**IN THE HIGH COURT OF AUSTRALIA**

**SYDNEY REGISTRY** **No. S143 of 2018**

**BETWEEN:** **BIANCA HOPE RINEHART**

First Applicant

**JOHN LANGLEY HANCOCK**

Second Applicant

and

**HANCOCK PROSPECTING PTY LTD ACN 008 676 417**

**AND OTHERS NAMED IN THE SCHEDULE**

Respondents



# PROPOSED CROSS APPELLANTS' SUBMISSIONS IN REPLY

3453-7602-4331v1
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## Part I: Certification

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

## Part II: Preliminary matters

2. HDIO, RHIO and MDIO have accepted that they need to obtain an extension of time to file the notice of cross-appeal, and a grant of special leave to cross-appeal.[2]

3. As to the first matter, HDIO, RHIO and MDIO attempted to file the notice of cross-appeal on 14 June 2018, two business days after the expiry of the seven day period in which it was to be filed.[3] While the delay was unfortunate, no prejudice was caused to the appellants, and it has not affected the preparation of the appeal. The summons seeking leave to file a notice of cross-appeal should be granted.[4]

4. As to the second matter, a grant of special leave is justified on the basis that, as noted at XAS [4], the Full Court at FC [319] declined to follow the decision of the Victorian Court of Appeal in *Flint Ink*, and therefore the High Court is required to resolve differences of opinion between different courts as to the state of the law[5], in much the same way as the appellants sought and obtained special leave to appeal on the basis of the difference between the decisions of the Full Court and that of the NSW Court of Appeal in *Rinehart v Welker* [2012] NSWCA 95. It is also in the interests of the administration of justice[6] for the cross-appeal to be determined at the same time as the appeal, so the parties' positions in respect of any future arbitral proceedings are finally resolved.

5. The appellants' submissions (**XRS**) at [5]-[6] in respect of these preliminary matters should not be accepted.

## Part III: Argument

6. It is first necessary to deal with the appellants' arguments in opposition to the contention that HDIO, RHIO and MDIO are claiming through or under HPPL and HRL as parties to the arbitration agreements, and therefore fall within the extended definition of "party" under s 2(1) of the CA Act.

7. *First*, they argue that Brennan and Dawson JJ's test in *Tanning* requires a non-party to an arbitration agreement to establish a matter of fact or law which is "necessary" for that non-party to succeed on its case, where that matter of fact or law is derived from the party to the arbitration agreement: XRS [7]-[8]. "Necessary" in this context is said to be a point that the non-party "has no choice but to take, given that its case would otherwise be doomed to fail": XRS [8]. The defences of HDIO, RHIO and MDIO based on the acknowledgements, releases and covenants not to sue in the Hope Downs Deed are said to

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[1] These submissions are made by the sixth to eight respondents to the appeal as the proposed cross-appellants on the cross-appeal. For the purposes of these submissions, they adopt the terms defined in the HPPL Respondents' submissions dated 3 August 2018 and their submissions dated 14 September 2018 (**XAS**).
[2] HPPL Respondents' submissions dated 3 August 2018 at [87].
[3] Rule 42.08.1 of the *High Court Rules 2004* (Cth); see affidavit of Mark Wilks dated 15 June 2018 at [9]: joint core appeal book (**JCAB**) at 401.
[4] Summons dated 14 June 2018: JCAB at 398; see rule 4.02 of the *High Court Rules 2004* (Cth).
[5] Section 35A(a)(ii) of the *Judiciary Act 1903* (Cth).
[6] Section 35A(b) of the *Judiciary Act 1903* (Cth).

lack this quality.

8. Brennan and Dawson JJ's test in *Tanning* does not require a Court to determine whether a claim or defence is a "necessary" one, or to use the language of the Full Court at FC [317], whether the non-party is "bound" to raise it. The Court's task is to look at the putative claim or defence and ascertain whether an "essential element" of it (rather than the causes of action or defence as a whole[7]) is derived from a party to the arbitration agreement. This characterisation process was also emphasised by Deane and Gaudron JJ, who said at 353 that the Court must look at the "subject matter in controversy", rather than the formal nature of the proceedings or the precise legal character of the person initiating or defending the proceedings.

9. The suggestion at XRS [8] that HDIO, RHIO and MDIO could succeed by simply establishing that Mrs Rinehart did not breach her duties, or that any breach was not part of a dishonest and fraudulent design, such that "the terms of the deeds would not feature in any such case", ignores the practical reality that the acknowledgments, releases and covenants in the Hope Downs Deed offer a complete answer to the appellants' attempt to impugn the title of HDIO, RHIO and MDIO to the mining tenements now held by them. It is not just "highly likely" that defences based on the Hope Downs Deed will be raised (FC [317]); it is inevitable.

10. *Secondly*, as to XRS [9]-[10], HDIO, RHIO and MDIO do not suggest that the mere fact of a close corporate relationship between them and HPPL and HRL is sufficient to establish that they are claiming "through or under" HPPL and HRL for the purposes of the definition of "party" in s 2(1). Rather, the close corporate relationship is relied upon to establish the derivative nature of the defences, in that the acknowledgments, releases and covenants not to sue relied upon were procured by HPPL and HRL for the benefit of the Hancock Group as a whole, including other companies in the Group that already held, or would come to hold, valuable mining tenements.

11. The contention at XRS [10] that the fact that HDIO, RHIO and MDIO are subsidiaries of parties to the deeds is "wholly fortuitous" to the knowing receipt claim, and that even if they were not related to HPPL the claim against them would be unchanged, ignores the manner in which the appellants put that case. As can be seen from the extract from the statement of claim at XAS [8], the case against HDIO is wholly reliant upon the allegation that Mrs Rinehart was the "director and controlling mind" of HDIO as well as HPPL, such that HDIO received legal title to the Hope Downs tenements from HPPL knowing of the alleged breaches of fiduciary duty by Mrs Rinehart.

12. *Thirdly*, contrary to XRS [11], HDIO, RHIO and MDIO do *not* contend in this Court that they are entitled, pursuant to s 11(2) of the *Property Law Act 1969* (WA), to enforce the relevant deeds in their own names.

13. *Fourthly*, in relation to XRS [12]-[14], the Full Court's acceptance that HPPL and HRL

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[7] *Flint Ink* at [20] per Warren CJ, at [71] per Nettle JA.

could themselves defend the derivative claims against HDIO, RHIO and MDIO on the basis of the same acknowledgements, releases and covenants not to sue that HDIO, RHIO and MDIO intend to raise only serves to emphasise the close proximity between those parties and their defences.

14. As has been seen, none of the arguments deployed by the appellants (or the Full Court's judgment) seek to grapple with a fundamental proposition: if a claim against title to property is released by a settlement agreement, then that claim is extinguished, and cannot be enlivened against a third party which acquires title to the property.[8] That may be seen to be consistent with and analogous to the rule that a release given to one of a number of parties jointly or jointly and severally liable, contractually discharges the others.[9]

15. The Full Court's (at FC [316]) and the appellants' (at XRS [8]) reliance on *Michael Wilson & Partners v Nicholls* (2011) 244 CLR 427 at [106] is therefore misplaced. That decision dealt with the question of whether the institution and prosecution of proceedings against former employees of the plaintiff in the Supreme Court of NSW was an abuse of process, in circumstances where a former shareholder and director of the plaintiff were the subject of arbitral proceedings in London. It did not concern the question of whether the release of a claim against a fiduciary could be relied upon by the persons said to have knowingly assisted the fiduciary's breach of duty. Nor did it concern the question of whether such persons would be claiming through or under the fiduciary for the purposes of s 2(1) of the CA Act.

16. If this fundamental proposition is accepted, it is impossible to see how the defences sought to be raised by HDIO, RHIO and MDIO on the basis of the releases given to HPPL and HRL under the Hope Downs Deed could be anything other than derivative defences which satisfy the test of Brennan and Dawson JJ in *Tanning*. An essential element of those defences - namely, the release itself - is vested in and exercisable by HPPL and HRL. Whilst it is true that the HDIO stands in a slightly different position to RHIO and MDIO, in that it acquired the Hope Downs tenements *before* the entry into of the Hope Downs Deed, this does not affect this analysis. Further, HDIO could still seek to invoke the appellants' covenant not to make a claim against the Hope Downs tenements in cl 7(b) of the Hope Downs Deed.[10]

Dated 12 October 2018


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| ..... | ..... | ..... |
| NC Hutley | C Colquhoun | JJ Hutton |
| T 02 8257 2599 | T 02 8915 2319 | T 02 8001 0225 |
| F 02 9221 8389 | F 02 9221 3724 | F 02 9232 7626 |
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[8] *Caraher v Lloyd* (1905) 2 CLR 480 at 501-503 per Griffith CJ.
[9] *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 608 per Gummow J.
[10] *Airberg Pty Ltd v Cut Price Deli Pty Ltd* (unreported, Lindgren J, 3 August 1998).

## SCHEDULE

**HANCOCK MINERALS PTY LTD (ACN 057 326 824)**

Second Respondent

**TADEUSZ JOSEF WATROBA**

Third Respondent

**WESTRAINT RESOURCES PTY LTD (ACN 009 083 783)**

Fourth Respondent

**HMHT INVESTMENTS PTY LTD (ACN 070 550 104)**

Fifth Respondent

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

Sixth Respondent

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

Seventh Respondent

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

Eighth Respondent

**GEORGINA HOPE RINEHART (IN HER PERSON CAPACITY AND AS TRUSTEE OF THE HOPE MARGARET HANCOCK TRUST AND AS TRUSTEE OF THE HFMF TRUST**

Ninth Respondent

**HANCOCK FAMILY MEMORIAL FOUNDATION LTD (ACN 008 499 312)**

Tenth Respondent

**150 INVESTMENTS PTY LTD (ACN 070 550 159)**

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