IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S144 of 2018**

BETWEEN

BIANCA HOPE RINEHART
First Appellant

JOHN LANGLEY HANCOCK
Second Appellant

AND

GEORGINA HOPE RINEHART (IN HER PERSONAL CAPACITY AND AS TRUSTEE OF THE HOPE MARGARET HANCOCK TRUST AND AS TRUSTEE OF THE HFMF TRUST) AND OTHERS NAMED IN THE SCHEDULE
Respondents

APPELLANTS' SUBMISSIONS

Yeldham Price O'Brien Lusk
Level 4, 1 Chifley Square
Sydney NSW 2000

Tel: (02) 9231 7000
Fax: (02) 9231 7005
Ref: Timothy Price

Part I: Certification

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

Part II: Statement of issues

2. This appeal arises in the context of two applications by the respondents for proceedings before the Federal Court of Australia to be stayed pursuant to s 8(1) of the *Commercial Arbitration Act 2010* (NSW) ("**the CA Act**").[1] Those applications were made in circumstances where the appellants challenge the validity of the arbitration provisions on which the respondents rely, as well as the deeds in which they appear. In the exercise of her discretion, the primary judge determined that there should be a trial of the question whether the agreements constituted by those arbitration provisions were null and void, inoperative or incapable of being performed within the meaning of s 8(1). In other words, her Honour refused to refer the question of the application, in this litigation, of the so-called proviso to s 8(1) of the CA Act for determination by an arbitral tribunal. The Full Court of the Federal Court ("**the Full Court**") thereafter upheld the respondents' appeal against her Honour's decision and made orders effectively acceding to their application for a stay.

3. In so doing, the Full Court held that her Honour's exercise of discretion was attended by error in at least two respects. The first was that her Honour failed, as required by the principle of separability embodied in s 16 of the CA Act, to identify an attack by the appellants on the relevant arbitration provisions separate and distinct from their attack on the deeds containing those provisions (FC [392]). Given the basis on which special leave was granted, that is not within the scope of this appeal. The second error was said to lie in the primary judge's having misconstrued various of the relevant arbitration clauses before her, which in turn produced an erroneous understanding of which issues fell within and which fell outside those provisions (FC [391]). In particular, the Full Court discerned error in her Honour's view that where an arbitration clause in an agreement is expressed to deal with disputes "under" that agreement, it does not cover disputes as to the agreement's validity. Whether the Full Court was correct in so concluding is the sole issue in this appeal.

Part III: Section 78B Notice

4. The appellants consider that no notice is required to be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

---

[1] Subsection 8(1) of the CA Act states: "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."

Part IV: Reasons for judgment below

5. The judgment of the primary judge ("**J**") is reported as *Rinehart v Rinehart (No 3)* [2016] FCA 539; (2016) 337 ALR 174; (2016) 16 ACSR 1. The judgment of the Full Court ("**FC**") is reported as *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170; (2017) 350 ALR 658.

Part V: Facts

"The substantive claims"

6. As is recorded at FC [2], the appellants' Statement of Claim ("**SOC**") alleges that following the death in 1992 of her father, Mr Langley George Hancock, Mrs Rinehart (the first respondent in S144/2018) controlled all of the entities in the so-called "Hancock Group", including the trusts which owned shares in Hancock Prospecting Pty Ltd ("**HPPL**") (the first respondent in S143/2018) and the Hancock Family Memorial Foundation Limited ("**HFMF**") (the tenth respondent in S143/2018 and eleventh respondent in S144/2018). The trusts in question were:

   (a) the "HFMH Trust", under which the issued share capital in HFMF was held, through an entity known as Zamoever Pty Ltd ("**Zamoever**"), on trust for Mrs Rinehart's children, being the appellants and their sisters, the twelfth and thirteenth respondents in both proceedings; and

   (b) the "HMH Trust", under which Mr Hancock had, until his death, held 15.6 per cent of the shares in HPPL on trust for Mrs Rinehart's children.

7. Central to the appellants' case is the allegation that both the HFMF Trust and HMH Trust were established pursuant to an agreement entered into by Mr Hancock and Mrs Rinehart in 1988 ("**the 1988 Agreement**"), which contemplated, having regard to HFMF's 33.3 per cent shareholding in HPPL, that:

   (a) 51 per cent of HPPL would be held by Mrs Rinehart; and

   (b) the remaining 49 percent of HPPL and 100 per cent of HFMF would be owned by her children.

8. As is again recorded at FC [2], the appellants plead that having obtained control of the Hancock Group in 1992, Mrs Rinehart, in breach of her duties as a fiduciary and a trustee, and with the knowing assistance of HPPL, sought:

   (a) to transfer all of the valuable mining assets held by HFMF (including the mining tenements now known as the Hope Downs Tenements) to HPPL, because she held shares in HPPL and had no financial interest in HFMF; and

(b) to renege upon and circumvent the 1988 Agreement by bringing about a situation in which she held a 76.55 per cent shareholding in HPPL, whereas her children held only a 23.45 per cent shareholding.

9. This part of the appellants' case, which is pleaded at SOC [128]-[274], was referred to in the reasons of the primary judge as the "substantive claims" (J [166]) and is to be distinguished from what her Honour termed the "validity claims", which "concern mainly the circumstances in which the [appellants] came to execute the various deeds containing the alleged arbitration agreements" (J [167]).

"The validity claims"

10. The history behind the validity claims is described at FC [61]-[101] and commences with the second appellant, upon investigating the affairs of the HMH Trust in late 2003, alleging "wrongdoing by Mrs Rinehart and HPPL concerning the transfer of missing interests out of the [HFMF Trust] and the reduction in shares in HPPL held for the children" (FC [61]). This culminated, in October 2004, in the provision to Mrs Rinehart and HPPL of an unsworn affidavit, prepared on behalf of the second appellant, which the Full Court described as revealing the themes of the SOC.

11. The allegations contained in that unsworn affidavit were advanced in the context of a prospective joint venture between HPPL and Rio Tinto Ltd in relation to the Hope Downs Tenements, which joint venture was consummated in March 2006 (FC [64]). It was in that setting that the second appellant executed two deeds, the first a deed of loan, and the second a document to which it is convenient to refer as the "Deed of Obligation and Release", which was also executed by the second appellant's three sisters (including the first appellant), Mrs Rinehart, HPPL, HFMF, the directors and officers of HPPL and the executors of Mr Hancock's estate. The Deed of Obligation and Release designated the second appellant as "Covenantor" and made provision, in cl 3, for the Covenantor, in consideration of various financial benefits:

(a) to release the Releasees (defined in cl 1 to mean, amongst others, HPPL, HFMF and Mrs Rinehart in her capacity as trustee of the HMH Trust) "from all and any liability, claims, demands, suits and actions of any nature whatsoever"; and

(b) to abandon "any claims against all and singular the Releasees which he may, but for this provision, at the date of executing this Deed have had on any account whatsoever".

12. Clause 14 of the Deed of Obligation and Release provided:

> "This Deed shall be governed by and shall be subject to and interpreted according to the laws of the State of Western Australia, and the parties hereby agree, subject to all disputes hereunder being resolved by confidential mediation and arbitration in Western Australia, to submit to the exclusive jurisdiction of the Courts of Western Australia for all purposes in respect of this Deed."

13. On 1 July 2005, the joint venture between the Hancock and Rio Tinto groups was announced (FC [72]). Shortly thereafter, the second appellant filed an affidavit in proceedings that had been commenced by Mrs Rinehart in the Supreme Court of Western Australia in relation to the HMH Trust and the HFMH Trust, in which affidavit he alleged that Mrs Rinehart had committed "grave breaches of trust". The second appellant proceeded in this fashion on the asserted basis that releases given in the Deed of Obligation and Release had been procured by undue influence (FC [73]).

14. In August 2006, the first appellant, her sisters, Mrs Rinehart and HPPL signed what is referred to as "the Hope Downs Deed". That document was described as follows by the Full Court (FC [77]):

> "its purpose was to quell disputes as to title concerning the mining tenements, especially Hope Downs. The deed involved releases of claims (which terms were drawn widely). The attempt to draft the widest possible release is to be seen in the definitions of 'claims' and 'Proceedings' which specifically included reference to the September 2005 version of Mr Hancock's unsigned affidavit and the subsisting Supreme Court proceedings. In return for acknowledgments of title, releases and promises not to sue, HPPL agreed to pay dividends on a quarterly basis, conditional upon compliance with the deed."

15. Such compliance similarly conditioned the obligation on Mrs Rinehart, in her capacity as trustee of the HMH Trust, to "pay any dividend received from HPPL ... to the Beneficiaries in equal shares of one-quarter each on the relevant dates" (cl 5(b)). Indeed, pursuant to cl 5(c), if any one or more of the Beneficiaries committed a breach of the Hope Downs Deed, HPPL was obliged to pay any further dividends to holders of B Class shares in HPPL. Mrs Rinehart was the ultimate beneficial holder of all such shares.

16. Crucially for present purposes, cl 20 of the Hope Downs Deed made provision for a process of dispute resolution "[i]n the event that there is any dispute under this deed". That process was to be initiated by the provision of a notification to all parties that there was a dispute. Clause 20.2 then provided that "[w]here the disputing parties are unable to agree to an appointment of a mediator for the purposes of this clause T within fourteen (14) days of the Notification or in the event any mediation is abandoned then the dispute shall on that date be automatically referred to arbitration".

17. The second appellant was not a party to the Hope Downs Deed as it was initially executed. He nonetheless acceded as a party, with a view purportedly to being bound by the releases given in that document, following the execution by him (and by Mrs Rinehart and his three sisters, amongst others) of what is termed the "April 2007 HD Deed". It suffices presently to say, without traversing in detail the provisions of that document, that cl 9.2 of the April 2007 HD Deed was relevantly identical to cl 20.2 of the Hope Downs Deed.

18. It is convenient at this point merely to note that the second appellant, Mrs Rinehart and HPPL executed subsequent deeds, pursuant to which the appellant was to be provided further financial benefits. These are the 2009 Deed of Further Settlement and the 2010 Deed of Variation, both of which may be distinguished from the deeds that preceded them on the basis that they each contain an arbitration clause that covers disputes "arising out of or in relation to" the relevant deed.

19. As for the substance of the validity claims, the allegations advanced by the appellants are summarised as follows in the reasons of the Full Court (FC [101]-[104]):

> "In sections 23 to 30 of the statement of claim, [the first appellant's] claims for relief in relation to the Hope Downs Deed and April 2007 Deed are pleaded: false representations as to the need for and benefits of the agreement, fraudulent concealment of the existence of the claims against Mrs Rinehart and HPPL for breaches of trust and duty, misleading and deceptive conduct by the representation made and by material non-disclosure, unconscionable conduct, undue influence, duress, breach of trust and fraud on a power. Various claims for relief are made: declarations that the Hope Downs Deed, the arbitration clause within it, the April 2007 HD Deed and the arbitration clause within it are void, orders restraining the enforcement of the releases and arbitration clauses, and claiming to rescind the Hope Downs Deed, the April 2007 Deed and the arbitration clauses in them.
>
> ...
>
> In sections 31 to 37 of the statement of claim, Mr Hancock's claims for relief in relation to the deeds executed in 2005 and the April 2007 HD Deed are pleaded: misleading and deceptive and unconscionable conduct, false representations, material and fraudulent non-disclosures, unconscionable conduct, undue influence, duress, breach of trust and fraud on a power.
>
> In section 38 of the statement of claim, Mr Hancock's claims for relief in relation to the 2009 and 2010 deeds of variation are pleaded.
>
> In sections 39 to 41, the further claims about the wrongful deployment of the deeds are pleaded."

Procedural history

20. By two interlocutory applications filed 3 December 2014 and 23 December 2014 respectively, the respondents sought a stay of the proceedings and an order that the parties be referred to arbitration.

21. As has already been alluded to, the primary judge made orders on 26 May 2016 requiring that there be a trial of the question whether any of the following agreements is null and void, inoperative or incapable of being performed within the meaning of s 8(1) of the CA Act or the *Commercial Arbitration Act 2012* (WA): cl 14 of the 2005 Deed of Obligation and Release, cl 20.2 of the Hope Downs Deed, cl 9.2 of the 2007 HD Deed, cl 16 of the 2009 Deed of Further Settlement and cl 11 of the 2010 Deed of Variation. In making those orders, her Honour:

(a) rejected the suggestion that the validity claims formed part of a dispute "under" the Hope Downs Deed or the April 2007 HD Deed (J [645] and [649]-[650]);

(b) accepted that the Court has a discretion about whether to make a determination that the relevant arbitration agreement is null and void, inoperative or incapable of being performed (J [119]) or whether to refer that question to arbitration;

(c) described as a factor favouring a trial on that question the circumstance that the first appellant's claims for relief impugning the validity of the Hope Downs Deed and the 2007 HD deed do not fall within the scope of any arbitration agreement (J [666(1)]).

22. On appeal, the Full Court rejected propositions (a) and (c) above. That, combined with a narrower understanding of the basis on which the appellants asserted that the relevant arbitration agreements were "null and void", caused their Honours to exercise their discretion in favour of referring the question of whether those agreements were in fact "null and void" to arbitration. As a consequence, their Honours ordered "that proceeding brought in the Court by [the appellants] being NSD 1124 of 2014 be stayed under s 8(1) of [the CA Act] pending any arbitral reference between the parties or until further order".

23. It is against that order that the appellants now appeal.

Part VI: Argument

24. At FC [200] the Full Court observed that "[t]he word 'under' is capable of varied relational reach, depending on the context." Nonetheless, even prepositions or prepositional phrases of "varied relational reach" can only reach so far, and in so doing, cover different distances. Thus, while the impulse to avoid resort to "legal and linguistic ingenuity differentiating prepositional phrases" (FC [182]) is understandable, there is no reason to think that the law in this country has abandoned the notion that different words quite often mean different things. The Full Court

appeared to accept as much when their Honours observed that "[t]he meaning of 'any dispute under this deed' may be narrower than the meaning of other phrases, such as 'a dispute in connection with this deed'" (FC [202]). And yet in explaining the content of the expression "any dispute under this agreement", their Honours included within its scope "a dispute that contained a substantial issue that concerned the exercise of rights or obligations in the agreement, or a dispute that concerned the existence, validity or operation of the agreement as a substantial issue, or a dispute the resolution of which was governed or controlled by the agreement" (FC [193]). It is difficult to see what might be covered by the phrase "a dispute in connection with this agreement" that was not included in that range of possible disputes. As will be developed below, this highlights the extent to which an approach to the construction of arbitration clauses that emphasises liberality over language and assumptions as to motivations over text obliterates real distinctions between different words and phrases.

The assumption on which the Full Court proceeded

25. Underpinning the Full Court's conclusions was the assumption, expressed by Gleeson CJ in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*,[2] that "[w]hen the parties to a commercial contract agree ... to refer to arbitration any dispute or difference arising out of the agreement ... [t]hey are unlikely to have intended that different disputes should be resolved before different tribunals." Two points in particular emerged from their Honours' reasons concerning the significance of that assumption. The first was that the assumption does not involve the adoption of "some legal rule outside the orthodox process of construction" (FC [185]); instead, it is merely a recognition of the commercial purpose of arbitration clauses, where:

(a) that purpose is reflected in "what reasonable persons would have in mind in the situation of the parties";[3] and

(b) "[t]he assessment of what reasonable persons would have in mind in the situation of the parted can be influenced by what courts have said about such contracts or the market or environment in which they are made" (FC [165]).

26. The second point was that the assumption informed the approach of the House of Lords in the case reported as *Fiona Trust & Holding Corporation v Privalov*,[4] in which their Lordships accepted, in the context of an arbitration clause, that the phrase "[a]ny dispute arising under" the relevant contract was apt to include disputes

---

[2] (1996) 39 NSWLR 160 at 165.
[3] *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 996.
[4] [2008] 1 Lloyd's Rep 254.

concerning that contract's validity, "whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else".[5]

27. In *Francis Travel* itself,[6] Gleeson CJ referred to *Ethiopian Oilseeds v Rio del Mar*,[7] in which it was held that a claim for rectification involved a dispute "arising out of" the relevant contract for the purposes of an arbitration clause. That decision, and the reasoning underlying it, were said by his Honour to reflect "the current state of the law in New South Wales".[8] This is significant because the arbitration clause considered in *Ethiopian Oilseeds* spoke of "[a]ny dispute arising out of *or under* this contract" (emphasis added), and while Hirst J accepted that the phrase "arising out of" should "be given a wide interpretation covering disputes other than one as to the very existence of the contract itself", he also observed that "'arising under' standing alone would probably not cover rectification".[9] It follows then that the mere adoption of the assumption expressed in *Francis Travel* does not, of itself, render implausible or incorrect a construction of the phrase "any dispute under this deed" that excludes disputes concerning the deed's validity. So much was recognised by Warren J in *BTR Engineering (Australia) Limited v Dana Corporation*,[10] a circumstance that, with respect, undermines the Full Court's dismissal of her Honour's reasoning as proceeding upon a selective reading of the Shorter Oxford Dictionary (FC [196]).

28. It is doubtful whether, having regard to his reference to a scenario in which "the parties to a commercial contract agree ... to refer to arbitration any dispute or difference *arising out of* the agreement" (emphasis added), Gleeson CJ intended the assumption which he expressed in *Francis Travel* to apply in any other circumstance. Given his Honour's approving reference to *Ethiopian Oilseeds*, and the remarks in that case concerning the distinction between "arising out of" and "arising under", the scenario that he described should be distinguished from one in which the parties agree to refer to arbitration any dispute *under* the relevant agreement.

29. In *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd*,[11] Evans J observed that a distinction, "obviously clear and justified as a matter of law", may be drawn "between those clauses which refer to arbitration only those disputes which may arise regarding the rights and obligations which are created by the contract itself, and other clauses which show an intention to refer some wider class or classes

---

[5] Id at 257 [15].
[6] (1996) 39 NSWLR 160 at 165.
[7] [1990] 1 Lloyd's Rep 86.
[8] (1996) 39 NSWLR 160 at 165.
[9] [1990] 1 Lloyd's Rep 86 at 97.
[10] [2000] VSC 246 at [23].
[11] [1988] 2 Lloyd's Rep 63 at 67.

of disputes." That distinction was said by Austin J in *ACD Tridon v Tridon Australia*[12] to be "reflected in Australian cases". That it has been recognised puts paid to the notion, implicit in the Full Court's reading of *Francis Travel*, that it would be absurd, and therefore an outcome that a court should try to avoid when construing an arbitration clause, for contracting parties to refer to arbitration only a subset of the disputes that might arise between them.

30. To the contrary, commercial parties should (if anything) be assumed, when entering into agreements, to understand those agreements to be valid and binding, such that, in the absence of clear words to the contrary, the class of disputes that they contemplate referring to arbitration are those which take as a given the validity of those agreements. As Evans J further remarked in *Overseas Union*,[13] the distinction posited in the preceding paragraph "may also be one which would be recognised by the parties whose contract it is, for at the very least, by making the contract, they demonstrate their agreement to create a new category of legal rights and obligations, *legally enforceable between themselves*" (emphasis added). This is not to suggest that such an assumption would straightforwardly inform the construction of arbitration clauses: first, a number of conflicting assumptions may be made concerning the intentions of commercial parties with respect to the arbitration of disputes; secondly, there is no adequate basis, empirical or otherwise, upon which this Court might conclude that one assumption is more likely to reflect reality than the other.

31. As for *Fiona Trust*, it is by no means obvious, *pace* the Full Court, that their Lordships' approach "does not reflect the imposition of a legal rule upon the process of construction" (FC [185]). That does not appear to be a fair description of the proposition, advanced in the leading speech of Lord Hoffmann, that "unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction", an arbitration clause should be construed in accordance with a "presumption" that the parties 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".[14] This was said to be "the approach adopted in Germany",[15] which approach was then importantly described by Lord Hope of Craighead as establishing a "rule of construction .... which presumes, in cases of doubt, that reasonable parties will wish to have claims arising from their contract decided by the

[12] [2002] NSWSC 896 at [155].
[13] [1988] 2 Lloyd's Rep 63 at 67.
[14] [2008] 1 Lloyd's Rep 254 at 257 [13].
[15] Id at 257 [14].

same tribunal irrespective of whether their contract is effective or not".[16] The Full Court itself conceded that the German authority relied on by Lord Hoffmann, and referred to by Lord Hope, "can be seen as the expression of a legal rule that to a degree dominates the process of construction" (FC [184]).

32. To this may be added the circumstance that one does not find in Lord Hoffmann's speech any consideration of the ordinary meaning, or the range of possible meanings, of the word "under". Instead, his Lordship merely observed that "[i]f one adopts this approach [being the approach adopted in Germany and which he commended to his fellow Lords of Appeal in Ordinary], the language of [the relevant arbitration clause] contains nothing to exclude disputes about the validity of the contract".[17] It is thus difficult to avoid the impression, expressed by Bathurst CJ in *Rinehart v Welker*,[18] that the House of Lords in *Fiona Trust* was giving recognition to a rule, unique to arbitration clauses, that in the absence of clear and express language to the contrary, such clauses are presumptively to be construed as referring to arbitration all disputes arising out of the relationship between contracting commercial parties.

33. That putative rule is plainly at odds with the proposition, accepted in this country, that when one is construing a contract, "the natural meaning of the language used must receive its effect unless, upon a proper application of the rules of interpretation, a contrary intention is found to be contained within the instrument".[19] The reasoning of the Full Court is redolent of the approach described in *Fiona Trust*. On the other hand, their Honours did consider the range of possible meanings that might be ascribed to the preposition "under". Specifically, their Honours consulted the Shorter Oxford Dictionary (FC [196]) and referred to the jurisprudence concerned with the phrase "arising under a law of the Parliament" in s 76(ii) of the *Constitution*, which in turn prompted the observation, noted above, that "[t]he word 'under' is capable of varied relational reach, depending on the context" (FC [200]). Nonetheless, their Honours then failed to take the essential step of identifying the particular meaning of the word "under" that would permit the phrase "under this agreement" to be read as including "a dispute that contained a substantial issue that concerned the exercise of rights or obligations in the agreement, or a dispute that concerned the existence, validity or operation of the agreement as a substantial issue, or a dispute the resolution of which was governed or controlled by the agreement" (FC [193]). After all, it does not follow from the mere fact of a word having a "varied relational reach" that that

---

[16] Id at 260 [30].
[17] Id at 257 [15].
[18] [2012] NSWCA 95 at [121].
[19] *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd* (1935) 53 CLR 618 at 636.

reach extends so far as to support a given construction of a phrase containing that word.

34. It is no answer to this to say that their Honours had, elsewhere in their reasons, drawn to attention the decision in *Mackender v Feldia AG*,[20] in which "a dispute as to whether an insurance policy could be avoided for breach of the common law duty of non-disclosure was found to be a dispute 'under' the contract of insurance (FC [169]). Beyond bare statements to the effect that a dispute as to non-disclosure was a dispute "arising under" the policy,[21] one does not find in the judgments of Lord Denning MR and Diplock LJ in *Mackender v Feldia* any reasoning concerning the meaning of the phrase "arising under". Moreover, a close reading of both judgments discloses that their Lordships saw a dispute as to the avoidance of an insurance policy on the grounds of non-disclosure as being, fundamentally, a dispute concerned, not with the validity of the policy, but rather with whether an insurer could lawfully "repudiate" that policy – "that is to say ... treat it as at an end so far as concerns any future performance".[22] That being so, *Mackender v Feldia* is not authority for the proposition that in the context of a jurisdiction clause or an arbitration clause, a dispute as to a validity of a contract is a dispute "arising under" that contract, and reliance on that decision is no substitute for the identification of that meaning of the word "under" which supports the Full Court's conclusions. That the Full Court omitted to take that step rather suggests that their Honours were deflected from orthodox textual and contextual interpretation by a concern to give effect to the assumption supposedly expressed in *Francis Travel.*

35. There is a further reason for caution in adopting an approach to construction that assigns a prominent, if not determinative, role to an assumption concerning the intentions of commercial parties. The deeds that the Court is now asked to consider were entered into in the context of a pre-existing trustee-beneficiary relationship between Mrs Rinehart and the appellants, amongst others. That relationship conferred upon the appellants various rights, including the right to inspect the accounts of the HMF Trust,[23] to compel the due administration of that trust and to seek, pursuant to s 77 of the *Trustee Act* 1962 (WA), the appointment of a new trustee in place of Mrs Rinehart. Those rights, which exist independently of the deeds the subject of this appeal, were sought to be enforced in *Rinehart v Welker*,[24] in circumstances where the NSW Court of Appeal had previously accepted that "[t]he proper conduct of trustees

---

[20] [1976] 2 QB 590.
[21] Id at 598 and 603.
[22] Id at 603.
[23] *Spellson v George* (1987) 11 NSWLR 300 at 315-316.
[24] [2012] NSWCA 95.

is a matter which warrants close public scrutiny".[25] Mrs Rinehart sought to avoid that public scrutiny by relying on various provisions of the Hope Downs Deed as part of her defence and asserting that the entirety of the dispute between the parties was thereby a "dispute under this deed" required to be (confidentially) arbitrated. It is no part of the appellants' case to submit that claims brought by beneficiaries against trustees are not arbitrable. Nonetheless, a Court is entitled to be cautious when considering any suggestion that beneficiaries in the position of the appellants would have been content, by the bland language of the arbitration clauses now in issue, to forego the right to litigate in open court their claims for the relief sought in *Rinehart v Welker*. After all, given the courts' "inherent supervisory jurisdiction over the administration of trusts",[26] that is no small alteration to the rights of beneficiaries, extending beyond the subject matter of the Hope Downs Deed, which, as the Full Court observed (FC [203]), was directed to the quelling of disputes about the title to certain mining assets.

36. Seen in this light, the assumption that contracting parties intend to have all disputes connected with their contract heard in the one arbitral tribunal is more readily made when the contract in question defines the entirety of their relationship, including by creating it in the first place. But where the contract is entered into in the context of a pre-existing trust arrangement, that should, at the very least, be cause for tempering any enthusiasm for that assumption. This is because giving prominence to the assumption in such circumstances creates the risk that one might ignore the totality of the context by reference to which, in a case of ambiguous meaning such as this, one discerns "what each party by words and conduct would have led a reasonable person in the position of the other party to believe".[27]

37. That context includes "the surrounding circumstances known to the parties". Accordingly, an arbitration clause can only be construed in accordance with an assumption that "the parties, as rational businessmen, are likely to have intended any dispute arising out of [their] relationship ... to be decided by the same tribunal",[28] to the extent that the circumstances surrounding the formation of the relevant agreement indicate that it was the product of commercial dealings between "rational businessmen". As the primary judge observed at J [145], the respondents' stay applications "were heard on the express basis that the Court would not make any factual findings about whether the asserted arbitration agreements are vitiated by

---

[25] *Rinehart v Welker* [2011] NSWCA 403 at [52].
[26] *Rinehart v Welker* [2012] NSWCA 95 at [173].
[27] *Toll (FGCT) Pty Limited v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40].
[28] *Fiona Trust* [2008] 1 Lloyd's Rep 254 at 257 [13].

fraud or other misconduct". This prompted the Full Court to conclude (FC [240) that her Honour should not have found that "the deeds were not the product of a commercial negotiation" and were not entered into "after a process of disclosure of information material to the financial consequences of the deeds for the applicants or an opportunity to obtain comprehensive legal and financial advice about the implications of the deeds" (J [666(3)]). That aspect of the Full Court's reasoning is not challenged in this appeal. Nonetheless, if it was inappropriate for her Honour to make those findings, then it was similarly inappropriate for the Full Court to construe the relevant arbitration clauses by reference to an assumption, which itself proceeded upon the unspoken premise that the Deeds were "the product of a commercial negotiation". It follows then that that assumption should have been accorded little, if any, weight. At the very least, the Full Court should have approached the deed as one that, whilst it touched on such topics as title to various mining assets and the distribution of dividends, was nonetheless an agreement between a parent and her children – and not as if it were an agreement between, say, the Hancock and Rio Tinto groups. Their Honours' approach thus more closely resembles the adoption of a presumption, as occurred in *Fiona Trust*, than the orthodox process of construction.

The proper construction of the relevant arbitration clauses

38. The effect of the Full Court's approach threatens substantively to elide the distinction – which their Honours accepted in principle – between the phrases "any dispute under this deed" and "any dispute in connection with this deed". Perhaps mindful of this, their Honours proposed to limit the reach of the former phrase by describing it as covering "a dispute which is framed by claims that are said to be met by pleading the deed, which in turn is said to be liable to be set aside for wrongful conduct that does not amount to a plea that the deed never existed whether by a plea of *non est factum*, or some other circumstance" (FC [204]). Implicit in this is that a dispute as to whether a deed ever existed is not a "dispute under this deed".

39. However, if the basis of the Full Court's approach were correct, it is not clear why this should be so. A plea of *non est factum* can be made good by showing that the party advancing that plea "signed the document in the belief that it was radically different from what it was in fact and that, at least as against innocent persons, his failure to read and understand it was not due to carelessness on his part".[29] But a person who signs a document in those circumstances is no more deserving of the opportunity to litigate his or her point in open court than a person who was induced by fraud or unconscionable conduct to execute a deed whose validity he or she now

[29] *Petelin v Cullen* (1975) 132 CLR 355 at 360.

impugns. It is true that the successful invocation of the defence of *non est factum* results in the relevant instrument being void, whereas unconscionable conduct has the consequence of rendering an instrument merely amenable to being set aside by curial order. However, that does not mean that a dispute involving a plea of *non est factum* is so much further removed from the contract in issue than a dispute concerning unconscionable conduct as to be outside the "relational reach" of the word "under". Reference should also be made to Sir Frederick Pollock's observation that "[t]he use of the word *void* proves nothing, for it is to be found in cases where there has never been any doubt that the contract is only voidable".[30]

40. This might explain why, elsewhere in their Honours' reasons, the Full Court said that the phrase "any dispute under this agreement" is sufficiently expansive to encompass "a dispute that concerned the *existence*, validity or operation of the agreement as a substantial issue" (emphasis added) (FC [193]). Their Honours' reasoning was marked by internal inconsistency, simultaneously:

(a) insisting upon a liberal construction that gives primacy to the assumption that commercial parties entering into agreements containing arbitration clauses are likely to intend that all disputes arising out of their relationship should be determined by the one arbitral tribunal; and

(b) recognising a difference in meaning between the phrases "any dispute under this deed" and "any dispute in connection with this deed".

41. In this dilemma, the ordinary usages of English should prevail, and not a judicial preference for adopting as a touchstone an assumption concerning the intentions of commercial parties that may or may not have any basis in reality, let alone a basis revealed by some empirical investigation. There is accordingly no reason to doubt the correctness, and the applicability in this appeal, of Evans J's observation in *Overseas Union* that disputes regarding the rights and obligations created by a contract "may well be described, as a matter of language, as ones arising 'under' the contract".[31] That observation accords with the remark by French J, as his Honour then was, in *Paper Products Pty Ltd v Tomlinsons (Rochdale) Limited*[32] that the phrase "[a]ny dispute between the parties hereto arising under this agreement" involved "a restricted form of words which in their terms, and as construed in the courts, limit the reference to matters arising ex contractu".

---

[30] *Principles of Contract*, 10th ed (1936) at 56, quoted in *Posner v Collector for Inter-State Destitute Persons (Victoria)* (1946) 74 CLR 461 at 483.
[31] [1988] 2 Lloyd's Rep 63 at 67.
[32] (1993) 43 FCR 439 at 448.

42. To say, as the Full Court did (FC [199]), that the approach reflected in this remark is "not liberal" is beside the point. The matter may be illustrated in a different setting. There can be no doubt that the *Constitution*, being "a mechanism under which laws are to be made and not a mere Act which declares what the law is to be",[33] should be given a liberal construction in the absence of any indication to the contrary.[34] And yet the phrase "any matter ... arising under any laws made by the Parliament" in s 76(ii) of the *Constitution* has been held to refer to a matter in which "the right or duty in question ... owes its existence to Federal law or depends on Federal law for its enforcement",[35] or "a defence or answer based on a Commonwealth law is tendered as stating an issue for decision",[36] where, critically, it is neither necessary nor sufficient that the matter might merely involve the interpretation of a Commonwealth law. This is not to say that there is some helpful analogy to be drawn from the cases concerning s 76(ii). Rather, it is to emphasise that the English language has not succumbed to such a state of post-modern indeterminacy that to insist upon the liberal construction of an instrument or a provision therein affords a basis for expanding, beyond colloquial understanding, the range of matters or disputes that might arise "under" that instrument.

43. There is a further inconsistency in the Full Court's reasoning. Having put to one side the jurisprudence concerned with s 76(ii) of the *Constitution* on the basis that "one meaning of the word 'under' should not necessarily control the meaning of the phrase 'dispute under this deed'" (FC [200]), their Honours construed the expression "any dispute", like the word "matter" in Ch III of the *Constitution*, as referring to the whole of any dispute or controversy between the parties (FC [201]). It was then said that this "reinforces the broader construction of 'under this deed'" (FC [201]).

44. However, there is no discernible reason why, in construing the compound expression "any dispute under this deed", one should first consider the term "dispute" in isolation, and having assigned it a particular meaning, deploy that as an aid in construing "under this deed". To reason in this manner is to ignore the circumstance that the words "under this deed" are an adjectival phrase qualifying the term "dispute", such that it is more appropriate to regard that adjectival phrase as bearing upon the width of the expression "any dispute", than vice versa. It would be an error then to take that expression, without any further indication from its context, as referring to the entirety of an extended controversy between the parties. At the risk of

---

[33] *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469 at 612.
[34] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 368.
[35] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154.
[36] *Felton v Mulligan* (1971) 124 CLR 367 at 388.

repetition, such an approach would have resulted in the claims for relief considered in *Rinehart v Welker*, which claims bore little, if any, connection to the questions of title sought to be resolved in the Hope Downs Deed, being seen as giving rise to a "dispute under this deed" merely by reason of Mrs Rinehart's reliance on the deed in her defence. It must be asked whether a reasonable person would actually regard the beneficiaries of the HFMF Trust or the HMH Trust as having been content, merely by executing the Hope Downs Deed, to surrender any opportunity to seek in open court the enforcement of, say, their right to access the records of either trust.

45. Accordingly, even before one comes to consider the reasons of Bathurst CJ in *Rinehart v Welker*,[37] it is apparent that the Full Court's construction of the arbitration clauses in the 2005 Deed of Obligation and Release, the Hope Downs Deed and the April 2007 HD Deed was attended by error. If, in the face of an assumption concerning the intentions of parties entering into commercial agreements, the dictates of ordinary English necessitate the preservation of the real distinction between "any dispute under this deed" and "a dispute in connection with this deed", then it is necessary to recognise some limit upon the scope of the former expression. Bathurst CJ supplied such a limit when he remarked that "if the outcome of the dispute was governed or controlled by the [Hope Downs Deed], then there would be a dispute under the [Hope Downs Deed] *irrespective of whether the claimant was invoking or enforcing some right created by the [Hope Downs Deed]*" (emphasis added).[38] The italicised words suggest that his Honour saw the scope of the expression "any dispute under this deed" as extending somewhat further than disputes strictly concerning the rights or obligations created by the deed. To that extent, his Honour's construction was liberal and not unduly narrow. There is, after all, nothing narrow about the class of disputes whose outcomes are governed or controlled by a given commercial contract, particularly if that contract regulates the entirety of the relationship between the parties. And if the contract does not so regulate, then there is nothing that amounts to an abandonment of a liberal approach in construing an arbitration clause so that it does not apply to every dispute arising out of the parties' relationship.

46. It might be said against the construction proffered by Bathurst CJ that it produces some measure of difficulty in a situation where an allegation of breach of contract is met by a defence that the conduct said to have constituted the breach simply did not occur, as the outcome of such a dispute may not be governed or controlled by the relevant agreement. However, this conflates the question whether a contractual

---

[37] [2012] NSWCA 326.
[38] [2012] NSWCA 95 at [125].

provision has been engaged, by breach or otherwise, with the question whether the outcome of a dispute is governed or controlled by the contract. For even in the postulated circumstance, the ultimate inquiry for the tribunal charged with resolving the dispute involves assessment of the defendant's conduct against the norm constituted by the contractual obligation said to have been breached. The fact that one possible outcome of that inquiry is that the alleged conduct is found not to have occurred does not alter the nature of the inquiry, and to that extent, the outcome of the dispute remains governed by the relevant agreement. In any event, there can be no doubt that such a dispute is, as Evans J put it in *Overseas Union*, a dispute "regarding the rights and obligations which are created by the contract itself", and thus should be seen as arising "under" the contract.

47. It follows then that:

(a) the primary judge did not err in finding that the so-called "validity claims" engaged neither cl 20.2 of the Hope Downs Deed nor cl 9.2 of the 2007 HD Deed (J [646], [649]-[650]); and

(b) her Honour should have made orders dismissing the respondents' interlocutory processes in so far as they related to the "validity claims"; and

(c) the order that the Full Court should have made in relation to those confined matters which their Honours held to constitute a separate attack on the validity of the arbitration agreements, was to remit the matter to her Honour to re-exercise her discretion as to whether the Federal Court should determine the applicability of the so-called "proviso" to s 8(1) of the CA Act.

48. Finally, there can be no suggestion that the relief sought in this appeal would be futile on the basis that some form of arbitration is inevitable, at least with respect to the so-called "substantive claims". If the primary judge were called on to re-exercise her discretion in relation to the forum for determination of any question concerning the "proviso" to s 8(1), there is no small prospect that her Honour might decide that there should be a trial of that question in the Federal Court. After all, if the "validity claims" were not arbitrable, it would require no great expansion of the matters in issue before the Court for the two matters identified by the Full Court (at FC [386]) as constituting a separate attack on the validity of the arbitration agreements to be heard alongside those "validity claims". And if the appellants succeeded in establishing that the arbitration agreements were "null and void, inoperative or incapable of being performed", there would simply be no arbitration.

Part VII: Applicable constitutional and statutory provisions

49. Subsection 8(1) of the CA Act is reproduced in footnote 1 above.

50. Section 16 of that statute relevantly provides:

> "(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.
>
> (2) For that purpose, an arbitration clause which forms part of a contract is to be treated as an agreement independent of the other terms of the contract.
>
> (3) A decision by the arbitral tribunal that the contract is null and void does not of itself entail the invalidity of the arbitration clause."

Part VIII: Orders sought

51. The appellants seek the following orders:

(a) Appeal allowed.

(b) Orders 2, 5, 6, 7 and 8 of the orders of the Full Court of the Federal Court of Australia dated 15 December 2017 in NSD916/2016 and NSD922/2016 be set aside and in lieu thereof order:

(i) The appeals be allowed in part.

(ii) Order 2 of the orders of the Federal Court of Australia dated 26 May 2016 in NSD1124/2014 be set aside.

(iii) The matter be remitted to the primary judge to determine, in accordance with law, whether there should be a trial of the question whether any of the following agreements is null and void, inoperative or incapable of being performed within the meaning of s 8(1) of the *Commercial Arbitration Act 2010* (NSW) or the *Commercial Arbitration Act 2012* (WA):

(A) Clause 14 of the 2005 Deed of Obligation and Release;

(B) Clause 20.2 of the Hope Downs Deed;

(C) Clause 9.2 of the 2007 HD Deed;

(D) Clause 16 of the 2009 Deed of Further Settlement; and

(E) Clause 11 of the 2010 Deed of Variation.

on the basis of the matters pleaded in 288 and 290 of the statement of claim.

(iv) In so far as the interlocutory applications dated filed 3 December 2014 and 23 December 2014 relate to:

(A) the relief sought in prayers 35 to 48 of the originating application; and

(B) the claims pleaded in paragraphs 275 to 287, 289 and 290 to 509 of the statement of claim,

the applications be dismissed.

(v) The costs of the appeals to the Full Court of the Federal Court of Australia in NSD916/2016 and NSD922/2016 be the costs of the interlocutory applications dated 3 and 23 December 2014.

(c) The respondents pay the appellants' costs of the appeal to this Court.

Part IX: Time for oral argument

52. The appellants estimate that one hour will be required for the presentation of oral argument on their behalf.

Date: 6 July 2018

	Bret Walker		Gerald Ng
Phone	(02) 8257 2527	Phone	(02) 9233 4275
Fax		Fax	(02) 9221 5386
Email	maggie.dalton@stjames.net.au	Email	gng@7thfloor.com.au

SCHEDULE

150 INVESTMENTS PTY LTD (ACN 070 550 159)
Second Respondent

HANCOCK PROSPECTING PTY LTD (ACN 008 676 417)
Third Respondent

HANCOCK MINERALS PTY LTD (ACN 057 326 824)
Fourth Respondent

TADEUSZ JOSEF WATROBA
Fifth Respondent

WESTRAINT RESOURCES PTY LTD (ACN 009 083 783)
Sixth Respondent

HMHT INVESTMENTS PTY LTD (ACN 070 550 159)
Seventh Respondent

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

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

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

HANCOCK FAMILY MEMORIAL FOUNDATION LTD (ACN 008 449 312)
Eleventh Respondent

HOPE RINEHART WELKER
Twelfth Respondent

GINIA HOPE FRANCES RINEHART
Thirteenth Respondent

MAX CHRISTOPHER DONNELLY (IN HIS CAPACITY AS TRUSTEE OF THE BANKRUPT ESTATE OF THE LATE LANGLEY GEORGE HANCOCK)
Fourteenth Respondent

MULGA DOWNS INVESTMENT PTY LTD (CAN 132 484 050)
Fifteenth Respondent