deed, both in her own right and as trustee of the HMH Trust. The deed purported to confer several benefits on her, including a mechanism permitting her lifetime control of the HMH Trust and HPPL, releases which would have covered the claims for breach of trust foreshadowed in the first appellant's unsworn affidavit of October 2004 and the ability to divert dividends payable to the HMH Trust to her in the event of any breach of the deed by the beneficiaries of that trust. Given the very real conflict between her interests and those of the appellants, it was incumbent upon Mrs Rinehart to ensure that their execution of, or accession to, the Hope Downs Deed was attended by fully informed consent to those benefits. In so far as the releases were concerned, this required full disclosure of any previous breaches of trust, so that the appellants were apprised of the extent of the benefit constituted by those releases. It would have been plain to any reasonable person in the position of the parties that a failure to disclose any such breach might well result in a challenge to the validity of the Hope Downs Deed, as well as a claim for relief in respect of that breach. That is, it was part of the context in which the deeds were executed that one could readily anticipate the making of a "validity claim" which incorporated allegations relevant to a "substantive claim". And yet, against the background afforded by *ACD Tridon* and *Paper Products*, Mrs Rinehart, the relevant HPPL Respondents and their advisers opted to define the scope of cl 20 by reference to "any dispute under this deed".

12. The prosecution in a court of a "validity claim" that overlaps with a "substantive claim" the subject of an arbitration clause may, on one view, be an anomalous outcome. However, in circumstances where a party, claiming to be a commercial party, might be taken to have anticipated such a "validity claim", and with the benefit of legal advice, drafted the arbitration clause in such a way as to make that anomalous outcome more likely, why should this Court rescue that party from the consequences of her decision? This is particularly because, at the risk of repetition, the respondents could have done for themselves what they now ask the Court to do for them (albeit under the rubric of construction, as distinct from rectification), simply by substituting "in connection with" for "under" in cl 20 of the Hope Downs Deed. In any event, as the primary judge observed (J [666(5)]), to the extent that the respondents might suffer any prejudice as a result of the appellants' "validity claims" being heard in a court, that can readily be addressed by the making of appropriate confidentiality orders. This suffices to dispose of what is submitted at GRS [72]-[74] and HPPLRS [16] and [84].

13. Thirdly, as was observed in chief, the stay applications were heard on the basis that the primary judge would not make "any factual findings about whether the asserted arbitration agreements [were] vitiated by fraud or other misconduct" (J [145]). To the extent then that the hearing of the applications involved a factual contest concerning the circumstances surrounding the

execution of the impugned deeds, that contest was not conducted as expansively or as vigorously as if the questions of "fraud or other misconduct" had fallen for determination by her Honour. The Court should therefore be cautious in giving weight to those matters relied on by the respondents either to conjure an impression of opportunism and rapacity on the part of the second appellant (in circumstances where he was not cross-examined even though the opportunity to do so was available to the respondents) (GRS [16], [20]; HPPLRS [20]-[23], [27]) or to suggest that there could have been no duress or other misconduct in procuring the execution by the first appellant of the impugned deeds (GRS [22]; HPPLRS [25]). This last example is particularly illustrative. On the one hand, the respondents submitted, and the Full Court accepted (FC [240]), that having regard to the basis on which the stay applications were heard, it was premature for the primary judge to have made any findings concerning the extent to which the appellants had been afforded an opportunity to obtain comprehensive legal advice before executing the impugned deeds. On the other hand, the respondents now point to what they say is evidence of the receipt of independent legal advice by the first appellant prior to her execution of the Hope Downs Deed (HPPLRS [25]). This inconsistency is all the more egregious, given that the Full Court's reference to that evidence omitted the epithet "independent" and was accompanied by the observation that "[t]here was some contemporaneous communication in which [the first appellant] said that she objected to being harassed" (FC [76]). The respondents are thus seeking to overleap the limits placed by the primary judge on the hearing of the stay applications in order to manufacture a distorted and untested account of the context in which the deeds were entered into, which account, in any event, sheds little light on the construction of the relevant arbitration clauses.

14. Finally, any hearing in the Federal Court of the "validity claims" is likely to be protracted and complex, particularly because, as has been acknowledged above, various allegations advanced in pleading those claims overlap with the allegations made in the "substantive claims". The consequence is that any such litigation will require rigorous case management. Matters of case management are thus likely to bear upon, and be intertwined with, the question whether the Court should also hear the appellants' challenge to the validity of the relevant arbitration clauses. Given that there is no basis for unduly interfering with the primary judge's scope of action in ensuring that the matter is properly and expeditiously prepared for hearing, this Court should simply remit that question to her Honour.

15. The respondents' submissions thus afford no basis for refusing the orders sought at AS [51].

Date: 24 August 2018

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SCHEDULE

150 INVESTMENTS PTY LTD (ACN 070 550 159)
Second Respondent

HANCOCK PROSPECTING PTY LTD (ACN 008 676 417)
Third Respondent

HANCOCK MINERALS PTY LTD (ACN 057 326 824)
Fourth Respondent

TADEUSZ JOSEF WATROBA
Fifth Respondent

WESTRAINT RESOURCES PTY LTD (ACN 009 083 783)
Sixth Respondent

HMHT INVESTMENTS PTY LTD (ACN 070 550 159)
Seventh Respondent

ROY HILL IRON ORE PTY LTD (ACN 123 722 038)
Eighth Respondent

HOPE DOWNS IRON ORE PTY LTD (ACN 071 514 308)
Ninth Respondent

MULGA DOWNS IRON ORE PTY LTD (ACN 080 659 150)
Tenth Respondent

HANCOCK FAMILY MEMORIAL FOUNDATION LTD (ACN 008 449 312)
Eleventh Respondent

HOPE RINEHART WELKER
Twelfth Respondent

GINIA HOPE FRANCES RINEHART
Thirteenth Respondent

MAX CHRISTOPHER DONNELLY (IN HIS CAPACITY AS TRUSTEE OF THE BANKRUPT ESTATE OF THE LATE LANGLEY GEORGE HANCOCK)
Fourteenth Respondent

MULGA DOWNS INVESTMENT PTY LTD (CAN 132 484 050)
Fifteenth Respondent