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 AND OTHERS
Respondents

FIRST AND SECOND RESPONDENTS' SUBMISSIONS ON WPPL'S APPLICATION FOR LEAVE TO INTERVENE

Part I: Certification

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

Part II: Intervention

2. WPPL seeks leave to intervene in order to address two issues: first, the construction of clause 20 of the Hope Downs Deed; and, secondly, the "through or under" point sought to be raised by HPPL on its proposed cross-appeal.

3. The first and second respondents oppose the grant of leave. As regards leave to intervene on the second issue, the first and second respondents adopt the submissions of HPPL and do not wish to add to them. The first and second respondents oppose intervention on the first issue for the following reasons.

4. First, WPPL's legal interest in the WA Proceeding is not substantially affected by the construction of clause 20 of the Hope Downs Deed: *Roadshow Films Pty Ltd v iiNet Ltd*

Speed & Stracey Lawyers
Level 4, 131 Macquarie Street
SYDNEY NSW 2000

Telephone: (02) 9251 8000
Fax: (02) 9251 5788
Email: pspeed@sslaw.com.au
Ref: PSS 161-17

(2011) 248 CLR 37 at [2]. WPPL is not a party to the Deed and it is no longer contended in the WA Proceeding that WPPL falls within the extended definition of "party" in s. 2(1) of the *Commercial Arbitration Act* 2012 (WA): WS [6]. The legal rights that WPPL asserts in the WA Proceeding will not be affected by the construction given to clause 20. Rather, WPPL's asserted interest is to avoid delay in the determination of its claims in the WA Proceeding. For the reasons at [8] below, that interest would not be advanced by the proposed intervention. In any event, it is not an interest that would support intervention.

5. Secondly, the construction that WPPL seeks to advance was not advanced by any party at first instance, nor was it advanced by any party (including WPPL) in the Full Court. As a result, this Court does not have the benefit of either Court below having considered WPPL's construction. In the Full Court, WPPL was neutral on the construction of clause 20 of the Hope Downs Deed: affidavit of Peter Stuart Speed sworn 13 September 2018, [32]-[33].

6. Thirdly, the construction that WPPL seeks to advance in this Court was not advanced by WPPL in the WA Proceeding and, further, WPPL adopted the position in the WA Proceeding that it was neutral as to the outcome of HPPL's application to stay Mr Hancock's and Ms Rinehart's counterclaim in that proceeding: affidavit of Peter Stuart Speed sworn 13 September 2018, [49].

7. Fourthly, the proposed intervention is inconsistent with the formulation of the issues on appeal as they are set out in the Notice of Appeal (JCAB p.392). As is apparent from the sole ground of appeal, the appellants do not challenge the conclusion of the Full Court that the arbitration agreement in clause 20 of the Hope Downs Deed applies to the appellants' substantive claims against the parties to the Deed: FC [216]-[244] (JCAB p.297-304). Consequently, the matter that WPPL identifies as "the real issue in the appeal" (WS [22]) is not an issue in the appeal at all. In this Court, it is common ground between the appellants and the respondents that clause 20 *does* apply to those substantive claims; the issue between the parties is whether clause 20 also applies to the validity claims. WPPL, conversely, accepts that clause 20 may apply to the validity claims (WS [30]) but wishes to contend that clause 20 does not apply to the substantive claims: WS [3]. In that regard, WPPL's application is in substance an application for special leave to appeal, rather than an application to intervene. The submission that there is "no contradictor" to the proposition that the substantive claims ought be characterised as a

"dispute under the deed" (WS [12]) is not a reason to grant leave to intervene in a dispute that concerns private, not public, rights. The related submission (WS [12]) that the parties to this appeal appear to accept that "under" should be construed as "governed or controlled by" is obviously wrong: the respondents dispute that construction and defend the construction arrived at by the Full Court.

8. Fifthly, the argument in support of intervention at WS [9]-[12] overlooks several other findings made by the Full Court. The Full Court found that the substantive claims made by Mr John Hancock are arbitrable under clause 14 of the 2005 Deed of Obligation and Release: FC [208]-[215] (JCAB p.296-297). The Full Court also found that Mr Hancock's substantive claims are arbitrable under clause 16 of the 2009 Deed of Further Settlement (FC [261]) (JCAB p.307) as well as under clause 11(ii) of the 2010 Deed of Variation: FC [265] (JCAB p.308). None of those findings is challenged by the appellants (or WPPL). While the consequences at WS [9]-[12] are expressed as flowing from the arbitrability of the appellants' substantive claims, the same consequences flow from the arbitrability of Mr Hancock's substantive claims alone. To avoid those consequences, WPPL would need to reverse each of the findings at FC [215], [261] and [265] (JCAB pp. 297, 307 and 308), which it does not seek to do.

9. Sixthly, for the reasons addressed immediately below, the arguments in favour of WPPL's proposed construction of clause 20 are so weak that leave to intervene on that issue is not warranted.

Part III: Submissions

10. WPPL submits that, on the proper construction of the Hope Downs Deed, the phrase "any dispute under this deed" in clause 20 refers to a dispute as to the nature or extent of any rights and obligations created by the Deed: WS [3].

11. The matters that WPPL identifies at WS [16]-[20] tell against its proposed construction, not in favour of it. WPPL accepts that a purpose of the Hope Downs Deed was to settle claims, including claims that had previously been made in Mr Hancock's unsworn affidavit: WS [17]-[18]. It is curious, in that context, to seek to attribute to the parties a presumed intention concerning whether the claims they were settling would be agitated in court or before an arbitrator: their intention, one would presume, was that those claims would not be agitated at all, because they had been settled. No doubt, the parties may be taken to have contemplated that, if a claim were brought in breach of the Deed, then the

party sued would rely on the Deed as an answer to the claim and, further, that there may be a dispute as to whether the claim was, in fact, subject to the releases and covenants in clauses 4, 6 and 7 of the Deed. But such a dispute would necessarily be a dispute about the nature and extent of the rights and obligations created by the Deed.

12. In that regard, the dichotomy between future disputes and past disputes settled by the Deed (WS [20]) is a false one. An obvious species of future dispute is the re-agitation of a past dispute that had been settled by the Deed. As the Full Court observed (FC [82] (JCAB p.259), unchallenged), that was an important part of the context in which the Hope Downs Deed was made. Mr Hancock had reneged on the promises he had given in the 2005 Deed of Obligation and Release and was seeking to re-agitate the same claims he had released by that deed.

13. That context is important for a second reason. At least insofar as Mr Hancock's claims are concerned, WPPL does not challenge the conclusion of the Full Court that the arbitration agreement in clause 14 of the 2005 Deed of Obligation and Release required those claims to be arbitrated: FC [215] (JCAB p.297). The parties to the Hope Downs Deed may be taken to have known of the 2005 Deed of Obligation and Release, because it is expressly referred to in Recital D to the Hope Downs Deed. Thus, the claims that were the subject of the releases and covenants in the Hope Downs Deed included claims that were already the subject of an arbitration agreement. There is nothing in the Hope Downs Deed to suggest that claims by John and Bianca were to be treated differently for the purpose of clause 20, so that claims by John should go to arbitration while claims by Bianca should not.

14. As regards WS [21], the proposed qualification is untenable. The principles (concerning liberal construction of arbitration agreements) that WPPL purports to accept are principles that assist in determining the subject matter of the arbitration agreement – that is, its scope: *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways* (1996) 39 NSWLR 160 at 165-166; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [162]-[175]. As such, they cannot be applied "once the subject matter of the arbitration agreement is identified."

15. WPPL's proposed construction of clause 20 is unsupported by authority (none is cited) and is contrary not only to the authorities on which the respondents rely (cited in the previous paragraph and in the respondents' previous submissions) but is also contrary to the decision of the Court of Appeal in *Rinehart v Welker* [2012] NSWCA 95.

16. At WS [24]-[26], WPPL appears to advance an alternative construction – a dispute will be "under" the Deed if it has a "substantial connection" or "substantial and close proximity" to the Deed: see esp. WS [24], [28]. That alternative construction is inconsistent with the primary construction advanced at WS [3] ("only apt to cover a dispute as to the nature or extent of any rights or obligations created by the Deed"). Moreover, on the alternative construction, the substantive claims would clearly be claims that were subject to the arbitration agreement. The substantive claims were the claims that were the released by the Deed. They were its subject matter. As such, they have a substantial connection to the Hope Downs Deed and would be arbitrable under clause 20.

17. WPPL's submission at [28]–[29] to the effect that the validity claims may be arbitrable, notwithstanding that the substantive claims are not, fails to grapple with the extensive overlap and interconnection between the validity claims and the substantive claims. Many, if not most, of the validity claims are pleaded in such a way that their determination necessarily involves a determination of one or more substantive claims. Take, for instance, the appellants' claim that the Hope Downs Deed is void because the first respondent failed to disclose past wrongdoing before obtaining the releases contained in the Deed: see, eg, Statement of Claim, [322.1], picked up at [352.1] and then [357]-[358] (Respondents' Further Materials, pp72, 78-80). To establish that claim, the appellants first need to establish wrongdoing, ie, one or more of the substantive claims.

18. By failing to grapple with the overlap and interconnection between the validity claims and the substantive claims, WPPL's submissions make the error of treating the substantive claims and validity claims as distinct classes of disputes and fail to address the Full Court's conclusion at FC [157]-[159] (JCAB p.280-281) and [246]-[248] (JCAB p.305) that the validity claims are not separate disputes to the substantive claims for the purposes of clauses 20 but rather form part of the same overall dispute.

19. WS [30]-[31], in any event, do not take the matter any further. Those paragraphs simply seek to identify which matters would work to the greater convenience of WPPL (a non-party to the Deed) in the very specific circumstances that now exist in the Supreme Court of Western Australia and in the Federal Court, which are unlikely to have been predicted by any party. They are not an aide to construction.

20. As regards WS [33]-[34], no authority is cited in support of the submission that "If a party is not bound by the terms of an arbitration agreement, and is not a "party" in the extended sense of claiming through or under a party to the arbitration agreement, no aspect of the

controversy involving the non-party is a "matter" for the purposes of s. 8(1)." If, as appears to be the case, WPPL's submission is that claims between parties to an arbitration agreement, which would otherwise be arbitrable, cease to be arbitrable if a non-party becomes involved in, or is affected by, the dispute, then that submission is contrary to *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420 at [65]-[66], *Casaceli v Natuzzi S.p.A.* (2012) 292 ALR 143 at [48]-[49] and the other authorities cited by the Full Court at FC [332ff] (JCAB p.329ff). The Full Court described the principles identified in those authorities as "basal and correct." WPPL's submissions do not identify why that conclusion was wrong, nor do they address those authorities.

10

Dated: 4 October 2018

Peter Brereton
02 8239 0239
brereton@banco.net.au

Christian Bova
02 9238 0264
cbova@elevenwentworth.com

Stuart Lawrance
02 9232 4609
lawrance@tenthfloor.org

Counsel for the first and second respondents

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 070 550 104)
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 008 499 312)
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 INVESTMENTS PTY LTD (ACN 132 484 050)
Fifteenth Respondent