IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S143 of 2018

BETWEEN:

BIANCA HOPE RINEHART
First Appellant

JOHN LANGLEY HANCOCK
Second Appellant

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and

HANCOCK PROSPECTING PTY LTD ACN 008 676 417 AND OTHERS
Respondents

APPELLANTS' OUTLINE OF ORAL ARGUMENT

Part I:

1. This outline of oral argument is in a form suitable for publication on the Internet.

20 **Part II:**

2. The Full Court held that in ordering a trial as to the application of the "proviso" to s 8(1) of the *Commercial Arbitration Act 2010* (NSW) ("**the CA Act**"), the primary judge proceeded upon an erroneous understanding of which issues in the proceeding fell within and which fell outside the relevant arbitration clauses, most prominently cl 20 of the Hope Downs Deed. Their Honours' construction of the phrase "any dispute under this deed" in that provision was premised upon:

   (a) characterising the entirety of the proceeding before the primary judge as involving the one "dispute" (FC [201]); and

   (b) the adoption of what was said to be a liberal approach that assigned significance
30 to an assumption that rational commercial parties are unlikely to have intended that different disputes between them should be resolved before different tribunals.

3. Both aspects of their Honours' reasoning were attended by error.

"Dispute" (Appellants' submissions ("AS") at [44]; Appellants' submissions in reply ("ASR") at [3]-[5])

4. Clause 20 of the Hope Downs Deed, like cl 9 of the 2007 HD Deed, is concerned, not merely with the mediation and arbitration, but also the notification, of "any dispute under this deed". The term "dispute" thus denotes a controversy, the contours of which, when it was first required to be notified, had not been shaped by the processes of
40 refinement and consolidation involved in the preparation of pleadings. That being so, the Full Court erred in giving content to the phrase "any dispute under this deed" by

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reference to the manner in which issue is eventually joined in a "substantive defence" and a "substantive reply" (FC [201] and [204]).

5. Moreover, cl 20 treats the words "dispute" and "difference" as synonyms. The latter term is inapt to describe a proceeding comprising several distinct claims, each involving a multitude of issues. It would be an error, then, to say that because part of the proceeding before the primary judge concerned the operation of the releases given in the Hope Downs Deed, the entire proceeding is a "dispute under this deed".

6. The term "dispute" should, in the present context, be taken to refer to any defended claim or set of claims capable of being resolved or determined independently of any other claim. The appellants could have brought proceedings seeking no more than to challenge the validity of the impugned deeds. It follows then that the "validity claims" constitute a dispute or set of disputes separate from the "substantive claims".

Anomalies in the Full Court's construction (AS [38]-[43]; ASR [5]-[6] and [8])

7. It is unclear whether, on the Full Court's construction, a dispute about the existence of a deed is a dispute "under" that deed. On the one hand, that question was answered in the affirmative at FC [193], but on the other, their Honours were careful not to include within the scope of the phrase "any dispute under this deed" "a plea that the deed never existed whether by a plea of *non est factum*, or some other circumstance" (FC [204]).

8. If a dispute about the existence of a deed is a dispute "under" that deed, then it is difficult to see how the distinction, recognised by the Full Court (FC [202]), between "any dispute under this deed" and "a dispute in connection with this deed" can be maintained. This serves to highlight their Honour's failure, despite remarking upon the "varied relational reach" of the word "under" (FC 200]), to identify that meaning of "under" which supports construing the phrase "any dispute under this deed" as encompassing a dispute concerning the validity of the relevant deed.

9. If, however, a plea of *non est factum* does not give rise to a dispute "under" that deed, then one must ask why a such plea and an allegation that a deed should be set aside for, say, duress or unconscionable conduct should produce different consequences, in so far as an arbitration clause is concerned. After all, both pleas are directed to whether, in the eyes of the law, there is an agreement at all, and to distinguish between them is to insist upon upon "fine shades of difference in the legal character of issues" of the sort that the Full Court sought to avoid (FC [167]).

10. This is sufficient to dispel the suggestion that their Honours' approach was marked by a greater degree of liberality than that of Bathurst CJ in *Rinehart v Welker* [2012] NSWCA 95. Thus, the deficiencies in the Full Court's construction are readily apparent, even before one considers the inordinate weight given by their Honours to assumptions concerning the intentions of rational commercial parties,

Errors in the Full Court's "liberal" approach (AS [25]-[37]; ASR [7], [9]-[13])

11. Those assumptions are of no utility in this case. This is because:

    (a) the effect, and therefore the usual intended point, of an arbitration clause is to remove disputes covered by it from such tools of judicial efficiency as consolidation, joinder of parties, cross-claims and associated procedures. Arbitration is not inherently a comprehensive mode of dispute resolution;

    (b) the assumptions in question have no empirical support. In particular, it is difficult to see why it is more likely that commercial parties would wish all disputes concerning their contractual relations to be arbitrated before the one tribunal than that they would enter into contracts assuming such instruments to

be valid, such that, in the absence of clear language to the contrary, they may be taken as referring only disputes that assume such validity to arbitration;

(c) it is an issue in the litigation whether the impugned deeds were the product of arm's length commercial negotiations. If, as the Full Court held (FC [240]), it was premature for the primary judge to conclude that they were not (given the limited basis on which her Honour was to determine the matter (J [145])), then it was similarly premature, and inappropriate, for their Honours to construe the impugned deeds as if they were;

(d) the impugned deed were no mere commercial instruments; they were entered into by a mother and her children, in the context of a pre-existing trustee beneficiary relationship (FC [134]). The Court should be slow to adopt a construction of the relevant arbitration clauses that would allow the conduct of a trustee to avoid close public scrutiny, as would occur if *Rinehart v Welker* had incorrectly been decided; and

(e) at the time of execution of the Hope Downs Deed, the authorities in this country indicated, at the very least, the reasonable likelihood that the phrase "any dispute under this deed" might be construed to refer only to disputes arising *ex contractu*: *Paper Products Pty Ltd v Tomlinsons (Rochdale) Limited* (1993) 43 FCR 439 at 448; *ACD Tridon v Tridon Australia* [2002] NSWSC 896 at [155]. It is telling that even though the parties might be taken to have anticipated the possibility of challenges to the validity of the impugned deeds, not least because the second appellant had impugned instruments that he had previously signed, the parties chose to refer only disputes "under this deed" to arbitration. It would have required no great effort to substitute "any dispute in connection with this deed" for "any dispute under this deed".

12. It is no answer to this to say that the appellants' construction would produce the inconvenient result that some of their claims would be litigated in a court and others before an arbitral tribunal, in circumstances where both sets of claims may overlap. Given what is said in paragraph 10(a) and (e) above, the parties should be taken as having been content to assume the risk of such inconvenience.

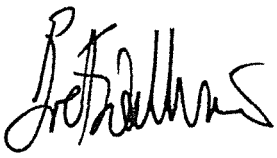
13. Nor did the Full Court avoid error by citing *Mackender v Feldia AG* [1976] 2 QB 590. What was said to be at issue in that case was whether an insurer's claim that it could treat an insurance policy as "at an end so far as concerns any future performance" (at 603) on the basis of the insured's non-disclosure was a dispute "arising under" that policy. What was said by Lord Denning MR and Diplock LJ cannot be taken as authority for some more general proposition that a dispute as to the validity of a contract is a dispute "under" that contract for the purposes of an arbitration clause.

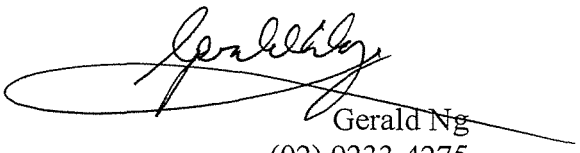
14. There is similarly no merit in the suggestion that because the bringing of the validity claims is arguably a breach of the impugned deeds, the validity claims involve a dispute under those deeds (FC [249]). Whether the impugned deeds are valid is a dispute anterior to, and separate from, whether those deeds have been breached.

Remitter (AS [47]-[48]; ASR [14])

15. It follows that the Full Court erred in allowing an appeal from the primary judge's order for a trial in respect of the "proviso" to s 8(1) of the CA Act. Having regard to the circumstance that the making of such an order is intimately related to questions of case management, including the making of confidentiality orders as foreshadowed by the primary judge at J [666(5)], the matter should be remitted to her Honour.

Date: 13 November 2018





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