

**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

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PROPOSED CROSS APPELLANTS' SUBMISSIONS

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Part I: Certification

1. These submissions¹ are in a form suitable for publication on the Internet.

Part II: Concise statement of issues

2. The issue raised by the proposed cross-appeal is a limited one. It is whether three companies within the Hancock Group - Hope Downs Iron Ore Pty Ltd (**HDIO**), Roy Hill Iron Ore Pty Ltd (**RHIO**) and Mulga Downs Iron Ore (**MDIO**) - are entitled to directly rely upon s 8(1) of the CA Act to stay claims brought against them by the appellants. Although these companies are not signatories to the arbitration agreements the subject of the appeal, they contend that they are entitled to rely upon s 8(1) directly because they fall within the extended definition of “party” under s 2(1) of the CA Act, which includes “any person claiming through or under a party to the arbitration agreement”.
3. The companies are sued by the appellants because they hold the title to valuable mining tenements, which were transferred to them by other members of the Hancock Group: HPPL and Hancock Resources Ltd (**HRL**).² Both HPPL and HRL are signatories to the Hope Downs Deed. The Hope Downs Deed, it will be recalled, contains extensive releases, acknowledgements and covenants, and requires any disputes under the deed to be resolved by confidential arbitration. HDIO, RHIO and MDIO contend that they are claiming through or under HPPL and HRL as parties to the arbitration agreement because they will defend the claims brought against them on the basis of the releases, acknowledgements and covenants contained in the Hope Downs Deed.
4. The Full Court rejected that argument: FC [289]-[323]. In doing so the Full Court erred by misapplying the principles stated by this Court in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 (*Tanning*), as more recently explained by the Victorian Court of Appeal in *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* (2014) 44 VR 64 (*Flint Ink*). Although the Full Court sought to distinguish *Flint Ink* on its facts, it ultimately declined to follow it: FC [319]. This was also in error.

Part III: Certification with respect to s 78B of the *Judiciary Act 1903* (Cth)

5. No notice is required to be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Relevant facts

6. The relevant facts are described at FC [291]-[293] and ought not be in dispute. Some matters, however, require exposition.
7. HDIO is a subsidiary of HPPL. HDIO holds title to the Hope Downs tenements, having

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.

² HPPL is the first respondent to the appeal. HRL is now known as Westrstraint Resources Pty Ltd (FC [293]), and is the fourth respondent to the appeal.

acquired those tenements from HPPL on or about 11 September 1997: FC [291].³ RHIO is also a subsidiary of HPPL. It was incorporated on 1 February 2007. Shortly afterwards, on 16 November 2007, RHIO acquired title to the Roy Hill tenements from HPPL: FC [292]. MDIO is another subsidiary of HPPL. MDIO acquired title to the Mulga Downs tenement from HRL on 10 February 2009: FC [293].⁴

8. The appellants' claims against HDIO, RHIO and MDIO are broadly similar.⁵ The appellants seek declarations that those companies hold the relevant mining tenements on constructive trust, and orders for an account of profits, on the basis that HPPL or HRL only transferred the *legal title* to the mining tenements to those companies; as the Full Court observed at FC [315], "it is a key allegation of the applicants that the transferors at no stage held the beneficial interest in the relevant tenements". For example, in relation to the Hope Downs tenements, the appellants plead (under the heading "Accessory Liability") that:

228 At all material times, HPPL was, through GHR, aware of the matters pleaded at Sections 10, 11 and 13 above.

229 By its execution of the Debt Reconstruction Deed and the Deed of Acknowledgment and Release on 24 October 1995, HPPL:

229.1 was knowingly involved in GHR's breaches of duty as trustee of the HFMF Trust and breaches of the fiduciary duties pleaded in Section 14(A) above; and

229.2 participated in a fraudulent and dishonest design, together with GHR, for the purposes of conferring a benefit on HPPL, being full legal and beneficial title to the Hope Downs Tenements.

230 As a consequence of its execution of the Debt Reconstruction Deed and the Deed of Acknowledgment and Release on 24 October 1995, HPPL received legal title to the Hope Downs Tenements knowing of the breaches of fiduciary duty by GHR pleaded in paragraph 226 above.

231 On or about 11 September 1997, HPPL transferred legal title to the Hope Downs Tenements to HDIO.

232 By virtue of the fact that GHR is, and was at all material times, a director and the controlling mind of HDIO, HDIO received legal title to the Hope Downs Tenements knowing of the breaches of fiduciary duty by GHR pleaded in paragraph 226 above."⁶

9. The appellants' claims against HDIO, RHIO and MDIO are therefore critically dependent on the appellants establishing that HPPL and HRL did not pass full legal and beneficial title to the mining tenements to those companies.
10. HDIO, RHIO and MDIO will defend those claims by invoking and relying upon various provisions in the Hope Downs Deed - including, in particular, the appellants' acknowledgment of the companies' full legal and beneficial title to the mining tenements

³ As noted at FC [291], HDIO holds 100% of certain Hope Downs tenements, and 50% of other Hope Downs tenements as part of the Hope Downs joint venture with certain Rio Tinto entities.

⁴ As noted at FC [293], the Mulga Downs tenement was transferred from HRL as to 98 shares, with the remaining two shares being transferred to Mulga Downs Investments Pty Ltd, the fifteenth respondent.

⁵ See statement of claim at [228]-[233] (in relation to HDIO), [146]-[148] (in relation to RHIO) and [260]-[271] (in relation to MDIO): respondents' book of further materials (RFM) at 36-37, 52-53, 57-58. As observed at FC [293], the appellants' pleas in relation to the Mulga Downs tenements are more complex and not as clear as the appellants' pleas in relation to the Hope Downs and Roy Hill tenements.

⁶ RFM at 52.

(cl 4), their releases (c11 6(a) and (c)) and their covenants not to sue (c11 6(b) and 7(b))⁷ - to establish that HPPL and HRL did pass full legal and beneficial title to the mining tenements.

Part V: Argument

11. The Full Court's rejection of the argument that HDIO, RHIO and MDIO are "claiming through or under a party to the arbitration agreement" is encapsulated in FC [317], where it was held, purportedly in reliance upon the statement of Brennan and Dawson JJ (with whom Toohey J agreed) in *Tanning*, that:

- 10 (a) *first*, it was necessary to establish a "legal relationship between the party to the arbitration agreement and the third party companies relevant to the defence", and there was no such legal relationship in this case; and
- (b) *secondly*, "the releases and other covenants in the deeds" were not "an essential element of the defences of a party to the arbitration agreements and of the third party companies in the relevant sense", because while "they are highly likely to raise the defences ... they are not bound to do so".

12. Neither proposition is supported by the judgment of Brennan and Dawson JJ in *Tanning*, as explained in *Flint Ink*. In *Tanning*, Brennan and Dawson JJ emphasised at 342 that the meaning of the phrase "through or under a party" must be ascertained by reference to the text and context of s 7(4) of the *International Arbitration Act 1974* (Cth)⁸:

- 20 "In the first place, as sub-s. (2) speaks of both parties to an arbitration agreement, a person who claims through or under a party may be either a person seeking to enforce or a person seeking to resist the enforcement of an alleged contractual right. The subject of the claim may be either a cause of action or a ground of defence. Next, the prepositions 'through' and 'under' convey the notion of a derivative cause of action or ground of defence, that is to say, a cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence."⁹

13. Brennan and Dawson JJ (at 341-342) also gave examples of cases in which the phrase "through or under a party" or its equivalent have been construed to apply to, including a trustee of a bankrupt's estate, an assignee of a debt arising out of a contract containing an arbitration clause, a company being a subsidiary of a parent company which is party to an arbitration agreement and a company being a parent of a subsidiary company which is party to an arbitration agreement when claims are brought against both companies based on the same facts.

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14. In *Flint Ink*, the Court of Appeal emphasised that Brennan and Dawson JJ's statement of principle ought not be construed narrowly; as Nettle JA (as his Honour then was) observed at [57], *Tanning* was "high authority" for the proposition that "claiming through

⁷ Appellants' further materials at 104, 107-108.

⁸ Section 7(4) of the *International Arbitration Act* is materially identical to the definition of "party" in s 2(1) of the CA Act.

⁹ Referred to at FC [309].

- or under a party” was a relatively flexible concept (see also at [60] and [64]).¹⁰ The Court of Appeal therefore rejected a submission that Brennan and Dawson JJ should be taken to have meant that a claimant or defendant is not properly to be regarded as claiming “through or under a party” to an arbitration agreement unless asserting a claim or defence which was available to the party and to which the claimant or defendant has succeeded by way of assignment or legal process in effect tantamount to assignment: see Warren CJ at [19], Nettle JA at [60]. It also held that Brennan and Dawson JJ did not proceed on the basis that it is the cause of action or defence as a whole and not merely an element of it that must be vested in or be exercisable by the party: see Warren CJ at [20], Nettle JA at [71]. Brennan and Dawson JJ’s reasoning was therefore seen as consistent with that of Deane and Gaudron JJ, who held at 353 that the question whether a person is claiming through or under a party to the arbitration agreement is necessarily to be answered by reference to 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: see Warren CJ at [21], Nettle JA at [72], Mandie JA at [145].
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15. Such a liberal approach to the phrase “claiming through or under a party” is consistent with the objects of the CA Act, as set out in s 1C: *AED Oil Ltd v Puffin FPSO Ltd (No. 2)* [2009] VSC 534 at [71] per Judd J.¹¹
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16. The approach taken by the Full Court did not accord with this liberal approach. As noted above, the Full Court held that it was necessary to establish a “legal relationship” between the party to the arbitration agreement and the person seeking to claim through or under that party. In this case, the Full Court held that the fact that HDIO, RHIO and MDIO were “related parties” to HPPL and HRL was “not sufficient” to establish such a “legal relationship”, and the only relationship between them was a “factual” one constituted by the transfer of the title to the mining tenements. However, Brennan and Dawson JJ did not require the person seeking to claim through or under the party to the arbitration agreement to establish a “legal relationship”, and in any event made it clear that parent and subsidiary companies could claim through or under each other. Moreover, the precise nature of the “legal relationship” that would satisfy this requirement is unclear.
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17. The Full Court further held that the “essential element of the cause of action or defence” vested in or exercisable by the party to the arbitration agreement be one that that the person claiming through or under that party is “bound” to raise. That requirement can also not be found in Brennan and Dawson JJ’s judgment. Moreover, it is an impractical one, in that defences are generally not required at the time of the making of an application under s 8(1).

¹⁰ Although in a different context, this Court has also acknowledged the flexible or protean quality of the expression “through or under”: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [76] per French CJ, Nettle and Gordon JJ; at [96] per Kiefel and Keane JJ (Bell and Gageler JJ agreeing).

¹¹ Reversed on appeal on different grounds: *AED Oil Ltd v Puffin FPSO Ltd* (2010) 27 VR 22.

18. Shorn of these unnecessary additional requirements, it is clear that HDIO, RHIO and MDIO meet the test as articulated by Brennan and Dawson JJ (or by Deane and Gaudron JJ for that matter). As already explained, HDIO, RHIO and MDIO will raise by way of defence the acknowledgments, releases and covenants granted to HPPL and HRL in the Hope Downs Deed. By those acknowledgments, releases and covenants, HPPL's and HRL's legal and beneficial title to the Hope Downs, Roy Hill and Mulga Downs tenements was vindicated. The Hope Downs Deed can therefore be set up by HDIO, RHIO and MDIO as a complete answer to the appellants' claim that they only received legal title to those tenements from HPPL and HRL. The defences of HDIO, RHIO and MDIO are therefore derivative upon HPPL and HRL, in much the same way as the claims against those companies are derivative claims.

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19. Two further observations should be made about these defences in this context:

(a) the close corporate relationship between HDIO, RHIO and MDIO on the one hand, and HPPL and HRL on the other, is relevant to those defences, because certain of the acknowledgements, releases and covenants extend to the Hancock Group generally, and not merely to HPPL and HRL as to the parties to the Hope Downs Deed¹²;

(b) it is not disputed that the raising of these same defences by HPPL and HRL will render the appellants' claims arbitrable at the request of HPPL and HRL, including both the direct claims against HPPL and HRL (FC [216]-[235]), and the derivative claims against HDIO, RHIO and MDIO (FC [328]-[331]).

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20. For these reasons, an essential element of the companies' defence is vested in or exercisable by HPPL and HRL as parties to the arbitration agreement, and as result, those companies are claiming through or under HPPL and HRL, and are entitled to apply to stay the claims against them under s 8(1).

Part VI: Orders

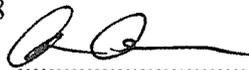
21. The proposed cross-appellants seek the orders set out in the notice of cross-appeal at [3]-[5].

Part VII: Time for oral argument

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22. The proposed cross-appellants estimate that 45 minutes will be required for the presentation of oral argument on their behalf.

Dated 14 September 2018



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¹² See e.g. cll 4 and 7(b) of the Hope Downs Deed, which refer to the "Hancock Group Interests".

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

10 **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**

20 **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

30 **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