IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No. S143 of 2018**

BETWEEN:

HIGH COURT OF AUSTRALIA
FILED
03 AUG 2018
THE REGISTRY SYDNEY

BIANCA HOPE RINEHART
First Applicant

JOHN LANGLEY HANCOCK
Second Applicant

and

HANCOCK PROSPECTING PTY LTD ACN 008 676 417

10 **AND OTHERS NAMED IN THE SCHEDULE**
Respondents

FIRST TO EIGHTH

RESPONDENTS' SUBMISSIONS

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Part I: Certification

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

Part II: Concise statement of issues

2. The narrowness of the issue on this appeal, in the context of both the underlying dispute between the parties and the stay applications brought by the HPPL Respondents[1] and Mrs Rinehart, is significant. The Full Court provided a concise and neutral summary of the "overall dispute" at FC [158]:

> "The applicants accuse their mother of wholesale breaches of equitable and contractual duties in wrongfully transferring hugely valuable commercial assets from the control of entities that owned the assets significantly for the benefit of the children to entities and ownership structures controlled by Mrs Rinehart. The companies controlled by Mrs Rinehart are said to have been legally complicit in these wrongs. Mrs Rinehart and the companies concerned set up various provisions of the deeds in answer to these claims, deeds that are said to have been entered by the applicants when they were adults and after proper advice. Very often, even if not always, the answer to the claims is said to be a complete answer. The applicants, in turn, deny those matters, and apart from pointing to what they say is the limited operation of the deeds, say that all the deeds should be set aside for various reasons based on equity, common law and statute."

3. The general correctness of the above summary is not in issue on this appeal, although the appellants are driven to deny that the underlying issues can be regarded as constituting a single "dispute" for the purposes of the settlement deeds.

4. In short, the appellants' primary claims in the SOC are for the misappropriation of assets.[2] When the proceedings were commenced those claims had apparently already been settled and made the subject of releases and covenants not to sue by settlement deeds that each of the appellants had signed (relevantly, for present purposes, the Hope Downs Deed and the April 2007 HD Deed). In fact, all but one[3] of the claims for misappropriation of assets had already been *expressly* made in an unsworn affidavit provided by Mr Hancock to Mrs Rinehart and HPPL and filed in the Western Australian Supreme Court *before* the Hope Downs Deed and April 2007 HD Deed were entered into. That affidavit was referred to in both the Hope Downs Deed and April 2007 HD Deed and incorporated into the definitions of "Claim" used in those deeds (Hope Downs Deed, cl 1.1(d), set out in J [374], FC [79]). Unsurprisingly, the appellants correctly anticipated that the releases and covenants not to sue in the deeds would be raised in

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[1] These submissions are made by HPPL and some of its related companies named as respondents in the underlying proceedings (**HPPL Respondents**) (see FC [5]). Defined terms in the appellants' Submissions (**AS**) are adopted in these submissions.

[2] Respondents' Further Materials (**RFM**) 5-106.

[3] The claim in respect of the Roy Hill exploration licences – see paragraph [18] below.

defence to the claims and so challenged the validity of the deeds. The challenges were pleaded in the SOC but are "in substance" by way of reply (see FC [201], [245]-[248]).

5. The sole issue raised on appeal[4] is whether the Full Court erred in finding that the "validity claims" (an expression commented on below) can be seen to be a "dispute" or part of a "dispute" that comes within the description "any dispute under this deed" in cl 20.2 of the Hope Downs Deed and cl 9 of the April 2007 HD Deed (FC [204]) (Notice of Appeal, Ground 1(b)). The rival approach, which the appellants contend the Full Court should have applied, is that the words "any dispute under this deed" do not extend beyond issues or sets of issues "the outcomes of which would be governed or controlled by those Deeds" and thus (it is contended) necessarily exclude any issue concerning the validity or enforceability of the deeds (Notice of Appeal, Ground 1(a)).

6. The appellants do not challenge the reasoning and conclusions of the Full Court and the Primary Judge on the appropriate "standard of proof" for determining whether the validity claims are the subject of apparently valid arbitration agreements. That reasoning was plainly correct and has been applied in many cases including by a majority of the New South Wales Court of Appeal in *Rinehart v Welker* [2012] NSWCA 95,[5] a decision on which the appellants rely.

7. The issue on appeal may therefore be understood in terms of whether there is a "sustainable argument" that the validity claims form part of one or more "dispute[s] under" the Hope Downs Deed or April 2007 HD Deed. The test is to be applied on the understanding that the Court's task under s 8 of the CA Act is to assess whether the dispute "can be seen to be" the subject of the arbitration agreement without attempting to determine that issue on a "final basis" and that at the stage of an application under s 8 of the CA Act the "boundaries of the dispute may be unclear" (FC [141]-[152]).

8. The appellants' submissions pay no regard to the intertwined nature of the substantive claims and the validity claims or the text and context of the deeds in question. They focus on abstract propositions about the meaning of "under" that are unpersuasive and would not see the appeal resolved in their favour even if accepted. The soothing suggestion that the appellants' case on appeal involves no more than giving the word "under" its ordinary English meaning is deceptive. In truth, what the appellants ask this Court to impose is a rule that in applying any arbitration clause that uses the words "any dispute under" the Court must, in characterising the "dispute" for the purposes of applying s 8(1) of the CA

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[4] See paragraph [87] regarding the appellants' proposed Notice of Cross-Appeal.

[5] The NSW Court of Appeal applied the "sustainable argument" test: see *Rinehart v Welker* [2012] NSWCA 95 at [135] (Bathurst CJ, Young JA agreeing at [218]; McColl P did not address the issue); see also *Hancock v Rinehart* (2013) 96 ACSR 76 at [98] and [130] (Bergin CJ in Eq). The Full Court observed that posing the test in terms of a sustainable argument "has its dangers" (FC [149], see also [212], [230], [238]) but, subject to certain reservations (FC [149]-[152]) was content to use that language (see FC [211]-[215], [216]-[217], [224]-[225], [226]-[227], [230], [235], [241], [249], [263]-[264]).

Act, carve out any issue about the validity or enforceability of the agreement containing the arbitration clause. That must be done however intimately the issue is related to the assertion of rights or obligations created by the agreement and even if (as in this case) the terms of the agreement and objective surrounding circumstances show that the parties were concerned to guard against such challenges (see paragraphs [49]-[50] below).

9. Finally, there are two subsidiary issues concerning the treatment of the claims against non-parties to the settlement deeds[6] and the appropriate relief if (contrary to the HPPL Respondents' position) the Full Court is found to have erred in construing or applying the settlement deeds.

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

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

Part IV: Statement of material facts

The substantive claims and validity claims

11. The appellants' account of the substantive and validity claims is partial and must be read together with the Full Court's summary at FC [28]-[105].

12. The "substantive claims" are in prayers 1 to 34 of the Originating Application and are pleaded at SOC [36]-[271]. They were accurately summarised by the Full Court at FC [2] and [28]-[54]. As the Full Court also recorded (FC [4]) the respondents are yet to file
20 a defence to the SOC, but the case before the Primary Judge and on appeal proceeded on the assumption that the HPPL Respondents and Mrs Rinehart denied every material allegation of wrongdoing.

13. The "validity claims" are in prayers 35 to 47 of the Originating Application and are pleaded at SOC [275]-[467]. They were also accurately summarised by the Full Court at FC [3] and [55]-[105].

14. The description "validity claims" (see FC [245] and J [166]-[168]) is a useful shorthand but should not distract from the fact that the relief sought includes declarations that the settlement deeds have been effectively rescinded (SOC at [341.1]-[341.2], [344.1]-[344.2], [348.1]-[348.2], [421.1]-[421.2], [421.4]-[421.5], [426.1]-[426.2], [426.4]-
30 [426.5], [467.1]-[467.3]) and injunctions preventing the releases, bars and arbitration clauses in the deeds from being enforced (SOC at [326.2], [338.2], [379.2], [407.2], [417.2], [467.5]). The relief directed at validity strictly speaking is confined to the seeking of declarations pursuant to s 87(2) of the *Trade Practices Act 1975* (Cth) (**TPA**) and in equity that the deeds are "void" as against either BHR or JLH (see SOC [326.1], [338.1], [341.3], [344.3], [348.3], [379.1], [407.1], [417.1], [421.3], [426.3], [467.4]).

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[6] Raised by Notice of Cross Appeal that has been served by the HPPL Respondents but not yet filed, see Joint Core Appeal Book (**CAB**) at 404.

15. The causes of action pleaded in the validity claims are that the appellants were induced to sign the deeds by false and misleading conduct, fraudulent concealment, misleading and deceptive conduct in contravention of 52 of the TPA, material non-disclosure, unconscionable conduct, undue influence, duress, breach of trust and fraud on a power (FC [3]). There is no allegation that the appellants did not personally sign the deeds (that is, an allegation of impersonation or forgery).

16. One further aspect of the validity claims should be noted. Some of the validity claims are pleaded so as to incorporate all of the substantive claims. At SOC [288.5] and [368.4] it is alleged that the purpose of the arbitration agreements is to "prevent any public disclosure of the facts pleaded in Sections 8-17 above and thereby protect the reputation of GHR, HPPL and the officers involved in the alleged misconduct pleaded in those sections". Similarly, in the context of allegations of misleading and deceptive conduct, fraudulent concealment and misrepresentation, it is pleaded at SOC [322.1], [369.1], [401.4], and [408.3(a)] that Mrs Rinehart and HPPL failed to disclose to and fraudulently concealed from BHR and JLH that they had claims against Mrs Rinehart and HPPL in relation to the breaches pleaded at "Sections 8-17 above". Both at first instance,[7] and on appeal,[8] the appellants emphasised that a trial of the validity claims would require a trial of all of the substantive claims. This further level of interrelationship is important in deciding whether the validity claims may be regarded as involving a dispute, or being part of a dispute, that is "under" the deeds in question.

The circumstances in which the settlement deeds were entered into

17. The appellants' account of the circumstances in which the Hope Downs Deed and April 2007 HD Deed were entered into (AS [10]-[17]) provides insufficient background for the determination of the issue raised on this appeal, given that both parties call in aid the surrounding circumstances known to both parties.[9] The account of the objective surrounding circumstances in FC [61]-[86] is to be preferred. Further, the description of the genesis of the settlement deeds in AS [10]-[17] requires the following corrections and additions.

18. First, it understates matters to suggest that the Full Court described the unsworn affidavit that Mr Hancock provided to Mrs Rinehart and HPPL in October 2004 as merely "revealing the themes of the SOC" (AS [10]). The Full Court was plainly referring only to the part of the unsworn affidavit excerpted in FC [62]. The Full Court accepted the

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[7] Applicant's Outline of Submissions in Opposition to the Stay Application dated 31 March 2015 at [631], [637] (RFM 110-111); Transcript of Proceedings before Gleeson J at 111.23-40 (RFM 116), 367.38-42 (RFM 120).

[8] Transcript of Proceedings before the Full Court at 176.18-26 (RFM 125), 230.2-4 (RFM 128).

[9] See AS [36]-[37]. Neither party contends that the language of cl 20.2 of the Hope Downs Deed or cl 9.1 of the April 2007 HD Deed is so clear that consideration of surrounding circumstances is impermissible, consistent with *Mount Bruce Mining Pty Ltd v Wright Prospecting* [2015] HCA 37; (2015) 256 CLR 104, 116 [47], 117 [49] (French CJ, Nettle and Gordon JJ) and *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 149 CLR 337 at 352 (Mason J).

Primary Judge's finding that there was "significant overlap" between the claims in the unsworn affidavit and the substantive claims in the SOC and then went on to find that the one substantive claim that the Primary Judge had found was not prefigured in the unsworn affidavit, namely, the claim in respect of the exploration licences for the Roy Hill tenements, was caught by the broad assertions in the affidavit that mineral interests, identified and unidentified, had been taken from HFMF for the benefit of HPPL (FC [63], [221]-[225]; see also J [289]-[308]).

19. Secondly, the statement in AS [11] that the prospective joint venture between HPPL and Rio Tinto Limited (**Rio Tinto**) provided the "setting" for the Deed of Obligation and Release that was signed by Mr Hancock in April 2005 is not an adequate description of the circumstances leading up to the execution of that deed, which is itself important context for the Hope Downs Deed. As the Primary Judge and Full Court found, the fact that a joint venture was being negotiated with Rio Tinto in respect of Hope Downs was known to all parties including Mr Hancock and Ms Rinehart (then a director of HPPL) and a "significant aspect" of the prospective joint venture was "the need to stabilise the question of claims to ownership of tenements as a safe foundation for this important external commercial relationship" (FC [64]). The Primary Judge and the Full Court set out the major recitals to the 2005 Deed of Obligation and Release, from which it was "clear that the Deed of Obligation and Release was directed to the intra-Hancock family disputes" (FC [65]-[66]).

20. The Full Court and Primary Judge also referred to clauses 5, 6 and 11 of the Deed of Obligation and Release, which the appellants pass over (FC [68]; J [324]-[326]). Clauses 5 and 6 provided for the payment of several million dollars to Mr Hancock and gave him rent-free access to specified residential properties and assets. By clause 11 Mr Hancock acknowledged that he had acted "wholly without duress" in making the Deed of Obligation and Release and that, before executing the deed, he had received independent advice "on all matters relating to or which are the subject of this Deed".

21. Thirdly, the appellants' submissions at AS [13] do not give an accurate impression of the manner in which Mr Hancock repudiated the Deed of Obligation and Release in July 2005. Mr Hancock did so on the basis that his entry into the Deed of Obligation and Release had been procured by undue influence, despite having signed it only months before (FC [73]) with the benefit of unquestionably robust and independent legal advice from Butcher Paull & Calder (who had prepared the unsworn affidavit) which he had acknowledged receiving in cl 11 of the Deed of Obligation and Release.

22. The appellants' submissions also omit the evidence, recited in both judgments below, that Mr Hancock made statements to the media to the effect that now the Hope Downs joint venture had been secured he would be pursuing legal claims against Mrs Rinehart and HPPL (see FC [73]; J [343]), and that he told Ms Rinehart that he had "hit [Mrs Rinehart] up" for a "few mil" knowing that she was under "immense pressure" to finalise

the joint venture agreement with Rio Tinto before 30 June 2005, that his "case" against Mrs Rinehart was "by no means over" and that he would "fight for ownership of our company's other assets ... ie, Roy Hill, and ... float these once he had control of them" (FC [74]; J [345]).

23. The appellants' submissions also omit that on 29 September 2005 Mr Hancock filed an affidavit in proceedings in the Western Australian Supreme Court in which he deposed to his intention to bring claims for misappropriation of assets against Mrs Rinehart and HPPL and to which was annexed an "updated" version of the unsworn affidavit (FC [73]; J [344]).

10 24. Fourthly, and crucially, the appellants do not fully set out the relevant provisions of the Hope Downs Deed (see AS [14]-[16]). These are critical to the resolution of the issues before this Court. They are set out in FC [79] (see also J [366]-[385]) and include:

a. an acknowledgment by all parties of the obligations of the Hancock Group under the joint venture with Rio Tinto in respect of Hope Downs (known as the **HDJVA**) (cl 3);

b. an acknowledgment that the "Hancock Group Interests" (defined widely to include all of the mining tenements the subject of the substantive claims) "have been and remain beneficially owned by the Hancock Group member that purports to own them" (cl 4);

20 c. a "distribution covenant" requiring the payment of dividends fixed by reference to a proportion of the income earned from the HDJVA, but subject to various conditions (cl 5);

d. broad releases and covenants not to sue, coupled with a broad definition of "Claims" that included, amongst other things, the claims in "the unsigned draft affidavit of [Mr Hancock]" (cll 1.1, 6);

e. broad undertakings by which each of the parties undertook, in essence, not to take steps that might jeopardise the HDJVA (cl 7) and, in particular, "not to challenge the right of any member of the Hancock Group to any of the Hancock Group Interests at any time" (cl 7(b));

30 f. importantly, acknowledgments by each party that he or she entered into the deed freely, without duress or influence, had received independent legal adviceand agreed to be bound irrespective of "the mother/child/beneficiary aspects of the HMH Trust relationships" (and was able to provide a letter from a lawyer to that effect) (cl 12); and

g. a dispute resolution clause that provided for confidential mediation and arbitration "in the event that there is any dispute under this deed" (cl 20).

25. It might also be noted that there was evidence before the Full Court and the Primary Judge that Ms Rinehart had received independent legal advice and provided a letter from a lawyer consistent with the acknowledgments in cl 12 (see J [363], FC [76]).

26. Fifthly, the appellants' submissions record that Mr Hancock refused to sign the Hope Downs Deed in August 2006 (when it was signed by Ms Rinehart and the other parties) but in April 2007 executed (together with the other parties to the Hope Downs Deed) a further deed, known as the April 2007 HD Deed, by which the Hope Downs Deed was ratified and Mr Hancock made a party to it: AS at [17]-[18]. What also needs to be brought out is that the April 2007 HD Deed objectively manifested a continuing awareness of the need to guard against potential challenges to its validity or to the validity of the Hope Downs Deed, including by each party jointly and severally ratifying and confirming the Hope Downs Deed (cl 3).[10]

27. The appellants' submissions also omit to mention that Mr Hancock signed the April 2007 HD Deed only after extracting further financial benefits from HPPL, including an annual salary of $750,000 per annum, which were documented in a contemporaneous side deed known as the 2007 CS Deed in respect of which Mr Hancock obtained independent legal advice (FC [83]-[86]).

28. Finally, though only obliquely referred to by the Full Court (FC [94]), there was evidence referred to by the Primary Judge at J [481]-[488] that the HPPL Respondents and Mrs Rinehart would contend that the appellants had affirmed the Hope Downs Deed and April 2007 Deed in 2012 by seeking declaratory and other relief to the effect that HPPL was obliged by the deeds to declare and pay certain dividends in their favour. The alleged affirmation occurred only months before these proceedings were commenced and after the proceedings in the NSW Supreme Court that included *Rinehart v Welker*.

Procedural history

29. The appellants' explanation of the extent to which the Full Court rejected the findings and conclusions of the Primary Judge, and how this affected its exercise of discretion with respect to a proviso hearing, is inaccurate (see AS [21]-[22]). The respects in which the Full Court regarded itself as differing from the Primary Judge are set out in FC [391]-[392] and are not limited to the treatment of the validity claims. The Full Court's disagreement with the Primary Judge's approach to fact-finding at FC [239]-[241] should also be noted.

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

Summary of appellants' submissions and nature of response

30. The main thrust of the appellants' submissions is a contention that "under" has a plain English meaning such that the words "any dispute under this agreement" can never

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[10] AFM 126-128.

extend to a dispute (or part of a dispute) in which the validity and enforceability of the agreement is put in question. Those words are necessarily limited to a dispute where the agreement is assumed to be valid and effective and the difference between the parties is what the outcome should be given the validity and effectiveness of the agreement. The paradigm example of such a dispute is a dispute about the meaning or construction of the agreement (AS at [46]).

31. Interwoven in the appellants' submissions, effectively in the alternative but without being explicitly identified as such, is a contention that the Full Court erred in finding, in the circumstances of this particular case, that the words "any dispute under this deed" in cl 20.2 of the Hope Downs Deed and cl 9.2 of the April 2007 HD Deed, extended to the validity claims. Responding to that contention requires, crucially, cognizance of all of the provisions of those deeds and the objective context in which they were entered into, and an appreciation of the interrelationship between the validity claims and the substantive claims. None of that is provided by the appellants' submissions.

32. These submissions will address the two contentions outlined above. Before doing so, however, it is necessary to examine in detail the Full Court's reasons, commenting on the appellants' criticisms of those reasons as they arise.

The Full Court's reasons for finding that the validity claims were the subject of an apparently valid arbitration agreement

33. The appellants' submissions do not adequately summarise the Full Court's reasons, instead conveying that the Full Court succumbed to "post-modern indeterminacy" of language in its treatment of the word "under" (see, eg, AS [24] and [42]).

34. That has a number of consequences, including that the appellants' submissions (eg, at AS [24] and [40]) focus their attack on a passage in the Full Court's reasons at FC [193] that is an illustrative *obiter* observation (and expressed to be so) and not dispositive of the issue on appeal and that the submissions fail to recognise the three alternative bases on which the Full Court reached its conclusion that the validity claims "could be seen to be" within the scope of cl 20.2 of the Hope Downs Deed and cl 9.2 of the April 2007 HD Deed. The steps in the Full Court's careful and detailed reasoning are set out below.

35. **First**, the Full Court set out general principles relating to the construction and interpretation of contracts (FC [163]-[165]) including citing various decisions of this Court for the uncontroversial proposition that "[t]he 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".

36. **Secondly**, the Full Court considered general observations on the construction of arbitration clauses made in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [162]-[187] (Allsop J, with whom Finn and Finkelstein JJ agreed), *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways* (1996) 39 NSWLR 160 at

165-166 (Gleeson CJ, with whom Meagher and Sheller JJA agreed), *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 256 at [6]-[8] and [11]-[13] (Lord Hoffman, with whom Lords Hope, Scott, Walker and Brown agreed) and [31] (Lord Hope) and *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 550 [16] (French CJ and Gageler J) (FC [166]-[186]).

37. The focus of the consideration was on whether the approach taken in the above cases, but particularly *Fiona Trust*, involved departure from orthodox principles of construction which start with, and give precedence to, the words chosen by the parties. The Full Court concluded that the above cases all supported broadly the same approach, namely, that a commonsense contextual assumption could be made that parties to an arbitration agreement intended that all disputes arising out of their relationship were to be decided by a single body and that the words chosen by the parties, *which remained determinative*, were to be interpreted in light of that assumption (FC [167], [179], [182], [184]-[185]).

38. The appellants' submission that the approach in *Fiona Trust* is unsound (AS [31]-[37]) does not advance matters. This is not an appeal from *Fiona Trust*. Whatever this Court might make of the speeches of their Lordships, the Full Court adhered in terms to what was said by Gleeson CJ in *Francis Travel*. That is, it was applying a commonsense factual assumption as an element of reaching a conclusion based on the text and context of the agreement. The appellants do not say that *Francis Travel* is unsound. That aspect of the appellants' submissions may therefore be put to one side.

39. **Thirdly**, the Full Court examined Bathurst CJ's decision in *Rinehart v Welker* and respectfully disagreed with his Honour's conclusion that *Fiona Trust* had held, inconsistently with *Francis Travel*, that arbitration clauses should be construed "irrespective of the language used" (FC [193]). However, as their Honours observed, that issue did not have any bearing on their ultimate conclusion (FC at [194]).

40. **Fourthly**, it was in the context of discussing *Fiona Trust* and *Rinehart v Welker* at FC [187]-[193], and *before* the Full Court came itself to construe cl 20.1 of the Hope Downs Deed and cl 9.1 of the April 2007 HD Deed, that the Full Court also observed that the phrase "under this agreement" could be construed as (at FC [193]):

> "...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."

41. The Full Court then immediately observed that that statement was "not meant to be a prescriptive definition, but rather an *illustration* of a liberal reading of an arbitration clause using the correct general approach as an aspect of context in conventional contractual construction" (FC [193]; see also FC [200] where the Court noted that "[t]he broader construction which we have suggested above can be taken as an example").

42. The above statement, expressly put forward by way of "illustration" of how far the words "under this agreement" could potentially reach is the one that the appellants take issue with in their submissions (see AS [24] and following). However, it was an abstract statement about the possible reach that an arbitration clause that used the word "under" might have. It was not related to the agreements or facts in this case. It is more general and far-reaching than is required to dispose of this case, as the Full Court recognised.

43. **Fifthly**, the Full Court considered Bathurst CJ's conclusion in *Rinehart v Welker* that the words "any dispute under this deed" in cl 20.2 of the Hope Downs Deed should be understood as being limited to disputes "the outcome of which was ... governed or controlled by the Settlement Deed" (FC [194]). The Full Court respectfully disagreed with the limitation of the clause to disputes "that are (necessarily) governed or controlled by the deed" (FC [199]).

44. The issue presently on appeal did not arise in *Rinehart v Welker*. The primary claims in those proceedings were for orders removing Mrs Rinehart as trustee of the Hope Margaret Hancock Trust and seeking access to documents and an account in respect of that trust: *Rinehart v Welker* at [22]-[26]. HPPL and Mrs Rinehart foreshadowed reliance on the Hope Downs Deed, which it was contended provided defences to the primary claims. The Court of Appeal followed the primary judge in accepting that a "dispute under" the Hope Downs Deed embraced both the claims made and the foreshadowed defences to those claims: at [132], [135], [148] (Bathurst CJ, Young JA agreeing on this point) and [207] (McColl JA, observing that "both claims and defences have to be examined to determine whether the dispute can be characterised as 'under this Deed'").

45. Nonetheless, the Court unanimously held that there was not a sustainable argument that the releases and bars that were to be raised by way of defence precluded the relief sought. That was principally because the entitlement to relief was said to arise by reason of conduct allegedly engaged in by Mrs Rinehart in 2011, four years after the Hope Downs Deed was entered into: see [131]-[145]. Accordingly, the meaning of "any dispute under this deed" did not need to be determined in *Rinehart v Welker* because, unlike the present case, there was found not even to be a sustainable argument that the Hope Downs Deed could be pleaded in answer to the (entirely different) claims.

46. Cogent criticisms of the "govern or control" test were made by the Full Court, which for the most part are not addressed in the appellants' submissions, even though it still appears to be put forward as the test this Court should adopt (AS [45]-[47]). The criticisms were that the govern or control test involved the adoption of an (incomplete) dictionary definition from *BTR Engineering (Australia) Limited v Dana Corporation* [2000] VSC 246 at [24] (FC [196]), that it is unnecessarily narrow (FC [198]-[200]), that it does not pay sufficient attention to the use of the words "any dispute" (FC [201]), that it is insensitive to the particular objective context of the Hope Downs Deed and April 2007 HD Deed ([204]-[205]) and that it results in meaningless, facile disputes about whether

the language used in a particular clause determines the outcome of a claim or whether instead that outcome is determined by facts lying outside the language used in the clause (FC [266]-[268]).

47. **Sixthly**, the Full Court itself went about construing cl 20.2 of the Hope Downs Deed and cl 9.2 of the April 2007 HD Deed (FC [200]-[205]). The Full Court considered the text of the two deeds. It began by observing on the importance of construing the whole of the phrase "*any dispute* under this deed" (FC [201], see also [156]-[159]). The dispute, the Full Court said, might be seen to embrace the whole of the dispute or controversy between the parties, including "the attack on the availability of the defence (viewed as a matter of substance)", namely, the question of whether the settlement deeds were invalid or should not be enforced (at [201]). There are further reasons, identified by the Full Court subsequently, for treating the substantive claims and validity claims as part of the same dispute, addressed in paragraph [84] below.

48. As to the words "under this deed", the Full Court had already referred to the range of dictionary meanings the word "under" bore (FC [196]) and described it as an "elastic relational phrase" that did not, as a matter of ordinary English, necessarily assume the validity of the deed (FC [168]-[172], [202], [204]). There is no error in reading under in that way.

49. Also consistently with the approach it had said it would take, the Full Court considered the objective context of each of the two deeds (including the genesis and apparent commercial purpose of the transaction). It made important, unchallenged findings about context at FC [203], including that "one of the fundamental purposes of the Hope Downs Deed and the April 2007 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".

50. The findings were amply supported by the factual background summarised in paragraphs [17]-[28] above and the terms of each deed, particularly the assurances given in relation to the receipt of legal advice and the deeds being entered into freely and without duress or influence (see paragraphs [24.f], [25], [26] above). They fully answer the appellants' submissions that the parties should be assumed to have regarded the validity and enforceability of the deeds as a given (AS [30]) or that the pre-existing trust relationship supports reading "under" so as to exclude some of the claims that the parties appear to have been most concerned about (AS [35]-[37]) – a submission that in any event cannot be squared with the appellants' failure to challenge the Full Court's findings on commerciality (FC [115]-[139]).

51. The Full Court concluded that the words "any dispute under this deed" as they appeared in cl 20.2 of the Hope Downs Deed and cl 9.2 of the April 2007 Deed (FC at [204]):

> "...can be seen to cover 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. In these circumstances, the deeds, in their operation if valid, and by reason of their invalidity if not, lie at the heart of the dispute."

52. That is the finding, rather than the more generally expressed statement at [193], that, subject to the analysis of the particular releases and claims that the Full Court went on to undertake, was dispositive of the validity claims. It is a complete answer to the appellants' submission 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 cover the validity claims (AS at [33]). The finding is perfectly comprehensible as a matter of ordinary English. The "dispute" is "under" the Hope Downs Deed and April 2007 HD Deed because it involves, as a substantial issue (perhaps the main issue), the assertion of the releases and bars in those deeds together with a consequential question as to whether they are enforceable and valid.

53. **Finally**, the Full Court went on to consider the terms of each of the releases and bars in the settlement deeds and their application to the substantive claims and validity claims (FC [208]-[268]). The validity claims were considered against the Hope Downs Deed and April 2007 HD Deed at FC [245]-[250]. Three reasons were given for the conclusion that the validity claims could be seen to be within cl 20.2 of the Hope Downs Deed and cl 9.2 of the April 2007 HD Deed. It is apparent that each of the reasons was independent and sufficient in itself.

54. The first reason was expressed as follows (J [247]):

> "First, in our view, 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', for the reasons we have earlier expressed. The phrase is wide enough to cover a dispute in which the existence or validity of the deed is put in question."

55. The proposition that the phrase "under this deed" is wide enough to cover a dispute in which the validity of the deed is put in question is the focus of the appellants' argument before this Court. It is addressed further below.

56. The second reason was as follows (FC [248]):

> "Secondly, for the reasons we have already expressed, we do not agree that the validity claims amount to separate 'disputes' for the purposes of cl 20.2 or cl 9. They are part of the one dispute or controversy."

57. The second reason turns on the meaning of "any dispute". While the first and second reasons are plainly connected, the second reason may be seen as being independent of the first reason, in the sense that *even if* this Court were to conclude that the issues raised by the validity claims were not properly to be understood as being "under" the Hope

Downs Deed or April 2007 HD Deed *in themselves*, they may nonetheless be part of a wider "dispute" that meets that description.

58. The third reason was put as follows (FC [249]):

> "Thirdly, related to the second point, arguably 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. At least, there is a sustainable argument that they can be so characterised."

59. The third reason relates to the promise in cl 7(b) of the Hope Downs Deed "not to challenge the right of any member of the Hancock Group to any of the Hancock Group Interests at any time". The appellants' submissions take no notice of it. The Full Court was correct to conclude that there was a sustainable argument that the validity claims were themselves brought in breach of cl 7(b). There are concurrent findings that the purpose or substance of the validity claims was to sweep the way clean for the highly valuable substantive claims, which themselves explicitly challenged the HPPL Group's ownership of the Hancock Group Interests in breach of cl 7(b) (FC [158], [201]; J [640]). The validity claims therefore formed part of a "challenge" to the Hancock Group Interests.

60. Further, by clause 4 of the Hope Downs Deed the appellants had acknowledged "...that at all material times the Hancock Group Interests have been and remain beneficially owned by the Hancock Group member that purports to own them." An attempt to avoid or set aside the Hope Downs Deed is an attempt to undo that acknowledgment and thus a "challenge" to the Hancock Group members' rights to the Hancock Group Interests. That would be the case irrespective of whether the validity claims were brought to clear the way for the substantive claims.

61. Finally, as noted at paragraph [16] above, some of the validity claims, as pleaded, require the determination of the substantive claims and the appellants have submitted at each level below that a trial of the validity claims will require a trial of the substantive claims. The validity claims therefore involve a challenge to the ownership of the Hancock Group Interests because they incorporate the substantive claims which themselves constitute such a challenge.

Further responses to the appellants' contentions

62. As noted above, the appellants' principal contention is that "under" has a plain English meaning such that the words "any dispute under this agreement" can never extend to a dispute (or part of a dispute) in which the validity and enforceability of the agreement is put in question. In effect, the appellants submit that whenever parties select the word "under" they manifest an intention to exclude from whatever is referred to arbitration any issue as to the validity or enforceability of the agreement in question, no matter what the terms of the deed and how the issue turns out to be related to other issues. It is on

that basis that the appellants are able to submit that the word "any dispute" should be read so as to exclude any issue relating to validity or enforceability (AS at [44]).

63. The basis for the contention seems to be that "under" describes a legal relationship of subordination and the dispute must therefore be concerned with rights and obligations that are subordinate to – that is derived from or created by – the agreement, rather than about the validity or enforceability of the agreement itself: see, for example, the cases referred to by Young JA in *Rinehart v Welker* at [223].

64. The contention is bad as a matter of logic and unsupported by the authorities relied on by the appellants. The Full Court was correct to reject it. Further, even if the basis is thought to have some logical appeal, it is fully met simply by adopting a realistic construction of "any dispute" so as to cover the whole of the controversy between the parties, consistent with the approach that the appellants are apparently content with in relation to the substantive claims and the approach taken in *Rinehart v Welker*. The following points may be made against it.

65. **First**, the appellants' make much of the distinction between "arising out of" and "arising under" and submit, by reference to *Ethiopian Oilseeds v Rio del Mar* [1990] 1 Lloyd's Rep 86 at 97 (approved in *Francis Travel* at 165) that the former expression does not to extend to disputes about "whether there was ever a contract at all" and the latter expression is even more limited (AS [27]-[29]). The appeal to *Ethiopian Oilseeds* is misplaced, because Hirst J only observed that the words "arising under" would "probably" not cover rectification (not an issue in the present case) and his Honour's reference to disputes about "whether there was ever a contract at all" was taken from a passage in Mustill & Boyd, *Commercial Arbitration* (2nd ed) p 120, set out in the judgment at 95-96, which is plainly referring to *non est factum* claims.

66. In any event, as has been recognised many times, a decision on a particular form of words in one contract is no sure guide to its meaning in another (see *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63 at 66-67; see also *Rinehart v Welker* at [198] (McColl J)). The authorities are useful for what they reveal about principle. The rejection in *Ethiopian Oilseeds* of the submission that the words "arising out of" assume the temporal existence of the contract, and thus cannot extend to a dispute concerning a pre-contractual representation, is of direct relevance in the present case. As the Full Court recognised at [168], exactly the same legal reasoning is at work in the appellant's submission that a dispute "under this deed" must be one that assumes the validity or enforceability of the deed. Attractive as that submission might be to a legal philosopher it should not be used to construe commercial agreements. "Under" is more likely to reach any dispute where the rights or obligations created by the agreement are a substantial issue, whether or not their validity is challenged.

67. **Secondly**, none of the cases relied upon by the appellants as supporting a restrictive meaning of "under this agreement" or similar expressions involved a dispute that had as

a substantial issue the exercise of rights or obligations in the agreement. They are rather cases where the dispute had no *ex contractu* component, being disputes involving trade practices claims, tortious negligent misstatement claims and claims for breach of a contract other than the contract referred to in the arbitration clause (for instance, a collateral contract).

68. For instance, *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 43 FCR 439 was a claim for damages for alleged pre-contractual misrepresentations concerning the capability of certain printing machines (at 440, 442). The causes of action were misleading or deceptive conduct, breach of a collateral warranty (ie, an agreement separate from the agreement containing the arbitration clause, and to which it referred) and the tort of negligent misstatement (at 440, 442). There was no assertion of any rights or obligations created by the agreement referred to in the arbitration clause and no responsive assertion that it should be set aside or not enforced.[11] It was an easy matter for French J to conclude that the dispute was not *ex contractu* (at 448).

69. Similarly, the claims in *BTR Engineering (Australia) Limited v Dana Corporation* [2000] VSC 246 were described as encompassing "allegations of misleading and deceptive conduct 'contrary to statute' and allegations, also, of fraudulent misrepresentation and negligent misstatement" (at [18]). It was those claims that Warren J found lay outside the arbitration clause. They were not said to be met by the sale of business agreement that contained the arbitration clause (see [4]). The dispute was again, one in which there was no *ex contractu* component.

70. The same can be said for all of the cases referred to in *BTR* at [18]-[23], including *Hi-Fert Pty Ltd and Anor v Kiukiang Maritime Carriers Inc* (1998) 90 FCR 1. As Beaumont J observed in *Hi-Fert*, the non-contractual claims, being the claims held to be outside the arbitration clause, were sourced in specific representations made after the charter party and bill of lading had been entered into, and could not have been litigated if the representations had not been made. In that sense the charter party and the bill of lading were merely "background matters" and the non-contractual claims were properly understood as being "independent and free-standing" (*Hi-Fert* at 6). That is a completely different situation to the one before the Court, where the defences based on the settlement deeds are closely connected with the validity claims (see paragraph [84] below).

71. *Overseas Union* is not an obvious case for the appellants to rely upon. Evans LJ welcomed the more liberal approach to the construction of arbitration clauses that his Honour perceived in *Ashville Investments Limited v Elmer Contractors Limited* [1988] 2 Lloyd's Rep 73 (at 67). The clause in question required referral to arbitration of "all

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[11] Hence French J concluded at 448: "I am satisfied that neither the trade practices claim, nor the claims for breach of warranty or negligent misstatement can be said to arise out of the agreement. They all arise out of matters which are antecedent to the contract even though they may involve questions which also go to its performance."

disputes and differences ... in respect of this Reinsurance" (at 65). The question was whether disputes involving a separate pre-contractual oral agreement or representation, said to found a collateral contract or a claim for rectification, were within the arbitration clause (at 66). Evans LJ held that they were, placing emphasis on, amongst other things, the width of the words "disputes or differences" which were found to extend to "all disputes concerning the transaction generally" (at 70). There was, again, no relevant *ex contractu* component in the disputes (although rectification must lie on the borderline[12]), nor any dispute about the validity or enforceability of the agreement in question (at 65). There was a separate claim that the oral representation gave rise to an implied term and it was accepted that it was arbitrable (at 66).

72. **Thirdly**, consideration of the above cases gives the lie to the appellants' submission that the Full Court's approach, in practical terms, conflates "under" with broader terms such as "in connection with" or "in relation to" (AS [24]). The Full Court properly regarded itself as construing particular words used in a particular contractual and commercial context. One does not test such a construction by substituting different words into the contract and asking what the result would be. Further, to observe that "*in connection with*" is broader than "*under*" does not say anything about whether any particular dispute is "*under*" the deed in question (see FC [199]). It rather sets up an inquiry that is apt to mislead.

73. Perhaps even more fundamentally, the Full Court's approach plainly does leave room for relational phrases such as "*in connection with*" to have a wider operation than "*under*". For instance, a claim for damages arising from a pre-contractual misrepresentation (as in *Paper Products*) might well, depending on context, be a dispute "*in connection with*" the deed but not a dispute "*under*" the deed. It would not come within the Full Court's actual holding at FC [204] (there being no *ex contractu* component of the dispute) and it would not seem to come within any of the three categories identified in the illustrative "broader construction" in FC [193].

74. **Fourthly**, from a purely practical perspective a dispute about the validity or enforceability of an agreement is indistinguishable from a dispute about its construction, in the sense that the outcome of the dispute will determine the agreement's "operation" or "effect". For a person involved in commercial affairs, whether the ultimate "operation" or "effect" is determined by one or the other is unlikely to be of much importance. Such a person, in using the expression "any dispute under this agreement", is unlikely to have had in mind any distinction between construction on the one hand, and validity or enforceability on the other hand. The distinction the person may have in mind is the distinction between disputes with an *ex contractu* component (ie, where rights and obligations created by the agreement are asserted by way of a claim or defence,

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[12] See also, in this respect, *Ethopian Oilseeds v Rio del Mar* [1990] 1 Lloyd's Rep 86.

such that the "operation" or "effect" of the agreement is in issue) and other classes of dispute not involving the assertion of the agreement. That is a distinction between the first and second categories of cases referred to above, and thus consistent with the HPPL Respondents' position. To the extent the above involves making an empirical assumption, it is a rational one.

75. **Fifthly**, the logic of "subordination" that the appellants rely upon does not conform to the distinction between *ex contractu* claims and other disputes that they also rely upon. Their appeal to "ordinary English" thus breaks down in practice. Take, for instance, a specific performance suit, where the term sought to be enforced is part of an agreement that contains an arbitration clause that uses the expression "any dispute under this agreement". The specific performance suit would, on any view, be a dispute "under" the agreement, since it involves the assertion of a right (and correlative obligation) sourced in the agreement. But what if specific performance is sought to be resisted solely on the basis that the claimant has unclean hands, or has delayed, or is time-barred under statute, or is estopped from enforcing the particular term because of a representation that has been made in the course of the performance of the agreement? Those defences raise questions, broadly speaking, about the enforceability of the agreement and are not *ex contractu* – on the appellants' approach they would therefore need to be ruled out. However, as a matter of ordinary English, there is nothing jarring about describing those disputes as being "under" the agreement, in the sense of subordinate to it – the agreement remains in place, the dispute is as to the operation of a particular term that in a metaphorical sense can comfortably be seen to be "under" it.

76. The example just given suggests that the appellants' approach may require a distinction to be drawn between claims that particular clauses of an agreement are invalid or should not be enforced, and claims that the entire agreement is invalid or should not be enforced. As Gleeson CJ remarked in *Francis Travel* at p 165D, those type of legal distinctions should be avoided in this area, and it must also be borne in mind that the relief sought in the validity claims includes injunctions targeted only at the enforcement of the releases and arbitration clauses in the settlement deeds (see paragraph [14] above).

77. **Sixthly**, a related problem with the appellants' approach is that whether the logic of subordination has any traction, as a matter of ordinary English, might be thought to depend on the legal basis for invalidity or lack of enforceability. So, for instance, a dispute that can properly be described as one going to the very existence of the agreement (ie, forgery) and that results in it being void *ab initio* is less obviously a dispute that in ordinary English would be regarded as "under this agreement" than a dispute about whether the agreement should be set aside on the basis that it was procured by misleading or deceptive conduct or has been validly rescinded.

78. The appellants' submissions on *Mackender v Feldia AG* [1967] 2 QB 590 (AS [34]) provide an illustration of the point – they seem to say that a dispute as to whether a

contract is no longer binding because it has been "repudiated" for non-disclosure may come within the ordinary English meaning of a dispute "under this agreement" whereas a dispute as to whether the agreement had been "rescinded" on the same basis would not. But the distinction in *Mackender* was between a voidable contract and *non est factum* and was stated as a general proposition and not one relating to insurance law only (at 603F-G (Diplock LJ)). The duty to disclose material facts in insurance law is not a contractual duty (*Khoury v GIO (NSW)* (1984) 165 CLR 622). Although the nature of the insured risk can bear upon what is required at law to be disclosed that is no different to undue influence or duress, where the effect of the impugned conduct can depend upon the terms of the bargain apparently struck. But whether the distinction be good or not, the point is that the prominence that the appellants' construction gives to the "legal character of individual issues" (*Francis Travel* at 165D) is a good reason for avoiding it.

79. The Full Court recognised, however, these potential distinctions in its holding at FC [204]. The circumstance that there were no *non est factum* allegations in this case meant that issues related to validity and enforceability fitted more easily within the ordinary English meaning of "under", even if the "legal character of the individual issues" was brought into account. The Full Court's observation at [193] that even a dispute about the "existence" of the deed might potentially be regarded as "under" it was not an inconsistency (cf AS [39]-[40]) – it was merely a recognition that the present case was not in the most difficult category, and that a construction that turns on the legal character of individual issues should be avoided (something with which the appellants apparently agree (AS [39])). They easily can be avoided – by not restricting "under" to legally subordinate relationships *or* by adopting a realistic and pragmatic construction of "dispute" which takes in the whole controversy, being the claim, defence and reply.

80. **Seventhly**, a further problem with the general proposition that the appellants ask this Court to accept is that, notwithstanding the repeated rhetorical appeals to the ordinary English meaning of "under", they seem incapable of defining in legal terms what disputes are within the expression and what disputes are not. The appellants' submissions champion the statement of Evans LJ in *Overseas Union* at 67, which referred to "only those disputes which may arise regarding the rights and obligations which are created by the contract itself" (AS at [29]). But the dispute in question would seem, quintessentially, to be a dispute "regarding the rights and obligations which are created by the contract itself". A substantial issue in it will be the assertion of those rights – giving rise to questions about whether they are valid and enforceable and what their scope is *if* they are valid and enforceable. Similarly, unless "governed or controlled" is understood to mean "necessarily" governed or controlled so that there is no possible outcome in which the terms of the agreement will not be determinative, it too covers the present "dispute" (see FC [199], [212], [217]).

81. **Finally**, and in any event, the appellants' submissions fail to deal with the words "any dispute". Even if the Court were to accept a narrow reading of "under", the present dispute would come within it.

82. As noted at paragraphs [44] and [71] above, the two principal authorities relied on by the appellants, *Rinehart v Welker* and *Overseas Union*, support a wide reading of respectively "any dispute" and "all disputes and differences". They do not suggest that the words "under this deed" take precedence or are controlling. In both cases the word "dispute[s]" was found to have an expansive effect.

83. Further, the appellants' position in this regard is hopelessly inconsistent. The appellants do not challenge (and have never sought to challenge) the findings of the Full Court that all of the "substantive claims" against the parties to the settlement deeds are the subject of apparently valid arbitration agreements within the meaning of s 8 of the CA Act, and so must be referred to arbitration (FC [204], [208]-[213], [216]-[244], [265]-[266]). They accept that those claims raise a dispute or disputes "under" the Hope Downs Deed and April 2007 HD Deed notwithstanding that the claims do not themselves involve the assertion of any rights or obligations created by those deeds. It is enough for the appellants, in this context, that the deeds are set up in defence to the claims. But as the Full Court observed with respect to the Primary Judge's approach, to construe "dispute" in that way brings in "the substantive defence, but not the substantive reply" (FC [201]). There is no principled basis for characterising the "dispute" so as to include the substantive claims but exclude the validity claims. Both the substantive claims and the validity claims are the same remove from the assertion of the rights and obligations in the settlement deeds – the deeds are put forward in response to the substantive claims, and the validity claims are in turn advanced in response to the settlement deeds.

84. The substantive claims and validity claims are interconnected at a number of levels. They are not "free standing" or "independent" as Beaumont J considered the non-contractual claims in *Hi-Fert* to be. The interconnections may be summarised as follows:

    a. the validity claims are, in substance, brought in response to the HPPL Respondents' setting up the settlement deeds by way of defence to the substantive claims. They form part of one "controversy" in that sense (see paragraphs [4] and [47] above);

    b. the validity claims are, at least arguably, directly precluded by cl 7(b) of the Hope Downs Deeds, because they involve a "challenge" to Hancock Group Interests (see paragraphs [58] to [61] above). They may be said to be "under" the Hope Downs Deed (and, so far as Mr Hancock is concerned, the April 2007 HD Deed) in that sense as well;

    c. some of the validity claims incorporate all of the substantive claims (see paragraph [16] above). That alone shows that they are, necessarily, part of the one dispute or controversy – on the appellants' pleading it is simply impossible to separate them

out, and the appellants have maintained that to be the position at every level (see footnotes 7 and 8 above); and

d. the validity claims are not only responsive to the settlement deeds – the settlement deeds will also be asserted in answer to them, it being contended that the Hope Downs Deed and April 2007 HD Deed were both affirmed in 2012 (see paragraph [28] above).

85. The Full Court's conclusion that the validity claims formed part of a wider "dispute" that was "under" the Hope Downs Deed and April 2007 HD Deed was, in light of the matters set out above, plainly correct.

Relief

86. The appellants seek orders remitting the proceedings to the Primary Judge (AS [47]-[48] and [51]). That may reflect their mistaken understanding that the Primary Judge's exercise of the discretion under s 8 of the CA Act was only found to be erroneous by reason of her Honour's application of the "govern or control" test (see paragraph [29] above). If the appeal is upheld, the proper course is to remit the matter to the Full Court, which plainly regarded itself as being in a position to exercise the same discretion (and did so – see FC [337]-[394]), so that it may exercise the discretion itself or remit the case to the Primary Judge, this ordinarily being the proper order for this Court (*Russo v Aiello* (2003) 215 CLR 643 at 653 [33], McHugh J).

Part VI: Argument on respondents' proposed notice of cross-appeal

87. If leave is granted to file the proposed Notice of Cross Appeal, and if special leave to appeal is granted in respect of it, certain of the HPPL Respondents (ie, Hope Downs Iron Ore Pty Ltd, Roy Hill Iron Ore Pty Ltd and Mulga Downs Iron Ore Pty Ltd) would wish to argue that, contrary to FC [289]-[323], they fall within the extended definition of "party" under s 2(1) of the CA Act because they are "claiming through or under" a party to the arbitration agreements contained in cl 20 of the Hope Downs Deed and cl 9 of the 2007 HD Deed, and are therefore entitled to seek an order under s 8(1) of the CA Act.

Part VII: Time for oral argument

88. The HPPL Respondents estimate that two hours will be required for the presentation of oral argument on their behalf.

Dated 3 August 2018

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SCHEDULE

HANCOCK MINERALS PTY LTD (ACN 057 326 824)

Second Respondent

TADEUSZ JOSEF WATROBA

Third Respondent

WESTRAINT RESOURCES PTY LTD (ACN 009 083 783)

Fourth Respondent

HMHT INVESTMENTS PTY LTD (ACN 070 550 104)

Fifth Respondent

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

Sixth Respondent

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

Seventh Respondent

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

Eighth Respondent

GEORGINA HOPE RINEHART (IN HER PERSON CAPACITY AND AS TRUSTEE OF THE HOPE MARGARET HANCOCK TRUST AND AS TRUSTEE OF THE HFMF TRUST

Ninth Respondent

HANCOCK FAMILY MEMORIAL FOUNDATION LTD (ACN 008 499 312)

Tenth Respondent

150 INVESTMENTS PTY LTD (ACN 070 550 159)

Eleventh Respondent

HOPE RINEHART WELKER

Twelfth Respondent

GINIA HOPE FRANCES RINEHART

Thirteenth Respondent

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