IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S143 of 2018

BETWEEN

BIANCA HOPE RINEHART
First Appellant

JOHN LANGLEY HANCOCK
Second Appellant

AND

HANCOCK PROSPECTING PTY LTD ACN (008 676 417)
AND OTHERS NAMED IN THE SCHEDULE
Respondents

APPELLANTS' SUBMISSIONS ON THE PROPOSED CROSS-APPEAL

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Part I: Certification

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

Part II: Statement of issues

2. The appellants do not disagree with the statement of issues in the submissions of the proposed cross-appellants (“**XAS**”).

Part III: Section 78B Notice

3. The appellants consider that no notice is required to be given in respect of the proposed cross-appeal in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

10 4. The appellants seek neither to add to nor to qualify the statement of relevant facts at XAS [6]-[10].

Part V: Argument

5. Two preliminary matters should be addressed at the outset. First, the proposed cross-appellants have yet to be granted an extension of time to file their proposed notice of cross-appeal. The appellants neither consent to nor oppose such a grant. Nonetheless, given that the appellants' application for special leave was filed on 19 December 2017, and special leave was granted on 18 May 2018, the sufficiency is not obvious of Mr Wilks' explanation that “[t]he sixth to eighth respondents were not able to file the proposed notice of cross appeal on or before Friday, 8 June 2018, as counsel for the sixth
20 to eighth respondents were not available to finalise and settle the proposed notice of cross-appeal in the time available”.[1]

6. Secondly, Rule 42.08.4 of the *High Court Rules 2004* provides that “[a] cross-appellant will be entitled to proceed with the cross-appeal only if special leave, which may be sought when the appeal is called on for hearing, is granted.” The proposed cross-appellants have not, in their submissions, addressed the criteria for the grant of special leave set out in s 35A of the *Judiciary Act 1903* (Cth). Nor have they sought to establish that “it would do injustice to determine the appeal alone”.[2] The cross-appeal, if permitted to be prosecuted, would involve no more than the application of settled principle to facts

[1] Affidavit of Mark Anthony Wilks affirmed 15 June 2018 at [9].

[2] *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 602.

lacking in novelty, in circumstances where, having regard to the terms on which special leave was granted to the appellants, the Court has sought to confine the scope of this proceeding. It should also be borne in mind that in its final orders of 15 December 2017, the Full Court stayed the claims against HDIO, RHIO and MDIO on the same terms as it stayed the claims against those respondents that were actual parties to the relevant deeds. HDIO, RHIO and MDIO are thus protected from what might otherwise be the consequences of a failure to refer the claims against them to arbitration, all the more so because one possible outcome of the arbitration envisaged by the Full Court is that the cross-respondents may be precluded from claiming relief against those companies (J [336]).

7. In any event, there is no substance in the proposed cross-appellants' submissions ("**XAS**"). It is uncontroversial that for HDIO, RHIO and MDIO to bring themselves within the extended definition of "party" in s 2(1) of the *Commercial Arbitration Act 2010* (NSW) ("**the CA Act**"), they must show that an "essential element" of their defence against the appellants' claims is "vested in or exercisable by" an actual party to the relevant arbitration agreements.[3] The expression "essential element" must, in this context, mean a matter of fact or law, the establishment of which is necessary if a defendant is to succeed in resisting the plaintiff's claim.

8. From the perspective of HDIO, RHIO and MDIO, the releases and other relevant covenants in the deeds lack this quality of essentiality. For example, HDIO could succeed by establishing that Mrs Rinehart did not breach her duties as trustee of the HFMF Trust, or that any such breach was not part of a dishonest and fraudulent design, as a consequence of which HPPL received both legal title to, and a beneficial interest in, the Hope Downs Tenements. Such a case would not involve HDIO relying on a defence that derives from that of Mrs Rinehart; instead, HDIO would merely be seeking to negative an essential element of the cause of action pleaded against it, namely, an alleged breach of trust by Mrs Rinehart in furtherance of a dishonest and fraudulent design. So much follows from what was said in *Michael Wilson & Partners v Nicholls*.[4] More importantly, the terms of the deeds would not feature in any such case. In the appellants' submission, it is with this in mind that one should read the Full Court's observation that

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[3] *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 342 per Brennan and Dawson JJ.
[4] (2011) 244 CLR 427 at 457 [106].

the respondent parties to the arbitration agreements and the third party companies "are not bound" to raise the releases and other covenants in the deeds as defences (FC [317]). Their Honours were not suggesting that there must be some legal obligation, on either the party or the non-party to an arbitration agreement, to take a particular point before the non-party can be said to claim "through or under" the party. Rather, their Honours were speaking of a point that the party or non-party has no choice but to take, given that its case would otherwise be doomed to fail. It is thus incorrect to say that the Full Court founded its conclusions upon a requirement that is not to be found in the reasons of Brennan and Dawson JJ in *Tanning* (XAS [17]). That alone is a sufficient basis for dismissing the cross-appeal.

9. The submissions of the proposed cross-appellants concerning "the close corporate relationship between HDIO, RHIO and MDIO on the one hand, and HPPL and HRL on the other" (XAS [19(a)]) are similarly devoid of merit. It is unclear whether the proposed cross-appellants are in fact contending that the mere fact of that close corporate relationship is sufficient to establish that HDIO, RHIO and MDIO are claiming "through or under" HPPL and HRL for the purposes of the definition of "party" in s 2(1) of the CA Act. If so, that proposition sits ill alongside the approach of Brennan and Dawson JJ in *Tanning*. After all, the fact that two companies stand in the position of parent and subsidiary does not necessarily produce the result that an essential element of the defence of one is vested in or exercisable by the other. And to insist that a subsidiary always claims "through or under" its parent, as if by definition, is to ignore entirely the focal point of analysis on the approach of Deane and Gaudron JJ in *Tanning*, namely, "the subject matter in controversy".[5]

10. It must be recalled that the appellants claim against HDIO, RHIO and MDIO as knowing recipients of trust property. In so far as that claim is concerned, the fact that HDIO, RHIO and MDIO are subsidiaries of parties to the deeds is wholly fortuitous. Even if they were not related to HPPL, the claim against them would be unchanged. One is prompted then to ask how the fact of being related entities of HPPL places HDIO, RHIO and MDIO in a position to defend the appellants' claims better than, or different from, the position in which they would be if they were not so related.

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[5] (1990) 169 CLR 332 at 353.

11. In answering this question, the proposed cross-appellants emphasise two matters. The first is the circumstance that "certain of the acknowledgements, releases and covenants [in the relevant deeds] extend to the Hancock Group generally, and not merely to HPPL and HRL" (XAS [19(a)]). However, this is no more than a reformulation of the submission, rejected by the Full Court (FC [297], [299]-[300]), that as third parties intended to be benefited by a contract, HDIO, RHIO and MDIO were entitled, pursuant to s 11(2) of the *Property Law Act 1969* (WA),[6] to enforce the relevant deeds, and the releases therein contained, in their own names. The Full Court's conclusions concerning s 11(2) are not now challenged, and on that basis alone, the proposed cross-appellants' invocation of the references in the deeds to "the Hancock Group" may be put to one side. Neither HDIO, RHIO and MDIO as related entities of HPPL nor a hypothetical unrelated recipient of HPPL's property would be able to enforce the deeds.

12. The second matter is the suggestion that by raising defences based on the terms of the deeds, HPPL and HRL will render all of the appellant' claims, including those against HDIO, RHIO and MDIO, arbitrable (XAS [19(b)]). Admittedly, a contest as to whether HPPL and HRL "have an enforceable contractual right to prevent [the appellants] from pursuing claims for relief against" HDIO, RHIO and MDIO may well be a dispute to which the relevant arbitration clauses apply (J [328]). However, it does not follow that the underlying claims against HDIO, RHIO and MDIO are themselves arbitrable. Any suggestion to the contrary is at odds with the Full Court's unchallenged rejection of the proposition that "the claims of a party to an arbitration agreement against a non-party fall within an arbitration clause and an unwilling party or an unwilling non-party can be required to bring or defend them in arbitration" (FC [324]-[327]).

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[6] This provision relevantly states:

> "Except in the case of a conveyance or other instrument to which subsection (1) applies, where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to subsection (3), enforceable by that person in his own name but –
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> (a) all defences that would have available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;
>
> (b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and
>
> (c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant."

13. It is true, of course, that a covenant in the terms of, say, cl 7(b) of Hope Down Deeds, which obliges the parties to that instrument "not to challenge the right of any member of the Hancock Group to any of the Hancock Group Interests at any time", does not confer an enforceable right on HPPL to prevent the appellants from impugning the interest of an unrelated recipient of HPPL's property. After all, such a recipient would not be a "member of the Hancock Group", and to that extent, the position of HDIO, RHIO and MDIO may be distinguished from that of a hypothetical transferee unrelated to HPPL.

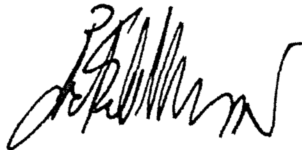
14. Nonetheless, it cannot be said that any enforceable right conferred by the deeds on HPPL to prevent the appellants from seeking relief against HDIO, RHIO or MDIO is an essential element of their defence. At the risk of repetition, those companies could ultimately succeed on the basis of matters wholly unrelated to the existence and the terms of the deeds. Thus, however the cross-appellants put their case, they cannot overcome their failure to establish that an essential element of their defence is "vested in or exercisable by" a party to the arbitration agreements before the Court.

15. The cross-appeal must accordingly fail.

Part VI: Time for oral argument

16. The appellants estimate that they will require 30 minutes for the presentation of oral argument in their behalf.

5 October 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

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HMHT INVESTMENTS PTY LTD (ACN 070 550 159)
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

20 **MULGA DOWNS IRON ORE PTY LTD (ACN 080 659 150)**
Eighth Respondent

GEORGINA HOPE RINEHART (IN HER PERSONAL 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 008 449 312)
Tenth Respondent

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

HOPE RINEHART WELKER
Twelfth Respondent

GINIA HOPE FRANCES RINEHART
Thirteenth Respondent

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

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