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 AND OTHERS NAMED IN THE SCHEDULE TO THE NOTICE OF APPEAL
Respondents

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. The appellants characterise the "sole issue in this appeal" as being whether the Full Court was correct in concluding that the primary judge erred in finding 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" (see AS [3]).

3. That issue arises from the Full Court's disagreement at FC [245]-[250] with the primary judge's conclusion at J [645] in which the primary judge said:

> I do not accept the characterisation of the "validity claims" as matters raised in reply to releases and bars lead to the conclusion that they form part of a dispute "under" the Hope Downs deed. This is because the existence of a dispute "under" the Hope Downs deed depends upon the existence of the deed itself. The Hope Downs deed cannot govern and control the outcome of a dispute about its validity.

4. The Full Court disagreed with the primary judge for three reasons.

5. First, the Full Court held that a construction of "under the deed" as limited to governed and controlled by the deed itself, as the primary judge held, is overly narrow and the product of an incorrect interpretation of the phrase "under the deed". The Full Court

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concluded that the phrase is wide enough to cover a dispute in which the existence or validity of the deed itself is put in question (FC [247]).

6. Secondly, the Full Court did not agree that the primary judge's conclusion that the "validity claims" amounted to separate "disputes" for the purposes of the deeds. The Full Court held that the "validity claims" are part of the one dispute or controversy (FC [248]).

7. Thirdly, the Full Court found that there was a sustainable argument that the claims to set the deeds aside are challenges to the rights of Hancock Group members to Hancock Group Interests and so can be seen to be themselves in breach of and controlled by the Hope Downs Deed (FC [249]).

10 8. While the appellants' "sole issue" focuses on the first reason for the Full Court's disagreement with the primary judge, it does not address the second and third reasons.

9. In these circumstances the issue on the appeal is best expressed as whether the Full Court was correct in its conclusion that the "validity claims" fall within the scope of the relevant arbitration agreements, being cl 14 of the 2005 Deed of Obligation and Release, cl 20.2 of the Hope Downs Deed and cl 9 of the 2007 HD Deed (FC [214]-[215] and J [245]-[250]).

Part III: Section 78B Notice

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

20 **Part IV: Material facts**

11. Although general reference is made to the surrounding circumstances leading up to the entry into the Hope Downs Deed in particular, the appellants omit express reference to the following facts relevant to the construction of the deeds and which are the subject of unchallenged findings by the Full Court at FC [61]-[86].

12. In late 2003, or perhaps earlier, the second appellant (Mr Hancock) began to investigate the affairs of the HMH Trust. By mid-2004 there was reference in communications between Mrs Rinehart and Mr Hancock to litigation. The correspondence alleged wrongdoing by Mrs Rinehart and HPPL in or about 1992 concerning the transfer of missing interests out of the trust (the HFMF Trust) and the reduction in shares in HPPL
30 held for the children. Mr Hancock had solicitors acting for him in relation to these issues and the possible litigation (FC [61]).

13. By October 2004, Mr Hancock's solicitors, Butcher Paull & Calder, sent Mrs Rinehart and HPPL an early version of an unsworn affidavit of Mr Hancock concerned with complaints about the HMH Trust (FC [62]). The allegations in the unsworn affidavit

were a claim that Mrs Rinehart had dishonestly breached her duty as trustee, should be replaced and the trust's administration, hitherto undertaken by her, reviewed. The breadth of the claims amounted almost to a claim for general administration of the trust and extended to any breach of trust found to have occurred (FC [63]).

14. In April 2005 two closely related deeds were entered into by Mr Hancock (Deed of Obligation and Release and Deed of Loan). The Deed of Obligation and Release was signed by Mr Hancock, his three sisters, Mrs Rinehart, HPPL, HFMF, the directors and officers of HPPL and the executors of Lang Hancock's estate (FC [65]). A significant aspect to this background was the prospect of a joint venture with the Rio Tinto group over the Hope Downs Tenements that was to the knowledge of all being negotiated at the time, and the need to stabilize the question of ownership of tenements as a safe foundation for this important external commercial relationship (FC [64]).

15. The recitals to and terms of the 2005 Deed of Obligation and Release are set out at FC [65]-[70]. They include a release from, inter alia, Mr Hancock's assertion contained in his unsworn affidavit that HPPL (through its subsidiary HDIO) was not the true owner of the Hope Downs Tenements. They also include an acknowledgement by Mr Hancock that he acted "wholly without duress in making this Deed" and that, before executing the deed, he had received independent advice (FC [68]).

16. In exchange for the releases, Mr Hancock received several millions of dollars and the use of two apartments on a rent free basis for his personal residence and access to an apartment on a cruise liner and a farm.

17. Shortly after the execution of the Deed of Obligation and Release, on 1 July 2005, the Hancock and Rio Tinto parties executed documentation concerning the Hope Downs Joint Venture and the joint venture was announced (FC [72]).

18. Despite Mr Hancock's broadly framed releases in the 2005 Deed of Obligation and Release, shortly after the announcement of the joint venture, he gave notice of his intention to become a party to, and make an application in, proceedings in the Supreme Court of Western Australia concerning the trusts that had been brought by his mother, Mrs Rinehart; and through his solicitors, he stated, contrary to his acknowledgment in the Deed of Obligation and Release, that he considered himself free of the releases (entered into only months before) in the 2005 Deeds because they were said to be the product of undue influence (FC [73]).

19. In late September 2005, Mr Hancock filed a supporting affidavit in the Supreme Court in which he alleged that Mrs Rinehart had committed "grave breaches of trust". That affidavit made allegations including:

    a. the removal of the Hope Downs Tenements (which had been publicly reported to have a value of around $1.6 billion) from the control of the trust;

    b. the reduction of the trust's ownership or control of shareholding in [HPPL];

    c. the simultaneous increase in Mrs Rinehart's shareholding in HPPL from 51% to about 76%; and

    d. Mrs Rinehart refusing any financial support from the trust after early 2003 and inadequate support previously (FC 73]).

20. In November 2005, Ms Bianca Rinehart made a record of a conversation she had with Mr Hancock as follows (FC 74]):

> John stated that I was not to assume his attack against [Mrs Rinehart] was over. He said that Hope Downs "belongs to the children" and that because he was aware [Mrs Rinehart] was under immense pressure to get the Hope Downs deal signed in time for a Government deadline of 30 June 2005, that is why he decided to "hit her up" for a "few mill" then, but that his 'case' against [Mrs Rinehart] was by no means over... he stated that he would fight for ownership of our company's other assets (excluding Hope Downs) – ie Roy Hill, and that he would float these once he had control of them.

21. In March 2006, the parties signed the Hope Downs Joint Venture Agreement involving the Rio Tinto group over the Hope Downs Tenements (FC [75]).

22. In August 2006 the Hope Downs Deed was signed, amongst others, by Ms Bianca Rinehart, her two sisters, Mrs Rinehart and HPPL (FC 76]). Although Ms Rinehart now says she signed the deed unwillingly, she received legal advice (FC [76]). At FC [77], the Full Court recorded the following in relation to the Hope Downs Deed:

> It is plain from the recitals and terms of the Hope Downs Deed that its purpose was to quell disputes as to title concerning the mining tenements, especially Hope Downs. The deed involved releases of claims (which were drawn widely). The attempt to draft the widest possible release is to be seen from 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 acknowledgement of title, releases and promises not to sue, HPPL agreed to pay dividends on a quarterly basis, conditional upon compliance with the deed.

23. The relevant terms of the Hope Downs Deed are set out or summarised at FC [79] including clause 12 which "contains various acknowledgements to the effect that the parties entered into the deed freely, without duress or influence and agreeing to be bound

irrespective 'of the mother/child/beneficiary aspects of the HMH Trust relationships between GHR, the Trustee and the Beneficiaries' " J [380].

24. The Hope Downs Deed was not signed by Mr Hancock; though the draft form anticipated his signature (FC [81]). However, with the execution of the Hope Downs Deed, all four children had signed wide releases: Mr Hancock in the 2005 Deed of Obligation and Release and his three sisters in the Hope Downs Deed (FC [82]).

25. Mr Hancock had shown that he was prepared to continue to challenge Mrs Rinehart by his actions in 2005 in the Supreme Court and by the deployment of the updated unsworn affidavit in those proceedings. Mrs Rinehart was anxious to have Mr Hancock commit to a settlement (FC [82]). This led to the April 2007 Deed which facilitated Mr Hancock becoming a party to the Hope Downs Deed (FC 83]).

26. Pursuant to the 2007 HD Deed, which was executed by Mrs Rinehart, Mr Hancock and HPPL, Mr Hancock received *inter alia* a salary of $750,000 per annum in return for an abandonment of all claims, including the allegations made in his updated unsworn affidavit (FC [86]).

27. On the date of execution of the 2007 HD Deed, Mr Hancock's solicitors wrote to HPPL in the following terms (FC [86]):

> We confirm that we have advised John Langley Hancock on the terms of the Confidential Settlement Deed Final received 12 April 2007.
>
> Our client has read the Deed, understood its terms, and has obtained advice from Robert Butcher in respect of it. He will execute the Deed of his own volition. He agrees to be bound by its terms.

28. Further, although general reference is made (AS [19]) to the "substance of the validity of the claims", with reference to FC [101]-[104], this reference fails to disclose the very significant degree of overlap between and cross–referencing to the factual allegations the subject of the substantive claims in the validity claims. The validity claims extensively cross reference to sections 8 – 19 of the Statement of Clam which deal with the substantive claims (either directly or indirectly through paragraphs 288-290).

Part V: Argument in answer to the argument of the appellants

Reasons of the Full Court

29. Before responding directly to the argument of the appellants, it is necessary to first outline the reasons why the Full Court concluded that all of the "validity claims" fall within cl 14 of the 2005 Deed of Obligation and Release, cl 20.2 of the Hope Downs Deed and cl 9 of the 2007 HD Deed.

30. In relation to the 2005 Deed of Obligation and Release, the Full Court observed that the primary judge did not separately consider whether the "validity claims" relating to the Deed of Obligation and Release were "disputes hereunder" but concluded that for the reasons given in relation to the Hope Downs Deed and the 2007 HD Deed, the validity claims as to the 2005 Deed of Obligation and Release were, and are, part of the dispute that involves the application of the deed (FC [214]). Further, the Full Court said there is a sustainable argument that cll 6(a), (b) and (c) and 7(b) of the Hope Downs Deed released the "validity claims" in relation to the 2005 Deed of Release (FC [215]).

31. In relation to the Hope Downs Deed and the 2007 HD Deed, as outlined in paragraphs 5 to 7 above, the Full Court gave three reasons for reaching this conclusion. First, a construction of "under the deed" as limited to governed and controlled by the deed itself is overly narrow and the product of an incorrect interpretation of the phrase "under the deed" (FC [247]). Secondly, the "validity claims" are part of the one dispute or controversy (FC [248]). Thirdly, there is a sustainable argument that the making of the "validity claims" are challenges to the rights of Hancock Group members to Hancock Group Interests and, therefore, is a breach of, and controlled by, the Hope Downs Deed (FC [249]).

32. The appellants focus on the first reason and neglect the second and third, which also received little attention on the special leave application. In essence, the appellants concentrate attention on the word "under" and say that "under" must be construed narrowly and, following what Bathurst CJ said in *Rinehart v Welker,*[1] the word "under" necessarily confines the operation of the deeds to issues which are "governed or controlled" by the deeds themselves.

33. The Full Court disagreed with this narrow view for following three reasons (FC [205]):

> First, [Bathurst CJ] applied earlier cases in which different phrases were construed and which revealed, in our respectful view, an overly narrow, dictionary-based meaning to an elastic relational phrase. Secondly, the whole phrase "any dispute under this deed" was not the subject of focus, and were it to have been, a liberal construction of "any dispute" as "controversy" would have militated against any narrow relationship between the operation of the deed and the dispute. Thirdly, the objective context of the execution of the Hope Downs Deed and the 2007 HD Deed reinforce the objectively wide meaning to the extent it can be given to the phrase "any dispute under the deed".

34. The appellants do not seek to grapple in any meaningful way with the second and third reasons for the Full Court's disagreement. Indeed, the appellants do not make any

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[1] [2012] NSWCA 95; (2012) 95 NSWLR 221.

substantive reference to the context of the surrounding circumstances known to the parties at the time, and the purpose and the object of the transaction, being clear and uncontroversial matters relevant to the construction of the deeds: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*[2] (see FC [191]).

35. The context of the surrounding circumstances and the purpose and the object of the transaction was important to the Full Court's decision, as is clear from FC [203]:

> Further, the context of these deeds was one that tended to widen, not narrow, the likely operation of the deeds. The context of the three deeds in 2005, 2006 and 2007 was the growing claims of one or more of the children that their mother had committed breaches of trust in dealing with the valuable mining assets. By the time of the execution of the Hope Downs Deed, Mr Hancock had signed releases and acknowledgments in the Deed of Obligation and Release and within months had sought to renege on these by setting aside the arrangement by asserting undue influence. He had apparently said to his sister, Ms Rinehart, that he viewed the Deed of Obligation and Release as a means of extracting money from his mother. One of the fundamental purposes of the Hope Downs Deed was the quelling of disputes about the title to the assets in a context where at least one sibling had expressed the view that he was not bound by an earlier deed, and where such quelling was of great commercial importance to the prospective arrangements with Rio Tinto. The context of the 2007 HD Deed was the same – Mr Hancock had previously asserted that he was not bound by a deed entered into by him two years before. Objectively, the Hope Downs Deed and the 2007 HD Deed had the purpose of quieting disputes about title, as did, on its face, the Deed of Obligation and Release.

36. This context and purpose is also important for disposition of this appeal.

37. Turning back to the reasons of the Full Court, it is important to outline why the Full Court concluded that Bathurst CJ's reasons revealed an overly narrow, dictionary-based meaning to an elastic relational phrase.

38. The Full Court began at FC [163] by recording that the construction of any arbitration clause in a contract is governed by principles of the common law of Australia attending the construction and interpretation of contracts. The construction and interpretation of written contracts is to be undertaken by an examination of the text of the document in the context of the surrounding circumstances known to the parties, including the purpose and object of the transaction or of the subject matter of the agreement and by assessing how a reasonable person would have understood the language in that context.[3]

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[2] [2004] HCA 52; 219 CLR 165 at 179 [40].

[3] *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; 210 CLR 181 at 188 [11]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; 218 CLR 451 at 461-462 [22]; *Zhu v Treasurer of the State of New South Wales* [2004] HCA 56; 218 CLR 530 at 559 [82]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 at 179 [40]; *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; 234 CLR 151 at 160 [8] and 174 [53]; *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; 251 CLR 640 at 656-657 [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; 256 CLR 104 at 116-117 [46]-[52]; *Victoria v Tatts Group Ltd* [2016] HCA 5;

39. The Full Court then said at FC [164]-[165] that the assessment of what reasonable persons would have in mind in the situation of the parties can be influenced by what courts have said about such contracts in the market or environment in which they are made and that doing so did not involve putting a gloss on the High Court cases referred to in footnote 4 below, but reflected the expression of principle in them.

40. At FC [166], the Full Court said that in the context of arbitration agreements, a rational assumption of reasonable people is that *"the parties do not intend the inconvenience of having possible disputes being heard in two places."* This approach reflected the reasoning of Gleeson CJ (with whom Meagher and Sheller JJA agreed) in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways,*[4] where Gleeson CJ used the expression at 165-166 the *"correct general approach to problems of this kind"*. As the Full Court correctly said at FC [167]:

> The existence of a "correct general approach to problems of this kind" does not imply some legal rule outside the orthodox process of construction; nor does it deny the necessity to construe the words of any particular agreement. But part of the assumed legal context is this correct general approach which is to give expression to the rational assumption of reasonable people by giving liberal width and flexibility where possible to elastic and general words of the contractual submission to arbitration, unless the words in their context should be read more narrowly. One aspect of this is not to approach relational prepositions with fine shades of difference in the legal character of issues, or by ingenuity in legal argument (Gleeson CJ in *Francis Travel* at 165); another is not to choose or be constrained by narrow metaphor when giving meaning to words of relationship, such as "under" or "arising out of" or "arising from". None of that, however, is to say that the process is rule-based rather than concerned with the construction of the words in question.

41. The Full Court then made three further comments about the correct general approach to construction of arbitration clauses before turning to a discussion of the decisions of the House of Lords in *Fiona Trust and Holding Corporation v Privalov*[5] and the NSW Court of Appeal in *Rinehart v Welker:*

    a. at FC [168], the Full Court commented that Gleeson CJ in *Francis Travel* at 165 approved not only the decision, but also the reasoning of Hirst J in *Ethiopian Oilseeds & Pulses Export Corporation v Rio Del Mar Foods Inc.*[6] The Full Court said that although Hirst J was dealing with the phrase "arising out of", his

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328 ALR 564 at 575 [51]; and *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; 343 ALR 58 at 61 [7].

[4] (1996) 39 NSWLR 160.

[5] [2007] UKHL 40' [2008] 1 Lloyd's Rep 254.

[6] [1990] 1 Lloyd's Rep 86.

reasoning is important because it reflected a refusal to be bound by any narrowness of approach which assumed the temporal existence of a contract before something could arise out of it;

b. at FC [169], the Full Court commented that in considering the meaning of "under" or "hereunder" the decision in *MacKender v Feldia AG*[7] should be recalled. There the Court of Appeal held that the claim as to the invalidity of a contract (by avoidance for non-disclosure and illegality) was "under the contract";

c. at FC [170]-[172], the Full Court commented on some features of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*[8] in which the Full Court rejected the reasoning of Emmett J in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) (The Kiukiang Career)*[9] to the extent that his Honour had rejected the approach of the primary judge who had relied on Hirst J in *Ethiopian Oilseeds* and the decision of French J in *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd.*[10] Insofar as *Paper Products* is concerned, the Full Court commented that, context aside, they disagreed with the proposition that there was little or no elasticity in the phrase "any dispute… arising under the agreement" and that they are a "restricted form of words."

42. At FC [173]-[186] the Full Court considered *Fiona Trust,* noting at the outset that they did *"not consider the arguments about* Fiona Trust *to be critical to the resolution of the appeals"* (FC [173]) and that *"the dispute as to* Fiona Trust *does not matter"* (FC [193]).

43. At FC [177]-[185], the Full Court considered the speeches of Lord Hoffmann and Lord Hope in *Fiona Trust.*

44. Insofar as the speech of Lord Hoffman is concerned, the Full Court concluded (at FC [182]):

> We do not see how this departs from the approach of Gleeson CJ in *Francis Travel.* Indeed, it is reflective of it. The assumption to be made is identical. To require that language be clear to move the assumption should not be read as a legal rule beyond one that gives work to do for the assumption. It is a text based construction, but one in which the assumption has a real role to play – not the subject of a nod, before fine textual analysis takes place using legal linguistic ingenuity differentiating prepositional phrases using spatial and temporal metaphors derived from, or imposed on, the words. The assumption of an

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[7] [1967] 2 QB 590.
[8] [2006] FCAFC 192; 157 FCR 45.
[9] [1998] FCA 1485; 90 FCR 1.
[10] [1993] FCA 494; 43 FCR 439.

appropriate common sense contextual framework is not foreign to, but part of, an orthodox approach to construction.

45. It was in this light, that the Full Court considered the decision of Bathurst CJ in *Rinehart v Welker.*

46. At FC [193] the Full Court disagreed with Bathurst CJ that *Fiona Trust* says that arbitration clauses should be construed irrespective of the language used or that it says anything different in substance from *Francis Travel* and *Comandate* (to which reference was made by his Honour without criticism). What was important, the Full Court said at FC [193], was *"the correct general approach referred to by Gleeson CJ in Francis Travel – that sensible parties do not intend to have possible disputes that may arise herd in two places. Effect is given to that assumption by interpreting words liberally when they permit that to be done."*

47. However, at FC [194] the Full Court stated that the dispute as to *Fiona Trust* did not matter because the Chief Justice had in terms applied the liberal approach.

48. Where the Full Court disagreed with Bathurst CJ was in the application of the liberal approach (stated in cases such as *Francis Travel* and *Comandate*) to the phrase "under this deed". In this regard, the Full Court said at [199]-[200]:

> With the utmost respect to Bathurst CJ, the limitation of disputes that are (necessarily) governed or controlled by the deed is narrow, not liberal. It is a construction that does not take account of the breadth of possible meaning of the phrase revealed by either dictionaries or by its context, or by judgments such as the Court of Appeal in *Mackender v Feldia* and Viscount Dilhorne and Lord Salmon in *The Evje*, and it is a construction which does not give meaning to a liberal approach to words that are capable of a broader construction. That it is a phrase that may be narrower in meaning than other phrases does not mean that its meaning is narrow.
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> ...
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> The word "under" is capable of varied relational reach, depending on the context. The broader construction which we have suggested above can be taken as an example.

<u>The appellants' argument</u>

49. The appellants' argument begins by suggesting that the Full Court's construction of the word "under" is an abandonment of the notion that different words quite often mean different things (AS [24]). This is not so. As the Full Court emphasises, context is fundamentally important in ascertaining the meaning of the word or the phrase that is to be construed. As the Full Court said at FC [200]: *"[t]he word under is capable of varied relational reach,* ***depending on the context****"* (emphasis added).

50. The context in this regard is twofold.

51. First, it is the context referred to in cases such as *Francis Travel*, that the assumed legal context of an agreement which contains an arbitration agreement is that *"the parties do not intend the inconvenience of having possible disputes being heard in two places"* noting of course that any that the process is not *"rule-based and is concerned with the construction of the words in question."* As the Full Court said, *"[t]he existence of a 'correct general approach to problems of this kind' does not imply some legal rule outside the orthodox process or construction; nor does it deny the necessity to construe the words of any particular agreement"* (FC 167]).

52. Secondly, it is the context of the surrounding circumstances and the purpose and the object of the agreement.

53. The appellants then submit at AS [24] that the acceptance by the Full Court that the meaning of "any dispute under this deed" is narrower than the meaning of "a dispute in connection with this deed" (at FC [202]), is somehow inconsistent with or contradicted by an earlier statement that seeking to give the phrase "under this agreement" some amplitude, one would construe the phrase as including *"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]).

54. This submission mischaracterises the Full Court's reasons. At FC [193], the Full Court was simply illustrating that a liberal reading of an arbitration clause using the correct general approach as an aspect of context in conventional contractual construction can be found in a number of cases, such as *Francis Travel, Fiona Trust, Comandate* and *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd.*[11] At FC [202] the Full Court said that the fact that *"one phrase has a narrower meaning than another, does not mean that the first has a narrow meaning"* and that cases such as *Francis Travel, Comandate* and *Fiona Trust* do not require the meaning of words to be set to one side for a rule, but rather say that the correct general approach is to give liberal amplitude to available meaning.

55. In any event, there is nothing inconsistent or contradictory in the Full Court's reasons at FC [193] and FC [202]. The manufactured distinction between "under this deed" and "in connection with this deed" goes nowhere because none of the three deeds in question, in fact, uses the phrase "in connection with this deed". Once could see force in the distinction if the deeds in question had used "under this deed" in the arbitration clauses

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[11] [2013] WASCA 66; 298 ALR 666.

but used "in connection with this deed" elsewhere, so that the former phrase could be seen to have been consciously used as a narrower alternative to the latter. But it is another thing to seek to construe a phrase used in a contractual document by contradistinction to another phrase that might have been used. That is really no more than a hindsight submission that, if the asserted meaning had been intended, then a clearer way of expressing it might have been found.[12]

A rational assumption of reasonable people

56. At AS [25], [27] and [28], the appellants seek to limit the assumption which Gleeson CJ expressed in *Francis Travel* to circumstances in which the relevant arbitration agreement uses the phrase *"arising out of the agreement"*. There is no such limitation. Although Gleeson CJ used the phrase *"arising out of"* at 165D, he did so because the arbitration clause his Honour was construing used the phrase *"arising out of"*. There is nothing in his Honour's reasons to suggest that the point of principle only applied in those limited circumstances. Indeed, such a limitation is contrary to his Honour's conclusion that the parties are unlikely to have intended *"that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument."*

57. No doubt this is why the highest the appellants put this submission is that it is *"doubtful"* that his Honour intended the assumption to apply *"in any other circumstance"*.

58. In any event, as the Full Court said at FC [166], the assumption is a sensible commercial presumption (in effect a rational assumption of reasonable people) which is not novel and is reflected in numerous cases.[13]

59. Moreover, as the Full Court emphasised, this assumption *"does not imply some legal rule outside the orthodox process of construction; nor does it deny the necessity to construe the words of any particular agreement"* (FC [167]). It is simply part of *"the assumed legal context... which is to give expression to the rational assumption of reasonable people by giving liberal width and flexibility where possible to elastic and general words of the contractual submission to arbitration, unless the words in their context should be read more narrowly"* (FC [167]).

60. At AS [29]-[30], the appellants appear to submit that the general approach expressed by Gleeson CJ in *Francis Travel* is wrong and that it cannot be said to be "unlikely" that

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[12] cf *Charrington & Co Ltd v Wooder* [1914] AC 71 at 82 per Lord Dunedin.
[13] *Comandate* at [166] and the cases cited therein.

parties to an arbitration agreement intended that different disputes should be resolved by different tribunals but rather, in the absence of clear words to the contrary, the class of disputes that commercial parties should be assumed to be referred to arbitration are those which take as a given the validity of those agreements. This submission is said to be supported by *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd*[14] and *ACD Tridon v Tridon Australia.*[15]

61. Neither *Overseas Union* nor *ACD Tridon* support the appellants' submission. Those cases say nothing about an assumption or otherwise. Rather, *Overseas Union* stands for a different proposition, namely that *"[t]he only sure guide in deciding whether a particular dispute is or is not within the scope of an arbitration clause is the intention of the parties as expressed in the clause."*[16]

62. Indeed the appellants do not point to any authority which stands for the propositions that: (a) it is not legitimate to assess what reasonable persons would have in mind in the situation of the parties, which can be influenced by what courts have said about such contracts or the market or environment in which they are made; and (b) that a rational assumption of a reasonable person who has entered into an arbitration agreement is that such a person does not intend the inconvenience of having possible disputes being heard in two different places.

63. The answer to the suggestion at AS [30] that commercial parties should (if anything) be assumed, when entering into agreements, to understand those agreements to be valid and binding, such that the class of disputes they contemplate referring to arbitration are those which take as a given the validity of those agreements, is that even at the time of contracting, one party is able to contemplate that there may in the future arise a dispute in which it will suit the counterparty to allege that the contract is not binding. Further, here such contemplation is evident from the parties having included in clause 12 of the Hope Downs Deed "*various acknowledgements to the effect that the parties entered into the deed freely, without duress or influence*" ([FC [79]). As the Full Court correctly held, such contemplation was a matter that favoured a broad construction of the arbitration clauses in the Hope Downs Deed and 2007 HD Deed in the present case, because those deeds were made in a context where Mr John Hancock had reneged on his promises in

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[14] [1988] 2 Lloyd's Rep 63.
[15] [2002] NSWSC 896.
[16] [1988] 2 Lloyd's Rep 63 at 67.

the 2005 Deed of Obligation and Release only months after giving them, and had raised allegations of undue influence in order to do so: FC [203].

64. At AS [31]-[32], the appellants contend that contrary to FC [185], the approach of the House of Lords in *Fiona Trust* reflects the imposition of a legal rule upon the process of construction. This submission should be rejected. As the Full Court stated, there is no disconformity between the House of Lords in *Fiona Trust* and the NSW Court of Appeal in *Francis Travel* or the Full Court in *Comandate*. Even if there was, it takes the matter no further because the Full Court recorded at FC [173] and FC [193] that arguments about *Fiona Trust* were not critical to the resolution of the appeals. So much is clear from FC [204] which refers only to *Francis Travel* and *Comandante.*

65. Further, there is nothing in the "presumption" or "assumption" point. The words are used interchangeably by Lord Hoffmann in the passage extracted at FC [181] and the reference to "presumption" by Lord Hope in the passages extracted at FC [184] is made in the context of *Comandate* which also uses the word "presumption" in this context (at [165]). Moreover, contrary to the appellants' submission at AS [32], there is no presumption as to the proper construction of an arbitration clause. Rather, the "presumption" ("in effect a rational assumption of reasonable people" (FC [166])) is simply an "an assessment of what reasonable persons would have in mind in the situation of the parties" (FC [165]) and therefore an objective consideration which may well affect the construction and interpretation of such a clause (FC [165]).

66. In any event, the notion of "presumption" was expressly endorsed by French CJ and Gageler J in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia,*[17] in answer to an argument that Australian arbitration agreements contained an implied term that the authority of the arbitral tribunal is limited to a correct application of law. Citing *Comandate* and *Fiona Trust,* their Honours said at [16]:

> The presumed or imputed intention is ordinarily to the contrary: parties who enter into an arbitration agreement for commercial reasons ordinarily intend all aspects of the defined relationship in respect of which they have agreed to submit disputes to arbitration to be determined by the same tribunal.

67. At AS [33], the appellants and submit that the Full Court "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

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[17] (2013) 251 CLR 533.

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]). This submission should be rejected for at least two reasons. First, it misconstrues the Full Court's reasons. At FC [193], the Full Court was simply providing examples of giving effect to the assumption in *Francis Travel* through a liberal reading of an arbitration clause using the correct general approach as an aspect of context in conventional contractual construction when the words permit that to be done. As the Full Court correctly, with respect, said at FC [200], *"[t]he word "under" is capable of varied relational reach,* ***depending on the context****"* (emphasis added). Secondly, the submission ignores what the Full Court actually did, which was to construe the whole phrase "any dispute under this deed" in the objective context of the execution of the deeds (see FC [200]-FC [204]).

68. At AS [34] the appellants focus on the word "under" and submit that the Full Court "was deflected from the orthodox textual and contextual interpretation by a concern to give effect to the assumption supposedly expressed in *Francis Travel.*" Again, this submission ignores what the Full Court actually did. Further, the appellants focus on the word "under" without consideration of the whole phrase "any dispute under this deed". Once consideration is given to the construction of "dispute" as the whole dispute or controversy between the parties, which necessarily includes the appellants' substantive reply to the respondents' reliance on the deed, then the dispute is undoubtedly a dispute "under" the deed, particularly having regard to textual and contextual interpretation.

69. At AS [35]-[36], the appellants argue that the assumption that contracting parties intend to have all disputes connected with their contract heard in one forum should be tempered in the context of a pre-existing trust arrangement. That submission ignores the unchallenged findings of the Full Court at FC [128]-[138] that the subject of the proceedings (and the deeds themselves) are "quintessentially" commercial. It also ignores the commercial nature and circumstances of the 2005 Deed of Obligation and Release, the Hope Downs Deed and the 2007 HD Deed, which were to "to stabilise the question of claims to ownership of tenements", including the Hope Downs tenements, which were the subject of proposed joint venture arrangement with Rio Tinto Limited (FC [64]).

70. Further, at AS [37], the appellants submit, by reference to *Fiona Trust,* that the assumption should have been accorded little weight given it was inappropriate for the Full Court to have proceeded upon the unspoken premise that the Deeds were "the product of

a commercial negotiation". This submission is wrong. The Full Court did not proceed on any such premise. Even if the Full Court had proceeded on such a premise, there is no reason to restrict the objective unlikelihood of parties intending the inconvenience of having possible disputes determined in two different places to businesspeople. It is "in effect a rational assumption of a reasonable person" (FC [166]). Moreover, this submission misunderstands the nature of an application under s 8(1) of the *Commercial Arbitration Act 2010* (NSW). Once the existence of a relevant arbitration agreement was satisfied by finding an apparently valid agreement (as was the case here), it was not appropriate for the Court to make any findings on the stay applications whether the deeds were entered into in the circumstances alleged by the appellants (FC [108]). Further, there is no challenge to the Full Court's finding that the contemplated arbitration will be a "commercial" one in any event: FC [138]-[139].

The proper construction of the relevant arbitration clauses

71. The Full Court correctly held that: (a) the construction of the arbitration clauses was governed by ordinary principles of contractual construction (FC [163]), which required an objective consideration of the text and context of the Deeds and the purpose and objects of the transactions embodied in them; and (b) one consequence of the application of those principles was that the language of an arbitration clause should generally be given a liberal construction, because of the objective unlikelihood that the parties intended the inconvenience of having possible disputes determined in two different places: FC [166]-[167], [193].

72. The construction arrived at by the Full Court was correct. The relevant phrase is not just "under this deed" but "any dispute under this deed". Taking a liberal approach to the construction of that phrase, the relevant "dispute" should be taken to include not just a matter raised by way of defence but a matter that is, in substance, a reply to that defence. Otherwise, one would arrive at the conclusion that the reply needed to be determined in a different forum to the defence. This is the point that the Full Court, with respect, correctly recognised at FC [201]. The appellants seek relief in respect of alleged misconduct said to constitute, in the most part, breaches of trust and breaches of fiduciary duty. Those are the claims that the Full Court described as the "substantive claims": FC [54]. If those substantive claims were to be considered as a discrete "dispute", then it is uncontroversial that that dispute would be a "dispute under this deed" because, even on the narrow construction of that phrase adopted by the Court of Appeal, the substantive claims are governed or controlled by the defences raised by the respondents under the

Hope Downs Deed. Why then, one asks rhetorically, is it necessary to subject the parties to the inconvenience of having the dispute raised by the substantive claims determined in two different places simply because the appellants' reply to those defences is to seek to set aside the Deed? This is particularly in circumstances where the determination of most, if not all, of the appellants' "validity claims" to set aside the Deed will involve the determination of one or more of the substantive claims. The Full Court correctly recognised that that type of inconvenience was avoided by construing the composite phrase "any **dispute** under this deed" liberally, so that the dispute includes not just the substantive defence but also the substantive reply: FC [201].

73. The appellants' submissions do not grapple with this point. The closest approach is at AS [44], where it is submitted that the Full Court was in error taking the expression "any dispute" "as referring to the entirety of an extended controversy between the parties". As a matter of ordinary language, there is no reason to adopt that approach. It is also contrary to the general approach of construing arbitration agreements liberally. In any event, the appellants do not identify why it was erroneous for the Full Court to have regard at FC [201] to the objective unlikelihood of parties intending that matters of substantive defence and reply be determined in different places when construing the arbitration clauses.

74. The claims made in the present proceeding provide a good illustration of why the Full Court's construction is to be preferred to the NSW Court of Appeal's construction. Otherwise, given the overlap between and the cross-referencing to allegations made in the substantive claims by the validity claims, one could potentially have the de facto determination by a Court of the substantive claims under the guise of a preliminary determination of the validity claims – in circumstances where the parties had clearly agreed that those substantive claims were to be determined in arbitration. This is a result, albeit in a different context, the Full Court "agreed wholeheartedly" is to be avoided (FC [383]), and reasonable parties ought not be taken to have intended.

75. It may also be noted that although the majority in the NSW Court of Appeal expressly adopted the liberal approach in *Rinehart v Welker,*[18] this was **not** an issue that the NSW Court of Appeal was required to consider. That liberal approach is plainly correct. Where the Full Court departed from the majority of the NSW Court of Appeal was in the application of those principles.

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[18] At [117]-[121] per Bathurst CJ and [197] per McColl JA; see also the Full Court at [194].

76. Turning to the appellants' submissions, the appellants contend that the Full Court's construction of the phrase "any dispute under this deed" elides the distinction between that phrase and the phrase "any dispute in connection with this deed" (AS [38]). This is not so. The distinction between the two phrases is manufactured for the reasons set out in paragraph 55 above.

77. Another manufactured distinction is the distinction between setting aside a deed for wrongful conduct and an assertion that a deed never existed by plea of *non est factum* or some other circumstances. The appellants submit at AS [38] that implicit in FC [204] is that a dispute as to whether a deed ever existed is not "a dispute under this deed." This submission misreads FC [204]. The words quoted by the appellants were simply the Full Court's characterisation of the dispute involved in the present case. The Court was saying that, on a liberal construction, the phrase used in the arbitration clauses could be seen to cover the dispute in question. The Court was not drawing the distinction suggested at AS [38] nor was the Court saying that a *non est factum* plea would necessarily take a dispute outside the clause. The Court was merely noting that that issue did not arise given that there are no *non est factum* allegations in the case and as such, "*there is little difficulty in concluding that all the substantive and validity claims fall within any clause framed 'any dispute under this deed.'*" That says nothing about what the position would be if there were such allegations.

78. The approach of the Full Court was to look at the actual dispute or disputes between the parties and determine whether they were "disputes under this deed". Whilst one can conceive, as the Full Court did, of a *non est factum* claim (such as a 'that is not my signature' claim) being susceptible of settlement as a discrete controversy and thus constituting a separate dispute which may not be a dispute under the applicable deed, there is no such *non est factum* claim here. By way of contrast the Full Court determined that the validity claims advanced in these proceedings by Mr Hancock and Ms Rinehart form part of a wider dispute which includes the substantive claims.

79. The appellants' submissions at AS [39]-[41] therefore go nowhere as they proceed on the false premise that the Full Court concluded, as a rule, that a dispute as to whether a deed ever existed is not a "dispute under this deed." Further, there is no inconsistency as asserted at AS [40]. The fact that the appellants seek to rely on such inconsistency rather demonstrates the difficulties of their position.

80. Further, the appellants' resort to the distinction between matters arising ex contractu (i.e. where an agreement is asserted by way of claim or defence) and those in which there is

no ex contractu component of the dispute at AS [41]-[43], ignores the Full Court's finding that the "validity claims" are part of the one dispute or controversy and therefore themselves ex contractu: see FC [201] and FC [248]. That is, although the "validity claims" are pleaded in the statement of claim in anticipation of the respondents' reliance on the relevant deeds, they are "as a matter of substance" an "attack on the availability of the defence" (being the respondents' reliance on the relevant deeds) and therefore part of the dispute itself (FC [248]).

81. The relevant dispute, was conveniently described by the Full Court at FC [158]. Although the appellants suggest error in the Full Court's consideration of the term "dispute" in AS [44], they do not suggest that the "validity claims" are not properly characterised as matters raised in reply to the respondents' reliance on the deeds. Nor can they in light of the Full Court's findings at FC [201] and FC [248], the effect of which was to accept the appellants' submission recorded at FC [246] *"that the validity claims should be viewed as part of the dispute made up of the releases, bars and covenants not to sue, such that the whole dispute (not merely that part of it constituted by the pleas based on the provision of the deeds) came within the arbitration agreement."*

82. Once it is accepted (as it must be) that the "validity claims" are part of the "dispute" then they are necessarily a "dispute under the deed".

83. This conclusion makes perfect sense and is consistent with the need to look at the substance of the dispute. If, for example, the appellants did not make the "validity claims", it is common ground in this appeal that <u>all</u> the "substantive claims" are a "dispute under the deed" because the respondents rely on the relevant deeds as a complete answer to those claims. The fact that the appellants make the "validity claims" in response to (or in anticipation of) the respondents' reliance on the relevant deeds, does not change the substance of the dispute and its characterisation as falling within the arbitration agreement (i.e. a dispute under the deed).

84. Contrary to AS [44], this is not to consider the term "dispute" in isolation, but rather to construe the phrase a "dispute under this deed" as a whole.

85. The appellants' submissions at AS [45]-[46] similarly do not deal with the Full Court's finding that the "validity claims" form part of the "dispute". Indeed, once it is accepted that the "validity claims" form part of the "dispute" then the outcome of the dispute will be governed or controlled by the deeds (see paragraph 72 above).

86. The appellants' submissions at AS [47]-[48] proceed on the mistaken basis that in the event that they can demonstrate error in the Full Court's interpretation of the phrase

"under this deed" then the appeal must succeed. That is mistaken for two reasons. First, even if this Court does not agree with the liberal approach to the construction of arbitration clauses, it is necessary for this Court to construe the phrase "dispute under this deed" in light of the surrounding circumstances which of themselves tend to widen and not narrow the operation of the deeds (FC [203]). Secondly, the appellants' submissions are mistaken because they fail to take into account the second and third reasons why the Full Court held that the "validity claims" fall within the scope of the Hope Downs Deed and the 2007 HD Deed. As set out above, at FC [248], the Full Court held that "validity claims" are part of the one dispute or controversy. Further, at FC [249], the Full Court held that there is a sustainable argument that the making of the "validity claims" is itself a challenge to the rights of Hancock Group members to Hancock Group Interests. Neither of these findings is directly challenged.

87. Further, AS [47]-[48] ignores the two reasons why the Full Court exercised its discretion to permit the proviso question to be determined by the arbitrator, being: (a) that the pleaded attack on the arbitration agreement was "ill-formulated", resting on an narrow foundation (FC [393]); and (b) it was likely that any proviso hearing would become entangled in a lengthy hearing concerning matters of complaint against the substance and validity of the deeds: FC [393]-[394].

88. In the event that the appeal is upheld, then the matter should be remitted to the Full Court for reconsideration as to the proper exercise of the discretion. There is no proper basis to remit the matter to the primary judge.

Part VI: Cross-appeal

89. The respondents do not wish to be heard on the HPPL respondents' application for special leave to cross-appeal (and any appeal).

Part VII: Time for oral argument

90. The respondents estimate that one hour will be required for presentation of oral argument on their behalf.

Dated: 3 August 2018

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Second Respondent

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

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

TADEUSZ JOSEF WATROBA
Fifth Respondent

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

HMHT INVESTMENTS PTY LTD (ACN 070 550 104)
Seventh Respondent

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

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

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

HANCOCK FAMILY MEMORIAL FOUNDATION LTD (ACN 008 499 312)
Eleventh Respondent

HOPE RINEHART WELKER
Twelfth Respondent

GINIA HOPE FRANCES RINEHART
Thirteenth Respondent

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

MULGA DOWNS INVESTMENTS PTY LTD (ACN 132 484 050)
Fifteenth Respondent