FEDERAL COURT OF AUSTRALIA

Rinehart v Rinehart (No 3) [2016] FCA 539

File number:	NSD 1124 of 2014
Judge:	**GLEESON J**
Date of judgment:	26 May 2016
Catchwords:	**CORPORATIONS** – commercial arbitration – interlocutory application seeking an order that the proceedings be referred to arbitration – whether the applicants had entered into an agreement to resolve the dispute by arbitration – whether the applicants are disentitled from seeking certain relief because of a contractual agreement to resolve disputes the subject of the proceeding by arbitration – should the Court direct that there be a trial to decide whether any or all of the arbitration agreements are null and void, inoperative or incapable of being performed – there be a trial of whether five of the agreements to arbitrate are null and void, inoperative or incapable of being performed **STATUTORY INTERPRETATION** – whether s 8(1) of the *Commercial Arbitration Act 2010* (NSW) or the *Commercial Arbitration Act 2012* (WA) ("commercial arbitration legislation") is 'picked up' by s 79 of the *Judiciary Act 1903* (Cth) – what is the meaning of 'domestic commercial arbitration' in the commercial arbitration legislation – what facts must the party seeking referral to arbitration establish to engage s 8(1) of the arbitration legislation – to what standard of proof must these facts be established – does the Court have discretion to decide or not decide whether an arbitration agreement is null and void, inoperative or incapable of being performed
Legislation:	*Bankruptcy Act 1966* (Cth) *Corporations Act 2001* (Cth) *Federal Court of Australia Act 1976* (Cth) *Income Tax Assessment Act 1936* (Cth) *International Arbitration Act 1974* (Cth) *Judiciary Act 1903* (Cth) *Trade Practices Act 1974* (Cth) *Arbitration Act 1928* (Vic) *Arbitration Act 2011* (Vic)

Commercial Arbitration Act 2011 (Vic)

Commercial Arbitration Act 2010 (NSW)

Commercial Arbitration Act 1990 (Qld)

Commercial Arbitration Act 2012 (WA)

Commercial Arbitration Act 1985 (WA)

Property Law Act 1969 (WA)

Trustees Act 1962 (WA)

Arbitration Act 1996 (NZ)

Arbitration Act 1996 (UK)

International Arbitration Act (Singapore) (Cap 143A, 2002 Rev Ed)

Cases cited:

A v B [2006] EWHC 2006 (Comm); [2007] 1 All ER (Comm) 591; [2007] 1 Lloyd's Rep 237

Accentuate Ltd v Asigra Inc [2009] EWHC 2655 (QB); [2009] 2 All ER (Comm) 738; [2009] 2 Lloyd's Rep 599

ACD Tridon Inc v Tridon Australia Pty Ltd [2002] NSWSC 896

Administration of Norfolk Island v SMEC Australia Pty Ltd [2004] NFSC 1

Albon (t/a NA Carriage Co) v Naza Motor Trading SDN BHD (No 3) [2007] EWHC 665 (Ch); [2007] 2 All ER 1075

Amcor Packaging (Australia) Pty Ltd v Baulderstone Pty Ltd [2013] FCA 253

Ashton v Pratt [2015] NSWCA 12; (2015) 88 NSWLR 281

Ashville Investments Ltd v Elmer Contractors Ltd [1988] 2 All ER 577; [1989] QB 488; (1988) 3 WLR 868

Baltic Shipping Co v Merchant Mikhail Lermontov (1994) 36 NSWLR 361

Bank of Credit and Commerce International SA (in liq) v Ali [2002] 1 AC 251

Bautista v Star Cruises 396 F. 3d 1289 (11th Cir, 2005)

BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd [2008] FCA 551; (2008) 168 FCR 169

Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd (1987) 14 FCR 193

Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd [2013] WASC 66; (2013) 298 ALR 666

Carr v Thomas [2009] NSWCA 208

Carter Holt Harvey Ltd v Genesis Power Ltd (No 2) [2006] 3 NZLR 794

Carter v McLaughlin (1996) 27 OR (3d) 792

Casaceli v Natuzzi SpA [2012] FCA 691; (2012) 292 ALR

City of London v Sancheti [2008] EWCA Civ 1283; [2008] 2 CLC 730; [2009] 1 Lloyd's Rep 117

Collector of Customs v Pozzolanic Enterprises Pty Ltd [1993] FCA 322; (1993) 43 FCR 280

Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192; (2006) 157 FCR 45

Cousens v Gray Ridge Pty Ltd [2000] VSCA 96

Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46

Discount & Finance Ltd v Gehrig's NSW Wines Ltd (1940) 40 SR (NSW) 598

El-Mir v Risk [2005] NSWCA 215

Fiona Trust and Holding Corp v Privalov [2007] UKHL 40; [2007] 4 All ER 951; [2008] 1 Lloyd's Rep 254

Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd (1979) 39 FLR 267; [1979] 2 NSWLR 243

Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd [2014] VSCA 166; (2014) 289 FLR 30

Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160

Grant v John Grant & Sons Pty Ltd [1954] HCA 23; (1954) 91 CLR 112

Greer v Kettle [1938] AC 156

Gulf Canada Resources Ltd v Arochem International Ltd (1992) 66 BCLR (2d) 113

Hancock v Rinehart [2013] NSWSC 1352; (2013) 96 ACSR 76

Hancock v Rinehart [2013] NSWSC 1978

Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1992] 1 Lloyd's Rep 81

Hashwani v Jivraj [2010] EWCA Civ 712; [2011] 1 All ER 50; [2010] 2 Lloyd's Rep 534

Heller Financial Services Ltd v Theiss Contractors Pty Ltd [2000] FCA 802

Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) (1998) 90 FCR 1

Huddart Parker Ltd v Ship Mill Hill [1950] HCA 43; (1950) 81 CLR 502

IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248; (2011) 38 VR 303

John Pfeiffer Pty Ltd v Rogerson [2000] HCA 36; (2000) 203 CLR 503

Joint Stock Company 'Aeroflot Russian Airlines' v

Berezovsky [2013] EWCA Civ 784; [2013] 2 CLC 206; [2013] 2 Lloyd's Rep 242

Lady Carrington Steamship Co Ltd v The Commonwealth [1921] HCA 49; (1921) 29 CLR 596

Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd [2014] FCA 880; (2014) 224 FCR 519

Lavin v Toppi [2014] NSWCA 160; (2014) 87 NSWLR 159; (2014) 308 ALR 598

McDermott v Black [1940] HCA 4; (1940) 63 CLR 161

nearmap Ltd v Spookfish Pty Ltd [2014] NSWSC 1790

Northern Territory v GPAO [1999] HCA 8; (1999) 196 CLR 553

P. Elliot & Co. Ltd v FCC Elliot Construction Ltd [2012] IEHC 361

Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd (1993) 122 ALR 279; (1993) 43 FCR 439

Porteous v Donnelly (Trustee), in the matter of Hancock (Bankrupt) [2002] FCA 862

Porteous v Rinehart (1998) 19 WAR 495

Re 700 Form Holdings Pty Ltd [2014] VSC 385

Re Ku-ring-gai Co-operative Building Society (No 12) Ltd [1978] FCA 50; (1978) 36 FLR 134

Recyclers of Australia Pty Ltd v Hettinga Equipment Inc [2000] FCA 547; (2000) 100 FCR 420

Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v Lauro 712 F. 2d 50 (3rd Cir, 1983)

Rinehart v Hancock [2013] NSWCA 326

Rinehart v Rinehart [2014] FCA 1241; (2014) 320 ALR 195

Rinehart v Welker [2011] NSWCA 345

Rinehart v Welker [2011] NSWCA 403

Rinehart v Welker [2012] NSWCA 95

Robotunits Pty Ltd v Mennel [2015] VSC 268; (2015) 297 FLR 300

Roussel-Uclaf v GD Searle & Co Ltd (No 2) [1978] FSR 95; [1978] 1 Lloyd's Rep 225

Seeley International Pty Ltd v Electra Air Conditioning BV [2008] FCA 29; (2008) 246 ALR 589

Shahid v Australasian College of Dermatologists [2008] FCAFC 72; (2008) 168 FCR 46

Sun Life Assurance Company of Canada v CX Reinsurance Company Ltd [2003] EWCA Civ 283; [2004] Lloyd's Rep IR 58

Tanning Research Laboratories Inc v O'Brien [1990] HCA

	8; (1990) 169 CLR 332 *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2009] VSC 553 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5; (2013) 251 CLR 533 *Thomas v Star Maid International Pty Ltd* [1999] FCA 911 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 *Trade Practices Commission v Milreis Pty Ltd* (1977) 29 FLR 144; (1977) 14 ALR 623 *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 *Welker v Rinehart (No 2)* [2011] NSWSC 1238 *Welker v Rinehart (No 4)* [2011] NSWSC 1636 *Welker v Rinehart* [2011] NSWSC 1094 Holtzmann HM and and Neuhaus JE, *A Guide to the UNICITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law, 1994) Joseph D, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd ed, Sweet & Maxwell, 2015) Merkin R, *Arbitration Law* (LLP, 2004)
Dates of hearing:	24, 27, 28 April 2015, 15, 16, 17 June 2015, 14, 15 July 2015
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Division:	General Division
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Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Category:	Catchwords
Number of paragraphs:	669
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ORDERS

NSD 1124 of 2014

BETWEEN:	**BIANCA HOPE RINEHART** First Applicant
	JOHN LANGLEY HANCOCK Second Applicant
AND:	**GEORGINA HOPE RINEHART (IN HER PERSONAL CAPACITY AS TRUSTEE OF THE HOPE MARGARET HANCOCK TRUST AND AS TRUSTEE OF THE HFMF TRUST)** First Respondent
	HANCOCK PROSPECTING PTY LTD (ACN 008 676 417) Second Respondent
	HANCOCK MINERALS PTY LTD (ACN 057 326 824) (and others named in the Schedule) Third Respondent

JUDGE: **GLEESON J**

DATE OF ORDER: **26 MAY 2016**

THE COURT ORDERS THAT:

1. Insofar as the interlocutory applications dated 3 and 23 December 2014 relied upon the arbitration agreement in the Porteous settlement deed, the applications be dismissed.

2. There be a trial of the question whether any of the following agreements is null and void, inoperative or incapable of being performed within the meaning of s 8(1) of the *Commercial Arbitration Act 2010* (NSW) or the *Commercial Arbitration Act 2012* (WA):

   (a) Clause 14 of the 2005 deed of obligation and release;

   (b) Clause 20.2 of the Hope Downs deed;

   (c) Clause 9.2 of the 2007 HD deed;

   (d) Clause 16 of the 2009 deed of further settlement; and

   (e) Clause 11 of the 2010 deed of variation.

3. Costs of the interlocutory applications dated 3 and 23 December 2014 be reserved.

4. The matter be listed for a case management hearing on Thursday, 30 June 2016 at 9:30 am.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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GLEESON J:

1 This judgment deals with two interlocutory applications made by the first respondent ("Mrs Rinehart" or "GHR") and several of the other respondents ("HPPL respondents"). Mrs Rinehart is the daughter of the late Langley George Hancock ("Mr Hancock senior" or "LGH") and the mother of the applicants ("Ms Rinehart" or "BHR" and "Mr Hancock" or "JLH"). The HPPL respondents have various relationships with Mrs Rinehart.

2 By her interlocutory application dated 23 December 2014, Mrs Rinehart seeks an order pursuant to s 8(1) of the *Commercial Arbitration Act 2010* (NSW) ("NSW Act") that the parties to this proceeding be referred to arbitration in respect of the matters the subject of the proceeding, an order that the proceeding be dismissed or permanently stayed or, in the alternative, various orders pursuant to s 8(1). Section 8(1) provides:

> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

3 By para 9 of their interlocutory application dated 3 December 2014, the HPPL respondents (comprising the second respondent ("HPPL"), third respondent ("HML"), fifth respondent ("Mr Watroba"), sixth respondent ("HRL" or "WRL"), seventh respondent ("HMHTI"),

twelfth respondent ("HDIO"), thirteenth respondent ("RDIO") and the fifteenth respondent ("MDIO")) seek an order that the proceeding be stayed.

4 In support of their application, the HPPL respondents rely on s 8(1) of the NSW Act or alternatively s 8(1) of the *Commercial Arbitration Act 2012* (WA) ("WA Act"), which is in identical terms.

5 In the main proceeding, the applicants seek extensive relief, based substantially upon allegations of misconduct by Mrs Rinehart since the death of Mr Hancock senior in March 1992, and concerning the administration of one or more trusts of which the applicants are beneficiaries. Mrs Rinehart and the HPPL respondents contend that the applicants are disentitled from seeking that relief because they are contractually bound to resolve the disputes that are the subject of the proceeding by arbitration.

6 Mrs Rinehart supported the interlocutory application made by the HPPL respondents and adopted their submissions.

7 The eighth respondent ("150 Investments") consents to the orders sought by the interlocutory applications. The other respondents (being the fourth respondent ("HFMF"), the ninth respondent ("Ms Welker" or "HRW"), the tenth respondent ("Ms Ginia Rinehart" or "GHFR"), the eleventh respondent ("Mr Donnelly") and the fourteenth respondent ("MDI")) did not appear on the interlocutory applications. However, in correspondence, MDI consented to claims affecting MDI being stayed pending an arbitration in respect of those claims, and consented to those claims being determined by confidential arbitration.

8 Ms Welker and Ms Ginia Rinehart are also Mrs Rinehart's children.

The case made by Mrs Rinehart and the HPPL respondents

9 The interlocutory applications are based on deeds executed by various of the applicants and respondents between September 2003 and November 2010. Six of the deeds are alleged to contain an "arbitration agreement" within the meaning of s 8(1). Those six deeds, described in more detail later in the judgment, are:

(1) the Porteous settlement deed;

(2) the 2005 deed of obligation and release;

(3) the Hope Downs deed (executed in about August 2006);

(4) the 2007 HD deed;

(5) the 2009 deed of further settlement; and

(6) the 2010 deed of variation.

10 As against Ms Rinehart, Mrs Rinehart and the HPPL respondents rely on the Porteous settlement deed, the Hope Downs deed and the 2007 HD deed.

11 As against Mr Hancock, they rely on all six deeds (noting that the reliance on the Hope Downs deed against Mr Hancock is based on his execution of the 2007 HD deed).

12 In brief, Mrs Rinehart and the HPPL respondents say that, by executing the deeds, the applicants have "repeatedly given up any right they may once have had to bring the claims now made in the statement of claim". Further, they have "repeatedly agreed that any such claim is to be resolved by way of confidential arbitration proceedings".

The applicants' response

13 The applicants oppose the orders sought by Mrs Rinehart and the HPPL respondents.

14 As to five of the alleged arbitration agreements (being those other than the agreement to arbitrate in the Porteous settlement deed), the applicants allege that the execution of the deeds in which those agreements are contained was procured by misconduct on the part of Mrs Rinehart and HPPL. In the main proceeding, the applicants claim injunctive relief to restrain the enforcement of the arbitration clauses contained in the 2005 deed of obligation and release, the Hope Downs deed, the 2007 HD deed, the 2009 deed of further settlement and the 2010 deed of variation. They also seek declarations that those deeds and the arbitration clauses contained in them are void *ab initio*.

15 The applicants also dispute that s 8(1) applies in this case on several grounds. First, they dispute that s 8(1) applies to this Court as a court exercising federal jurisdiction because it is not "picked up" by s 79 of the *Judiciary Act 1903* (Cth) ("Judiciary Act").

16 If s 8(1) binds this Court pursuant to s 79, then the applicants dispute that s 8(1) applies because it is concerned only with "domestic commercial arbitrations", being the subject matter of the NSW Act and the WA Act (individually and collectively "commercial arbitration legislation"). The applicants say (in summary) that the relationships between them and the respondents are not commercial relationships and, accordingly, any arbitration of disputes between the applicants and the respondents would not be a commercial arbitration.

17 If an arbitration between the applicants and the respondents of the matters in dispute in this proceeding would be a "domestic commercial arbitration", then the applicants dispute that the pre-conditions for an order under s 8(1) are satisfied in this case.

18 If the pre-conditions to an order under s 8(1) are satisfied, then the applicants submit that, before granting the interlocutory relief sought, the Court should decide whether the arbitration agreements upon which the respondents rely are "null and void, inoperative or incapable of being performed" within the meaning of this proviso to s 8(1).

QUESTIONS FOR DETERMINATION

19 The parties identified the following 17 questions for determination (to which I have made minor adjustments to recognise the HPPL respondents' reliance on the WA Act):

(1) What is the meaning and operation of s 1(1) of the commercial arbitration legislation?

(2) What factors are relevant to determining whether the commercial arbitration legislation applies?

(3) Does there need to be a commercial relationship between the parties in order for an arbitration to be a domestic commercial arbitration?

(4) If so, have GHR and each of the HPPL respondents demonstrated that there was a commercial relationship between each of them and each of the applicants, as a result of which any arbitration between them should be characterised as a domestic commercial arbitration?

(5) Have GHR and each of the HPPL respondents met their burden of proving that the commercial arbitration legislation applies as between each of them and the applicants?

(6) If the commercial arbitration legislation applies, what facts must the party seeking referral of the parties to arbitration establish in order to engage s 8(1)?

(7) To what standard of proof must those facts be established:

    (a) does it require GHR and the HPPL respondents to demonstrate an arguable case or sustainable argument that the matter(s) in the court proceedings are the subject of an arbitration agreement; or

    (b) does it require GHR and the HPPL respondents to prove, on the balance of probabilities, that matter(s) in the court proceedings are the subject of an arbitration agreement?

(8) Which, if any, of the respondents to these proceedings are "parties" to a deed containing an arbitration agreement with one or both of the applicants?

(9) Have GHR and the HPPL respondents met their burden of proving that the matter(s) in the current proceedings are "the subject of an arbitration agreement" within the meaning of s 8(1) of the commercial arbitration legislation? If so, which "matters" constitute:

(a) a dispute "under" the 2005 deed of obligation and release, the Hope Downs deed or the 2007 HD deed?

(b) a dispute "arising out of, relating to or in connection with" the Porteous settlement deed, the 2007 CS deed, or the 2009 deeed of further settlement and the 2010 deed of variation?

(10) Does the Court have discretion to decide or not decide whether the arbitration agreement is null and void, inoperative or incapable of being performed?

(11) If the Court does have discretion, should the Court direct that there be a trial before this Court on the question whether the arbitration agreements applicable to those matter(s) identified in answer to agreed question (9) are null and void, inoperative or incapable of being performed for the purposes of s 8(1), on any one or more of the following grounds:

(a) undue influence;

(b) duress;

(c) unconscionability;

(d) fraudulent concealment;

(e) mispresentation;

(f) misleading and deceptive conduct;

(g) fraud on a power?

(12) Can the proviso in s 8(1) apply where an arbitration agreement is voidable rather than void?

(13) If the Court determines that s 8(1) is engaged with respect to one or more of the matters in the proceedings, what should happen to those matters which are not the subject of an arbitration agreement?

(14) Is s 8(1) binding on this Court pursuant to s 79 of the Judiciary Act?

(15) If the Court determines that the commercial arbitration legislation does not apply or that GHR and the HPPL respondents have not met their burden of proving that any matter(s) in the proceedings are the subject of an arbitration agreement, does the Court otherwise have the power to stay the proceedings and refer the parties to arbitration?

(16) If so, should the Court exercise its discretion to do so?

(17) On the assumption that answers favourable to the respondents are given to the questions stated above, what form of order staying the proceedings or referring them to arbitration is appropriate to give effect to the Court's reasons?

20 I have addressed the agreed questions in the course of addressing the following issues:

(1) The proper construction of s 8(1). This issue requires consideration of agreed questions (1), (2), (3), (6), (7), (10) and (12).

(2) The Court's powers to make the orders sought (agreed questions (14) and (15)).

(3) Whether s 8(1) applies to the facts of this case. This issue requires consideration of agreed questions (4), (5), (8) and (9).

(4) The consequences that flow from the conclusions about the application of s 8(1) in this case. This issue raises, at least potentially, agreed questions (11), (13), (16) and (17).

SUMMARY OF CONCLUSIONS

21 For the reasons given below, I have concluded that:

(1) Section 79 of the Judiciary Act "picks up" s 8(1) of the commercial arbitration legislation;

(2) The NSW Act does not apply in this proceeding to the alleged arbitration agreement in the Porteous settlement deed, because it is not an agreement to submit to arbitration any dispute between the applicants and Mrs Rinehart or any of the HPPL respondents. If that conclusion is wrong, none of the claims in the proceeding is a matter which is the subject of the alleged arbitration agreement because the release in clause 3.9 of the Porteous settlement deed does not cover any claim made in this proceeding. It was not suggested that the WA Act applies to the Porteous settlement deed;

(3) The other five arbitration agreements relied upon by the applicants are arbitration agreements within of s 8(1) of either the NSW Act or the WA Act because they are apparently valid arbitration agreements within the meaning of s 7(1);

(4) The following matters in the proceeding are the subject of an apparently valid arbitration agreement, in that there is a sustainable argument that the outcome of those claims is governed or controlled by the Hope Downs deed:

(a) the claims in prayers 8, 23, 24, 27.2 and 28.1 to 28.3 of the originating application, concerning the ownership of shares in HPPL, by reason of clauses 20.2 and 7(e) of the Hope Downs deed;

(b) the claims in prayers 15 and 29 which seek declaratory relief as to the ownership by HDIO and HPPL respectively of the Hope Downs and Nicholas Downs tenements, by reason of clauses 20.2 and 7(b) of the Hope Downs deed;

(c) the claims in prayers 48 to 51, which appear to concern the rights of Mrs Rinehart and HPPL to "deploy" the Hope Downs deed.

(5) The following matters in the proceeding are the subject of an apparently valid arbitration agreement, in that there is a sustainable argument that the matters form part of a dispute under the Hope Downs deed within the meaning of clause 20.2, by reason of their close connection with the claims for relief identified in (4) above and the fact that the parties against whom the relief is claimed are parties to the Hope Downs deed:

(a) the claims in prayers 9 to 14, 27.1, 28.4 and 28.5 of the originating application concerning the ownership of HPPL shares;

(b) the claims in prayers 16, 17, 20 and 21 of the originating application, concerning the Hope Downs tenements;

(c) the claims in prayers 22, 25 and 26 of the originating application, concerning the 1988 Agreement (described below);

(d) the claims in prayers 30 and 31 of the originating application, concerning the Nicholas Downs tenements.

(6) The following matters in the proceeding are the subject of an apparently valid arbitration agreement, being clause 16 of the 2009 deed of further settlement:

(a) the claims in prayers 42 to 44 of the originating application, concerning the rights arising out of the 2007 HD deed and the 2007 CS deed against Mr Hancock;

(b) the claims in prayers 45.1, 45.2, 46.1, 46.2 and 47 of the originating application concerning the operation of the release and the arbitration clause in the 2009 deed of further settlement;

(7) The following matters in the proceeding are the subject of an apparently valid arbitration agreement, being clause 11 of the 2010 deed of variation:

(a) the claims in (6) above; and

(b) the claims in prayers 45.3, 46.3 and 47 of the originating application concerning clause 11 of the 2010 deed;

(8) The following matters in the proceeding are not the subject of an apparently valid arbitration agreement:

(a) the claims for relief in the following prayers in the originating application

(i) prayers 4 and 5 (against RHIO);

(ii) prayers 18 and 19 (against HDIO);

(iii) prayers 32 to 34 (against MDI and MDIO).

(b) the disputes between the applicants, Mrs Rinehart and HPPL concerning ownership of the Roy Hills tenements arising from the claims made by prayers 1 to 3, 6 and 7 of the originating application;

(c) the disputes between Ms Rinehart, Mrs Rinehart and HPPL concerning the enforceability of the releases and arbitration clauses in the Hope Downs deed and the 2007 HD deed, arising from prayer 35;

(d) the disputes between Ms Rinehart, Mrs Rinehart and those HPPL respondents who are signatories to the Hope Downs deed and the 2007 HD deed concerning the validity of those deeds, arising from prayers 36 and 37;

(e) the disputes between Ms Rinehart and Mrs Rinehart concerning her conduct in executing the Hope Downs deed and the 2007 HD deed, arising from prayers 38 and 39;

(f) the disputes between Mr Hancock, Mrs Rinehart and the HPPL concerning the validity and enforceability of provisions of the 2005 deed of obligation and release, arising from prayers 40 and 41;

(9) Insofar as there are matters in the proceeding that are the subject of an arbitration agreement, the Court should exercise its discretion to decide whether any of the five arbitration agreements is null and void or inoperative within the meaning of s 8(1).

APPLICATION OF COMMERCIAL ARBITRATION LEGISLATION

22 Agreed questions (1) to (3), (6) and (7) concern the factual circumstances in which the commercial arbitration legislation and, in particular, s 8(1) may apply. Questions (10) and (12) also concern the proper interpretation of s 8(1).

Preliminary observations

23 The commercial arbitration legislation is based upon the UNCITRAL Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on 21 June 1985 with amendments as adopted by that Commission in 2006. The English text of the Model Law is set out in Schedule 2 to the *International Arbitration Act 1974* (Cth) ("International Arbitration Act").

24 In *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5; (2013) 251 CLR 533 ("*TCL*") at [11], French CJ and Gageler J noted that "[t]he analytical commentary published by the UNCITRAL Secretariat to accompany the 1985 draft of the UNCITRAL Model Law (the UNCITRAL analytical commentary) spelt out that the UNCITRAL Model Law was 'designed for consensual arbitration', which the UNCITRAL analytical commentary explained to mean 'arbitration based on voluntary agreement of the parties'."

25 The development of the Model Law was explained by Maxwell P of the Victorian Court of Appeal in *Subway Systems Australia Pty Ltd v Ireland* [2014] VSCA 142. His Honour referred to the Explanatory Note from the UNCITRAL Secretariat which accompanied the Model Law, including the following statement:

> Recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.

26 At [16], Maxwell P said:

> Article 8 of the Model Law is concerned with court jurisdiction in the substantive sense, not the adjectival sense. The manifest purpose of art 8 is to ensure that, where parties have agreed to arbitrate their disputes, any recourse to a 'court' is precluded.

> The purpose of the Article is to impose an obligation on the 'court' in effect to enforce the agreement to arbitrate, by requiring that it decline to exercise jurisdiction over the dispute and instead refer the parties to arbitration.

27 Article 8(1) of the Model Law is in identical terms to s 8(1) of the commercial arbitration legislation except that the word "shall" is used instead of "must". The UNCITRAL analytical commentary on the draft text of the original version of the Model Law (which contains Article 8 in its final form) states:

> Article 8 deals with an important 'negative' effect of an arbitration agreement. The agreement to submit a certain matter to arbitration means that this matter shall not be heard and decided upon by any court, irrespective of whether this exclusion is expressed in the agreement.

28 The correct application of s 8(1) is complicated where, as here, there are disputes as to the enforceability of the asserted arbitration agreements, and as to the scope of those agreements. As appears below, the commercial arbitration legislation enshrines, in s 16, the doctrine of *kompetenz-kompetenz* by which arbitrators are empowered to decide for themselves whether they have jurisdiction under an arbitration clause, although their decision is provisional in that either party has the right to apply to the court to have the jurisdictional question reopened and reconsidered in full.

29 The scheme of the commercial arbitration legislation is intended to discourage the court (and, in some cases, may prohibit the court) from intruding into the remit of the arbitral tribunal's *kompetenz-kompetenz*. However, the court must first be satisfied that s 8(1) is engaged on the facts of the case. In *Albon (t/a NA Carriage Co) v Naza Motor Trading SDN BHD (No 3)* [2007] EWHC 665 (Ch); [2007] 2 All ER 1075 ("*Albon*"), Lightman J considered a submission that the doctrine of *kompetenz-kompetenz* precluded the court from intervening in the arbitral process where the arbitral tribunal is seized of the issue of its own jurisdiction and in particular, from intervening on the issue of whether or not an arbitration agreement has been concluded. He concluded (at [20]):

> Whilst the doctrine of 'Kompetenz-Kompetenz' (which is given effect in a domestic arbitration by s 30 of the [Arbitration Act 1996 (UK)]) provides that the arbitral tribunal shall have jurisdiction to determine whether the arbitration agreement was ever concluded, it does not preclude the court itself from determining that question. There are two reasons why the court must have jurisdiction to rule on whether the arbitration agreement was concluded. The first is that the rule of law in general and subject only to limited exceptions requires that a party should not be barred from access to the court for the resolution of disputes unless the grounds for such bar are established. A bar on the ground of the alleged conclusion of an arbitration agreement (in general and subject only to limited exceptions) is not established unless and until the court has ruled on the issue whether it has been concluded. The

second is that, unless and until it is held that the arbitration agreement has been concluded, the compelling factors requiring respect for the terms agreed regarding arbitration do not come into play or at any rate do not come into play with their full force and effect.

Relevant statutory provisions

30 The provisions set out below are taken from the NSW Act. Relevantly, there are identical provisions in the WA Act.

31 The long title to the NSW Act is "[a]n Act relating to the conduct of commercial arbitrations; to repeal the *Commercial Arbitration Act 1984*; and for other purposes". Section 1C is entitled "Paramount object of Act". It provides:

> (1) The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.
>
> (2) This Act aims to achieve its paramount object by:
>
> (a) enabling parties to agree about how their commercial disputes are to be resolved (subject to subsection (3) and such safeguards as are necessary in the public interest), and
>
> (b) providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly.
>
> (3) This Act must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of this Act is achieved.

32 Section 1 provides relevantly:

> **1 Scope of application**
>
> (cf Model Law Art 1)
>
> (1) This Act applies to domestic commercial arbitrations.
>
> **Note**. The *International Arbitration Act 1974* of the Commonwealth covers international commercial arbitrations and the enforcement of foreign arbitral awards.
>
> (2) The provisions of this Act, except sections 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in New South Wales.
>
> (3) An arbitration is *domestic* if:
>
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in Australia, and
>
> (b) the parties have (whether in the arbitration agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled by arbitration, and

(c) it is not an arbitration to which the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth) applies.

(4) For the purposes of subsection (3):

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement, and

(b) if a party does not have a place of business, reference is to be made to the party's habitual residence.

33 The following note appears at the end of s 1:

Model Law Note. The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

34 Section 2(1) contains the following relevant definitions:

arbitration means any domestic commercial arbitration whether or not administered by a permanent arbitral institution.

party means a party to an arbitration agreement and includes:

(a) any person claiming through or under a party to the arbitration agreement, and

(b) in any case where an arbitration does not involve all of the parties to the arbitration agreement, those parties to the arbitration agreement who are parties to the arbitration.

35 Section 2A provides:

2A **International origin and general principles**

(cf Model Law Art 2A)

(1) Subject to section 1C, in the interpretation of this Act, regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth) to international commercial arbitrations and the observance of good faith.

(2)

Note. This section differs from the Model Law. Art 2A (1) has been changed as a consequence of the application of the Act to domestic (instead of international) commercial arbitrations. Art 2A (2) is omitted because it is covered by the provision referred to in section 1C (4). Subsections (3) and (4) reflect section 17 of the *International Arbitration Act 1974* of the Commonwealth.

(3) Without limiting subsection (1), in interpreting this Act, reference may be made to the documents relating to the Model Law of:

(a) the United Nations Commission on International Trade Law, and

(b) its working groups for the preparation of the Model Law.

(4) Subsection (3) does not affect the application of section 34 (Use of extrinsic material in the interpretation of Acts and statutory rules) of the *Interpretation Act 1987* for the purposes of interpreting this Act.

36 By s 7(1), an "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

37 An arbitration agreement may be in the form of an arbitration clause in a contract: s 7(2).

38 Section 16 provides relevantly:

16 Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(2) For that purpose, an arbitration clause which forms part of a contract is to be treated as an agreement independent of the other terms of the contract.

(3) A decision by the arbitral tribunal that the contract is null and void does not of itself entail the invalidity of the arbitration clause.

Note. The Model Law provides that such a decision does not "ipso jure" entail the invalidity of the arbitration clause.

(4) A plea that the arbitral tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence.

…

(8) The arbitral tribunal may rule on a plea referred to in subsection (4) … either as a preliminary question or in an award on the merits.

(9) If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Court to decide the matter.

(10) A decision of the Court under subsection (9) that is within the limits of the authority of the Court is final.

Domestic commercial arbitration

39 The parties argued at length over the meaning of "domestic commercial arbitration" and, in particular, "commercial arbitration" in the commercial arbitration legislation.

40 Mrs Rinehart explicitly accepted that s 8(1) will have no application unless the arbitration to which the parties are to be referred would be a domestic commercial arbitration.

Agreed questions (1) and (2): What is the meaning and operation of s 1(1) of the commercial arbitration legislation? What factors are relevant to determining whether the legislation applies?

41 Section 1(1) identifies the scope of operation of the commercial arbitration legislation. Relevantly, it limits the legislation's application (and, accordingly, the application of s 8(1)) to agreements to submit disputes to domestic commercial arbitration within the meaning of the legislation. Consequently, an agreement to submit a dispute or disputes to an arbitration which would be of a kind other than a "domestic commercial" arbitration is not an agreement to which the commercial arbitration legislation applies.

42 It follows that, in order to apply s 8(1), it is necessary to be satisfied that an arbitration to which the parties would be referred would be a domestic commercial arbitration.

43 At [31] of the *Report of the Secretary-General: possible features of a model law on international commercial arbitration* (1981) UN Doc A/CN.9/207, the original drafters of the Model Law Note below s 1 (which first appeared as a note to the Model Law) referred to the differentiation of commercial arbitrations from arbitrations of a different nature:

> [The term 'commercial'] has by now gained a sufficiently clear meaning, at least as a modifier to arbitration, thus excluding arbitrations of a different nature such as those in labour disputes or family law matters.

Meaning of "domestic" commercial arbitration

44 The three criteria for an arbitration to be "domestic" are set out in s 1(3).

45 For criterion (a), it is necessary to identify the "parties" to an "arbitration agreement". The "parties" are to be identified by reference to the extended definition of "party" in s 2(1). As noted above, the meaning of "arbitration agreement" is contained in s 7.

46 The applicants argued that the commercial arbitration legislation is concerned with commercial disputes between business people, based on the requirement in s 1(3)(a) that the parties to an arbitration agreement have their "places of business" in Australia. However, s 1(4) explicitly contemplates that a party to an arbitration agreement may not have a place of business.

47 The applicants' case was that neither of them conducted any relevant business with the necessary consequence that neither of them had a place of business at any relevant time. However, they did not suggest that their habitual residences, at the time of execution of each of the deeds, were not in Australia.

48 In my view, the effect of s 1(3)(a), read with s 1(4)(b), is that criterion (a) will be satisfied where a party has his or her habitual residence in Australia even though they have no place of business in Australia. This criterion is directed to the parties' physical connection with Australia, as opposed to the nature of their activities (which is the subject of the requirement that an arbitration be "commercial").

49 For criterion (b), it is necessary to identify an agreement that any dispute that has arisen or may arise between the parties is to be settled by arbitration. This criterion requires interpretation of the alleged arbitration agreement (or any other relevant document) to determine whether the parties have agreed that a particular dispute is to be "settled by arbitration".

50 For criterion (c), it is necessary to find that the arbitration the subject of the agreement is not an arbitration to which the Model Law applies. The applicants did not dispute that criterion (c) was satisfied for each of the alleged arbitration agreements.

Meaning of domestic "commercial" arbitration

51 It appears from s 1C(1) and (2) that the commercial arbitration legislation is concerned with the resolution of "commercial disputes". A natural interpretation of the word "commercial" when qualifying the word "arbitration" is that it refers to arbitration of commercial disputes. The note to s 1 indicates that the term "commercial" should be given a wide interpretation, and that commercial disputes generally arise from a transaction between parties who have a relationship of a commercial nature. However, the legislation does not expressly require the identification of a commercial relationship between the parties to an arbitration agreement.

52 The adjective "commercial" is defined in the Macquarie Dictionary online, relevantly, to mean:

> *adjective*
>
> **1.** of, or of the nature of, commerce.
>
> **2.** engaged in commerce.
>
> **3.** capable of returning a profit: *a commercial project*.

4. capable of being sold in great numbers: *is the invention commercial?*

5. setting possible commercial return above artistic considerations.

6. preoccupied with profits or immediate gains.

…

53 The word "commerce" is defined, relevantly to mean:

> *noun*
>
> **1.** interchange of goods or commodities, especially on a large scale between different countries (**foreign commerce**) or between different parts of the same country (**domestic commerce** or **internal commerce**); trade; business.

54 The parties agreed that the concept of "commercial" in the commercial arbitration legislation is not confined by domestic law principles, recognising that the legislation has its origins in the UNCITRAL Model Law and having regard to s 2A.

55 In *Chief Executive Officer of the Australian Sports Anti-Doping Authority v 34 Players* [2014] VSC 635 ("*ASADA*") at [11], Croft J set out the following extract from Holtzmann HM and and Neuhaus JE, *A Guide to the UNICITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law, 1994) ("Holtzmann and Neuhaus commentary") :

> **(ii) 'Commercial'**. In the early stages of drafting the Model Law, the Working Group recognized the difficulties of defining the term 'commercial'. Various suggestions were advanced, including use of the words 'trade', 'commerce', 'economic transaction', or 'business', but no comprehensive definition of the term was found. As the Secretariat noted in its commentary on the Working Group's final draft, conventions on international commercial arbitration do not define the word. The view appears to have been that the compound term 'commercial arbitration' is widely used and has acquired a sufficiently clear meaning.
>
> ...
>
> The footnote itself states that the term 'commercial' was to be given a wide interpretation, and this call is repeated throughout the legislative history. In particular, the Commission and Working Group reports emphasize that the term is not to be construed in accordance with national law definitions of 'commercial' in certain civil law countries, some of which include only those relationships dealt with in the commercial code or only transactions between 'commercial persons' (*i.e.*, merchants). This concern arose out of experience with the provision in the New York Convention that allows States to restrict the Convention to awards arising out of 'legal relationships ... which are considered as commercial under the national law of the State' making the restriction. The view was that this proviso had resulted in an excessively narrow interpretation.
>
> In both the Working Group and the Commission, attempts were made to make explicit in the Law this intent not to limit 'commercial' to transactions with merchants. Amendments to the footnote were offered that would have stipulated that

> the Law applied 'irrespective of whether the parties are "commercial persons" (merchants) under any given national law' or, in another version, 'regardless of the nature or character of the parties'. Some delegations feared, however, that such a provision might be interpreted as touching upon the question of State or sovereign immunity. It was widely agreed that the Law is not intended to confer immunity on States that have waived it under the applicable rules (such as by engaging in non-governmental activities or signing arbitration clauses), nor to lift that immunity where it has not been waived. In the end, the Commission found that the footnote expressed sufficiently clearly that the 'commercial' nature of a relationship for purposes of the Model Law did not depend on the nature of the parties, and that view was further stipulated in the Report of the session.
>
> The list of examples of commercial relationships is, by its terms, not exhaustive; it is intended merely to illustrate that the term is to be interpreted broadly. The Secretariat noted, for example, several relationships that were not included in the list, but should be considered to be 'commercial' within the meaning of Article 1, including arrangements to supply electrical energy or to transport liquefied gas via pipeline, and 'non-transactions' such as claims for damages arising in a commercial context. This is not to say that the term 'commercial' is boundless. The legislative history also provides examples of relationships that were not meant to be included in the term, in particular, labor and employment disputes and ordinary consumer claims. In addition, Article 1(5) of the Law places an additional limitation on the scope of relationships that are subject to the Law: no matter may be submitted to arbitration under the Model Law if it is not arbitrable under municipal law or if it may be submitted to arbitration only under other provisions of law. See the discussion of Article 1(5), pages 38-39 *infra*.
>
> (Footnotes omitted)

56 The New York Convention mentioned in the Holtzmann and Neuhaus commentary is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting, referred to in s 2D(d) of the International Arbitration Act.

57 In deciding that proceedings conducted by the Australian Football League Anti-Doping Tribunal were not "commercial" for the purposes of the *Commercial Arbitration Act 2011* (Vic), Croft J had regard to relevant contractual provisions which indicated that the proceedings were properly characterised as a labour or employment dispute. The fact that "a variety of more commercial provisions were "mixed" with what may be described as player entitlement, engagement and employment provisions [did] not detract from the labour or employment characterisation" (at [56]).

58 The HPPL respondents referred to the following statement in the Analytical Commentary contained in the Report of the Secretary General to the Eighteenth Session of UNCITRAL (1984) UN Doc A/CN.9/264:

> 19. The footnote, while not giving a clear-cut definition, provides guidance for an autonomous interpretation of "commercial"; it does not refer, as does the 1958 New York Convention … to what the existing national law regards as commercial. Therefore it would be wrong to apply national concepts which define as commercial, for example, only those types of relationship dealt with in the commercial code or only those transactions the parties to which are commercial persons.
>
> 20. This latter idea of preclusion had been expressed in a previous draft of the footnote by the words … 'irrespective of whether the parties are "commercial persons" (merchants) under any given national law'. This wording, which was exclusively intended to clarify that the commercial nature of the relationship is not dependent on the qualification of the parties as merchants (as used in some national laws for distinguishing between commercial and civil relationships), was nevertheless deleted lest it might be construed as dealing with the issue of State immunity.

59 The HPPL respondents also referred to Canadian authority construing the term "commercial" broadly. For example, in *Carter v McLaughlin* (1996) 27 OR (3d) 792, the question was whether an arbitration agreement or award arising from a dispute over a contract for sale of residential property was "commercial". Rutherford J concluded that it was, saying (at 798 b-d):

> In my view, the arbitration agreement between the parties to this application and the resulting award should be viewed as being "commercial" within the meaning of that term as used in the *International Commercial Arbitration Act* of Ontario and the UNICITRAL Model Law it implements in this Province. While the sale of the home … was unconnected to the regular business activity of either party that, in my view, is insufficient to remove the transaction from the scope of what is meant by the term "commercial" in the legislation. The transaction was done in a business-like way, with the assistance of professional realtors and within a legal framework appropriate for a transaction involving a large sum of money. It bears all the earmarks of what goes on in trade and commerce except that the parties were not "commercial persons" … in regards to that transaction.
>
> The Analytical Commentary to which the Ontario statute specifically refers for assistance in the interpretation of the Model Law, tells us that the Commissioners drafting the Model Law anticipated the term "commercial" being given a broad interpretation so as to embrace matters arising from all relationships of a commercial nature. The Analytical Commentary also suggests that were it not for concern as to its possible effect on the doctrine of State Immunity, a consideration irrelevant to this case, the footnote to article 1 would have stated that the broad interpretation intended for the term "commercial" would mean inclusion of commercial relationships irrespective of whether the parties are commercial persons or merchants under any given national law.

60 While the parties agreed that the word "commercial" should not be confined by analogous domestic law concepts, the HPPL respondents submitted that statements of Australian courts about the meaning of "trade or commerce" do help to elucidate the width or minimum

content of the concept. In *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134 at 167, in considering the scope of the *Trade Practices Act 1974* (Cth) ("Trade Practices Act"), Deane J said:

> The terms "trade" and "commerce" are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phrases of development of trade, commerce and commercial communication, the terms are clearly of the widest import (see, generally, *W. & A. McArthur Ltd. v. State of Queensland* (1920) 28 CLR, at pp 546 et seq and *Bank of New South Wales v. The Commonwealth* (1948) 76 CLR, at pp 284 et seq, 381 et seq). They are not restricted to dealings or communications which can properly be described as being at arm's length in the sense that they are within open markets or between strangers or have a dominant objective of profit-making. They are apt to include commercial or business dealings in finance between a company and its members which are not within the mainstream of ordinary commercial activities and which, while being commercial in character, are marked by a degree of altruism which is not compatible with a dominant objective of profit-making.

61 Deane J's statement was applied by a Full Federal Court in *Shahid v Australasian College of Dermatologists* [2008] FCAFC 72; (2008) 168 FCR 46 at [26] to [27]. In finding that the College had a commercial relationship with practitioners, Branson and Stone JJ referred to matters including fees charged and revenue generated from the sale of texts and the conduct of seminars and courses, and the considerable amount of revenue generated by the College.

62 In my view, having regard to the language of s 1C of the commercial arbitration legislation, an arbitration will be a "commercial" arbitration if it involves the resolution of a commercial dispute. A "commercial" arbitration is typically an arbitration to resolve a dispute between parties arising from a commercial relationship, typically although not invariably, at arms' length. Typically, such disputes are not governed by any specific regime for arbitrations or other alternative dispute resolution, in contrast to the position in many jurisdictions for employment, family law and consumer disputes.

63 I accept that an arbitration is not a "commercial" arbitration merely because it involves a party which is a corporation, association or individual which carries on business: cf. *ASADA* at [52]. I also accept that the inclusion of a variety of commercial provisions in a contract will not necessarily render a dispute arising out of that contract a commercial dispute, as Croft J concluded in *ASADA*.

64 On the other hand, where a dispute is conducted in the manner of commercial litigation, for example, where the parties retain commercial legal advisers to conduct the dispute and where the dispute concerns multiple complex factual and legal questions about ownership of

valuable assets, those matters frequently indicate the high financial stakes in the dispute. Features of this kind frequently demonstrate the commercial nature of a dispute.

65 A commercial dispute may arise from the terms of a contract between parties even though the parties do not have a pre-existing commercial relationship, although not every contractual dispute is also a commercial dispute.

66 In my view, a dispute is aptly described as a commercial dispute where it concerns ownership of commercially valuable assets and entitlements to profits generated by those assets. Typically, such disputes will arise from a relationship based on shared ownership of the relevant assets or contractual agreements concerning entitlements to profits generated by the assets. However, as this case illustrates, a dispute may arise over ownership of valuable commercial assets where those assets form part of a deceased estate or a family trust.

67 Mrs Rinehart and the HPPL respondents did not contend that the applicants had any relationship with any of the respondents of the kinds listed in the Model Law Note to s 1. However, the written submissions filed on Mrs Rinehart's behalf argued that the relationships from which the present dispute arises are commercial and that this is demonstrated by the following matters:

(1) The various interests of the parties in HPPL and the assets of the Hancock Group;

(2) The commercial activities of the corporate respondents;

(3) The terms of the deeds relied upon by Mrs Rinehart and the HPPL respondents;

(4) References to resolution of disputes under commercial arbitration legislation in some of the deeds; and

(5) The identities of the various parties to the deeds.

68 The HPPL respondents pointed to various features of the circumstances in which disputes between the parties arose which would cause an arbitration of those disputes to be a "commercial arbitration". The HPPL respondents identified the following factors as relevant to characterising a putative arbitration as a "commercial" arbitration:

(1) the nature of the parties;

(2) the circumstances in which the alleged arbitration agreement was entered into;

(3) the terms of the arbitration agreement;

(4) the subject matter of the dispute to be arbitrated;

(5) the issues raised for determination in the dispute;

(6) the conduct of the parties in relation to the dispute; and

(7) the manner in which the arbitration can be expected to be conducted.

69 I accept that each of the factors set out above may have a bearing on the characterisation of a dispute as a "commercial dispute" and hence an arbitration of that dispute as a "commercial arbitration".

70 The applicants emphasised the familial relationship between the applicants and Mrs Rinehart and facts which, they argued, demonstrated the absence of any "commercial relationship" between the applicants and the respondents. They also emphasised that the dispute is substantially concerned with the affairs of a family trust (or, as they argued, two family trusts). The applicants' case was presented as one arising from strong feelings of personal hurt and, perhaps, animosity, resulting from their beliefs that they have been wronged by their mother. The applicants contended that the dispute in this proceeding should be characterised as a dispute about a family trust arrangement, albeit one involving substantial assets.

71 In my view, the applicants' characterisation of the dispute is not necessarily inconsistent with its characterisation as a "commercial dispute". However, it draws attention to features of the case which may affect the application of s 8(1) and which are unusual in commercial contexts. In particular:

(1) The alleged arbitration agreements are all contained in agreements for the resolution of disputes about entitlements following the death of Mr Hancock senior, as distinct from agreements to engage in commercial activity; and

(2) The claims made by the applicants, and which are said to be the subject of the arbitration agreements, concern their disputed entitlements which ultimately arise from their status as grandchildren of Mr Hancock senior rather than from any commercial activity.

Agreed questions (3) and (4): Does there need to be a commercial relationship between the parties in order for an arbitration to be a domestic commercial arbitration? If so, have GHR and each of the HPPL respondents demonstrated that there was a commercial relationship between each of them and each of the applicants, as a result of which any arbitration between them should be characterised as a domestic commercial arbitration?

72 As to agreed question (3), no. For the reasons given above, there must be a commercial dispute. Giving the word "commercial" a wide interpretation, there may be circumstances in which parties to a commercial dispute are not, and have not been, in a relationship of a commercial nature (beyond any such relationship created by the dispute itself). The commercial nature of the dispute may arise from issues about ownership of commercial assets, or entitlements to profits, or other features of the context of the dispute which reveal an underlying concern with the making of profits or commercial gains.

73 Accordingly, agreed question (4) does not arise. However, in case I am wrong, I have made findings below about whether the applicants had a commercial relationship with any of the respondents at relevant times.

Requirements to establish application of commercial arbitration legislation

74 In my view, based on s 1, in order to establish that the commercial arbitration legislation may apply to their respective interlocutory applications, Mrs Rinehart and the HPPL respondents must prove the following matters:

(1) An "arbitration agreement" to which the applicants, Mrs Rinehart, HPPL respondents and the other respondents are "parties". This involves identifying:

  (a) an agreement to arbitrate, being an agreement by the parties to submit to (domestic commercial) arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship;

  (b) the parties to any such agreement;

(2) That the parties have their places of business or habitual residence in Australia;

(3) That the parties have agreed that the disputes that have arisen between them are to be settled by (domestic commercial) arbitration; and

(4) That the disputes to which any arbitration agreement applies are commercial disputes, so that an arbitration of those disputes would be a commercial arbitration.

75 Concerning matter (2), it was not disputed by either party that all parties to the proceeding have either their relevant place of business or their habitual residence in Australia.

Proof of arbitration agreements

76 In this case, the parties are at issue as to the enforceability of various of the alleged arbitration agreements. They also dispute the scope of the alleged arbitration agreements. Mrs Rinehart and the HPPL respondents contend that these issues should be resolved by arbitration in accordance with s 16 of the commercial arbitration legislation. The applicants contend that they should be determined by this Court.

77 The HPPL respondents observed that s 16 empowers an arbitral tribunal to rule on its own jurisdiction, enshrining the arbitral principles of separability and *kompetenz-kompetenz* in the legislation. I have mentioned *kompetenz-kompetenz* earlier in these reasons. The principle of severability is also reflected in s 7(2) of the legislation, which provides that an arbitration agreement may be in the form of an arbitration clause in a contract. In Merkin R, *Arbitration Law* (LLP, 2004) , the principle was explained as follows (at 5.40):

> [T]he arbitration clause is treated as a separate contractual undertaking: under the concept of separability, the obligation to go to arbitration is distinct from the main contract, so that disputes as to the scope, or even the existence, of the main contract can be arbitrated.

78 In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 157 FCR 45 ("*Comandate*") at [219], Allsop J (as his Honour then was) explained that the doctrine of separability has two aspects of importance:

> First, the arbitrator can be seen to have a clear basis of jurisdiction to decide whether the substantive contract was void or voidable or should be rescinded, without destroying his or her own authority or jurisdiction to arbitrate. Secondly, and underpinning this first question, the invalidity of the substantive contract does not necessarily entail the invalidity of the arbitration clause.

79 In *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40; [2007] 4 All ER 951; [2008] 1 Lloyd's Rep 254 ("*Fiona Trust*"), the House of Lords held that the doctrine of separability required direct impeachment of the arbitration agreement before it could be set aside. In that case, there was an inference that the owners' agent had been bribed to consent to the main agreement, but that did not show that he had been bribed to enter into the arbitration agreement. Accordingly, the arbitration agreement had to be given effect and the parties who invoked the arbitration agreement were entitled to a stay of proceedings. The judgment of Lord Hoffman emphasises the business context in which the relevant arbitration agreement was made. At [19], he noted that "[i]t would have been remarkable for [the agent] to enter into any charter without an arbitration agreement, whatever its other terms had been".

80 As a matter of construction of s 8(1), by itself and in the context of s 16, it is plainly not necessary to establish, on a final basis, the validity or enforceability of the asserted arbitration agreement in order for the commercial arbitration legislation to apply. Section 8 contemplates the possibility of an arbitration agreement which is "null and void, inoperative or incapable of being performed".

81 In *Joint Stock Company 'Aeroflot Russian Airlines' v Berezovsky* [2013] EWCA Civ 784; [2013] 2 CLC 206; [2013] 2 Lloyd's Rep 242 ("*Berezovsky*") at [72] to [74], Aikens LJ (Mann J and Laws LJ agreeing) said:

> **How should the court deal with an application to stay under s 9 of the AA 1996?**
>
> 72. It is necessary first to analyse the structure of section 9(1) and (4) of the [Arbitration Act 1996 (UK)], to see where the burden lies and what standard of proof is required when there is an application for a stay of proceedings because one side asserts that two parties are bound by an arbitration agreement to submit the disputes being litigated to arbitration and the other side asserts that there was no concluded arbitration agreement or it is is [sic] "null and void". Section 9(1) and (4) are based on Article II of the New York Convention 1958. That stipulates that each Contracting State "shall" recognise arbitration agreements in writing and it further obliges a court of a Contracting State to refer the parties to arbitration if requested to do so by one of the parties in the context of an action in a matter which is the subject of an arbitration agreement, unless the court "finds that the said agreement is null and void, inoperative or incapable of being performed".
>
> 73. That has been translated into the terms of section 9(1) so as to give a party the right to apply for a stay of proceedings "in respect of a matter which under the [arbitration] agreement is to be referred to arbitration". Therefore, it seems to me in principle that there is a burden on the party asserting that there is (a) a concluded arbitration agreement as defined in the 1996 Act, and (b) that it covers the disputes that are the subject of the court proceedings, to prove that this is the case. This is borne out by the authorities: [See eg: *Fiona Trust* at para 36 per Longmore LJ; *Albon v Naza Motor Trading Sdn Bhd (No 3)* (2007) 2 Lloyd's Rep 1; [2007] 2 All ER (Comm) 513 at para 15 per Lightman J; *JSC BTA Bank v Ablyuzov* [2011] 2 Lloyd's Rep 129 at paras 31 to 33 per Christopher Clarke J; *The Barito* [2013] EWHC 1240 (Comm) at paras 49 and 50 per Popplewell J]. If the party seeking a stay cannot prove both (a) and (b), then there is no jurisdiction to grant a stay under section 9(1) and (4) of the [*Arbitration Act 1996* (UK)]. However, if the court considers that it cannot decide those issues for itself in a summary fashion on the written evidence, it has two other options, as this court made clear in *Ahmed Al-Naimi (T/A Buildmaster Construction Services) v Islamic Press Agency Inc* [[2000] CLC 647 at 650-2]. It can direct an issue to be tried, pursuant to CPR Pt 62.8(3), or it can stay the proceedings (under its inherent jurisdiction) so that the putative arbitral panel can decide the issue of the existence of the arbitration agreement, pursuant to section 30 of the [Arbitration Act 1996 (UK)]. If the court decides that it will and can determine whether or not there was a concluded arbitration agreement on the written evidence before it, then, in my view, the authorities establish that it is for the party asserting the existence of the concluded arbitration clause to prove it on a balance of probabilities. As I point out below, the position appears to be different if the court decides, on an application for a stay, that it cannot, on the materials before it, determine whether there was a concluded arbitration agreement.

> 74. Under section 9(4) [of the Arbitration Act 1996 (UK)] the court "shall grant a stay" unless "satisfied" that the arbitration agreement is "null and void, [or] inoperative…". This means, in my view, that once the first party has established the existence of an apparently concluded relevant arbitration agreement and that it covers the matters in dispute in the proceedings, it is for the party resisting a stay to "satisfy" the court that the apparently existing arbitration agreement is "null and void". That was the position under the old law, ie. section 1 of the Arbitration Act 1975, which provision first gave statutory effect in English law to the New York Convention. This court has said that this remains the position under the [Arbitration Act 1996 (UK)], albeit without elaborating on its reasoning.
>
> (Footnotes omitted)

82 On an application for enforcement of a foreign arbitral award, the Victorian Court of Appeal (Hansen JA and Kyrou AJA) in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 38 VR 303 at [135] and [136] accepted that the scheme of the New York Convention, reflected in s 9 of the International Arbitration Act, gives "limited prima facie credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements", citing Lord Mance JSC in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at [30].

83 In *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 ("*Tomolugen")*, the Singapore Court of Appeal was required to consider whether court proceedings between two parties fell within the scope of an arbitration clause. At [28], Menon CJ (delivering the judgment of the Court), noted that "any determination made by the court on the existence and scope of the arbitration agreement may well intrude into the remit of the arbitral tribunal's *kompetenz-kompetenz".* Speaking generally, Menon CJ said (at [25] and [26]):

> It is often said that an arbitral tribunal's jurisdiction is based on the consent of the parties as manifested in the arbitration agreement concerned. But, it is also established that an arbitral tribunal has the jurisdiction to determine the existence and extent of such consent. The arbitral tribunal's jurisdiction to determine its own jurisdiction – known as *kompetenz-kompetenz* – cannot be based entirely on the parties' consent. This form of jurisdiction necessarily precedes and exists independently of such consent. The arbitral tribunal may, in the exercise of its *kompetenz-kompetenz,* conclude that there was never any consent by the parties to refer their disputes to arbitration, and as a consequence, that it had no jurisdiction to begin with.
>
> The potential circularity that this entails is broken by Art 16 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), which has the force of law in Singapore: s 3 of the [International Arbitration Act (Cap 143A, 2002 Rev Ed)]. Article 16 embodies the *kompetenz-kompetenz* principle, and it confers on an arbitral tribunal the jurisdiction to "rule on its own jurisdiction, *including* any objections with respect to *the existence or validity of the arbitration agreement*".
>
> (Emphasis in original)

84 The disputes in *Tomolugen* concerned alleged oppression or unfairly prejudicial conduct towards a minority shareholder, and whether the Court should stay proceedings under s 6 of Singapore's International Arbitration Act (Cap 143A, 2002 Rev Ed). Section 6 was substantially similar to s 8(1), providing:

> **Enforcement of international arbitration agreement**
>
> 6.-(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. …

85 After reviewing the position under the Model Law, England, the Hong Kong Special Administrative Region and Canada, Menon CJ concluded that:

> 63 … a Singapore court should adopt a *prima facie* standard of review when hearing a stay application under s 6 of the IAA. In our judgment, a court hearing such a stay application should grant a stay in favour of arbitration if the applicant is able to establish a *prima facie* case that:
>
> (a) there is a valid arbitration agreement between the parties to the court proceedings;
>
> (b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and
>
> (c) the arbitration agreement is not null and void, inoperative or incapable of being performed.

86 In my view, the language of ss 8(1) and 16 and the authorities set out above lead to the conclusion that the existence of an apparently valid arbitration agreement is sufficient to satisfy the first of the factual requirements for the general applicability of the commercial arbitration legislation in this case. This will generally be established by the tender of an executed agreement containing a clause which, properly construed, is an arbitration agreement within the meaning of s 7(1).

87 There remains the question, considered below, whether the Court should decide whether an apparently valid arbitration agreement is "null and void, inoperative or incapable of being performed". The applicants accepted that, if the respondents proved the existence of an

arbitration agreement, then the burden shifts to the applicants to demonstrate that the relevant arbitration agreement is "null and void, inoperative or incapable of being performed".

"Parties" to an arbitration agreement

88 Where it is contended that persons other than signatories to an agreement containing an arbitration clause are parties to the agreement, by reason of the definition of "party" in s 2(1), it is necessary to consider whether any such person is a person claiming through or under a party to the arbitration agreement.

Agreement that the disputes that have arisen between the parties are to be settled by (domestic commercial) arbitration

89 This is generally a matter of interpretation of the asserted agreement to arbitrate.

Whether disputes are commercial disputes

90 This question requires consideration of the proper characterisation of identified disputes, by reference to the factors identified above.

Section 8(1)

Agreed question (6): If the commercial arbitration legislation applies, what facts must the party seeking referral to arbitration establish in order to engage section 8(1)?

91 The parties agreed that the party seeking referral to arbitration must establish that this proceeding is brought in a "matter" which is the subject of an "arbitration agreement" and that the party has requested the referral not later than when submitting the party's statement of the substance of the dispute: cf *Seeley International Pty Ltd v Electra Air Conditioning BV* [2008] FCA 29 at [12]; (2008) 246 ALR 589; *Berezovsky* at [73]. Satisfaction with the second requirement was not in issue.

92 Accordingly, in order to engage s 8(1), Mrs Rinehart and the HPPL respondents must establish that this proceeding is brought in a matter which is the subject of an arbitration agreement. Determining whether a matter is the subject of an arbitration agreement requires the identification of the matter or matters in the proceeding, the existence of one or more arbitration agreements and the scope of the arbitration agreement or agreements: cf *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [99] ("*Tridon*").

"Matter"

93 Article 8(1) of the Model Law, as incorporated into New Zealand law by the First Schedule to the *Arbitration Act 1996* (NZ), was considered by Randerson J in *Carter Holt Harvey Ltd v Genesis Power Ltd (No 2)* [2006] 3 NZLR 794. His Honour held at [57]-[58]:

> [57] … As noted by Holtzmann and Neuhaus at 302:
>
> > [Article 8(1)], which directs courts to refer parties to arbitration, is modelled on Article II(3) of the New York Convention. Thus, like that Convention, the action before the court must be "in" the same "matter" that is the subject of the arbitration agreement and not "merely related" to it or "involved" in it, as some proposed during the debate by the Commission.
>
> [58] The mere fact there may be some connection between the court proceeding and the matter which is the subject of an arbitration agreement is not sufficient to engage Article 8(1). There must be a direct relationship between the matter before the court and the matter which is the subject of the arbitration agreement. Ordinarily, this is likely to arise where the relationship between the two is sufficiently close as to give rise to a material risk of conflicting decisions on fact or law.

94 A "matter" for the purposes of s 8(1) means some right or liability in dispute which is susceptible of settlement as a discrete controversy: cf *Tanning Research Laboratories Inc v O'Brien* [1990] HCA 8; (1990) 169 CLR 332 ("*Tanning Research*") per Deane and Gaudron JJ; *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* [2014] VSCA 166; (2014) 289 FLR 30 ("*Flint Ink*") at 39 [31] per Warren CJ, at 51-54 [84]-[89] per Nettle JA (as his Honour then was); *Amcor Packaging (Australia) Pty Ltd v Baulderstone Pty Ltd* [2013] FCA 253 at [44]-[47] (*"Amcor*"), or a claim for relief of a kind proper for determination in a court: *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* (1979) 39 FLR 267; [1979] 2 NSWLR 243 at 250; (1979) 39 FLR 267; *nearmap Ltd v Spookfish Pty Ltd* [2014] NSWSC 1790 at [65] ("*nearmap Ltd*").

95 A "matter" is something more than a mere issue that falls for decision: cf *Tanning Research* per Deane and Gaudron JJ.

96 In *Comandate*, Allsop J said in construing s 7(2)(b) of the International Arbitration Act:

> [235] The phrase "a matter" is apt to be understood at a level of generality by reference to the arbitration agreement. This conforms with the views of all the justices in *Tanning Research Laboratories Inc v O'Brien* [[1990] HCA 8;] (1990) 169 CLR 332 at 344-45 and 351-52 and McLelland J in *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* [1979] 2 NSWLR 243 at 250. See also *Metrocall Inc v Electronic Tracking Systems Pty Ltd* (2000) 52 NSWLR 1. It is plain that the phrase "a matter" cannot have the full connotation of the phrase in the Constitutional sense: *Tanning Research* at 351. This is so because it is linked to the terms of the arbitration

> agreement. It is the matter, the differences between the parties, the controversy between the parties, which, under the agreement, the parties have agreed to submit to arbitration. Thus, some issue may be part of the overall controversy or matter in the sense understood in federal jurisdiction: *Fencott v Muller* (1983) 152 CLR 570 at 608 and *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 585-86, but not fall within the scope of the arbitration clause. Recognising how the word "matter" is used in Art II Subart 3 and the content of Art II Subart 1, the word "matter" in s 7(2)(b) 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. That is, such part (or all) of the differences that fall within the scope of the arbitration agreement. It is that body of differences which is to be capable of settlement by arbitration.
>
> …
>
> [238] The above approach conforms to the requirement expressed in *Tanning Research* to ascertain the "matter" by reference to the subject matter in dispute and the substantive questions for determination in the proceedings and, necessarily, by reference to the scope of the arbitration agreement.

97 A "matter" for the purposes of s 8(1) may or may not comprise the whole dispute in any given court proceeding: *Tanning Research* per Deane and Gaudron JJ; *Flint Ink* at 53 [87(c)] per Nettle JA; *Casaceli v Natuzzi SpA* [2012] FCA 691; (2012) 292 ALR 143 at 158 [48]; *Amcor* at [45]-[47]. As Beaumont J observed in *Administration of Norfolk Island v SMEC Australia Pty Ltd* [2004] NFSC 1 at [107] "there may, of course, be more than one 'matter' [in the proceeding] and some only of these may be capable of settlement by arbitration".

Scope of arbitration agreement

98 In *Rinehart v Welker* [2012] NSWCA 95 ("*Rinehart v Welker*"), the New South Wales Court of Appeal considered the interpretation of the Hope Downs deed, including the arbitration clause (clause 20) in that deed.

99 At [114], Bathurst CJ stated that the approach to construction of arbitration clauses is no different to the construction of any other contractual provisions. Thus, the following general principles, stated by the plurality in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at [40], apply:

> It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

100 Bathurst CJ (at [117]) cited with approval the following passage from the judgment of Gleeson CJ in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 ("*Francis Travel*") at 165:

> 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 arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument.

101 Under Australian law, there is no legal presumption in favour of arbitration. That is to say, in construing arbitration agreements, courts will not presume that a dispute falls within the scope of an arbitration clause unless the court can be persuaded otherwise: *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 at [41] ("*Walter Rau*"); *Tridon* at [123] (Austin J); *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2009] VSC 553 at [17]-[20] (Hargrave J).

102 Nevertheless, some courts have taken a "liberal approach" to the construction of arbitration clauses, whereby "words capable of broad and flexible meaning will be given liberal construction and content": *Comandate* at [164] and [165] (Allsop J); see also *Walter Rau* at [41]-[42] (Allsop J) (noting, however, that the liberal approach "does not entitle one to give the words in question meaning which they do not bear").

Agreed question (7): To what standard of proof must the facts identified by question 6 be established:

(a) does it require an arguable case or sustainable argument that the matter(s) in the court proceedings are the subject of an arbitration agreement; or

(b) does it require GHR and the HPPL respondents to prove, on the balance of probabilities, that matter(s) in the court proceedings are the subject of an arbitration agreement?

103 For the reasons given above, Mrs Rinehart and the HPPL respondents must prove, on the balance of probabilities, the existence of an apparently valid arbitration agreement. There is a separate question as to the standard to which they must prove that a matter is the subject of such an agreement.

104 On behalf of Mrs Rinehart and the HPPL respondents, it was initially argued that it is sufficient to demonstrate an "arguable" case or a "sustainable argument" that the matter or matters in the proceeding are the subject of an arbitration agreement, relying on *Rinehart v*

Welker and *Hancock v Rinehart* [2013] NSWSC 1352; (2013) 96 ACSR 76 ("*Hancock v Rinehart 2013* (Bergin CJ in Eq)"). In written submissions filed after the hearing, the HPPL respondents sought to rely on the decision in *Robotunits Pty Ltd v Mennel* [2015] VSC 268; (2015) 297 FLR 300 ("*Robotunits*") to argue that an articulated claim or defence which falls within the scope of the arbitration agreement is sufficient to conclude that there is a matter the subject of the arbitration agreement.

105 The applicants submitted that the Court must determine whether or not the claims made by the applicants are matters that are the subject of an arbitration agreement on the balance of probabilities, citing in *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (Comm); [2015] All ER (Comm) 1025; [2013] 2 Lloyd's Rep 421 ("*Golden Ocean*") at [59(2)] and *Berezovsky* at [74]. However, the applicants accepted that the "sustainable argument" test "arises where a party asserts that a claim gives rise to a dispute "under" a deed because a release in the deed absolutely bars a claim and therefore "governs or controls" the outcome. This submission uses the language of clause 20 of the Hope Downs deed, as construed by Bathurst CJ in *Rinehart v Welker.* As a matter of logic, if the "sustainable argument" test applies in this circumstance, then it must also apply where the asserted dispute arises from the application of a release by reason of an arbitration agreement which applies to a dispute "arising out of" a deed.

106 In *Golden Ocean,* Popplewell J summarised the principles applicable "to a situation where C brings proceedings against D in relation to matters which D claims, but C disputes, are governed by an arbitration agreement which confers Kompetenz-Kompetenz on the arbitral tribunal". At [59(2)], Popplewell J stated, in relation to s 9(1) of the Arbitration Act 1996 (UK), that "to bring himself within the scope of s 9, D must establish that … an agreement [to arbitrate] was concluded, and that its terms apply to the underlying dispute". At [59(5)], his Honour said:

> … It is not enough for him to show merely an arguable case that he is party to a concluded arbitration agreement which has agreed to refer to arbitration the matters in respect of which C has brought the proceedings. Unless the court is satisfied that that is so, there is no jurisdiction under the section to stay proceedings. The court must therefore determine the dispute if it affects the question whether D comes within s. 9(1). If it cannot do so on the written evidence at the hearing of the application, it must direct a trial of that issue before granting a stay under s 9. If may, however, decline to direct a trial of the issue and grant a stay under its inherent jurisdiction without resolving the issue.

107 The passage relied upon from *Berezovsky* is set out at [82] above, and contains a statement to similar effect to the statement of Popplewell J at [59(2)] in *Golden Ocean.*

108 In *Rinehart v Welker,* the appellants (Mrs Rinehart and Ms Ginia Rinehart) had sought a stay of proceedings before the Supreme Court of New South Wales, relying on clause 20 of the Hope Downs deed. The primary judge rejected the stay application, finding that the relevant dispute was not one "under" the Hope Downs deed (being the language of clause 20). Bathurst CJ (Young JA agreeing) held that a dispute is "under this deed" if the outcome of the dispute is governed or controlled by the deed, regardless of whether the claimant is invoking or enforcing a right created by the deed. At [135], Bathurst CJ said:

> If the [Hope Downs deed] had the effect of barring the claims of the respondents, then it would follow that the dispute in question was governed or controlled by the [Hope Downs deed] as the outcome would be regulated by its terms. However, the mere fact that these assertions were made does not mean that it automatically follows that the whole claim is a dispute under the [Hope Downs deed]. The primary judge, in my opinion, was entitled to examine the claim to form a view as to whether he could properly conclude, in the light of the evidence available, that the assertion that the claim was barred by the [Hope Downs deed] was sustainable: see *Channel Tunnel Group Limited v Balfour Beatty Construction Ltd* [1993] AC 334 at 356. This was particularly the case when each party made extensive submissions on the issue and none suggested there was any further material which may become available which would be of assistance to the Court on the issue of construction of the clause in question. It was also relevant, in my opinion, to look at the strength of the assertion to determine whether, as a matter of discretion, a stay of the whole or any part of the proceedings should be granted.

109 In *Hancock v Rinehart 2013* (Bergin CJ in Eq), her Honour applied the reasoning of Bathurst CJ to applications for a stay and referral under s 8(1) of the WA Act. At [98], her Honour noted that all parties proceeded on the basis that, in determining whether there was a dispute "under" the Hope Downs deed, it was necessary to determine whether assertions that the claims made in the proceeding were barred were "sustainable". At [130], her Honour concluded that the success of the applications "depends on the availability of a sustainable argument that any conduct of which the plaintiffs were aware at the time of execution of the Deed that would ground a claim against the defendants would be released by the Deed".

110 In *Robotunits*, Croft J considered an application for a stay of proceedings and referral to arbitration under s 7(2)(b) of the International Arbitration Act. His Honour rejected a contention that any matter for determination in a proceeding must be "sustainable", that is, it must have reasonable prospects of success, in order to constitute grounds for a stay. Croft J's decision draws attention to the distinction between the question of whether a matter falls within the scope of the arbitration agreement, and the question of whether there is a

sustainable argument in support of a matter said to fall within the scope of an arbitration agreement. While his Honour concluded that there was no "sustainability requirement" under s 7(2)(b), Croft J proceeded on the basis (from [43]) that it was necessary to decide whether determination of the identified matter fell within the scope of the arbitration agreement, "or, in other words, whether the parties intended those matters to be settled by arbitration". Implicitly, this decision was made on the balance of probabilities.

111 There are overseas authorities supporting the contention that an arguable case or sustainable argument that the matter(s) in the relevant court proceedings are the subject of an arbitration agreement is sufficient to engage a provision analogous to s 8(1). As appears above, the decision of the Singapore Court of Appeal in *Tomolugen* supports a conclusion that the applicants must establish only a *prima facie* case that the matters in the proceeding (or any part thereof) fall within the scope of the arbitration agreement. There is also the Canadian decision of *Gulf Canada Resources Ltd v Arochem International Ltd* (1992) 66 BCLR (2d) 113, cited in *Hancock v Rinehart 2013* (Bergin CJ in Eq) at [87] to [88]. The test stated in this case has been approved in *P. Elliot & Co. Ltd v FCC Elliot Construction Ltd* [2012] IEHC 361 at [49]. Canadian authorities show a preference for the *prima facie* approach: *Union des consommateurs v Dell Computer Corp* [2007] 2 SCR 801 at [940.1]-[943.2]. The courts of the Hong Kong SAR have also adopted the *prima facie* approach: *Private Company "Triple V" Inc v Star (Universal) Co Ltd* [1995] 2 HKLR 62 at 65, cited with approval in *PCCW Global Ltd v Interactive Communications Service Ltd* [2007] 1 HKLRD 309.

112 The Singapore Court of Appeal recognised that its approach differed from the English approach as set out in *Berezovsky.* At [67], the Court justified its approach on the basis that to require the Court to undertake a full determination of an arbitral's jurisdiction could significantly hollow the *kompetenz-kompetenz* principle of its practical effect.

113 The HPPL respondents argued that the approach in *Robotunits* is consistent with the allocation of power to the arbitral tribunal in s 16(1) to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. It also involves construing s 8(1) in a way which avoids the possible problem of needing to hear a substantive matter on its merits in order to decide whether to refer it to arbitration.

114 *Robotunits* is an Australian authority of direct relevance. However, I am not convinced that it is authority for a lesser degree of scrutiny than that adopted in *Hancock v Rinehart 2013* (Bergin CJ in Eq.). The argument considered and rejected in *Robotunits* was whether, to

constitute a "matter" within s 7(2)(b) of the International Arbitration Act, it was necessary to find that the matter was the subject of an arbitration act and was, in addition, sustainable. The relevant matter, whether shareholders agreements provided a legal or equitable basis for Mennel to cause Robotunits to make a payment, did not raise difficult questions about the scope of the arbitration agreement.

115 In my view, the approach in *Robotunits* is consistent with the approach articulated in *Berezovsky,* which I respectfully consider to be correct for the reasons given by Aitkens LJ. Thus, in my view, the correct approach is to decide on the balance of probabilities whether, on the proper interpretation of the relevant arbitration agreement, a matter arising in the proceeding falls within the scope of the agreement. This will generally involve a characterisation of the matter, without an assessment of the merits of the disputes arising from the matter. However, in some cases, it may be necessary to consider the merits of a claim or defence said to be the subject of an arbitration agreement in order to be satisfied that there is a relevant "matter". For example, if the application of the release is a matter which falls within the scope of an arbitration agreement, the mere fact that the release's application is asserted will not justify a finding as to the existence of a matter the subject of the arbitration agreement if there is no sustainable argument that the release potentially operates to bar or preclude the claims the subject of the dispute.

Agreed question (10): Does the Court have discretion to decide or not decide whether the arbitration agreement is null and void, inoperative or incapable of being performed?

116 The applicants submitted that the Court is obliged to consider and determine whether any relevant arbitration agreement is "null and void, inoperative or incapable of being performed".

117 Conversely, Mr McClintock SC submitted that the language "unless it finds" in s 8(1) requires the Court to make a decision as to whether to embark upon an inquiry about whether the proviso in s 8(1) is engaged, which the Court would not do in this case because that would require the Court to deal with the merits of the applicants' substantive claims.

118 The applicants' submission was based on the judgment of Emmett J in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1. In that judgment, his Honour said (at 13-14):

> Where a statute confers an entitlement on one party as against another party, a court having jurisdiction in relation to such an entitlement would be bound to exercise that

> jurisdiction, whether or not the statute is framed in terms which purport to impose a duty on the court or in terms which purport to create an entitlement in one of the parties. In other words, s 7 [of the International Arbitration Act] does not purport to direct the manner and outcome of the exercise by the Federal Court of its jurisdiction. The section merely lays down a general rule under which a party to an arbitration agreement is entitled to have that arbitration agreement given effect by the relevant court.
>
> Section 7 lays down a substantive rule of law that an arbitration clause in a contract is to be given priority over all other clauses to the extent that it is to be enforced in substitution for any other clause. A statute providing that particular contractual terms may not be enforced would be valid. The effect of s 7 is simply that all contractual terms in a contract which contains an arbitration clause are not to be enforced in proceedings in a court. Nor are secondary delegations arising from breach of such a contract.
>
> In the present case, the Court must consider and determine whether or not the prerequisites for the granting of a stay have been established. The Court must also determine whether the arbitration agreement comprised in cl 34 is null and void, inoperative or incapable of being performed and must consider whether conditions should be imposed on the stay. All of those determinations involve the exercise of the judicial power of the Commonwealth.

119 I do not consider that Emmett J's reasons should be taken to require the Court to make a finding as to whether a relevant arbitration agreement is "null and void, inoperative or incapable of being performed" in every case. His Honour's reasons record a conclusion expressed in the context of the particular case. In my view, the language of s 8(1) indicates that the court has a discretion as to whether to consider the question whether an agreement is "null and void, inoperative or incapable of being performed". In particular, I accept the submission made on behalf of the HPPL respondents that the word "unless" in s 8(1) indicates that the Court has a discretion about whether to make a determination that the arbitration agreement is "null and void, inoperative or incapable of being performed".

How should the discretion be exercised?

120 In Mrs Rinehart's written submissions, it was argued that the extent to which the Court will undertake an enquiry into the validity of the arbitration agreement is likely to depend on the circumstances of the case, citing *Comandate* at [215]. At [215] to [217], Allsop J said:

> 215 … The extent to which the court will undertake the enquiry called for by Art 8 of the Model Law (and Art II of the New York Convention and s 7(5) of the *International Arbitration Act*) may well depend upon the circumstances of the case. Certainly, the notion of the court "finding" the state of affairs, referred to in Arts 8 and II and s 7(5), assumes a responsibility of the court.
>
> 216 Where the court has before it a claim that the arbitration agreement should be set aside *ab initio* because of misrepresentation inducing it, that is not an allegation easily able to be disposed of in an interlocutory motion for a stay. Nor is it likely that the court or another court will have already given a judgment on the issue, given the

> hypothesis that one party seeks to send the dispute to arbitration. In such a circumstance, if there is no other ground made out to resist a stay, the court may well retain the issue of the avoidance of the arbitration agreement. If the claim for nullity or voidness is properly directed to the arbitration clause itself, the need for the court to deal with the issue can be readily appreciated, even accepting the doctrine of separability (to which I will come shortly). See in particular the comments of Steyn J (as his Lordship then was) in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81 at 86 and see generally *Anglia Oils Ltd v Owners and/or Demise Charterers of the Marine Champion* [2002] EWHC 2407 (Adm), *El Nasharty v J Sainsbury Plc* [2004] 1 Lloyd's Rep 309 and *O'Callaghan v Coral Racing Ltd* [1998] EWCA (Civ) 1801. It is the practice of some courts to permit this question to go to the arbitrator, particularly if the issue is not clear or manifest: see the cases referred to and discussed in *Merkin*, R [*Arbitration Law* (LLP, 2004)] at [8.30] especially at footnote 7 at 261.
>
> 217 The circumstances here do not require answers to these questions. I am prepared to proceed (without being taken to have decided the issue) on a basis favourable to Pan, that a claim under the *Trade Practices Act* for an order avoiding the arbitration agreement *ab initio* answers the description of 'null and void' and that if a credible case for such is made out the Court should not grant a stay and should allow that issue to be heard by the Court before any arbitration.

121 The relevant passage from *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81 at 86, to which Allsop J referred, is as follows:

> *Circumstances directly impeaching the arbitration agreement*
>
> The foundation of an arbitrator's authority is the arbitration agreement. If the arbitration agreement does not in truth exist, the arbitrator has no authority to decide anything. Similarly, if there is an issue as to whether the arbitration agreement exists, that issue can only be resolved by the Court. For example, if the issue is whether a party ever assented to a contract containing an arbitration clause, the issue of lack of consensus impeaches the arbitration agreement itself. Similarly, the arbitration agreement itself can be directly impeached on the ground that the arbitration agreement itself is void for vagueness, void for mistake, avoided on the ground of misrepresentation, duress, and so forth. All such disputes fall outside the scope of the arbitration agreement, no matter how widely drawn, and are obviously outside the arbitrator's jurisdiction. The scope of the principle of the separability of the arbitration agreement only arises for consideration where the challenge is directed at the contract, which contains an arbitration clause. This fundamental distinction requires the Court to pay close attention to the precise nature of each dispute.

122 In *Berezovsky* at [79] and [80], Aikens LJ said:

> 79. In theory I suppose the court could order that there be a trial of an issue to determine whether the arbitration agreement was "null and void" or "inoperative". But if the evidence and possible findings going to the issue of whether the arbitration agreement is "null and void" or "'inoperative'" also impinge on the substantive rights and obligations of the parties the court is unlikely to do so unless such a trial can be confined to "a relatively circumscribed area of "investigation". (*A v B* [2006] EWHC 2006 (Comm); [2007] 1 All ER (Comm) 591; [2007] 1 Lloyd's Rep 237 at 261 per Colman J, quoted in *JSC BTA Bank v Ablyazov* [2011] 2 Lloyd's Rep 129 at 50.) Otherwise, in such a case, where the court is satisfied of the existence of the arbitration agreement and that the matters in dispute are within its scope, then

> logically it must be for the arbitral tribunal finally to decide the "section 9(4) matters", assuming it has *compétence-compétence* to do so. (*A v B* [2007] 2 CLC 157 at 133–139 per Colman J …). In such a case, the right course for the court to take is to grant a stay under section 9(4) and let the arbitral tribunal get on with determining the dispute.
>
> 80. In *JSC BTA Bank v Ablyazov* Christopher Clarke J held that, in circumstances where the court could only definitively decide the question of whether the arbitration clause was "null and void" by deciding the substantive issue between the parties and that was not a realistic option, either at the interlocutory stage or by directing a trial of the issue, then, for the purposes of section 9(4), it was sufficient for the applicant for a stay to satisfy the court that there was an arguable case that the arbitration clause was valid. This was because if it did so, then it must follow that the party resisting a stay could not discharge the burden on it of "satisfying" the court that the agreement was null and void. ([2011] 2 Lloyd's Rep 129 at 31, 33, 36, 46 and 49.) In *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* Popplewell J emphasised that if the court *can* itself resolve the issue of whether the arbitration agreement is "null and void" (or "inoperative"), then a "merely arguable case" that the arbitration agreement is a valid one will not suffice to obtain a stay under section 9; it only does so if the court cannot decide or it cannot or will not direct an issue to be tried, for reasons outlined above.

123 In support of this passage, Aikens LJ cited *A v B* [2006] EWHC 2006 (Comm); [2007] 1 All ER (Comm) 591; [2007] 1 Lloyd's Rep 237 ("*A v B*") at [133] to [139]. *A v B* arose out of an agreement to settle a dispute between two brothers who had carried on business together. According to the headnote, the agreement required a relatively complex structure of preliminary steps to be taken in respect of the temporary disposition of disputed assets, the standstill of pending proceedings, the withdrawal of criminal proceedings against A in the Bahamas and the parties' facilitating the work of the arbitrator and the procedures to be adopted in the arbitration. It was also an agreement that all outstanding disputes would be determined by B on the basis that he would be given extremely wide powers for that purpose and that the parties waived objections which they might otherwise have had to B acting or continuing to act in his capacity as sole arbitrator. The arbitration commenced with its seat in Geneva. Just over a year later A issued proceedings against the defendants claiming a declaration that the arbitration agreement was void and had been rescinded in English and Swiss law and that all orders or awards made or purported to be made by B were void and unenforceable. Colman J concluded that, in the circumstances of that case, it would be an inappropriate exercise of the court's discretion to order a trial of the issue whether the arbitration agreement was "null and void etc". At [137] and [138], Colman J said:

> 137. The structure of Section 9 of the [UK Arbitration Act] leaves no doubt that once the *existence* of an arbitration agreement has been established by the applicant, a stay will be granted unless one of the section 9(4) matters is established. The respondent to the application must therefore make good the existence of one of those

> matters. If the court is unable to determine whether it is so satisfied on the witness statements before it, consideration has to be given to whether to order a trial of the issue or whether a stay should be granted and the question of substantive jurisdiction under s 9(4) left to the arbitrators. Whether the latter course is adopted may in many cases depend heavily on the extent to which the resolution of that issue will involve findings of fact which impact on substantive rights and obligations of the parties which are already in issue and whether in general the trial can be confined to a relatively circumscribed area of investigation or is likely to extend widely over the substantive matters in dispute between the parties. If the latter is the case the appropriate tribunal to resolve the jurisdictional issues is more likely to be the arbitration tribunal, provided it has Kompetenz-Kompetenz.
>
> 138. Section 9 applies both to domestic and foreign arbitrations. In the latter case there is likely to be the conjunction of a foreign seat and an arbitration agreement governed by the law of that seat. It follows that the section 9(4) matters will probably have to be determined by reference to that body of law. In such a case where the arbitral tribunal has Kompetenz-Kompetenz, this court should be slow to displace the regime which the parties have agreed for the determination of such matters of jurisdiction. The emphasis in modern international arbitration law is to maximise the arbitrators' opportunity to determine their own jurisdiction: see in particular the judgment of Thomas J in *Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping* [2002] 2 All ER (Comm) 70; [2002] 2 Lloyd's Rep 1; [2000] CLC 1200.

124 In *Golden Ocean,* at [59(7)] Popplewell J identified the following factors which are likely to be of significance in deciding whether to order the trial of the "arbitrability issue" under s 9(1) or s 9(4) of the Arbitration Act 1996 (UK), or whether to grant a stay under the court's inherent jurisdiction to permit the arbitrability issue to be resolved by the arbitral tribunal:

> (a) Whether the arbitrability issue is likely to fall to be resolved by the court in any event, for example in the context of enforcement of an award. If so, this will be a powerful factor in favour of the court deciding the issue rather than leaving it in the first instance to the arbitral tribunal.
>
> (b) Whether the resolution of the arbitrability issue will involve findings of fact or law which impact on the substantive rights and obligations of the parties in relation to their underlying dispute, or only affects the question whether such rights and liabilities are arbitrable. In the latter case, the court can conduct the inquiry without risk of interfering with D's right to have his chosen tribunal decide the disputes, because if the issue is resolved in D's favour, there will be a stay in favour of the tribunal without the court having trespassed into considering issues which affect the merits of the underlying dispute. On the other hand where, as is not uncommon, the determination of the issue whether there is an effective agreement to arbitrate is bound up with the issues which arise in relation to the underlying dispute, there is a balance of prejudice to each party to be taken into consideration. It may be more efficient and just to leave the arbitrability issue to be dealt with by the tribunal where, if the issue is resolved in D's favour, he can at the same time obtain an award on the merits from his chosen tribunal. Against this is to be weighed the risk of any prejudice to C in being subjected to the process and decision of a tribunal on which he may not have agreed to confer jurisdiction.
>
> (c) The length and cost of the inquiry into the arbitrability issue and how quickly it will be resolved. Where the issue cannot be resolved without a lengthy

investigation, the court will be reluctant to order the issue to be tried in advance of the arbitration. This will be especially so where the trial of the issue is likely to extend widely over the substantive matters in dispute between the parties, in which case considerations of cost and convenience may be decisive: ordering a trial of the arbitrability issue will normally be inappropriate where the trial cannot be confined to a relatively circumscribed area of investigation.

(d) Whether there have been or will be related proceedings addressing the arbitrability issue between the same or other parties. If the arbitrability dispute has been or will be addressed or resolved in other proceedings, the court will be anxious to do what it can to minimise the risk of inconsistent judgments and provide for orderly case management.

(e) The degree of connection between the arbitrability dispute and England. In this context the law applicable to the arbitrability issue may be of significance. Where the law governing the issue of the existence, effectiveness or applicability of the agreement to arbitrate is English law, that will be a factor in favour of the issue being resolved by the English court rather than a foreign tribunal, unless it is clear that there is no real dispute as to the legal principles, or that the foreign tribunal is as well placed to apply those principles as an English court. Other relevant factors in this context will include the relative convenience for the parties of contesting the arbitrability question before the English court, on the one hand, or the arbitral tribunal on the other. Factors such as the location and language of witnesses and documents and other factors commonly taken into account when considering the *Spiliada* discretion will here be relevant. Also relevant in this context would be the potential applicability of an English jurisdiction clause if the agreement to arbitrate did not exist or was ineffective or inapplicable, as in *Claxton*.

(f) The strength of the arguments on the arbitrability issue. The court will not conduct a mini trial in determining whether to direct a trial of the issue. But as in other interlocutory contexts, if the court can determine on a brief perusal of the materials before it that one party has a very strong case on the arbitrability issue, the court will take this into account.

(g) The nature and quality of the arbitral tribunal and arbitral process, including the supervisory jurisdiction of the curial court. Where the English court declines to resolve the issue and leaves it to the Kompetenz-Kompetenz of the tribunal in the first instance, C has the comfort that if he is right in his contention that there is no applicable or effective agreement to arbitrate, he will have the opportunity to establish that before the tribunal, which will then decline jurisdiction. The degree of comfort will depend upon the quality of the tribunal and of the arbitral process, supported by resort to the courts having supervisory jurisdiction over the arbitral process. The degree of prejudice to C in requiring him to entrust the issue to a tribunal with whom it may transpire he has not agreed that it should be entrusted will depend upon the degree to which the tribunal can be trusted to reach the correct answer.

Agreed question (12): Can the proviso in s 8(1) apply where an arbitration agreement is voidable rather than void?

125 It has been suggested that the exceptions to mandatory referral to arbitration ought to be narrowly construed: Joseph D, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd ed, Sweet & Maxwell, 2015) at [11.47].

The applicants must impeach the arbitration agreements

126 The applicants accepted that the proviso to s 8(1) applies to arbitration agreements, as distinct from any wider agreement in which the arbitration agreement is contained. In *Walter Rau,* Allsop J explained what is required, in relation to the proviso in s 7(5) of the International Arbitration Act (at [89] to [91]):

> 89 … Thus, what is required for s7(5) to be engaged and to justify the matter of avoidance for fraud or otherwise not being referred to the arbitrator for decision, is that the fraud or vitiating conduct be directed to the arbitration clause itself: see for example *Prima Paint Corp v Flood & Conklin Manufacturing Co* [[1967] USSC 172;] 388 US 395*,* 402-404; *Ferris v Plaister*; *QH Tours*; *Morton v Baker,* Einfeld J, 25 March 1993; and *Harbour Assurance Company (UK) Ltd v Kansa General International Co Ltd.*
>
> 90 The conclusory assertions in the amended application are insufficient because the facts pleaded in the proposed second amended application do not raise a claim directed to the arbitration clause. There is no reason why, on the assumption that the arbitrator has been invested contractually to resolve issues of the avoidance of the substantive contract, that he or she should not do so. Apart from assertion, unsupported by a claim directed specifically to the arbitration clause, there is no basis to conclude that these claims satisfy s 7(5).
>
> 91 This approach conforms with an operation of s 7 of the IA Act in accordance with the fostering of the aims of the New York Convention and the Model Law. To allow the assertion of voidness or of the entitlement of avoidance, unsupported by a pleaded claim directed at the arbitration clause, to defeat a stay under s 7(2) would undermine the intent of the operation of the New York Convention and the IA Act which was intended to give it effect. To quote Judge Schwebel, as cited by Kirby P in *Ferris v Plaister,* at 488-489:
>
> > *2. If a party could avoid arbitration by the mere assertion that the principal agreement is invalid, it would be a very simple way to avoid arbitration or to delay the resolution of the dispute by arbitration . A court would then have to determine whether the contract was valid at its inception. Then the parties would need to arbitrate the rest of their dispute. The advantages of a single arbitration would thereby be lost. Yet, by agreeing to the arbitration clause, that was the imputed contractual intention of the parties.*
> >
> > *...*
> >
> > *4. Without separability, a court would be required to consider the substance of the dispute. This would be necessary to determine whether the arbitrator was correct to find that the agreement was valid so that the arbitrator had jurisdiction. To allow this would conflict with the international and local law precluding a review of awards on the merits and holding parties to their agreement to submit disputes to arbitration.*
>
> (Italics in original)

127 Similarly, in *Fiona Trust,* Lord Hope said (at [35]), concerning the appellants' claim that they were entitled to rescind the contract because it was induced by bribery:

> Allegations of that kind, if sound, may affect the validity of the main agreement. But they do not undermine the validity of the arbitration agreement as a distinct agreement. The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity of the main agreement will not do.

Null and void

128 In *Comandate*, Allsop J at [209]-[214] referred to international commentary and case law as follows:

> As to the phrase "null and void", two major texts on the New York Convention and the Model Law: van den Berg AJ, [*The New York Arbitration Convention of 1958* (Kluwer, 1981)] and [Holtzmann and Neuhaus commentary] respectively, reveal that there was very little discussion about the meaning of the phrase in the meetings and Working Groups leading to the two instruments: see generally van den Berg AJ, *op cit* at 154-161 and [Holtzmann and Neuhaus commentary] at 302-307. At 156, van den Berg says the following about the phrase:
>
> > The words may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning. It would then cover matters such as the lack of consent due to misrepresentation, duress, fraud or undue influence.
> >
> > …
> >
> > It may be added that the words 'null and void' etc. would also apply the question of capacity of a party to agree to arbitration, which question is to be decided under his personal law or another law which a court may hold applicable to this issue according to its conflict rules.
>
> Mustill M and Boyd S, *Commercial Arbitration* (Butterworths, 1989) at 464 express the view that the phrase 'null and void' includes circumstances not only where the arbitration agreement has never come into existence, such as when there was no concluded bargain, but also the case where an arbitration agreement has come into existence but has become void *ab initio*, eg by rescission on the ground of misrepresentation. These comments concerned s 1 of the *Arbitration Act 1975* (UK) which contained the following in respect of granting a stay of court proceedings:
>
> > … the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.
>
> Professor Merkin, on the other hand, in *Arbitration Law* (LLP, 2004) at [8.32] says 63 that an arbitration agreement is not null and void if it is merely voidable, at least until it has been avoided.
>
> The authors of *Russell on Arbitration* (22nd ed, Sweet and Maxwell, 2003) made the following comment about [when] the phrase as it appears in s 9 of the *Arbitration Act 1996* (UK) [will apply] at 302:
>
> > The court is satisfied that the arbitration agreement is null and void. This will be the case where the arbitration agreement (as opposed to the main contract)

> was never entered into or where it was entered into but has subsequently been found to have been void ab initio, …

Section 9 of the *Arbitration Act 1996* (UK) is relevantly in the following terms:

> On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

The United States courts appear to take a narrow view of the content of "null and void" conformable with a perceived declared policy in the New York Convention of enforceability of agreements to arbitrate. In *Chloe Z Fishing Co Inc v Odyssey Re (London) Ltd* 109 F Supp 2d 1236 (2000) (SD Cal 2000) Gonzalez J, applying *Oriental Commercial and Shipping Co (UK) Ltd v Rosseel NV* 609 F Supp 75 (1985) (SDNY 1985), said at 1241:

> [U]nder Article II, § 3, an agreement to arbitrate is 'null and void' only when it is subject to internationally recognised defenses such as duress, mistake, fraud, or waiver, or when it contravenes fundamental policies of the forum nation.

129 Allsop J did not determine whether a contention that an arbitration agreement is liable to be declared void under s 87 of the Trade Practices Act was sufficient to engage the "null and void" proviso, or whether it was necessary for the arbitration agreement to be "null and void" at the time of the application for the stay.

130 In *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v Lauro* 712 F. 2d 50 (3rd Cir, 1983) at [19], the Court discussed the interpretation of the "null and void", and said:

> [W]e conclude that the meaning of Article 11 section 3 which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is "null and void" only (1) where it is subject to an internationally recognized defence such as duress, mistake, fraud or waiver ... or (2) when it contravenes fundamental policies of the forum State. The "null and void" language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate.

131 In *Bautista v Star Cruises* 396 F. 3d 1289 (11th Cir, 2005) at 1294-1295, the Eleventh Circuit Court of Appeal held that:

> The [New York] Convention's 'null and void' clause ... limits the bases upon which an international arbitration agreement may be challenged to standard breach-of-contract defences. ... [The 'null and void' clause] "must be interpreted to encompass only those situations – such as fraud, mistake, duress, and waiver – that can be applied neutrally on an international scale."

132 The term "null and void" has also been considered by the English courts. Lightman J cited US case law in *Albon* in construing s 9(1) and (4) of the Arbitration Act at [18]:

> My construction of s 9(1) is entirely in accord with s 9(4) and (again subject only to minor qualifications) with the authorities on that section. Section 9(4) assumes that an arbitration agreement has been concluded and it provides for the situation where issues arise whether that concluded agreement is or may be in law 'null and void, inoperative or incapable of being performed'. In this context 'null and void' means 'devoid of legal effect'. This is made clear by the decision in 1983 of the United States Court of Appeals for the Third Circuit in *Rhone Mediterranee Compagnia v Achille Lauro* (1983) 712 F.2d 50.

133 In *Albon,* the question was whether the relevant agreement was a forgery. Following *Albon*, the English courts have largely construed the meaning of "null and void" to be "devoid of legal effect". For example, in *Hashwani v Jivraj* [2010] EWCA Civ 712; [2011] 1 All ER 50; [2010] 2 Lloyd's Rep 534, the Court of Appeal held that an arbitration agreement was void by reason of the operation of the (now repealed) *Employment Equality (Religion and Belief) Regulations 2003* (UK). These regulations provided that a term of a contract was void where it contravened the prohibitions set out in the Regulations.

134 Similarly in *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB); [2009] 2 All ER (Comm) 738; [2009] 2 Lloyd's Rep 599, Tugendhat J lifted a stay based on the argument that the arbitration agreement between the parties was null and void because it purported to apply a foreign law (the law of Ontario) which did not give effect to mandatory provisions of the law of the European Union, namely, an agent's entitlement to compensation under the *Commercial Agents (Council Directive) Regulations 1993* (UK) (implementing the European Union's EC Directive 86/653).

135 In *Sun Life Assurance Company of Canada v CX Reinsurance Company Ltd* [2003] EWCA Civ 283; [2004] Lloyd's Rep IR 58, the English Court of Appeal found an arbitration clause to be null and void because the wider agreement, of which the arbitration agreement was part, was never formally signed. The common intention of the parties was that they were negotiating on the basis that the agreement would require authorised signatures to indicate each company's assent. Since these signatures had never been obtained, following the orthodox rules of contract, the parties were never bound and the arbitration clause did not apply (at [38] and [45]).

136 In *Golden Ocean,* Popplewell J summarised the relevant principles as follows (at [59(3)]):

> If s 9(1) is fulfilled, s 9(4) requires the court to grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of having effect. Examples of disputes which will engage this subsection are where C alleges that the arbitration agreement is vitiated by fraud or misrepresentation, or that the agreement is void for illegality, mistake or duress.

137 Based on these authorities, in my view, an arbitration agreement vitiated by fraud or misrepresentation, or made under duress or undue influence, will be "null and void" within the meaning of s 8(1). In those cases, the validity of the agreement is liable to be impugned from its commencement (subject to questions such as affirmation or waiver) with the result that the arbitrator's jurisdiction may be found never to have existed.

Can the proviso apply to claims under the Trade Practices Act?

138 In this case, the applicants seek relief under the Trade Practices Act based on conduct alleged to amount to fraudulent concealment of relevant facts: see, for example, paras 369 and 378 of the statement of claim, concerning the 2005 deed of obligation and release. The relief sought includes orders pursuant to s 87(2)(a) declaring arbitration agreements void, for example, clause 14 of the 2005 deed of obligation and release (originating application prayer 40.2) and clause 20 of the Hope Downs deed (originating application prayer 37.1).

139 The power under s 87(2)(a) of the Trade Practices Act to declare a contract void *ab initio* does no more than confer a power to make a declaration in accordance with the legal validity of the contract: *Trade Practices Commission v Milreis Pty Ltd* (1977) 29 FLR 144; (1977) 14 ALR 623 at 638-639 and 645-646. Thus, the claim for statutory relief requires a finding that a relevant agreement is vitiated, from its inception, by fraud.

140 Accordingly, I am satisfied that, in an appropriate case, the proviso in s 8(1) can apply to a claim for a declaration pursuant to s 87(2)(a) of the Trade Practices Act that an arbitration agreement is void *ab initio*.

Standard of proof

141 Mrs Rinehart and the HPPL respondents submitted that "finds" in the proviso means "finds on the balance of probabilities". The applicants' submission was that, where the party resisting referral establishes a "credible case" that the proviso applies, the Court should decline to refer the parties to arbitration and should allow that issue to proceed to a final hearing. I do not understand these submissions to be inconsistent.

142 In *Berezovsky* at [77]-[78], Aikens LJ (with whom Mann and Laws LJJ agreed) concluded that the standard of proof in respect of the proviso in respect of the corresponding provision in s 9(4) of the Arbitration Act 1996 (UK) was the balance of probabilities. As the Lord Justice observed: "After all, it is for the court finally to decide the issue of whether or not to

refuse a stay because the arbitration agreement is 'null and void' or 'inoperative'. No other tribunal has or can have this jurisdiction".

143 At [79] and [80], set out earlier, Aikens LJ then considered how the court should decide whether to conduct a trial on the issue of the application of the proviso.

144 The finding of a "credible" argument does not necessarily entail a final decision to refuse to refer the parties to arbitration. Rather, it justifies consideration of whether to exercise the Court's discretion to decide, on a final basis (and by reference to findings on the balance of probabilities), whether the proviso applies to an arbitration agreement.

145 These applications were heard on the express basis that the Court would not make any factual findings about whether the asserted arbitration agreements are vitiated by fraud or other misconduct as a result of the hearings of the applications to date. The agreed questions reflect this limitation on the scope of the matters for decision.

COURT'S POWER TO REFER PARTIES TO ARBITRATION AND STAY PROCEEDINGS (AGREED QUESTIONS (14) AND (15))

Is s 8(1) "picked up" by s 79 of the Judiciary Act?

146 Agreed question (14) is: "Is s 8(1) of the commercial arbitration legislation binding on this Court pursuant to s 79 of the Judiciary Act?"

147 Section 79(1) of the Judiciary Act provides:

> (1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

148 This Court exercises federal jurisdiction. The content of the law to be applied is determined by ss 79 and 80 of the Judiciary Act. Unless the Constitution or a law of the Commonwealth otherwise provides, s 79 of the Judiciary Act will pick up the laws of the States, including the common law choice of law rules, subject to any statutory modifications: *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503 at 531; *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 193 ("*Bond Corporation*"); *Re 700 Form Holdings Pty Ltd* [2014] VSC 385.

149 In *Northern Territory v GPAO* [1999] HCA 8; (1999) 196 CLR 553 at [80], Gleeson CJ and Gummow J said:

> The objective of s 79 is to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth, but subject always to the overriding effect of the Constitution itself … The law of a State of Territory which is to operate as a surrogate law of the Commonwealth is to be measured beside other laws of the Commonwealth.

150 Mrs Rinehart and the HPPL respondents contend that s 8(1) of the NSW Act is picked up by s 79 of the Judiciary Act because its application is a question of procedure and so governed by the law of the forum under the common law choice of law rules in force in New South Wales (or, if an issue of substance, because the common law choice of law rules have been modified by s 8(1) of the NSW Act which, properly construed, is directed to all arbitration agreements brought before a court in New South Wales, whatever their governing law).

151 The applicants contend that s 53A of the *Federal Court of Australia Act 1976* (Cth) ("Federal Court Act") "otherwise provides". Section 53A is in the following terms:

> **Arbitration, mediation and alternative dispute resolution processes**
>
> (1) The Court may, by order, refer proceedings in the Court, or any part of them or any matter arising out of them:
>
> (a) to an arbitrator for arbitration; or
>
> (b) to a mediator for mediation; or
>
> (c) to a suitable person for resolution by an alternative dispute resolution process;
>
> in accordance with the Rules of Court.
>
> (1AA) Subsection (1) is subject to the Rules of Court.
>
> (1A) Referrals under subsection (1) (other than to an arbitrator) may be made with or without the consent of the parties to the proceedings. Referrals to an arbitrator may be made only with the consent of the parties.
>
> (2) The Rules of Court may make provision for the registration of awards made in an arbitration carried out under an order made under subsection (1).
>
> (3) This section does not apply to criminal proceedings.

152 Section 53A concerns, relevantly, the Court's power to refer proceedings in the Court, or any part of them or any matter arising out of them to an arbitrator for arbitration. It does not provide for the compulsory referral of parties to arbitration, which is the subject matter of s 8.

153 In *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* [2014] FCA 880; (2014) 224 FCR 519 at [47], Mortimer J explained the correct approach to determining whether a federal law "otherwise provides" as follows:

> At [17] of *Austral Pacific* [*Group Ltd (in liq) v AirServices Australia* (2000) 203 CLR 136; [2000] HCA 39], Gleeson CJ, Gummow and Hayne JJ stated that, in determining whether a federal law "otherwise provides" for the purposes of s 79, a court is to ask whether the federal law would so reduce the ambit of the State law that the provisions of the federal law are irreconcilable with the provisions of the State law. The "covering the field" approach, drawn from decisions concerning s 109 of the *Constitution of the Commonwealth*, is not to be taken: *GPAO* [[1999] HCA 8; (1999) 196 CLR 553;] at [78]-[83] per Gleeson CJ and Gummow J, at [135] per Gaudron J, at [254] per Hayne J. In *Austral Pacific*, the plurality held that the federal law was silent on the legal question to which the State law applied, evincing a legislative intention to "leave such matters for the operation of State or Territorial legislation 'picked up' by s 79" and therefore the federal law did not "otherwise provide" for the purposes of s 79 of the *Judiciary Act*. To frame the question another way, as Gleeson CJ and Gummow J put it in *GPAO* at [84], does the federal law "leave room" for the State law, or a provision of it, to operate? As the authorities demonstrate, what is "picked up" as surrogate federal law may be an entire legislative scheme, a portion of a scheme, or a particular provision within a scheme.

154 The applicants' argument was that s 53A preserves the Court's discretion whether to refer the parties to arbitration, in contrast to s 8(1) which purports to make referral mandatory in certain circumstances. Further, s 53A only permits referrals to an arbitrator with the consent of the parties, in contrast to s 8(1) which may mandate referral in the absence of consent.

155 The applicants acknowledged that other federal courts have "picked up" state law arbitration provisions applying s 79: see, for example, *Thomas v Star Maid International Pty Ltd* [1999] FCA 911("*Star Maid*") at [2]; *Heller Financial Services Ltd v Theiss Contractors Pty Ltd* [2000] FCA 802 ("*Heller*") at [1]. But, the applicants said, in each case (with one exception), the relevant state provision was expressed in discretionary, rather than mandatory terms. The exception is *Amcor* [2013] FCA 253, but in that case there was no issue between the parties about the application of the *Arbitration Act 1928* (Vic) or that it was picked up and applied by s 79.

156 In *Bond Corporation*, French J (as he then was) held that this Court might stay its own proceeding by virtue of s 53 of the *Commercial Arbitration Act 1985* (WA) on the strength of s 79. His Honour noted (at 205) that the possible operation of s 79 in relation to a State law empowering State courts to stay their proceedings pending the determination of an arbitration was referred to, but not decided, in *Lady Carrington Steamship Co Ltd v The Commonwealth* [1921] HCA 49; (1921) 29 CLR 596. In *Huddart Parker Ltd v Ship Mill Hill* [1950] HCA 43; (1950) 81 CLR 502*,* Dixon J held that the High Court had power under s 5 of the *Arbitration Act 1928* (Vic) to stay the proceedings. The applicants noted that s 53A was not in force at the time of the decision in *Bond Corporation.* Although s 53A commenced before the decisions in *Heller* and *Star Maid,* there was no reference to s 53A in either case.

157 In *Re 700 Form Holdings Pty Ltd* [2014] VSC 385, Robson J held that s 8 of the *Commercial Arbitration Act 2011* (Vic) applied to an oppression claim brought under s 233 of the *Corporations Act 2001* (Cth), although he did not refer to s 79. Leave to appeal has been granted.

158 In my view, s 53A does not affect the ambit of s 8(1). Section 53A confers a power on the Court to refer parties to arbitration with their consent. It is silent as to the question of proceedings in a matter which is the subject of an arbitration agreement, and as to the question of enforcement of rights arising from an arbitration agreement.

159 Accordingly, in my view, s 8(1) of the NSW Act is binding on this Court pursuant to s 79 of the Judiciary Act despite s 53A of the Federal Court Act.

Power to stay proceedings

160 The precise question agreed by the parties is:

> 15. If the Court determines that the commercial arbitration legislation does not apply or that GHR and the HPPL respondents have not met their burden of proving that any matter(s) in the proceedings are the subject of an arbitration agreement, does the Court otherwise have the power to stay the proceedings and refer the parties to arbitration?

161 The Court has a general power to control its own proceedings and that power extends to enable it to order a stay of proceedings: *Bond Corporation* at 203.

162 In *Recyclers of Australia Pty Ltd v Hettomga Equipment Inc* [2000] FCA 547; (2000) 100 FCR 420 at [65] to [66], Merkel J said:

> 65 In the event that a proceeding includes matters that are not capable of being referred to arbitration, but the determination of which is dependent upon the determination of the matters required to be submitted to arbitration, a court may, in the exercise of its discretion, stay the whole proceeding: see *Tanning Research* at 216 per Brennan and Dawson JJ. A court may also exercise a discretion to impose terms that the arbitration of the arbitrable claims not proceed prior to the determination of the non-arbitrable claims where the arbitrable claims are seen to be subsidiary to or significantly less substantial than, but overlapping with, the non-arbitrable claims: see *Hi-Fert* at 167-168 cf *Dodwell & Co (Aust) Pty Ltd v Moss Security Ltd* (unreported, Federal Court, Wilcox J, No 130 of 1990, 11 April 1990) [at [5] and [7]]. The discretion may also be exercised to stay the proceeding where the non-arbitrable claims are the ancillary claims.
>
> 66 The broad discretion arises as part of the exercise of a court's general power to control its own proceedings. The basis for the discretion is that the spectre of two separate proceedings – one curial, one arbitral – proceeding in different places with the risk of inconsistent findings on largely overlapping facts, is undesirable: see *Dodwell & Co* per Wilcox J at [5] and [7], *Hi-Fert* at 167-168 and *McDonnell*

Dowell Smith East Asia Pty Ltd v State Electricity Commission (unreported, Supreme Court, Vic, Beach J, No 5035 of 1996, 24 November 1998) [at [22] to [24]].

163 The application for a stay of the proceeding is dependent upon some or all of the parties to the proceeding being referred to arbitration. I accept that, in those circumstances, the Court has power to stay the proceedings. See *Albon* at [24] and *Golden Ocean* at [50].

FACTS

164 This section of the judgment sets out the facts relied upon by Mrs Rinehart and the HPPL respondents in support of their contentions that the parties must or should be referred to arbitration, and the proceeding stayed. It also sets out facts relied upon by the applicants in support of their contention that the applications should fail or, alternatively, that the Court should order a trial of the question whether the proviso in s 8(1) applies to the extent that s 8(1) is otherwise engaged.

"Substantive claims" and "validity claims"

165 For the purpose of determining whether there are matters that are the subject of an arbitration agreement within s 8(1), it is necessary to identify, at least in broad terms, the allegations made by the applicants in this Court and their claims for relief based on those allegations.

166 The HPPL respondents divided the applicants' case in the main proceeding into two categories: "substantive claims", being "claims" of alleged misconduct by HPPL and Mrs Rinehart pleaded in paras 128 to 274 of the statement of claim, and "validity claims", being "claims" pleaded in paras 275 to 506 of the statement of claim. The "substantive claims" generally concern the manner in which valuable mining assets changed hands and in which the financial positions of HPPL and HFMF have been altered, allegedly to the detriment of the applicants. The events pleaded mainly, but not entirely, precede the execution of the deeds containing the alleged arbitration agreements.

167 The "validity claims" concern mainly the circumstances in which the applicants came to execute the various deeds containing the alleged arbitration agreements. They also include claims based on alleged misconduct seeking to deploy or give effect to the deeds.

168 The relief sought in prayers 1 to 34 of the originating application broadly corresponds with the "substantive claims". The relief sought in prayers 35 to 47 broadly corresponds with the "validity claims" which challenge the validity or enforceability of the various deeds. Prayers 48 to 51 seek relief arising from complaints about the manner in which Mrs Rinehart and

HPPL have conducted themselves, in the context of litigation between them and the applicants, since 5 September 2011.

169 The respondents have not filed defences in the proceeding. However, it is reasonable to assume that the important elements of the applicants' case will be contested in due course: cf *Rinehart v Welker* at [130].

Factual findings sought by the applicants

170 The applicants proposed 17 findings "based on [their] unchallenged evidence". Several of the proposed findings concerned the absence of a "commercial relationship" at various times. I have made findings about that matter.

171 Other proposed findings concerned whether HPPL or GHR "exerted influence over" either of the applicants on particular occasions and the circumstances in which the applicants executed various deeds, being circumstances that are said to affect the validity of the deeds. I have not made findings about those matters, having noted that I would not address those issues on 15 April 2015.

Background to the main proceeding

172 The background goes back to the 1980s.

173 Mr Hancock senior was the founder of the Hancock group of companies, which included HPPL, HFMF and Zamoever Pty Ltd ("Zamoever"). He was the controller of the Hancock group of companies until his death. Mr Hancock senior was allegedly responsible for the discovery and acquisition by the Hancock group of vast iron ore resources in the Pilbara region of Western Australia.

174 HPPL, incorporated on 25 November 1955, was controlled by Mr Hancock senior from 25 November 1955 until his death and, since then, has been controlled by Mrs Rinehart. HPPL's primary business is in relation to iron ore mining in the Pilbara region of Western Australia.

175 HFMF was incorporated in 1972 as a company limited by guarantee. In 1986, its objects were expanded to include business activities.

176 Mrs Hope Margaret Hancock was the wife of Mr Hancock senior and a one third shareholder in HPPL during her lifetime. She died in 1983. Upon her death, her shares in HPPL passed to Mr Hancock senior.

177 After the death of Mrs Hancock, Mr Hancock senior married Rose Porteous ("Mrs Porteous").

178 According to the statement of claim, by about 1985 disputes had arisen between Mr Hancock senior and Mrs Rinehart regarding his relationship with Mrs Porteous and his dealings with assets of HPPL.

179 The statement of claim pleads, relevantly, that:

(1) On 22 June 1988, Mr Hancock senior and Mrs Rinehart entered into an agreement, referred to as the "1988 Agreement" setting out the terms of the arrangements between them concerning the future ownership of HPPL and HFMF;

(2) The 1988 Agreement provided that, upon Mr Hancock senior's death, 51% of HPPL would be held by Mrs Rinehart while the other 49% of HPPL and 100% of HFMF would be owned by Mrs Rinehart's four children, that is, the applicants, Ms Welker and Ms Ginia Rinehart (collectively, the "children");

(3) It was a term of the 1988 Agreement that, upon Mr Hancock senior's death and when Mrs Rinehart's youngest child, Ms Ginia Rinehart, reached the age of 25, the children's entitlement would be 15.6% of the ordinary and special cumulative shares held by the "HMH Trust" and absolute ownership or control over HFMF, which would give them ownership or control over the 33.3% shares in HPPL held by HFMF with a total interest of 49%.

180 Section 5 of the statement of claim is entitled "Creation of the HMH Trust and the HFMF Trust".

181 As to the HMH Trust, the statement of claim alleges that:

(1) It was established, pursuant to a written agreement between Mr Hancock senior and Mrs Rinehart made in 1988, by a deed of settlement dated 28 December 1988;

(2) At all material times:

(a) the trustee of the HMH Trust was Mrs Rinehart;

(b) the beneficiaries were the children in equal shares;

(c) the principal asset of the HMH Trust was and is its shares in HPPL.

182 Zamoever was registered as a company on 3 March 1989.

183 As to the HFMF Trust, para 105 of the statement of claim alleges:

> On 20 March 1992, in furtherance of the terms of the 1988 Agreement, LGH executed a deed (the 1992 Deed) by which he formally declared in writing that he held the whole of his legal and beneficial interest in his 2 shares in Zamoever upon trust for the children of GHR (being JLH, BHR, HRW and GHFR) as tenants in common in equal shares (the HFMF Trust).
>
> (emphasis removed)

184 The existence of the HFMF Trust is central to the applicants' claims in this proceeding.

185 In an unsworn affidavit prepared by Mr Hancock in around 2005 ("Mr Hancock's unsworn affidavit"), Mr Hancock stated, relevantly:

> 106. On 20 March 1992, LGH executed a deed (the "Share Purchase Supplementary Deed and Hancock Group Arrangement" … stating at Clause 5 that he held the shares in Zamoever on trust for my mother's children absolutely as tenants in common in equal shares upon the same terms as to the appointment of trustee as the Trust, and to vest on the same date as the Trust. Clause 5 does not say the shares are to be held on identical terms as the Trust, and it would appear the intention was to create a separate trust. I believe LGH's intention, manifested in the Plan, the Supplementary Share Deed and his Will, was that the Trustee of the Trust would not only hold the one third shareholding in HPPL which LGH gifted to the Trust on 27 December 1988, but also would hold the shares in Zamoever, in trust purely for my mother's children, as a second Trust (the "Zamoever Trust"). Alternatively, if I am wrong, LGH intended the Zamoever shares to form part of the Trust, to be held purely for my mother's children …

186 In support of the existence of the HFMF Trust, the applicants rely upon admissions by Mrs Rinehart and HPPL in Supreme Court of Western Australia proceedings CIV 2121 of 1992 ("proceeding CIV 2121/1992") brought by Mrs Porteous which, the applicants contend, are to the effect that Mr Hancock senior declared himself a trustee of the whole of his interest in shares in Zamoever for Mrs Rinehart's children.

187 Mrs Rinehart argues that the allegation made in Mr Hancock's unsworn affidavit as to the existence of the Zamoever Trust is the same allegation made in these proceedings as to the existence of the HFMF Trust.

188 The statement of claim alleges that the terms of the HFMF Trust and the HMH Trust provided for Mr Hancock senior to be the trustee of both trusts during his lifetime, for Mrs Rinehart to become the trustee of both trusts upon his death, and for both trusts to vest on the 25th birthday of Mrs Rinehart's youngest child.

189 That child, Ms Ginia Rinehart, reached the age of 25 on 6 September 2011.

The position at the time of Mr Hancock senior's death

190 At the time of his death on 27 March 1992, the applicants were aged 15 and 16 respectively.

191 The applicants allege that, at the time of Mr Hancock senior's death, HFMF held the following valuable assets:

(1) A 33.3% shareholding in HPPL;

(2) Exploration licences for the Hope Downs tenements;

(3) Applications for exploration licences for the Roy Hill tenements;

(4) A 50% share of the legal and beneficial title to mining tenements now known as Nicholas Downs tenements; and

(5) A 100% share of the legal and beneficial title to the mining tenement now known as the Mulga Downs tenement.

192 The Hope Downs, Roy Hill and Mulga Downs tenements are valuable iron ore resources. The statement of claim alleges that the Nicholas Downs tenements comprise a ferruginous manganese deposit in the Pilbara region of Western Australia.

193 For her part, and without attempting to state Mrs Rinehart's position exhaustively, Mrs Rinehart's case is that beneficial ownership of the Hope Downs tenements was always with HPPL.

Mrs Rinehart's roles and duties after Mr Hancock senior's death

194 The applicants claim that, following Mr Hancock senior's death, Mrs Rinehart became the trustee of each of the HMH Trust and the HFMF Trust.

195 The applicants also allege that, at or shortly after Mr Hancock senior's death, Mrs Rinehart became:

(1) The chairman and controlling mind of HPPL;

(2) A director and the controlling mind of Zamoever;

(3) A director and the controlling mind of HFMF;

(4) A director and the controlling mind of HRL;

196 It is also alleged that at or shortly after Mr Hancock senior's death, Mrs Rinehart controlled 51% of the shares in HPPL. The statement of claim pleads that HFMF's financial statements as at 30 June 1992 recorded HFMF's 33.33% shareholding in HPPL as a non-current asset

with a value of $43,320,000, and exploration licences for areas including the "Hope Downs No 1 iron ore deposits" as non-current assets with a value of $40,011,664.

197 Section 7 of the statement of claim is entitled "GHR's fiduciary duties arising out of the 1988 agreement". At para 124, it pleads that Mrs Rinehart owed fiduciary duties to her children in relation to the interests conferred upon them by the 1988 Agreement.

Alleged misconduct prior to 2003

198 In Mr Hancock's unsworn affidavit, he claims that, following her father's death, Mrs Rinehart embarked upon "a sustained campaign to return assets to HPPL which she considered were the rightful property of the family, HPPL being the family company". At para 141 of the unsworn affidavit, he says:

> In pursuing the transfer of ownership of various assets from HFMF to HPPL, my mother failed to recognise her duty as trustee of the [HMH] Trust, and the Zamoever Trust of which she became a trustee on LGH's death. By divesting the Zamoever Trust of its assets in the manner she subsequently did, my mother caused the Trust to lose significant assets, as HFMF, controlled by Zamoever, was supposed to be controlled by the Zamoever Trust…

1992 appropriation of Roy Hill tenements (section 8 of statement of claim)

199 The applicants allege that, almost immediately after Mr Hancock senior's death, Mrs Rinehart caused HRL to give up its pursuit of valuable exploration licences over the Roy Hill tenements.

200 Underpinning this complaint is an allegation that HRL was then a wholly owned subsidiary of HFMF.

201 The alleged facts are that exploration licence applications made by HRL were marked "refused" in the records of the Western Australian Department of Mines and Petroleum on about 30 May 1992 (that is, about two months after Mr Hancock senior had died). On about 27 August 1992, Mrs Rinehart caused HPPL to apply for exploration licences for the same or substantially the same tenements. On 2 January 1993, the relevant minister granted HPPL each of the exploration licences sought.

202 A particular bone of contention concerns whether Mrs Rinehart falsely stated to the applicants that she personally discovered the Roy Hill tenements.

203 The applicants allege that Mrs Rinehart used her knowledge of the earlier exploration licence applications to obtain a benefit for HPPL at the expense of HRL (being a wholly owned subsidiary of HFMF).

204 The misconduct alleged against Mrs Rinehart comprises:

(1) breach of her alleged duties as trustee of the HFMF Trust to act honestly and in good faith;

(2) acting for an improper and ulterior purpose;

(3) using her position as alleged trustee of the HFMF Trust to gain an advantage for herself; and

(4) breach of her alleged fiduciary duties as trustee of the HFMF Trust.

205 The applicants allege that a consequence of Mrs Rinehart's misconduct was that HRL "was deprived of the commercial opportunity to obtain valuable mining assets which would have been recorded as assets of HRL and, indirectly, HFMF" at the time of the "debt reconstruction" pleaded in section 11 of the statement of claim, and explained in more detail below.

206 In oral submissions, Mr Hutley SC, counsel for the HPPL respondents, noted that, on the applicants' case, HPPL never held beneficial title to the Roy Hill tenements. In this regard, Mr Hutley SC noted the allegation, at para 146 of the statement of claim, that, on about 16 November 2011, HPPL transferred *legal* title to the Roy Hill tenements to RHIO.

Relief sought

207 By prayers 1 to 8 of the originating application, the applicants seek, in summary, a declaration that RHIO has held and holds the Roy Hill tenements on constructive trust for the children, and for consequential relief in the nature of an account of profits made by Mrs Rinehart, RHIO and HPPL from the use of the tenements or equitable compensation for the children's lost opportunity to profit from exploiting the tenements.

208 In her written submissions, Mrs Rinehart contended that the relief sought gives rise to a matter subject to all of the arbitration agreements, except for clause 9.2 of the 2007 HD deed.

1992 to 1994 manipulation of HFMF's financial position (section 10 of statement of claim)

209 In summary, the applicants complain that Mrs Rinehart took steps to "engineer" the present position in which she holds 76.55% of the issued shares of HPPL, rather than 51% as

allegedly provided for by the 1988 Agreement. As a result, it is alleged, the children's interest in HPPL was reduced from 49% to 23.45%.

210 Paragraphs 155 to 176 of the statement of claim set out a series of allegations which may be summarised as actions taken by Mrs Rinehart, through HFMF and HPPL, allegedly intended to devalue HFMF. In particular, it is alleged that on 23 July 1993, HPPL commenced legal proceedings seeking a declaration that the Hope Downs tenements were held on constructive trust for HPPL by HRL. It is also alleged that Mrs Rinehart caused HFMF and HRL to cease contesting the constructive trust claim.

211 The applicants claim that the decision to cease contesting the constructive trust claim meant that the ownership of the Hope Downs tenements was transferred to HPPL and HFMF's non-current assets decreased by at least $40,011,664. They claim that this decision, and other decisions made prior to July 1995, resulted in:

(1) A $77,871,422 decrease in the net assets recorded in the HFMF financial statement for the year ended 30 June 1994, reducing net assets from $61,730,338 in 1993 to negative $27,595,965 in 1994;

(2) The loss of HFMF's principal income generating assets;

(3) The Roy Hill tenements not being recorded on the balance sheet of HRL as an asset of HRL;

(4) The loss of HFMF's ability to earn income independently or separately from its entitlement to dividends from HPPL; and

(5) A significant diminution in HFMF's bargaining power in any future dealings with HPPL.

212 It is alleged that, on or about 11 September 1997, HPPL transferred legal title to the Hope Downs tenements to HDIO.

213 The misconduct alleged against Mrs Rinehart comprises:

(1) breach of her alleged duties as trustee of the HFMF Trust to act honestly and in good faith;

(2) acting for an improper and ulterior purpose;

(3) using her position as alleged trustee of the HFMF Trust to gain an advantage for herself; and

(4) breach of her alleged fiduciary duties as trustee of the HFMF Trust.

214 In addition, it is alleged that Mrs Rinehart's conduct was in breach of the 1988 Agreement.

Relief sought

215 By prayers 15 to 21 of the originating application, the applicants seek, in summary, similar relief to the relief sought in connection with the Roy Hill tenements. That is, a declaration that HDIO has held and holds the Hope Downs tenements on constructive trust for the children, and for consequential relief in the nature of an account of profits made by Mrs Rinehart, HDIO and HPPL from the use of the tenements or equitable compensation for the children's lost opportunity to each profits from exploiting the tenements.

216 Again, in her written submissions, Mrs Rinehart contended that the relief sought gives rise to a matter subject to all of the arbitration agreements, except for clause 9.2 of the 2007 HD deed.

1995 "debt reconstruction" (sections 11 and 13 to 16 of statement of claim)

217 There was a debt reconstruction deed dated 24 October 1995 ("debt reconstruction deed") made by HFMF and HPPL, and a deed of acknowledgement and release made by HFMF, HPPL and HRL. Recital C to the debt reconstruction deed stated that, as at the date of the deed, HFMF's liabilities exceeded its assets and it was unable to discharge its debts to HPPL.

218 The applicants complain that, in December 1995, HFMF's shares in HPPL were converted into ordinary shares and were purchased by HPPL for $9.3 million which, it is alleged, was below the fair value of HFMF's shares in HPPL.

219 The applicants allege that the buy-back of HFMF's 33.3% shareholding in HPPL had the effect of increasing Mrs Rinehart's shareholding in HPPL from 51% to 76.55%.

220 The misconduct alleged against Mrs Rinehart is the same as in [213] above.

221 As against HPPL, it is alleged that it was knowingly involved in Mrs Rinehart's various breaches of duty as alleged trustee of the HFMF Trust and her fiduciary duties and that, by its execution of the debt reconstruction deed and the deed of acknowledgement and release, it participated "in a fraudulent and dishonest design, together with GHR, for the purposes of conferring a benefit on HPPL, being full legal and beneficial title to the Hope Downs tenements".

222 At section 16 of the statement of claim, the applicants allege that the 1992 to 1994 manipulation of HFMF's financial position and the 1995 debt reconstruction involved breaches by Mrs Rinehart of her obligations under the 1988 Agreement.

Debt reconstruction relief sought

223 The relief sought is in prayers 8 to 14 of the originating application, by which the applicants claim:

> 8. A declaration that GHR:
>
> 8.1 holds, and has held since about December 1995, 25.55% of the ordinary shares in HPPL;
>
> 8.2 holds, and has held since about December 1995, 25.55% of the cumulative special shares in HPPL; and
>
> 8.3 held, since about December 1995 until she disposed of them to [150 Investments], 25.55% of the preference shares in HPPL,
>
> on constructive trust for BHR, JLH, HRW and GHFR.
>
> 9. A declaration that 150 Investments holds, and has held since it acquired them 25.55% of the preference shares in HPPL on constructive trust for BHR, JLH, HRW and GHFR.
>
> 10. An order pursuant to s 175 of the *Corporations Act 2001* (Cth) that HPPL rectify its register of members to reflect that the shares referred to in orders 8 and 9 are held beneficially for BHR, JLH, HRW and GHFR.
>
> 11. An order that GHR provide an account of profits to the Applicants in relation to the benefits obtained by her from her and 150 Investments' ownership of the shares held on constructive trust referred to in orders 8 and 9.
>
> 12. In the alternative to order 11, an order that GHR pay equitable compensation to the Applicants in respect of lost income from the shares held on constructive trust referred to in orders 8 and 9.
>
> 13. An order that 150 Investments provide an account of profits to the Applicants in relation to the benefits obtained by it from the ownership of the shares held on constructive trust referred to in order 9.
>
> 14. In the alternative to order 13, an order that 150 Investments pay equitable compensation to the Applicants in respect of lost income from the shares held on constructive trust referred to in order 9.

224 In addition, prayers 22 to 26 seek relief to enforce the 1988 Agreement or for damages for breach of the agreement, and prayers 27 and 28 seek the following relief:

> 27. Damages pursuant to s 82 of the [Trade Practices Act] and or s 236 of the *Australian Consumer Law* (Cth) (ACL) in respect of the loss and damage suffered by the applicants arising from the unconscionable conduct of GHR in:

27.1 devaluing the assets of [HFMF] and effecting the 'Debt Reconstruction' between HFMF and HPPL, as a result of which the interest of BHR, JLH, HRW and GHFR in HPPL dropped from 49% to 23.45%;

27.2 refusing to acknowledge, since 6 September 2011, that she holds 25.55% of her present shareholding in HPPL on trust for JLH, BHR, GHFR and HRW.

28. Orders pursuant to s 87 of the [Trade Practices Act] that:

28.1 GHR transfer or cause to be transferred one quarter of the shares referred to in orders 8 and 9 to BHR;

28.2 GHR transfer or cause to be transferred one quarter of the shares referred to in orders 8 and 9 to JLH;

28.3 In the event that GHR fails to transfer or cause to be transferred the shares referred to in this order within 28 days of the date of these orders, a Registrar of the Court be authorised to execute such transfers and instruments as may be required to effect the transfers contemplated by those orders;

28.4 HPPL register the transfers contemplated by orders 28.1and 28.2; and

28.5 GHR compensate each of BHR and JLH in respect of any liability or other expense consequent upon the transfers contemplated by orders 28.1 and 28.2.

1992 to 1998 appropriation of Nicholas Downs tenements (section 18 of statement of claim)

225 In summary, the complaint concerns the following alleged conduct:

(1) The transfer, on 26 November 1992, of HML's 50% share in the Nicholas Downs tenements to a company called Gayna Park Pty Ltd ("Gayna Park"), a wholly owned subsidiary of HRL.

(2) The transfer, on 19 January 1998, of all of the issued shares in HRL from HFMF to HPPL for no or no adequate consideration, which in turn conferred upon HPPL an indirect ownership interest in 100% of Gayna Park and the Nicholas Downs tenements.

(3) The transfer of the interest in the Nicholas Downs tenements to various entities;

(4) The entry into a joint venture to develop the Nicholas Downs tenements, as a result of which, HPPL received a profit of $59,189,729.

(5) The transfer, in June 2014, of all the shares in Gayna Park from HRL to HPPL.

226 The applicants allege that this conduct was in furtherance of breaches of fiduciary duty and dishonest and fraudulent design pleaded earlier and was intended to remove mining assets from HFMF and place them in the hands of HPPL and its subsidiaries.

Relief sought

227 By prayers 29 to 31 of the originating application, the applicants seek, in summary, similar relief to the relief sought in connection with the Roy Hill tenements. That is:

(1) A declaration that HPPL holds, and has held since it acquired them, the Nicholas Downs tenements on constructive trust for the children;

(2) An order that HPPL provide an account of profits to the applicants in relation to the benefits obtained by it from its ownership, use, possession and exploitation of the Nicholas Downs tenements;

(3) In the alternative, an order that HPPL pay equitable compensation to the applicants for their loss of opportunity to earn profits from the exploitation of the Nicholas Downs tenements.

1998 appropriation of Mulga Downs tenement (section 18 of statement of claim)

228 In summary, the complaint concerns the following alleged conduct:

(1) The transfer, on 19 January 1998, of all of the issued shares in HRL from HFMF to HPPL for no or no adequate consideration, which in turn conferred upon HPPL an indirect ownership interest in 100% of the Mulga Downs tenement.

(2) HPPL's conduct in obtaining an exploration lease E47/1244 for an area adjacent to the Mulga Downs tenement.

(3) The transfer of the Mulga Downs tenement, for no consideration, in February 2009, from HRL to MDI as to two shares and MDIO, as to 98 shares, both companies being wholly owned subsidiaries of HPPL.

(4) The transfer, in February 2011, of the shares in MDI to Outback WA Pty Ltd.

(5) The transfer, on 9 October 2014, of the exploration lease E47/1244, from HPPL to MDI as to 98 shares and MDIO, as to 2 shares.

229 The applicants allege that this conduct was in furtherance of breaches of fiduciary duty and dishonest and fraudulent design pleaded earlier and was intended to remove mining assets from HFMF and place them in the hands of HPPL and its subsidiaries. A review of sections

10 to 14 of the statement of claim shows that the relevant breaches of fiduciary duty and dishonest and fraudulent design are principally alleged against Mrs Rinehart.

Relief sought

230 By prayers 32 to 34 of the originating application, the applicants seek similar relief to the relief sought in connection with the Roy Hill tenements. In summary, the applicants seek a declaration that MDI and MDIO have held and hold the Mulga Downs tenement on constructive trust for the children, and for consequential relief in the nature of an account of profits by MDI and MDIO made from the use of the tenement or equitable compensation for the children's lost opportunity to profit from exploiting the tenement.

Events leading to September 2003 Porteous settlement deed

231 Litigation between Mrs Rinehart and Mrs Porteous commenced shortly after the death of Mr Hancock senior. According to recital H of the Porteous settlement deed, proceeding CIV 2121/1992, mentioned earlier, was commenced in September 1992.

232 In November 1995, Mrs Porteous commenced proceeding CIV 2094/1995 in the WA Supreme Court against Mrs Rinehart and others.

233 On 4 May 1996, the WA Supreme Court granted probate of Mr Hancock senior's estate.

234 In July 1996, Mrs Porteous commenced proceeding CIV 1716/1996 in the WA Supreme Court against Mrs Rinehart and others.

235 In 1998, the WA Supreme Court dismissed an application by Mrs Porteous to remove Mrs Rinehart and Mr Schwab as trustees of the trusts created by Mr Hancock senior's will: *Porteous v Rinehart* (1998) 19 WAR 495. The judgment records that Mrs Porteous alleged that there was a dispute over the ownership of the Zamoever shares, while the defendants alleged that there was no dispute, or that any such dispute was false and contrived.

236 On 8 April 1999, this Court ordered that the estate of the late Mr Hancock senior be administered under Part XI of the *Bankruptcy Act 1966* (Cth).

237 In 1999, three sets of proceedings were commenced in this Court in connection with the administration of the bankrupt estate. A fourth proceeding was commenced in this Court in October 2000.

238 In August 2000, HPPL commenced proceedings in the NSW Supreme Court against Mrs Porteous, which were subsequently transferred to the WA Supreme Court and numbered CIV 2666/2000.

239 In 2002, an application by Mrs Porteous to expunge a proof of debt lodged by HFMF and subsequently admitted by the trustee was dismissed: *Porteous v Donnelly (Trustee), in the matter of Hancock (Bankrupt)* [2002] FCA 862.

September 2003 Porteous settlement deed

240 On 15 September 2003, the disputes between Mrs Rinehart and Mrs Porteous, as well as other disputes, were resolved by the execution of a deed of settlement and release ("Porteous settlement deed").

241 There are 16 parties to the deed, including the applicants, Mrs Rinehart, HPPL, HFMF, Zamoever and HMHTI. The HPPL respondents noted that Ms Rinehart executed the deed in her own right and for HPPL as one of its directors.

242 Other relevant parties to the Porteous settlement deed are Mrs Porteous, her husband ("Mr Porteous") and two companies related to Mrs Porteous, being Johanna Lacson Nominees Pty Ltd ("JLN") and Belle Rosa Holdings Pty Ltd ("BRH").

243 An email dated 19 August 2003 from Mrs Rinehart to the applicants explains that the Porteous parties had dropped a demand for the applicants to be signatories to the then proposed deed. The email commences:

> We had an interesting development yesterday afternoon with the protracted struggle to tie up the Porteous settlement.

244 In the email, Mrs Rinehart expresses a concern to prevent the continuation of litigation after the deed is signed, and a proposal to include the applicants as signatories as a means of addressing this concern. The email is signed off "love Mother". There is nothing in the email suggesting that the Porteous settlement deed was intended to confer any benefit in favour of Mrs Rinehart (or any of the HPPL respondents) at the expense of the applicants.

245 An email dated 8 September 2003 from Peter Neil, an in-house lawyer at HPPL, to Mr Hancock advises him to sign the then proposed deed in his personal capacity to avoid "the severe risk of vindictive action by the Porteous interest against you personally". There is no

suggestion in this email that the Porteous settlement deed was intended to confer rights in favour of Mrs Rinehart (or any of the HPPL respondents) by Mr Hancock.

246 According to Mr Hancock's unchallenged evidence, prior to signing the Porteous settlement deed, Mrs Rinehart said to him words to the effect of:

> You need to sign this Deed. Rose and her lawyers have insisted you sign it so that you cannot make a claim against Rose in the future.

And:

> You cannot not [sic] hold up a settlement that has taken so many years to reach.

247 There is no specific evidence that either of the applicants had made any of the allegations of misconduct set out above against any of the respondents at any time before the Porteous settlement deed was executed. However, by email dated 15 September 2003 (that is, the date of the Porteous settlement deed), Mr Hancock made proposals to Mrs Rinehart for financial accommodation in return for which he agreed "not to take any action regarding the HMHT, debt reconstruction issues, make media comment regarding family etc".

Terms of the Porteous settlement deed

248 There are references, in the recitals to the Porteous settlement deed, to some of the facts pleaded in the statement of claim, for example, recital B refers to Mr Hancock senior's execution of a shareholders agreement with Mrs Rinehart on 22 June 1988. This appears to be a reference to the 1988 Agreement. The HPPL respondents' written submissions contended that the recitals reveal that the proceedings that were compromised on the terms of the Porteous settlement deed referred to and made allegations concerning:

(a) the affairs of the late Mr Hancock senior;

(b) the terms and effect of the 1988 Agreement;

(c) the beneficial ownership of Zamoever;

(d) the beneficial ownership of the tenements held by HRL;

(e) the debt reconstruction of October 1995.

249 The recitals to the deed commence with the death of the late Mr Hancock senior. They refer to his execution of documents including, apparently, the 1988 Agreement, a will and a deed. Among other things, the recitals set out allegations by Mrs Porteous and counter-allegations by Mrs Rinehart, HPPL, HFMF and Mr Gary Schwab in relation to the legal effect of

Mr Hancock senior's acts, and refer to proceedings brought in the WA Supreme Court. The final recital is that the parties "have agreed to compromise the Claims in the Proceedings and in the Discontinued Proceedings and to fully and finally resolve such of the Proceedings to which each is a party on the terms set out in this deed".

250 Neither of the applicants is referred to in the lengthy recitals. Neither of them was a party to any of the "Proceedings" or the "Discontinued Proceedings", as those terms are defined in the deed.

251 Section 3 of the Porteous settlement deed is entitled "Releases". Clauses 3.1 to 3.6 are headed as follows:

> 3.1 Release by Mr and Mrs Porteous, JLN and BRH.
>
> 3.2 Release by Defendants in CIV 2121.
>
> 3.3 Release by HPPL in Duress Proceeding.
>
> 3.4 Release by Mr and Mrs Porteous in Discontinued Proceeding.
>
> 3.5 Release by Mr and Mrs Porteous – Proposed Amended Claim.
>
> 3.6 Release by Slater & Gordon in CIV 2121 and CIV 1716.

252 These releases, which form part of the context in which clause 3.9 is to be construed, reflect the fact that the Porteous settlement deed is primarily concerned with disputes to which the applicants were not a party.

253 Clause 3.7 refers to covenants not to sue in clauses 3.1 to 3.6. Clause 3.8 sets out indemnities given by Mr and Mrs Porteous, JLN and BRH.

254 Mrs Rinehart and the HPPL respondents contend that, by clause 3.9 of the Porteous settlement deed, the applicants released Mrs Rinehart, HPPL, HFMF and HMHTI from claims that include claims made in this proceeding. Clause 3.9 provides:

> **3.9 General Mutual Releases**
>
> Subject hereto on and from the Effective Date, the parties release each other from all claims in respect of:
>
> (a) the Proceedings;
>
> (b) the circumstances or allegations giving rise to or referred to in the Proceedings; and
>
> (c) any claim which was or could reasonably have been known to the parties (or any of them) as at the date of this deed,

arising from:

(i) the Proceedings;

(ii) the circumstances or allegations giving rise to or referred to in the Proceedings.

255 "Claim" is defined in Clause 1.1 to mean:

(a) any claim, demand, action, suit or proceeding whether at law, under statute, in equity or otherwise, for damages, injunctions, for debt, restitution or other remedy including, without limitation, breach of fiduciary duty of whatever nature and howsoever arising; and

(b) damage, loss, liability, costs, charge, expense, outgoing or payment.

256 Clause 15 provides:

> Each releasing party severally promises each of the other parties to this deed that it will not advance, cause, procure, finance, support, encourage or otherwise facilitate in any way (except on compulsion of law including, but not limited to, service of a subpoena) directly or indirectly the advancement, institution or prosecution of any Claim the subject of a release by that party in this deed.

257 Clause 12 provides:

> On and from the Effective Date each party may plead this deed in bar to any Claim or proceeding the subject of a release in this deed PROVIDED HOWEVER that nothing in this clause 12 shall prevent any party from enforcing the provisions of this deed.

258 Clause 16.1 provides that the deed is governed by the law of Queensland. Clause 16.2 provides relevantly:

(a) Any dispute arising out of, relating to or in connection with this deed which cannot be settled amicably must be resolved by arbitration as set out in this clause.

(b) A party claiming that a dispute has arisen in respect of this deed must notify the other party in writing specifying the nature of the dispute ("notice").

(c) If the parties are unable to resolve the dispute within 90 days after receipt of the notice, either party shall be entitled to refer the dispute to arbitration in accordance with the *Commercial Arbitration Act* 1990 (Qld).

259 Mrs Rinehart and the HPPL respondents contend that the claims made in this proceeding or at least some of the claims, give rise to a "dispute arising out of, relating to or in connection with" the Porteous settlement deed. It was submitted that the relevant dispute is whether the applicants released the claims by clause 3.9.

260 For the purpose of considering this contention, I will assume that the claims made by the applicants in this proceeding include claims based on allegations that were made by one or

more of the parties to the Porteous settlement deed prior to the execution of that deed (but not by either of the applicants, it not being suggested that either of them had made any claim against Mrs Rinehart or any of the HPPL respondents at the time the Porteous settlement deed was executed). For example, recital L refers to the "debt reconstruction" in or about October 1995. As previously noted, recital B apparently refers to the 1988 Agreement.

Ms Rinehart's relationships with respondents prior to the Porteous settlement deed

261 According to Ms Rinehart, she was financially dependent upon her mother until 2008 (that is, until her early thirties). In saying this, Ms Rinehart may have included income from the HMH Trust and from employment at HPPL as financial support from Mrs Rinehart.

262 Ms Rinehart was a director of HPPL from 2 July 1998. At about the time that the Porteous settlement deed was signed, Ms Rinehart also became a director of HFMF, HRL, HMHTI and 150 Investments. There is a dispute about the extent to which Ms Rinehart fulfilled, and was permitted to fulfil, her roles as directors of companies within the Hancock group.

263 Ms Rinehart was employed by HPPL from about July 1999 to 2008. From about 2001 to 2004, Ms Rinehart was a personal assistant to Mrs Rinehart, in the latter's capacity as HPPL's executive chairman.

264 It was not suggested that there was any commercial transaction, in the sense of any business dealing, between Ms Rinehart and either Mrs Rinehart or any of the respondents prior to the execution of the Porteous settlement deed.

265 The language of the 19 August 2003 email is not indicative of a commercial relationship between the applicants and Mrs Rinehart arising out of the Porteous settlement deed.

266 However, in my view, the relationship between Mrs Rinehart as trustee of the HMH Trust and the applicants as beneficiaries of that trust is aptly described as a commercial relationship because the principal asset of the HMH Trust was a valuable commercial asset, being shares in HPPL. The trustee beneficiary relationship in a trust over a valuable commercial asset is centrally concerned with the beneficiaries' entitlements to benefit financially from the trust's ownership of such a valuable commercial asset. The trustee's fiduciary duties in this context must necessarily involve commercial decisions required to be made in the interests of the beneficiaries.

267 The same reasoning applies to the alleged HFMF trust.

268 In addition, in my view, the applicants and Mrs Rinehart had a commercial relationship arising out of their co-ownership of HPPL, by reason of the commercial activities of HPPL.

Mr Hancock's relationships with respondents prior to the Porteous settlement deed

269 As a young adult, Mr Hancock was financially dependent on his mother but had complaints about the unpredictable and ad hoc nature of her financial assistance. Also as a young adult, he had a disappointed expectation that he would one day play a significant role in the business founded by Mr Hancock senior.

270 A letter from Mr Hancock to Mrs Rinehart dated 14 November 1995 refers to his employment by HPPL as consideration for a confidentiality undertaking.

271 Mr Hancock worked at HPPL, assisting on the coronial inquiry into the death of Mr Hancock senior and assisting with public relations. According to him, Mrs Rinehart stopped his salary from HPPL sometime around August 2003.

272 Mr Hancock was briefly a director of HPPL, from 20 February 1997 to July 1998. Mr Hancock held several directorships of Hancock companies between July 2001 and October 2003. As with Ms Rinehart, there is a dispute about the extent to which he fulfilled, or was permitted to fulfil, these directorship positions.

273 Mr Hancock completed a Masters of Business Administration in July 2003.

274 It was not suggested that there were any business dealings between Mrs Rinehart and Mr Hancock or any of the respondents prior to the execution of the Porteous settlement deed. However, for the reasons given above, I accept that there was a pre-existing commercial relationship between Mr Hancock and Mrs Rinehart based on the HMH Trust and, if it existed, the alleged HFMF Trust.

275 On behalf of the HPPL respondents, it was submitted that Mr Hancock and his mother were in an openly hostile relationship from at least August 2003 if not earlier. It is not necessary for me to make a finding about the precise nature of their relationship, at any particular time.

Commencement of disputes between Mr Hancock and Mrs Rinehart

276 According to Mr Hancock, he moved to Sydney in late 2003. His evidence is that he started to investigate the affairs of the HMH Trust about this time, although the 15 September 2003 email mentioned above suggests that his investigations might have commenced earlier.

277 On 14 May 2004, there was an exchange of emails between Ms Rinehart and Mr Hancock concerning the possibility of litigation against Mrs Rinehart.

278 By letter dated 24 May 2004, Mr Hancock's then solicitors, Butcher Paull & Calder wrote to Mrs Rinehart saying relevantly:

> Dear Mrs Rinehart
>
> **HOPE MARGARET HANCOCK TRUST**
>
> We advise that we act for your son, John Langley Hancock.
>
> We are instructed by John that he has a number of concerns about the above Trust. He has attempted to discuss these concerns with you but his concerns have not been addressed.
>
> John wishes to view the Trust accounts and be informed about the transactions relating to the Trust…
>
> John's second concern is that, at least in his case, no distributions have been made for some time…
>
> John's third concern is that mining interests have been transferred out of the Trust and that non-Trust expenses have been charged to the Trust, i.e., there has been a failure on your part to distinguish between the interests of the various entities you control and the interests of the Trust.

279 The letter concluded by asking Mrs Rinehart to step down as trustee of the HMH Trust.

280 Zamoever was deregistered on 28 June 2004.

281 By letter dated 7 October 2004 to Terry Solomon (in house counsel at HPPL), Butcher Paull & Calder asserted:

> In relation to the "permanent resolution option", it does not seem at all likely that agreement will be reached as to valuation. This is because Lang Hancock originally intended that the Trustee of the Hope Margaret Hancock Trust hold 49% of the issued shares in Hancock Prospecting Pty Ltd on trust for the children. According to our research, by various devices your client has reduced the number of shares held on trust for the children to well below that amount, whilst simultaneously increasing her proportional shareholding in the company.

282 The contention that Mr Hancock senior intended the children to have 49% of the shares in HPPL is an early articulation of the allegation summarised at [179(2)] above.

283 The applicants submitted that the Court should infer from the 7 October 2004 letter that Mr Solomon had made an offer to Mr Hancock to buy out his shares held in the HMH Trust at a valuation but Butcher Paull & Calder responded by saying this would not be possible as there was a dispute as to how many shares should be held in the HMH Trust.

Mr Hancock's unsworn affidavit

284 On 27 October 2004, Butcher Paull & Calder sent Mrs Rinehart an earlier version of Mr Hancock's unsworn affidavit. According to an affidavit sworn by Mr Hancock on 29 September 2005 in ("Mr Hancock's September 2005 affidavit") WA Supreme Court proceeding CIV 1327/2005 ("proceeding CIV 1327/2005"), the unsworn affidavit detailed Mr Hancock's:

> … intention to lodge an application with this Honourable Court exposing what I had learned of [Mrs Rinehart's] mismanagement of the [HMH] Trust and my entitlement to replace her as trustee of the Trust with my own nominee.

285 Although the version of the unsworn affidavit provided to this Court was attached to Mr Hancock's September 2005 affidavit, the applicants' counsel did not suggest that it was materially different from the version supplied to Mrs Rinehart in October 2004.

286 Paragraph 1 of the unsworn affidavit states:

> I make this affidavit in support of my request of this Honourable Court for an order to substitute the Trustee of the [HMH Trust] with my own nominee, and for further orders for the full disclosure and delivery up of the accounts and documents of the Trust.

287 Among other things, the unsworn affidavit states that Mr Hancock no longer trusted his mother and that his relationship with his mother had "completely broken down".

288 Notable allegations made in the lengthy affidavit include the following:

> 285. At all times in the past 10 years, my mother acted in conflict with her various positions as director and Trustee, to her benefit. It is my strong belief that she must be removed as Trustee of the Trust, and that there should be some form of redress for the calculated and astounding breaches of fiduciary duty she displayed in divesting HFMF, which was always intended to be solely for the benefit of myself and my siblings, of all its valuable assets, particularly its shareholding in HPPL.
>
> 286. My mother has also divested HFMF of the Hope Downs tenement, which would have provided a huge source of income to HFMF.
>
> …
>
> 296. My mother's conduct as director and controller of the various Hancock group entities, as well as her performance as trustee of the Trust and the Zamoever Trust, demonstrate she has only acted in her own interests, to the detriment of her children, and their rightful entitlements, in breach of her director's duties, and fiduciary duties as trustee. I believe she is totally unsuitable and also incapable of properly performing her role as trustee of the Trust, based on the matters I have described, and she continually fails to make provision for her children from the Trust in any amount that reflects the fact that the Trust holds 23.4% of HPPL shares for our benefit. I also feel that there must be some redress for the systematic, calculated action she has taken to divest HFMF and the Zamoever Trust of its most valuable assets.

> 297. As for her performance as trustee of the Zamoever Trust, it is completely obvious that she has breached her duty in the most fundamental manner imaginable, by rendering the trust worthless through removal of assets worth many millions of dollars from the Zamoever Trust, and placing them within her own grasp. My mother has even gone so far as to de-register Zamoever Pty Ltd.

Overlap between the statement of claim in this proceeding and the unsworn affidavit

289 The HPPL respondents contended that all of the "Substantive Claims were made or asserted in substance in the Unsigned Affidavit".

290 I accept that there is significant commonality between the factual allegations made in the statement of claim and the factual allegations made in the unsworn affidavit particularly in relation to the complaints of the 1992 to 1994 manipulation of HFMF's financial position and the 1995 debt reconstruction, summarised above.

291 For example, there is a marked similarity between paras 185 to 216 of the statement of claim and paras 159 to 200 of Mr Hancock's unsworn affidavit.

292 The unsworn affidavit contains allegations that Mrs Rinehart has breached her duties as director and as a fiduciary, that she has preferred her interests to the detriment of the children (to whom she owed fiduciary duties) and that profits have been made which rightly belong to other entities. However, the unsworn affidavit is relatively circumspect in making demands or asserting rights for relief.

293 The HPPL respondents drew attention to the introduction to the statement of claim and, in particular, the summary of alleged breaches by Mrs Rinehart of the 1988 Agreement and removal of assets from the HFMF Trust. They observed that the following three broad allegations are made:

(1) If GHR had adhered to the terms of the 1988 Agreement (which the HPPL respondents refer to as the "Plan of 22 June 1988") and not engaged in various alleged breaches of trust and fiduciary duty, the children would have held interests in 49% of the shares in HPPL and 100% ownership or control of HFMF, and HFMF would have owned and controlled certain valuable mining tenements (statement of claim paras 14 to 15);

(2) That is to be contrasted with the recent situation, which is that GHR owns 76.55% of HPPL instead of 51% and the four children own 23.345% of HPPL (instead of 49%) and HPPL or its subsidiaries have title to the valuable mining assets which previously

belonged to or were being pursued by HFMF (and its subsidiary HRL) (statement of claim paras 15 to 16);

(3) In summary terms, GHR's alleged wrongdoing is said to have two aspects:

(a) removing valuable mining assets from HFMF (in which she had no financial interest) and transferring them to HPPL (in which she had a majority shareholding); and

(a) engineering a situation whereby HPPL bought back HFMF's 33.3% shareholding in HPPL pursuant to the debt reconstruction deed for (allegedly) less than its true value, thereby increasing GHR's share in HPPL from 51% to 76.55% and reducing the shareholding of her children from 49% to 23.45% (statement of claim para 17).

294 The HPPL respondents referred to the summary at the conclusion of the affidavit and in particular to paras 6(f), 290 to 292 and 293, which state:

> 6(f). My mother in or about 1995 and through to 1997 removed assets, including the Hope Downs Tenements from the [HMH] Trust and increased her own proportion of shareholding in HPPL from 51% to 76% or thereabouts at the expense of the Trust interest which was reduced from 49% over which the Trust held ownership or control to 21% or thereabouts.
>
> …
>
> 290. In addition to this entitlement of 49% of the shares in HPPL my siblings and I were the sole beneficiaries of the Zamoever Trust, and through Zamoever Pty Ltd's ranking membership of HFMF, the Trustee of the Zamoever Trust could control HFMF, and therefore control companies (including dividend policy) owned by HFMF particularly HRL and HML, which owned extremely valuable mining tenements, in particular the Hope Downs tenements.
>
> …
>
> 292. As of today, HFMF no long holds any shares in HPPL, those shares having been bought back and cancelled. This had the effect of increasing the proportional value and rights of my mother's one third shareholding HPPL (which effectively became a one half shareholding upon that cancellation). Furthermore, HRL (now called WRPL) is allegedly now owned by HPPL and Hope Downs is supposedly owned by a company ultimately owned by HPPL, removing the tenements from the sphere of the Zamoever Trust's ownership.
>
> 293. Zamoever is now de-registered, and my mother's shareholding in HPPL is over 76%, giving her absolute control over the company, including the right to declare discriminatory dividends to herself on her shares of a particular class.

295 HPPL respondents contended that "[t]here can be no suggestion that the alleged wrongdoing in the Unsigned Affidavit is less extensive than is now alleged in the [statement of claim.]". They noted that the unsworn affidavit includes allegations that GHR has:

(1) since LGH's death, "sought to undo" the trust arrangement LGH established for his grandchildren's benefit, and "put herself in absolute control of the Hancock Group, which LGH had specifically sought to prevent" (unsworn affidavit at para 291; see also paras 139, 254);

(2) "acted in her own interests, to the detriment of her children and their rightful entitlements, in breach of her director's duties, and fiduciary duties as trustee" (unsworn affidavit at para 296; see also para 160);

(3) acted (in relation to the debt reconstruction deed and restructure) "in staggering conflict, and in breaches of duty as a director and controller of HPPL, shadow director and controller of HFMF, shadow director and controller of Zamoever Pty Ltd, Trustee of the [HMH] Trust, and Trustee of the Zamoever Trust" (unsworn affidavit at para 221); and

(4) "breached her duty [as trustee of the HFMF Trust] in the most fundamental manner imaginable, by rendering the trust worthless through removal of assets worth many millions of dollars from the Zameover Trust, and placing them within her own grasp" (unsworn affidavit at para 297; see also paras 141, 160).

296 The HPPL respondents then argued that the principal allegations that underlie the "substantive claims" in the statement of claim are:

(1) The formation and terms of the Plan of 22 June 1988;

(2) The establishment and terms of the HMH Trust and the HFMF Trust;

(3) Allegations relating to the "divestment" of valuable assets held by HFMF through its subsidiary HRL between about 1992 and 1995, resulting in a "devaluing" of HFMF such that it became balance sheet insolvent; and

(4) The "reconstruction" of the Hancock Group between about 1995 and 1998, with the ultimate result that:

(a) HRL (and any remaining valuable mining tenements) became a subsidiary of HPPL;

(b) HFMF's shareholding in HPPL was cancelled;

(c) GHR's shareholding interest in HPPL increased from 51% to 76.55%; and

(d) GHR's children's shareholding interest in HPPL (held through the HFMF Trust and the HMF Trust) was reduced from 49% to 23.45%.

297 The facts set out above support the general observation made by the HPPL respondents, that the starting point for the "substantive claims" and the complaints made in the unsworn affidavit is, in each case, the alleged 1988 Agreement.

298 I also accept that both the "substantive claims" and the unsworn affidavit include allegations that the HMH Trust and HFMF Trust were established pursuant to the 1988 Agreement (although the HFMF Trust is referred to as the Zamoever Trust in the unsworn affidavit). They also contain similar allegations concerning the effect of the "reconstruction" of the Hancock Group between about 1995 and 1998.

299 I also accept that, together with the duties and obligations said to be contained in, or to arise from, the 1998 Agreement, Mrs Rinehart's duties as trustee of the HMH Trust and the HFMF Trust provide the basis for the asserted allegations, claims and remedies in the originating application and the statement of claim.

Overlap of allegations concerning divestment of valuable assets held by HFMF

300 There is no express reference to the Roy Hill, Nicholas Downs and Mulga Downs tenements in Mr Hancock's unsworn affidavit.

301 Paragraph 10 of the statement of claim alleges that, when Mr Hancock senior died:

> 10.2 HFMF's wholly owned subsidiary HRL owned the Hope Downs Tenements and the Mulga Downs Tenement;
>
> 10.3 HRL was in the process of pursuing an opportunity to obtain exploration licences over the area now known as the Roy Hill Tenements; and
>
> 10.4 HFMF's wholly owned subsidiary HML owned a 50 % share of the Nicholas Downs Tenement.

302 The unsworn affidavit alleges that on 30 November 1992, Mrs Rinehart caused HRL to transfer the bare legal title to its exploration licences to a company Mr Hancock believed to be Hope Downs Pty Limited. The HPPL respondents acknowledged that this was a reference to the Hope Downs tenements.

303 The unsworn affidavit alleges "further divesting of HFMF's assets", asserting that as at 30 June 1992 HFMF's accounts showed net assets of $45 million and that by 30 June 1994

HFMF's accounts showed that it was substantially insolvent (unsworn affidavit paras 153 and 155).

304 It was submitted on behalf of the HPPL respondents that the applicants' complaints concerning dealings with these various tenements (or at least the Roy Hill tenements) were referred to in paras 6(f), 219(iii) and 143 to 152 of the unsworn affidavit. Para 6(f) is set out at [294] above and refers to assets removed from the HMH Trust "including" the Hope Downs tenements.

305 Paragraph 219(iii) complains that "[a]s a result of the Restructure, my mother's children including me have lost the benefit of HFMF's ownership of all shares in HRL, which held various mining tenements". The HPPL respondents argued that the Roy Hill, Nicholas Down and Mulga Downs tenements must have been some of the "various mining tenements" held by HRL and referred to in the unsworn affidavit at para 219(iii).

306 The HPPL respondents referred to paras 136, 138 and 145 of the unsworn affidavit which state:

> 136. My mother had long disagreed with the way LGH had conducted the affairs of his companies. In particular, my mother argued that valuable assets of HPPL were being transferred to other entities, particularly HFMF. These included the issued shares in HML and HRL (which companies held various mining tenements), and further mining tenements subsequently transferred to HML and HRL by HPPL.
>
> …
>
> 138. LGH had caused the transfer of mining tenements to HRL and HML to allow for an easier Initial Public Offering to be effected, in order to raise capital for the various potentially risky mining enterprises that HRL and HML were looking at embarking upon. By placing these enterprises outside the sphere of HPPL's ownership, LGH sought to protect HPPL from the not altogether unlikely chance of one of the ventures to exploit a mining tenement failing.
>
> …
>
> 145. HRL was the holder of various mining tenements. All issued shares in HRL, as I have mentioned, were held by HFMF, which was controlled by Zamoever, on trust for my mother's children.

307 I am not satisfied that the unsworn affidavit refers to the complaint now made that Mrs Rinehart caused HRL to give up its pursuit of valuable exploration licences over the Roy Hill Tenements. The affidavit refers to tenements that had been held by HRL, including tenements transferred to HRL by HPPL. The Roy Hills exploration licences do not answer these descriptions. Further, alleged misconduct concerning the Roy Hills exploration licences occurred in 1992. Both paras 6(f) and 219(iii) refer to later events.

308 Paragraph 219(iii) may refer to the Nicholas Downs and Mulga Downs tenements, which were owned by HRL.

Events leading to April 2005 deed of obligation and release

309 Mr Hancock's unsworn affidavit records that Mrs Rinehart made proposals to buy out his shares in the HMH Trust from mid-2004 onwards.

310 A letter from Mr Solomon to Butcher Paull & Calder dated 15 November 2004 stated: "We are ready to proceed with the settlement discussions".

311 By letter dated 25 November 2004, Ms Rinehart sought legal advice in connection with a draft settlement deed, a copy of which was not in evidence, but which apparently involved a proposed settlement with Mr Hancock. The letter refers to Mr Hancock's concern about "the debt reconstruction … given his desire for a greater equity in our family company". The letter also refers to a letter written by Ms Rinehart to her mother. That letter expresses the view that Mr Hancock is:

> … quite ready to take actions which damage family company interests, and ultimately, other family members. He is well aware of the situation we are in with regards to financing for Hope Downs, a deal that he knows would support us all for the next 40 plus years, but still, he has brought this litigation against you.

312 The HPPL respondents contended that the main driver for the entry into the 2005 deed of obligation and release, and subsequently the Hope Downs deed, the 2007 HD deed and the Confidential Settlement Deed ("2007 CS deed") (identified below) was "to provide certainty in relation to" a joint venture for the development and exploitation of the Hope Downs tenements "and in particular, the title to valuable mining assets given claims that had been asserted over those assets by JLH".

313 A memo from Peter Neil dated 2 December 2004 addressed to "Bianca, Hope and Ginia" and entitled "Preliminary advice on Confidential Draft Deed" describes the deed as involving "your brother John, no longer being a beneficiary under the Deed of Settlement made the 27th day of December 1988 and known as the Hope Margaret Hancock Trust".

314 According to Mr Hancock, in early 2005 Mrs Rinehart purported to resign as trustee of the HMH Trust and purported to appoint a replacement trustee. On 22 March 2005, Mrs Rinehart commenced proceeding CIV 1327/2005 seeking her discharge as trustee and the appointment of her nominee under s 77 of the *Trustees Act 1962* (WA). This is the proceeding in which Mr Hancock filed his September 2005 affidavit, to which the unsworn affidavit was attached.

APRIL 2005 DEED OF OBLIGATION AND RELEASE AND DEED OF LOAN

315 On 1 April 2005, Mr Hancock signed a deed entitled "Confidential Deed of Obligation and Release" ("2005 deed of obligation and release") and another document titled "Deed of Loan" ("2005 deed of loan") (collectively "2005 deeds"). The other signatories to the 2005 deed of obligation and release include HPPL, HFMF, Mrs Rinehart in her own right and as "former" trustee of the HMH Trust and Ms Rinehart in her own right and as a beneficiary of the HMH Trust and a director of HPPL.

316 Paragraph 360 of the statement of claim alleges that the 2005 deeds were interdependent, in that one would not have been executed without the other being executed.

317 The 2005 deed of obligation and release contains the following recitals:

> C. Serious and substantial differences have arisen between the Covenantor [JLH] and the Hancock Group which the parties hereto have agreed shall be settled upon the execution hereof on the terms herein.
>
> D. Having particular regard to the commercial interests and the commercial sensitivities of the Hancock Group (and the potential for the Covenantor to negatively seek exposure with the public or with the media particularly during periods of negotiation of large commercial projects such as the Hope Downs Project currently under complex negotiation by HPPL at the date of execution of this Deed), HPPL and the Hancock Group are desirous of obtaining the undertakings of the Covenantor to wholly retract, cease and desist from any such activities now and in the future.
>
> E. The parties hereto by their execution hereof acknowledge that the primary nature of the HPPL business, is very long-term, complex, large-scale mining projects. The HPPL business necessitates long term consistent business plans, and many dealings with third parties on a strictly confidential basis, and the contrary, short-term and time consuming demands of the Covenantor, linked to his use of sensationalist media to publicise his contrary views, are opposed to the careful focus required and successful achievement and attainment of HPPL's interests. Accordingly, the Board of HPPL, having considered the matter in depth, has resolved that the making of the payments to the Covenantor under this Deed is necessary in order to enable the required focus and to protect the confidential nature of information, including with third parties, the business, prosperity and future profitability of HPPL.

318 As Bathurst CJ noted in *Rinehart v Welker* at [7], in the 2005 deed of obligation and release Mr Hancock "gave extensive releases to the other parties to the deed in consideration of certain payments and other benefits being conferred on him by HPPL and other companies related to the Rinehart family".

319 Clause 2 provides:

> The Covenantor hereby wholly releases and discharges all and singular the Releasees and each of them and all of the successors in time and title of them and each of them from all and any obligations they and each of them may have to him in any manner and in any capacity whatsoever as at the date of execution hereof.

320 Clause 3 provides:

> Without limiting or derogating from the provisions of clause 2 herein, the Covenantor additionally:
>
> (a) hereby releases and forever discharges all and singular the Releasees from all and any liability, claims, demands, suits and actions of any nature whatsoever and any loss, injury or damage that might be caused to the Covenantor therefrom, and the liability of the Releasees in respect of any such claim is hereby absolutely extinguished, discharged and in all respects ended;
>
> (b) abandons any claims against all and singular the Releasees which he may, but for this provision, at the date of executing this Deed have had on any account whatsoever;
>
> (c) will not bring or make any other claim or proceeding against all and singular the Releasees or any one or more of them that is in any way connected with or incidental to the matters the subject of this Deed or any earlier claims;
>
> (d) acknowledges that this Deed may be pleaded in bar against any claim or proceeding by him against all and singular the Releasees; and
>
> (e) releases and forever discharges all and singular the Sisters from all and any liability, claims, demands, suits and actions of any nature whatsoever and any loss, injury or damage that might be caused to the Covenantor therefrom, and the liability of the Releasees in respect of any such claim is hereby absolutely extinguished, discharged and in all respects ended.

321 Clause 1(b) defines "the Releasees" as "HPPL, the Hancock Group, HFMF, Georgina Hope Rinehart as former trustee of the Hope Margaret Hancock Trust, Georgina Hope Rinehart in right of herself, the Sisters, the Other Beneficiaries of the Hope Margaret Hancock Trust, the Trustee of the Hope Margaret Hancock Trust[,] Stephen John Scudamore, the HPPL Directors and Officers and the Executors of the Estate of Langley George Hancock deceased".

322 Clause 1(a) defines "the Hancock Group" as HPPL and all of its subsidiary, affiliated and associated companies, present, former and future directors, secretaries, officers, employees and consultants on whose behalf and on behalf of each of whom HPPL entered into the deed.

323 Clause 4 contains an undertaking by Mr Hancock to refrain from divulging to the media matters which touch upon the other parties to the deed and their "commercial and personal

affairs". It appears from the language of clause 4 that Mr Hancock continued to retain Butcher Paull & Calder at the time that the 2005 deed of obligation and release was executed.

324 Clause 5 specifies consideration payable by HPPL to Mr Hancock "in particular in consideration of the covenants of the Covenantor set out in clause 4", including a payment of money in lieu of further distributions from the HMH Trust prior to the date of vesting of the HMH Trust and other monetary payments.

325 Clause 6 provides for Mr Hancock to have use of two apartments on a rent-free basis for his personal residence, subject to conditions. Clause 7 provides for Mr Hancock to have access to an apartment on a cruise liner and a farm, on certain conditions.

326 Clause 11 contains an acknowledgement by Mr Hancock that he acted "wholly without duress in making this Deed" and that, before executing the deed, he had received independent advice "on all matters relating to or which are the subject of this Deed".

327 Clause 14 provides:

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

328 The "serious and substantial differences" that had arisen between Mr Hancock and the Hancock Group are not identified in the 2005 deed of obligation and release. Based on the recitals to the deed, it appears to have been made, at least in part, to address a perceived risk of commercial damage to the Hancock Group and the business of HPPL arising from public statements by Mr Hancock, including a risk of disclosure of confidential information. Under the deed, Mr Hancock received financial benefits on the condition that, if he did not comply with the deed, those benefits would be discontinued.

329 The 2005 deed of loan provided for HPPL to lend Mr Hancock $3 million, repayable one year after the date upon which Mr Hancock's interest in trust property (as defined) vested pursuant to the terms of the HMH Trust. On 1 April 2005, Mr Hancock was advanced the sum of $2.15 million under the deed of loan.

330 By memorandum dated 31 March 2005, Ms Rinehart and her two sisters received the following advice from Peter Neil concerning the latest drafts of the 2005 deeds:

> Dear Bianca, Hope and Ginia
>
> I have arranged for you to receive copies of the latest draft Confidential Deed of Obligation and Release and draft Deed of Loan. There have been amendments to the earlier draft Deeds to take into account various modifications requested by your brother John.
>
> Under the Clause 5(a) of the Deed of Obligation and Release your brother John is to receive the sum of $398,125 in lieu of any further distributions of moneys whatsoever from the Hope Margaret Hancock Trust prior to the date at vesting (which is the date Ginia turns 25 years of age). This represents a disproportionate share of the Trust of approximately 17% (not 25%) at a February estimation.
>
> Other provisions are to be made for the company to supplement this.
>
> Under the Deed of Loan your brother is to receive a loan of $3 million in two tranches from HPPL, but pays interest on such loan. The loan plus interest is repayable one year after Ginia turns 25 years of age. Security for the loan is 50% of your brother's interest in the Hope Margaret Hancock Trust.
>
> My advice is that the Deeds are in your best interests as the amount that John is to receive over the next seven years from the Hope Margaret Hancock Trust by way of a distribution is limited to the total amount of $398,125, and below the 25% he may otherwise claim.
>
> Please do not hesitate to contact me should you require any further explanations or advice.

331 On 12 April 2005, Mr Hancock filed a "Notice of Intention to be heard" in proceeding CIV 1327/2005.

Commercial relationships

332 The language of the 2005 deed of obligation and release makes it clear that the deed was intended to protect the commercial interests of HPPL and "the Hancock group". For HPPL's part, the deed sought to achieve, on its face:

(1) "immediate rectification" of inappropriate and/or erroneous disclosure to third parties; and

(2) no further distraction to the ongoing focus of HPPL and its directors (recital F).

333 The 2005 deed of obligation and release does not document any commercial transaction of the kind identified in the note to s 1 of the commercial arbitration legislation, or provide for any future commercial transaction. To the contrary, the deed provides for the resolution of disputes between the parties. The language of the deed does not suggest that the relevant disputes arose from any commercial transaction between the parties to the deed, and there is no evidence to that effect.

334 On the other hand, the deed identifies commercial reasons for the decision of HPPL to enter into the deed and it is expressly made to promote the commercial interests and protect the commercial sensitivities of the "Hancock Group".

Alleged misconduct in connection with the making of the 2005 deed of obligation and release (section 31 of statement of claim)

335 Paragraph 367 of the statement of claim alleges that Mr Hancock had a "reasonable expectation" arising out of Mrs Rinehart's duties as trustee of the HMH Trust and the HFMF Trust, and the parent-child relationship, that Mrs Rinehart would disclose to Mr Hancock any matters that were material to his decision whether to enter into the 2005 deed of obligation and release.

336 Paragraph 369 of the statement of claim alleges that Mrs Rinehart and HPPL "failed to disclose to and fraudulently concealed from JLH, prior to his execution of the 2005 Deeds including the 2005 arbitration clauses and the 2005 release, that he had valid claims against GHR and HPPL" for the reasons pleaded in sections 8 to 17 of the statement of claim.

Relief sought

337 By prayers 40 and 41 of the originating application, Mr Hancock seeks:

(1) An injunction pursuant to s 80 of the Trade Practices Act restraining Mrs Rinehart and HPPL from enforcing or seeking to enforce clauses 2, 3 and 14 of the 2005 deed of obligation and relief and clause 26 of the deed of loan.

(2) A declaration pursuant to s 87(2) of the Trade Practices Act that these clauses of the 2005 deeds are void *ab initio*.

Hope Downs Joint Venture

338 As noted above, the 2005 deed of obligation and release referred to the "Hope Downs Project" as a large commercial project under negotiation.

339 On 1 July 2005, HML and Rio Tinto Finance Limited ("Rio Tinto") entered into a deed entitled "Hancock Entity Security Deed", and HDIO and Rio Tinto entered into an agreement entitled "Hope Downs Project Charge". Ms Rinehart signed the deed on behalf of HML and the charge on behalf of HDIO.

340 A press release from HDIO dated 1 July 2005 attributes the following statement to Ms Rinehart:

> Bianca Rinehart, Director of Hancock Prospecting adds "I very much look forward to working together with Rio Tinto, who have shown they are committed to achieving a rapid development of this excellent project. I am also pleased to say that the Project will retain its name of Hope Downs, to honour my grandmother, and additional railway spurs and subsequent rail links will be named the Lang Hancock railway, in honour of my Grandfather. I wish they were both here today to celebrate this significant occasion. I am very proud to have been part of the HPPL team working with my mother on this project and look forward immensely to our continued work with Rio to bring our project to fruition.

341 Also on 1 July 2005, HDIO, HPPL, Rio Tinto and other entities entered into an agreement entitled "Co-operation Agreement Hope Downs Project". The latter agreement included a representation by HDIO and HPPL to the effect that HDIO had the sole legal and beneficial ownership of the "Hope Downs Project Assets".

342 According to the HPPL respondents, the deal comprised an agreement for Rio Tinto to purchase a 50% interest in HPPL's Hope Downs iron ore assets, and a 50:50 unincorporated joint venture to develop those assets. The development and ongoing day to day operation of the assets was to be managed by Rio Tinto subject to overview by a management committee comprising equal numbers of representatives of Rio Tinto and the Hancock group.

343 On 5 July 2005, an article appeared in the West Australian which referred to Mr Hancock "waiting for his mother to complete the deal to develop the Hope Downs Deposit" before pressing ahead with his "legal claim" against her. The article also referred to Mr Hancock having "expanded on a lengthy affidavit originally prepared late [2004]".

Mr Hancock's September 2005 affidavit

344 On 29 September 2005, Mr Hancock filed an application to be joined as a party to proceeding CIV 1327/2005. In support of that application, he swore his September 2005 affidavit. In the affidavit, Mr Hancock alleged that Mrs Rinehart had

> likely committed grave breaches of trust. These included:
>
> > (a) the removal of the Hopes Downs Mining Tenements (which have been publicly reported to have a value of around 1.6 billion dollars) from the control of the Trust;
> >
> > (b) the reduction of the Trust ownership or control of shareholding in [HPPL];
> >
> > (c) the simultaneous increase in my mother's shareholding in HPPL from 51% to about 76%; and
> >
> > (d) my mother refusing me any financial support whatsoever from the trust after early 2003 and inadequate support previously.

345 In late November 2005, Ms Rinehart made a record of a conversation with Mr Hancock including the following:

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

Consistent with Ms Rinehart's record, letters from HPPL to Mr Hancock dated 28 March 2006 and 6 April 2006 show that there was an ongoing dispute between Mr Hancock and Mrs Rinehart (and HPPL) involving allegations and counter-allegations of misconduct.

March 2006 Hope Downs Joint Venture Agreement (section 19 of the statement of claim)

346 On or about 16 March 2006, HDIO and companies associated with Rio Tinto entered into an agreement entitled "Hope Downs Joint Venture Agreement". Ms Rinehart executed the agreement on behalf of HDIO.

347 The agreements provided for the creation of an unincorporated joint venture in relation to the development of an iron ore mining project located at Hope Downs in the Pilbara, utilising the Hope Downs tenements. It was a term of the agreement that, if HDIO ceased to be an entity "wholly owned and controlled by":

(a) Hancock Family Group Members (defined in the HDJVA as meaning, relevantly, (i) GHR; (ii) "any and all direct line descendants from the blood" of GHR; (iii) GHR's adopted descendants; or (iv) the spouse of any such person listed in (i)–(iii) for so long as that person remains a spouse); and

(b) entities wholly owned and controlled by Hancock Family Group Members,

then Hamersley WA Pty Ltd had the right to exercise certain pre-emptive rights to purchase HDIO's interest in the Hope Downs joint venture.

348 Section 19 of the statement of claim does not allege that the entry into the Hope Downs Joint Venture Agreement involved any misconduct.

August 2006 Hope Downs deed

349 An email from Mrs Rinehart dated 11 August 2006 to Ms Rinehart, Ms Hope Welker and Ms Ginia Rinehart refers to the Hope Downs deed having been sent to each of them "earlier this week" for execution. The language of the email is informal. It is addressed "Dearest Biancs, Hopie and Gins" and concludes "Love Mother, Mem, Mummy". The following sentence of the email suggests that a purpose, or at least a hoped for outcome of the Hope Downs deed, was to modify the behaviour of Mr Hancock:

> Hopefully after you have all (or at least 2 of you) signed the Agreement sent you earlier this week and faxed your signature pages back, John's damaging tactics will disintegrate.

350 By email dated 14 August 2006, Mr Solomon told Ms Rinehart:

> As you know, several Group companies (including HPPL) are parties to the above deed.
>
> This is to confirm the advice already given you of July 31st from Michael Blakiston of Blakiston & Crabb and verbally and to your own knowledge, that it is of the utmost importance for HPPL Group to secure compliance with the access arrangements for Riotinto [sic] infrastructure and one of the primary purposes of the deed is to ratify the settlement deeds you have previously entered into and the RTIO transaction documents you have also signed are compli3ed [sic] with, to the benefit of the HPPL Group over a long period of time.
>
> Accordingly, directors of the concerned Group companies, including yourself in your capacity as a director, are asked to ensure that they expeditiously sign the deed in that capacity. You have been requested by fellow director tad [sic] Watroba to accordingly sign today, having had 5 days to review, and being aware of the importance of these matters for a much longer period.
>
> Please note that, in your capacity as a director, you may not permit any personal interests to affect your prompt discharge of your duties as a director.

351 There is another email dated 14 August 2006 in which Ms Rinehart asks Mr Watroba and Mr Solomon to "stop harassing me to sign the new JH/HMH Trust Deed". The statement of claim alleges that, in 2006, Mr Watroba was a trusted advisor to Mrs Rinehart and a director of HPPL, HFMF and HRL.

352 One of them apparently responded to that accusation as follows:

> You are not being harassed to belatedly sign this document, you are only being asked to carry out your duties as a director, and knowing as you are aware of time being important given the financing timetable. We have reminded you, you cannot put your personal interest ahead of your duties as a director, and advice has been given to you as a director. If you wanted additional advice as a director you should have so sought last week or over the weekend not sought to delay the documents execution.

353 Ms Rinehart's email continues:

> As stated to both Tad & Terry today, and as a pre-signing requirement (as stated in the Deed), I am to seek Independent legal advice, and again, as stated to both Tad and Terry I will receive such independent legal advice tomorrow.
>
> Upon my complete understanding of the document and satisfaction with its implications for me personally and as a HPPL/HFMF Director I will sign

354 Mr Solomon or Mr Watroba apparently responded within an hour, making comments on Ms Rinehart's email that included:

> Again, you should have sought last week or over the weekend, not sought to delay when knowing time is critical.

355 On 15 August 2006, Ms Rinehart wrote to Mr Watroba as follows:

> About to leave in a few mins for my mtng to obtain legal advice on the Deed.
>
> Attached privately to you is what i will present to GHR upon my return to office, after obtaining such advice
>
> i understand that 2 of the 4 siblings have now signed in a personal capacity, and that 2 of the 3 company directors have also signed, so as i understand it, the Deed is now in force, so it cannot be said that i have in any way delayed this important process.

356 Ms Rinehart's evidence is that she signed the Hope Downs deed unwillingly after forming that view that she "had no other real option". On 16 August 2006 at 5:28pm, Ms Rinehart sent a lengthy email to Mr Solomon complaining about Mrs Rinehart's refusal to include the "words of comfort" she had suggested, stating that she had been bullied by him, Mr Watroba and Mrs Rinehart and that she felt "isolated and threatened" in connection with the proposed deed.

357 The email states:

> As director of a number of relevant Hancock companies, full time Hancock staff member, beneficiary of HMH Trust, and eldest (and longest serving) daughter of GHR, I am both appalled and very very upset by this treatment, and not only want a reponse [sic] to the above (together with response to my letter to GHR cc'd you and Tad of yesterday), but am still looking for a remedy to this extremely stressful and uncomfortable situation I now find myself in, as a direct result of insessant [sic] threatening by yourself and others to sign this strange 'Deed'.

358 The email concludes:

> The honest truth is that right now I feel my own family is going against me.
>
> Please address my concerns, and if it has to be by way of "family agreement", which appears to (sadly) be the flavour of the moment, then please have one such agreement drawn up, that upon receiving advice, I am happy to sign.

359 Mr Solomon replied to Ms Rinehart's email by an email dated 16 August 2006 10:07 pm. He denied her allegation that he had bullied her and rebutted her other complaints. Mr Solomon sought to persuade Ms Rinehart of the benefits of the Hope Downs deed, saying, for example:

> The great benefits of the deed to the "non defaulters", vastly improves their position compared to the current position … The dividend … in clause 5 of the agreement, even if you Bianca are not satisfied with this, is still far better than the situation at present when HPPL is not obligated to pay any dividends whatsoever other than the small amount it pays now per the cumulative special shares.

360 Mr Solomon stated that Ms Rinehart "must immediately decide … to act for or against the interests of the company; immediacy is required because we have run out of time". Mr Solomon asserted that Ms Rinehart had been given legal advice to sign "in the interests of the companies" and was causing "a very significant problem" by not signing the deed.

361 By email dated 18 August 2006, Ms Rinehart wrote to Mr Solomon as follows:

> I don't want to be removed as Director. I am part of the threads tying together the hope downs deal.
>
> [Indecipherable] me a letter to satisfy clause 12 and I'll see you at HPPL shortly
>
> I also can't afford the legal advice so please have authority to give me a HMH trust cheque to cover it

362 The first sentence of the email responded to a statement, by either Mr Solomon or Mr Watroba, to Ms Rinehart to the effect that she would be removed as a director of HPPL if she did not signed the Hope Downs deed.

363 By letter dated 18 August 2006 addressed to Mrs Rinehart, Anthony Muscat solicitor certified that Ms Rinehart had advised him, in a telephone conference that day, that she had read the Hope Downs deed and executed it "without duress or undue influence". The letter concludes:

> Ms Bianca Hope Rinehart also confirmed in the telephone conference dated 18th August 2006 that she specifically did not wish me to enquire into the legal or commercial aspects of the deed but merely to provide evidence that there was no coercion by any individual or circumstance involved in her agreement to sign the deed.

364 The signatories to the Hope Downs deed include HPPL, HML, HFMF, Mrs Rinehart in her own right and as trustee of the HMH Trust, Ms Rinehart in her own right and a director of HPPL, HRL and HMHTI.

365 Mr Hancock did not sign the Hope Downs deed. His evidence is that he refused to sign it "because it did not guarantee me any continuing role in HPPL going forwards … Nor did it

offer me any security going forward as dividends from the Hope Downs Project would not start until the end of 2011". However, as appears below, Mr Hancock became bound by the Hope Downs deed upon his execution of the 2007 HD deed.

Terms of the Hope Downs deed

366 The recitals to the Hope Downs deed are:

> (A) GHR is the daughter of the late Langley George Hancock who was the founder of HPPL and the Hancock Group and who established the HMH Trust and who died on 27 March 1992.
>
> (B) JLH and BHR, HGRW, GHFR are the natural children of GHR and with GHR they constitute the total present class of capital and income beneficiaries of the HMH Trust.
>
> (C) GHR, the Trustee, JLH, BHR, HGRW, GHFR, HMHTI and 150 together constitute one hundred per cent (100%) of the legal and beneficial owners of all of the issued share capital of HPPL.
>
> (D) Those of the parties hereto who are parties to the Porteous Settlement Deed and who are parties to the Deed of Obligation and Release desire by their execution hereof to reaffirm and ratify the same.

367 Clause 3 provides:

> 3. **AFFIRMATIONS AND ACKNOWLEDGMENT**
>
> 3(i) All parties to this deed which or who were parties to the Porteous Settlement Deed reaffirm the Porteous Settlement Deed and all their obligations and releases thereunder.
>
> 3(ii) All parties to this deed which or who were parties to the Deed of Obligation and Release reaffirm and ratify the Deed of Obligation and Release and all their obligations and releases thereunder.
>
> 3(iii) The parties acknowledge that the obligations of the Hancock Group, due to HDIO's ownership and interest in the Hope Downs Tenements and pursuant to the HDJVA and HDIO's obligations under financing arrangements for its interest in the HDJV may include the following:
>
> (a) as a result of the HDJV transaction a Capital gains tax of $36,856,597.00;
>
> (c) no repayment of or contribution by the HMH Trust for all expenditure by HDIO to date on the Hope Downs Tenements, overheads and HDJV costs, and including without limitation the financing costs for HDIO's interest in the HDJV; and
>
> (d) HDIO, and where relevant HPPL, will continue to finalise and maintain to the best of its endeavours, the required financing for HDIO's interest in the Hope Downs Joint Venture;

368 Clause 4 provides:

> 4. **HPPL/HDIO OWNERSHIP OF HOPE DOWNS**
>
> The parties acknowledge 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 including, without limitation, the Hope Downs Tenements which Tenements have been at all times beneficially owned by only HPPL and or HDIO and which are now fifty per cent (50%) beneficially and legally owned by HDIO.

369 The "Hancock Group Interests" are defined in clause 1.1 to mean:

> (a) the Hancock Group's interests in the Hope Downs tenements and the Hope Downs Joint Venture;
>
> (b) all other mining tenements, licences, permits and interests therein currently held by any member of the Hancock Group including without limitation any joint venture interests in any state or territory of Australia;
>
> (c) any partnership or royalty interests, choses in action, real property and any other property or asset of any nature or description held or owned by the Hancock Group.

370 The "Hancock Group" is defined to mean HPPL and any "Related Body Corporate" of HPPL. "Related Body Corporate" is stated to have the meaning given in s 50 of the *Corporations Act 2001* (Cth).

371 Section 50 provides that, where a body corporate is a holding company of another body corporate or a subsidiary of another body corporate or a subsidiary of a holding company of another body corporate, the first mentioned body and the other body are related to each other.

372 Clause 5 provides:

> 5. **DISTRIBUTION COVENANT**
>
> In consideration of the matters recited in and the subject of this deed (including without limitation the undertakings and releases given herein) HPPL and the Trustee covenant and agree with each other and the other parties hereto that they will implement the following according to these terms:
>
> (a) to the extent that it is lawfully permitted and subject to sub-clause (f), HPPL shall pay dividends to holders of A Class shares in HPPL, based upon a proportion of the Hope Downs Net Cash Flow After Tax commencing 6 September 2011, with the first such payment being made in respect of the quarter ending on 31 December 2011 and subsequent payments being made in respect of each quarter

ending on 31 March, 30 June, 30 September and 31 December, each payment being made as soon as practicable after the end of the respective quarter and calculated as follows:

(i) twenty-five per cent (25%) of the Hope Downs Net Cash Flow After Tax;

(ii) a further twenty-five per cent (25%) of the Hope Downs Net Cash Flow After Tax, less any amounts required to be retained for HPPL's and the Hancock Group's equity requirements in relation to additional developments of or associated with the Hope Downs Joint Venture and/or the development of the Hope Downs Tenements as determined by the Directors of HPPL and/or HDIO in accordance with the requirements of the HDJV, and subject to the further requirements of this Clause 5;

(b) subject to sub-clause (c) the Trustee shall pay any dividend received from HPPL in accordance with sub-clause (a) above to the Beneficiaries in equal shares of one-quarter each on the relevant dates as noted in sub-clause (a) above;

(c) if any one or more of the Beneficiaries commit a breach of this deed at any time then:

(i) HPPL's obligation to pay further dividends on the A Class shares pursuant to sub-clause (a) shall immediately cease from and after a date fourteen days after the service by HPPL on all other executing parties to this deed of a notice in writing advising of the breach which has been committed and advising the notice recipients that HPPL's said obligation will cease on the said date fourteen days after service of the notice if the said breach has not by then been rectified; the parties each undertake to advise HPPL in writing if and when they or any of them first become aware that any party has or may have committed a breach of this deed;

(ii) subject to clause 5(c)(iii) HPPL shall pay any further dividends to holders of the B Class shares in HPPL on the same terms as to time and amount as set out in sub-clause (a);

(iii) upon the cessation of the default and the carrying out or payment by the defaulting party of any remedy or damages to be performed or paid pursuant to any judgment consequent upon the default or upon any settlement of the same, HPPL shall reinstate the arrangements referred to in clause 5(a) and any further declaration of dividend pursuant to clause 5(c)(ii) shall thereupon cease;

(d) any default by a Beneficiary under the Deed of Obligation and Release dated 1 April 2005 (or as such is amended in writing by mutual agreement of all parties thereto) shall be deemed to be a default by that Beneficiary under this deed for the purpose of this clause;

(e) within one hundred and twenty (120) days of the end of any financial year of HPPL in respect of which payments are made under sub-clause 5(a) any amount calculated under this Clause 5 shall be verified by an independent auditor appointed by HPPL, at the request of any Beneficiary. A copy of the audit certificate will be provided to each Beneficiary. Any adjustments to the amounts paid required as a consequence of the audit shall be made as soon as practicable after the date of the audit certificate. The cost of such audit will be borne by all Beneficiaries receiving any payment under Clause 5 for the relevant year, in equal proportions; and

(f) payments under this Clause 5 shall immediately cease upon the declaration of an Event of Force Majeure under the HDJV and shall resume upon such an event abating and being rectified.

373 Clause 6 provides:

6 **RELEASES**

Each party hereto both in its own right and in any representative capacity hereby:

(a) releases and discharges each of the other parties hereto now and in the future from any Claims,

(b) Irrevocably covenants not to take any proceedings against any of the other parties to this deed in relation to any matter arising in any jurisdiction, in respect of the Claims;

(c) Withdraws and forever abandons any and all allegations made against any of the other parties to this deed in respect of or arising (in whole or in part) directly or indirectly out of:

(i) the Proceedings and any of the other Claims;

(ii) the subject matter of the Proceedings;

(iii) any claim relating to an undertaking given or costs orders made in the Proceedings,

wherever and whenever arising, whether;

(iv) known or unknown at the time of execution of this deed;

(v) presently in contemplation of such parties; or

(vi) arising under common law, equity, statute or otherwise.

374 A "Claim" is defined in clause 1.1 to mean:

(a) any claim, demand, action, suit or proceeding whether existing or discontinued, whether at law, under statute, in equity or otherwise:

(i) for damages, injunctions, debt, restitution or other remedy including, without limitation, breach of fiduciary duty of whatever nature and howsoever arising with respect to events or matters arising or actions taken prior to the date of this deed but not including any claim, demand, action, suit or proceedings arising as a consequence of the obligations and releases which any of the parties

to this deed have agreed to in the Deed of Obligation and Release or the Deed of Loan or the Porteous Settlement Deed;

(ii) with respect to any attempt to remove or vary the Trustee or any subsequent Hancock Family Group Member as trustee of the HMH Trust and replace the trustee with a person or entity who or which is not a Hancock Family Group Member; and

(iii) any damage, loss, liability, costs, charge, expense, outgoing or payment;

(iv) any action against any of the Directors of any company within the Hancock Group, including without limitation, the Other Directors; and

(b) without limitation of clause (a) includes any claim made in the Proceedings;

(c) any damage, loss, liability, costs, charge, expense, outgoing or payment; and

(d) without limitation of sub-clause (a) includes any claim made in the Proceedings; and

(d)[sic] without limitation of sub-clauses (a) and (b) includes any claim made in any proceeding or any discontinued proceeding and any documents to support such claim and without limitation and for clarity in the case of the Proceedings includes the unsigned draft affidavit of JLH.

375 "Proceedings" is defined in clause 1.1 to refer to proceeding CIV 1327/2005.

376 The "unsigned draft affidavit of JLH" is annexure C to Mr Hancock's September 2005 affidavit. That is, it is a later version of Mr Hancock's unsworn affidavit.

377 Clauses 7(a) to (e) of the Hope Downs deed provide:

7. **UNDERTAKINGS**

Each of the parties to this deed undertakes with each of the other parties to this deed

(a) that they will not at any time do, nor attempt to do nor encourage, nor assist in any way any other party or third party to do anything which could have an adverse impact on the Hancock Group's rights under:

the Services and Commingling Agreement entered into or which may subsequently be entered into between Hamersley Iron Pty Ltd and members of the Hancock Group;

or any of the documents entered into by the Rio Tinto Group and the Hancock Group in respect of the Hope Downs Joint Venture;

or under any of the financing arrangements entered into by members of the Hancock Group in respect of the Hope Downs Joint Venture;

(b) not to challenge the right of any member of the Hancock Group to any of the Hancock Group Interests at any time.

(c) not to take any steps at any time which would result in HPPL ceasing to be wholly owned and controlled by Hancock Family Group Members, including without limitation any change to the Trustee in contravention of the provisions of this Deed; and

(d) not to Disparage at any time.

(e) subject to the rights of HPPL under the Deed of Loan not to challenge the rights of any of GHR, JLH, BHR, HGRW or GHFR who execute this Deed to any of their right title or interest in any of the Hancock Group or in any trust in which they or any member of the Hancock Group is a beneficiary.

378 Clauses 8, 9.1 and 9.2 provide, respectively:

8. **GHR CONTROL OF HPPL**

The parties hereto acknowledge that GHR by her direct ownership of the share capital of and voting power in HPPL, has control of HPPL and without limiting in any way the legal and other rights of GHR in that regard whether at law or in equity or pursuant to the Constitution of HPPL, the parties hereto acknowledge that during her lifetime GHR shall maintain full ongoing control and management of HPPL and that GHR shall accordingly have the continuing right during her lifetime at her election from time to time to maintain or relinquish or re-establish herself as the chairman on an executive or non executive basis as she in her sole discretion shall decide of HPPL.

9 **VESTING OF HMH TRUST**

9.1 Subject to GHR's agreement at any time prior to 6 September 2011, the Beneficiaries agree to extend the vesting date of the HMH Trust to the maximum extent permitted by law or to any prior date after 6 September 2011 by agreement of the majority of Beneficiaries.

9.2 Each of the Beneficiaries shall do all matters and things necessary to implement and facilitate any decision at any time by the Trustee to appoint any one or more of JLH, BHR, HGRW and GHFR as trustee of the HMH Trust and such appointment may be as an additional trustee together with the Trustee or to replace the Trustee permanently or temporarily or to succeed the Trustee when at some future time she may retire or otherwise cease to be trustee during her lifetime (which shall be deemed to be conditional upon the continuing right of GHR to decide to reassume the position of trustee by herself or with one or more of her children if and when she should subsequently so decide).

379 Clause 11 states:

11. **PLEA IN BAR**

On and from the Effective Date each party may plead this deed in bar to any Claim or proceeding the subject of a release in this deed PROVIDED HOWEVER that nothing in this clause shall prevent any party from enforcing the provisions of this deed, the Porteous Settlement Deed, the Deed of Obligation and Release or Deed of Loan.

380 Clause 12 contains various acknowledgements to the effect that the parties entered into the deed freely, without duress or influence and agreeing to bound irrespective of "the

mother/child/beneficiary aspects of the HMH Trust relationships between GHR, the Trustee and the Beneficiaries".

381 Clause 13 provides:

> 13. **PARTIES NOT TO ASSIST PROSECUTION OF CLAIMS**
>
> Each party severally covenants with each of the other parties to this deed that he, she or it will not advance, cause, procure, finance, support, encourage or otherwise assist or facilitate in any way (except on compulsion of law including, but not limited to service of a subpoena) directly or indirectly the advancement, institutional prosecution of any Claim the subject of a release in this deed.

382 Clause 20 provides, relevantly:

> 20. **CONFIDENTIAL MEDIATION/ARBITRATION**
>
> In the event that there is any dispute under this deed then any party to his [sic] deed who has a dispute with any other party to this deed shall forthwith notify the other party or parties with whom there is the dispute and all other parties to this deed ("Notification") and the parties to this deed shall attempt to resolve such difference in the following manner.
>
> 20.1 **Confidential Mediation**
>
> …
>
> 20.2 **Confidential Arbitration**
>
> (a) Where the disputing parties are unable to agree to an appointment of a mediator for the purposes of this clause T within fourteen (14) days of the date of the Notification or in the event any mediation is abandoned then the dispute shall on that date be automatically referred to arbitration for resolution ("Referral Date") and the following provisions of this clause shall apply;
>
> (i) in the event that no agreement on the arbitrator can be reached within three (3) Weeks of the Referral Date, the arbitrator will be Mr Tony Fitzgerald QC (provided he is willing to perform this function and has not reached 74 years of age at that time), or in the event Mr Tony Fitzgerald QC is unwilling or unable to act, the Honourable Justice John Middleton (provided he is no longer a Judge of the Federal or other Australian Court and provided he has not reached 74 years of age at that time), and irrespective of whether either of these persons have carried out the mediation referred to above, or in the event that neither is willing or able to act,
>
> (ii) subject to paragraph (iv) below by confidential arbitration with one (1) party to the dispute nominating one (1) arbitrator, and the other party to the dispute nominating another arbitrator and the two (2) arbitrators selecting a third arbitrator within a further three (3) weeks, who shall together resolve the matter pursuant to the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties;

(iii) if the arbitrators nominated pursuant to paragraph 2(a)(ii) are unable to agree in the selection of a third arbitrator within the time provided in paragraph 2(a)(iii), the third arbitrator will be designated by the President of the Law Society of Western Australia and shall be a legal practitioner qualified to practise in the State of Western Australia of not less than twenty (20) years standing.

(iv) in the event that a disputing party does not nominate an arbitrator pursuant to Clause 2(a)(ii) within twenty-one (21) days from being required to do so it will be deemed to have agreed to the appointment of the arbitrator appointed by the other disputing party.

(b) The dispute shall be resolved by confidential arbitration by the arbitrator agreed to by each of the disputing parties or appointed pursuant to paragraph (2)(a)(i) above (or if more than one is appointed pursuant to paragraph 2(a)(ii) then as decided by not less than a majority of them) who shall resolve the matter pursuant to the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties.

…

20.8 **Confidentiality of Proceedings**

The dispute the subject of the mediation/arbitration, the mediation and arbitration hearing and submissions thereto and the decision of the mediation and/or arbitration shall be kept confidential.

…

383 Clause 21 provides that the deed "shall be governed by and be subject to and interpreted according to the laws of the State of Western Australia".

384 Clause 22 provides that "Other than as specifically provided in this deed it sets out the only conduct relied on by the parties in connection with its subject matter".

385 Clause 23 states:

23. **FURTHER ASSURANCES**

Each party shall sign, execute and deliver all deeds, documents, instruments and assurances and shall do all acts, matters and things as shall be necessary for the complete performance of all its duties, responsibilities and obligations under this deed and the transactions contemplated by it.

Hancock Group Interests

386 I did not understand there to be any dispute that the Hope Downs tenements referred to in the statement of claim are "Hancock Group Interests" for the purposes of the Hope Downs deed.

387 The HPPL respondents gave unchallenged evidence that, at the time of entry into the Hope Downs deed, HPPL was the owner of exploration licences E46/334 and E46/335 which, together with E46/336 (surrendered by HPPL on 20 April 1994) covered the same area as the applications for exploration licences made by HRL over the area covered by the Roy Hill tenements. Exploration licences E46/334 and E46/335 were therefore "Hancock Group Interests" for the purposes of the Hope Downs deed.

388 As noted at [225] above, the statement of claim alleges that the Nicholas Downs tenements were owned, from 26 November 1992 by Gayna Park, a wholly owned subsidiary of HRL. The HPPL respondents acknowledged that, at the time of entry into the Hope Downs deed, Gaynor Park was the owner of mining leases M46/80 and M46/81, being the Nicholas Downs tenements as defined in para 114.3 of the statement of claim.

389 I accept that Gayna Park was a member of the "Hancock Group" and the Nicholas Downs tenements are therefore "Hancock Group Interests" for the purposes of the Hope Downs deed.

390 The Mulga Downs tenement is defined in para 114.4 of the statement of claim as mining tenement numbered M47/206. At the time of entry into the Hope Downs deed, WRL was the owner of mining lease M47/206.

391 WRL was a member of the "Hancock Group" and mining lease M47/206 was therefore a "Hancock Group Interest" for the purposes of the Hope Downs deed.

Commercial relationships

392 Apart from the Hope Downs deed itself, there is no evidence that Ms Rinehart had developed a commercial relationship with Mrs Rinehart or any of the respondents by August 2006 beyond the relationships arising from the HMH Trust and co-ownership of HPPL.

393 Mr Solomon's email, set out at [351] above, asserts, in effect, that the Hope Downs deed was intended to protect the commercial interests of HPPL and "the HPPL Group".

394 The Hope Downs deed does not document any commercial transaction of the kind identified in the note to s 1 of the commercial arbitration legislation, or provide for any future commercial transaction. The acknowledgements in clause 12 are only appropriate because of the non-arms' length relationship between the parties, which does not preclude, but tells against the creation of a commercial relationship by the entry into the Hope Downs deed.

Alleged misconduct in procuring the Hope Downs deed (sections 20, 22 to 30 and 37 of statement of claim)

395 Section 20 of the statement of claim is entitled "BHR and JLH's claims to set aside the Hope Downs Deed". Paragraph 278 of the statement of claim alleges that there were "no negotiations or no genuine negotiations between BHR and any other party to the Hope Downs Deed prior to BHR's entry into the Deed".

396 Section 22 of the statement of claim is entitled "The underlying purposes of the Hope Downs deed for GHR and HPPL". Paragraph 288 alleges that Mrs Rinehart and HPPL's purposes in seeking the applicants' execution of the Hope Downs deed were:

> 288.1 to confer upon GHR the right to maintain full ongoing control and management of HPPL during her lifetime, including the right at her election from time to time to maintain or relinquish or re-establish herself as the chairman of HPPL on an executive or non-executive basis as she in her sole discretion shall decide;
>
> 288.2 to prevent the beneficiaries of the HMH Trust and the HFMF Trust from advancing claims against GHR and HPPL concerning the ownership of the Hope Downs Tenements and Roy Hill Tenements, GHR's shareholding in HPPL and the conduct of GHR, the other relevant directors and officers of HPPL and HPPL in relation to the HFMF Trust or the HMH Trust (the past misconduct);
>
> 288.3 to protect GHR, the other relevant directors and officers of HPPL and HPPL from claims by the beneficiaries in respect of the past misconduct;
>
> 288.4 to effect a unilateral settlement of the claims the beneficiaries had or may have had in respect of the past misconduct on terms which were attractive to GHR and HPPL and without disclosing to the beneficiaries of the HFMF Trust and HMH Trust that they had claims with respect to the past misconduct;
>
> 288.5 to preclude, through the HDD arbitration clause, JLH, BHR, HRW, GHFR from conducting any public litigation against GHR or HPPL in which the past misconduct may become publicly known and thereby to:
>
> (a) prevent there being any public scrutiny of the conduct of GHR as trustee of the HMH Trust and trustee of the HFMF Trust;
>
> (b) prevent any public disclosure of the facts pleaded in Sections 8 - 16 [of the statement of claim] and thereby protect the reputation of GHR, HPPL and the officers involved in the misconduct pleaded in those sections;
>
> (c) to dissuade BHR and JLH from bringing any action against GHR, HPPL or its officers;
>
> (d) confer on GHR and HPPL the ability to choose the arbitrator, by permitting GHR and HPPL to initiate an action against BHR and JLH, select an arbitrator of their choice and take advantage of the fact that at least BHR and JLH would not have the means to meet the

cost of three arbitrators and would therefore be forced into an arbitration with a sole arbitrator of GHR's or HPPL's choice;

288.6 to confer on GHR as the sole holder of B class shares in HPPL an entitlement to receive all of the funds payable pursuant to the Distribution Covenant in the event clause 5(c) was triggered in the event of a breach of the Hope Downs Deed by any one of JLH, BHR, GHFR or HRW, without any obligation on GHR to repay such funds upon the rectification of such breach;

288.7 to confer the right, pursuant to clause 5(c)(i) of the Hope Downs Deed, upon HPPL and GHR through her control of HPPL, to determine whether a breach of the Hope Downs Deed had occurred, thereby entitling GHR to receive the funds otherwise payable to JLH, BHR, HRW and GHFR pursuant to the Distribution Covenant.

397 Paragraph 289 alleges that the terms of the Hope Downs deed were to the material disadvantage of the applicants and the material advantage of Mrs Rinehart for 10 specified reasons.

398 Paragraph 290 pleads:

290 Inclusion of the HDD arbitration clause in the Hope Downs Deed was to the material disadvantage of BHR and JLH because:

290.1 it imposed a financial burden on BHR and JLH of the cost of commencing and prosecuting an arbitration, by reason of the obligation to pay the fees of any arbitral tribunal in circumstances where such fees could operate as a substantial disincentive for BHR and JLH to commence an arbitration against GHR or HPPL and in circumstances where GHR through HPPL could control and withhold the amount of funds available to BHR and JLH to fund an arbitration;

290.2 it purported to deny BHR and JLH their right and entitlement to seek a determination by an independent judicial officer and the benefits of public scrutiny of claims they may have in relation to the misconduct of GHR as trustee of the HFMF Trust and trustee of the HMH Trust and HPPL's involvement in GHR's breaches of duty .

Alleged misrepresentations (sections 23 and 27 of statement of claim)

399 Section 23 of the statement of claim is entitled "BHR's claims for relief in relation to the Hope Downs deed and the 2007 HD deed".

400 Paragraph 292 of the statement of claim alleges that, prior to executing the Hope Downs deed, Mrs Rinehart and HPPL made the following false and misleading representations to her in trade or commerce:

292.1 Entry into the Hope Downs Deed would confer 'great benefits' on BHR and 'vastly improve the position' of BHR compared to her current position (the Great Benefits Misrepresentation);

292.2 Entry into the Hope Downs Deed would entitle BHR to a special dividend from HPPL when HPPL was not obligated to pay any dividends other than the small amount of dividends HPPL paid on cumulative special shares (the Substantial Dividends Misrepresentation);

292.3 Entry into the Hope Downs Deed was necessary in order to protect the interests of HPPL (the Necessity Misrepresentation);

292.4 BHR's fiduciary obligations as a director of one or more of HPPL, Hancock Minerals, HFMF, HRL, HMHT Investments and or 150 Investments required her to execute the Hope Downs Deed without delay (the Fiduciary Obligation Misrepresentation);

292.5 BHR's failure to execute the Hope Downs Deed was causing a very significant problem for HPPL and was not putting the interests of HPPL at risk (the Risk to the Company Misrepresentation);

292.6 Execution of the Hope Downs Deed was required urgently (the Urgency Misrepresentation); and

292.7 Entry into the Hope Downs Deed was in BHR's best interests (the BHR Best Interests Misrepresentation).

Particulars

(i) Each of the Misrepresentations was contained expressly and or impliedly in an email sent by Solomon, General Counsel for HPPL, on 16 August 2006 at 10.07 pm.

(ii) Substantially the same Misrepresentations were made in person by GHR and Solomon to BHR between 7-18 August 2006 and in voicemail-messages left for BHR during that time.

(iii) Further particulars of the Misrepresentations will be provided following discovery and with the Applicants' lay evidence.

401 The email referred to in particular (i) is the email referred to at [350] above.

402 At paras 304 and 306 of the statement of claim, it is alleged that Ms Rinehart relied upon the misrepresentations in deciding to execute the Hope Downs deed and, subsequently, the 2007 HD deed.

Relief sought

403 By section 27 of the statement of claim, on the basis of the alleged misrepresentations, which are alleged to have been fraudulent, or alternatively, innocent or negligent, Ms Rinehart claims an entitlement to rescind the Hope Downs deed (and the 2007 HD deed) and seeks a declaration that each deed and the arbitration clauses contained in them are void as against Ms Rinehart.

Fraudulent concealment (section 24 of statement of claim)

404 Paragraph 307 alleges that prior to Ms Rinehart's execution of the Hope Downs deed and the 2007 HD deed, Mrs Rinehart and HPPL:

> 307.1 deliberately withheld from BHR a copy of the Intercreditor Deed dated 16 March 2006 referred to on page 4 of the Hope Downs Deed, which was critical to an understanding of BHR's future entitlements under the Distribution Covenant;
>
> 307.2 deliberately sought to mislead BHR and JLH into believing that GHR and HPPL had discovered the Roy Hill Tenements, when that was not the case, for the reasons pleaded in Section 8 above;
>
> 307.3 deliberately failed to disclose to and fraudulently concealed from BHR the facts that:
>
> (a) BHR had a claim against GHR and HPPL in relation to breaches of duty pleaded against GHR and HPPL's knowing involvement in those breaches pleaded in Sections 8 – 17 above;
>
> (b) The Distribution covenant did not give BHR any automatic entitlement to the distribution of dividend to the holders of A Class shares in HPPL and GHR controlled whether any dividends should be paid at all and if so in what amount.

Inter-creditor deed

405 In an affidavit sworn in April 2015, Ms Rinehart said that she did not have access to the Inter-Creditor deed when she signed the Hope Downs deed, and she did not understand its significance at the time that she signed the Hope Downs deed.

406 However, in cross-examination Ms Rinehart conceded that she had received numerous copies of drafts of the Inter-Creditor deed, that she had a basic understanding of its terms, and that she had signed the Inter-Creditor deed. Ultimately, Ms Rinehart agreed that para 307.1 of the statement of claim could be withdrawn.

Misleading and deceptive conduct (section 25 of statement of claim)

407 Section 25 of the statement of claim seeks to invoke the Trade Practices Act in relation to the alleged misrepresentations.

408 It also alleges that Mrs Rinehart and HPPL engaged in misleading and deceptive conduct by reason of the following matters, in summary:

(1) The benefits that Mrs Rinehart and HPPL stood to obtain from Ms Rinehart's execution of the Hope Downs deed and the 2007 HD deed.

(2) Mrs Rinehart's duties as trustee of the HMH Trust and the HFMF Trust.

(3) The close personal relationship between Mrs Rinehart and Ms Rinehart prior to the execution of the deeds and Mrs Rinehart's awareness that Ms Rinehart trusted her mother to act in her best interests, leading to a "reasonable expectation" on Ms Rinehart's part that Mrs Rinehart would disclose to her any matters that were material to Ms Rinehart's decision whether to execute the deeds.

(4) Mrs Rinehart and HPPL's failure to disclose and fraudulent concealment from Ms Rinehart:

(a) that entry into the Hope Downs deed was not in her best interests and was to her material disadvantage;

(b) the matters pleaded in sections 8 to 17 of the statement of claim;

(c) the fact that Ms Rinehart, as a beneficiary of the HFMF Trust had or may have a claim against Mrs Rinehart in relation to the latter's conduct as trustee of that trust.

Relief sought

409 On the basis of the alleged misleading and deceptive conduct, Ms Rinehart seeks:

(1) A declaration pursuant to s 87(2) of the Trade Practices Act that the Hope Downs deed, the 2007 HD deed and the arbitration clauses contained in each of those deeds are void *ab initio*.

(2) An injunction pursuant to s 80 of the Trade Practices Act restraining Mrs Rinehart and HPPL from enforcing or seeking to enforce the releases and arbitration clauses in each of the Hope Downs deed and the 2007 HD deed.

Unconscionable conduct (section 26 of statement of claim)

410 Paragraph 329 of the statement of claim alleges misconduct by Mrs Rinehart and HPPL in connection with Ms Rinehart's execution of the Hope Downs deed including:

(1) Procuring that BHR speak by telephone with Mr Muscat, for the purposes of providing the appearance of compliance with clause 12.4 of the Hope Downs deed;

(2) Failing to inform Ms Rinehart of a personal relationship between Mr Muscat and a close friend of Mrs Rinehart;

(3) Knowledge that Mr Muscat did not provide Ms Rinehart with any legal advice in relation to the Hope Downs deed;

(4) Knowledge that Ms Rinehart felt isolated and threatened by GHR and HPPL and did not want to be rushed into signing the Hope Downs deed without understanding it, even though she had been urged to do so;

(5) Failing to provide Ms Rinehart with a copy of the Hope Downs deed and other relevant documents in sufficient time for her to obtain independent legal advice;

(6) Placing "extreme pressure" on Ms Rinehart to urgently execute the Hope Downs deed for the purpose of denying her a sufficient opportunity to obtain her own independent legal advice in relation to entry into the Hope Downs deed.

411 Paragraphs 330 and 331 of the statement of claim allege that, to the knowledge of Mrs Rinehart and HPPL, Ms Rinehart was "vulnerable and at a special disadvantage in her dealings with HPPL and GHR in relation to the Hope Downs deed" because of:

(1) the misconduct pleaded in para 329;

(2) Ms Rinehart's financial dependence on Mrs Rinehart and HPPL;

(3) The absence of an opportunity for Ms Rinehart to consider the Hope Downs deed properly and whether it was in her best interests to execute it, and to obtain detailed legal advice;

(4) the extreme pressure placed upon her to execute the Hope Downs deed; and

(5) Ms Rinehart's concern not to jeopardise the interests of HPPL because shares in HPPL were the principal asset of the HMH Trust.

412 Paragraphs 332 and 336 allege that Mrs Rinehart and HPPL sought unconscientiously to take advantage of the matters pleaded in paras 329 and 330 in order to secure Ms Rinehart's execution of the Hope Downs deed for their own material advantage, and thereby engaged in unconscionable conduct.

Relief sought

413 The same relief is sought on the basis of the alleged unconscionable conduct, as for the alleged misleading and deceptive conduct.

Undue influence and duress (sections 28 and 29 of statement of claim)

414 Ms Rinehart alleges that she executed the Hope Downs deed as a result of undue influence and illegitimate pressure exerted upon her by each of Mrs Rinehart and HPPL.

415 Consequently, she claims an entitlement to rescind the Hope Downs deed and the 2007 HD deed and seeks a declaration that each deed and the arbitration clauses contained in them are void as against Ms Rinehart.

Breach of trust and fraud on trustee's power (section 30 of statement of claim)

416 At para 252 of the statement of claim, it is alleged that the conduct pleaded in sections 25 to 29 of the statement of claim was in breach of Mrs Rinehart's duties as trustee of the HMH Trust. At para 356, it is alleged that Mrs Rinehart executed the Hope Downs deed in her personal interest and in conflict with her duties as trustees of the HMH Trust and the HFMF Trust and as a director of HPPL.

417 For these reasons, Ms Rinehart seeks a declaration that Mrs Rinehart's execution of each of the Hope Downs deed and the 2007 HD deed was a fraud on her powers as trustee of the HMH Trust.

Events leading to the 2007 HD deed and the 2007 CS deed

418 According to Mr Hancock, after the Hope Downs deed was executed, he received repeated requests from Mrs Rinehart to sign the deed, who said that it was in his best interests to do so. He claims that he was told:

> If you sign the Hope Downs Deed you will share in the 50% of the Hope Downs profits as dividends. It will be a very substantial amount of money. It will be hundreds of millions.

419 Paragraph 381 of the statement of claim alleges that Mrs Rinehart and HPPL denied the allegations of misconduct in Mr Hancock's September 2005 affidavit by correspondence dated 28 March, 6 April and 24 October 2006.

420 An email from Mrs Rinehart to Ms Rinehart, Ms Hope Welker and Ms Ginia Rinehart dated 12 December 2006 states:

> Please read the attached.
>
> There is a chance John may be getting ready to execute. Just in case, please execute and where relevant, get witnessed, and return without Sue having to remind you.

421 Around that time, Ms Rinehart executed a deed which purported to ratify and confirm the Hope Downs deed.

422 Mr Hancock also states that, around this time, he was told by Mrs Rinehart that the repayments on the $3 million loan he had received pursuant to the 2005 deed of loan would

need to be accelerated to avoid the loan being taxable as a deemed dividend. The issue was raised in an email to Mr Hancock dated 24 January 2007. According to Mr Hancock, he would have been unable to meet the resulting tax liability.

2007 HD deed

423 The 2007 HD deed is dated 13 April 2007. The signatories to the 2007 HD deed include the first to tenth respondents and Ms Rinehart. Mr Hancock was also a signatory to the 2007 HD deed.

424 From recital B to the 2007 HD deed, it appears that the purpose of the deed was to facilitate Mr Hancock becoming a party to the Hope Downs deed.

425 Clause 1 provides:

> The parties to the Hope Downs Deed hereby covenant and agree with JLH that (notwithstanding the time limits set out in clause 15.1 of the Hope Downs Deed) by virtue of his execution of this deed, JLH shall and does (subject only to clause 2 hereof) hereby become a party to the Hope Downs Deed with full force and effect and in all respects as if he had executed the Hope Downs Deed on or before 30 August 2006.

426 Clause 2 provides:

> JLH Covenants and Agrees with all and singular the parties hereof and each of them and with the parties to the Hope Downs Deed and each of them that he will observe perform and fulfil all and singular the terms covenants, conditions and provisos of the Hope Downs Deed and his obligations and undertakings thereunder AND without limitation and for the avoidance of doubt the parties acknowledge that the requirements of clause 12 of the Hope Downs Deed which require provision of a letter from a lawyer shall not be required to be complied with by JLH.

427 Annexure A to the Deed is a deed dated 12 December 2006 executed by Ms Rinehart and the other parties to the Hope Downs deed which is in substantially identical terms to the 2007 HD Deed.

428 Clause 3 provides:

> The parties to the Hope Downs Deed and JLH hereby jointly and severally ratify and confirm the Hope Downs Deed as hereby amended.

429 Clause 9.2 of the 2007 HD deed is relevantly identical to clause 20.2 of the Hope Downs deed.

2007 CS deed

430 The 2007 CS deed is also dated 13 April 2007. Its signatories are Mr Hancock, Mrs Rinehart and HPPL. The HPPL respondents characterised this deed as a "side deal" not enjoyed by the other signatories to the Hope Downs deed.

431 The recitals to the deed include:

> B GHR intends for her four children or the lineal descendents [sic] surviving in due course to inherit the whole of her shares of HPPL, the parent company of the Hancock Group. Consistent therewith GHR intends to provide for the appointment in due course such of her lineal descendants as show interest in affairs relating to the Hancock Group and who can be trusted to the Board of Directors of HPPL and thereby to participate in the governance of the business affairs of the Hancock Group whilst doing so in accord with the interests of HPPL. These terms set no programme for such appointment, nor provide for any continuation of such appointment if the appointee then shows himself or herself to be purposefully acting against the interests of HPPL or to be in breach of the Confidential Settlement Deed dated 7 August 2006 ("Hope Downs Deed"). The appointment in due course of lineal descendants of GHR to the Board of Directors of HPPL will be with the view that each of those appointed in due course become participants on a professional basis in the oversight and governance of the future direction of HPPL and the Hancock Group.
>
> C This Deed by these terms, intends to make financial provision for the support, maintenance, further education and advancement in life of JLH.
>
> …
>
> G The parties acknowledge that as of 1 April 2005 JLH was paid for six years advance payment of the royalty dividend income of the Trust from HPPL and the parties now accept that if the independent iron ore price negotiations since then have meant that JLH received less than such increases, then any such difference is more than adequately catered for by the amendment of the Hope Downs Deed to enable JLH's belated entry into such Deed …

432 Clauses 1 and 3 of the 2007 CS deed provide, respectively:

> 1. JLH agrees to repay to HPPL (either by deductions from any monies to be paid by HPPL or otherwise) the loan advanced to him by Deed dated 1 April 2005 by way of instalments set out in the Schedule hereto until December 2011 and thereafter either by continuing instalments as provided in the said Schedule or at the option of JLH by his payment of balance then due at his election to be completed by June 2013, subject always to compliance with any minimum repayment terms required by clause 2 below.
>
> …
>
> 3. a) JLH will receive after executing the Hope Downs Deed, from either of HPPL, Trust or GHR, a salary or other payments of $750,000 per annum in respect of performing his duties for his support, maintenance, further education and advancement in life. JLH acknowledges that all such payments from HPPL will be

> remuneration in relation to the services rendered by JLH during the Rio Tinto executive management programme of approximately 12 months, and his concurrent duties as Secretary of the HPPL Executive Committee (requiring monthly meetings and preparation therefore), together with other duties as required from time to time. JLH acknowledges that all money paid by HPPL will be paid in accordance with applicable taxation legislation and JLH will be responsible to pay any further taxes assessed and payable thereon (in addition to the loan repayment instalments as set out in the Schedule hereto.) JLH further acknowledges that his employment with HPPL is subject to JLH continuing to remain compliant with the terms of the Hope Downs Deed, and deductions may be made by HPPL from such salary or other payments under this clause if not otherwise paid by JLH by way of the loan repayment and instalments set out in the Schedule hereto. The obligations under the Hope Downs Deed are, for the purposes of this clause, not severable.
>
> b) The amounts in clause 3a) herein, after appropriate deduction of income tax in accordance with relevant legislation will, subject to clause 3a) above, be directly credited to the account or accounts of JLH as directed by JLH from time to time, at times and in a manner consistent with the usual terms of employment for HPPL employees.

433 Clause 5 provides that HPPL and GHR would not reduce the payments to be made under the deed provided that JLH is not in breach of the Hope Downs deed. Clauses 6 and 7 contain promises by GHR to make provision "for her lineal descendents", including by leaving all her shares in HPPL to her lineal descendents.

434 Clauses 11 to 13 of the deed state:

> 11. Each party acknowledges that (except as set out in this Deed) it:
>
> (a) enters into this Deed freely and voluntarily based upon its own information, investigation, and subject to legal advice; and
>
> (b) does not execute this Deed as a result of or in reliance on any promise, representation, advice, statement, opinion or information of any kind given or offered to it by or on behalf of any other party, whether in answer to any inquiry or not and whether contained in any correspondence between the parties and/or their legal or other advisers or not.
>
> 12. This Deed applies and the execution parties hereto are hereby bound irrespective of whether those parties waive or do not waive the obtaining of legal or other expert advice, whether independent advice or otherwise.
>
> 13. Each party who executes this Deed acknowledges that he, she or it acts wholly without duress or undue influence in making this Deed and in executing same acknowledges and declares that he, she or it has had and obtained or waived the right to obtain legal, or other expert advice on all matters relating to or which are the subject of this Deed.

435 Clause 15 of the deed provides:

> Each party to this Deed irrevocably covenants not to take any proceedings against any of the other parties to this Deed in relation to any matter arising in any jurisdiction, in respect of the matters the subject of the releases referred to in this Deed and the Hope Downs Deed and withdraws and forever abandons any and all allegations made against any of the other parties to this Deed, including in connection with:
>
> (a) The subject matter of CIV 1327 of 2005;
>
> (b) The allegations contained in JLH's affidavit or draft affidavit of or around 27 September 2005; and
>
> (c) Any combination of the above.

436 Proceeding CIV 1327/2005 is the proceeding in which Mrs Rinehart sought to be removed as trustee of the HMH Trust. Clause 15(b) refers to Mr Hancock's September 2005 affidavit prepared for that proceeding and to which, as earlier noted, Mr Hancock's unsworn affidavit was annexed.

437 By letter dated 13 April 2007, Butcher, Paull and Calder wrote to Terry Sullivan stating:

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

Alleged misconduct in procuring the 2007 HD deed and the 2007 CS deed (sections 31 to 37 of statement of claim)

438 In sections 31 and 32, it is alleged that Mr Hancock executed the 2007 HD deed and the 2007 CS deed in reliance on representations that were false and which involved fraudulent concealment of the fact that the Hope Downs deed was to the material disadvantage of Mr Hancock and the material advantage of Mrs Rinehart. Similar to Ms Rinehart's case concerning her situation when she signed the Hope Downs deed, it is alleged (at para 394 of the statement of claim) that Mr Hancock was in a position of disadvantage, arising from matters that include:

(1) his debt to HPPL and pressure from HPPL to make substantial repayments to avoid a substantial tax liability; and

(2) insufficient information and documentation to enable him to evaluate and obtain independent legal advice concerning whether to enter into the deeds.

Misleading and deceptive conduct (section 32 of statement of claim)

439 Paragraph 399 of the statement of claim alleges that Mr Hancock had a "reasonable expectation" arising out of Mrs Rinehart's duties as trustee of the HMH Trust and the HFMF Trust, representations made to him by Mrs Rinehart concerning the benefits of entering into the Hope Downs deed and the 2007 HD deed, and the parent-child relationship, that Mrs Rinehart would disclose to Mr Hancock any matters that were material to his decision whether to enter into the 2007 HD deed and the 2007 CS deed.

440 Paragraphs 400, 401 and 403 allege that Mrs Rinehart and HPPL engaged in misleading and deceptive conduct by reason of the following matters, in summary:

(1) Mrs Rinehart and HPPL's failure to disclose and fraudulent concealment from Mr Hancock:

(d) that entry into the Hope Downs deed was not in his best interests and was to his material disadvantage;

(e) the matters pleaded in sections 8 to 17 of the statement of claim;

(2) By attempting to persuade Mr Hancock that he did not have a valid claim arising out of Mrs Rinehart's conduct as trustee of the HMH Trust.

(3) By attempting to persuade Mr Hancock that HFMF was insolvent at the time of the 1995 debt reconstruction, without disclosing to him the true facts.

(4) By falsely representing that the Hope Downs tenements had been transferred from HPPL to HFMF for little or no consideration and with considerable negative repercussions for HPPL when this was not the case because HML and HRL acquired those tenements when they were each subsidiaries of HFMF.

Relief sought

441 On the basis of the alleged misleading and deceptive conduct, Mr Hancock seeks:

(1) A declaration pursuant to s 87(2) of the Trade Practices Act that the 2007 HD deed and clause 9.2 of that deed, and the release in clause 15 of the 2007 CS deed are void *ab initio*.

(2) An injunction pursuant to s 80 of the Trade Practices Act restraining Mrs Rinehart and HPPL from enforcing or seeking to enforce the releases and the arbitration clause in the 2007 HD deed and the release in the 2007 CS deed.

Fraudulent concealment and misrepresentation, unconscionable conduct, undue influence and duress by Mrs Rinehart and HPPL (sections 33 to 36 of statement of claim)

442 Mr Hancock makes substantially similar allegations of fraudulent concealment and misrepresentation, unconscionable conduct, undue influence and duress in relation to his execution of the 2007 HD deed and the 2007 CS deed as Ms Rinehart makes in connection with her execution of the Hope Downs deed.

443 He also seeks similar relief, on the basis of these allegations to the relief sought by Ms Rinehart in connection with the Hope Downs deed and the 2007 HD deed.

444 However, there are emails dated between 5 and 11 April 2007 which may suggest, contrary to the allegation of duress, a cordial relationship between Mr Hancock and Mrs Rinehart in the period shortly before he executed the 2007 HD deed and the 2007 CS deed.

Breach of trust and fraud on trustee's power (section 37 of statement of claim)

445 At para 429 of the statement of claim, it is alleged that the conduct pleaded in sections 31B and 32 to 36 of the statement of claim was in breach of Mrs Rinehart's duties as trustee of the HMH Trust. At para 433, it is alleged that Mrs Rinehart executed the 2007 HD deed in her personal interest and in conflict with her duties as trustees of the HMH Trust and the HFMF Trust and as a director of HPPL.

446 For these reasons, Mr Hancock seeks a declaration that Mrs Rinehart's execution of each of the Hope Downs deed, the 2007 HD deed and the 2007 CS deed was a fraud on her powers as trustee of the HMH Trust.

Events between 13 April 2007 and February 2009

447 On 20 April 2007, consent orders were filed in proceeding CIV 1327/2005 by which Mr Hancock agreed to the following orders:

> 1. The application by John Langley Hancock to be joined as a party to the proceedings by chamber summons dated 29 September 2005 be and is hereby dismissed.
>
> 2. The application by John Langley Hancock for an order that the discontinuance filed by [GHR] be set aside and the action be re-instated which was programmed for hearing by the Order for Directions made 14 August 2006, be and is hereby dismissed.

448 Paragraph 440 of the statement of claim alleges that, on about 23 November 2007, Mr Hancock and HPPL entered into a loan agreement to replace the 2005 deed of loan.

February 2009 appropriation of Mulga Downs tenement (section 18 of statement of claim)

449 Paragraph 266 of the statement of claim alleges that, on 10 February 2009, Mrs Rinehart caused the Mulga Downs tenement to be transferred, for no consideration, from HRL to MDI as to two shares and MDIO as to 98 shares.

450 It is alleged that this conduct was intended to remove mining assets from HFMF and place them in the hands of HPPL and its subsidiaries.

August 2009 deed of further settlement

451 The signatories to the 2009 deed of further settlement are Mr Hancock, HPPL and Mrs Rinehart in her own right and as trustee of the HMH Trust.

452 Paragraph 442 of the statement of claim alleges that the 2009 deed provided for further monies to be loaned to Mr Hancock, secured upon and repayable from amounts "due" to him under the Hope Downs deed commencing in or around 2012. Paragraph 443 alleges that Mr Hancock agreed that the repayment of the "HPPL loan" would be accelerated "such that 25% of any payments due to JLH under the Hope Downs Deed shall be used to repay the Loan until it is extinguished".

453 Recital B to the Deed provides:

> JLH has requested financial assistance to build and furnish a holiday home in Koh Samui, Thailand, currently under construction (the "Thailand Property"), purchase one or two additional blocks of land adjacent to the Thailand Property (the "Blocks"), one family sized comfortable car (the "Car"), one buggy or similar (the "Buggy"), and/or to make improvements to 148 Victoria Avenue, Dalkeith, which improvements require the pre-approval of GHR and in return offers to forego his bonus in the CS Deed, to lower his salary in the CS Deed, and to forego any legal claims against HPPL, HPPL's directors and officers, Ginia Hope Francis Rinehart, Hope Georgina Rinehart Welker, GHR, HMHT or its Trustee.

454 Clause 4 provides:

> JLH further acknowledges and agrees that, given his existing agreements with HPPL and other parties (including, but not limited to, the Confidential Deed of Obligation and Release, dated on or around 1 April 2005) under which JLH agreed that he was not to receive any further distributions from HMHT prior to vesting, how funds of HMHT have been applied are of no relevance to him and that if JLH chooses to regard the application of HMHT funds as frivolous or unrelated to the business of HMHT, this remains irrelevant to JLH given the above and that notwithstanding any such views JLH remains bound by his undertaking in Recital B above.

455 Clause 14 contains an acknowledgement and agreement by Mr Hancock that "if he breaches the terms of this Deed or the CS Deed, such breach shall cause a breach of the Hope Downs Deed".

456 The "CS Deed" is the 2007 CS deed.

457 Clause 16 provides:

> 16. The CS Deed and this Deed will be governed by the following dispute resolution clause:
>
> (i) the parties shall first seek to resolve any dispute or claim arising out of, or in relation to this Deed or the CS Deed by discussions or negotiations in good faith;
>
> (ii) Any dispute or claim arising out of or in relation to this Deed or the CS Deed which is not resolved within 90 days, will be submitted to confidential arbitration in accordance with the UNCITRAL Arbitration Rules then in force. There will be three arbitrators. JLH shall appoint one arbitrator, HPPL shall appoint the other arbitrator and both arbitrators will choose the third Arbitrator. The place of arbitration shall be in Australia and the exact location shall be chosen by HPPL. Each party will be bound by the Arbitrator's decision.
>
> (iii) A party may not commence court proceedings in relation to any dispute arising out of or in relation to this Deed or the Original Deed or the CS Deed;
>
> (iv) The costs of the arbitrators and the arbitration venue will be borne equally as to half by JLH and the other half by the non JLH party. Each party is responsible for its own costs in connection with the dispute resolution process; and
>
> (v) Despite the existence of a Dispute, the parties must continue to perform their respective obligations under this Deed.

458 Clauses 18 to 20 are substantially similar to clauses 11 to 13 of the 2007 CS deed.

Alleged misconduct in procuring the August 2009 deed of further settlement (section 38 of statement of claim)

459 Paragraph 447 of the statement of claim alleges that GHR and HPPL failed to disclose and fraudulently concealed from Mr Hancock the claims now pleaded in sections 8 to 17 of the statement of claim. Paragraph 448 alleges that this conduct was unconscionable conduct.

460 At para 467, Mr Hancock claims a declaration that the release (clause 4 read with recital B) and clause 16 of the 2009 deed of further settlement are void as against him.

November 2010 deed of variation

461 The parties to the deed of variation are the same as the parties to the 2009 deed of further settlement.

462 By recital E, the purpose of the deed is to provide for additional loan funding to Mr Hancock. The deed purports to impose an obligation on Mr Hancock to make certain payments in order to "ensure ongoing compliance…with Division 7[A] of the Income Tax Assessment Act 1936".

463 By clause 3 the parties confirmed the 2007 CS deed and the 2009 deed of further settlement.

464 Clause 8 provides:

> In addition to JLH's obligation under clause 10 of the DFS to apply 25% of any payments due to JLH under the Hope Downs Deed towards repayment of the HPPL Loan until extinguished, JLH hereby agrees to apply a further 12.5% of any payments due under the Hope Downs Deed towards repayments of the GHR Loan until extinguished.

465 By clause 10, Mr Hancock acknowledged and agreed that if he breaches the terms of the November 2010 deed of variation or the 2009 deed of further settlement or the 2007 CS deed "such breach shall cause a breach of the Hope Downs Deed".

466 Clause 11(ii) of the 2010 deed provides:

> Any dispute or claim arising out of or in relation to this Deed which is not resolved within 90 days, will be submitted to confidential arbitration in accordance with the UNCITRAL Arbitration Rules then in force …

467 Clauses 13 to 15 are again substantially similar to clauses 13 to 15 of the 2007 CS deed.

Alleged misconduct in procuring the 2010 deed of variation (section 38 of statement of claim)

468 Paragraph 454 of the statement of claim alleges that GHR and HPPL failed to disclose and fraudulently concealed from Mr Hancock the claims now pleaded in sections 8 to 17 of the statement of claim. Paragraph 455 alleges that this conduct was unconscionable conduct.

469 At para 467, Mr Hancock claims a declaration that clause 11(ii) of the 2010 deed of variation is void as against him.

September 2011 Mrs Rinehart's failure to account to the children for 25.5% of her shares in HPPL (section 13 of statement of claim)

470 The core complaint made by the applicants is that Mrs Rinehart has "declined to recognise that she holds 25.55% of her present shareholding in HPPL on trust for" the children. Paragraph 235 of the statement of claim alleges:

> In breach of her obligations under the 1988 Agreement … GHR failed to take such steps as were required to ensure that on 6 September 2011, 49% of the shares in HPPL were held by or on behalf of GLH, BHR, HRW and GHFR.

471 It was submitted orally that this cause of action accrued in September 2011 at the time when the HMH Trust and HFMF Trust are each alleged to have vested.

Relief sought

472 Prayers 22 to 26 of the originating application seek the following relief:

(1) An order for specific performance of the obligations of GHR under the 1988 Agreement;

(2) Further to order 22, an order that GHR transfer or cause to be transferred:

  (a) one quarter of the shares referred to in orders 8 and 9 to BHR; and

  (b) one quarter of the shares referred to in orders 8 and 9 to JLH.

(3) An order that, in the event that GHR fails to transfer or cause to be transferred the shares referred to in order 23 within 28 days of the date of these orders, a Registrar of the Court be authorised to execute such transfers and instruments as may be required to effect the transfers contemplated by that order.

(4) Further to order 23, damages in respect of:

  (a) any liability or other expense each of BHR and JLH consequent upon the transfers contemplated by order 23; and

  (b) dividends paid to ordinary and special cumulative shareholders for the period from 6 September 2011 to date .

(5) In the alternative to orders 23 to 25, damages for breach of the 1988 Agreement.

Welker v Rinehart (No 2)

473 Written submissions made on behalf of the HPPL respondents noted that, in *Welker v Rinehart (No 2)* [2011] NSWSC 1238 ("*Welker v Rinehart (No 2)*") at [21], Brereton J found that the Hope Downs deed was binding on Ms Rinehart. The HPPL respondents

acknowledged that this finding was made on an interlocutory application and therefore does not create an issue estoppel.

2012 transfer of HMH Trust's shares in HMHTI to HPPL (section 12 of statement of claim)

474 The applicants allege that one of the terms of the debt reconstruction deed was a condition precedent that HMHTI be admitted as a Class A member of HFMF. It is alleged that, at the time that HMHTI became a Class A member of HFMF, its sole shareholder was the HMH Trust.

475 The applicants claim that, in 2012, Mrs Rinehart as trustee of the HMH Trust caused the transfer of the HMHT Investments shares to HPPL for no valuable consideration, and without the consent of the beneficiaries of the HMH Trust.

Complaints about deployment of the Hope Downs deed (sections 39, 40, 41 of statement of claim)

476 Section 39 of the statement of claims sets out a serious of alleged events from 5 September 2011. On that day, the applicants and Ms Welker commenced proceedings seeking urgent interlocutory relief in relation to the vesting of the HMH Trust. On 17 October 2011, Ms Rinehart and Ms Welker filed an amended summons seeking, *inter alia*, orders in relation to GHR's alleged misconduct in her role as trustee of the HMH Trust.

477 By notice dated 1 December 2011, HPPL purported to give notice to the applicants and Ms Welker under clause 5(c)(i) of the Hope Downs deed that each of them had breached the Hope Downs deed, particularly by bringing proceedings which constituted an attempt to remove Mrs Rinehart as trustee of the HMH Trust. HPPL's claims were subsequently referred to arbitration before Mr Tony Fitzgerald QC ("Fitzgerald HPPL arbitration").

478 The statement of claim refers to orders made in the NSW Supreme Court in *Welker v Rinehart* [2011] NSWSC 1094, *Welker v Rinehart (No 2)* and *Rinehart v Welker* [2011] NSWCA 345, *Rinehart v Welker* [2011] NSWCA 403, *Welker v Rinehart (No 4)* [2011] NSWSC 1636, *Rinehart v Welker*, *Hancock v Rinehart 2013* (Bergin CJ in Eq) and *Rinehart v Hancock* [2013] NSWCA 326 ("*Rinehart v Hancock"*).

479 At para 496, the applicants allege that, in the litigation referred to above, GHR and HPPL have "endeavoured to deploy the Hope Downs Deed and the April 2007 HD Deed" to place financial pressure on the applicants and, among other things, to prevent them from seeking

redress in relation to the claims pleaded in sections 8 to 17 of the statement of claim. It is alleged that this conduct is unconscionable conduct within the meaning of s 20 of the Australian Consumer Law. Injunctive relief is sought to prevent Mrs Rinehart and HPPL respondents from seeking to deploy the Hope Downs deed and the April 2007 HD deed against the applicants.

480 Finally, it is alleged that the deployment of the Hope Downs deed and the April 2007 HD deed since September 2011 involves the use of "legal process with the predominant purpose of accomplishing an ulterior and improper end", namely, dissuading the applicants from pursuing their claims in the NSW Supreme Court and from investigating or bringing proceedings in respect of the alleged past misconduct. For this, damages are claimed comprising the costs of responding to the deployment of the deeds, and exemplary damages for conscious wrongdoing in contumelious disregard of the applicants' rights.

Alleged affirmation of Hope Downs deed

481 By letter dated 7 May 2012, the applicants' then solicitors made a demand that HPPL "pay dividends to holders of A Class shares in HPPL in the amounts provided for in clause 5(a)(i) and (ii) of the Hope Downs Deed, including all such amounts required to be paid in respect of the quarters ending 31 December 2011 and 31 March 2012". When that demand was duly rejected, the applicants' then solicitors gave notification pursuant to clause 20 of the Hope Downs deed of a dispute arising under the deed.

482 The applicants subsequently referred this dispute to arbitration before Mr Fitzgerald QC ("Fitzgerald applicants' arbitration"). Further amended points of claim dated 3 December 2012 evidence the applicants' reliance on the Hope Downs deed and the 2007 HD deed in the Fitzgerald applicants arbitration.

483 By cross-claim dated 30 July 2012, HPPL sought, among other things, a declaration that the applicants had elected to affirm the Hope Downs deed.

484 By points of defence dated 29 August 2012, in the Fitzgerald HPPL arbitration, the applicants admitted entry into the Hope Downs deed and sought to rely upon the terms of the Hope Downs deed.

485 According to a decision made by Mr Fitzgerald QC dated 17 July 2013, applications by HPPL against Mr Hancock were set down for hearing on 2 May 2013, but did not proceed because of undertakings formalised on 6 May 2013. Also on 2 May 2013, the dispute

concerning the applicants' claim pursuant to the Hope Downs deed was "stayed until further order".

486 In a written undertaking dated 6 May 2013, Mr Hancock gave the following undertakings:

> 2. I undertake to comply with all of my confidentiality obligations which were existing at the time I became a party to the Hope Downs Deed, as provided in clause 10.3 of the Hope Downs Deed, including the deed of confidentiality I executed on 13 April 2007.
>
> 3. I undertake to comply with clause 23 of the Hope Downs Deed.

487 Clause 23 is set out at [385] above.

488 By his 17 July 2013 decision, Mr Fitzgerald QC declared that Mr Hancock breached the 6 May 2013 undertakings by statements to journalists on or about 31 May and 5 and 17 June 2013 concerning GHR's conduct as Chairman of HPPL and trustee of the Hope Downs Trust.

Hancock v Rinehart 2013 (Bergin CJ in Eq)

489 The HPPL respondents also noted that, in *Hancock v Rinehart 2013* (Bergin CJ in Eq) at [27], Her Honour recorded that it was not in issue that all relevant parties were bound by the Hope Downs deed. At [82] Bergin CJ in Eq concluded that she was satisfied that the NSW Act applied in respect of the relevant applications and, at [83] that, for the purposes of s 8(1), clause 20 of the Hope Downs deed is an "arbitration agreement". At [83], her Honour recorded that there was "no suggestion or contention that cl 20 [of the Hope Downs deed] is null and void or inoperative or incapable of being performed".

Hancock v Rinehart 2013 (Brereton J)

490 In *Hancock v Rinehart* [2013] NSWSC 1978 ("*Hancock v Rinehart 2013* (Brereton J)"), his Honour made orders in relation to production of documents and access. At [32], his Honour set out his understanding that the plaintiffs sought production of documents including the Inter-Creditor deed "with a view to raising an issue as to whether the Hope Downs Deed is valid and enforceable if consideration for it has not been paid."

491 At [34], his Honour noted that, in the proceeding before him at that time, there was no issue that the Hope Downs deed was not valid and enforceable, although there were issues as to its construction and effect. Before me, Mr McClintock SC submitted that Brereton J was wrong in saying this.

Hancock v Rinehart 2015

492 On behalf of Mrs Rinehart, it was argued that Brereton J's judgment *Hancock v Rinehart* [2015] NSWSC 646 ("*Hancock v Rinehart 2015*") creates an issue estoppel and an Anshun estoppel between the applicants and Mrs Rinehart concerning the validity of the Hope Downs deed. It was initially contended that, as far as the claims brought against Mrs Rinehart are concerned, that issue estoppel or Anshun estoppel is a complete answer to the applicants' submission that there is no binding arbitration agreement between the applicants and Mrs Rinehart because the Hope Downs deed is liable to be set aside. However, in oral submissions, Mr McClintock SC clarified that Mrs Rinehart's case was concerned only with the question whether there was a credible argument on the applicability of the proviso to s 8(1) having regard to questions of issue estoppel or Anshun estoppel, for the purpose of deciding the application of s 8(1).

493 Separately, Mr McClintock SC submitted that the applicants' construction of the releases in the Hope Downs deed is inconsistent with the construction of Brereton J. At [347], Brereton J held that a claim is released by the Hope Downs deed if the claim was articulated in Mr Hancock's draft affidavit. The parties' intention was to release all claims to scrutinise Mrs Rinehart's management of the HMH Trust up to the date of the Hope Downs deed. On behalf of Mrs Rinehart, it was contended that this construction is inconsistent with the applicants' attempted distinction between claims and allegations for the purpose of clause 6 of the Hope Downs deed.

494 Brereton J's decision, delivered on 28 May 2015, followed the final hearing of the proceeding commenced on 5 September 2011 and referred to above. At [10], his Honour referred to the 2005 deed of obligation and release. At [14] and following, his Honour referred to the Hope Downs deed.

495 At [343], Brereton J noted that Mrs Rinehart had not rendered accounts to the beneficiaries of the HMH Trust for the period prior to 30 August 2006, the date of the Hope Downs deed, but concluded that the Hope Downs deed had the effect of releasing any claim for accounts prior to that date. At [351], his Honour concluded that the claims for accounts before him were released by the Hope Downs deed.

496 Mr Withers sought to tender the judgment of Brereton J, relying on s 190(3) of the *Evidence Act 1995* (Cth) as the basis for the court exercising its discretion to dispense with the application of s 91 of that Act, by which the judgment would be inadmissible to prove the

existence of a fact that was in issue in the earlier proceeding. The tender of the judgment was opposed.

497 I decline to dispense with the application of s 91, with the result that the tender of Brereton J's judgment is rejected. I am not satisfied that the requirements of s 190(3) were met in the circumstances of this case. The question of the admissibility of the judgment on a final hearing, concerning the questions of issue estoppel and Anshun estoppel or any other issue between the parties, is for another day.

AGREED QUESTION (5): APPLICATION OF COMMERCIAL ARBITRATION LEGISLATION IN THIS CASE

498 The precise question agreed by the parties is: "Have GHR and each of the HPPL respondents met their burden of proving that the Act applies as between each of them and the applicants?"

Apparently valid agreements to arbitrate

499 In my view, in this case, the tender of a signed agreement containing an agreement to submit to arbitration is sufficient to satisfy the requirement as to the existence of an apparently valid arbitration agreement, subject to the question whether the agreement is an agreement to submit disputes to "domestic commercial arbitration".

500 It is neither necessary nor appropriate to consider the allegations made by the applicants as to the circumstances in which the agreements were signed at this point of the analysis.

501 Accordingly, I am satisfied that each of the six arbitration clauses relied upon by Mrs Rinehart and the HPPL respondents is an apparently valid agreement to submit disputes to arbitration.

Agreements to submit to *commercial* arbitration?

502 It is necessary to consider whether the arbitration clauses are agreements to submit to commercial arbitration. In my view, this question is determined by whether the scope of the arbitration clause includes the submission of commercial disputes to arbitration.

Clause 16.2 of Porteous settlement deed

503 I am satisfied that the arbitration clause in the Porteous settlement deed (clause 16.2) is an agreement to submit to commercial arbitration. Clause 16.2 covers "[a]ny dispute arising out of, relating to or in connection with this deed". Clause 16.2 potentially concerns disputes concerning the scope of the releases given in the deed in connection with claims concerning

valuable commercial assets, which may be commercial disputes. The conclusion that clause 16.2 is an agreement to submit to commercial arbitration in an appropriate case (that is, where the relevant dispute is a commercial dispute) is fortified by the references to the *Commercial Arbitration Act 1990* (Qld) in clauses 16.2(c), (e) and (g).

Clause 14 of the 2005 deed of obligation and release

504 Clause 14 covers "all disputes hereunder". It potentially concerns the scope of the releases given in the deed and disputes concerning Mr John Hancock's compliance with undertakings apparently sought to avoid a perceived risk of harm to the commercial interests of the Hancock group (recital D) and "distraction to the ongoing focus of" HPPL (recital F). Although there is no express reference in clause 14 to commercial arbitration or to the application of commercial arbitration legislation, I accept that clause 14 provides for the submission of disputes which may be commercial disputes to arbitration. Accordingly, I accept that it is an agreement to submit to commercial arbitration to the extent that the relevant dispute is a commercial dispute.

Clause 20.2 of the Hope Downs deed

505 Clause 20.2 is an agreement to submit to arbitration by arbitrators "who shall resolve the matter pursuant to the Commercial Arbitration Act of Western Australia". Clause 20 states that this agreement concerns "any dispute under this deed." The subject matter of the deed includes the ownership of the Hope Downs tenements and the distribution of dividends by HPPL. Accordingly, clause 20.2 potentially concerns disputes concerning entitlements to valuable commercial assets and the profits from commercial ventures, which are likely to be commercial disputes.

506 Accordingly, I accept that clause 20.2 is an agreement to submit to commercial arbitration.

Clause 9.2 of the 2007 HD deed

507 Clause 9.2 is relevantly similar to clause 20.2 of the Hope Downs deed. Accordingly, for the reasons given in respect of clause 20.2, I accept that clause 9.2 is an agreement to submit to commercial arbitration.

Clause 16 of the 2009 deed of further settlement

508 Clause 16 covers "[a]ny dispute or claim arising out of or in relation to" the 2009 deed of further settlement or the 2007 CS deed. The main subject matter of the two deeds is

"financial provision for the support, maintenance, further education and advancement in life" of Mr John Hancock (recital C of the 2007 CS deed). That is, the main subject matter of the two deeds is non-commercial.

509 Even so, the applicants acknowledge that Mr Hancock's claim challenging the validity and enforceability of clause 16 is a claim "in relation to" the 2009 deed of further settlement. In my view, for the reasons given in relation to clause 14 of the 2005 deed of obligation and release, to the extent that claims such as this claim give rise to a commercial dispute, clause 16 is an agreement to submit to commercial arbitration.

Clause 11 of the 2010 deed of variation

510 For the reasons given in relation to clause 16 of the 2009 deed of further settlement, to the extent that claims covered by clause 11 give rise to commercial disputes, clause 11 is an agreement to submit to commercial arbitration.

Agreements to submit to arbitration disputes which have arisen *between the parties*?

Clause 16.2 of the Porteous settlement deed

511 I do not accept that clause 16.2(a) of the Porteous settlement deed is an agreement by the applicants to submit to arbitration "disputes which have arisen or which may arise between them in respect of a defined legal relationship" and any of the respondents within the meaning of s 7(1) of the commercial arbitration legislation. Clause 16.2(a) is an agreement by the parties to the Porteous settlement deed to submit to arbitration any dispute "arising out of, relating to or in connection with" the Porteous settlement deed "which cannot be settled amicably". It is directed to disputes between Mrs Rinehart (including parties associated with her) on the one hand and Mrs Porteous (including parties associated with her) on the other hand. It is not directed to disputes between Mrs Rinehart and those parties associated with her who executed the Porteous settlement deed, including the applicants.

512 This interpretation of clause 16.2(a) is based on the following matters:

(1) The Porteous settlement deed records an agreement principally between Mrs Rinehart and Mrs Porteous to compromise claims made in specified proceedings, and to fully and finally resolve the relevant proceedings.

(2) There is nothing in the Porteous settlement deed to indicate that it is in any way concerned with liabilities owed by Mrs Rinehart and the HPPL respondents to the applicants. It was not concerned with those liabilities.

(3) There is no basis to infer that clause 3.9 was intended to confer a benefit on Mrs Rinehart and the HPPL respondents at the expense of the applicants.

(4) There is nothing in the language of the Porteous settlement deed from which it could be inferred that the parties intended that the applicants would surrender rights and claims which either of them had Mrs Rinehart and the HPPL respondents by signing the deed.

(5) The Porteous settlement deed does not provide consideration passing from Mrs Rinehart and the HPPL respondents (except to the extent that it might be argued that clause 3.9 provided consideration, which I do not accept).

Other arbitration clauses

513 The arbitration clauses in the 2005 deed of obligation and release, the 2009 deed of further settlement and the 2010 deed of variation are plainly agreements to submit to arbitration disputes arising between Mr John Hancock and the counterparties to those deeds.

514 Similarly, clause 20.2 of the Hope Downs deed is an agreement to submit to arbitration disputes arising between Ms Rinehart and the counterparties to that deed. Clause 9.2 of the 2007 HD deed is an agreements to submit to arbitration disputes arising between Ms Rinehart and Mr Hancock and the counterparties to that deed.

"Parties" to the arbitration agreements (agreed question (8))

515 I have made findings above as to parties to the six deeds in which the arbitration agreements are contained.

516 None of the eleventh to fifteenth respondents is a signatory to any of the six deeds, or is bound, as a matter of contract law, by any of the arbitration agreements or the deeds in which they are contained.

Mr Donnelly

517 As to the eleventh respondent (Mr Donnelly), Mr Hutley SC stated (without disagreement from Mr Withers) that his presence as a party to the proceeding was explained by s 11 of the *Property Law Act 1969* (WA) ("WA Property Law Act"). He is not a necessary party to any

arbitration and, accordingly, there is no need for the HPPL respondents to demonstrate that he is a "party" within the meaning of the commercial arbitration legislation.

HDIO, RHIO, MDI and MDIO

518 Mrs Rinehart and the HPPL respondents contended that HDIO, RHIO, MDI, and MDIO are each "parties" to various of the arbitration agreements, particularly the Hope Downs deed, within the extended meaning of the word in the commercial arbitration legislation, because they are persons claiming "through or under a party to" the relevant arbitration agreements.

"through or under a party to"

519 In *Tanning Research*, the High Court held that a liquidator of a company who resisted a claim made by a creditor against the assets available for distribution on the ground that the alleged debt was unenforceable against the company under the general law stands in the same position in relation to the creditor as the company, and thus claims "through or under" the company. At 342, Brennan and Dawson JJ said (Toohey J agreeing at 354):

> [T]he prepositions "through" and "under" convey the notion of a derivative cause of action or ground of defence, that is to say, a 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.

520 At 353, Deane and Gaudron JJ said:

> Section 7(2) of the Act is concerned with "proceedings [which] involve the determination of a matter ... capable of settlement by arbitration". Its operation is thus not confined to proceedings in which the parties seek the same relief as might have been sought in arbitration proceedings. Because s. 7(2) has this wider operation, 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 proceedings or the precise legal character of the person initiating or defending the proceedings…
>
> [T]he liquidator stands precisely in the position in which [the company] would have stood if it were in a position to require and did require a determination of the amount, if any of its enforceable indebtedness to [the creditor and counter-party to the arbitration agreement]. So standing, the liquidator claims the benefit of the defences and answers which would otherwise have been available to [the company] and thus claims through or under [the company]."

521 In *Flint Ink,* the Victorian Court of Appeal applied *Tanning Research.* Flint Ink was the cross-defendant in a negligence claim and the supplier of ink to the manufacturer of allegedly defective packaging (Huhtamaki NZ). The cross-claimant (Huhtamaki Australia) supplied the packaging to the claimant (Lion-Dairy), and was a company related to the package manufacturer. Warren CJ concluded (at [23]) that the alleged duty of care owed to Huhtamaki Australia was based primarily on the alleged proximity between Huhtamaki Australia and Huhtamaki NZ. At [25], the Chief Justice agreed that the fact that Huhtamaki Australia had no dealings with Flint Ink and that every circumstance giving rise to Huhtamaki Australia's claim necessarily concerned and originated with Huhtamaki NZ provided strong support for the conclusion that Huhtamaki Australia was claiming through or under Huhtamaki NZ.

522 At [28], the Chief Justice said:

> To the extent that Deane and Gaudron JJ articulate a different approach to that of Brennan and Dawson JJ in *Tanning*, in my view it is also satisfied in this case. The subject matter in controversy here is whether Flint Ink is liable to provide indemnity or contribution to Huhtamaki Australia in respect of any liability of Huhtamaki Australia to Lion-Dairy. Such liability could only arise because Flint Ink was negligent in its advice to Huhtamaki NZ in relation to the suitability of the ink it supplied.

523 At [74], Nettle JA (as he then was) concluded:

> [I]n my view that Huhtamaki Australia is claiming through or under Huhtamaki NZ in the sense identified in *Tanning*. In terms of the test propounded by Brennan and Dawson JJ in Tanning, Huhtamaki Australia is so claiming because essential elements of its cause of action against Flint Ink are that Flint Ink breached its agreement with Huhtamaki NZ or breached a duty of care to Huhtamaki NZ which is alleged to have arisen out of the agreement. Equally, in terms of the test favoured by Deane and Gaudron JJ, Huhtamaki Australia is claiming through or under Huhtamaki NZ because the matter principally in controversy between Huhtamaki Australia and Flint Ink is whether Flint Ink breached its agreement with Huhtamaki NZ or breached its alleged duty of care to Huhtamaki NZ.

524 Mandie JP came to similar conclusions at [148] and [149].

525 In *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* [2008] FCA 551; (2008) 168 FCR 169, Finkelstein J considered a claim by a third party (Cosco) to a charter party to invoke s 7 of the International Arbitration Act and concluded that Cosco was not claiming through or under a party to an arbitration agreement. At [14], his Honour observed that, having regard to the nature of a derivative action, while the relationship between the claimant and the party to the arbitration agreement must be an essential ingredient of the claim, that relationship must be relevant to the grounds advanced in support of the claim. Finkelstein J

was not satisfied that Cosco's asserted right to enforce a time bar in the charterparty was derived from a party to the charterparty in any relevant sense (at [16]).

526 In *nearmap Ltd* at [45], Bergin CJ in Eq observed that *Tanning Research* and *Flint Ink* "are not authority for the proposition that a person claims "through or under" a party merely as a consequence of the status of their relationship with another party. The party must derive their claim or defence through the other party". At [47], her Honour concluded that, where the potential claims were for misuse of confidential information, if a third party to an arbitration agreement knowingly received confidential information from a party to the arbitration agreement, and used it in establishing its own business, it would be defending the application in its own right and not through a party to the arbitration agreement.

527 Finally, in *City of London v Sancheti* [2008] EWCA Civ 1283; [2008] 2 CLC 730; [2009] 1 Lloyd's Rep 117, Collins LJ (Richards LJ and Laws LJ agreeing) held that "a mere legal or commercial connection" with a party to an arbitration agreement was not sufficient to justify a conclusion that such a party is claiming through or under a party to an arbitration agreement. Thus, the City of London was not claiming through or under the United Kingdom, as a party to a Bilateral Investment Treaty with India, in claiming unpaid rent due from an Indian national under a premises lease. In his reasons, Collins LJ expressly disapproved of the decision in *Roussel-Uclaf v GD Searle & Co Ltd (No 2)* [1978] FSR 95; [1978] 1 Lloyd's Rep 225 in which the Court held that a wholly owned subsidiary company was "claiming through or under" the parent company on the basis that the parent and subsidiary were "so closely related".

HDIO

528 HDIO was a subsidiary of HPPL and held title to the Hope Downs tenements at the time of the Hope Downs deed. Accordingly, Mr Hutley SC submitted, HDIO would seek to rely upon the express acknowledgement in clause 4 of the Hope Downs deed, as well as the releases given in clause 6 and the undertakings in clause 7(b) that the applicants would not challenge HDIO's title to the Hope Downs tenements. The submission did not explain how, as a third party to the Hope Downs deed, HDIO is entitled to the benefit of the deed.

529 Mr Hutley SC next said that HDIO "will therefore be claiming through or under its parent company HPPL because HDIO will rely on the position of HPPL". The submission did not explain how HDIO was entitled to rely on the position of HPPL.

530 Mr Hutley SC contended that a fundamental element of the applicants' claim against HDIO is that there was an entitlement of the applicants with respect to HPPL at the time that title to the Hope Downs tenements were transferred to HDIO. He said that, if there is a release in place, then that entitlement does not exist, so that HDIO takes clear of any such entitlement and HDIO takes the benefit of any defence of HPPL which precludes the raising of the entitlement.

531 It was also submitted that HDIO would seek to rely on s 11(2) of the WA Property Law Act which provides:

> (2) 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 —
>
> (a) all defences that would have been 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.

532 It was argued, in particular, that clause 4 of the Hope Downs deed (set out at [368] above) purports to confer a benefit on HDIO.

533 I do not accept these submissions. I am prepared to accept that HDIO's defence to the claim will have the characteristics outlined in submissions, although no defence has been filed. However, I do not accept that HDIO has a right to rely on the Hope Downs deed as a third party to the deed, in the absence of any statutory right of the kind in s 11(2) of the WA Property Law Act. As to s 11(2), I do not accept that there is a sustainable argument that clause 4 or any other provision of the Hope Downs deed "expressly in its terms purports to confer a benefit directly on" HDIO. The submission that s 11(2) applies was not developed.

534 Finally, there is the question whether HDIO may claim the benefit of the agreement to arbitrate agreement in the Hope Downs deed on the basis that it obtained its title to the Hope Down tenements from HPPL or another company having the benefit of the arbitration agreement. Again, in the absence of developed submissions, I am not satisfied that the

releases in the Hope Downs deed, assuming that they have the effect contended for by the HPPL respondents, operate to the benefit of HDIO.

535 Accordingly, I am not satisfied that HDIO is a "party" to the agreement to arbitrate in the Hope Downs deed within the meaning of the commercial arbitration legislation. For the same reasons, HDIO is not a "party" to any other agreement to arbitrate.

RHIO

536 RHIO was incorporated after the Hope Downs deed was executed, and is alleged by the applicants to have received legal title to the Roy Hill tenements in November 2011.

537 Mr Hutley SC argued that clause 7(b) of the Hope Downs deed precludes the applicants from challenging the right of any members of the Hancock Group to any of the Hancock Group interests at any time. He contended that RHIO is a member of the "Hancock Group" and the Roy Hill tenements were "Hancock Group Interests" at the time of the Hope Downs deed. Therefore, Mr Hutley SC argued, RHIO will be entitled to rely on clause 7.

538 I am not persuaded that this conclusion follows from the stated premises. Even if it be assumed that RHIO is a member of the "Hancock Group" within the meaning of the Hope Downs deed (which is not obvious since the company was not registered at the time of the deed), that fact is not sufficient to entitle RHIO to rely on the deed.

539 Mr Hutley SC contended, and I accept, that the claims made against RHIO depend on the applicants impugning title to RHIO's predecessor in title, and particularly the title of HPPL (para 145 of the statement of claim). However, if RHIO defends the claims against it on the basis that the Hope Downs deed extinguished a previously existing constructive trust, in my view, RHIO would not be relying on a defence which would have been available to HPPL under the Hope Downs deed. Rather, it is relying on the circumstances in which RHIO acquired title to the tenements.

540 Accordingly, I am not satisfied that the matters identified by Mr Hutley SC cause RHIO to be a "party" to the agreement to arbitrate in the Hope Downs deed, or to any other arbitration agreement relied upon by Mrs Rinehart and the HPPL respondents.

MDI and MDIO

541 For MDI and MDIO, the position is relevantly similar. Based on the statement of claim, they are likely to argue that they obtained their respective beneficial interests in the Mulga Downs

tenements from HRL and, potentially, that HRL's beneficial interest was confirmed or otherwise protected by the Hope Downs deed. However, that is not a derivative defence: it is a defence which arises entirely from the positions of MDI and MDIO as transferees of interests in the tenements from HRL.

GHR as trustee of the HFMF trust

542 The applicants contended that Mrs Rinehart was not a party to any arbitration agreement in her capacity as trustee of the HFMF Trust. At para 276 of the statement of claim, it is alleged that Mrs Rinehart did not enter into the Hope Downs deed in her capacity as trustee of the HFMF Trust. At para 285 of the statement of claim, it is alleged that Mrs Rinehart did not enter into the 2007 HD deed in her capacity as trustee of the HFMF Trust.

543 Mr Hutley SC asserted that Mrs Rinehart could not have purported to enter into the Hope Downs deeds as trustee of the HFMF Trust since no trust existed. He said that, as she did not have a separate legal personality as a trustee, this did not matter.

544 Thus, as I understood the submissions, it was not contended that Mrs Rinehart is a party to any of the arbitration agreements in her capacity as trustee of the HFMF Trust. Whether this precludes Mrs Rinehart from relying on the arbitration agreements in relation to any particular matter is a separate question.

Places of business or habitual residence

545 There was no dispute that Mrs Rinehart and the HPPL respondents had their places of business in Australia at the relevant times; nor was there any dispute that the applicants had their respective habitual residences in Australia at the relevant times.

Agreement that disputes that have arisen between the parties be settled by arbitration

546 In this case, the arbitration agreements in the Porteous settlement deed, the 2005 deed of settlement and release, the Hope Downs deed and the 2007 HD deed are each expressed as an agreement to resolve disputes by arbitration. In the 2009 deed of further settlement and the 2010 deed of variation, the arbitration agreements include a term that each party "will be bound by the Arbitrator's decision".

Conclusions on agreed question (5)

Clause 16.2 of the Porteous settlement deed

547 The Porteous settlement deed is expressed to be governed by the law of Queensland. I do not see any basis for the application of the WA Act to this deed.

548 Although clause 16.2 is an "arbitration agreement" within the meaning of s 7(1) of the NSW Act, it is not an agreement by the applicants and Mrs Rinehart or any of the HPPL respondents to submit to arbitration any disputes which have arisen or which may arise between them. Accordingly, the NSW Act has no application as between the applicants and Mrs Rinehart or any of the HPPL respondents pursuant to clause 16.2 of the Porteous settlement deed.

Other arbitration clauses

549 Each of the 2005 deed of obligation and release, the Hope Downs deed, the 2007 HD deed, the 2009 deed of further settlement and the 2010 deed of variation is expressed to be governed by the laws of Western Australia.

550 I am satisfied that the arbitration clauses in each of these deeds is an apparently valid agreement that the parties to the relevant deed submit commercial disputes to domestic commercial arbitration.

551 Accordingly, either the WA Act or the NSW Act applies to the rights and obligations of those parties arising under each of these arbitration agreements.

AGREED QUESTION (9): WHAT MATTERS ARE SUBJECT OF AN ARBITRATION AGREEMENT?

552 The agreed question is: "Have GHR and the HPPL respondents met their burden of proving that the matter(s) in the current proceedings are 'the subject of an arbitration agreement' within the meaning of s 8(1)?"

The relevant matters

553 The following claims for relief in the originating application are not matters the subject of an arbitration agreement because they are claims made solely against respondents that are not a party to any arbitration agreement:

(a) Prayers 4 and 5 (against RHIO);

(b) Prayers 18 and 19 (against HDIO);

(c) Prayers 32 to 34 (against MDI and MDIO).

554 There is a matter in the proceeding that comprises the applicants' claims over the Roy Hills tenements, including the claim for imposition of a constructive trust, an account of profits and equitable compensation. These are the claims made by prayers 1 to 3, 6 and 7 of the originating application. Defined in this way, however, the matter does not fall wholly within the scope of an arbitration agreement because it includes the dispute between the applicants and RHIO as to RHIO's ownership rights over the Roy Hills tenements.

555 Mrs Rinehart and HPPL contended that the "validity claims" (or at least some of them) should not be characterised as claims discrete from the "substantive claims". However, at the outset, it is useful to identify discrete matters by reference to subject and parties affected by the claim or claims for relief.

556 Following the order of the prayers for relief in the originating application, and the approach set out above concerning the dispute over the Roy Hills tenements, the following matters, which may be the subject of an arbitration agreement, arise in the proceeding:

(1) The disputes between the applicants, Mrs Rinehart and HPPL concerning ownership of the Roy Hills tenements arising from the claims made by prayers 1 to 3, 6 and 7 of the originating application.

(2) The disputes between the applicants, Mrs Rinehart, HPPL and 150 Investments concerning ownership of the HPPL shares arising from prayers 8 to 14, 27 and 28.

(3) The disputes between the applicants, Mrs Rinehart and HPPL concerning ownership of the Hope Downs tenements arising from the claims made by prayers 15 to 17, 20 and 21.

(4) The disputes between the applicants and Mrs Rinehart concerning the 1988 Agreement arising from prayers 22 to 26.

(5) The disputes between the applicants and HPPL concerning the ownership of the Nicholas Downs tenements arising from prayers 29 to 31.

(6) The disputes between the applicants, Mrs Rinehart and HPPL concerning the enforceability of the releases and arbitration clauses in the Hope Downs deed and the April 2007 HD deed, arising from prayer 35.

(7) The disputes between Ms Rinehart, Mrs Rinehart and the HPPL respondents who are signatories to the Hope Downs deed and the April 2007 HD deed concerning the validity of those deeds, arising from prayers 36 and 37.

(8) The disputes between the applicants and Mrs Rinehart concerning her conduct in executing the Hope Downs deed and the April 2007 HD deed, arising from prayers 38 and 39.

(9) The disputes between Mr Hancock, Mrs Rinehart and HPPL concerning the enforceability of the releases and arbitration clauses in the 2005 deeds, the 2007 CS deed, the 2009 deed of further settlement and the 2010 deed of variation, arising from prayers 40 to 43, 45 and 46.

(10) The disputes between Mr Hancock and Mrs Rinehart concerning her conduct in executing the 2007 CS deed, the 2009 deed of further settlement and the 2010 deed of variation, arising from prayers 44 and 47.

(11) The disputes between the applicants, Mrs Rinehart and HPPL concerning the deployment of the Hope Downs deed and the 2007 HD deed, arising from prayers 48 to 51.

557 In each case, the matter includes the possible application of any relevant contractual release as a defence to the claim, or any other contractual provision which governs or controls the outcome of the disputes.

558 If it is appropriate to identify, as separate matters in the proceeding, disputes concerning the same subject matter but between different parties (as I have done in connection with the disputes concerning the Roy Hills tenements), then it may be appropriate to identify, as separate matters, disputes between Mr Hancock (independent of Ms Rinehart), Mrs Rinehart and HPPL for the purpose of determining whether those matters are the subject of an arbitration agreement between those parties.

Are the matters in the proceeding commercial disputes?

559 The nature of the disputes is determined, first, by considering the claims articulated in the originating application and the statement of claim and, second, by considering whether the asserted arbitration agreements are agreements to submit disputes arising out of those claims between the parties to the arbitration agreement to commercial domestic arbitration.

Claims concerning ownership of valuable commercial assets and entitlements to profits

560 I am satisfied that the claims made in the originating application raise disputes which are commercial disputes, to the extent that they concern ownership of valuable commercial assets and entitlements to profits generated by those assets. The commerciality of the disputes arising from such claims also arises from the fact that they involve disputed claims to a share in profits derived from commercial activities. Although it is not a determining factor, I accept that the commerciality of these disputes is borne out by the applicants' various claims for relief under the Trade Practices Act based on allegations of misconduct occurring "in trade or commerce". I also accept that, if these claims were referred to arbitration, the arbitration can be expected to be conducted in a commercial manner by all parties having regard to the high financial stakes involved and the complexity of the issues.

561 I do not consider the familial relationships between the applicants and Mrs Rinehart deprive these claims of their commercial character. Nor do I accept that any lack of commercial sophistication on the part of either of the applicants would cause the disputes not to be characterised as commercial disputes.

Claims impugning the Hope Downs deed and the 2007 HD deed

562 Claims 35 to 39, 42.1, 42.2, 48 and 49 seek to impugn the Hope Downs deed and the 2007 HD deed. In my view, the execution of those deeds involved the creation of a commercial relationship between the applicants and the other signatories to those deeds because of the provisions in those deeds which concern the ownership of valuable commercial assets and the distribution of profits generated by those assets.

563 I am satisfied that all of these claims give rise to commercial disputes. The commercial nature of the disputes arises from their underlying concern with entitlements to valuable commercial assets and income streams from exploitation of valuable commercial assets.

Mr Hancock's claim challenging the 2010 arbitration agreement

564 The applicants accept that Mr Hancock's claim to set aside clause 11 (originating application paras 45.3, 46.3 and 47) is a claim "in relation to" the 2010 deed of variation falling within the scope of clause 11. However, that concession does not address the question whether clause 11 is an agreement to submit disputes to "commercial arbitration".

565 The basis of Mr Hancock's claim is set out at paras 450 to 467 of the statement of claim. In substance, it is that clause 11 was included in the 2010 deed of variation for improper

purposes including to prevent Mr Hancock from advancing claims in public litigation about Mrs Rinehart's misconduct and to protect Mrs Rinehart from such claims. Further, it is alleged that Mr Hancock would not have entered into the 2010 deed of variation including clause 11 had Mrs Rinehart and HPPL revealed the true position concerning claims available to Mr Hancock against Mrs Rinehart and HPPL (statement of claim para 456). It is also alleged that clause 11 is void for reasons that include misleading and deceptive conduct and fraudulent concealment and misrepresentations concerning claims available to Mr Hancock against Mrs Rinehart and HPPL (statement of claim para 459).

566 The subject matter of the 2010 deed of variation itself is not commercial. In essence, it is provides for an interest free loan from mother (as trustee of the HMH Trust) to son, for the purpose of enabling Mr Hancock to make payments in connection with an interest free loan from HPPL. The deed does, however, provide that the parties "confirm" the terms of earlier deeds, namely the 2007 CS deed and the 2009 deed of further settlement. It also contains an acknowledgement, by Mr Hancock, that breaches of the 2010 deed (or the 2007 CS deed or the 2009 deed of further settlement) will cause a breach of the Hope Downs deed, giving rise to rights in Mrs Rinehart and HPPL to stop payments otherwise due to Mr Hancock and to seek re-imbursement of payments made to him. I do not accept that these terms create a commercial relationship between Mr Hancock, Mrs Rinehart and HPPL. In my view, they are properly characterised as the conditions on which the parties agreed that Mr Hancock would receive interest-free loans from Mrs Rinehart and HPPL, such loans not being transactions which created a commercial relationship between the parties.

567 The fact that the deed concerns HPPL's compliance with its income tax obligations (under Division 7A of the *Income Tax Assessment Act 1936* (Cth)) does not give Mr Hancock's claim a commercial character.

568 However, in my view, the allegations to the effect that Mr Hancock would not have executed the 2010 deed of variation had Mrs Rinehart and HPPL revealed the true position concerning claims available to him, and that clause 11 is void because it was the result of misleading and deceptive conduct, and fraudulent misrepresentation and concealment, squarely raise questions as to the true entitlements to valuable commercial assets and profits earned from those assets. On the applicants' case, these entitlements depend upon an analysis of commercial transactions such as the 1995 "debt reconstruction". In my view, these are

commercial subjects which cause Mr Hancock's claim to impugn clause 11 to be a commercial dispute.

569 Accordingly, I am satisfied that the challenge to clause 11 gives rise to a commercial dispute.

Mr Hancock's claim challenging the 2009 release and the 2009 arbitration agreement

570 Mr Hancock challenges the validity and enforceability of the release in Recital B and clause 4 of the 2009 deed of further settlement, and also the validity and enforceability of clause 16 (originating application paras 45.1, 45.2, 46.1, 46.2 and 47).

571 The basis of Mr Hancock's claim is set out at paras 441 to 449 and 457 to 467 of the statement of claim. In essence, he makes the same allegations concerning the inclusion of the releases and clause 16 in the 2009 deed of further settlement as he makes concerning the inclusion of clause 11 in the 2010 deed of variation.

572 The applicants accept that clause 16 applies to these claims. The applicants also accept that, because the 2010 deed of variation "confirmed" the 2009 deed of further settlement, their claims to set aside recital B and clause 16 are claims "in relation to" the 2010 deed of variation.

573 The subject matter of the 2009 deed of settlement is not commercial. The deed does not create a commercial relationship between the parties, and was not made in the context of a commercial relationship. In essence, it provides for an interest free loan from mother (as trustee of the HMH Trust) to son to build a holiday home and for other purposes. The agreement to forego legal claims against several persons in Recital B reflects the history of disputation between the parties but the question whether it was procured by misconduct is not a commercial question.

574 However, for similar reasons to those given in relation to Mr John Hancock's claim challenging clause 11 of the 2010 deed of variation, the challenge to the relevant provisions of the 2009 deed of further settlement gives rise to a commercial dispute.

Mr Hancock's claims challenging the validity and enforceability of the release in the 2007 CS deed, and seeking to set aside the 2007 CS deed

575 For similar reasons to those given in relation to Mr Hancock's claim challenging the 2010 agreement, the challenge to the relevant provisions of the 2007 CS deed and the claim to set aside the deed both give rise to commercial disputes.

Other claims

576 For similar reasons to those given above, I have no doubt that the remainder of the claims made in the proceeding give rise to commercial disputes.

Principles concerning scope of the arbitration agreements

577 As agreed question (9) recognises, the arbitration agreements fall into two groups:

(1) The agreements in the 2005 deed of obligation and release, the Hope Downs deed and the April 2007 HD deed, which cover disputes "under" the relevant deed;

(2) The agreements in the 2009 deed of further settlement and the 2010 deed of variation, which cover disputes "arising out of or in relation to" the relevant deeds. For the 2009 deed of further settlement, the relevant deeds are the 2009 deed and the 2007 CS deed. For the 2010 deed of variation, the relevant deed is that deed itself.

578 Having regard to my conclusions above concerning the arbitration agreement in the Porteous settlement deed, it is unnecessary to consider that agreement further.

Any dispute "under this deed"; "disputes hereunder"

579 In *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASC 66; (2013) 298 ALR 666, Martin CJ (Buss JA agreeing) concluded (at [56]):

> The weight of decisions in Australia and in leading commercial jurisdictions internationally establishes that courts will generally take a broad, liberal and flexible approach to the construction of agreements to refer disputes to arbitration, and will favour a construction of an agreement which provides a single forum for the adjudication of all disputes arising from, or in connection with, that agreement.

580 In *TCL* at [16], French CJ and Gageler J observed that "parties who enter into an arbitration agreement for commercial reasons ordinarily intend all aspects of the defined relationship in respect of which they have agreed to submit disputes to arbitration to be determined by the same arbitral tribunal".

581 In *Fiona Trust,* the relevant arbitration clause provided that "[a]ny dispute arising under this charter shall be decided by the English courts", but either party could elect to have the dispute referred to arbitration. At [15], Lord Hoffman, with whom the other Law Lords agreed, held that the arbitration clause applied to a dispute about whether the main agreement was procured by bribery on the basis that the clause "contains nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else." In reaching this conclusion, Lord Hoffman

applied a presumption that the parties "as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal" (at [13]).

582 Lord Hoffman's approach was rejected by Bathurst CJ in *Rinehart v Welker* at [121] although, as the HPPL respondents noted, the latter decision did not concern the question whether a dispute as to the validity of the Hope Downs deed was a dispute "under" the deed.

583 Lord Hope (at [26]) stated that there is a "golden rule" that if "the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly". Read in context, Hope LJ was referring to the parties to an international commercial contract. In the light of the reasons of Bathurst CJ in *Rinehart v Welker,* I do not accept that a golden rule to the effect stated by Hope LJ applies to any of the arbitration agreements in this case.

584 As set out at [109] above, based on Bathurst CJ's interpretation of clause 20 of the Hope Downs deed in *Rinehart v Welker,* a dispute will be a dispute "under" a deed if the outcome of the dispute is "governed or controlled" by the deed. In considering the scope of clause 20, at [123], Bathurst CJ noted that the phrase "under this deed" has "consistently been given a narrower construction than phrases such as 'arising out of the deed' or 'in connection with the deed'". At [124], the Chief Justice cited the following analysis by French J (as he then was), in *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 122 ALR 279; (1993) 43 FCR 439 ("*Paper Products*") at 448, concerning an arbitration clause which applied to "any dispute between the parties hereto arising under this agreement":

> Case citations and examples could be multiplied but there is little point. When the language of the arbitration clause in question is sufficiently elastic, then the more liberal approach of the courts to which Kirby P and others have referred can have some purchase. A wide construction of such clauses can be supported on the basis advanced by Clarke JA that it is unlikely to have been the intention of the parties to artificially divide their disputes into contractual matters which could be dealt with by an arbitrator and non-contractual matters which would fall to be dealt with in the courts. When, as here, the parties have agreed upon a restricted form of words which in their terms, and as construed in the courts, limit the reference to matters arising ex contractu, there is little room for movement. I am satisfied that neither the trade practices claim, nor the claims for breach of warranty and 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. No authority has been cited to me which would support the wide construction of the clause contended for by Tomlinsons and certainly the natural meaning of the words does not support their extension to disputes arising out of matters antecedent to the agreement. I come to this conclusion with some regret

> because I have no doubt, having regard to the various provisions of the agreement which have been set out, that much of the evidence in this case would go to the actual performance of the machines and would be evidence of the kind that one would expect to hear in an action for breach of contract. It may be that the resort to the *Trade Practices Act*, negligent misstatement and breach of collateral warranty is made necessary because of the limiting provisions of the agreement. It is of course possible that the parties may consent to have their dispute referred to arbitration. However, there is nothing in the language of the agreement which would justify an order for the stay of these proceedings. In the circumstances, the motion will be dismissed.

585 In *Paper Products,* French J referred with approval to the following statement by Balcombe J in *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 All ER 577; [1989] QB 488; (1988) 3 WLR 868 at 881:

> [A] dispute between the parties as to whether an innocent misrepresentation or negligent misstatement, which led Elmer to enter into the contract, gives a right to damages, is neither a dispute as to the construction of the contract, nor a dispute as to any matter arising under the contract.

586 In *Hi-Fert* at 22, Emmett J (Beaumont J and Branson J agreeing) said, after considering authorities including *Paper Products*, in construing an arbitration clause applying to any dispute "arising from this charter or any Bill of Lading hereunder":

> [W]here there is a dispute as to a claim in respect of conduct which is antecedent to the making of a contract, I do not consider that such a dispute can be said to arise *from* the contract in question. In relation to the Addendum Contract, for example, the conduct complained of by Hi-Fert was antecedent to and did not depend upon the contractual relationship that existed by reason of the Addendum Contract. That latter contractual relationship was induced by the conduct complained of. In the present case, the Non-Contractual Claims are not generated by the Charter Contract. They will not be resolved by examining the Charter Contract but by considering and assessing evidence external to it. They do not *arise out of* the Charter Contract nor do they *arise from* the Charter Contract.

587 In *Rinehart v Welker,* Bathurst CJ identified the following matters the outcome of which was not governed or controlled by the Hope Downs deed:

(1) An application for removal of Mrs Rinehart as trustee of the HMH Trust (although the relevant circumstances would include the deed, and it would be open to Mrs Rinehart to argue that what was done was reasonable in the context of the regime established by the deed) (at [127]).

(2) Defences based on clauses 7(d), 7(e) and 8 as constituting either a representational or conventional estoppel, on the basis that "to the extent that the respondents are bound from pursuing their claim as a result of the estoppels alleged by [Ms Ginia Rinehart], that is not a matter governed or controlled by the [Hope Downs deed], although the

representations and assumptions said to arise from the [Hope Downs deed] will be relevant to the determination of the claim" (at [133]).

(3) Alleged breaches of undertakings in the deed, which breaches may be relevant to determining whether to grant the relief sought but would not necessarily be determinative of the outcome (at [146]).

Any dispute "arising out of or in relation to" relevant deeds

588 This language has potential relevance for claims made by Mr Hancock. Mr Hancock accepted that disputes concerning the validity of the 2009 deed of further sesttlement and the 2010 deed of variation arose out of each deed within the meaning of the arbitration agreements contained in those deeds.

Principles governing interpretation of releases

589 Mrs Rinehart and the HPPL respondents argued that one or more arbitration agreements applied to matters in the proceeding by reason of a release or a covenant not to sue in the deed containing the relevant arbitration agreement. Accordingly, based on the reasons given in answer to agreed question (7), it is be necessary to consider whether there is a sustainable argument that the relevant contractual provisions have application to claims made by the applicants.

590 The general principle identified in *Grant v John Grant & Sons Pty Ltd* [1954] HCA 23; (1954) 91 CLR 112 ("*Grant*") is that the general words in a release are limited to that thing or those things which were especially in contemplation of the parties at the time when the release was given. In his submissions on the interpretation of the various provisions said to operate as releases of claims by the applicants, Mr Withers emphasised the importance of determining the "true purpose of the transaction". That expression is taken from the following passage of the judgment of Dixon CJ, Fullagar and Kitto JJ in *Grant* at 129-130:

> [A] releasee must not use the general words of a release as a means of escaping the fulfilment of obligations falling outside the true purpose of the transaction as ascertained from the nature of the instrument and the surrounding circumstances including the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and the actual intention of the releaser.

591 In *Rinehart v Rinehart* [2014] FCA 1241; (2014) 320 ALR 195 at [70], Jacobson J said:

> The general words of a release are to be restrained by the particular occasion which is the subject of the agreement and the scope of a general release is to be determined

> from the nature of the instrument and the circumstances in which it was made including the state of knowledge of the parties concerning the character of the liability in question: [*Grant*] at 123, 129-130.

Covenants not to sue and pleas in bar, and agreements to withdraw allegations

592 In *Carr v Thomas* [2009] NSWCA 208 at [34] and [35], the Court of Appeal (Beazley, Ipp and McColl JJA) said:

> A covenant not to sue does not act as a release of the obligation owed to the other party. Rather, it is a contract between two parties that one will not sue the other. Any attempt to do so constitutes a breach of contract. Parties usually make provision in their agreement that the covenant can be pleaded in bar as was done in this case. This saves the party with the benefit of the covenant from bringing a separate action for breach of contract. The covenant acts as a bar to avoid circuity of action: *Solly v Forbes* [1820] EngR 383; (1820) 2 Brod & Bing 38 at 47; [1820] EngR 383; 129 ER 871 at 875.
>
> A plea in bar is a well known device. An example is found in some Limitation Statutes, where the expiry of the limitation period renders a claim unenforceable but does not extinguish the claim. In such cases, it is incumbent upon the party sued to plead the statute so as to take the benefit of the statutory unenforceability of the claim. If a claim is extinguished, it cannot be brought. An omission to plead the statute does not revive the claim.

593 In *Baltic Shipping Co v Merchant Mikhail Lermontov* (1994) 36 NSWLR 361 at 370 to 371, Handley JA stated that an absolute and unconditional agreement not to sue is a release, citing *McDermott v Black* [1940] HCA 4; (1940) 63 CLR 161("*McDermott*") at 183, 186 and 187. In *McDermott,* at 183, Dixon J said:

> An agreement not to sue upon particular allegations might give a defendant a good equitable plea, but at common law it would be necessary for him to show that it amounted to an accord and satisfaction discharging the cause of action or else that it gave rise to an estoppel.

594 In *McDermott,* the High Court found, by majority, that the withdrawal of allegations in consideration of an extension of time for completion of a contract amounted to a promise not to sue in respect of alleged misrepresentations or to a release of any cause of action in respect of them and, accordingly, constituted a complete defence to an action for deceit based on the misrepresentation.

595 In *Lavin v Toppi* [2014] NSWCA 160; (2014) 87 NSWLR 159; (2014) 308 ALR 598*,* Leeming JA accepted that in some circumstances, the covenant could be pleaded in bar as a release.

596 No particular words are required to create a covenant not to sue: cf *El-Mir v Risk* [2005] NSWCA 215 at [68].

Matters subject of clause 14 of the 2005 deed of obligation and release

597 The HPPL respondents contended that all of the "substantive claims" in the proceeding fall within the scope of clause 14, to the extent that those claims are made by Mr Hancock, by reason of:

(1) the releases said to have been given by Mr Hancock in clauses 2 and 3 of the 2005 deed of obligation; and

(2) the "ratification" of the 2005 deed of obligation and release by the Hope Downs deed and the 2007 HD deed.

598 Although Mrs Rinehart organised her submissions by reference to different descriptions of the relevant claims, I understood her case to correspond with that of the HPPL respondents.

599 At [168] above, I noted that the relief sought in prayers 1 to 34 of the originating application broadly corresponds with the paragraphs in the statement of claim referred to by the HPPL respondents as the "substantive claims". In turn, matters (1) to (5) in [556] above are defined by reference to the relief sought within prayers 1 to 34.

600 The submissions made by Mrs Rinehart and the HPPL respondents assume that, in identifying the relevant "matter" for s 8(1), it is appropriate to characterise Mr Hancock's claims under prayers 1 to 34 as separate matters from Ms Rinehart's claims under the same prayers. I will make this assumption.

601 As to clause 2, I accept the applicants' contention that the word "obligations" probably means something different to "claims", having regard to the language of clause 3. However, clause 2 is arguably not limited to established claims because it refers to obligations that the "Releasees" "may have" to Mr Hancock. Clause 2 does not refer to future obligations: it refers to obligations "as [at] the date of execution hereof".

602 Clause 3 is expressed in very wide terms. I accept that clauses 3(b), (c) and (d) are not expressed as releases, but consider it arguable that clause 3(c) is an unconditional covenant not to sue which may amount to a release.

603 In my view, there is a sustainable argument that clauses 3(b) and (c) extend to claims which had not been articulated by Mr Hancock at the time of making the 2005 deed of obligation and release. This includes both claims that had not been made but are based on allegations that had been made (examples of which, on the current evidence, are the claims in the

proceeding based on the alleged 1992 to 1994 manipulation of HFMF's financial position, and the 1995 "debt reconstruction") and claims that had not been made based on allegations that had also not been made, but which are based on events which had occurred (the claims based on the alleged misappropriations of the Roy Hills, Nicholas Downs and Mulga Downs tenements). In reaching this conclusion, I note that the evidence before me did not identify the "serious and substantial differences" referred to in recital C to the deed and, as a result, I do not make any finding about what matters are "connected with or incidental to the matters the subject of" the 2005 deed of obligation and release.

604 Accordingly, I accept that there is a sustainable argument that the claims made by Mr Hancock based on the "substantive claims" in the statement of claim, concerning events prior to 1 April 2005, fall within the scope of clause 2 or 3 of the 2005 deed of obligation and release. It can be reasonably anticipated that, as parties to the deed, HPPL, HFMF and Mrs Rinehart would seek to rely on those clauses in answer to those substantive complaints: cf *Rinehart v Welker* at [130]. On that basis, I am satisfied that there is a dispute under the 2005 deed of obligation and release between the parties to that deed concerning Mr Hancock's entitlement to relief based on allegations included in the "substantive claims".

605 In my view, there is nothing in the language of clause 3 which extends to claims which had not arisen at the time that the releases in clause 3 were given. The word "forever" in clause 3(a) does not have that effect: cf *Welker v Rinehart (No 2)* [2011] NSWSC 1238 at [37]. Accordingly, it does not cover the substantive claims that are based on events occurring after the deed of obligation and release.

606 Accordingly, matters 1 to 5 are the subject of the clause 14 to the extent that they comprise disputes between Mr Hancock, Mrs Rinehart and HPPL about events occurring prior to the 2005 deed of obligation and release. Those matters are not the subject of clause 14 to the extent that they concern claims made by Ms Rinehart, or claims made against 150 Investments (matter 2).

607 I do not consider that the "ratification" of the 2005 deed of obligation and release by the Hope Downs deed and the 2007 HD deed affects the position.

Matters subject of clause 20.2 of the Hope Downs deed

608 The HPPL respondents (supported by Mrs Rinehart) made the following contentions concerning the application of clauses 20.2 of the Hope Downs deed:

(1) The "substantive claims" are "Claims" within the meaning of the Hope Downs deed and are therefore barred and released by the Hope Downs deed.

(2) The "substantive claims" are "allegations" arising out of the subject matter of the "WA proceedings" within the meaning of the Hope Downs deed and are therefore barred and released by that deed.

(3) The applicants are estopped from bringing the "substantive claims" by reason of clause 4 of the Hope Downs deed.

(4) The "substantive claims" must be submitted to arbitration by reason of the covenant not to sue in clause 7(b) of the Hope Downs deed.

The "validity claims" do not form a separate dispute. They are, in substance, matters raised in reply to the releases and bars that will be put forward by the HPPL respondents (and Mrs Rinehart) in defence of the substantive claims.

Are the "substantive claims" "Claims" within the meaning of the Hope Downs deed?

609 By clauses 6(a) and (b) of the Hope Downs deed, the parties to that deed gave mutual releases and covenants not to sue with respect to "Claims". By clause 11 the parties agreed that each was entitled to "plead this deed in bar to any Claim or proceeding the subject of a release in this deed". By clause 13 the parties agreed between themselves not to assist in the prosecution of "Claims".

610 "Claim" is defined in clause 1.1(a) to mean "any claim, demand, action, suit or proceeding … for damages, injunctions, debt, restitution or other remedy including, without limitation, breach of fiduciary duty of whatever nature and howsoever arising with respect to events or matters arising or actions taken prior to the date of this deed".

611 In *Rinehart v Welker,* the Court of Appeal held that clause 1.1(a), although widely expressed, is limited to claims "existing or discontinued or claims which were in existence at the time the [Hope Downs deed] was entered into" (at [137]). In *Hancock v Rinehart 2013* (Bergin CJ in Eq), her Honour held that the definition of "Claim" is limited to claims that were "made" (in the sense of "asserted" or "communicated") at the time the Hope Downs Deed was entered into (at [119]-[122] described as "consummate claims and not inchoate claims").

612 At [123], Bergin CJ in Eq referred to para (d) of the definition of "Claim" and said:

> These are … in the instance of the unsigned affidavit, claims that were made that were yet to be the subject of signature as required in the court process. They are

> circumstances and events that have been formulated into claims. They are "existing" claims. I am respectfully of the view that the expression used by the Chief Justice in relation to "claims which had not arisen" in paragraph [142] when read with the conclusions in paragraph [137] of the Chief Justice's judgment was intended to be a reference to claims that were not in existence, that is, claims that had not been made.

613 Leave to appeal from Bergin CJ in Eq's decision was refused on the basis that "Claim" in clause 1.1(a) of the Hope Downs deed meant a "claim for something" rather than a "right to something": *Rinehart v Hancock* at [4], [6]-[11].

614 The HPPL respondents submitted that this Court should not follow Bergin CJ in Eq in finding that the definition of "Claim" in clause 1.1(a) of the Hope Downs deed was limited to claims that were consummate (in the sense of asserted or communicated) at the time the Hope Downs deed was entered into. They argued that her Honour's judgment and the judgment of the Court of Appeal in *Rinehart v Hancock* inappropriately read the word "claim" in clause 1.1(a) as if it were coterminous with the following words ("demand, action, suit or proceeding") when it should have been given a distinct and separate operation to avoid redundancy. In any event, the HPPL respondents argued, the question whether "claim" means a "claim for something" is different to the question of whether that claim needs to have been "made" (or "asserted") by the releasor at the time of the release in order to be caught by the release. The limitation imposed by Bergin CJ in Eq was said to be stricter than the correct approach based on *Grant* (restricting general releases to matters in the contemplation of the parties), which approach was said to have been superseded by the less restrictive approach taken in *Bank of Credit and Commerce International SA (in liq) v Ali* [2002] 1 AC 251 ("*BCCI*").

615 I do not accept that the general principle in *Grant* has been superceded: see, for example, *Ashton v Pratt* [2015] NSWCA 12; (2015) 88 NSWLR 281 at [174] Bathurst CJ (McColl JA and Meagher JA agreeing). I also do not accept that Bergin CJ in Eq misapplied *Grant* or applied a different principle to the principle stated in *Grant.*

616 The HPPL respondents contended that:

(1) Bergin CJ in Eq and the Court of Appeal did not have occasion to address the level of specificity at which a claim must have been "made" or "asserted" as at the date of the Hope Downs deed in order for it to be caught by the definition of "Claim", because there was no suggestion in those proceedings that the relevant claims (being claims

relating to the validity of amendments to the articles of HPPL in 2006 shortly before the Hope Downs deed) had been asserted at that time.

(2) It would not be appropriate to construe the definition of "Claim" so that a claim made before the Hope Downs deed was entered into needed to have the same legal formulation as the claim said to be released or barred. If that construction were adopted, a party could avoid the releases and bars in clauses 6, 11 and 13 simply by changing the cause of action relied upon (for instance, asserting a *Barnes v Addy* claim instead of a direct breach of trust claim). Such a construction would fall foul of the observations of Gleeson CJ in *Francis Travel* at 165 (see [100] above), by making the application of the releases and bars depend on "fine shades of difference in the legal character of individual issues" or "the ingenuity of lawyers in developing points of argument". The parties are not likely to have intended such an outcome.

(3) The terms of Hope Downs deed confirm that the parties did not intend the releases and bars in respect of "Claims" to be restricted to any particular legal formulation of any claim. Clause 1.1(a)(i) plainly intends to capture all potential causes of action or remedies ("for damages, injunctions, debt, restitution or other remedy including, without limitation, breach of fiduciary duty of whatever nature and howsoever arising…"). Clause 1.1(d) also specifically extends the definition of "Claim" to the claims made in Mr Hancock's unsworn affidavit in circumstances where the claims asserted in that document are not formally pleaded and no particular form of relief is specified. The text is not consistent with the parties intending only to release claims of a particular legal character.

(4) For similar reasons, the definition of "Claim" should not be construed so that every particular of the claim alleged to be released or barred needs to have been articulated at the time of the release in order for that claim to have been "made". A claim may be "made" without any degree of particularisation. Further, in concluding that the definition of "Claim" extended only to consummate claims, Bergin CJ in Eq relied on the judgment of Lord Nicholls of Birkinhead in *BCCI*, where his Lordship stated that while there was no room for special "rules" of interpretation of general releases, such releases were frequently to be understood as being intended to apply to claims, known or unknown, "relating to a particular subject matter" (at [118]). Confining the terms of the release to a particular "subject matter" is not consistent with a construction of clause 1.1(a) that allows a party to circumvent the release on the basis that the claims

asserted by it at the time of the release differed in their particulars from the claims it presently asserts.

(5) Finally, an approach requiring a strict or complete overlap between the particulars of the claim made at the time of the release and the claim alleged to have been released or barred would also not be consistent with the rationale stated in *Grant* of preventing a party from "escaping the fulfilment of obligations falling outside the true purpose of the transaction as ascertained from the nature of the instrument and the surrounding circumstances" (*Grant* at 129-130). In *Grant* itself the High Court found that the general release was confined to a particular "area of dispute" (at 131). It did not suggest that it was confined to a particularised claim or set of particularised claims.

617 Accordingly, the HPPL respondents submitted that in applying the definition of "Claim", it is sufficient that the claim in question is one *the substance of which* was made at the time of the release, even if the claim that was made differs in its particular legal formulation. I accept that this submission is arguably correct.

618 Applying the propositions set out above, the HPPL respondents submitted that all of the "substantive claims" were asserted in substance in Mr Hancock's unsworn affidavit. I accept that this submission is arguable in relation to alleged 1992 to 1994 manipulation of HFMF's financial position and the 1995 "debt reconstruction", on the basis that the matters pleaded in paras 128 to 274 of the statement of claim on those subjects are recorded, in substance, in the affidavit. The HPPL respondents did not explain how the other matters pleaded in the "substantive claims" were asserted "in substance" in the affidavit beyond saying that "the broad subject matter" of the unsworn affidavit is the same as the "substantive claims". I am not satisfied that the unsworn affidavit says anything that could be construed as a reference to the Roy Hills tenements.

619 There are certain claims made in the unsworn affidavit (whether a claim for something or a right to something) that are "Claims" for the purposes of clause 1.1 of the Hope Downs Deed. For example, as Brereton J found in *Hancock v Rinehart 2015* (at [351]), the unsworn affidavit included a claim for accounts of the HMH Trust up to 30 August 2006. At least to that extent, the reference to the unsworn affidavit in the definition of "Claims" is given content.

620 However, I do not accept that there is a sustainable argument that the statements in the unsworn affidavit that there "should be some redress" and "there must be some redress" are

"Claims". The statements do not amount to a demand for something, or the assertion of a right to something. They are expressions of a belief that "redress" should or must be given for wrongs identified in the affidavit. Further, the language of "redress" does not identify the substance of what might be demanded or of any right which might be asserted. Accordingly, I do not accept that there is a sustainable argument that any of the claims made in this proceeding (being the claims for relief in the originating application as distinct from the "substantive claims", as defined by the HPPL respondents) were made, in substance or at all, in the unsworn affidavit.

621 Since the applicants in this proceeding are not making any "Claims" within the meaning of the Hope Downs deed, and Mrs Rinehart and the HPPL respondents did not identify a basis for applying clause 6(b) if the applicants are not making any such "Claims", I do not consider there to be a sustainable argument that the proceedings are "in respect of the Claims" within the meaning of clause 6(b).

Are "substantive claims" allegations arising out of the subject matter of proceeding CIV 1327/2005 and therefore barred and released by the Hope Downs deed?

622 The release in clause 6 is not confined to "Claims". By clause 6(c) it provides that each party:

> Withdraws and forever abandons any and all allegations made against any of the other parties to this deed in respect of or arising (in whole or in part) directly or indirectly out of: (i) the Proceedings and any of the other Claims; (ii) the subject matter of the Proceedings … wherever and whenever arising, whether … known or unknown at the time of execution of this deed.

623 The "Proceedings" are proceeding CIV 1327/2005. In my view, the "subject matter" of the proceedings refers to the rights or liabilities in dispute in the proceedings (that is, its words have a similar meaning to the word "matter"). Allegations made in respect of the subject matter of proceeding CIV 1327/2005 include allegations contained in Mr Hancock's unsworn affidavit.

624 The HPPL respondents contended that clause 6(c) is a release. While no special form of words is necessary to achieve an effective release, what must be demonstrated by the language used is that there is an intention to discharge some right of action or to give up some claim. Neither Mrs Rinehart nor the HPPL respondents identified any case in which language of the kind used in clause 6(c) has been construed as a release. Having regard to *McDermott,* I accept that there is a sustainable argument that the language of withdrawal and abandonment of allegations is capable of being construed as amounting to the discharge of a

right of action or a claim. Accordingly, I accept that there is a sustainable argument that clause 6(c) operates to bar and release the claims made in the proceeding by Mr Hancock, based on allegations made by him in the unsworn affidavit. Those claims are the claims based on the alleged 1992 to 1994 manipulation of HFMF's financial position and the 1995 "deed reconstruction". I accept that there is a sustainable argument that the claims based on the alleged misappropriation of the Nicholas Downs and Mulga Downs tenements are also covered by clause 6(c). Mr Hancock is bound by the Hope Downs deed by his execution of the April 2007 HD deed (subject to his claims about the validity or enforceability of those deeds). I do not accept that clause 6(c) has any relevant operation for claims made by Ms Rinehart since she made no relevant allegation which could be withdrawn by clause 6(c).

Are Ms Rinehart and Mr Hancock estopped from bringing the "substantive claims" by reason of clause 4 of the Hope Downs deed?

625 By clause 4 of the Hope Downs deed, the parties 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 including, without limitation, the Hope Downs Tenements which Tenements have been at all times beneficially owned by only HPPL and or HDIO and which are now fifty per cent (50%) beneficially and legally owned by HDIO.

626 I have previously found that each of the Hope Downs, Roy Hills, Nicholas Downs tenements and the Mulga Downs tenement are "Hancock Group Interests" within the meaning of clause 4.

627 The HPPL respondents submitted that the acknowledgment in clause 4 governs or controls the outcome of all of the "substantive claims", relying on estoppel by deed. The basis of estoppel by deed is explained by Lord Maugham in *Greer v Kettle* [1938] AC 156 at 171:

> Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between parties and privies, and therefore as not admitting any contradictory proof. It is important to observe that this is a rule of common law, though it may be noted that an exception arises when the deed is fraudulent or illegal. The position in equity is and was always different in this respect, that where there are proper grounds for rectifying a deed, e.g., because it is based upon a common mistake of fact, then to the extent of the rectification there can plainly be no estoppel based upon the original form of the instrument. It is at least equally clear that in equity a party to a deed could not set up an estoppel in reliance on a deed in relation to which there is an equitable right to rescission or in reliance on an untrue statement or an untrue recital induced by his own misrepresentation, whether innocent or otherwise to the other party.

628 In *Cousens v Gray Ridge Pty Ltd* [2000] VSCA 96, Batt JA (Charles JA and Chernov JA agreeing) said (at [57]):

> Estoppel by deed is not confined to statements in recitals but applies also, and indeed originally applied only, to statements in operative provisions: *Coke on Litt (1832 edn., vol.2) 352(b)***;** *Greer v. Kettle* per Lord Maugham and, for instance, *Helmich & Taylor v. Thorp & Strathdee* [1997] 3 NZLR 86 at 92. If estoppel by deed is now properly to be considered as a form of estoppel by convention (as Sir Alexander Turner may be said to have demonstrated), then it may be that even at common law no estoppel arose here, for there is no estoppel by convention unless it can be shown that the alleged assumption has in fact been adopted by the parties as the conventional basis of their relationship (*Con-Stan Industries of Australia*) …
>
> (footnotes omitted)

629 As previously noted, in *Rinehart v Walker,* Bathurst CJ concluded that to the extent that certain provisions of the Hope Downs deed gave rise to an estoppel by convention, that was not a matter governed or controlled by the deed, although the assumptions said to arise from the deed would be relevant to the determination of the claim. Once it is accepted that the relevant estoppel is an estoppel by convention, Bathurst CJ's conclusion applies to any dispute arising out of clause 4 of the Hope Downs deed.

630 Accordingly, I do not accept that there is a sustainable argument that clause 4 governs or controls the outcome of any of the claims for relief based on the "substantive claims".

Must the "substantive claims" be submitted to arbitration by reason of the covenant not to sue in clause 7(b) or 7(e) of the Hope Downs deed?

631 In *Rinehart v Welker,* the Court of Appeal found that the undertakings in clauses 7(c), (d) and (e) of the Hope Downs deed did not "govern or control" the outcome of the claims asserted in those proceedings, being claims for the removal of Mrs Rinehart as trustee of the HMH Trust by reason of events occurring in 2011 (at [146]). However, the Court of Appeal did not consider clause 7(b), nor did it consider the application of clause 7 to claims other than the claims then asserted by the applicants for removal of Mrs Rinehart as trustee.

632 I accept that it is arguable that clause 7(b) of the Hope Downs deed is properly construed as an absolute and unconditional covenant promise "not to challenge" the right of any member of the "Hancock Group" to any of the "Hancock Group Interests". It is arguable that a "challenge" would include prayers 15 and 29 of the originating application which seek declaratory relief as to the ownership by HDIO and HPPL respectively of the Hope Downs and Nicholas Downs tenements. Prayers 1 and 29 do not fall within the scope of clause 7(b)

because they challenge the rights of entities which were not in existence at the time of the Hope Downs deed and, so, do not fall within the meaning of "Hancock Group".

633 Clause 7(e) relevantly precludes challenges to the rights of Mrs Rinehart "to any of [her] right title or interest in any of the Hancock group or in any trust in which [she] or any members of the Hancock Group is a beneficiary". In my view, clause 7(e) arguably covers prayer 8 (which seeks a declaration as to Mrs Rinehart's ownership of shares in HPPL), the consequential relief sought in prayers 23, 24 and 28.1 to 28.3 and the related relief sought in prayer 27.2 of the originating application.

Conclusions about "substantive claims" subject to clause 20.2

634 In my view, by reason of clause 6(c) of the Hope Downs deed, there is a sustainable argument that Mr Hancock's claims based on the alleged 1992 to 1994 manipulation of HFMF's finances and the 1995 "debt reconstruction", and for relief arising from the alleged misappropriation of the Nicholas Downs and Mulga Downs tenements, fall within the scope of clause 20.2.

635 By reason of clauses 7(b) and (e) variously, the applicants' claims for declarations in prayers 8, 9, 15, 23, 24, 27.2, 28.1 to 28.3 and 29 of the originating application also fall within the scope of clause 20.2.

636 Construing clause 20.2, so as to avoid a conclusion that the parties intended that the appropriate tribunal should be determined by "fine shades of difference in the legal character of individual issues", in my view, there is a sustainable argument that clause 20.2 also covers the claims made by prayers 10 to 14, 16 to 21, 22, 25, 26, 27.1, 28.4 and 28.5, 30 and 31 of the originating application.

The "validity claims"

637 The HPPL respondents referred to the applicants' claims disputing the validity of the various deeds as "validity claims", being the various claims pleaded in paras 275 to 506 of the statement of claim.

638 At [168] above, I noted that the relief sought in prayers 35 to 47 broadly corresponds with the "validity claims". In turn, matters (6) to (10) in [556] above are defined by reference to the relief sought within prayers 35 to 47.

639 In their written submissions, the HPPL respondents contended that, seen in context, the "validity claims" "are directed solely towards preventing the respondents from relying on the releases, bars, covenants not to sue, and referrals to arbitration contained in the Hope Downs deed and the April 2007 HD deed". This contention is not correct as a matter of construction of the relief sought in the originating application. Matters (9) and (10) in [556] above are not directed to those ends at all. In fact, only matter (6) is as narrowly confined as the HPPL respondents suggested.

640 However, I accept that the "validity claims" are, in large part, directed towards preventing the respondents from relying on the releases, bars, covenants not to sue, and referrals to arbitration contained in the Hope Downs deed and the April 2007 HD deed (see, for example, statement of claim paras 326, 338, 341, 344, 348, 358, 379, 407, 417, 421, 426, 435, 467, 500). The applicants also make claims, in the alternative, premised on loss suffered by reason of those releases, bars and covenants not to sue being effective (statement of claim para 378) and legal costs incurred in responding to attempts to deploy the releases, bars, covenants not to sue, and referrals to arbitration (statement of claim paras 504-506).

641 The HPPL respondents next contended that the "validity" claims "are in truth matters that in substance arise in reply to a defence on the part of the respondents that the substantive claims are released or barred. It is in anticipation of such a defence that the "validity claims" are advanced." I do not doubt that the "validity" claims are made, at least in part, pre-emptively in anticipation of the respondents' reliance on the releases, bars, covenants not to sue and arbitration agreements. However, that does not mean that those claims are not properly made in the statement of claim. As Mr McClintock SC conceded in relation to the allegations of duress in the statement of claim, they are not "demurrable".

642 The HPPL respondents next contended that the scope of a "dispute" (within the meaning of clause 20 of the Hope Downs deed) is not measured only by reference to the claims brought by the claimant. As the judgment in *Rinehart v Welker* makes clear (at [128] ff), it also turns on the defences deployed or to be deployed in response to those claims. By extension, the HPPL respondents argued, it also extends to matters relied upon in reply to those defences.

643 Based on these premises, the HPPL respondents argued that the proper analysis of whether the "validity claims" are required to be referred to arbitration is as follows:

(1) There will be a dispute "under" the Hope Downs deed if there is a sustainable argument that "the outcome of the dispute [is] governed or controlled by the [Hope Downs deed]", for instance, because the Hope Downs Deed releases or bars the claims based on the "substantive claims";

(2) For the reasons given by the HPPL respondents, various clauses of the Hope Downs deed (applying by its own force and through the April 2007 HD deed to Mr Hancock) provide a complete answer to the "substantive claims" and thus "govern or control" the dispute; and

(3) The "validity claims" do not form a separate dispute. They are, in substance, matters raised in reply to the releases and bars that will be put forward by the HPPL respondents (and Mrs Rinehart) in defence of the "substantive claims". Accordingly, when the "validity claims" are taken into account, the dispute remains one the outcome of which is "governed or controlled" by the Hope Downs deed.

644 While I accept proposition (1), for the reasons set out above, in my view, only some of the claims for relief based on the alleged facts that are referred to by the HPPL respondents as the "substantive claims" are claims in respect of which there is a sustainable argument that one or more clauses of the Hope Downs deed provide a complete answer. Thus, proposition (2) is only partly correct.

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

646 Accordingly, I am not satisfied that any of the claims arising from the "validity claims" is a matter that is the subject of clause 20.2.

Matters subject of clause 9.2 of the 2007 HD deed

647 The HPPL respondents did not make separate written submissions concerning the scope of clause 9.2. Nor did Mrs Rinehart.

648 The 2007 HD deed does not contain separate releases, but clause 3 of the deed provides that the parties to the Hope Downs deed and Mr Hancock "jointly and severally ratify and confirm the Hope Downs Deed as hereby amended".

649 In oral submissions, Mr McClintock SC contended that, by virtue of clause 3, an attack on the Hope Downs deed is a dispute "under" the 2007 HD deed within the meaning of clause 9.2. I do not accept this contention: the language of clause 3 does not "govern or control" a claim which seeks to impugn the Hope Downs deed by reason of pre-contractual conduct. At most, it is evidence that might be relied upon in defending an attack on the deed.

650 I therefore conclude that clause 9.2 of the 2007 HD deed does not cover any matters in the proceeding that do not already fall within the scope of clause 20.2 of the Hope Downs deed.

Matters subject of clause 16 of the 2009 deed of further settlement

651 Clause 16 is set out at [457] above, and governs disputes or claims "arising out of or in relation to" the 2009 deed of further settlement or the 2007 CS deed. It is necessary to remember that the parties to each of these deeds are Mr Hancock, Mrs Rinehart and HPPL. Accordingly, it does not govern the claims for relief made by Ms Rinehart, or against respondents other than Mrs Rinehart and HPPL.

652 Consistent with the reasons set out above, I accept that there is a sustainable argument that the matters arising from the claims (as propounded by Mr Hancock against Mrs Rinehart or HPPL) that arguably fall within the scope of the Hope Downs deed also fall within the scope of clause 15 of the 2007 CS deed and, consequently give rise to disputes or claims "arising out of or in relation to" the 2009 deed of further settlement within the meaning of clause 16 of the latter deed.

653 The HPPL respondents argued that the words "in connection with" in clause 15 give rise to a sustainable argument that clause 15 covers claims such as claims for misrepresentation and innocent misrepresentation inducing "the contract in question" (which I take to be the 2007 CS deed). In addition, they contended that, to the extent that the "substantive claims" were not made in Mr Hancock's unsworn affidavit, "there can be no real contest to the proposition that they are claims 'in connection with' the claims and allegations in" the unsworn affidavit.

654 The words "in connection with" are "capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote": *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 322; (1993) 43 FCR 280 at 288. In the context of a release, the words will be limited by reference to the "true purpose of the transaction". On the evidence, there was nothing to indicate that clause 15 is intended to cover claims in relation to the Roy Hills, Nicholas Downs and Mulga Downs tenements. In particular, there is

nothing in the recitals to support such a construction. Accordingly, I am not satisfied that there is a sustainable argument to that effect.

655 I accept that there is a sustainable argument that Mr Hancock's challenges to the 2009 release and the 2009 arbitration clause, clause 15 of the 2007 CS deed and his claim to set aside the 2007 CS deed fall within the scope of clause 16 of the 2009 deed of further settlement.

656 The HPPL respondents contended that, insofar as the "validity claims" are asserted by Mr Hancock, they are all required to be submitted to arbitration under the 2009 deed of further settlement. The argument appeared to be based upon a misconstruction of clause 16, to the effect that it covers any dispute "arising out of or in relation to" the Hope Downs deed. I reject that contention.

657 A similar argument was put on Mrs Rinehart's behalf, based on clause 15 of the 2007 CS deed. It was submitted that clause 15 is an "affirmation of the validity of the April 2007 HD deed", by which Mr Hancock acceded to the Hope Downs deed. Clause 15 was said to create an estoppel by deed, which is a defence to Mr Hancock's claim challenging the validity of the 2007 HD deed.

658 Mrs Rinehart's submissions did not develop this argument. There is no reference to the 2007 HD deed in clause 15 and, to the extent that it was put, I do not accept that the reference, in clause 15, to the releases referred to in the Hope Downs deed, is an "affirmation of the validity of the 2007 HD deed". In any event, an estoppel by deed requires the identification of a "precise and unambiguous statement of the fact in question": *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598 at 603. The precise statement of fact said to give rise to an estoppel by deed was not identified. Clause 15 does not contain any express statement of fact. It was not explained how the reference to releases in the Hope Downs deed could amount to a statement of fact capable of preventing Mr Hancock from attempting to prove his claim to set aside the Hope Downs deed. Accordingly, I do not accept that Mr Hancock's "validity claims" give rise to a dispute "arising out of or in relation to" the 2009 deed of further settlement and the 2010 deed of variation except for the claims concerning the validity of those particular deeds.

Matters subject of clause 11 of the 2010 deed of variation

659 Clause 11(ii) is set out at [466] above, and governs disputes or claims "arising out of or in relation to" the 2010 deed of variation. As with clause 16 of the 2009 deed of further

settlement, clause 11(ii) does not govern the claims for relief made against respondents other than Mrs Rinehart and HPPL.

660 Mrs Rinehart argued, based on recital E and clauses 8 and 10 of the 2010 deed of variation, that Mr Hancock is estopped from denying the validity of the Hope Downs deed. Consequently, she argued, the claims challenging the validity of the Hope Downs deed and the 2007 HD deed are disputes falling within the scope of clause 11(ii). I accept that there is a sustainable argument that clause 11(ii) may be construed this broadly, in relation to claims for relief against Mrs Rinehart and HPPL concerning the validity of these two deeds.

661 Otherwise, in my view, the scope of clause 11 corresponds with the scope of clause 16 in relation to claims based on the "substantive claims". Clause 11 also covers the discrete disputes between Mr Hancock, Mrs Rinehart and HPPL concerning the enforceability of clause 11 and concerning Mrs Rinehart's conduct in the 2010 deed of variation.

AGREED QUESTION (11): SHOULD THE COURT DIRECT A TRIAL ON THE ARBITRABILITY ISSUE?

662 The precise question is "If the Court does have discretion, should the Court direct that there be a trial before this Court on the question whether the arbitration agreements applicable to those matter(s) identified in answer to question (9) are null and void, inoperative or incapable of being performed for the purposes of s 8(1), on any one or more of the following grounds:

(a) undue influence;

(b) duress;

(c) unconscionability;

(d) fraudulent concealment;

(e) mispresentation;

(f) misleading and deceptive conduct;

(g) fraud on a power?"

663 In my view, the various bases on which the applicants seek to impugn the various arbitration agreements could, if successful, lead to a finding that each arbitration agreement is void or inoperative for the purposes of s 8(1). In particular, I accept that the applicants' respective cases are directed to impeaching the various arbitration agreements and not merely the broader agreements in which the arbitration agreements are contained. On the applicants'

cases, it is arguable that in the absence of the alleged misconduct, they would not have entered into an arbitration agreement with any of the respondents.

664 Mrs Rinehart and the HPPL respondents raised various matters casting doubt on the strength of the applicants' contentions concerning the validity of the arbitration agreements. These include:

(1) The contention that the applicants have affirmed the arbitration agreement in the Hope Downs deed;

(2) The absence of evidence that the relevant transactions were disadvantageous or improvident: cf *White v Wills* [2014] NSWSC 1160 at [66] to [67];

(3) The various written acknowledgements that the agreements were not procured by undue influence, such as in clause 12 of the Hope Downs deed;

(4) Ms Rinehart's participation in the events that led to the execution of the Hope Downs deed, through her employment with HPPL;

(5) Mr Hancock's knowledge and beliefs concerning his mother's alleged wrongdoings, set out in his unsworn affidavit; and

(6) Mr Hancock's frequently acrimonious relationship with Mrs Rinehart which tends strongly against any suggestion that he was subject to undue influence or duress from her.

665 Although I am not in a position to reach any final conclusion about any of these points, at face value they raise serious challenges to the claims of undue influence, duress and other species of misconduct.

666 Taking these matters into account, the following considerations nevertheless favour a trial on the application of the proviso to the arbitration agreements in the Hope Downs deed and the 2007 HD deed:

(1) Ms Rinehart's claims for relief impugning the validity of the Hope Downs deed and the 2007 HD deed do not fall within the scope of any arbitration agreement. Accordingly, she is entitled to have those claims determined by the Court, subject to whether the claims should be stayed pending an arbitral process. It is likely to be more efficient to have the applicants' claims on these issues dealt with together, rather than separately.

(2) The history of litigation between the applicants, Mrs Rinehart and HPPL makes it highly likely that the issue of arbitrability under the two arbitration clauses will need to be resolved in any event, by reason of the parties' rights under s 16(9) of the commercial arbitration legislation to request that the Court decide the matter.

(3) If I am wrong in concluding that Ms Rinehart's claims mentioned in (1) do not fall within the arbitration agreements in the two deeds, the evidence strongly suggests that the deeds were not made on an arms' length basis in relation to either of the applicants. On the currently available evidence, the deeds were not the product of a commercial negotiation. Nor were the deeds entered after a process of disclosure of information material to the financial consequences of the deeds for the applicants or an opportunity to obtain comprehensive legal and financial advice about the implications of the deeds. In my view, it is striking and troubling that there is no evidence of advice of this kind, except perhaps in relation to the 2005 deed of obligation and release and the absence of such evidence casts significant doubt as to whether the applicants consented to resolve disputes arising in this proceeding by arbitration. .

(4) This is not a case like *Fiona Trust* in which the commercial relationship between the parties meant that they could be expected to include an arbitration clause in any agreement which they made. In the absence of more evidence, the context of the deeds does not permit any conclusion about the applicants' intention concerning commercial arbitration.

(5) It is necessary to balance the possible prejudice to the applicants of arbitral proceedings to which they are ultimately found not to have consented, against the possible prejudice to the respondents of Court proceedings on the application of the proviso which would undermine any right which they may ultimately be found to have had to resolution of the disputes by arbitration. In each case, the prejudice will be substantial. However, in my view, the possible prejudice to the respondents may be mitigated in Court proceedings, particularly by appropriate, confidentiality orders. On the other hand, the inherent prejudice involved in submitting to an inevitably lengthy non-consensual arbitration cannot be addressed.

(6) The Court would be able to determine the issues in the proceeding that do not fall within the scope of the arbitration agreements, but which raise questions about the

validity of the Hope Downs deed and the 2007 HD deed, concurrently with the question of the applicability of the proviso.

(7) There is no evidence of ongoing business relationships or any other commercial imperative that would cause the Court to refrain from directing a hearing on the application of the proviso.

667 The position is different for clause 14 of the 2005 deed of obligation and release. The evidence suggests that this deed was the product of negotiation between Mr Hancock and Mrs Rinehart on behalf of the other parties to the deed, and that Mr Hancock had the benefit of legal representation in agreeing the terms of the deed. However, the grounds on which the validity of clause 14 is challenged are parallel to a significant complaint made by the applicants in relation to the validity of the arbitration agreements in the Hope Downs deed and the 2007 HD deed. That is, that the deeds were procured by Mrs Rinehart's dishonest concealment of important facts about the manner in which she had conducted herself as trustee of the HMH Trust. In those circumstances, in my view, the Court's discretion should be exercised to direct a trial on the arbitrability issue concerning clause 14 of the arbitration agreement.

668 It follows that the Court's discretion should also be exercised to direct a trial on the arbitrability of clause 16 of the 2009 deed of further agreement and clause 11 of the 2010 deed of variation.

REMAINING QUESTIONS

669 As I have not determined that s 8(1) is engaged with respect to any matter in the proceeding, agreed question (13) is not necessary to answer. As to agreed question (16), it will be a matter for case management how those matters which are not the subject of an arbitration agreement proceed to trial. In the absence of any referral to arbitration, there is no case for a stay of any part of the proceeding. Agreed question (17) does not arise.

I certify that the preceding six hundred and sixty-nine (669) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson.

Associate:

Dated: 26 May 2016

SCHEDULE OF PARTIES

NSD 1124 of 2014

Respondents

Fourth Respondent:	HANCOCK FAMILY MEMORIAL FOUNDATION LTD (ACN 008 499 312)
Fifth Respondent:	TADEUSZ JOSEF WATROBA
Sixth Respondent:	WESTRAINT RESOURCES PTY LTD (ACN 009 083 783)
Seventh Respondent:	HMHT INVESTMENTS PTY LTD (ACN 070 550 104)
Eighth Respondent:	150 INVESTMENTS PTY LTD (ACN 070 550 159)
Ninth Respondent:	HOPE RINEHART WELKER
Tenth Respondent:	GINIA HOPE FRANCES RINEHART
Eleventh Respondent:	MAX CHRISTOPHER DONNELLY (IN HIS CAPACITY AS TRUSTEE OF THE BANKRUPT ESTATE OF THE LATE LANGLEY GEORGE HANCOCK)
Twelfth Respondent:	HOPE DOWNS IRON ORE PTY LTD (ACN 071 514 308)
Thirteenth Respondent:	ROY HILL IRON ORE PTY LTD (ACN 123 722 038)
Fourteenth Respondent:	MULGA DOWNS INVESTMENTS PTY LTD (ACN 132 484 050)
Fifteenth Respondent:	MULGA DOWNS IRON ORE PTY LTD (ACN 080 659 150)