IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S143 of 2018

BETWEEN:

BIANCA HOPE RINEHART
First Appellant

JOHN LANGLEY HANCOCK
Second Appellant

and

HANCOCK PROSPECTING PTY LTD (ACN 008 676 417)
AND OTHERS NAMED IN THE SCHEDULE TO THE NOTICE OF APPEAL
Respondents

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 TO THE NOTICE OF APPEAL
Respondents

HPPL RESPONDENTS' OUTLINE OF ORAL ARGUMENT

Corrs Chambers Westgarth
Level 17, 8 Chifley
8-12 Chifley Square
Sydney NSW 2000

Telephone: (02) 9210 6159
Fax: (02) 9210 6611
Email: mark.wilks@corrs.com.au
Ref: 9133319

Part I:

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

Part II:

Appeal

1 The ultimate issue for determination is whether there is a sustainable argument that the difference between the parties as to whether the Hope Downs Deed and April 2007 Deed (**Deeds**) should not be enforced or be declared void *ab initio* is a "dispute", or part of a "dispute", "under" the Hope Downs Deed or April 2007 Deed properly construed.

[HPPL Respondents' Written Submissions (**WS**) at [5] (general issue), [6]-[7] and footnote 5 (sustainable argument); see also prayers 35-41 of Originating Application (Joint Core Appeal Book (**JCAB**) at pp 5-6); Full Court Reasons (**FC**) at [141]-[152] (JCAB 272-277); *Alati v Kruger* (1955) 94 CLR 216 at 224.]

2 The Deeds are to be construed by reference to what a reasonable person with an understanding of the objective surrounding circumstances and purposes of the Deeds would understand them to mean.

[WS at [35]; FC at [163]-[165] (JCAB at pp 282-283).]

3 In construing the arbitration agreements in the Deeds, a common-sense contextual assumption can be made that, if there is a range of available meanings which affect the scope of disputes to be referred to arbitration, the parties are objectively likely to have intended a broader meaning rather than a narrower one.

[WS at [36]-[38]; FC at [166]-[186] (JCAB at pp 283-290).]

4 Because the dispute resolution mechanism chosen by the parties to the Deeds was arbitration, an objective characteristic of which was the ability of the arbitrator to determine disputes as to the validity of the Deeds, the parties are objectively likely to have intended to have authorised the arbitrator to determine such disputes.

[FC at [341]-[360] (JCAB at pp 331-337).]

5 The objective purpose or object of the Deeds was to quell disputes about the ownership of valuable mining tenements and, to the extent that those disputes were not quelled, have them decided by confidential arbitration rather than in open Court.

[WS at [17]-[28] and [49]-[50]; FC at [203] (JCAB at p 295); see also the relevant deeds in Appellants' Further Materials at pp 74, 76, 99ff, 126, 129-130 and 133.]

6 The objective surrounding circumstances included anticipation of the possibility of disputes about the continued legal effect of the Deeds, which would raise the same commercially sensitive considerations as were going to be raised in any disputes as to ownership of the mining tenements.

[Relevant objective circumstances: WS at [21]-[22], [24(f)], [25], [50]; FC at [73] (JCAB at p 249); Appellants' Reply Submissions at [9].]

[Allegations that deeds ineffective incorporate allegations concerning ownership of mining assets: WS at [15]-[16]; see also Statement of Claim at paragraphs 288.2, 288.3, 288.4, 288.5, 289.4, 289.7, 289.8, 292, 294, 295, 298,

307, 309, 315, 316, 322.1, 329.10, 339, 340, 342, 345, 350.4 and 352 (Respondents' Further Materials at pp 8ff).]

7 In the circumstances, a reasonable person in the position of the parties would be expected to intend to include within the matters agreed to be subject to arbitration disputes about the continued legal effect of the Deeds.

8 The authorities, particularly those predating the acceptance of the separability principle in Anglo-Australian law in the 1990s, are of little assistance in determining whether a reasonable person in the position of the parties to the Deeds would have understood the words "any dispute under this deed" to comprehend a dispute about their continued legal effect. If they assist at all the statements of principle in them favour the respondents.

[WS at [65]-[71], [78] and [80]; see also, on "arising under" vs "arising out of", *The Union of India v EB Aaby's Rederi A/S* [1974] 2 All ER (HPPL's Additional Authorities at pp 46-60); and on whether *Mackender v Feldia AG* can be distinguished, *Halsbury's Laws of England* (Butterworth & Co, 2nd ed, 1935) pp 407-414 and 450-452 and Ivamy Hardy, *General Principles of Insurance Law* (Butterworths, 5th ed, 1986) pp 122-125, 155-157 and 194-201 (HPPL's Additional Authorities at pp 61-89).]

9 The word "under" is an ordinary English word with a range of meanings, mostly metaphorical, and the particular meaning it assumes will be affected by context; the correct frame of reference is to ask whether, as a matter of ordinary English, a posited dispute is properly described as "under" the relevant deed; attempts to paraphrase or encapsulate the precise meaning of "under" by a substitute expression do not assist.

[WS at [40]-[42], [48], [72]-[73], [51]-[52]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [96] (HPPL's Additional Authorities at p 37); FC at [193], [196], [204] (JCAB at pp 292, 293 and 295); dictionary definitions (HPPL's Additional Authorities at pp 5-12).]

10 Even assuming, in the appellants' favour, that the relevant "dispute" is only as to the continued legal effect of the Deeds, that dispute is properly to be regarded as "under" the Deeds.

[WS at [40], [48]-[50], [54]-[55], [72]-[80].]

11 Further or in the alternative, the "dispute" is properly to be regarded as "under" the Deeds because the issue concerning the continued legal effect of the Deeds is an inseparable part of a wider controversy which the appellants accept involves the assertion of rights and obligations created by the Deeds.

[WS at [51]-[52], [81]-[85].]

12 The "governed or controlled by" test should be rejected because it results in absurdities and in all but name it makes arbitration optional. It is not compelled by the language chosen by the parties and contrary to authority.

[WS at [43]-[46], [80].]

13 Further or in the alternative, and even if the governed or controlled test applies, the dispute as to the continued legal effect of the Deeds is governed or controlled

by the terms of those deeds, particularly clauses 7(b) and 12 of the Hope Downs Deed.

[WS at [59]-[60]; see also FC [233] (JCAB at p 302).]

Application for special leave to cross-appeal ("through or under")

14 The Full Court erred in determining that three companies within the Hancock Group (HDIO, RHIO and MDIO) were not "claiming through or under" two related companies in the same group (HPPL and HRL) for the purposes of the extended definition of "party" under s 2(1) of the *Commercial Arbitration Act 2010* (NSW) (**CA Act**).

[Cross-appellants' submissions (**XAS**) at [11], [16]-[17]; cross-appellants' reply submissions (**XARS**) at [7]-[13]; FC [317]-[318] (JCAB at pp 324-325).]

15 The Full Court ought to have adopted the approach taken by the Victorian Court of Appeal in *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* (2014) 44 VR 64, which was referred to with approval by this Court in *Mount Bruce Mining Pty Ltd* v *Wright Prospecting Pty Ltd* (2015) 256 CLR 104 and is consistent with the paramount object of the CA Act set out in s 1C of the CA Act.

[XAS at [12]-[15]; *Flint Ink* at [58]-[75] per Nettle JA (HPPL's Additional Authorities at p 144ff); *Mount Bruce Mining* at [76] per French CJ, Nettle and Gordon JJ and [96] per Kiefel and Keane JJ (Bell and Gageler JJ agreeing) (HPPL's Additional Authorities at pp 31, 37); cf. FC [319].]

16 If the approach in *Flint Ink* had been followed, HDIO, RHIO and MDIO would have been found to be "claiming through or under" HPPL and HDIO for two reasons. First, since the claims against HDIO, RHIO and MDIO are substantially identical to and closely interdependent with the claims against HPPL and HRL, HDIO, RHIO and MDIO will advance the same defences as HPPL and HRL. Secondly, HDIO, RHIO and MDIO will advance defences based on the acknowledgements, releases and covenants not to sue in the Hope Downs Deed that were procured by HPPL and HRL for the benefit of the Hancock Group as a whole.

[XAS at [18]-[20], XARS at [14]-[16]; *Caraher v Lloyd* (1905) 2 CLR 480 at 501-503 per Griffith CJ; *Airberg Pty Ltd v Cut Price Deli Pty Ltd* (unreported, Lindgren J, 3 August 1998).]

Dated: 13 November 2018

NC Hutley
T 02 8257 2599
F 02 9221 8389
nhutley@stjames.net.au

C Colquhoun
T 02 8915 2319
F 02 9221 3724
colquhoun@tenthfloor.org

JJ Hutton
T 02 8001 0225
F 02 9232 7626
hutton@elevenwentworth.com