HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, NETTLE, GORDON AND EDELMAN JJ

Matter No S143/2018

BIANCA HOPE RINEHART & ANOR — APPELLANTS

AND

HANCOCK PROSPECTING PTY LTD & ORS — RESPONDENTS

Matter No S144/2018

BIANCA HOPE RINEHART & ANOR — APPELLANTS

AND

GEORGINA HOPE RINEHART (IN HER PERSONAL CAPACITY AND AS TRUSTEE OF THE HOPE MARGARET HANCOCK TRUST AND AS TRUSTEE OF THE HFMF TRUST) & ORS — RESPONDENTS

Rinehart v Hancock Prospecting Pty Ltd
Rinehart v Rinehart
[2019] HCA 13
8 May 2019
S143/2018 & S144/2018

ORDER

Matter No S143/2018

1. *The appeal be dismissed with costs.*

2. *The third party companies' application for special leave to cross-appeal be allowed.*

3. The cross-appeal be treated as instituted and heard instanter and allowed.

4. Orders 5, 6 and 8 of the orders of the Full Court of the Federal Court of Australia made on 15 December 2017 be set aside and, in their place, it is ordered that:

> *"5. The orders of the Court made on 26 May 2016 be set aside and in lieu thereof order:*
>
> > *(a) that the proceeding brought in the Court by the applicants being NSD 1124 of 2014 be stayed under s 8(1) of the* Commercial Arbitration Act 2010 *(NSW) (CA Act) pending any arbitral reference between the parties or until further order, save and except for those claims made against Mulga Downs Investments Pty Ltd; and*
> >
> > *(b) the first and second applicants to the main proceedings (being the first and second respondents to the appeals) pay the costs of the moving parties to the interlocutory application filed on 3 November 2014 in proceedings NSD 1124 of 2014 in connection with paragraph 9 thereof and the costs of the moving parties to the interlocutory application filed on 24 December 2014 in those proceedings, subject to Mulga Downs Investments Pty Ltd paying the costs related to the question of whether it is a party to the arbitration agreement pursuant to s 2 of the CA Act.*
>
> *6. The claims made by the applicants in the underlying proceedings against Mulga Downs Investments Pty Ltd be stayed on the same terms as the stay in order 5.*
>
> *8. The first and second respondents pay the appellants' costs of appeal including the costs of the application for leave to appeal, subject to Mulga Downs Investments Pty Ltd paying the costs related to the question as to whether it is a party to the arbitration agreement pursuant to s 2 of the CA Act."*

5. The respondents to the cross-appeal pay the cross-appellants' costs of the cross-appeal.

Matter No S144/2018

The appeal be dismissed with costs.

On appeal from the Federal Court of Australia

Representation

B W Walker SC and G E S Ng for the appellants in both matters (instructed by Yeldham Price O'Brien Lusk Lawyers)

N C Hutley SC with I C Colquhoun and J J Hutton for the first to eighth respondents in S143/2018 and the third to tenth respondents in S144/2018 (instructed by Corrs Chambers Westgarth)

P J Brereton SC with C N Bova and S A Lawrance for the ninth and eleventh respondents in S143/2018 and the first and second respondents in S144/2018 (instructed by Speed and Stacey Lawyers)

Submitting appearances for the twelfth and thirteenth respondents in both matters

No appearance for the tenth, fourteenth and fifteenth respondents in S143/2018 and the eleventh, fourteenth and fifteenth respondents in S144/2018

The Australian Centre for International Commercial Arbitration appearing as amicus curiae in both matters, limited to its written submissions

CATCHWORDS

Rinehart v Hancock Prospecting Pty Ltd
Rinehart v Rinehart

Contract – Construction – Dispute resolution clause – Arbitration – Where arbitral clause in deeds provided for confidential arbitration in event of any dispute "under this deed" – Where deeds came into existence against background of claims and threats of litigation made publicly by one party to deeds against others – Where deeds contained releases, acknowledgments and covenants not to sue, and promises not to make further claims – Where deeds contained assurances they were entered into without undue influence or duress – Where appellants brought proceedings alleging breaches of equitable and contractual duties against other parties to deeds – Where appellants asserted they were not bound by deeds because their assent procured by misconduct of other parties to deeds ("validity claims") – Where respondents sought orders that matter be referred to arbitration and proceedings be dismissed or permanently stayed – Whether validity claims subject to arbitral clause.

Arbitration – Parties – Where s 8(1) of *Commercial Arbitration Act 2010* (NSW) ("NSW Act") provided that court before which action is brought in matter which is subject of arbitration agreement must in certain circumstances refer parties to arbitration – Where s 2(1) of NSW Act defined "party" to include any person claiming "through or under" party to arbitration agreement – Where trustees and beneficiaries party to arbitration agreement – Where beneficiaries alleged breaches of trust against trustees and knowing receipt against third party companies as assignees of trust property – Where third party companies asserted beneficial entitlement of trustees to property as essential element of defence – Where third party companies sought order that claims against them be referred to arbitration pursuant to s 8(1) of NSW Act – Whether third party companies claiming "through or under" party to arbitration agreement.

Words and phrases – "arbitral clause", "arbitration agreement", "claiming through or under a party", "confidential processes of dispute resolution", "context and purpose of deed", "dispute under this deed", "party", "privity of contract".

Commercial Arbitration Act 2010 (NSW), ss 2, 8.

1 KIEFEL CJ, GAGELER, NETTLE AND GORDON JJ. The appellants in these appeals, Ms Bianca Rinehart and Mr John Hancock (who is referred to in these reasons as Mr Hancock), are two of Mrs Gina Rinehart's four children. Mrs Rinehart is the daughter of Mr Lang Hancock, the founder of the Hancock Group of companies, which were involved in the discovery and acquisition of substantial iron ore deposits in the Pilbara region of Western Australia. The Hancock Group includes Hancock Prospecting Pty Ltd ("HPPL"), which was incorporated in 1955, Hancock Family Memorial Foundation Limited ("HFMF"), Hancock Resources Limited ("HRL") and Zamoever Pty Ltd ("Zamoever"). Mr Lang Hancock controlled the Hancock Group until his death in 1992.

The Federal Court proceedings

2 The appeals arise out of proceedings brought in the Federal Court of Australia by the appellants in which they make a number of claims concerning conduct of Mrs Rinehart, HPPL and others which is said to have diminished the assets of trusts which were established prior to Mr Lang Hancock's death and of which the appellants and their two siblings are beneficiaries. No defence has as yet been filed to the appellants' statement of claim and no findings with respect to the claims have been made.

3 Central to the appellants' claims is an agreement said to have been made between Mr Lang Hancock and Mrs Rinehart in 1988 concerning arrangements for future shareholdings of Mrs Rinehart and the children in HPPL and HFMF consequent upon Mr Lang Hancock's death ("the 1988 Agreement"). It is alleged that on 20 March 1992, in furtherance of the 1988 Agreement, Mr Lang Hancock executed a deed by which he formally declared in writing that he held the whole of his legal and beneficial interests in his two shares in Zamoever upon trust for Mrs Rinehart's four children as tenants in common in equal shares ("the HFMF Trust"). It also is alleged that as well as being equal beneficiaries of the HFMF Trust, the children were equal beneficiaries of "the HMH Trust" (the Hope Margaret Hancock Trust, a reference to Mr Lang Hancock's deceased wife). The HMH Trust is said to have a substantial shareholding in HPPL. The HFMF Trust, through the medium of HFMF and Zamoever, is said to have owned one-third of the shares in HPPL and shares in companies within the Hancock Group which own valuable mining tenements, including the tenements known as the Roy Hill Tenements, the Hope Downs Tenements and the Mulga Downs Tenement. There may be an issue as to the existence of the HFMF Trust.

4 The appellants' statement of claim avers that Mr Lang Hancock was the trustee of both trusts during his lifetime and that Mrs Rinehart became trustee upon his death. The children were all minors at that time. The trusts were to vest

when Mrs Rinehart's youngest child attained the age of 25, which occurred in 2011.

5 The appellants further allege that Mrs Rinehart became the controlling mind of HPPL, HFMF and other relevant companies in the Hancock Group and that, in breach of the trusts and of other equitable and contractual duties, Mrs Rinehart dealt with the companies and their assets to her benefit and that of HPPL and to the detriment of the children as beneficiaries. These allegations were referred to in the proceedings below as "the substantive claims". It is not necessary to detail them more fully for present purposes.

6 The appeals concern orders made on interlocutory applications brought by Mrs Rinehart, and HPPL and other related parties ("the HPPL respondents"), in the proceedings. Mrs Rinehart sought an order pursuant to s 8(1) of the *Commercial Arbitration Act 2010* (NSW) ("the NSW Act") that the matters the subject of the proceedings be referred to arbitration. That sub-section provides:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

7 Both Mrs Rinehart and the HPPL respondents sought an order that the proceedings be dismissed or permanently stayed and certain other orders.

8 The applications brought by Mrs Rinehart and the HPPL respondents relied upon a number of deeds entered into between one or both of the appellants and various of the respondents between September 2003 and November 2010. Three are the subject of these appeals ("the Deeds"): the confidential Deed of Obligation and Release which was entered into with Mr Hancock in April 2005; the Hope Downs Deed entered into with Ms Rinehart and her two sisters in August 2006; and a further deed entered into with Mr Hancock in April 2007 in which he adopted the Hope Downs Deed ("the April 2007 Deed"). Argument on these appeals tended to focus upon the Hope Downs Deed because of the disputes it allegedly resolved and its provision for the process of dispute resolution at issue in this matter.

9 The Deeds came into existence against the background of and were addressed to claims and threats of litigation made publicly by Mr Hancock about wrongdoing on the part of Mrs Rinehart, HPPL and others which are reiterated in the substantive claims in the proceedings. The Deeds contain releases or abandonment of claims, expressed in wide terms, and promises not to make

further claims. They contain assurances that they were entered into without undue influence or duress.

The arbitral clauses

10 Each of the Deeds contains an arbitral clause. Clause 20 of the Hope Downs Deed provides that "[i]n the event that there is any dispute under this deed" there is to be a confidential arbitration. Clause 9 of the April 2007 Deed and cl 14 of the Deed of Obligation and Release are in relevantly similar terms[1].

11 The appellants do not deny that they executed the Deeds but assert that they are not bound by their terms because their assent to them was procured by misconduct on the part of Mrs Rinehart, HPPL and others. They seek declarations in the proceedings that the Deeds are void as against them. These claims were referred to below as "the validity claims".

12 The appellants' "validity claims" are not discrete from the appellants' "substantive claims". The validity claims incorporate and rely upon the substantive claims. An example serves to illustrate the point. Paragraph 288.5 of the appellants' statement of claim attacks the validity of the arbitral clause in the Hope Downs Deed, including on the basis that the purpose of the arbitral clause was to prevent *public disclosure of the facts pleaded at sections 8-16 of the statement of claim*; however, sections 8-16 of the statement of claim contain the *substantive* claims made by the appellants.

13 It is also necessary to mention certain principles stated in the NSW Act in connection with the arbitral clauses. There is no dispute that the NSW Act applies to the clauses even though the Deeds pre-date the Act[2]. The Act is part of an integrated statutory framework for international[3] and domestic[4] arbitration

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1 Noting that cl 14 of the Deed of Obligation and Release refers "all disputes *hereunder*" to arbitration (emphasis added).

2 NSW Act, Sch 1, cl 2(1)(a).

3 *International Arbitration Act 1974* (Cth).

4 The domestic arbitration regime is governed by the NSW Act, which has been enacted in substantially the same form in each State and Territory as the applicable supervisory law for domestic arbitrations seated within those jurisdictions: see *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas);

(Footnote continues on next page)

which implements the UNCITRAL Model Law on International Commercial Arbitration. The Act adopts principles such as that which recognises an arbitration agreement as distinct and limits attacks upon its validity (the separability principle) and the related principle by which an arbitral tribunal is competent to rule on its jurisdiction (kompetenz-kompetenz)[5]. Those principles are not determinative of the issues in these appeals and it is not necessary to resort to them, for the reasons which follow.

The proceedings below

14 The question before the primary judge which is relevant to these appeals is whether the validity claims are subject to the arbitral clauses.

15 The primary judge held that they were not. Central to her Honour's reasoning was a perceived limitation on the scope of the clause resulting from the words "under this deed". Accordingly, whilst the substantive claims may be the subject of arbitration, the validity claims are to be determined by the court under the proviso to s 8(1) of the NSW Act.

16 The Full Court (Allsop CJ, Besanko and O'Callaghan JJ) disagreed with the primary judge's construction of cl 20 of the Hope Downs Deed, holding that it should be given a liberal, not a narrow, interpretation[6]. The Full Court stayed the proceedings, permitting the arbitrator to deal with all issues, including validity.

17 When regard is had to the context of the Deeds, including the circumstances in which they were made as reflected in the text of the Deeds, it is apparent that the conclusion reached by the Full Court that the validity claims fell within the scope of the arbitral clauses is correct.

The reasons of the Full Court

18 A significant part of the Full Court's reasons was taken up with arguments as to the approach taken by the House of Lords to the construction of arbitral

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Commercial Arbitration Act 2011 (Vic); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2017* (ACT).

5 NSW Act, s 16.

6 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 489 [166]-[167], 496 [193].

clauses in *Fiona Trust & Holding Corporation v Privalov*[7]. This was understandable, given the way in which the matter had been dealt with by the primary judge. But, as will be explained, these appeals can be resolved in the application of orthodox principles of interpretation, which require consideration of the context and purpose of the Deeds, without reference to *Fiona Trust*.

Fiona Trust

19 In *Fiona Trust* the House of Lords was referred to cases which had considered various forms of wording in arbitral clauses. As noted by Lord Hoffmann[8], with whom the other Law Lords agreed, some drew a distinction between disputes "arising under" and those "arising out of" agreements. Some held that disputes which arise "under" the contract concern only rights and obligations which are created by the contract itself, whereas disputes "arising out of" refer to a wider class. On the other hand, it had been held that a clause in an insurance policy submitting disputes "arising thereunder" to a foreign jurisdiction was wide enough to extend to the question whether the contract could be avoided for non-disclosure[9]. In yet another case judges expressed the view that they could not see the difference between the two phrases[10].

20 Lord Hoffmann was of the view that the distinctions made in those cases "reflect[ed] no credit upon English commercial law"[11]. He considered that the time had come to "draw a line under the authorities to date" and "make a fresh start"[12]. In his Lordship's view, the construction of an arbitral clause should "start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal"; and that the clause should be construed in accordance with that presumption "unless the

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7 [2007] 4 All ER 951 ("*Fiona Trust*").

8 *Fiona Trust* [2007] 4 All ER 951 at 957-958 [11].

9 *Mackender v Feldia A G* [1967] 2 QB 590.

10 *Union of India v E B Aaby's Rederi A/S* [1975] AC 797 at 814 per Viscount Dilhorne, 817 per Lord Salmon.

11 *Fiona Trust* [2007] 4 All ER 951 at 958 [12].

12 *Fiona Trust* [2007] 4 All ER 951 at 958 [12].

language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction"[13].

21 The approach adopted in *Fiona Trust* may not assume so much importance for courts in the future given the likelihood that arbitral clauses such as the UNCITRAL Arbitration Clause in different and arguably wider terms are now recommended for use by commercial parties. In any event it is unnecessary to consider the correctness of the approach in *Fiona Trust*. It is clear that the arbitral clauses in the Deeds, construed in context, include as their subjects the validity claims raised by the appellants.

Rinehart v Welker

22 Before leaving the decision in *Fiona Trust*, however, it is necessary finally to note that the primary judge eschewed[14] the approach in *Fiona Trust* in favour of the construction of the arbitral clauses in the Deeds advanced by the Court of Appeal of the Supreme Court of New South Wales in *Rinehart v Welker*[15]. Her Honour considered it to be determinative of the meaning to be given to the words "under this deed". That case concerned proceedings brought by Ms Rinehart, Mr Hancock and their sister Ms Welker, seeking information about the trusts and orders under the *Trustees Act 1962* (WA) including the removal of Mrs Rinehart as trustee. An application to stay the proceedings was brought to enforce the arbitral clauses in the same Deeds the subject of these proceedings.

23 Bathurst CJ (Young JA agreeing) held that the approach adopted in *Fiona Trust* is contrary to the approach taken to the construction of commercial contracts in Australia[16]. Bathurst CJ said the phrase "under this deed" has consistently been given a narrower meaning[17]. A dispute is "under" a deed if its outcome is governed or controlled by the deed or invokes some right created by it[18].

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13 *Fiona Trust* [2007] 4 All ER 951 at 958 [13].

14 *Rinehart v Rinehart [No 3]* (2016) 257 FCR 310 at 424-425 [583]-[584].

15 (2012) 95 NSWLR 221.

16 *Rinehart v Welker* (2012) 95 NSWLR 221 at 247 [121].

17 *Rinehart v Welker* (2012) 95 NSWLR 221 at 248 [123].

18 *Rinehart v Welker* (2012) 95 NSWLR 221 at 248-249 [125].

24 Applying that approach, the primary judge reasoned that the existence of a dispute "under" the Hope Downs Deed depends on the existence of the deed itself. The Hope Downs Deed cannot be said to govern or control the outcome of a dispute about its validity[19].

25 Nevertheless, as the Full Court recognised, *Fiona Trust* was not critical to the resolution of these appeals. It is unnecessary to consider, or rely upon, *Fiona Trust*, or the observations of Bathurst CJ in *Rinehart v Welker* concerning *Fiona Trust*, to dispose of these appeals.

The background to and purpose of the Deeds

26 As the Full Court concluded: "[c]ontext will almost always tell one more about the objectively intended reach of such phrases than textual comparison of words of a general relational character"[20]. There may be cases which have to be resolved largely, if not entirely, by reference to the language of the arbitral clause in question. But this is not such a case. The background to and the purposes of the Deeds, as reflected in their terms[21], point clearly to arbitral clauses of wide coverage with respect to what was to be the subject of confidential processes of dispute resolution.

27 The Full Court treated the context and purposes for which the Deeds were made as important to their construction. Their Honours identified the context for the making of the Deeds as the growing number of claims being made. One of the fundamental purposes of the Deeds, their Honours said, was the quelling of

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19 *Rinehart v Rinehart [No 3]* (2016) 257 FCR 310 at 436 [645].

20 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 496 [193].

21 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 348, 352 per Mason J; [1982] HCA 24; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11] per Gleeson CJ, Gummow and Hayne JJ; [2001] HCA 70; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at 52-53 [10] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; [2002] HCA 5; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; [2004] HCA 35; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 178-179 [38] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; [2004] HCA 52; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35] per French CJ, Hayne, Crennan and Kiefel JJ; [2014] HCA 7.

disputes about the title to assets, which was of great commercial importance to the prospective arrangements with a joint venturer[22]. We respectfully agree. It is necessary to consider each of the Deeds in further detail.

The Deed of Obligation and Release

28 The background to the Deed of Obligation and Release was investigations undertaken by Mr Hancock around 2003, or perhaps earlier, and the possibility he had raised of commencing litigation against Mrs Rinehart. In October 2004 Mr Hancock's solicitors sent a copy of an affidavit by him, unsworn, which contained many of the allegations concerning wrongful conduct on the part of Mrs Rinehart as trustee which now form part of the substantive claims.

29 Mr Hancock's unsworn affidavit and correspondence entered into leading up to the execution of the Deed of Obligation and Release refer to proposals to buy Mr Hancock's interests in the HMH Trust or achieve some kind of settlement. In March 2005 Mrs Rinehart commenced proceedings in the Supreme Court of Western Australia seeking her discharge as trustee of the HMH Trust and the appointment of her nominee.

30 In April 2005 Mr Hancock signed the Deed of Obligation and Release together with a deed of loan. The recitals to the Deed of Obligation and Release referred to "[s]erious and substantial differences" which had arisen between Mr Hancock and the Hancock Group which were to be settled. Mr Hancock was the sole covenantor to the deed. The other signatories included Mrs Rinehart, in various capacities, HPPL, HFMF, and Mr Hancock's sisters. The effect of the deed was the provision of releases and discharges by him to the other parties. They were expressed in wide terms which included the abandonment of any claims and a covenant not to make further claims or bring proceedings. In return Mr Hancock was to receive certain payments, a loan repayable on the vesting of the HMH Trust and certain other benefits.

31 At the time the Deed of Obligation and Release was entered into it was known to all the parties to it that a joint venture between the Hancock Group and the Rio Tinto group of companies concerning the Hope Downs Tenements ("the Joint Venture") was being negotiated. It is to be inferred from the recitals to the deed, as the Full Court observed[23], that it was considered necessary to stabilise the question of claims to ownership of tenements to provide a safe foundation for

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22 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 498 [203].

23 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 459 [64].

what was to be a long-term commercial venture. The parties to the deed acknowledged that "the primary nature of the HPPL business, is very long-term, complex, large-scale mining projects … necessitat[ing] long term consistent business plans, and many dealings with third parties on a strictly confidential basis".

32 Confidentiality was plainly a serious concern at this point. The recitals referred to Mr Hancock's use of "sensationalist media" to publicise his claims and the potential for him "to negatively seek exposure with the public or with the media" particularly during periods of negotiation. HPPL and the Hancock Group were desirous of obtaining undertakings from him to "wholly retract, cease and desist from any such activities now and in the future". Accordingly, the HPPL board had resolved that the payments to Mr Hancock provided for in the deed were necessary "to protect the confidential nature of information". The recitals bear out the primary judge's findings[24] that the deed was intended to address the risk of commercial damage to HPPL and the Hancock Group by public statements which might be made by Mr Hancock and the risk of disclosure of confidential information.

33 These are circumstances which bespeak the object of cl 14 in providing for confidential mediation and arbitration of "all disputes hereunder". The resolution of them was to be non-public and confidential. In this respect it is to be observed that whilst the Deeds were commercial arrangements and concerned claims concerning commercial dealings, the disputes also involved members of a family. That, too, is consistent with the need for confidentiality. It is also of relevance to the background to and provisions made in the Hope Downs Deed that, by cl 11 of the Deed of Obligation and Release, Mr Hancock acknowledged that he had received independent advice "on all matters relating to or which are the subject of this Deed" and that he acted wholly without duress – notwithstanding that he was to assert the contrary soon thereafter.

The Hope Downs Deed

34 The Joint Venture was announced in July 2005. Co-operation agreements were signed by the parties. Shortly after the announcement of the Joint Venture, a newspaper in Western Australia published an article in which Mr Hancock was said to be pressing ahead with his "legal claim" against his mother after the Hope Downs "deal" was completed. Mr Hancock through his solicitors gave notice of his intention to become a party to the proceedings brought by his mother with

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24 *Rinehart v Rinehart [No 3]* (2016) 257 FCR 310 at 382 [328].

respect to the HMH Trust and said that he considered himself to be free of the releases given by the Deed of Obligation and Release because they were the product of undue influence. In September 2005 he filed an affidavit in those proceedings in which he alleged that his mother had committed "grave breaches of trust". That affidavit exhibited a later version of the unsworn affidavit referred to earlier, which raised allegations about Mrs Rinehart's extraordinary exertion of control and influence over Mr Hancock and others.

35 In March 2006 the Hope Downs Joint Venture Agreement ("the Joint Venture Agreement") was executed. Correspondence between HPPL and Mr Hancock in March and April 2006 evidences an ongoing dispute between him and Mrs Rinehart and HPPL.

36 In August 2006 the Hope Downs Deed was signed by Ms Rinehart and her two sisters, Mrs Rinehart, HPPL and other parties. Mr Hancock was not a party to it but later adopted it by the April 2007 Deed. A purpose of the Hope Downs Deed, the Full Court observed, was to quell disputes as to title concerning the mining tenements, especially the Hope Downs Tenements.

37 The parties to the Hope Downs Deed acknowledged that the Hancock Group interests, including the Hope Downs Tenements, had always been beneficially owned by HPPL and are now owned by HPPL and another company, Hope Downs Iron Ore Pty Ltd ("HDIO"), which is referred to in greater detail later in these reasons. They acknowledged the obligations of the Hancock Group to finalise the required financing for the Joint Venture and they reaffirmed and ratified the Deed of Obligation and Release.

38 The Hope Downs Deed contains releases from any "Claims", a term which was defined to include any claim of breach of fiduciary duty with respect to actions taken prior to the date of the deed and any claim made in the proceeding in the Supreme Court of Western Australia to which the HMH Trust and Mrs Rinehart are parties and Mr Hancock was seeking to be joined as a party and any claim made in Mr Hancock's draft affidavit. The parties undertook not to do anything which would have an adverse impact on the Hancock Group's interests including the Joint Venture, not to disparage, and not to challenge the rights of any party to the deed so far as concerns their interest in any of the companies in the Hancock Group or any trust in which they or any member of the Hancock Group is a beneficiary. They covenanted not to advance, encourage or assist or facilitate the institution or prosecution of any claim the subject of a release under the deed. In return for the releases and undertakings, HPPL agreed to pay dividends on a quarterly basis. The terms of the deed were to be kept confidential.

39 Clause 20 of the Hope Downs Deed provided that in the event that there is "any dispute under this deed" the party disputing is to notify the other parties with whom there is a dispute and all other parties to the deed, and "the parties to this deed shall attempt to resolve such difference" in the manner provided. In the first place a confidential mediation was required to take place. If the parties could not agree upon a mediator, or the mediation was abandoned, a confidential arbitration was to take place. Provision was made for settling any disagreement about the appointment of arbitrators. The award of the arbitrator or arbitrators was to be non-appealable, conclusive and binding on the parties to the extent permitted by the law (cl 20.2(e)).

40 By cl 12 each party acknowledged that the deed was entered into freely and without duress or undue influence. A similar provision had been made in the earlier deed, but the Hope Downs Deed went further. Each party also declared that he, she or it had obtained legal advice or waived the right to obtain it and this was to be confirmed in writing. Each of the children was required, on the execution of the deed, to provide a letter from a lawyer to the effect that he or she had advised the lawyer that he or she had read the deed, was executing it without duress or undue influence and has agreed to be bound to it irrespective of the "mother/child/beneficiary aspects" of the HMH Trust and any employer/employee relationship with the Hancock Group.

The April 2007 Deed

41 With the execution of the Hope Downs Deed, all four of Mrs Rinehart's children had signed wide releases: Mr Hancock in the Deed of Obligation and Release and his three sisters in the Hope Downs Deed. However, Mr Hancock had shown that he was prepared to continue to challenge his mother by his actions in 2005 in the Supreme Court proceedings brought by Mrs Rinehart. Accordingly, Mrs Rinehart was anxious to have Mr Hancock commit to a settlement. This led to the April 2007 Deed.

42 Recital B of the April 2007 Deed stated that the parties to the Hope Downs Deed wished to facilitate Mr Hancock becoming a party to the Hope Downs Deed. Clause 2 achieved that aim, providing that Mr Hancock "Covenants and Agrees with all and singular the parties hereof … that he will observe perform and fulfil all … terms … of the Hope Downs Deed".

The meaning of cl 20 of the Hope Downs Deed

43 Even on an approach which focuses only on the language of cl 20 it might be argued that the validity claims are disputes "under" the deed. The question whether the substantive claims are the subject of releases and covenants may be

seen to depend upon the question whether the validity claims are available and if so whether they are made out. And the challenges to validity may depend upon the effect given to the acknowledgment in the Deeds concerning duress, undue influence and the receipt of legal advice. This is a further example of how the substantive claims and the validity claims are intertwined in these appeals.

44 It is well established that a commercial contract should be construed by reference to the language used by the parties, the surrounding circumstances, and the purposes and objects to be secured by the contract[25]. It could not have been understood by the parties to these Deeds that any challenge to the efficacy of the Deeds was to be determined in the public spotlight. Especially is this so with respect to the Hope Downs Deed.

45 The Hope Downs Deed was an attempt to put to rest the issues regarding ownership of property which had motivated Mr Hancock in the first place. Although the Joint Venture Agreement had been signed by this time, the Hancock Group of companies were undertaking negotiations for financing it in accordance with their contractual obligations. The need for commercial confidence remained.

46 Accordingly, a critical object of the Hope Downs Deed was the maintenance of confidentiality about the affairs of the Hancock Group, the trusts, the intra-family dispute and the provisions of the Deeds themselves. This object could not be clearer. Contrary to the submissions for the appellants, the parties were indeed agreeing to avoid public scrutiny. The fact that the claims made by Mr Hancock involve the administration of trusts does not affect the meaning persons in the parties' position must have understood the arbitral clause to have.

47 By the time the Hope Downs Deed was executed, Mr Hancock had shown that he was intent on pursuing claims respecting the trusts. It was more than possible that he might challenge the Hope Downs Deed as he had done with respect to the Deed of Obligation and Release. This in large part explains the requirements of cl 12, including that as to lawyers' assurances, which were addressed to the possibility of a dispute about the validity of the deed.

48 A person in the position of the parties to the Hope Downs Deed would have appreciated that disputes might once again arise, not only with respect to the claims made by Mr Hancock concerning the trusts but also concerning the

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25 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35] per French CJ, Hayne, Crennan and Kiefel JJ.

validity of the deed. It is inconceivable that such a person would have thought that claims of the latter kind, raising allegations such as undue influence, were not to be the subject of confidential dispute resolution but rather were to be heard and determined publicly, in open court.

The meaning of cl 14 of the Deed of Obligation and Release

49 The same may be said of the Deed of Obligation and Release. The Deed of Obligation and Release was brought about by Mr Hancock's public statements, which were considered to have the potential to cause damage to the commercial interests of the Hancock Group. The need to avoid this and to ensure the confidentiality of information was critical because of the Joint Venture which was then being negotiated, which would have long-term implications for the Hancock Group. The evident object of the deed was to ensure that there was no further public airing of the claims made by Mr Hancock. It is inconceivable that a party to the deed could have thought that any challenge to it would be determined publicly, in court.

Orders on the appeals

50 The appeals should be dismissed with costs.

Applications for leave to intervene and to be heard as amicus curiae

51 At the outset of the hearing of these appeals the Court confirmed that the Australian Centre for International Commercial Arbitration Limited had been granted leave to file written submissions as amicus curiae but that the applications by Wright Prospecting Pty Ltd ("WPPL") to intervene in the proceedings had been refused. These are the reasons for that refusal.

52 WPPL brought actions against HPPL and HDIO in the Supreme Court of Western Australia in which it claimed royalties payable on iron ore from the Hope Downs mine and a legal interest in the Hope Downs Tenements. Because the appellants alleged that certain of the Hope Downs Tenements form part of the trust assets of the HFMF Trust, of which they and their siblings are beneficiaries, WPPL joined them as necessary parties to the proceedings. HPPL and HDIO applied for orders under s 8(1) of the *Commercial Arbitration Act 2012* (WA) ("the WA Act"), which is in the same terms as s 8(1) of the NSW Act, for a stay of those proceedings on the basis that whilst WPPL is not a party to the Hope Downs Deed, it claims "through or under" HPPL and therefore fell within the extended definition of "party" in s 2(1) of the WA Act. The application was adjourned pending the determination of the Full Court in the proceedings below and remains adjourned.

53 WPPL was granted leave to intervene before the Full Court on a limited basis, to argue that each of HDIO and two other companies are not a "party" as defined by s 2(1) of the NSW Act. That issue is addressed by the respondents to the proposed cross-appeal. There is therefore no need for further submissions from WPPL on that point.

54 WPPL also seeks to make submissions about the construction of cl 20 of the Hope Downs Deed, to the effect that the substantive claims are not within its scope. It seeks to do so because, if that is correct, much of the basis for HPPL's and HDIO's stay application in WPPL's proceedings falls away. It points out that there is no submission put to the Court on this point. The submission overlooks the reason that is so: there is no issue before this Court as to the substantive claims and cl 20. Special leave was confined to whether the validity claims fell within the scope of that clause.

55 Further, the reason for WPPL's intervention does not accord with the basis upon which leave to intervene will be granted, namely when a person's legal interest in, for example, pending proceedings is likely to be substantially affected by the outcome of the proceedings[26]. WPPL asserts this as the basis for its intervention, but in reality the principal effect with which it is concerned is the potential for its proceedings to be delayed, which does not rise to the level of a substantial effect.

The cross-appeal

56 The sixth, seventh and eighth respondents, Roy Hill Iron Ore Pty Ltd ("RHIO"), HDIO and Mulga Downs Iron Ore Pty Ltd ("MDIO") ("the third party companies"), cross-appeal in proceeding S143 of 2018 and seek, pursuant to s 8 of the NSW Act, to stay claims brought against them by the appellants. They are not parties to the Deeds and in this Court they confined their submissions on the cross-appeal to the arbitration agreement in the Hope Downs Deed because that deed contains releases, acknowledgements and covenants on which they seek to rely.

57 At first instance each of them applied[27] to the primary judge for an order that the claims made against them be referred to arbitration pursuant to s 8(1) of the NSW Act on the basis that each of them is a person claiming "through or

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26 *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37 at 38-39 [2]-[3]; [2011] HCA 54.

27 *Rinehart v Rinehart [No 3]* (2016) 257 FCR 310 at 414 [518].

under" a party to the Hope Downs Deed, and, therefore, is a party within the definition of "party" in s 2(1) of the NSW Act. That definition is as follows:

> "***party*** means a party to an arbitration agreement[28] and includes:
>
> (a) any person claiming *through or under* a party to the arbitration agreement, and
>
> (b) in any case where an arbitration does not involve all of the parties to the arbitration agreement, those parties to the arbitration agreement who are parties to the arbitration." (emphasis added)

58 In brief substance, the appellants' claim against the third party companies is that HPPL received the Roy Hill Tenements and the Hope Downs Tenements and, indirectly through HRL, the Mulga Downs Tenement as a knowing participant in Mrs Rinehart's alleged fraudulent and dishonest design, breaches of trust and breaches of fiduciary duty; that HPPL and HRL thereafter transferred those tenements to RHIO, HDIO and MDIO respectively, in breach of trust; and that each of RHIO, HDIO and MDIO received the tenements so assigned with knowledge of the breach of trust, with the result that they now hold the tenements as constructive trustees for the appellants. The third party companies contend that they are claiming through or under HPPL and HRL, and therefore are parties to the arbitration agreement in the Hope Downs Deed, because it is an essential element of their defence to the appellants' claims that HPPL and HRL were beneficially entitled to the tenements, and further or alternatively that HPPL and HRL obtained releases under that deed, to the benefit of which the third party companies are entitled as assignees of the tenements.

59 The primary judge rejected the third party companies' application[29]. The Full Court upheld[30] the rejection of the third party companies' application, primarily on the bases[31] that in order for a defence to qualify as a defence claimed through or under a party it must generally be a "derivative defence"; that the third party companies' invocation of HPPL's and HRL's releases and other

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28 The definition and form of "arbitration agreement" is provided for in s 7 of the NSW Act.

29 *Rinehart v Rinehart [No 3]* (2016) 257 FCR 310 at 417 [535], 418 [540], [541].

30 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 522-523 [323].

31 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 521 [317].

covenants in the relevant deeds was not a derivative defence "in the ordinary sense of that term"; and that the third party companies' invocation of HPPL's and HRL's releases was not an essential element of the third party companies' defences. The Full Court added[32] that there was no legal relationship between HPPL or HRL and the third party companies "relevant to the defence" and, in any event, as no defences had been filed[33], it was not certain that the third party companies would plead those defences.

60 For the reasons which follow, the third party companies' application for leave to cross-appeal should be granted and the cross-appeal should be allowed.

The Full Court's reasoning

61 In this country, the leading authority as to the meaning of "through or under" in its application to s 8 of the NSW Act is this Court's decision in *Tanning Research Laboratories Inc v O'Brien*[34]. In this matter, the Full Court reasoned according to what their Honours perceived *Tanning Research* to have decided. The reasoning of the Full Court proceeded by four steps, as follows.

62 The first was to identify[35] what their Honours described as the "critical passage" in the joint judgment of Brennan and Dawson JJ in *Tanning Research*, which stated as follows[36]:

> "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*

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32 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 521 [317].

33 See *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 514 [290].

34 (1990) 169 CLR 332; [1990] HCA 8.

35 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 519-520 [309].

36 (1990) 169 CLR 332 at 342.

> *the party before the person claiming through or under the party can rely on the cause of action or ground of defence*[37]. A liquidator may be a person claiming through or under a company because the causes of action or grounds of defence on which he relies are vested in or exercisable by the company; a trustee in bankruptcy may be such a person because the causes of action or grounds of defence on which he relies were vested in or exercisable by the bankrupt."

63 The second was to consider[38] the submission put to the Full Court that the liability of a knowing assistant or knowing recipient is "not indirect or derivative". The Full Court continued[39]:

> "Although a knowing assistant or recipient's liability may be described as accessorial liability, that only means that an element of the liability is a breach of fiduciary duty. As the [appellants] correctly submitted, these propositions in the case of a knowing assistant are supported by the decision of the High Court in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at [100]-[106] per Gummow A-CJ, Hayne, Crennan and Bell JJ. We agree with the [appellants] that there is no reason why a similar analysis does not apply in the case of a knowing recipient. In our opinion, the nature of a knowing recipient's liability does support the conclusion that the third party companies are not claiming through or under the defaulting fiduciaries."

That led the Full Court to conclude[40] that the third party companies did not have a derivative defence "in the ordinary sense of that term".

64 The third step was to acknowledge that the notion of claiming through or under a party is not limited to cases of assignment or transfer, but to say that it was beside the point because the only relationship between HDIO, RHIO and MDIO and the party to the Hope Downs Deed under or through whom they purported to claim was not a "legal relationship" but "purely factual"[41]:

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37 The emphasis is that of the Full Court.

38 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 521 [316].

39 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 521 [316].

40 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 521 [317].

41 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 521 [317].

> "We recognise that the cases have made it clear that the extended definition of 'party' is not restricted to cases where there has been an assignment or other means of transfer, but it is relevant that there is no legal relationship between the party to the arbitration agreement and the third party companies relevant to the defence. The fact that they are related parties might explain why the transfer of property took place, but is in itself not sufficient. The only relationship is purely factual, being the transfer of the property from a party to an arbitration agreement to a third party company."

65 The fourth step was to reject that the covenants and releases in the Hope Downs Deed were an essential element in the third party companies' defences, on the basis that the third party companies were not "bound" to raise those releases and covenants as a defence[42]:

> "[W]e do not consider that the releases and other covenants in the deeds are an essential element of the defences of a party to the arbitration agreements and of the third party companies in the relevant sense. It may be accepted that, as a matter of fact, they are highly likely to raise the defences, but they are not bound to do so. A defaulting fiduciary and a knowing recipient may raise different defences".

66 The Full Court's reasoning should be rejected. Beginning with the first and second steps of it, it should be understood that, although Brennan and Dawson JJ stated at one point in their reasons in *Tanning Research* that "through" and "under" convey the notion of a derivative cause of action or ground of defence, their Honours' ultimate formulation of the test was, relevantly, whether an essential element of the defence was or is vested in or exercisable by the party to the arbitration agreement. That accorded to the protean quality of the phrase "through or under" and their Honours' view[43] that its meaning was to be "ascertained not by reference to authority but by reference to the text and context of" the provision in which it appeared[44]. When their Honours' judgment is properly understood in that way, it will be seen that the

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42 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 521 [317].

43 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 342.

44 See also *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 128 [96] per Kiefel and Keane JJ; [2015] HCA 37.

relevance of the observation[45] of the plurality in *Michael Wilson* that a knowing assistant's liability "depends upon establishing … that there has been a breach of fiduciary duty by another" – an observation that applies *mutatis mutandis* to a knowing recipient – is that, putting aside any debate as to whether the liability of a knowing recipient is to be characterised as "accessorial", the statutory conception of "claiming through or under" applies to an alleged knowing recipient of trust property who invokes as an essential element of its defence that the alleged trustee was beneficially entitled to the subject property.

67 To similar effect, but more explicitly, Deane and Gaudron JJ reasoned that whether a party to proceedings is advancing a defence through or under a party to an 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[46]:

> "To ascertain whether s 7(2) [of the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth)] operates in respect of proceedings pending in a court it is necessary to first identify the subject matter of the controversy which falls for determination in those proceedings. Only when that has been done is it possible to identify whether the proceedings 'involve the determination of a matter … capable of settlement by arbitration': s 7(2)(b). *That process of identification is also necessary to ascertain whether, if a party to the proceedings is not a party to the arbitration agreement, he or she is a person 'claiming through or under a party': s 7(4).*" (emphasis added)

68 Further, as Deane and Gaudron JJ went on to explain, it is unnecessary that the issues that the defence puts in controversy in the proceedings be limited to the matter capable of settlement by arbitration. The two need not be co-extensive. It is sufficient that the defence puts in issue, among other things, some right or liability which is susceptible of settlement under the arbitration agreement as a discrete controversy[47]:

> "By requiring that the proceedings or so much of the proceedings as involves the determination of a matter capable of settlement by arbitration

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45 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 457 [106] per Gummow A-CJ, Hayne, Crennan and Bell JJ; [2011] HCA 48.

46 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 350, 353.

47 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 351-352.

> be stayed, s 7(2) clearly contemplates that the proceedings may encompass issues additional to those constituting 'a matter … capable of settlement by arbitration'. …
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> The word 'matter' is not defined in the Act. … In the context of s 7(2), the expression 'matter … capable of settlement by arbitration' may, but does not necessarily, mean the whole matter in controversy in the court proceedings. So too, it may, but does not necessarily encompass all the claims within the scope of the controversy in the court proceedings. Even so, the expression 'matter … capable of settlement by arbitration' indicates something more than a mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. … It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy. The words 'capable of settlement by arbitration' indicate that the controversy must be one falling within the scope of the arbitration agreement and, perhaps, one relating to rights which are not required to be determined exclusively by the exercise of judicial power. …
>
> The substance of the controversy between TRL and the liquidator is the amount, if any, enforceable as a debt for goods sold and delivered to Hawaiian under the licence agreement. That controversy is susceptible of settlement as a discrete controversy. And, when stated in those terms, the controversy is readily seen as one arising out of or relating to the licence agreement and thus encompassed within the agreement to arbitrate contained in cl 10."[48]

69 Turning to the third step of the Full Court's reasoning, it is unclear what their Honours meant in describing the relationship between the third party companies and any party to the arbitration agreement as "purely factual" as opposed to "legal". Presumably, it was intended to emphasise that the third party companies are not privy to the arbitration agreement. But for present purposes, that is beside the point. Relevantly, as has been seen, the allegation against the

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48 See also *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 105-106 [235], 107 [238] per Allsop J; *Autoridad del Canal de Panamá v Sacyr SA* [2017] 2 Lloyd's Rep 351 at 376-377 [125]-[127]; cf *City of London v Sancheti* [2009] 1 Lloyd's Rep 117 at 121 [29] per Lawrence Collins LJ (Richards LJ and Laws LJ agreeing at 123 [40], [41]).

third party companies is that they took the mining tenements as assignees from a party to the arbitration agreement (HPPL or HRL) with knowledge that the tenements had been assigned to HPPL or HRL in breach of trust. The third party companies admit that they took the tenements as assignees from HPPL and HRL. The controversy is as to whether HPPL and HRL were beneficially entitled to the mining tenements and so free to assign the mining tenements to the third party companies without breach of trust. The first and potentially determinative issue is, therefore, whether HPPL and HRL were beneficially entitled to the mining tenements. That is a discrete matter of controversy capable of settlement by arbitration under the arbitration agreement and, as between the appellants and HPPL, has been referred to arbitration in accordance with the Hope Downs Deed[49].

70 There is then the fourth step of the Full Court's reasoning: that the releases and other covenants in the Deeds are not to be regarded as an essential element of the defences of a party to the arbitration agreements and of the third party companies in the relevant sense because, although the third party companies are "highly likely" to raise the defences, they are not bound to do so.

71 That is not so either. It is not a case of the third party companies being "highly likely" to raise the defences. The third party companies have raised the defences. The application for stay of the proceedings was made on the basis that the third party companies raised the defences and therefore that the proceedings as against them should be stayed and the issue raised by the defences referred to arbitration. It is true that the third party companies had not filed and served a defence at the time of making application. But, as counsel for the third party companies submitted, that was due to the requirement for the third party companies to make application for stay under s 8 of the NSW Act no later than making their first statement on the dispute. The primary judge did not consider[50] it necessary to formalise the controversy by ordering that the third party companies file their defences before the determination of the stay application (although her Honour could have and probably should have done so). Nor did any party suggest before the primary judge or in argument before the Full Court that the third party companies had not invoked the defences in a manner in which they could be relied upon. Rather, as the parties had proceeded on the assumption that HPPL, HRL and Mrs Rinehart denied every material allegation

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49 cf *nearmap Ltd v Spookfish Pty Ltd* [2014] NSWSC 1790 at [45].

50 *Rinehart v Rinehart [No 3]* (2016) 257 FCR 310 at 360 [169].

of wrongdoing[51], the matter was argued as if the defences had been raised. Indeed, the appellants had anticipated that the releases and covenants not to sue in the Deeds would be raised in defence to the claims, and so challenged the validity of the Deeds in their statement of claim, albeit in effect by way of reply[52]. And, if there were any doubt about it (which there was not), the order for stay could have been conditioned on the issue being referred to arbitration and the third party companies undertaking to use all reasonable endeavours to prosecute the matter[53].

72 In *Tanning Research*, Brennan and Dawson JJ reasoned as follows[54]:

> "A liquidator who resists a claim made by a creditor against the assets available for distribution on the ground that there is no liability under the general law thus stands in the same position vis-à-vis the creditor as does the company. If the creditor and the company are bound by an international arbitration agreement applicable to the claim, there is no reason why the claim should not be determined as between the creditor and the liquidator in the same way as it would have been determined had no winding up been commenced. To exclude from the scope of an international arbitration agreement binding on a company matters between the other party to that agreement and the company's liquidator would give such agreements an uncertain operation and would jeopardize orderly arrangements: see *Scherk v Alberto-Culver Co*[55]."

73 Likewise here, where an assignee of mining tenements is alleged to have taken the assignment with knowledge that the tenements were held by the assignor upon trust for the claimant and assigned to the assignee in breach of trust, and the assignee contests the claim on the ground that there was no breach of trust or if there were that, by reason of a deed of settlement, the assignor was absolved of responsibility for the breach of trust, the assignee takes its stand upon a ground which is available to the assignor and stands in the same position

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51 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 448 [3]-[4].

52 See *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 506 [245].

53 See, eg, *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* (2014) 44 VR 64 at 74 [41] per Warren CJ, 92 [118] per Nettle JA.

54 (1990) 169 CLR 332 at 342-343.

55 (1974) 417 US 506 at 516-517.

vis-à-vis the claimant as the assignor. Accordingly, since the assignor and the claimant are bound by an arbitration agreement applicable to the claim of breach of trust, there is no good reason why this claim should not be determined as between the claimant and the assignee in the same way as it will be determined between the claimant and the assignor. To exclude from the scope of the arbitration agreement binding on the assignor matters between the other party to that agreement and the assignee would give the arbitration agreement an uncertain operation. It would jeopardise orderly arrangements, potentially lead to duplication of proceedings and potentially increase uncertainty as to which matters of controversy are to be determined by litigation and which by arbitration. And ultimately it would frustrate the evident purpose of the statutory definition.

74 It should be concluded that the third party companies are persons claiming through or under HPPL or HRL and, therefore, are parties within the meaning of s 8 of the NSW Act.

75 In England, it appears still to be doubted that a non-party invoking a defence dependent on the position of a party to an arbitration agreement should be recognised as a person claiming through or under that party[56]: the suggestion being that the only defensible approach would be to stay an action brought against the party to the arbitration agreement in favour of arbitration and then decide whether in all the circumstances it would be just to order a stay against the non-party.

76 That doubt in England stems from the reasoning in *Roussel-Uclaf v G D Searle & Co Ltd*[57], referred to in the reasons of Brennan and Dawson JJ in *Tanning Research*[58], and the subsequent English cases that have treated[59] *Roussel-Uclaf* as holding that a "mere legal or commercial connection" between

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56 See Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement*, 3rd ed (2015) at 233-234 [7.50]. See generally *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at 837 [105]-[106] per Lord Collins of Mapesbury JSC.

57 [1978] 1 Lloyd's Rep 225.

58 (1990) 169 CLR 332 at 341-342.

59 See, eg, *Alfred McAlpine Construction Ltd v Unex Corporation Ltd* (1994) 38 Con LR 63; *Grupo Torras SA v Al-Sabah* [1995] 1 Lloyd's Rep 374; *City of London v Sancheti* [2009] 1 Lloyd's Rep 117.

a parent company and subsidiary is a sufficient basis for the subsidiary to claim "through or under" the parent[60]. For present purposes, two points only need be made. In *Roussel-Uclaf*, Graham J did not suggest that a "mere legal or commercial connection" between the parent company and the subsidiary was sufficient for the subsidiary to claim "through or under" the parent. Rather, as Mance J[61] characterised the ratio of *Roussel-Uclaf* in *Grupo Torras SA v Al-Sabah*, it was that a licence agreement was central to the issues against both the parent company and subsidiary and the position of the subsidiary depended on the entitlement of the parent company under the licence agreement. Secondly, if the parent company were blameless under the licence agreement, the subsidiary as purchaser from the parent would be equally blameless, and, therefore, by invoking the parent company's averred blamelessness under the licence agreement, the subsidiary was "claiming through or under" the parent company. Understood in that way, the approach taken in *Roussel-Uclaf* accords with the *Tanning Research* test.

77 Four things remain to be mentioned. First, Edelman J observes in his dissenting judgment on the cross-appeal that the position of the third party companies is comparable to that of guarantors. The analogy is inapt. This is not a case of a creditor attempting to bind a guarantor to admissions, or an arbitration between creditor and principal debtor, by which the guarantor has not agreed to be bound[62]. This is a matter in which the defendant third party companies claim a defence through or under parties to an arbitration agreement – that those parties were beneficially entitled to mining tenements which they assigned to the defendant third party companies – in circumstances where the appellants agreed with those parties to the arbitration agreement that any dispute as to those parties' beneficial title to the mining tenements would be determined by arbitration. And although there is no privity of contract as such between the defendant third party companies and the appellants, it is not in any sense exceptionable that the defendant third party companies are entitled to hold the appellants to an arbitration agreement by which the appellants agreed with the defendant third party companies' predecessors in title that the appellants would be bound. The statutory expansion of privity effected by the extended definition of "party" in

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60 *City of London v Sancheti* [2009] 1 Lloyd's Rep 117 at 121-122 [30]-[34] per Lawrence Collins LJ (Richards LJ and Laws LJ agreeing at 123 [40], [41]).

61 [1995] 1 Lloyd's Rep 374 at 451.

62 cf *Ex parte Young; In re Kitchin* (1881) 17 Ch D 668.

s 2(1) of the NSW Act accords with the precept that a claimant who takes the benefit of an agreement must accept "the burden of [its] stipulated conditions"[63].

78 Secondly, whether *Tanning Research* applies to contracts of guarantee is not an issue that arises in this matter and it was not the subject of argument. Nor is there any question here more generally of whether, in cases involving more than one contract, a defendant's purported reliance on an arbitral clause in a contract to which the defendant is not party is precluded by the absence of an arbitral clause from the contract to which it is party. It might be (although it need not now be decided) that the nature of a contract of guarantee is such of itself to preclude a guarantor invoking an arbitration agreement between creditor and principal debtor, and so preclude the application of *Tanning Research* to contracts of guarantee. Suffice it to say for present purposes that contracts of guarantee and possibly other securities raise special considerations that do not apply to claims of the kind in issue. When and if the appropriate case arises, the application of *Tanning Research* to guarantees and other securities may be considered with the benefit of full argument and a thorough examination of the English decisions regarding guarantees to which Edelman J refers. It should also be understood that no party made submissions regarding the wider and complex issues of arbitral consent and privity and third party claims more generally, still less submissions regarding how different jurisdictions have approached such issues[64] and how comparative jurisprudence bears upon the Australian framework. Consistently with the common law imperative of incremental development of the law on a case by case basis, attempts to resolve issues raising separate considerations capable of discrete controversy must be eschewed as beyond the boundaries of the resolution of the question of law raised on the cross-appeal.

79 Thirdly, the third party companies do assert the rights of HPPL and HRL, as established or confirmed by the Hope Downs Deed, to pass HPPL's and HRL's beneficial title to the mining tenements to the third party companies, free and

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63 See and compare *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 588-589 [57] per Gummow, Hayne and Kiefel JJ; [2008] HCA 57.

64 See and compare *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763; *Gouvernement du Pakistan – Ministère des Affaires Religieuses v Société Dallah Real Estate and Tourism Holding Company*, Court of Appeal of Paris, 17 February 2011 (Case No 09/28533).

clear of the appellants' claims of breach of trust[65]. In the language of *Tanning Research*, the rights of HPPL and HRL under the deed is an "essential element"[66] of the third party companies' defences said to be vested in and exercisable by the parties to the deed and they are the "subject matter"[67] of the controversy.

80 Finally, *Tanning Research* was not decided on the basis that the liquidator was resisting enforcement of a duty owed by the company. Precisely because "a liquidator is not the company and legal title to the assets of the company is not vested in him", the liability immediately at issue in a proceeding to reverse or modify a liquidator's decision is a liability of the liquidator, albeit one that he or she is allowed to defend on grounds available to the company and to satisfy out of property of the company[68]. The statutory rights and duties of the liquidator in *Tanning Research* depended on, but could not be identified with, the contractual rights and duties of the insolvent company. For the reasons earlier stated, the recognition that the liquidator was claiming through or under the company is dispositive of this cross-appeal.

Orders on the cross-appeal

81 The third party companies' application for special leave to cross-appeal should be allowed. The cross-appeal should be treated as instituted and heard instanter and allowed. Orders 5, 6 and 8 of the orders of the Full Court made on 15 December 2017 should be set aside and, in their place, it should be ordered that:

> "5. The orders of the Court made on 26 May 2016 be set aside and in lieu thereof order:
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> (a) that the proceeding brought in the Court by the applicants being NSD 1124 of 2014 be stayed under s 8(1) of the *Commercial Arbitration Act 2010* (NSW) (**CA Act**) pending any arbitral reference between the parties or until further

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65 cf [99] below.

66 (1990) 169 CLR 332 at 342 per Brennan and Dawson JJ.

67 (1990) 169 CLR 332 at 350 per Deane and Gaudron JJ.

68 (1990) 169 CLR 332 at 341 per Brennan and Dawson JJ.

order, save and except for those claims made against Mulga Downs Investments Pty Ltd; and

(b) the first and second applicants to the main proceedings (being the first and second respondents to the appeals) pay the costs of the moving parties to the interlocutory application filed on 3 November 2014 in proceedings NSD 1124 of 2014 in connection with paragraph 9 thereof and the costs of the moving parties to the interlocutory application filed on 24 December 2014 in those proceedings, subject to Mulga Downs Investments Pty Ltd paying the costs related to the question of whether it is a party to the arbitration agreement pursuant to s 2 of the CA Act.

6. The claims made by the applicants in the underlying proceedings against Mulga Downs Investments Pty Ltd be stayed on the same terms as the stay in order 5.

8. The first and second respondents pay the appellants' costs of appeal including the costs of the application for leave to appeal, subject to Mulga Downs Investments Pty Ltd paying the costs related to the question as to whether it is a party to the arbitration agreement pursuant to s 2 of the CA Act."

82 The respondents to the cross-appeal should pay the cross-appellants' costs of the cross-appeal.

83 EDELMAN J. I agree with the reasons in the joint judgment for refusing the applications for leave to intervene and for dismissing the appeals. Every clause in a contract, no less arbitration clauses, must be construed in context. No meaningful words, whether in a contract, a statute, a will, a trust, or a conversation, are ever acontextual. As the joint judgment in this Court explains, the Full Court of the Federal Court of Australia was correct to treat a fundamental purpose of the Deeds as the quelling of disputes about the title to important commercial assets[69]. That purpose is plain from the context of the Deeds. The context of the Deeds also reveals the importance to the parties of confidential resolution of such disputes, including validity disputes similar to those which the appellants submitted lay outside the scope of the arbitration agreements. This context requires that the words "any dispute under this deed" and "all disputes hereunder" be construed broadly to include the validity claims. For that reason, it is unnecessary in this case to consider the amount of additional weight that should be placed upon the usual consideration of context that reasonable persons in the position of the parties would wish to minimise the fragmentation across different tribunals of their future disputes[70] by establishing "one-stop adjudication" as far as possible[71].

84 I have, however, reached a different conclusion from the joint judgment in relation to the cross-appeal. Whatever might be the effect of the principle of privity upon other issues in arbitration in jurisdictions without a classical commitment to privity[72], or in jurisdictions where the contractual principle of privity has been altered by legislation[73], the cross-appeal unavoidably and directly requires consideration of that principle in Australian law in the limited context of whether New South Wales legislation has required some persons who would not otherwise be parties to an arbitration agreement to sue, and be sued,

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69 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 498 [203].

70 *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 at 958 [13].

71 *Openyd Ltd v G J Lawrence Dental Ltd* [2018] NZHC 1618 at [33].

72 See Mayer, "The Extension of the Arbitration Clause to Non-Signatories – The Irreconcilable Positions of French and English Courts" (2012) 27 *American University International Law Review* 831 at 836, discussing *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 and *Gouvernement du Pakistan – Ministère des Affaires Religieuses v Société Dallah Real Estate and Tourism Holding Company*, Court of Appeal of Paris, 17 February 2011 (Case No 09/28533).

73 *Contracts (Rights of Third Parties) Act 1999* (UK). Compare Stevens, "The Contracts (Rights of Third Parties) Act 1999" (2004) 120 *Law Quarterly Review* 292 at 315-317.

upon it. I conclude that the Parliament of New South Wales did not intend to depart from the principle of privity of contract by the use of the century-old formula concerning "claiming through or under a party", which had a long-standing meaning consistent with privity. In the reasons which follow, I adopt the same terminology as the joint judgment.

The cross-appeal

85 The cross-appeal concerns the extended meaning of "party" in s 2(1) of the *Commercial Arbitration Act 2010* (NSW). That extended meaning includes "any person claiming through or under a party to the arbitration agreement". In my view, the Full Court was correct to conclude that the third party companies do not claim "through or under" HPPL and HRL[74]. To stretch the words of s 2(1), giving them a wide and liberal construction, would be antithetical to the global "fundamental principle that arbitration is a matter of contract"[75] and, consequently, that "parties may specify with whom they choose to arbitrate their disputes"[76].

86 However laudable may be the pragmatic considerations of reducing expense and increasing convenience, there is no basis for an extended meaning of "party" in s 2(1) that would compel a third party to submit its independent claim or defence to arbitration[77], without the third party having consented to the procedure, without an arbitrator to whose appointment the third party had consented[78] in the exercise of its own "voice in the choosing of the

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74 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 522 [323].

75 *Rent-A-Center West Inc v Jackson* (2010) 561 US 63 at 67. See also *Desputeaux v Éditions Chouette (1987) Inc* [2003] 1 SCR 178 at 198 [22]; *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at 810 [24], 837 [106]; *Seidel v TELUS Communications Inc* [2011] 1 SCR 531 at 545 [7]; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 550 [17], 554 [29], 575 [108]-[109]; [2013] HCA 5; *American Express Co v Italian Colors Restaurant* (2013) 570 US 228 at 233.

76 *Stolt-Nielsen S A v AnimalFeeds International Corp* (2010) 559 US 662 at 683 (emphasis omitted). See also *Equal Employment Opportunity Commission v Waffle House Inc* (2002) 534 US 279 at 289, 293-294.

77 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 341; [1990] HCA 8, citing *Bonnin v Neame* [1910] 1 Ch 732 at 738.

78 *Bonnin v Neame* [1910] 1 Ch 732 at 738.

arbitrators"[79], and possibly by a reference to a legal system that would not have been chosen by and would not otherwise have applied to the third party.

The meaning of "any person claiming through or under a party to the arbitration agreement"

87 At its heart, commercial arbitration is based upon the agreement of the parties to a form of alternative dispute resolution[80]. An arbitration clause, in which the parties consent to the resolution of disputes by arbitration, will often be part of a package of rights and duties agreed by the parties. As a general rule, therefore, third parties who do not incur the burdens of the other provisions of the contract should not be entitled to take the benefit of an arbitration clause. Nor should a third party be compelled to go to arbitration by a clause to which it has not agreed. This general rule is not unique to arbitration clauses. It is a basic tenet of justice that a voluntarily assumed obligation should not be imposed upon a person without some manifestation by the person of an undertaking to be bound by the obligation. When considering a motion for an order under s 11 of the *Common Law Procedure Act 1854* (UK) (17 & 18 Vict c 125), which is the origin of the extended definition of "party" in provisions such as s 2(1) of the *Commercial Arbitration Act*, in *Piercy v Young*[81], Jessel MR said:

> "The great object of these [arbitration] clauses is to prevent the delay and expense of litigation, but we must not forget in deciding upon them that they do deprive one of the parties, that is, the one who objects to the arbitration, of the right to resort to the ordinary tribunals of the country, and he is entitled to say, 'Shew me that I have agreed to refer this matter to an arbitrator.'"

88 In other words, the predecessor provision to s 2(1) did not represent an alteration of the basic rules of privity of contract. This context reinforces the meaning of the definition of "party" in s 2(1) of the *Commercial Arbitration Act*. The meaning of s 2(1) requires that, for a third party's claim to be "through or under" a party, the third party seek to enforce or to resist the enforcement of a right held or duty owed by the party[82]. So understood, this is not an exception to privity of contract, because if a third party's claim relies upon or resists a right of

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79 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 24; [1910] HCA 33.

80 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 558-559 [45].

81 (1879) 14 Ch D 200 at 208.

82 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 342.

the party to the arbitration agreement, then the third party is agitating the right of a party and not agitating its own right. Circumstances in which the third party seeks to rely upon the right of a party, and is therefore bound by the arbitration clause, include where the third party's claim is based upon an assignment or novation of the rights of the party[83]: "[t]he assignee takes the assigned right with both the benefit and the burden of the arbitration clause"[84]. The circumstances also include where the third party claim asserts those rights as the principal of the party[85] or where the third party is the trustee asserting the rights of a bankrupt estate[86]. These third party claims within s 2(1) could "equally be introduced pursuant to traditional contract law theories"[87].

89 An interpretation of s 2(1) that maintains the rules of privity of contract is further supported by the consequence that otherwise a person who had not agreed to arbitration could unilaterally be deprived of her, his, or its right of access to the courts. Parliament should not lightly be found to have had such an intention in these circumstances[88]. There are, of course, some express statutory exceptions to privity. One of those is s 11(2) of the *Property Law Act 1969* (WA).

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83 *The "Leage"* [1984] 2 Lloyd's Rep 259 at 262. See *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 341. See also *Freshwater v Western Australian Assurance Co* [1933] 1 KB 515 at 522; *Dennehy v Bellamy* [1938] 2 All ER 262 at 265-266; *Smith v Pearl Assurance Co Ltd* [1939] 1 All ER 95 at 96-97; *The "Padre Island"* [1984] 2 Lloyd's Rep 408 at 414; *The "Jordan Nicolov"* [1990] 2 Lloyd's Rep 11 at 15; *The "Baltic Strait"* [2018] 2 Lloyd's Rep 33 at 38 [25].

84 *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep 279 at 285.

85 *The "Scaplake"* [1978] 2 Lloyd's Rep 380 at 384; *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd* [2003] 1 Lloyd's Rep 190 at 196 [19]; *The "Elikon"* [2003] 2 Lloyd's Rep 430 at 441-442 [57].

86 *Piercy v Young* (1879) 14 Ch D 200. See *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 341, 342.

87 Brekoulakis, *Third Parties in International Commercial Arbitration* (2010) at 107 [3.45].

88 Compare *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248 at 258 [34]; 351 ALR 225 at 233; [2018] HCA 4, citing *Hockey v Yelland* (1984) 157 CLR 124 at 130-131, 142; [1984] HCA 72, *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160; [1991] HCA 33, and *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492-493 [32], 505 [72], 516 [111]; [2003] HCA 2.

The third party companies relied on that exception in the courts below but their submissions on s 11(2) were rejected by the Full Court and those conclusions were not challenged in this Court.

90 The approach consistent with privity of contract was taken by at least three of the five Justices in *Tanning Research Laboratories Inc v O'Brien*[89]. In that case, a liquidator rejected a creditor's proof of debt and the creditor appealed against that rejection to the Supreme Court of New South Wales. The liquidator sought to defend his decision but since the legal title to the assets is vested in the company rather than the liquidator, the liquidator was required to rely upon the rights of the company. The liquidator was entitled to assert the rights of the company because, as Brennan and Dawson JJ (with whom Toohey J agreed[90]) said, the liquidator had the right to say "[i]t is my business to see that those who seek to rank against this estate are persons who are really creditors of that estate"[91]. Although title to the company's assets did not vest in the liquidator as it would for a trustee in bankruptcy, the liquidator had custody and control over the assets and the powers of dealing with the company's assets and therefore the power to assert the rights of the company[92]. In this respect, there was "no reason to distinguish between the position of a liquidator and that of a trustee in bankruptcy"[93].

91 One question was whether the liquidator was "claiming through or under" the company in liquidation, within s 7(4) of the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth), so that he could rely upon an arbitration clause in a contract for the sale of goods to the company. Counsel for the liquidator argued that s 7(4) "is designed to apply to privies, that is third parties whose rights or title in respect of property or contract are derived or claimed ... through the party"[94]. As the joint judgment in this Court later said in *Tomlinson v Ramsey Food Processing Pty Ltd*[95], the "basic requirement of a privy in interest is that the

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89 (1990) 169 CLR 332.

90 (1990) 169 CLR 332 at 354.

91 (1990) 169 CLR 332 at 340, quoting *In re Van Laun; Ex parte Chatterton* [1907] 2 KB 23 at 31.

92 *Ayerst v C & K (Construction) Ltd* [1976] AC 167 at 177, cited in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 339.

93 (1990) 169 CLR 332 at 339.

94 (1990) 169 CLR 332 at 335.

95 (2015) 256 CLR 507 at 515 [17]; [2015] HCA 28, quoting *Ramsay v Pigram* (1968) 118 CLR 271 at 279; [1968] HCA 34.

privy must claim under or through the person of whom he is said to be a privy". Since the third party liquidator must be a privy, the legal "relationship between [the third party and the party] must be an essential ingredient of the claim"[96]. The legal relationship between the third party liquidator and the company establishes the basis upon which the liquidator, as a privy, can assert the rights of, or resist rights claimed against, the company.

92 In *Tanning Research Laboratories Inc v O'Brien*, the liquidator's argument was accepted by Brennan and Dawson JJ (with whom Toohey J agreed). Their Honours explained that "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"[97]. In either case, the issue must involve the enforcement, by or against the third party, of the alleged contractual right that is part of the package that includes the arbitration clause. Their Honours then continued[98]:

> "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."

93 The test of a "derivative action"[99] that was proposed by their Honours is consistent with the basic notion of justice that a person is not bound by new duties to which he or she had not consented. Although their Honours then explained this test "[i]n other words"[100], the further explanation did not limit or qualify the test. The further explanation was that a third party's cause of action will be derived from a party where an essential element of the third party's cause of action was previously vested in the party. Similarly, a third party's defence will be derived from the party where an essential element of the third party's

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96 *Mount Cook (Northland) Ltd v Swedish Motors Ltd* [1986] 1 NZLR 720 at 725.

97 (1990) 169 CLR 332 at 342.

98 (1990) 169 CLR 332 at 342.

99 See also *nearmap Ltd v Spookfish Pty Ltd* [2014] NSWSC 1790 at [45].

100 (1990) 169 CLR 332 at 342.

defence was previously exercisable by the party. As Bingham J put the point in relation to an assignee in *The "Leage"*[101]:

> "The entitlement of the assignor is an essential ingredient of the assignee's claim, to be properly pleaded and proved. The derivative nature of the assignee's claim is underlined by the rule that an assignee takes subject to equities and by the practice of joining the assignor as either plaintiff or defendant in bringing suits on an equitable assignment of a legal chose in action."

94 Their Honours in *Tanning Research Laboratories Inc v O'Brien* concluded that the liquidator, in resisting the proof of debt made by the creditor "against the assets available for distribution", was relying upon the company's rights[102]. But, as their Honours recognised, the position would be different if the liquidator sought to rely upon an entitlement of "him, and him alone"[103], such as the power to go behind a judgment. However efficient, however convenient, and however practical it might be for an arbitration to include all disputes concerning the same proof of debt, the objects of the extended definition of party, and their roots in the tenet of justice that I have mentioned, require "a discriminatory operation"[104] between those disputes that involve the assertion of the company's rights and those that do not.

95 One authority that is contrary to this approach is the "long unpopular"[105] decision of Graham J in *Roussel-Uclaf v G D Searle & Co Ltd*[106]. That decision was overruled in 2008[107]. In *Roussel-Uclaf*, the plaintiffs were an exclusive patent licensee of the second defendant under a licence agreement containing an arbitration clause. The second defendant sold and distributed products through its subsidiary, the first defendant. The plaintiffs sought to restrain both defendants from selling a derivative product. Graham J held that the subsidiary

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101 [1984] 2 Lloyd's Rep 259 at 262.

102 (1990) 169 CLR 332 at 342.

103 (1990) 169 CLR 332 at 343.

104 (1990) 169 CLR 332 at 343.

105 Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement*, 3rd ed (2015) at 234 [7.50]. See also Brekoulakis, *Third Parties in International Commercial Arbitration* (2010) at 108 [3.51].

106 [1978] 1 Lloyd's Rep 225.

107 *City of London v Sancheti* [2009] 1 Lloyd's Rep 117 at 122 [34].

company was "claiming through or under" the parent company by asserting a right to sell the derivative product, which it had obtained from, and been ordered to sell by, the parent company[108].

96 In *Grupo Torras SA v Al-Sabah*[109], Mance J said that it was not easy to extract any principle from the reasoning in *Roussel-Uclaf* that, in some circumstances, a person can be said to be claiming through or under a party "even though he is not himself privy to the agreement by virtue of agency, operation of law, assignment or novation". Although Mance J concluded that *Roussel-Uclaf* could be distinguished on the basis that the licence agreement in that case was central to the issues against both defendants, his Honour certainly did not suggest that a common central issue in dispute was sufficient to constitute a third party as claiming through or under a party. Mustill and Boyd attempted to re-explain the decision as one in which the subsidiary was an agent of the parent, saying that "otherwise it is difficult to see how the [subsidiary] could have taken any part in the arbitration"[110]. But no submission of agency had been made and, in *City of London v Sancheti*[111], Lawrence Collins LJ (with whom Richards and Laws LJJ agreed[112]) held that the decision in *Roussel-Uclaf* was "wrongly decided on this point and should not be followed".

The third party companies do not claim through or under a party

97 The circumstances of the third party companies (RHIO, HDIO, and MDIO) are explained in detail in the joint judgment. The issue concerns the Hope Downs Deed, which was signed by, amongst others, HPPL, HRL[113] and Mrs Rinehart in August 2006. It contains an arbitration clause ("the arbitration agreement"). Each third party company submits that it is a party to the arbitration agreement within the definition of "party" in s 2(1) of the *Commercial Arbitration Act*. This would mean that each third party company would be a party to "an agreement ... to submit to arbitration all or certain disputes which

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108 [1978] 1 Lloyd's Rep 225 at 231.

109 [1995] 1 Lloyd's Rep 374 at 450-451.

110 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 137 fn 2. See also *Alfred McAlpine Construction Ltd v Unex Corporation Ltd* (1994) 38 Con LR 63 at 70.

111 [2009] 1 Lloyd's Rep 117 at 122 [34].

112 [2009] 1 Lloyd's Rep 117 at 123 [40]-[41].

113 Which had by then changed its name to Westraint Resources Pty Ltd.

have arisen or which may arise between them in respect of a defined legal relationship"[114].

98 Although the third party companies in this case seek to take advantage of the arbitration agreement in the Hope Downs Deed, if the third party companies were "parties" within s 2(1) then they would also be bound by the arbitration agreement. In broad terms, the appellants allege that the third party companies were either "knowingly involved in" or "participated in" a fraudulent and dishonest design by Mrs Rinehart amounting to a breach of fiduciary duty. That design is said to have involved the transfer of mining tenements[115] from parties to the Hope Downs Deed to the third party companies. The relief sought against the third party companies includes declarations that they hold the mining tenements on constructive trust, an account and disgorgement of profits, and equitable compensation. The claims against the third party companies are assertions of direct liability[116]; the concern is with a remedy against them, not HPPL, HRL, or Mrs Rinehart[117].

99 The third party companies defend the claims on the basis that they hold unencumbered legal title to the mining tenements. They make no assertion in defence that any of their rights to the mining tenements are derivative. The third party companies' defences include claims that the parties to the Hope Downs Deed had acknowledged in that Deed that HPPL or HRL had full legal and beneficial title to the mining tenements and were entitled to the benefit of releases and covenants not to sue in that Deed, and so were in a position freely to transfer the tenements to the third party companies.

100 None of the third party companies signed the Hope Downs Deed containing the arbitration agreement. RHIO had not even been incorporated at the time of the arbitration agreement[118]. None of the third party companies allege that it took any novation or assignment of any right under the Hope Downs Deed.

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114 *Commercial Arbitration Act*, s 7(1).

115 The Hope Downs tenements, the Roy Hill tenements, and the Mulga Downs tenement.

116 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 457 [106]; [2011] HCA 48.

117 See Gummow, "Dishonest Assistance and Account of Profits" (2015) 74 *Cambridge Law Journal* 405 at 406.

118 RHIO was incorporated on 1 February 2007: *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 515 [292].

None of the third party companies allege that any party to the Hope Downs Deed acted as its agent.

101 There is no dispute about the power of HPPL and HRL to transfer legal title to the mining tenements to the third party companies. Although there is a dispute about whether HPPL and HRL held their legal rights to the mining tenements on trust for the appellants, the denial of this trust by the third party companies involves no reliance by them upon the rights of HPPL or HRL. As Maitland said more than a century ago, a trust does not involve two competing, and co-existing, titles in the subject matter[119]. The third party companies merely deny that the appellants had any equitable proprietary rights against HPPL and HRL in relation to the mining tenements. The issue would not be any different if the third party companies were alleged to have been knowingly involved in a destruction of rights allegedly held on trust rather than knowingly involved in a transfer of those rights. In both cases, the third party companies would be denying the rights of an alleged beneficiary rather than relying upon the rights of the alleged trustee.

102 In summary, although the third party companies' defences rely upon establishing some of the same matters as a defence that could be made by HPPL or HRL, who are signatories to the Hope Downs Deed, the third party companies do not assert any of the rights of HPPL or HRL. They are not bound by any admissions by HPPL or HRL. They defend an independent claim against them by relying upon their own rights.

103 The position of the third party companies can be compared with the established law concerning a third party guarantor who seeks to avoid liability under a guarantee by proving that there was no liability under a principal contract of loan, between a creditor and a debtor, where the principal contract of loan contains an arbitration agreement but the guarantee does not. Like the position of the third party companies and the alleged trustee, the dispute between the creditor and the guarantor might involve the same issue that arises in a dispute between the creditor and the debtor. Also like the position of the third party companies and the alleged trustee, that issue may be capable of being settled by arbitration between the creditor and the debtor under the arbitration agreement. And, again like the position of the third party companies and the alleged trustee, the issue may have been referred to arbitration in accordance with the arbitration agreement. It may be the only issue in dispute between (i) the creditor and the guarantor and (ii) the creditor and the debtor. But, again, like the position of the third party companies and the trustee, the guarantor – who is not a party to the arbitration agreement – is not privy to that agreement because the guarantor does

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119 Maitland, *Equity: also The Forms of Action at Common Law* (1910) at 17-18. See also Maitland, *Equity: A Course of Lectures,* 2nd ed (1936) at 17-18.

not claim "through or under" the debtor[120]. And although the guarantee proceedings might be stayed pending the arbitration in exceptional circumstances, such as where the guarantor had agreed to be bound by the result of the arbitration[121], the guarantor, like the third party companies, is not entitled to the benefit of, nor is to be bound by, the arbitration agreement. It is not the case that a person "who is not bound by any admission of the principal debtor, should be bound by an agreement between the creditor and the principal debtor as to the mode in which the liability should be ascertained"[122].

Conclusion

104 The application for special leave to cross-appeal should be granted but the cross-appeal should be dismissed with costs.

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120 *Daunt v Lazard* (1858) 27 LJ Ex 399 at 400; *Alfred McAlpine Construction Ltd v Unex Corporation Ltd* (1994) 38 Con LR 63 at 70, 75. See also *Ex parte Young; In re Kitchin* (1881) 17 Ch D 668 at 671-672, 673; *The "Vasso"* [1979] 2 Lloyd's Rep 412 at 418-419; *Sabah Shipyard (Pakistan) Ltd v Government of Pakistan* [2008] 1 Lloyd's Rep 210 at 228 [143]; *Classic Maritime Inc v Lion Diversified Holdings Berhad* [2010] 1 Lloyd's Rep 59 at 63-64 [21]-[24].

121 *Roche Products Ltd v Freeman Process Systems Ltd* (1996) 80 BLR 102 at 130; *Stemcor UK Ltd v Global Steel Holdings Ltd* [2015] 1 Lloyd's Rep 580 at 590 [53].

122 *Ex parte Young; In re Kitchin* (1881) 17 Ch D 668 at 672.