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 (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
Respondents

AND BETWEEN:

WRIGHT PROSPECTING PTY LTD
ACN 008 677 021
Intervener

INTERVENER'S SUMISSIONS

Part I: Certification

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

Part II: Basis of Intervention

2. The Intervener (**WPPL**) seeks leave to intervene as a non-party whose legal rights in pending litigation before the Supreme Court of Western Australia (the **WA Proceedings**) are likely to be affected by the outcome of this appeal.[1] The basis for this is explained more fully in Part III. WPPL was granted leave to intervene in the Court below on a limited basis.[2] WPPL similarly seeks to intervene in this appeal, on a limited basis, for

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1 *Roadshow Films v iiNet Ltd* (2011) 248 CLR 37 at [6].

2 Reasons of the Full Court at [23] and [281] to [288].

THE SOLICITOR FOR THE INTERVENER IS: Date: 20 August 2018
GARETH JENKINS of Clayton Utz

Level 28, Riparian Plaza
71 Eagle Street
Brisbane QLD 4000

Tel: (07) 3292 7000
Fax: (07) 3221 9669
Contact: Gareth Jenkins
Ref: 12279/21099/80198863

two reasons, the second of which is the same issue upon which it was granted leave to intervene below.

3. *First,* WPPL contends for a construction of cl 20 of the Hope Downs Deed[3] that is different to the contentions advanced by both the appellants and the respondents. WPPL's contention is that cl 20 does not cover the appellants' "substantive claims" (summarised at AS[6]-[9]). Hence these claims are not arbitrable. WPPL contends the phrase "*any dispute under this deed*" is only apt to cover a dispute as to the nature or extent of any rights and obligations created by the Deed. If cl 20 is construed at the extremity of liberality, the "validity issues" may be arbitrable – but subject to the exercise of the primary judge's discretion to determine those issues under the "proviso" to s 8(1) of the CA Act. If the primary judge were to refer the "validity issues" to arbitration, any consequent stay of the "substantive claims" pending the arbitral reference would be based on discretionary case management principles.

4. Thus, WPPL does not seek to support either the appellants' or respondents' submissions on the appeal, but does support the appellants' claim for remittal of the matter to the primary judge to reconsider the appropriate relief in accordance with law. As is explained in Part III, if the construction of cl 20 for which WPPL contends is accepted, much of the basis of the respondents' application to stay WPPL's (and the Rhodes parties') claims in the WA Proceedings will fall away.[4]

5. *Second,* WPPL understands that the respondents have served but not filed a proposed Notice of Cross-Appeal in relation to which it will seek special leave (RS [87]). The proposed Notice is attached to an affidavit filed in the appeal to which WPPL has not been permitted access.[5] WPPL understands that the respondents wish to contend that certain of the HPPL respondents are within the scope of the extended definition of "*party*" in s 2(1) of the CA Act on the basis they are claiming "*through or under*" a party to the Deed. This was one of the issues on which the Full Court granted WPPL leave to intervene and found

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3 These submissions will adopt the terminology used in the Appellants' and Respondents' submissions.

4 That application was heard on 30 and 31 May 2018 by Le Miere J and the judgment has been reserved.

5 WPPL applied to the Registrar by email on 14 August 2018 to which the Registrar responded on the same day "*Rule 4.07.4(a) of the High Court Rules 2004 prevents the giving of the access sought.*" The respondents have denied access to the material to WPPL.

its submissions of assistance (FC [286]).

6. The "*through or under*" issue also is likely to affect WPPL's legal rights in the pending WA Proceedings. The respondents originally applied for a mandatory stay of WPPL's claim in the WA Proceedings under s 8(1) on the basis that WPPL fell within the scope of s 2(1) (but that part of the application was withdrawn some months after the Full Court hearing). WPPL is concerned that the respondents will seek to renew the s 8 application in the WA Court if this Court were to grant special leave and find in the respondents' favour on the "*through or under*" issue. Without having had access, despite requesting it from the respondents, to the proposed Notice of Cross-Appeal or any supporting material, all WPPL can presently do is set out in outline form in Part IV why the Full Court's determination on this point is correct.

Part III: Why Leave to Intervene Should be Granted

7. The broad outline of the WA Proceedings and how they overlap with these proceedings was explained by the Full Court at FC [285]. In essence, in the WA Proceedings WPPL claims that certain of the Hope Downs Tenements (known as the East Angelas Tenements) acquired in 1989 on behalf of the partnership between HPPL and WPPL (Hanwright) that has existed since the 1950's and are accordingly partnership property in which it has always had a 50% beneficial interest. Inconsistently with this claim, in these proceedings, the appellants claim the East Angelas Tenements form part of the HFMF Trust of which they (and their siblings) are beneficiaries.

8. WPPL recognised that, because of the competing claims to beneficial interests in the tenements, the appellants (and their siblings) were necessary parties to the WA Proceedings (per *John Alexander's Clubs v White City Tennis Club*[6]). They were joined to those proceedings in September 2016.[7] In November 2016, the respondents applied to stay the WA Proceedings and that application was adjourned pending the determination of the Full Court in the proceedings below.[8] The stay application was re-listed for hearing following delivery of the Full Court judgment and heard by Le Miere J on 30 and 31 May

6 [2010] HCA 19; (2010) 241 CLR 1 at [136]-[138].

7 See *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd (No. 7)* [2016] WASC 305.

8 See *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd (No. 7)* [2016] WASC 361.

2018. Judgment is reserved. At the hearing of the stay application before the WA court, the respondents indicated they may apply for special leave on the "*through or under*" point and put a formal submission to preserve their position in the WA Proceedings.[9]

9. The construction issue before this Court affects WPPL's legal interests in the WA Proceedings because of the way in which the respondents sought to deploy the s 8 stay ordered by the Full Court in support of the application for a stay against WPPL (and the Rhodes parties). This was only fully revealed in oral submissions in the WA court in which the respondents submitted that the WA court effectively had no choice but to stay the claims by WPPL and the Rhodes parties. This of course would have deleterious consequences to WPPL in delaying its ability to litigate its claims in court. In submissions in chief, counsel for the respondents put the contention in the following terms:

> Ultimately, the real question for determination on the stay applications is this: what should the court do with the rump of non-arbitral claims in circumstances where the legislature has mandated that the parties must be referred to arbitration in respect of the arbitral claims, but the arbitral and non-arbitral claims concern the same property. And the arbitral claims, as will become apparent when we go through the pleadings, contradict the essence of the claims made by the Rhodes parties and the WPPL parties. They are flatly contradictory.
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> Now, we – our ultimate submission is that the court would stay the proceedings pending that – the outcome of the arbitration. Whilst that might be perceived by some to be an unfortunate delay in the determination of WPPLs and Rhode parties' claims, that is the consequence of the legislature mandating that arbitral matters must be referred with the consequent stay.

10. In reply, the respondents went on to submit further that the "consequent stay" of WPPL's and the Rhodes parties' claims was "inevitable" because the legislative policy of s 8 demanded prior determination of the arbitrable claims.[10] The respondents did not submit that any of the factors normally considered on a discretionary stay application weighed in favour of a stay (see *Sterling Pharmaceuticals*[11]). A further problem never adequately addressed by the respondents is how the principles explained in *John Alexander's Clubs* could ever be satisfied if the appellants (and their siblings) are not able to appear as active

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9 Hearing before Le Miere J, 30 May 2018, T 1679.

10 Hearing before Le Miere J, 30 May 2018, T 1851.

11 *Sterling Pharmaceuticals Pty Ltd v Boots Co (Aust) Pty Ltd* (1992) FCR 287; [1992] FCA 72.

defendants in the WA Proceedings.

11. If, however, as WPPL contends, the "substantive claims" are not within the scope of cl 20, much of the basis of respondents' stay application in the WA Proceedings falls away. There would be nothing that would render (on the respondents' argument) a stay of WPPL's claim an inevitable consequence of a s 8 stay. In addition, the *John Alexander's Clubs* issue could be resolved by the exercise of the WA court's discretionary case management powers – allowing it to weigh up when, and in what forum, the competing proprietary claims should be determined.

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12. As the battle lines are currently drawn in the appeal, there is no contradictor to the proposition that the "substantive claims" ought be characterised as a "*dispute under the deed*". The parties to the appeal seem to accept that the word "*under*" should be construed as "*controlled or governed*" despite the Full Court's criticism of the use of that dictionary definition by Warren J in *BTR Engineering*[12] (which was adopted by Bathurst CJ in *Rinehart v Rinehart*[13]). Permitting WPPL to intervene in the appeal will ensure that all the available and relevant constructions of the phrase "*dispute under the deed*" are addressed in submissions.

20 13. If the Court grants special leave on the "*through or under*" point, it is submitted that WPPL's contribution will be of assistance in the same way that it was of assistance to the Full Court. The possibility that WPPL might be treated as a statutory party to a Deed of which it had no knowledge before the present litigation began underscores its keen interest in the s 2(1) issue the respondents seek to raise.

14. Although WPPL seeks leave to intervene as a non-party, WPPL (and the Rhodes parties) are necessary parties to the proceedings below, which was recognised by the appellants' application to join WPPL (and the Rhodes parties) brought shortly before the Full Court hearing (FC [285]). That application was adjourned pending the Full Court appeal. If it
30 had been brought earlier, WPPL would have been a party to the proceedings below with a right to be heard on the appeal.

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12 *BTR Engineering v Dana Corporation* [2000] VSC 246 at [23].

13 [2012] NSWCA 95; (2012) 95 NSWLR 95 at [125].

Part IV: Submissions

Clause 20 of the Hope Downs Deed

15. WPPL's essential contention is that neither the Full Court's analysis of cl 20 nor the analysis of Bathurst CJ in *Rinehart v Rinehart* should be accepted without significant qualification by this Court.

16. The appellants' criticism[14] of the assumption underpinning the Full Court's conclusion, expressed in *Francis Travel Marketing,*[15] does not focus on the way in which Gleeson CJ prefaced his observations in the following terms: "*When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference, their agreement should not be construed narrowly*" (at 165). His Honour was specifically considering what could be assumed to be the parties' contractual intentions at the beginning of their commercial relationship before any dispute had arisen and before differences had emerged. His Honour was not referring to an agreement to compromise existing disputes.

17. The context of the Hope Downs Deed is therefore entirely different. The Hope Downs Deed was a compromise of existing disputes arising out of an existing and fraught relationship. The respondents secured broadly framed acknowledgements as to ownership of the *Hancock Group Interests* (cl 4), releases of the *Claims* (cl 6), including in cl 6(b) a covenant not to bring proceedings, and undertakings (cl 7) in exchange for covenants as to the distribution of funds from the Trust (cl 5). It was agreed that "*each party may plead this deed in bar to any Claim or proceeding the subject of a release in this deed*" (cl 11).

18. The Hope Downs Deed is (and was expressed to be) a settlement agreement. The purpose of the Deed was to bring to an end *Claims* that had already arisen and been articulated by the second appellant in his draft affidavit. In this context, there is no basis for an assumption to be made that the parties intended to provide for arbitration of the *Claims* (the "substantive claims" using the terminology in the appeal). Indeed, both the context and the terms of the Deed contradict such an assumption. Clause 11 makes no assumption

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14 AS [25]-[37].

15 *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165.

that a *Claim* would be brought in arbitral proceedings. The point of the clause was that each party could plead the Deed as a bar "*to any Claim or proceeding.*"

19. It may be asked rhetorically, why should it be assumed that the Deed was providing for arbitration of the *Claims* when those claims had been compromised and, as a safeguard, cl 11 provided a mechanism for summary disposal of any *Claim* brought in any proceeding in breach of the Deed? Accepting that the purpose of the Deed was "*the quelling of disputes about the title to the assets*" (FC [203]) does not support any assumption as to an intention to arbitrate those disputes.

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20. The language of cl 20 is entirely consistent with this construction of the Deed. The parties provided for confidential mediation/arbitration "*in the event there is any dispute under this deed.*" By its terms, cl 20 is directed to future disputes, not past disputes settled by the Deed. The assumption identified by Gleeson CJ in *Francis Travel* may have a role to play in respect of future disputes under Deed – such as the meaning and effect of the releases in cl 6 or the operation of distribution covenant in cl 5. But it has no application to the "substantive claims" settled by the Deed.

21. Much of the Full Court's analysis of the principles underlying the construction of
20 arbitration agreements (at FC [199]-[205]) can be accepted - subject to one important qualification. Those principles can only apply once the subject matter of the arbitration agreement is identified by a process of construction of the Deed as a whole. The parties are free to limit their agreement to arbitrate to particular categories of disputes or differences. A liberal construction of cl 20 cannot extend the reach of the arbitration agreement beyond those categories, but it can mean that disputes within those defined categories will not be resolved by different tribunals and be "*determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument*" (*Francis Travel* at 165).

30 22. WPPL submits that the real issue in the appeal is whether the phrase "*any dispute under the deed*" extends the reach of the arbitration agreement to the "substantive claims" despite the contextual factors strongly indicating the parties had no contractual intention to submit the "substantive claims" to arbitration.

23. The Full Court was, with respect, right to find the use of a dictionary definition of the word "*under*" in *BTR Engineering* unpersuasive (FC [196]). The meaning attributed to "*under*" in that case ("*governed, controlled, or bound by; in accordance with*") is, as the Full Court pointed out, only one of its definitions as a preposition and not one dictated by the word itself.

24. In contexts such as cl 20, the word "*under*" describes the relationship between abstract concepts by way of a metaphor with the placement of physical objects. A chair is *under* a table because the table – either substantially or completely - covers the chair. It is this sense of covering that is, in WPPL's submission, the way in which the word "*under*" is used in cl 20. It carries with it connotations of substantial and close proximity.

25. Attributing the meaning "*governed or controlled*" to the word "*under*" gives a very different meaning to cl 20. It focusses attention purely on the legal effect of the successful deployment of the Deed in response to claims that otherwise have no relationship with the Deed at all. If the "substantive claims" were subject to a complete time bar defence, it would not be accurate to characterise those claims as "*a dispute under a limitation statute*". It is no more accurate to characterise the "substantive claims" as a "*dispute under the deed*" simply because the Deed might provide a complete defence to them.

26. The drafter of the Deed could have chosen broad relational phrases which would have extended the reach of cl 20 to the "substantive claims." Those phrases are canvassed in the Full Court judgment and the submissions of the appellants and respondents. A deed of settlement which, on the evidence before the primary judge, was drafted by experienced commercial lawyers acting to protect the respondents' interests can be presumed to have had regard to the body of case law relating to those phrases. It is no criticism that a formulation ("*any dispute under this deed*") was chosen which naturally limited the scope of the arbitration agreement to future disputes as to the nature or extent of any rights and obligations created by the Deed. There was simply no need to provide for arbitration of the compromised *Claims*. This is not a sensible, commercial meaning that arises from the Deed.

27. The current dispute as to whether the "validity claims" are arbitrable has its genesis in attributing the meaning "*governed or controlled*" to the word "*under*" in cl 20. On that

approach to cl 20, there is an obvious logical problem in treating the "validity claims" as arbitrable when those claims are directed at establishing that the Deed is of no legal effect. The "validity claims" are not, and cannot be, in any relevant sense, "*governed or controlled*" by the Deed.

28. But if the phrase "*any dispute under this deed*" has the sense for which WPPL contends, much of the conceptual difficulty in treating the "validity claims" as arbitrable falls away. What matters is characterising the nature of the connection between the Deed and the dispute. If those connections are substantial, the metaphorical meaning of the word "*under*" will be satisfied. Viewed in this light, the respondents submissions at RS [72]-[75] may assume greater force.

29. The construction for which WPPL contends also provides a more coherent scheme for the resolution of the arbitrable and non-arbitrable disputes. The practical problems that may lie ahead as things currently stand can be illustrated by one example. The effect of the Full Court's orders is that the appellants are required to arbitrate both the "substantive claims" and the "validity claims." But, if the appellants prevail on the "validity claims," the jurisdiction of the arbitral tribunal to determine the "substantive claims" is brought into question. If the tribunal hears all the claims together (which the respondents suggest it must), the findings on the "substantive claims" may not be capable of enforcement under the CA Act. The "substantive claims" will, for practical purposes, be unresolved.

30. On WPPL's construction of cl 20, the arbitration agreement may extend to the "validity claims." Because those claims bear on the question of whether the arbitration agreement is "*null and void, inoperative or incapable of being performed*," the primary judge will have a discretion to order a trial of the "validity claims" or refer those claims to arbitration. If (as the respondents currently contend) the "substantive claims" and the "validity claims" cannot be disentangled, this would weigh in favour of a trial of the whole dispute. If the "validity claims" are referred to arbitration, the primary judge will be able to consider whether to stay the "substantive claims" pending the outcome of the arbitral reference – applying discretionary case management principles. If the respondents prevail on the "validity claims" the Deed can be deployed by them as a plea in bar to the proceedings below – effectively bringing the proceedings to an end. If the appellants prevail, they will be free to continue the action without having been forced to arbitrate under an arbitration

agreement in a Deed that was always liable to be set aside.

31. The benefit to WPPL has been identified above in paragraph 11 above. This mitigates against the possibility of delay to the ability of WPPL to prosecute its claims in the WA court. The contention that there is a statutory constraint on the exercise by the WA Court of its case management powers will fall away.

32. WPPL would also wish to restate a submission it made to the Full Court (pursuant to the leave to intervene) about the proper delineation of the arbitral "matter" under an arbitration agreement.

33. The respondents' submissions seem to carry an implicit suggestion that an arbitrable "matter" (for the purposes of s 8) can extend beyond the controversy between the parties to the arbitration agreement. Certainly, the respondents' submission in the WA court that a stay under s 8 against the appellants "mandates" a consequent stay of WPPL's claim seems to be based on a very broad conception of the arbitral "matter."

34. But as Allsop J (as his Honour then was) observed in *Commandate Marine Corp v Pan Australia Shipping,*[16] the concept of an arbitral matter is necessarily linked to the terms of the arbitration agreement and "*can be seen to be a reference to the differences between the parties or the controversy that are or is covered by the terms of the arbitration agreement*" (at [235]). 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). This is so even if the subject matter of the claim substantially overlaps with a "matter" which is the subject of an arbitration agreement between different parties. The identification of the "matter" for the purposes of s 8(1) cannot be divorced from the identification of the "parties" to the arbitration agreement.

Section 2(1) of the CA Act

35. For the reasons explained above, WPPL has been unable to obtain a copy of the proposed Notice of Cross-Appeal or any of the material filed by the respondents in support of that

[16] [2006] FCAFC 192; (2006) 157 FCR 280.

proposed application. WPPL intends to apply for access to that material prior to the hearing of the appeal on 12 October 2018 and will seek the Court's leave to file amended submissions dealing with the "*through or under*" issue if appropriate to do so.

36. All that WPPL can sensibly submit at the moment is that the reasons of the Full Court at FC [289] to [323] are not attended by any error and, in WPPL's submission, there is no basis for the grant of special leave in relation to the issue sought to be raised by the proposed Notice of Cross-Appeal. The Full Court identified, and correctly applied, the applicable principles derived from this Court's analysis of the extended definition of "*party*" (in identical terms) under s 7 of the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth) in *Tanning Research Laboratories v O'Brien* (1990) 169 CLR 332 at 342 and 353. There is no occasion to reconsider those principles – particularly where those respondents that are not parties to the Deeds have the benefit of a discretionary stay pending determination of the arbitration and there is no appeal from that order of the Full Court.

Part V: Time for Oral Argument

37. It is estimated that up to 1 hour will be required for oral argument if leave to intervene is granted with permission to supplement the written submissions with oral argument.

Dated: 20 August 2018

Liam Kelly QC
Tel: 07 3259 1678
Fax: 07 3259 1699
Email: lfkelly@qldbar.asn.au

Terry Mehigan
Tel: 02 9232 6531
Fax: 02 9223 3710
Email: Mehigan@12thfloor.com.au

Will LeMass
Tel: 07 3259 1602
Fax: 07 3259 1699
Email: wlemass@qldbar.asn.au

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