Amended on 21 September 2018 pursuant to order of Chief Justice Kiefel made on 10 September 2018.

21/9/18

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S144 of 2018

BETWEEN:

HIGH COURT OF AUSTRALIA
FILED
21 SEP 2018
THE REGISTRY BRISBANE

**BIANCA HOPE RINEHART**
First Appellant

**JOHN LANGLEY HANCOCK**
Second Appellant

and

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

AND BETWEEN:

**WRIGHT PROSPECTING PTY LTD**
**ACN 008 677 021**
Intervener

# INTERVENER'S ~~SUMISSIONS~~AMENDED SUBMISSIONS

## Part I: Certification

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

## Part II: Basis of Intervention

2. The Intervener (**WPPL**) seeks leave to intervene as a non-party whose legal rights in pending litigation before the Supreme Court of Western Australia (the **WA Proceedings**) are likely to be affected by the outcome of this appeal.[1] The basis for this is explained more fully in Part III. WPPL was granted leave to intervene in the Court below on a limited basis.[2] WPPL similarly seeks to intervene in this appeal, on a limited basis, for

1 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [6].

2 Reasons of the Full Court at [23] and [281] to [288].

**THE SOLICITOR FOR THE INTERVENER IS:**
**GARETH JENKINS of Clayton Utz**

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two reasons, the second of which is the same issue upon which it was granted leave to intervene below.

3. *First,* WPPL contends for a construction of cl 20 of the Hope Downs Deed[3] that is different ~~to~~from the contentions advanced by both the appellants and the respondents. WPPL's contention is that cl 20 does not cover the appellants' "substantive claims" (summarised at AS[6]-[9]). Hence these claims are not arbitrable. WPPL contends the phrase "*any dispute under this deed*" is only apt to cover a dispute as to the nature or extent of any rights and obligations created by the Deed. If cl 20 is construed at the extremity of liberality, the "validity issues" may be arbitrable – but subject to the exercise of the primary judge's discretion to determine those issues under the "proviso" to s 8(1) of the CA Act. If the primary judge were to refer the "validity issues" to arbitration, any consequent stay of the "substantive claims" pending the arbitral reference would be based on discretionary case management principles.

4. Thus, WPPL does not seek to support either the appellants' or respondents' submissions on the appeal, but does support the appellants' claim for remittal of the matter to the primary judge to reconsider the appropriate relief in accordance with law. As is explained in Part III, if the construction of cl 20 for which WPPL contends is accepted, much of the basis of the respondents' application to stay WPPL's (and the Rhodes parties') claims in the WA Proceedings will fall away.[4]

5. *Second,* ~~WPPL understands that~~ the sixth to eighth respondents, RHIO, HDIO, and MDIO, have ~~served but not~~ filed ~~a~~ submissions ("the proposed ~~Notice of Cross-Appeal~~cross-appellants' submissions") in relation to which it will be necessary for these parties to seek special leave ~~(RS [87]). The proposed Notice is attached to an affidavit filed in the appeal to which WPPL has not been permitted access.[5] WPPL understands that the respondents~~, RHIO, HDIO and MDIO wish to contend that ~~certain of the HPPL~~

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3 These submissions will adopt the terminology used in the Appellants' and Respondents' submissions.

4 That application was heard on 30 and 31 May 2018 by Le Miere J and the judgment has been reserved.

~~5 WPPL applied to the Registrar by email on 14 August 2018 to which the Registrar responded on the same day "*Rule 4.07.4(a) of the High Court Rules 2004 prevents the giving of the access sought.*" The respondents have denied access to the material to WPPL.~~

~~respondents~~they are within the scope of the extended definition of "*party*" in s 2(1) of the CA Act on the basis they are claiming "*through or under*" a party to the Deed. This was one of the issues on which the Full Court granted WPPL leave to intervene and found its submissions of assistance (FC [286]).

6. The "*through or under*" issue also is likely to affect WPPL's legal rights in the pending WA Proceedings. The respondents originally applied for a mandatory stay of WPPL's claim in the WA Proceedings under s 8(1) on the basis that WPPL fell within the scope of s 2(1) (but that part of the application was withdrawn some months after the Full Court hearing). WPPL is concerned that the respondents will seek to renew the s 8 application in the WA Court if this Court were to grant special leave and find in the respondents' favour on the "*through or under*" issue. ~~Without having had access, despite requesting it from the respondents, to the proposed Notice of Cross-Appeal or any supporting material, all WPPL can presently do is set out in outline form in Part IV why the Full Court's determination on this point is correct.~~

**Part III: Why Leave to Intervene Should be Granted**

7. The broad outline of the WA Proceedings and how they overlap with these proceedings was explained by the Full Court at FC [285]. In essence, in the WA Proceedings WPPL claims that certain of the Hope Downs Tenements (i.e. those known as the East Angelas Tenements) were acquired in 1989 on behalf of the partnership between HPPL and WPPL (Hanwright) that has existed since the ~~1950's~~1950s and are accordingly partnership property in which it has always had a 50% beneficial interest. Inconsistently with this claim, in these proceedings, the appellants claim the East Angelas Tenements form part of the trust assets of the HFMF Trust of which they (and their siblings) are beneficiaries.[6]

8. WPPL recognised that, because of the competing claims to beneficial interests in the tenements, the appellants (and their siblings) were necessary parties to the WA Proceedings (per *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*[7]). They

[6] WPPL also claims royalty payments in relation to iron ore produced from the Hope Downs 1 mine. The appellants do not admit WPPL's royalty claim on the basis that they hold the equitable interest in the Hope Downs 1 mine.

[7] [2010] HCA 19; (2010) 241 CLR 1 at [136]-[138].

were joined to those proceedings in September 2016.[8] In November 2016, the respondents applied to stay the WA Proceedings and that application was adjourned pending the determination of the Full Court in the proceedings below.[9] The stay application was re-listed for hearing following delivery of the Full Court judgment and heard by Le Miere J on 30 and 31 May 2018. Judgment is reserved. At the hearing of the stay application before the WA court, the respondents indicated they may apply for special leave on the "*through or under*" point and put a formal submission to preserve their position in the WA Proceedings.[10]

9. The construction issue before this Court affects WPPL's legal interests in the WA Proceedings because of the way in which the respondents sought to deploy the s 8 stay ordered by the Full Court in support of the application for a stay against WPPL (and the Rhodes parties). This was only fully revealed in oral submissions in the WA court in which the respondents submitted that the WA court effectively had no choice but to stay the claims by WPPL and the Rhodes parties. This of course would have deleterious consequences to WPPL in delaying its ability to litigate its claims in court. In submissions in chief, counsel for the respondents put the contention in the following terms:

> Ultimately, the real question for determination on the stay applications is this: what should the court do with the rump of non-arbitral claims in circumstances where the legislature has mandated that the parties must be referred to arbitration in respect of the arbitral claims, but the arbitral and non-arbitral claims concern the same property. And the arbitral claims, as will become apparent when we go through the pleadings, contradict the essence of the claims made by the Rhodes parties and the WPPL parties. They are flatly contradictory.
>
> Now, we – our ultimate submission is that the court would stay the proceedings pending that – the outcome of the arbitration. Whilst that might be perceived by some to be an unfortunate delay in the determination of WPPLs and Rhode parties' claims, that is the consequence of the legislature mandating that arbitral matters must be referred with the consequent stay.

10. In reply, the respondents went on to submit further that the "consequent stay" of WPPL's

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8 See *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd (No. 7)* [2016] WASC 305.

9 See *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd (No. 78)* [2016] WASC 361.

10 Hearing before Le Miere J, 30 May 2018, T 1679.

and the Rhodes parties' claims was "inevitable" because the legislative policy of s 8 demanded prior determination of the arbitrable claims.[11] The respondents did not submit that any of the factors normally considered on a discretionary stay application weighed in favour of a stay (see *Sterling Pharmaceuticals*[12]). A further problem never adequately addressed by the respondents is how the principles explained in *John Alexander's Clubs* could ever be satisfied if the appellants (and their siblings) are not able to appear as active defendants in the WA Proceedings.

11. If, however, as WPPL contends, the "substantive claims" are not within the scope of cl 20, much of the basis of the respondents' stay application in the WA Proceedings falls away. There would be nothing that would render (on the respondents' argument) a stay of WPPL's claim an inevitable consequence of a s 8 stay. In addition, the *John Alexander's Clubs* issue could be resolved by the exercise of the WA court's discretionary case management powers – allowing it to weigh up when, and in what forum, the competing proprietary claims should be determined.

12. As the battle lines are currently drawn in the appeal, there is no contradictor to the proposition that the "substantive claims" ought be characterised as a "*dispute under the deed*". The parties to the appeal seem to accept that the word "*under*" should be construed as "*controlled or governed*" despite the Full Court's criticism of the use of that dictionary definition by Warren J in *BTR Engineering*[13] (which was adopted by Bathurst CJ in *Rinehart v ~~Rinehart~~Welker*[14]). Permitting WPPL to intervene in the appeal will ensure that all the available and relevant constructions of the phrase "*dispute under the deed*" are addressed in submissions.

13. If the Court grants special leave on the "*through or under*" point, it is submitted that WPPL's contribution will be of assistance in the same way that it was of assistance to the Full Court. The possibility that WPPL might be treated as a statutory party to a Deed of

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11 Hearing before Le Miere J, 30 May 2018, T 1851.

12 *Sterling Pharmaceuticals Pty Ltd v Boots Co (Aust) Pty Ltd* (1992) 34 FCR 287; [1992] FCA 72.

13 *BTR Engineering (Australia) Ltd & Ors v Dana Corporation & Ors* [2000] VSC 246 at [23].

14 [2012] NSWCA 95; (2012) 95 NSWLR ~~95~~ 221 at [125].

which it had no knowledge before the present litigation began underscores its keen interest in the s 2(1) issue the respondents seek to raise.

14. Although WPPL seeks leave to intervene as a non-party, WPPL (and the Rhodes parties) are necessary parties to the proceedings below, which was recognised by the appellants' application to join WPPL (and the Rhodes parties) brought shortly before the Full Court hearing (FC [285]). That application was adjourned pending the Full Court appeal. If it had been brought earlier, WPPL would have been a party to the proceedings below with a right to be heard on the appeal.

## Part IV: Submissions

*Clause 20 of the Hope Downs Deed*

15. WPPL's essential contention is that neither the Full Court's analysis of cl 20 nor the analysis of Bathurst CJ in *Rinehart v ~~Rinehart~~Welker* should be accepted without significant qualification by this Court.

16. The appellants' criticism[15] of the assumption underpinning the Full Court's conclusion, expressed in *Francis Travel Marketing,*[16] does not focus on the way in which Gleeson CJ prefaced his observations in the following terms: "*When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference, their agreement should not be construed narrowly*" (at 165). His Honour was specifically considering what could be assumed to be the parties' contractual intentions at the beginning of their commercial relationship before any dispute had arisen and before differences had emerged. His Honour was not referring to an agreement to compromise existing disputes.

17. The context of the Hope Downs Deed is therefore entirely different. The Hope Downs Deed was a compromise of existing disputes arising out of an existing and fraught relationship. The respondents secured broadly framed acknowledgements as to ownership of the *Hancock Group Interests* (cl 4), releases of the *Claims* (cl 6), including in cl 6(b) a

15 AS [25]-[37].

16 *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165.

covenant not to bring proceedings, and undertakings (cl 7) in exchange for covenants as to the distribution of funds from the Trust (cl 5). It was agreed that "*each party may plead this deed in bar to any Claim or proceeding the subject of a release in this deed*" (cl 11).

18. The Hope Downs Deed is (and was expressed to be) a settlement agreement. The purpose of the Deed was to bring to an end *Claims* that had already arisen and been articulated by the second appellant in his draft affidavit. In this context, there is no basis for an assumption to be made that the parties intended to provide for arbitration of the *Claims* (the "substantive claims", using the terminology in the appeal). Indeed, both the context and the terms of the Deed contradict such an assumption. Clause 11 makes no assumption that a *Claim* would be brought in arbitral proceedings. The point of the clause was that each party could plead the Deed as a bar "*to any Claim or proceeding.*"

19. It may be asked rhetorically, why should it be assumed that the Deed was providing for arbitration of the *Claims* when those claims had been compromised and, as a safeguard, cl 11 provided a mechanism for summary disposal of any *Claim* brought in any proceeding in breach of the Deed? Accepting that the purpose of the Deed was "*the quelling of disputes about the title to the assets*" (FC [203]) does not support any assumption as to an intention to arbitrate those disputes.

20. The language of cl 20 is entirely consistent with this construction of the Deed. The parties provided for confidential mediation/arbitration "*in the event there is any dispute under this deed.*" By its terms, cl 20 is directed to future disputes, not past disputes settled by the Deed. The assumption identified by Gleeson CJ in *Francis Travel* may have a role to play in respect of future disputes under the Deed – such as the meaning and effect of the releases in cl 6 or the operation of the distribution covenant in cl 5. But it has no application to the "substantive claims" settled by the Deed.

21. Much of the Full Court's analysis of the principles underlying the construction of arbitration agreements (at FC [199]-[205]) can be accepted - subject to one important qualification. Those principles can only apply once the subject matter of the arbitration agreement is identified by a process of construction of the Deed as a whole. The parties are free to limit their agreement to arbitrate to particular categories of disputes or differences. A liberal construction of cl 20 cannot extend the reach of the arbitration

agreement beyond those categories, but it can mean that disputes within those defined categories will not be resolved by different tribunals and 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*" (*Francis Travel* at 165).

22. WPPL submits that the real issue in the appeal is whether the phrase "*any dispute under the deed*" extends the reach of the arbitration agreement to the "substantive claims" despite the contextual factors strongly indicating the parties had no contractual intention to submit the "substantive claims" to arbitration.

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23. The Full Court was, with respect, right to find the use of a dictionary definition of the word "*under*" in *BTR Engineering* unpersuasive (FC [196]). The meaning attributed to "*under*" in that case ("*governed, controlled, or bound by; in accordance with*") is, as the Full Court pointed out, only one of its definitions as a preposition and not one dictated by the word itself.

24. In contexts such as cl 20, the word "*under*" describes the relationship between abstract concepts by way of a metaphor with the placement of physical objects. A chair is *under* a table because the table – either substantially or completely - covers the chair. It is this
20 sense of covering that is, in WPPL's submission, the way in which the word "*under*" is used in cl 20. It carries with it connotations of substantial and close proximity.

25. Attributing the meaning "*governed or controlled*" to the word "*under*" gives a very different meaning to cl 20. It focusses attention purely on the legal effect of the successful deployment of the Deed in response to claims that otherwise have no relationship with the Deed at all. If the "substantive claims" were subject to a complete time bar defence, it would not be accurate to characterise those claims as "*a dispute under a limitation statute*". It is no more accurate to characterise the "substantive claims" as a "*dispute under the deed*" simply because the Deed might provide a complete defence to them.

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26. The drafter of the Deed could have chosen broad relational phrases which would have extended the reach of cl 20 to the "substantive claims." Those phrases are canvassed in the Full Court judgment and the submissions of the appellants and respondents. A deed of settlement which, on the evidence before the primary judge, was drafted by experienced

commercial lawyers acting to protect the respondents' interests can be presumed to have had regard to the body of case law relating to those phrases. It is no criticism that a formulation ("*any dispute under this deed*") was chosen which naturally limited the scope of the arbitration agreement to future disputes as to the nature or extent of any rights and obligations created by the Deed. There was simply no need to provide for arbitration of the compromised *Claims*. This is not a sensible, commercial meaning that arises from the Deed.

27. The current dispute as to whether the "validity claims" are arbitrable has its genesis in attributing the meaning "*governed or controlled*" to the word "*under*" in cl 20. On that approach to cl 20, there is an obvious logical problem in treating the "validity claims" as arbitrable when those claims are directed at establishing that the Deed is of no legal effect. The "validity claims" are not, and cannot be, in any relevant sense, "*governed or controlled*" by the Deed.

28. But if the phrase "*any dispute under this deed*" has the sense for which WPPL contends, much of the conceptual difficulty in treating the "validity claims" as arbitrable falls away. What matters is characterising the nature of the connection between the Deed and the dispute. If those connections are substantial, the metaphorical meaning of the word "*under*" will be satisfied. Viewed in this light, the ~~respondents~~respondents' submissions at RS [72]-[75] may assume greater force.

29. The construction for which WPPL contends also provides a more coherent scheme for the resolution of the arbitrable and non-arbitrable disputes. The practical problems that may lie ahead as things currently stand can be illustrated by one example. The effect of the Full Court's orders is that the appellants are required to arbitrate both the "substantive claims" and the "validity claims." But, if the appellants prevail on the "validity claims," the jurisdiction of the arbitral tribunal to determine the "substantive claims" is brought into question. If the tribunal hears all the claims together (which the respondents suggest it must), the findings on the "substantive claims" may not be capable of enforcement under the CA Act. The "substantive claims" will, for practical purposes, be unresolved. This is a direct result of the fact that WPPL will not be a party to the arbitration where claims will be made by the appellants that are directly in contradiction of WPPL's claims in the WA Proceedings and which would directly affect WPPL (*John Alexander's Clubs*). The

arbitration will also not bind the Rhodes parties or HDIO which is not a party to any arbitration agreement and asserts a competing interest in the mining tenements.

30. On WPPL's construction of cl 20, the arbitration agreement may extend to the "validity claims." Because those claims bear on the question of whether the arbitration agreement is "*null and void, inoperative or incapable of being performed*," the primary judge will have a discretion whether to order a trial of the "validity claims" or refer those claims to arbitration. If (as the respondents currently contend) the "substantive claims" and the "validity claims" cannot be disentangled, this would weigh in favour of a trial of the whole dispute. If the "validity claims" are referred to arbitration, the primary judge will be able to consider whether to stay the "substantive claims" pending the outcome of the arbitral reference – applying discretionary case management principles. If the respondents prevail on the "validity claims" the Deed can be deployed by them as a plea in bar to the proceedings below – effectively bringing the proceedings to an end as between the appellants and the parties to the Hope Downs Deed. If the appellants prevail, they will be free to continue the action without having been forced to arbitrate under an arbitration agreement in a Deed that was always liable to be set aside.

31. The benefit to WPPL has been identified above in paragraph 11 ~~above~~. This mitigates against the possibility of delay to the ability of WPPL to prosecute its claims in the WA ~~court~~Proceedings. The contention that there is a statutory constraint on the exercise by the WA Court of its case management powers will fall away.

32. WPPL would also wish to restate a submission it made to the Full Court (pursuant to the leave to intervene) about the proper delineation of the arbitral "matter" under an arbitration agreement.

33. The respondents' submissions seem to carry an implicit suggestion that an arbitrable "matter" (for the purposes of s 8) can extend beyond the controversy between the parties to the arbitration agreement. Certainly, the respondents' submission in the WA court that a stay under s 8 against the appellants "mandates" a consequent stay of WPPL's claim seems to be based on a very broad conception of the arbitral "matter."

34. But as Allsop J (as his Honour then was) observed in ~~*Commandate*~~*Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,[17] the concept of an arbitral matter is necessarily linked to the terms of the arbitration agreement and "*can be seen to be a reference to the differences between the parties or the controversy that are or is covered by the terms of the arbitration agreement*" (at [235]). If a party is not bound by the terms of an arbitration agreement, and is not a "party" in the extended sense of claiming through or under a party to the arbitration agreement, no aspect of the controversy involving the non-party is a "matter" for the purposes of s 8(1). This is so even if the subject matter of the claim substantially overlaps with a "matter" which is the subject of an arbitration agreement between different parties. The identification of the "matter" for the purposes of s 8(1) cannot be divorced from the identification of the "parties" to the arbitration agreement.

*Section 2(1) of the CA Act*

35. ~~For the reasons explained above, WPPL has been unable to obtain a copy of the proposed Notice of Cross-Appeal or any of the material filed by the respondents in support of that proposed application. WPPL intends to apply for access to that material prior to the hearing of the appeal on 12 October 2018 and will seek the Court's leave to file amended submissions dealing with the "*through or under*" issue if appropriate to do so.~~

36. ~~All that WPPL can sensibly submit at the moment is that the reasons~~ In relation to the proposed cross-appellant's submission, WPPL submits that there should be no grant of special leave (or, if special leave is granted, the cross-appeal should be dismissed). The reasons of the Full Court at FC [289] to [323], and particularly at FC [313] to [319] are not attended by any error. The reasons are clearly correct and~~, in WPPL's submission, there~~ reflect an approach to principle that is ~~no basis for the grant of special leave in relation to the issue sought to be raised by the proposed Notice of Cross-Appeal. The Full Court identified, and correctly applied, the applicable principles derived from~~ consonant with the authorities of this ~~Court's analysis of the extended definition of "*party*" (in identical terms) under s 7 of the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth)~~ Court in *Tanning Research Laboratories Inc v O'Brien*[18] and *Michael Wilson &*

[17] [2006] FCAFC 192; (2006) 157 FCR ~~280~~45.

[18] (1990) 169 CLR 332 at 342 and 353.

*Partners v Nicholls*[19]. The latter authority is not referred to in the proposed cross-appellants' submissions even though the Full Court relied on this authority in the critical part of its reasoning below (FC [316] and [317]).[20] ~~(1990) 169 CLR 332 at 342 and 353. There is no occasion to reconsider those principles particularly where those respondents that are not parties to the Deeds have the benefit of a discretionary stay pending determination of the arbitration and there is no appeal from that order of the Full Court.~~

*(1) Special Leave*

10 37. The proposed cross-appellants have not identified the proposed special leave question or explained how that question satisfies the criteria for a grant of special leave under s 35A of the *Judiciary Act 1903*. In the absence of any such elucidation of the point by the proposed cross-appellants, WPPL contends that this case is not an appropriate vehicle for the grant of special leave for at least three reasons.

~~36.~~38. *First*, there is no occasion to reconsider the principles stated by this Court in *Tanning* and *Michael Wilson* where HDIO, RHIO and MDIO, who are not parties to the Deeds, have the benefit of a discretionary stay pending determination of the arbitration and there is no appeal from that order of the Full Court. *Second*, one of the companies said
20 to be a "party" to the Hope Downs Deed under s 2(1) (HDIO) was in existence at the time the deed was executed. It can be inferred that a choice was made not to make it an actual party to the deed. *Third*, as discussed below, the decision of the Victorian Court of Appeal in *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd*[21], is distinguishable from the present case and turns upon the peculiarities of the pleading in that case. When properly analysed, *Flint Ink* does not signify a necessary conflict with the judgment of the Full Court below.

*(2) The Claims against RHIO, HDIO and MDIO*

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19 [2011] HCA 48; (2011) 244 CLR 427 at [105] to [107].

20 (1990) 169 CLR 332 at 342 and 353.

21 [2014] VSCA 166; (2014) 44 VR 64.

39. The claims made by the appellants against RHIO, HDIO and MDIO are that they were knowing recipients of trust property from parties to the Hope Downs Deed in that the property they received is subject, in each case, to a constructive trust and that each of these non-parties to the Hope Down Deed is liable for an account of profits (FC [291], [292] and [293]). Put simply, it is alleged that these non-parties to the Hope Downs Deed, acquired property with knowledge of breaches of fiduciary duties by HPPL and Mrs Rinehart.

40. Any defence by RHIO, HDIO and MDIO will involve distinct and separate defences from any defence available to, say, HPPL or Mrs Rinehart, as alleged defaulting fiduciaries who are each parties to the Hope Downs Deed. The defences of the proposed cross-appellants will be responding to a different claim than that which is made against a defaulting fiduciary. This is necessarily the case because the claims against a knowing recipient for accessorial liability are directed to the knowing recipient as an independent and self-standing cause of action. They are not the same as and should not be conflated with claims made against a defaulting fiduciary. As this Court stated in *Michael Wilson* at [106]:

> As MWP rightly pointed out, this Court has held that liability to account as a constructive trustee is imposed directly upon a person who knowingly assists in breach of fiduciary duty. The reference to the liability of a knowing assistant as an 'accessorial' liability does no more than recognise that the assistant's liability depends upon establishing, among other things, that there has been a breach of fiduciary duty by another. It follows, as MWP submitted, that the relief that is awarded against a defaulting fiduciary and knowing assistant will not necessarily coincide in either nature or quantum. So, for example, the claimant may seek compensation from the defaulting fiduciary (who made no profit from the default) and an account of profits from the knowing assistant (who profited from his or her own misconduct). And if an account of profits were to be sought against both the defaulting fiduciary and a knowing assistant, the two accounts would very likely differ. It follows that neither the nature nor the extent of any liability of the respondents to MWP for knowingly assisting Mr Emmott in a breach or breaches of his fiduciary obligations depends upon the nature or extent of the relief that MWP obtained in the arbitration against Mr Emmott. [citations omitted]

41. The Full Court correctly applied these principles by parity of reasoning to the case of the liability of a knowing recipient (FC [316]). The essential reasoning of the Full Court is at FC [316]-[318]. The reasoning is correct and applies *Michael Wilson* in an orthodox

fashion.

42. This gives the quietus to the core of the argument of RHIO, HDIO and MDIO, at paragraphs 9 and 10 of the proposed cross-appellants' submissions. Whether these parties have liability as knowing recipients must be defended on their own merits and not be a derivation of defences arising from the Hope Downs Deed that may be available to parties to that deed who are sued in their capacity as defaulting fiduciaries.

43. *Michael Wilson*, at [107], is authority for the principle that the allegations concerning the primary wrongdoer, namely the defaulting fiduciary, can be determined differently in one forum (an arbitration in which the defaulting fiduciary is the party) from the way the allegations are determined in another forum (in that case the NSW Supreme Court proceedings against the employees who were knowing participants in the breach of fiduciary duty). The two outcomes may be different as they were in *Michael Wilson*, with different findings being made in each forum.

44. The above underscores the distinct nature of the knowing recipient claims from the claims against the fiduciary. Applying the reasoning of *Michael Wilson* to the present case, the Hope Downs Deed cannot of itself exculpate HDIO (which is not a party to the deed) in a claim brought in court against it by the appellants as a knowing recipient, nor can provisions in the deed bind a court, in a claim brought against HDIO, as to whether the fiduciary has or has not breached its fiduciary duty. At most, the parties to the deed might be able to restrain a claim against HDIO if (as is seemingly contended) cl 7(b) operates to prevent a claim being asserted against HDIO as a knowing recipient.

45. For this reason, the argument put by HDIO, RHIO and MDIO, in paragraph 10 of their submissions, that they will defend claims brought by the appellants against them as knowing recipients by invoking clauses of the Hope Downs Deed is not to the point. The argument conflates the claims against the defaulting fiduciaries with the separate claims against the knowing recipient. But importantly, and at its essence, it wrongly assumes that HDIO, RHIO and MDIO can rely on the Hope Downs Deed as if they were parties to the deed to prevent the appellants separately pursuing claims against HDIO, RHIO and MDIO as knowing recipients, and proving a relevant default by a fiduciary in the course of doing so.

*(3) Tanning correctly applied by the Full Court*

46. In the reasons at FC [309], [310] and [317] the Full Court identified the principles stated in *Tanning* and correctly applied them to the facts of this case. The proposed cross-appellants do not suggest that the principles discussed in *Tanning* should be reconsidered by this Court.

47. At 342 in *Tanning*, Brennan and Dawson JJ (with whom Toohey J agreed), referring to section 7(2) of the *Arbitration (Foreign Awards and Agreements) Act* 1974 (Cth) stated:

> In the first place, as sub-s. (2) speaks of both parties to an arbitration agreement, a person who claims through or under a party may be either a person seeking to enforce or a person seeking to resist the enforcement of an alleged contractual right. The subject of the claim may be either a cause of action or a ground of defence. Next, the prepositions 'through' and 'under' convey the notion of a derivative cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence. A liquidator may be a person claiming through or under a company because the causes of action or grounds of defence on which he relies are vested in or exercisable by the company; a trustee in bankruptcy may be such a person because the causes of action or grounds of defence on which he relies were vested in or exercisable by the bankrupt".

48. By way of further elaboration, at 343 Brennan and Dawson JJ went on to state:

> In the present case, the liquidator does not seek to uphold rejection of Tanning's proof of debt on grounds which are available to the liquidator alone; he relies on grounds of defence available to Hawaiian under the general law.

49. At FC [310]) discussed the reasoning of Deane and Gaudron JJ in *Tanning* and correctly observed that whether there was any material difference with the plurality was not a matter which needed to be addressed. The quoted passage from Deane and Gaudron JJ used the expression:

> ... the question whether a person is claiming through or under a party to the arbitration agreement is necessarily to be answered by reference to the subject matter in controversy rather than the formal nature of the proceeding or the

precise legal character of the person initiating or defending the proceeding.

50. It was in this context that the Full Court correctly observed at FC [311] that:

> We do not think a person is claiming through or under another person merely because they are in a close relationship or because their respective rights are 'closely related.'

51. Applying the principles drawn from *Tanning*, the Full Court correctly concluded at FC [317] that:

> The fact that they are related parties might explain why the transfer of property took place, but is in itself not sufficient. The only relationship is purely factual, being the transfer of the property from a party to an arbitration agreement to a third party company...

*(3) Flint Ink*

52. Flint Ink had a direct contractual relationship with HNZ to which it supplied ink used to manufacture packaging. HNZ in turn supplied the packaging to a related company (HA) which then supplied it to a dairy product manufacturer Lion Dairy. Lion Dairy sued HA for damages in relation to defective packaging. HA sought to join Flint Ink as a third party. Flint Ink did not have a contractual relationship with HA as distinct from HNZ which did have a contract with Flint Ink, which contained an arbitration agreement. HA originally sought to sue Flint Ink in contract, and then sought to abandon its contractual claim and sue in negligence.

53. The negligence claim was pleaded by reference to an alleged proximity arising from the contractual relationship between HNZ and Flint Ink (per Warren CJ at [22] to [25] and per Nettle JA at [51]). In that particular context the alleged duty of care that Flint Ink owed to HA was solely dependent upon and derived from the direct contractual relationship between its related company HNZ and Flint Ink. In this sense the claim of HA was no stronger than and depended upon the contractual relationship between Flint Ink and HNZ.

54. The Victorian Court of Appeal decided that HA was claiming "*through or under*" HNZ in the sense expressed in *Tanning*. The case can be analysed, however, as turning on the particular way in which HA framed its claim in negligence; namely, by reference to the

contractual relationship between its related company (and supplier) HNZ, on the one hand, and Flint Ink, on the other hand. As Nettle JA stated at [77], HA's claim was "*critically dependent upon and derivative from the contractual and common law obligations alleged to have been owed...*" by Flint Ink to HNZ. The same point was emphasised by Mandie JA at [148]-[149]. HNZ was not a party to any proceedings.

55. Properly understood, *Flint Ink* (even if correctly decided) is not authority for any general proposition that a related company will be treated as a party to an arbitration agreement on the "*through or under*" principle. The facts of *Flint Ink* have no relationship with the claims asserted against RHIO, HDIO and MDIO. The liability of a knowing recipient is independent of the liability of the defaulting fiduciary and is self-standing.

56. To the extent that *Flint Ink* might be understood to stand for a more general proposition that a related company sues "*through or under*" another company merely because they are related, then it would have been, with respect, incorrectly decided. This is discussed by the Full Court at FC [307]-[319].

57. As explained by the Full Court at FC [306]-[309], the Victorian Court of Appeal placed reliance on the English decision of *Roussel-Uclaf v GD Searle & Co Ltd*[22] but it seems that it was not drawn to the court's attention that the English Court of Appeal had overruled *Roussel-Uclaf* (see *City of London v Sancheti*[23]).

58. *Roussel-Uclaf v Searle* had been cited by this Court in *Tanning* but not in circumstances that suggested obiter endorsement of the proposition that a related company will be treated as a party to an arbitration agreement on the "*through or under*" principle. As the Full Court observed at FC [309], *Roussel-Uclaf* was cited in *Tanning* together with a New Zealand case that distinguished it (*Mount Cook (Northland) Ltd v Swedish Motor Ltd*)[24]. The Full Court correctly concluded that *Roussel-Uclaf* was inconsistent with the statements of principle in *Tanning* (FC [309]-[311]).

[22] [1978] FSR 95; [1978] 1 Lloyd's Rep 225 (CHD).

[23] [2008] EWCA Civ 1283; [2009] 1 Lloyd's Rep 117.

[24] [1986] 1 NZLR 720.

59. The proposed cross-appellants submit that *Flint Ink* should be seen as an elaboration of the principles stated in *Tanning* (at [4]). *Flint Ink* should, however, be seen as a decision that turns on its own particular facts and wrongly decided if it is to be understood as standing for a general proposition about the application of the "*through or under*" principle to related parties.

**Part V: Time for Oral Argument**

~~37.~~60. It is estimated that up to 1 hour will be required for oral argument if leave to intervene is granted with permission to supplement the written submissions with oral argument.

Dated: ~~20 August~~21 September 2018

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## SCHEDULE

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

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

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

**TADEUSZ JOSEF WATROBA**
Fifth Respondent

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

**HMHT INVESTMENTS PTY LTD (ACN 070 550 104)**
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