

BETWEEN:

**BIANCA HOPE RINEHART**  
First Appellant

**JOHN LANGLEY HANCOCK**  
Second Appellant

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and

**GEORGINA HOPE RINEHART AND  
OTHERS NAMED IN THE SCHEDULE**  
Respondents

FIRST AND SECOND RESPONDENTS' 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 reason the construction issue arises is because it was necessary for the primary judge to determine the extent to which there was before the Federal Court an action "in a matter which is the subject of an arbitration agreement": section 8(1) of the *Commercial Arbitration Act 2010* (NSW). That determination was to be answered by having regard to what was before the Federal Court and then addressing the question of whether there was a matter, or matters, that were the subject clause 14 of the Deed of Obligation and Release, clause 20.2 of the Hope Downs Deed or clause 9.2 of the 2007 HD Deed.
3. The constructional question that arises, placed in context, may be characterised as follows: is the dispute (or disputes) under the Hope Downs Deed confined to the so-called "substantive claims" or does it extend to both the substantive claims and the so-called "validity claims"?
4. The primary judge concluded that the validity claims should not be viewed as part of the dispute made up of the releases and bars because the Hope Downs Deed cannot govern or control the outcome of a dispute about its validity: J [645]. The Full Court disagreed for three reasons. The Full Court disagreed with the primary judge about the proper construction of "under this deed": FC [247]. It disagreed with the primary judge about the identification of the relevant "dispute": FC [248]. It also concluded that there was a sustainable argument that the

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claims to set aside the deeds are themselves in breach of and controlled by the Hope Downs Deed: FC [249].

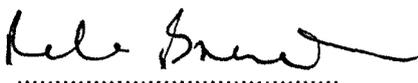
5. The use of “presumptions” and “assumptions” as aids to contract construction is commonplace and orthodox, and is consistent with the proper approach to the construction and interpretation of contracts in this country: see, for example, *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; 251 CLR 640 at [35]; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; 149 CLR 337 at 352 and *Darlington Futures Limited v Delco Australia Pty Ltd* [1986] HCA 82; 161 CLR 500 at 510.
6. It is not the norm for rules of construction to be applied “irrespective of the plain meaning of the words [of a contract]”: cf *Rinehart v Welker* [2012] NSWCA 95; 95 NSWLR 221 at [122]. The decision in *Fiona Trust* does not elevate presumption over the plain meaning of the words of a contract.
7. The parties to the Hope Downs Deed and to the 2007 HD Deed included an arbitration clause in those deeds. Thus it is certain that the parties’ presumed intention was that at least some disputes between them, if any arose, would be determined by arbitration. It can be presumed that the parties intended that the arbitration clause would work sensibly, that is to say it would work reasonably and effectively, and that all aspects of the defined relevant relationship would be determined by the same tribunal: *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; 251 CLR 533 at [16].
8. There are two or more possible meanings that can be given to the the relevant provisions in the Hope Downs Deed. The words “any dispute under this deed” could mean various things, and (at least) could extend:
  - (a) only to contests in relation to claims which are (or may be) governed or controlled by the terms of the deed and on the basis that the deed is valid, enforceable and not subject to any other legal impediment; or
  - (b) to capture those disputes about how and what and whether something is covered by the deed.Under (b), a dispute about whether a release in a deed is inefficacious because the deed is unenforceable or invalid is a dispute under the deed because it is a dispute about what is covered by the deed.
9. The presumption is especially strong where the matters giving rise to controversy are overlapping and intertwined. The bifurcation of overlapping matters between an arbitrator and a Court is unlikely to have been intended. This indicates that the word “dispute” in the Hope Downs Deed should not be construed narrowly. The Full Court was correct to conclude that the validity claims do not amount to separate “disputes” but are part of the one dispute or

controversy: FC [248]. The meaning given to “dispute” by the Full Court does not break down “under the weight of its own expansiveness”: cf ASR [4].

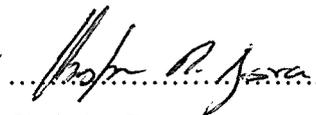
10. The language of the Hope Downs Deed lends further support. It is to be recalled that the obligation under clause 20 imposes an obligation on a party who “has a dispute” to “forthwith notify” the other party or parties with whom there is “the dispute”. Resolution of the substantive claims could not be achieved, by mediation or arbitration, unless the mediator and arbitrator were seized of all of the defences to the substantive claims, including whether any releases and bars conferred by the deeds were ineffective or otherwise invalid.
11. The substantive claims and the validity claims overlap. That is because the basis of some of the validity claims are based on the facts underlying the substantive claims. There is also overlap because of the sustainable argument that the claims to set aside the deeds are themselves in breach of and controlled by the Hope Downs Deed: FC [249]. The Appellants submit that the Full Court conflates the content of the validity claims with the Appellants’ conduct in advancing those claims, submitting that the former is separate from and anterior to the latter: ASR [7]. That submission overlooks the fact that the “validity claims” do not merely seek declarations that deeds are void *ab initio*: Originating Application [36], [37]. The Appellants also, for example, seek injunctions to restrain Mrs Rinehart and HPPL from enforcing terms of the deeds: Originating Application [42].
12. A further overlap is demonstrated by the Full Court’s finding that there was a sustainable argument that the Hope Downs Deed released the validity claims in relation to the 2005 Deed of Obligation and Release: FC [215]. Here plainly the validity claim is governed or controlled by the terms of the Hope Downs Deed.
13. The Appellants submit that at the time of entry into the Hope Downs Deed, “any competent legal practitioner in Australia” would have been conscious that the decisions in *ACD Tridon* and *Paper Products* meant that there was a reasonable likelihood that the phrase “any dispute under this deed” might be construed as referring to matters arising *ex contractu*: ASR [9]. This is a dangerous and unsafe basis on which to approach the question of construction.

Dated: 13 November 2018

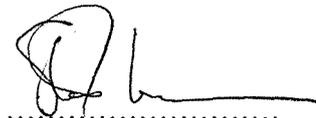
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Peter Brereton SC



Christian Bova



Stuart Lawrance

**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**

10 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)**

20 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

30 **MULGA DOWNS INVESTMENTS PTY LTD (ACN 132 484 050)**

Fifteenth Respondent