FEDERAL COURT OF AUSTRALIA

Hancock Prospecting Pty Ltd v Rinehart [2017] FCAFC 170

Appeal from:	*Rinehart v Rinehart (No 3)* [2016] FCA 539
File numbers:	NSD 916 of 2016 NSD 922 of 2016
Judges:	**ALLSOP CJ, BESANKO AND O'CALLAGHAN JJ**
Date of judgment:	27 October 2017
Catchwords:	**ARBITRATION** – appeal from interlocutory decision on an application under s 8(1) of the *Commercial Arbitration Act 2010* (NSW) seeking an order that the parties to the proceeding be referred to arbitration in respect of the subject matter of various deeds – whether the primary judge erred in ordering a proviso trial under s 8(1) **ARBITRATION** – whether the arbitration contemplated by the arbitration agreements is commercial for the purposes of the *Commercial Arbitration Act 2010* (NSW) – meaning of the phrase "commercial arbitration" – whether parties need to demonstrate the existence of a pre-existing commercial relationship between the parties to the dispute – whether a family or domestic dispute and the arbitration to resolve it can also be characterised as a commercial dispute **ARBITRATION** – proper approach to determination of an application under s 8(1) of the *Commercial Arbitration Act 2010* (NSW) – proper approach to construction of an arbitration agreement – whether the disputes in question are the subject of an arbitration agreement – where arbitration agreements refer to "any dispute under this deed" – whether that phrase should be read as limited to those disputes governed or controlled by the deed – breadth of the potential meaning of entire phrase "any dispute under this deed" **ARBITRATION** – whether parties that are not parties to the deeds and arbitration agreements can be referred to arbitration because they claim "through or under" entities who are parties – definition of party within s 2(1) of the *Commercial Arbitration Act 2010* (NSW) – whether the claims against third parties are part of the same "matter" within s 8(1) of the *Commercial Arbitration Act 2010* (NSW) – circumstances in which claims against third party

companies can be stayed under the Court's general power to stay proceedings

ARBITRATION – principles of separability and competence – whether any of the arbitration agreements can be said to be null and void, inoperative or incapable of being performed – whether the requisite separate attack on the arbitration agreement present – character of the necessary attack on the arbitration agreement for the proviso of s 8(1) – construction of phrase "null and void" – circumstances in which the Court should hear the separate attack or permit the arbitral tribunal to hear the attack

CONSTITUTIONAL LAW – Constitutional validity of s 8(1) of the *Commercial Arbitration Act 2010* (NSW) – whether s 8(1) is picked up by s 79 of *the Judiciary Act 1903* (Cth) – whether allowing the arbitrator to decide the proviso challenge under s 8(1) impermissibly confers judicial power upon the arbitrator

Legislation:

Constitution, s 76

Australian Consumer Law (Sch 2 of the *Competition and Consumer Act 2010* (Cth)), ss 18, 20

Judiciary Act 1903 (Cth), ss 78B, 79

International Arbitration Act 1974 (Cth), s 7

Trade Practices Act 1974 (Cth), ss 51AA, 52

Federal Court Rules 2011 (Cth), rr 9.12, 36.32

Commercial Arbitration Act 2010 (NSW), ss 1, 1C, 2, 5, 7, 8, 10, 16, 34, 36

Commercial Arbitration Act 2012 (WA), s 8

Property Law Act 1969 (WA), s 11

Trustees Act 1962 (WA)

Federal Arbitration Act 1925 (US)

Arbitration Act 1996 (UK), s 7

European Convention Providing a Uniform Law on Arbitration, 484 UNTS 364, done at Strasbourg 20 January 1966

UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006), Arts 8, 16, 34

UNCITRAL Arbitration Rules 1976, Art 21

Blackaby N and Partasides C, *Redfern and Hunter on International Arbitration* (6th ed, Oxford, 2015)

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Schwebel S, 'The Severability of the Arbitration Agreement' published in *International Arbitration: Three Salient Problems* (1987), pp 1–60.

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van den Berg AJ, *The New York Arbitration Convention of 1958* (Wolters Kluwer, 1981)

Cases cited:

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

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Bathurst City Council v PWC Properties Pty Limited [1998] HCA 59; 195 CLR 566

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

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

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

Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd [1981] AC 909

BTR Engineering (Australia) Ltd v Dana Corporation [2000] VSC 246

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

Casaceli v Natuzzi S.p.A. [2012] FCA 691; 292 ALR 143

China Minmetals Materials Import and Export Co Ltd v Chi Mei Corpn 334 F 3d 274 (3d Cir, 2003)

Christopher Brown Ltd v Genossenschaft Österreichischer [1954] 1 QB 8

City of London v Sancheti [2009] 1 Lloyd's Rep 117

Codelfa Construction Pty Ltd v State Rail Authority of NSW [1982] HCA 24;149 CLR 337

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

Concrete Constructions (NSW) Pty Limited v Nelson [1990] HCA 17; 169 CLR 594

Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd [1999] 1 Lloyd's Rep 784

Dalimpex v Janicki (2003) 228 DLR (4th) 179

Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2010] UKSC 46; [2011] 1 AC 763

Dell Computer Corp. v Union des consommateurs [2007] SCC 34; 2 SCR 801

Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd [2017] HCA 12; 343 ALR 58

Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; 251 CLR 640

El-Mir v Risk [2005] NSWCA 215

El Nasharty v J Sainsbury PLC [2007] EWHC 2618 (Comm); [2008] 1 Lloyd's Rep 360

Ethiopian Oilseeds & Pulses Export Corporation v Rio Del Mar Foods Inc [1990] 1 Lloyd's Rep 86

Federal Commerce and Navigation Co Ltd v Tradax Export SA (The Maratha Envoy) The Maratha Envoy [1978] AC 1

Felton v Mulligan [1971] HCA 39; 124 CLR 367

Ferris v Plaister (1994) 34 NSWLR 474

Fiona Trust & Holding Corporation v Privalov [2007] EWCA 20; [2007] 2 Lloyd's Rep 267

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

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

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Golden Ocean Groups Ltd v Humpuss Intermoda Transportasi Tbk Ltd [2013] EWHC 1240 (Comm); 2 Lloyd's Rep 421

Grant v John Grant & Sons Proprietary Limited [1954] HCA 23; 91 CLR 112

Grollo Darwin Management Pty Ltd v Victor Plaster Products Pty Ltd (1978) 33 FLR 170

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

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Harrison v UBS Holding Canada Ltd (2014) 418 NBR (2d) 328

Heyman v Darwins Ltd [1942] AC 356

Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) (The Kiukiang Career) [1998] FCA 1485; 90 FCR 1

House v King [1936] HCA 40; 55 CLR 499

Hughes Motor Services Pty Ltd v Wang Computers Pty Ltd (1978) 35 FLR 346

IBM Australia Ltd v National Distribution Services Ltd (1991) 22 NSWLR 466

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Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky [2013] EWCA Civ 784; [2013] 2 Lloyd's Rep 242

JSC BTA Bank v Ablyazov [2011] EWHC 587 (Comm); 2 Lloyd's Rep 129

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Lipman Pty Ltd v Emergency Services Superannuation Board [2011] NSWCA 163

Mackender v Feldia AG [1967] 2 QB 590

Maggbury Pty Ltd v Hafele Australia Pty Ltd [2001] HCA 70; 210 CLR 181

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

Michael Wilson & Partners Limited v Nicholls and Others [2011] HCA 48; 244 CLR 427

Morton v Baker (unreported, Federal Court of Australia, 25 March 1993, Einfield J)

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37; 256 CLR 104

Mount Cook (Northland) Ltd v Swedish Motor Ltd [1986] 1 NZLR 720

Muller v Fencott (1981) 53 FLR 184

nearmap Ltd v Spookfish Pty Ltd [2014] NSWSC 1790

P Elliot & Company Ltd (In receivership and liquidation) v FCC Elliot Constructions Ltd [2012] IEHC 361

Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; 218 CLR 451

Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd

[1993] FCA 494; 43 FCR 439

PCCW Global Ltd v Interactive Communication Service Ltd [2006] HKCA 434; [2007] 1 HKLRD 309

Posner v Collector for Inter-State Destitute Persons (Victoria) [1946] HCA 50; 74 CLR 461

Prima Paint Co v Flood Conklin Manufacturing Corporation 388 US 395 (1967)

QH Tours Ltd v Ship Design and Management (Aust) Pty Ltd (1991) 33 FCR 227

Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989

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

Re Ku-ring-gai Co-operative Building Society (No 12) Ltd [1978] FCA 107; 36 FLR 134

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

Rich v Australian Securities and Investment Commission [2004] HCA 42; 220 CLR 129

Rinehart v Hancock [2013] NSWCA 326

Rinehart v Rinehart (No 3) [2016] FCA 539; 337 ALR 174

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Roussel-Uclaf v GD Searle & Co Ltd and Anor [1978] 1 Lloyd's Rep 225

Samick Lines Co Ltd v Owners of the Antonis P Lemos [1985] AC 711

Star (Universal) Co Ltd v Private Company "Triple V" Inc [1995] 2 HKLR 62

T v Ts [2014] 4 HKLRD 772

Tanning Research Laboratories Inc v O'Brien [1990] HCA 8; 169 CLR 332

TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Limited [2009] VSC 553

TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia [2013] HCA 5; 251 CLR 533

The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) [2008] WASC 239; 225 FLR 1

The 'Lisheen Mine' v Mullock & Sons (Shipbrokers) Ltd [2015] IEHC 50

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; 219 CLR 165

Tomolugen Holdings Ltd v Silica Investors Ltd [2015] SGCA 57

	Trident General Insurance Co Limited v McNiece Bros Proprietary Limited [1988] HCA 44; 165 CLR 107 *Union of India v E B Aaby's Rederi A/S (The Evje)* [1975] AC 797 *United Group Rail Services Ltd v Rail Corporation of New South Wales* [2009] NSWCA 177; 74 NSWLR 618 *Ursem v Chung* [2014] NZHC 436; NZAR 1123 *Victoria v Tatts Group Ltd* [2016] HCA 5; 328 ALR 564 *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157; 44 WAR 1 *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd [No 7]* [2016] WASC 305 *Yegiazaryan v Smagin* [2016] EWCA Civ 1290; [2017] 1 Lloyd's Rep 102 *Zhu v Treasurer of the State of New South Wales* [2004] HCA 56; 218 CLR 530
Date of hearing:	13, 14, 15, 16, 17 February 2017
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Category:	Catchwords
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ORDERS

NSD 916 of 2016
NSD 922 of 2016

BETWEEN:	**HANCOCK PROSPECTING PTY LTD ACN 008 676 417** and others named in the schedule Applicants/Appellants
AND:	**BIANCA HOPE RINEHART** and others named in the schedule Respondents
JUDGES:	**ALLSOP CJ, BESANKO AND O'CALLAGHAN JJ**
DATE OF ORDER:	**27 OCTOBER 2017**

THE COURT ORDERS THAT:

1. Within 14 days of today's date, the parties, after consultation with each other, file an index of any subject, including the form of orders proposed in [417] of the reasons, upon which they seek leave to address the Court conformably with what is contained in [416] of the reasons.
2. The proceedings be stood over to a date to be fixed for the hearing of submissions (if any) as to the form of orders or any other matter upon which the Court gives leave to address and for the making orders.

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

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 In October 2014, Bianca Rinehart (**Ms Rinehart**) and her brother, John Hancock (**Mr Hancock** having changed his surname by deed poll from Rinehart some years ago), commenced a proceeding in this Court against 15 respondents, including their mother, Georgina Rinehart (**Mrs Rinehart**), in her personal capacity and as a trustee of two trusts. Among the 14 other named respondents are Hancock Prospecting Pty Ltd (**HPPL**), various companies in the HPPL group, and individuals, including Hope Welker and Ginia Rinehart (as the ninth and tenth respondents respectively) who are Mrs Rinehart's other children. (Neither Hope Welker nor Ginia Rinehart has appeared in this proceeding.) From time to time in these reasons, we refer to the parties as they are named in the underlying proceeding. A schedule of parties and how they are named in the appeals brought by HPPL and Mrs Rinehart is annexed as Schedule A to these reasons.

2 The statement of claim filed by the applicants, in substance, alleges that following the death of her father, Langley "Lang" Hancock, in 1992, Mrs Rinehart controlled all of the entities in what is called "the Hancock Group", including the trusts which owned shares in HPPL and the Hancock Family Memorial Foundation Limited (**HFMF**, the fourth respondent). It is further alleged, in substance, that having assumed that position of control, Mrs Rinehart, in breach of her duties as a fiduciary and as a trustee, used that positon with the knowing assistance of HPPL to:

(1) remove all of the valuable mining assets from HFMF and transfer them to HPPL, because she held shares in HPPL and had no financial interest in HFMF; and

(2) "renege upon and circumvent" an agreement reached in 1988 between Mr Hancock and herself about the ownership of the Hancock Group, "by engineering a situation" giving Mrs Rinehart a 76.55% shareholding in HPPL and her children a 23.45% shareholding, instead of the 49% Mrs Rinehart agreed with Lang Hancock that the children would have after Lang Hancock's death.

3 The statement of claim, the precise terms of which it will be necessary to return to later in these reasons, also makes allegations in respect of deeds entered into by one or both of the applicants, on the one hand, and various of the respondents. The deeds are 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. The primary judge also dealt with submissions made by the parties below about another deed, executed in 2003, known as the Porteous Settlement Deed. For reasons we give below, it has no bearing on any issue arising on these applications and appeals. The statement of claim alleges that the execution of those deeds, which contain acknowledgements, releases, covenants not to sue, and arbitration agreements, was procured by misconduct of one sort or another by Mrs Rinehart and HPPL. The causes of action pleaded are false and misleading conduct, fraudulent concealment, misleading and deceptive conduct in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (**the *TP Act***) and Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**the *Australian Consumer Law***), material non-disclosure, unconscionable conduct, undue influence, duress, breach of trust and fraud on a power. Both Ms Rinehart and Mr Hancock plead that they are entitled to rescind, and, by their pleading, do rescind, the various deeds to which they are a party. They also seek declarations that the deeds, and the arbitration agreements, are void.

4 The respondents are yet to file a defence to the pleading, but the case before the primary judge and on appeal proceeded on the assumption that the respondents (or at least those that appeared) deny every material allegation of wrongdoing.

5 It is necessary to say something of the respondents. The respondents described as the HPPL respondents are the second, third, fifth, sixth, seventh, twelfth, thirteenth and fifteenth respondents in the substantive proceeding and are the first to eighth applicants/appellants in the appeal. The fourth, ninth, tenth, eleventh and fourteenth respondents in the substantive proceedings did not appear, although in correspondence the fourteenth respondent consented to the substance of the relief sought by the HPPL respondents. The eighth respondent in the substantive proceedings, Mrs Rinehart, consented to the orders sought by the interlocutory applications referred to below.

6 The HPPL respondents brought an interlocutory application under s 8(1) of the *Commercial Arbitration Act 2010* (NSW) (**the *CA Act***) seeking an order, among others, that the parties to the proceeding be referred to arbitration in respect of the matters the subject of the various arbitration agreements contained in the deeds pleaded in the statement of claim, by staying the proceedings in this Court. (The HPPL respondents also relied on the identical provision in s 8(1) of the *Commercial Arbitration Act 2012* (WA). The parties have since agreed that

nothing turned on that, and that the Court should apply the New South Wales Act.) The HPPL respondents submit that the applicants have repeatedly given up any right to bring any of the claims made in the statement of claim and have in any event repeatedly agreed that any such claims be made in confidential arbitral proceedings.

7 Mrs Rinehart and the eighth respondent, 150 Investments Pty Ltd (**150 Investments**), a company controlled by her, were separately represented.

8 Section 8(1) of the *CA Act* is in the following terms:

> 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.

9 The application of the HPPL respondents came before the primary judge on 24 April 2015. It occupied eight hearing days. The parties proffered 17 questions for the primary judge to decide. Those questions are set out in Schedule B to these reasons.

10 The questions proffered by the parties did not expose with sufficient precision, and in some ways obscured, the true issues required to be decided by the primary judge.

11 It is not necessary for present purposes to recite the primary judge's answers to each of the 17 questions. Her Honour held that the *CA Act* applied to the dispute because any arbitration of it would be a "commercial arbitration" within the meaning of the Act. However, for the reasons the primary judge gave, her Honour did not order that the parties be referred to arbitration by staying the proceedings, but instead directed that the Court try the question of whether the relevant arbitration agreements were "null and void, inoperative or incapable of being performed" within the meaning of s 8(1) of the *CA Act*: see *Rinehart v Rinehart (No 3)* [2016] FCA 539; 337 ALR 174 at 301 [669]. In that regard, the primary judge held that some of the disputes in the proceeding were the subject of an arbitration agreement, and others, including, in particular, issues concerning the enforceability of the releases and arbitration clauses in the Hope Downs Deed, were not: see *Rinehart v Rinehart (No 3)* 337 ALR at 288-299 [597]-[661].

12 The HPPL respondents, and Mrs Rinehart and the eighth respondent, sought leave to appeal and to appeal against the orders of the primary judge. The applicants (Ms Rinehart and

Mr Hancock) sought leave to cross-appeal and to cross-appeal; and they rely upon a notice of contention.

13 It is not necessary to consider in detail the question of whether leave should be granted. For the reasons set out below, the issues raised by both applications concern significant matters of principle and, it seems to us, with respect, that the primary judge's reasoning and approach was in error in certain important respects. The parties, sensibly enough, did not address the question of leave during the course of oral submissions. Each party was content to rely on their written submissions and affidavits on the leave issue. Because the applications for leave self-evidently raise important questions and because the primary judge's discretion miscarried, we will grant leave to appeal in both applications.

The structure of these reasons

14 On the first day of hearing of the appeals, the Court raised with the parties "a decisional structure of the appeal" the purpose of which was to elucidate with precision the issues between the parties. The parties did not demur from the Court's suggestion. We have used that decisional tree to assist in the structure of these reasons.

15 Having had the benefit of oral submissions, we propose to approach the issues in controversy between the parties in the following manner.

16 The first issue is whether the *CA Act* applies at all. This has a number of sub-issues. The first sub-issue, which is related to the Constitutional challenge by the applicants to the validity of s 8(1) of the *CA Act*, is whether the *CA Act*, and relevantly s 8(1), is picked up by s 79 of the *Judiciary Act 1903* (Cth). It is convenient to deal with this question towards the end of these reasons, apart from saying here that our view is that s 8(1) of the *CA Act* is relevantly picked up by s 79, that s 8(1) is Constitutionally valid, and that these reasons proceed on that basis.

17 The second sub-issue to the question whether the *CA Act* applies is whether, assuming the disputes are matters which are the subject of the relevant arbitration agreements, the arbitration contemplated by the agreements is "commercial" for the purposes of the *CA Act*. As part of this sub-issue, it will be necessary to consider whether (as the applicants submitted) the parties to the dispute must also be, or have at relevant times been in "a commercial relationship".

18 We are of the view that the *CA Act* is engaged. Should we be wrong in that conclusion, it would be necessary to consider whether the Court has power or discretion to stay the proceedings and refer the parties to arbitration in any event, and if it does, whether and how that power or discretion should be exercised. Given our views as to the engagement of the *CA Act*, it is unnecessary to address these questions save in one respect.

19 The second issue is the extent to which the various arbitration clauses cover the matters in dispute, or, to put the matter in the words of s 8(1), the extent to which the matters are the subject of an arbitration agreement. Closely related to this is the proper approach of the Court to deciding that question. This issue relates, in particular, to the Hope Downs Deed.

20 The third issue or group of issues concerns the operation of the principles of separability and competence. The separability principle requires the arbitration agreement (as an agreement distinct from the main substantive agreement in which it is found as a provision or clause) to be directly impugned or attacked as "null and void, inoperative or incapable of being performed". In the light of this principle and the competence principle, the question arises whether the applicants by their pleading, or by their articulation of the controversy in argument (if the latter be a legitimate way to address the question), have attacked the arbitration agreement itself, and if they have, what the limits of that attack are. Related to this is the question whether any such articulated attack can be said to be that the arbitration agreement is "null and void, inoperative or incapable of being performed". In this respect, the HPPL parties, Mrs Rinehart and the eighth respondent contend that the attack must be that the arbitration agreements were invalid *ab initio*, or at least at the time of the stay application.

21 The fourth issue, assuming there is a sufficiently articulated attack on the arbitration agreements such that the proviso to s 8(1) is engaged, is whether the power to refer that attack on the arbitration agreement to arbitration is mandatory or discretionary, and if the latter, how that discretion is to be exercised.

22 The fifth issue is whether any of the parties to the proceeding, who are not parties to any deed or arbitration agreement, should nonetheless be referred to arbitration because they claim "through or under" entities who are parties to the relevant deed or agreement for the purpose of the definition of the word "party" in s 2(1) of the *CA Act*.

23 Leave was granted at the hearing of the appeal for Wright Prospecting Pty Ltd (**WPPL**) to intervene to put submissions on limited questions. Those submissions (notwithstanding some

attempts during oral argument to widen the ambit of the intervention) principally concerned the question of "through or under" referred to in the last paragraph and were in support of contentions, which we accept, that the entities who were not parties to the deed do not claim through or under the parties to the agreements.

24 A number of other subsidiary issues, including whether and to what extent the learned primary judge was entitled to make use of certain evidence before her, whether the primary judge erred in making certain factual findings or observations, and questions relating to standards of proof, were also the subject of extensive written and oral submissions and are dealt with below. These will be dealt with to the extent necessary to dispose of the main issues.

25 At the hearing, the Court rejected the application of Ms Rinehart and Mr Hancock to amend their notice of contention and to adduce fresh evidence. The reasons for this are set out later.

26 The analysis must commence, however, with a discussion, necessarily in some detail, of the surrounding facts and the allegations made by the applicants in the statement of claim.

27 Thus, the structure of these reasons is as follows:

A.	The surrounding facts and the allegations in the statement of claim.	[28]-[105]
B.	The conclusions of the primary judge.	[106]-[114]
C.	Whether the arbitration is "commercial" for the purposes of the *CA Act*.	[115]-[139]
D.	The extent to which the matters in dispute are the subject of an arbitration agreement.	[140]-[268]
E.	(1) Whether any party that is not a party to the deeds and to the arbitration agreements can be referred to arbitration because they claim "through or under" entities who are parties; (2) whether the claims against the third party companies are part of the same "matter" within s 8(1) of the *CA Act*; (3) whether WPPL should be granted leave to intervene; and (4) whether the claims against the third party companies should be stayed under the Court's general power.	[269]-[336]
F	Whether the applicants have engaged the proviso to s 8(1) by a relevant attack on the arbitration agreements.	[337]-[394]
G.	Whether the power to refer any attack on the arbitration agreements to arbitration is mandatory or discretionary.	[337]-[394]

H. To the extent that the power to refer any attack on the arbitration agreements to arbitration is discretionary, how that discretion should be exercised. [337]-[394]

I. The Constitutional validity of s 8(1) of the *CA Act*. [395]-[400]

J. The applications by the applicants to amend their notices of contention and to adduce fresh evidence. [401]-[414]

K. Orders [415]-[417]

A. The surrounding facts and the allegations in the statement of claim

28 The events go back to the 1980s. Lang Hancock was the founder and controller of the Hancock Group, including HPPL. Hope Margaret Hancock, Lang Hancock's wife, died in 1983. Lang Hancock then married Rose Porteous, and by 1985 disputes had arisen between Lang Hancock and his daughter (Mrs Rinehart) about this relationship and about his dealing with assets of HPPL. The statement of claim pleads that, by 1988, Lang Hancock and Mrs Rinehart reached an agreement, known as the "1988 Agreement", the essential aspects of which were referred to by the primary judge at [179(2) and (3)] of the reasons as follows:

> (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%.

29 Two trusts were said to be established pursuant to the 1988 Agreement: the HMH Trust and the HFMF Trust. (HMH were the initials of the late wife of Lang Hancock, Hope Margaret Hancock.) After the death of her father in 1992, Mrs Rinehart assumed the trusteeship of the HMH Trust; her four children (Mr Hancock, Ms Rinehart, Hope Welker and Ginia Rinehart) were the beneficiaries in equal shares and the principal asset of the trust was a significant shareholding in HPPL. It was stated in argument by Mr Hutley SC, who appeared for the HPPL parties, that there will be an issue as to whether the HFMF Trust was established. The HFMF Trust lies at the heart of the claims as to the wrongful transfer of the valuable mining assets from the applicants to HPPL and Mrs Rinehart.

30 After the death of her father, Mrs Rinehart also assumed the trusteeship of the HFMF Trust; her children were beneficiaries in equal shares, and its principal asset was two shares in a company called Zamoever Pty Ltd (**Zamoever**) whose principal asset was a shareholding in a company called The Hancock Family Memorial Foundation Limited (the fourth respondent – **HFMF**).

31 The HFMF Trust (through Zamoever and HFMF) is said to have owned 33.3% of the shares in HPPL, owned the sixth respondent, Hancock Resources Limited (**HRL**), now known as Westraint Resources Pty Ltd (**WRL**), which owned valuable mining tenements, including the Hope Downs, Nicholas Downs and Mulga Downs Tenements, and which was pursuing an opportunity to obtain an exploration licence over the area now known as the Roy Hill Tenements, and owned Hancock Mining Limited (**HML**), which was sold to BHP Minerals Limited in 1992.

32 The statement of claim pleads (at para 115) that upon the death of her father, Mrs Rinehart came to control the family interests as: chair and controlling mind of HPPL; director and controlling mind of Zamoever; director and controlling mind of HFMF; and director and controlling mind of HRL.

33 All four children were minors in 1992. The youngest, Ginia, reached her majority in 2004.

34 The statement of claim (at para 124) alleges that from these facts Mrs Rinehart owed fiduciary obligations to her children:

> 124.1 to act in their best interests;
>
> 124.2 not to act capriciously or unreasonably;
>
> 124.3 not to put herself in a position whereby her interests conflicted or may conflict with the interests of her children; and
>
> 124.4 not make a profit or pursue a gain in circumstances where there existed a conflict or real or substantial conflict on possibility of conflict between GHR's personal interests and those of her children.

35 Central to the substantive claims made by the applicants is the asset position of the family, of the HPPL group, of the HFMF Trust and of the children at the death of Lang Hancock, and the steps said to have been taken thereafter by Mrs Rinehart, in asserted breach of trust and fiduciary duty to her children, to place herself and HPPL in control and ownership of significant and extremely valuable commercial assets, to which, it is asserted, the children were entitled, through the various trust arrangements.

36 In sections 8 to 18 of the statement of claim (paras 128 to 271 thereof) the applicants plead various bodies of misconduct by Mrs Rinehart in which HPPL is said to have participated. The primary judge dealt with this at [198]-[230] of her Honour's reasons. That alleged misconduct was said to be the following.

37 First, and within two months of the death of her father, Mrs Rinehart is said to have given up the pursuit of a valuable exploration licence over the Roy Hill Tenement by HRL (the company owned by HFMF on trust for the children) and thereafter applied for and won the exploration licence for the tenement in the name of HPPL. By so doing, Mrs Rinehart is said to have breached her duties to her children, to the HFMF Trust and to HRL, to advantage herself as the majority shareholder in HPPL. The applicants seek an account of profits or equitable compensation against Mrs Rinehart in respect of the Roy Hill Tenements. Relief in the nature of an account or equitable compensation is also sought against HPPL as a knowing participant in a dishonest breach of trust by Mrs Rinehart, and against the thirteenth respondent – Roy Hill Iron Ore Pty Ltd (**RHIO**) to which HPPL transferred legal title to the Roy Hill Tenements, which is said to have received that property with knowledge of the breaches by Mrs Rinehart, she being a director of the company. The applicants claim against RHIO a constructive trust over the Roy Hill Tenements, in addition to an account or equitable compensation.

38 The second body of asserted misconduct by Mrs Rinehart occurred within three years of her father's death. This involved the asserted manipulation of HFMF's financial position which is said to have facilitated Mrs Rinehart increasing her ownership of HPPL from 51% to 76.55%. The asserted manipulation involved the following. In 1992, Mrs Rinehart is said to have caused HPPL to make a claim against HFMF and HRL that the Hope Downs Tenements were held by HRL on constructive trust for HPPL, and then, in 1994 or 1995, to have caused HRL and HFMF to agree to relinquish ownership of those tenements to HPPL – in effect, to capitulate (without justification) to the claims in the litigation. The assertion by the applicants is that this claim by HPPL was confected. This will be a central issue in the proceedings. Also in 1992, Mrs Rinehart is said to have caused HRL to execute a charge to HPPL for a purported liability of $15 million and HFMF to execute a charge and a guarantee to HPPL for that purported liability. In 1995, HFMF revalued downwards its investment in HPPL and made provision for its liability to guarantee HRL's purported liability. Mrs Rinehart is said to have caused this through her (conflicting) positions controlling HPPL, HRL, HFMF, the HFMF Trust, Zamoever and the HMH Trust.

39 The consequences of these asserted manipulations is pleaded in para 183 of the statement of claim as follows:

> 183.1 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;
>
> 183.2 the loss of HFMF's principal income generating assets;
>
> 183.3 the Roy Hill Tenements not being recorded on the balance sheet of HRL as an asset of HRL;
>
> 183.4 the loss of HFMF's ability to earn income independently or separately from its entitlement to dividends from HPPL; and
>
> 183.5 a significant diminution in HFMF's bargaining power in any future dealings with HPPL.

40 These matters are said to form the background to the "Debt Reconstruction Deed" between HPPL and HFMF under which HPPL became entitled to buy back HFMF's 33.3% shareholding in HPPL for only $9.3 million, on the basis that HFMF was insolvent. Upon the cancellation of those shares when bought back, Mrs Rinehart's shareholding increased to 76.55%, and the effective shareholding of the four children was reduced to 23.45%.

41 It is unnecessary to recite all aspects of the detail of the Debt Reconstruction Deed and associated conduct and agreements that are dealt with in section 10 of the statement of claim. It is sufficient to say that HFMF was effectively placed under the control of HPPL and Mrs Rinehart, and was required to pay significant dividends in 1995 and 1996 to HPPL in priority to any other distribution.

42 Further, in 1995, in a "Deed of Acknowledgement and Release", HFMF agreed with HPPL to relinquish ownership of all of the shares in HRL to HPPL and to recognise in HPPL the beneficial ownership of the shares in HML that had been sold to BHP in April 1992.

43 The consequences of the reconstruction are pleaded in paras 208 and 209 of the statement of claim: to divest the HFMF Trust of its major assets (the shares in HRL and HPPL and the Hope Downs Tenements), to remove Zamoever's control of HFMF and to give it to Mrs Rinehart, to require almost $33 million in dividends to be paid by HFMF to HPPL and, until such be done, to preclude the children participating in any profits of HFMF, and to increase Mrs Rinehart's control of HPPL to 76.55%.

44 The above asserted manipulations are alleged to have been brought about by Mrs Rinehart in furthering her own personal interest and in breach of her duties as a trustee of the HFMF

Trust, as a director of Zamoever, of HRL and of HML and her fiduciary duties to her children.

45 The legal consequences of this asserted misconduct are pleaded in sections 13 to 17 of the statement of claim.

46 Sections 13 and 14 claim a constructive trust in favour of the children over a 25.5% shareholding held by Mrs Rinehart in HPPL (that is, the percentage above 51%). The claim to these shares, and an accounting or the payment of equitable compensation by Mrs Rinehart and her company, 150 Investments, is made in claims 8 to 14 of the application.

47 Section 15 is directed to the Hope Downs Tenements held by HPPL. It is pleaded that HPPL was aware of the breaches of duty of Mrs Rinehart involved in the Debt Reconstruction Deed and Deed of Acknowledgement and Release when it received "legal title" to the Hope Downs Tenements. HPPL has since (in 1997) transferred the Hope Downs Tenements (para 231 of the statement of claim says "transferred legal title") to Hope Downs Iron Ore Pty Ltd (**HDIO**), the twelfth respondent. The claim is then made that HDIO took the "legal title" with knowledge of the breaches of duty and of trust by Mrs Rinehart because she was a director and the controlling mind of HDIO.

48 The claim that HDIO holds the Hope Downs Tenements on constructive trust for the children of Mrs Rinehart and orders for accounting or payment of equitable compensation by Mrs Rinehart, HPPL and HDIO are claims 15 to 21 of the application.

49 Section 16 frames relief for the asserted contractual breach of the 1988 Agreement, and claims 22 to 26 of the application claim specific performance and damages in the alternative.

50 Section 17 frames relief for the conduct involving the assets of HFMF and the debt reconstruction as unconscionable conduct within the meaning of s 51AA of the *TP Act* and s 20 of the *Australian Consumer Law*. Importantly, the allegations in this regard are based upon the assertion in para 238 that Mrs Rinehart was engaged in trade and commerce, as follows:

> Each of:
>
> 238.1 GHR's conduct in devaluing the assets of HFMF and procuring the Debt Reconstruction referred to in **Sections 10 and 11** above; and
>
> 238.1 GHR's refusal to acknowledge, since the vesting of the HFMF Trust on 6 September 2011 that she holds 25.55% of her present shareholding in HPPL on trust for JLH, BHR, HRW and GHFR, GHR

is conduct in trade or commerce

51 Claims 27 to 28 in the application claim damages and specific relief under the *TP Act* and the *Australian Consumer Law* for this conduct characterised as unconscionable.

52 Section 18 of the pleading and claims 29 to 34 of the application concern other asserted misconduct of Mrs Rinehart since 1992 concerning two mining tenements: Nicholas Downs and Mulga Downs. In a series of transactions from 1992, it is said that the interest in the Nicholas Downs Tenements came to be held by HPPL via subsidiaries, having originally been owned by HFMF. These allegations form part of the claims concerning the movement of assets from the HFMF Trust to HPPL. Claims 29 to 31 of the application seek the imposition of a constructive trust over HPPL's ownership of the tenements and orders for accounting or payment of equitable compensation by HPPL.

53 The Mulga Downs Tenement was owned by HRL, and prior to the transfer of shares in HRL from HFMF to HPPL was an asset of the HFMF Trust. In the 1998 transfer of HRL shares to the HPPL (see [42] above), the HFMF Trust is said to have lost this asset. Since 1998, another exploration licence was applied for adjacent to the Mulga Downs Tenement for the development of a mine. HPPL has also transferred the Mulga Downs Tenement to Mulga Downs Investments Pty Ltd (**MDI**) and Mulga Downs Iron Ore Pty Ltd (**MDIO**) (the fourteenth and fifteenth respondents, respectively) for no value, and Mrs Rinehart is said to have caused the shareholding in those companies to be transferred to associates of her and to HPPL. Claims 32 to 34 of the applications seek the imposition of a constructive trust over MDI's and MDIO's ownership of HRL and the Mulga Downs Tenement and an order for an account or equitable compensation.

54 These are the substantive claims. They originate in the family ownership of large and extremely valuable commercial assets. They involve assertions of breaches of equitable duties springing from trust, corporate responsibilities, familial duty and obligations of honesty, proper purpose and good faith. Some of the asserted breaches are said to have occurred when all four children were minors.

55 Meanwhile, litigation between Mrs Rinehart and Rose Porteous had been proceeding since 1992. This was constituted by an action against Lang Hancock's estate brought by Rose Porteous, proceedings brought by HPPL against Rose Porteous and various applications in relation to the bankrupt estate of Lang Hancock.

56 This litigation was settled in 2003. The applicants were among 16 signatories to the settlement deed. The primary judge at [244]-[247] of her Honour's reasons set out the following important aspects of the background:

> 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".

57 Mrs Rinehart relies on cl 3.9 of the Porteous Deed signed 15 September 2003. That clause was in the following terms:

> **3.9 General Mutual Release**
> 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.

58 She also relies on the arbitration clause in cl 16.2.

59 The primary judge dealt with the Porteous Deed at [248]-[275], [511]-[512] and [548] of her Honour's reasons. Her Honour found that the matters of context were such that the deed should not be construed as one whereby intra-Hancock family parties were releasing each other or dealing with issues among themselves, even if, as appears to have been the case, the dispute between Mrs Hancock and the applicants, or at least Mr Hancock, was nascent.

60 The primary judge was plainly correct in this conclusion. There was no suggestion that there was any intra-Hancock family settlement of any claim of the children against their mother or any Hancock group company (of which there is no evidence of any articulation). The deed should be viewed in its context and construed accordingly. The general words of a release are limited always to that thing or those things which were especially in the contemplation of the parties at the time the release was given: *Grant v John Grant & Sons Proprietary Limited* [1954] HCA 23; 91 CLR 112. The release and the arbitration clause should be viewed accordingly, as not directed to any intra-family disputation.

61 Mr Hancock began to investigate the affairs of the HMH Trust in late 2003, perhaps earlier. By mid-2004 there was reference in communications between Mrs Rinehart and Mr Hancock to litigation. The correspondence alleged wrongdoing by Mrs Rinehart and HPPL concerning the transfer of missing interests out of the trust (the HFMF Trust) and the reduction in shares in HPPL held for the children. Mr Hancock had solicitors acting for him in this regard (Butcher Paull & Calder).

62 By October 2004, these solicitors sent Mrs Rinehart and HPPL an early version of an unsworn affidavit of Mr Hancock concerned with complaints about the HMH Trust. The primary judge dealt with this at [284]-[308] of her Honour's reasons, including the question of the overlap between the contents of the statement of claim and the unsworn affidavit. The allegations in the unsworn affidavit set out at [288] of the reasons reveal the themes of the statement of claim:

> 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.

63 The primary judge concluded that whilst there was significant overlap, certain matters in the statement of claim were not contained in the unsworn affidavit, namely, the wrongful giving up of the Roy Hill Tenement exploration licences on behalf of HRL. We will deal with this later in the context of the application of the Hope Downs Deed, but it is sufficient at this point to say that we consider that the primary judge was overly narrow in characterising the nature of the claims in the unsworn affidavit. It can be accepted that the events pleaded in the statement of claim about Roy Hill were not adverted to, but the draft affidavit can be seen as a claim that Mrs Hancock had dishonestly breached her duty as trustee, should be replaced and the trust's administration, hitherto undertaken by her, reviewed. Though not couched as an equity writ, the breadth of the claims amounted almost to a claim for general administration of the trust. Viewed thus, the claims made can be seen to extend to any breach of trust found to have occurred.

64 The next important documents signed by the parties were the April 2005 Deed of Obligation and Release and Deed of Loan. The events leading up to this are discussed by the primary judge at [309]-[314] of her Honour's reasons. A significant aspect to this background was the prospect of a joint venture with the Rio Tinto Ltd group over the Hope Downs Tenements that was to the knowledge of all being negotiated at the time, being the joint venture that eventuated in March 2006 (see the statement of claim, section 19, paras 272-274), and the need to stabilise the question of claims to ownership of tenements as a safe foundation for this important external commercial relationship.

65 The two deeds (of obligation and release, and of loan) were entered into by Mr Hancock in April 2005, and can be seen as closely related. The Deed of Obligation and Release was signed by Mr Hancock, his three sisters, Mrs Rinehart, HPPL, HFMF, the directors and officers of HPPL and the executors of Lang's estate. The primary judge set out the major recitals at [317] of her Honour's reasons as follows:

> 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.

66 From these recitals it is clear that the Deed of Obligation and Release was directed to the intra-Hancock family disputes. Only Mr Hancock was a convenantor. Ms Rinehart, at this point, was not in dispute with her mother. Indeed, she was a director of HPPL. The releases were wide and set out at [319] and [320] of the primary judge's reasons, as follows:

> 2. Release of the Releases by Covenantor:
>
> 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.
>
> 3. Further releases by Covenantor
>
> 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.

67 The phrases "Hancock Group" and "The Releasees" were defined in cl 1, as follows:

1. **Definition of "the Hancock Group" and "the Releasees"**

(a) In this Deed of Obligation and Release, 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 enters into this Deed, in addition to entering into this Deed on its own behalf, are herein collectively referred to as **"the Hancock Group"**.

(b) In this Deed of Obligation and Release, 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 are collectively referred to as **"the Releasees"**.

68 Other relevant provisions concerning consideration to Mr Hancock and the independent advice he received were dealt with by the primary judge at [324]-[326] of her Honour's reasons:

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".

69 Clause 14 of the deed was a proper law and dispute resolution clause in the following terms:

> 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.
>
> (emphasis added)

70 At [328] of her Honour's reasons, the primary judge summarised the context, purpose and intent of the Deed of Obligation and Release, as follows:

> 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.

71 Under the Deed of Loan, Mr Hancock was entitled to a loan of $3 million repayable after the vesting of the HMH Trust.

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

73 Despite Mr Hancock's broadly framed releases in the April 2005 Deed of Obligation and Release, shortly after the announcement of the joint venture, he gave notice of his intention to become a party to, and make an application in, Supreme Court of Western Australia proceedings concerning the trusts that had been brought by his mother; and through his solicitors, he stated that he considered himself free of the releases (entered into only months before) in the 2005 Deeds because they were said to be the product of undue influence. In late September 2005, he filed a supporting affidavit in the Supreme Court in which he alleged that his mother had committed "grave breaches of trust". The primary judge referred at [344] of her Honour's reasons to part of the affidavit containing the following allegations:

(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.

74 Ms Rinehart made a record of a conversation that she had with her brother in November 2005, which the primary judge set out at [345] of her Honour's reasons:

> 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.

75 In March 2006, the parties signed the Hope Downs Joint Venture Agreement involving the Rio Tinto group. This was executed by Ms Rinehart as a director of HDIO.

76 In August 2006, the next important document was signed – the Hope Downs Deed. This was signed, amongst others, by the three sisters, Mrs Rinehart and HPPL. The correspondence leading up to its signature is discussed by the primary judge at [349]-[363] of her Honour's reasons. Ms Rinehart now says that she signed the deed unwillingly. There was some contemporaneous communication in which she said that she objected to being harassed; but she received legal advice.

77 It is plain from the recitals and terms of the Deed that its purpose was to quell disputes as to title concerning the mining tenements, especially Hope Downs. The deed involved releases of claims (which terms were drawn widely). The attempt to draft the widest possible release is to be seen in the definitions of "claims" and "Proceedings" which specifically included reference to the September 2005 version of Mr Hancock's unsigned affidavit and the subsisting Supreme Court proceedings. In return for acknowledgments of title, releases and promises not to sue, HPPL agreed to pay dividends on a quarterly basis, conditional upon compliance with the deed.

78 The proper construction and operation of the Hope Downs Deed is central to this application, the appeals and the ultimate resolution of the disputes between the parties.

79 It is convenient to set out [366]-[385] of the primary judge's reasons for the relevant 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.

80 The full terms of cll 21 and 22 were as follows:

21 **APPLICABLE LAW**

This deed shall be governed by and be subject to and interpreted according to the laws of the State of Western Australia and (subject to the provisions hereof requiring all disputes hereunder to be resolved by confidential mediation and confidential arbitration) the parties agree to submit to the exclusive jurisdiction of the Courts of Western Australia for all purposes in respect of this deed.

22 **ENTIRE DEED**

This deed contains the entire agreement between the parties with respect to its subject matter. 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.

81 We will come to the arguments of the parties in due course. It is helpful, however, at this point to remark upon some of the features of these provisions of the Hope Downs Deed. First, recital D and its reference to the Porteous Deed cannot change the proper approach to,

and construction of, that deed in its contemporaneous circumstances. Secondly, Mr Hancock did not sign the Hope Downs Deed; though the draft form anticipated his signature. Nevertheless, when he adopted it in April 2007 (see below) he reaffirmed and ratified the Deed of Obligation and Release. Thirdly, the releases in cl 6, the undertakings in cl 7, especially cl 7(b) and (e) and the plea in bar provision in cl 11 are critical to the debate about whether or not the matters raised in the statement of claim properly fall within the arbitration clause of the Hope Downs Deed.

82 With the execution of the Hope Downs Deed, all four children had signed wide releases: Mr Hancock in the 2005 Deed of Obligation and Release and his three sisters in the Hope Downs Deed. Mr Hancock had shown that he was prepared to continue to challenge his mother by his actions in 2005 in the Supreme Court and by the deployment of the updated unsworn affidavit in those proceedings. Mrs Rinehart was anxious to have Mr Hancock commit to a settlement. This led to the 2007 deeds, sometimes referred to as the April 2007 HD Deed (also sometimes referred to as the 2007 HD Deed) and the 2007 CS Deed, both executed on 13 April 2007.

83 The April 2007 HD Deed included Mr Hancock, Mrs Rinehart and the three sisters. Recital B states that the parties to the Hope Downs Deed wished to facilitate Mr Hancock becoming a party to the Hope Downs Deed. Clause 2 achieved that aim, providing as follows:

> 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.

84 Clause 3 provided:

> The parties to the Hope Downs Deed and JLH hereby jointly and severally ratify and confirm the Hope Downs Deed as hereby amended.

85 Clause 9.2 was relevantly identical to the arbitration clause in cl 20.2 of the Hope Downs Deed.

86 The 2007 CS Deed was only executed by Mrs Rinehart, Mr Hancock and HPPL. It was a side agreement. The recitals and relevant clauses were set out by the primary judge at [431]-[435] of the reasons. The deed involved a salary to Mr Hancock of $750,000 per annum; it

involved Mr Hancock repaying loans; it also involved covenants not to proceed against the others and an abandonment of all claims including expressly the Supreme Court proceedings and the allegations in the draft affidavit. Butcher Paull & Calder advised Mr Hancock on the terms of the deed. The firm wrote to HPPL on 13 April 2007 in the following terms:

> 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.

87 For a time, Mr Hancock appears to have complied with his contractual undertakings. On 20 April 2007, he agreed to orders dismissing his application in the Supreme Court.

88 A new loan agreement was entered in November 2007 between Mr Hancock and HPPL.

89 At this point, the sequence of events in relation to the Roy Hill, Hope Downs, Nicholas Downs and Mulga Downs Tenements should be noted for the purposes of the arguments concerning the operation of the Hope Downs Deed. We have referred to these tenements above at [37] and [39] (Roy Hill), [47] and [48] (Hope Downs), [52] and [53] (Mulga Downs and Nicholas Downs). The Roy Hill Tenements were transferred from HPPL to RHIO after the execution of the Hope Downs Deed. HPPL held title to the relevant interest at the time of the Hope Downs Deed. HPPL, but not RHIO, was a party to the Hope Downs Deed. The Hope Downs Tenements were transferred from HPPL to HDIO in September 1997, before the Hope Downs Deed. HDIO was not a party to the Hope Downs Deed, but it was mentioned in the Deed in the acknowledgment of ownership in cl 4 and was part of the defined "Hancock Group". The Mulga Downs Tenement was transferred to MDIO in February 2009. The tenement had been held by HRL, which until 1998 was owned by HFMF, but the ownership in HRL had then been transferred to HPPL: see paras 260 to 271 of the statement of claim. The ownership and control of the Nicholas Downs Tenement is dealt with at paras 243 to 259 of the statement of claim. For present purposes, it is to be noted that the shares in HRL were transferred to HPPL in 1998, by which time HRL had, through one of its subsidiaries, ownership of the Nicholas Downs Tenement. From October 2008, that subsidiary's interest in the Nicholas Downs Tenement was dealt with as discussed in paras 252 to 258 of the statement of claim.

90 In August 2009, Mrs Rinehart, HPPL and Mr Hancock executed the August 2009 Deed of Further Settlement. The deed provided for some further financial accommodation to Mr Hancock. The deed contained a dispute resolution clause (cl 16), as follows:

> 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.

91 The following year, in November 2010, the parties to the 2009 Deed of Further Settlement entered another deed, the November 2010 Deed of Variation which provided further loan funding to Mr Hancock. Clause 11(ii) of this 2010 deed concerned dispute resolution and was as follows:

> 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 …

92 The 2010 deed also contained acknowledgements and releases in substantially the same form as in the 2007 CS Deed.

93 In September 2011, litigation in the Supreme Court of New South Wales was commenced by the applicants and Hope Welker seeking urgent relief in relation to the vesting of the HMH Trust. In October 2011, they made allegations about asserted misconduct of Mrs Rinehart as a trustee of the HMH Trust.

94 In 2012, demands were made by the applicants that HPPL pay dividends. Upon refusal, the applicants referred such dispute to arbitration under cl 20 of the Hope Downs Deed. The matter went before Mr Fitzgerald QC.

95 Litigation proceeded in the New South Wales Supreme Court in 2013.

96 This necessarily incomplete conspectus of the facts gives a sense of the character of the unresolved differences between the parties.

97 We have described the substantive claims by the applicants up to section 18 of the statement of claim.

98 The statement of claim contains a number of sections which plead various matters seeking to set aside the various deeds. These are referred to as the validity claims.

99 The first attack is upon the Hope Downs Deed and the April 2007 Deed. Paragraphs 288 to 290 of the statement of claim concern the underlying purposes of the Hope Downs Deed for Mrs Rinehart and HPPL – broadly to cement the control of Mrs Rinehart over the group. The arbitration clause was the subject of specific pleading in para 288.5 as one of the purposes of Mrs Rinehart and HPPL:

> 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** above 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.

100 Paragraphs 289 and 290 plead that the Hope Downs Deed was to the material disadvantage of the applicants in various respects, and to the material advantage of Mrs Rinehart and HPPL. Some focus is given to the arbitration clause in para 289.10 and 290 as follows:

> 289.10 the Hope Downs Deed purposed to provide for any disputes arising

> under it to be resolved by arbitration rather than through court proceedings, which was to the material disadvantage of BHR and JLH and to the material advantage of GHR and HPPL for the reasons set out in paragraphs 288.5 above and 290 below.
>
> 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.

101 In sections 23 to 30 of the statement of claim, Ms Rinehart's claims for relief in relation to the Hope Downs Deed and April 2007 Deed are pleaded: false representations as to the need for and benefits of the agreement, fraudulent concealment of the existence of the claims against Mrs Rinehart and HPPL for breaches of trust and duty, misleading and deceptive conduct by the representation made and by material non-disclosure, unconscionable conduct, undue influence, duress, breach of trust and fraud on a power. Various claims for relief are made: declarations that the Hope Downs Deed, the arbitration clause within it, the April 2007 HD Deed and the arbitration clause within it are void, orders restraining the enforcement of the releases and arbitration clauses, and claiming to rescind the Hope Downs Deed, the April 2007 Deed and the arbitration clauses in them.

102 As will become relevant in due course, it is to be noted that some of the claims for relief are founded on the *TP Act* and the assertions are made that various conduct of Mrs Rinehart was made in trade and commerce: paras 309-311 and 314-322 (implicitly).

103 In sections 31 to 37 of the statement of claim, Mr Hancock's claims for relief in relation to the deeds executed in 2005 and the April 2007 HD Deed are pleaded: misleading and deceptive and unconscionable conduct, false representations, material and fraudulent non-disclosures, unconscionable conduct, undue influence, duress, breach of trust and fraud on a power. Once again, these claims were in part based on assertions that conduct was in trade and commerce: see paras 370, 374, 402 and 413.

104 In section 38 of the statement of claim, Mr Hancock's claims for relief in relation to the 2009 and 2010 deeds of variation are pleaded.

105 In sections 39 to 41, the further claims about the wrongful deployment of the deeds are pleaded.

B. The conclusions of the primary judge

106 The conclusions of the primary judge were set out in summary form in [21] of her Honour's reasons. These conclusions were, relevantly, as follows.

107 First, the *CA Act* applied because it was picked up by s 79 of the *Judiciary Act* and because the arbitration agreements provided for domestic *commercial* arbitrations. We agree with these conclusions of the primary judge.

108 Secondly, the existence of any relevant arbitration agreement was satisfied by finding an apparently valid agreement; it was not appropriate to make findings on the stay application whether the deeds were entered into in the circumstances alleged by Mr Hancock and Ms Rinehart. We agree with that approach.

109 Thirdly, determining whether a matter was the subject of an arbitration agreement will generally involve a process of characterisation of the matter without going into the merits of the dispute, though it may be necessary to examine the merits to some degree to ascertain whether there is a relevant matter. Subject to an important qualification as to the expression of principle, we agree with that approach.

110 Fourthly, and relatedly to the third matter, the primary judge concluded that the relevant arbitration clause should be construed as to its proper scope and meaning, against which the matters in dispute should be assessed and characterised to see whether they were the subject of the arbitration agreement. We agree with the primary judge's general approach.

111 Fifthly, upon concluding that the proceedings raised a matter the subject of an apparently valid arbitration agreement, the Court had a discretion whether to hear itself or send to the arbitrator the question of the validity of the arbitration agreement in the proviso. The applicants criticised this, saying the Court was obliged to hear that challenge. We reject that criticism and agree with the primary judge's approach in principle, though we consider that her Honour erred in the exercise of the discretion.

112 Sixthly, the primary judge concluded that most of the so-called substantive claims fell within valid arbitration agreements, with the exception of claims against companies that were not parties to any arbitration agreement. We agree with the primary judge's conclusion.

113 Seventhly, the primary judge concluded that the so-called validity claims propounded by Ms Rinehart were not the subject of arbitration agreements, but with some exceptions, those of Mr Hancock were; as were the so-called miscellaneous clauses. We disagree with the first of these conclusions of her Honour and broadly agree with the second. Involved in this disagreement is our disagreement on the proper construction (and the approach to such) of the Hope Downs Deed and 2007 HD Deed.

114 Eighthly, having decided that these matters fell within apparently valid arbitration agreements, the primary judge refused to stay the proceedings and ordered that the Court would hear the attack on the arbitration agreements under the proviso to s 8(1). We disagree with her Honour's conclusion as to relief. We would stay the proceedings in Court, permitting the arbitrator to deal with all issues including the attack on the arbitration agreements.

C. Whether the arbitration is "commercial" for the purposes of the *CA Act*?

115 The primary judge held at [62] that "an arbitration will be a 'commercial' arbitration if it involves the resolution of a commercial dispute". Her Honour explained at [66] that:

> … 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.

Her Honour held that the dispute the subject of this proceeding would, if referred, be a commercial arbitration within the meaning of the *CA Act*. Her Honour also held that it was not necessary, as the applicants contended, for it to be demonstrated that the parties were in, or that the dispute arose out of a "commercial relationship".

116 The applicants submitted that the primary judge was wrong in respect of her conclusions about the meaning of the phrase "commercial arbitration" and that she was also wrong in holding that it is not necessary to prove the existence, in addition, of a "commercial relationship" between the parties to the dispute. The applicants' written submissions on the

issue occupied almost 30 pages and their oral submissions on the points were extensive. In our view, however, the submissions are wrong and can be dealt with relatively briefly.

Commercial relationship

117 Neither the *UNCITRAL Model Law on International Commercial Arbitration* (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) (the **Model Law**) nor the *CA Act* by their terms provide that the parties to a commercial arbitration must be in a commercial relationship.

118 The only relevant reference in the *CA Act* to "commercial relationship" is the following paragraph that appears as a note at the end of s 1 of the *CA Act*:

> **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.

119 In our view, that note, although forming part of the Act (see s 2(5) of the *CA Act*), does not, as the applicants contend, provide "that the enquiry into whether or not an arbitration is 'a commercial arbitration' is directed first and foremost to the nature of the relationship from which the dispute arises". That enquiry is not a separate and necessary one on the proper interpretation of s 8(1) of the *CA Act*, and the primary judge was correct so to find. It may well be that in many circumstances a pre-existing commercial relationship will exist and will make it easy to characterise why a dispute and an arbitration to resolve it are "commercial". In our view, the submission that a commercial relationship is a necessary prerequisite is not correct for many of the reasons advanced by counsel for Mrs Rinehart and the HPPL parties.

120 First, s 1 of the *CA Act* refers to a domestic "commercial arbitration". As counsel submitted, and we agree, it is significant that s 1 applies the adjective "commercial" to the word "arbitration" – not the relationship from which the dispute has arisen. Given that "[t]he paramount object of [the] Act is to facilitate the fair and final resolution of commercial disputes" it "may be accepted…that a 'commercial arbitration' may be understood as an arbitration of a 'commercial dispute'".

121 Secondly, the UNCITRAL Analytical Commentary on the Draft Text of Model Law on International Commercial Arbitration, by reference to which the *CA Act* is also to be construed, makes it clear that it was never intended that the existence of a commercial relationship was to be a prerequisite to the existence of a commercial arbitration. As counsel for Mrs Rinehart and the HPPL parties submitted, "the Analytical Commentary indicates that disputes between persons who had no relationship prior to the dispute are intended to be covered", and that, as the Analytical Commentary says, "even 'non-transactions' such as claims for damages arising in a commercial context" would be covered: see Analytical Commentary at [18].

122 Thirdly, if there were an additional and separate requirement to prove the existence of a commercial relationship in order for the *CA Act* to apply, it would pose a number of problematic, and difficult questions of construction that do not arise from the text of the provision, including: (i) what the term actually means; (ii) must it be the only relationship between the parties?; (iii) what connection is required between the relationship and the dispute? In our view, the legislature never intended the application of s 8(1) of the *CA Act* to involve the consideration of such arguably existential questions.

123 Counsel for Ms Rinehart and Mr Hancock conceded, as they were bound to, in oral argument that it is possible for parties in a commercial arbitration properly constituted never to have been, or ever to be in, a pre-existing commercial relationship. The Court posited an example of parties operating their respective rival businesses. In those circumstances, it would be an unusual case in which a competitor would seek a "commercial relationship" with a rival. But if a dispute arises between them because one party injures the other – for example, one damages the property of the other by, say, allowing poison to seep on to its property – and the parties agree to arbitrate the questions of resultant liability and damages, how could it sensibly be argued that such an arbitration is not a "commercial arbitration"? It may be that some relationship is found in the agreement to arbitrate – to resolve the dispute by arbitration in a business-like way.

124 For those reasons, in our opinion, it is not necessary for parties seeking to invoke s 8(1) of the *CA Act* to demonstrate the existence of a pre-existing commercial relationship between the parties to the dispute, and the primary judge was clearly correct so to find (at [72] of the reasons).

Commercial arbitration

125 It was common ground that in order to invoke the proviso in s 8(1) of the *CA Act*, a court must be relevantly satisfied, if the parties to the proceeding are to be referred to arbitration, that the arbitration would be a "domestic commercial arbitration". There was no dispute that the arbitration in this case would be "domestic". But the parties disagreed about whether the dispute is properly to be characterised as "commercial", as Mrs Rinehart and the HPPL parties submitted, or as a "family" or "trust" dispute, as Ms Rinehart and Mr Hancock submitted.

126 We would first make the point that the enquiry is not binary. That the dispute may be seen as a family dispute does not mean that it and the arbitration to resolve it are not to be characterised as commercial. That was also the view of the primary judge: see for instance [71] of the reasons. The applicants submitted that the arbitration would not be "commercial" because "this dispute is concerned with rights and obligations arising from two different family trust arrangements". During oral argument, counsel for Ms Rinehart and Mr Hancock further characterised what he referred to as "the August 2006 conduct" in respect of the Hope Downs deed, and thus the nature of the dispute in that regard, in these terms:

> We say that there was oppression by the mother borne upon the children to persuade them to sign a deed which they were told was required for the benefit of the company, but, in fact, a very large part of the objective was to secure releases for the trustee in relation to prior misconduct pertaining to the HFMF and HMH trusts, and there was a taking advantage by the mother of the control that she exercises over the children because of their financial dependence upon her and because of [Ms Rinehart's] desire to remain a part of [HPPL] with that position being under threat.

127 The applicants also submitted that the fact that their pleaded case is founded in large part upon conduct or representations "in trade or commerce" within the meaning of s 52 of the *TP Act* (as pleaded by them) is not necessarily determinative against them on the point. They quote a passage from *Concrete Constructions (NSW) Pty Limited v Nelson* [1990] HCA 17; 169 CLR 594 at 602 as authority for the proposition that the concept of "in trade or commerce" "encompass[es] conduct in the course of myriad activities *which are not of their nature, of a trading or commercial character* but which are undertaken in the course of or as incidental to, the carrying on of an overall trading or commercial business" (emphasis added in the submission). They further contend that the conduct of Mrs Rinehart and HPPL alleged was engaged in "for the purpose…of furthering HPPL's commercial activities" and that accordingly the dispute between the applicants and Mrs Rinehart and HPPL about that conduct was not a "commercial dispute". The applicants also submitted that the primary judge was wrong to have placed weight on the notion that any arbitration of the dispute

between the parties would "be conducted in a commercial manner by all parties having regard to the high financial stakes and the complexity of the issues" (citing the reasons at [560]), because there was no evidence about how the arbitration was to be conducted and because such an approach was "superficial".

128 Mrs Rinehart, HPPL and the HPPL respondents submitted that the disputes were quintessentially commercial, relying in particular on a number of factors. First, Ms Rinehart and Mr Hancock "have brought proceedings in a Court of general law jurisdiction with recognised commercial law expertise" pleading claims in "contract, corporations law, misleading or deceptive conduct and equity," so "the subject matter of the dispute is, in a real sense, valuable commercial assets and the income generated by them" (as the primary judge observed).

129 Secondly, they submitted that the conduct of Mrs Rinehart and HPPL the subject of the pleaded case in connection with the settlement deeds was conduct "in trade or commerce". This case was concerned with various activities or transactions between 2005 and 2010 which, of their nature, have a trading or commercial character, citing *Concrete Constructions* 196 CLR at 603 per Mason CJ, Deane, Dawson and Gaudron JJ.

130 Thirdly, they submitted that the objective context in which the settlement deeds were entered into bespoke the commercial character of the agreements and the disputes about them.

131 Fourthly, the deeds focus upon quelling disputes as to title in order that large scale commercial relations with third parties could be undertaken. The quelling of those disputes involved the provision of dividends taken from the profits earned through the commercial relationship with Rio Tinto for the Hope Downs Tenement. And this is a commercial arrangement concerned with significant sums of money paid over a period of time and the maintenance of title for the purpose of a commercial enterprise between HPPL and commercial third parties. Mrs Rinehart and the HPPL parties also pointed out that in 2012 Ms Rinehart and Mr Hancock themselves made a claim in an arbitration (later stayed) before Mr Tony Fitzgerald AC QC pursuant to cl 5 of the Hope Downs Deed relying on HPPL's obligation to pay distributions. That, they contend, and the fact that the parties to the various deeds, including the applicants, agreed that the various commercial arbitration Acts should apply, indicated an acceptance of the commercial nature of the relationship.

132 We agree with these submissions. The disputes the subject of the proceeding are "quintessentially" commercial. The word commercial is intended to be given a wide interpretation, as the note from the Model Law makes clear. As Deane J said in *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* [1978] FCA 107; 36 FLR 134 at 167, in considering the scope of s 52 of the *TP Act*:

> [t]he 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….

133 The case pleaded by Ms Rinehart and Mr Hancock concerns the circumstances in which they entered into numerous agreements, which they now seek to rescind and make void, involving the settlement of disputes as to the ownership of, and entitlement to, assets (including mines and dividends and distributions) worth hundreds of millions of dollars. To adopt the expression of the matter by senior counsel for Mrs Rinehart in oral argument: "…it's a commercial dispute about the metes and bounds of the disagreement between them and about who owns what". Properly characterised as a term of the widest import, and as a matter of "fact and common knowledge" it seems to us that the dispute the subject of this proceeding is manifestly "commercial".

134 It is, of course, also true to say that in one sense the dispute is capable of being described as one between a mother and her children, about the destruction of a family relationship under the crushing weight of wealth, about the alleged maladministration of family trusts, and about the asserted loss of a large part of an inheritance that the childrens' grandfather (Mr Lang Hancock) had intended them to have. But, in our opinion, the choice between a dispute being "commercial" on the one hand, or "family" on the other, is not, as the applicants' submissions imply, a binary one. Such questions of characterisation rarely involve the existence of mutually exclusive categories. Questions of characterisation are not questions of definition. As the plurality of the High Court in *Rich v Australian Securities and Investment Commission* [2004] HCA 42; 220 CLR 129 at 146 [35] explained when considering the question of whether the purpose of disqualification orders against company directors is to protect the public or punish the directors:

> That it may be possible to characterise proceedings as having a purpose of protecting the public is not determinative. And to begin the inquiry from an a priori classification of proceedings as *either* protective *or* penal invites error. It invites error primarily because the classification adopted assumes mutual exclusivity of the categories chosen when they are not, and because the classification is itself unstable.

> To assume mutual exclusivity of the categories is to fall into the same kind of error as was identified in the constitutional context in *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 192-194. Just as a law may bear several characters, a proceeding may seek relief which, if granted, would protect the public but would also penalise the person against whom it is granted. That a proceeding may bear several characters does not deny that it bears *each* of those characters, citing Stone, *Legal System and Lawyers' Reasonings*, (1964) at 248-252. Moreover, as Hayne J emphasised in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*, (2003) 216 CLR 161 at 205-206, [136] those who seek the 'essential character' of statutory provisions do not proffer explanations of that process of distillation.

135 As the primary judge said (at [71] of the reasons), the applicants' characterisation of the dispute is not necessarily inconsistent with its characterisation as a "commercial dispute". In our view, to characterise this dispute *only* as a family dispute or a family trust dispute, which is the view propounded by the applicants, is to ignore the overwhelming commercial nature and circumstances of the dispute.

136 The applicants' contention in that regard also fails to deal with the inconvenient fact that their pleading, or a large part of it, is founded on express allegations that the pleaded misrepresentations and conduct were and was made "in trade or commerce" within the meaning of s 52 of the *TP Act*. Counsel for the applicants have, with respect, misread the reasoning of the plurality in *Concrete Constructions.* The High Court did *not* hold that the concept of "in trade or commerce" encompasses conduct which is not of its nature of a trading or commercial character, as the applicants contend in their written submissions. It held the opposite: see *Concrete Constructions* 169 CLR at 603. The plurality there held that "the reference to conduct 'in trade or commerce' in s 52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character". That is the "narrower" of the alternative constructions, which the plurality said was "preferable" to the construction that they rejected – which is the construction which the applicants mistakenly cite and reply upon.

137 It follows that in order for the applicants' pleading to disclose a proper cause of action, the pleaded claims which rely on the *TP Act* must, by definition, be read to refer to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a "commercial character".

138 This reinforces the conclusion that the dispute is necessarily a "commercial dispute", there being no contention that the word "commerce" in s 52 of the *TP Act* (now s 18 of the

Australian Consumer Law) has any different or narrower connotation than the word "commercial" in the *CA Act*.

139 In our view, the arbitration would be a domestic commercial arbitration.

D. The extent to which the matters in dispute are the subject of an arbitration agreement

140 This question was the subject of agreed questions 6, 7 and 9.

The proper approach to an application under s 8

141 The terms of question 7 and the reference to "standard of proof" were and was prompted by debate in the cases concerning provisions such as s 8 as to how the Court should approach the task. Broadly, there have been said to be two approaches. The first approach taken largely by courts in what might be called "Model Law jurisdictions" is to give significant weight to the authority of the arbitrator and to the principle of *Kompetenz-Kompetenz* recognised by s 16 of the *CA Act*. Under this approach, the Court does not reach a final view on the balance of probabilities in respect of the matters in s 8, including the scope of the arbitration agreement. If there appears to be a valid arbitration agreement which *prima face* covers the matters in dispute, the matter should be referred to the arbitrator to deal with questions of jurisdiction, including the scope of the arbitration agreement. With one important qualification, one sees this approach most fully discussed in the comprehensive reasons of Menon CJ writing for the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57, in Hong Kong: *Star (Universal) Co Ltd v Private Company "Triple V" Inc* [1995] 2 HKLR 62 at 65 (Court of Appeal) and *PCCW Global Ltd v Interactive Communication Service Ltd* [2006] HKCA 434; [2007] 1 HKLRD 309 at 320-321 [60] (Court of Appeal) and in first instance courts there: *T v Ts* [2014] 4 HKLRD 772 at 778 [16] and *Ling Yan Temple Ltd v Ng Yook Mau* [2010] HKEL 734, in Canada in the British Columbia, Ontario and New Brunswick Courts of Appeal: *Gulf Canada Resources Ltd v Arochem International Ltd* (1992) 66 BCLR (2d) 113, *Dalimpex v Janicki* (2003) 228 DLR (4th) 179, and *Harrison v UBS Holding Canada Ltd* (2014) 418 NBR (2d) 328. *Gulf Canada* and *Dalimpex* were specifically approved by the majority of the Supreme Court of Canada in *Dell Computer Corp. v Union des consommateurs* [2007] SCC 34; 2 SCR 801. There was a caveat in the judgment of the majority in *Dell* as to the general applicability of the so-called *prima facie* approach to which we will come and which is of importance to this case. The *prima facie* approach has also been adopted in New Zealand and Ireland: *Ursem v*

Chung [2014] NZHC 436; NZAR 1123 per Abbott AsJ and *P Elliot & Company Ltd (In receivership and liquidation) v FCC Elliot Constructions Ltd* [2012] IEHC 361 per Mac Eochaidh J, but cf *The 'Lisheen Mine' v Mullock & Sons (Shipbrokers) Ltd* [2015] IEHC 50 at [114]-[135] per Cregan J.

142 The second and contrasting approach is that adopted by the English Courts that a full merits hearing will be undertaken as to the existence and scope of the arbitration agreement and that the disputes fall within it: *Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky* [2013] EWCA Civ 784; [2013] 2 Lloyd's Rep 242 at 258 [72]-[74].

143 In dealing with the application of the *CA Act* the primary judge appeared in one part of her Honour's judgment to favour the *prima facie* approach, when her Honour said at [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).

144 In dealing, however, with agreed questions 6 and 7, the primary judge expressed herself as applying the balance of probability approach reflected in the views of Aikens LJ for the Court of Appeal in *Berezovsky*. Her Honour said at [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.

145 We think that any rigid taxonomy of approach is unhelpful, as are the labels "*prima facie*" and "merits" approach. How a judge deals with an application under s 8 of the *CA Act* will depend significantly upon the issues and the context. Broadly speaking, however, and with some qualification, aspects of the *prima facie* approach have much to commend them as an approach that gives support to the jurisdiction of the arbitrator and his or her competence, as recognised by the common law and by s 16 of the *CA Act*, whilst preserving the role of the

Court as the ultimate arbiter on questions of jurisdiction conferred by ss 16(9) and (10), 34(2)(a)(iii) and 36(1)(a)(iii) of the *CA Act*. Broadly, the approach is consonant with the structure of the *CA Act* and the Model Law. However, it is difficult to see how the Court can exercise its power under s 8 without forming a view as to the meaning of the arbitration agreement. Further, it may be that if there is a question of law otherwise affecting the answer to the question of jurisdiction, especially one that is confined, which might be dispositive, it might be less than useful for the Court not to deal with it. In *Dell*, Deschamps J speaking for the majority (McLachlin CJ, Binnie, Abella, Charron and Rothstein JJ) reflecting this approach said at [2007] 2 SCR 848-849 [84]:

> … [t]he court's expertise in resolving such questions, … the fact that the court is the forum to which the parties apply first when requesting referral and … the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.

146 To understand whether a body of disputes being the "matter", assessed and characterised (at the necessarily early stage of the proceeding), is the subject of an arbitration agreement, will generally require the Court to form a view as to the legal meaning of the arbitration agreement. Section 8 is an important power the purpose of which is to protect the practical legitimacy and authority of the arbitration process as reflected in the words of s 1C of the *CA Act*. It involves the referral to arbitration, by a stay of court proceedings. However, it will often not be possible fully to delineate the metes and bounds of a dispute without fully hearing the dispute. To do so, that is to hear the facts to decide the width of the dispute, would undermine the practical and effective operation of s 8. The application must be brought early (not later than when submitting the party's first statement on the substance of the dispute). The boundaries of the dispute may be unclear, but it will have to be characterised on the material available to be assessed as to whether it can be seen to be the "subject of" the arbitration agreement. That latter assessment will require some stability or clarity as to the meaning of the arbitration agreement. The Court is then required to construe the clause, at least to the point of being satisfied that the disputes forming the matter are the subject of the agreement, or not, as the case may be. That said, and it is relevant to the arguments here, not every legal question need be, or should be, decided by the Court about the rights and obligations of the parties. That too would tend to undermine the practice and effective operation of s 8.

147 Whilst s 8 uses the word "finds" in the proviso, that should not be taken as a categoric requirement that the Court must hear that issue. It can be accepted that as a general rule, unless there is an established legal basis for refusing to do so, a court should, upon legitimate request, exercise jurisdiction conferred on it. However, s 8 is found in an Act of Parliament the paramount object of which is the facilitation of the work of impartial arbitral tribunals. One of the features of that facilitation is the express recognition of the authority of the arbitral tribunal to rule on its own jurisdiction. This includes, expressly, any objection "with respect to the existence or validity of the arbitration agreement", including any objection with respect to the existence or validity of the arbitration agreement: s 16(1). Section 8 should be read with s 16(1) and thus, the word "finds" should not be read as requiring that the matters in the proviso cannot be part of the reference to the arbitrator. These considerations are central to the resolution of the issues discussed in sections F, G and H below.

148 The question will arise as to when the Court should hear the issues in the proviso. We will return to this in more detail in section G below. It is, however, useful at this point to refer to what was said by Colman J in *A v B* [2006] EWHC 2006 (Comm); [2007] 1 Lloyd's Rep 237 at 261 [137] in discussing the question whether the Court should hear the application as to whether the arbitration agreement is "null and void etc":

> … [O]nce 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 section 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.

149 There is a further difficulty in the approach of the primary judge in so far as it proceeded beyond a characterisation of the nature of the matter and whether it fell within the arbitration agreement. The requirement of an assessment as to whether there was a "sustainable argument" that the matter falls within the arbitration agreement has its dangers. Of course, if there is no sustainable argument that a matter or dispute can be characterised as falling within the agreement, it should not be referred to arbitration. But difficulties arise if this enquiry becomes one directed to the strength of the case raised by the issue or matter. The

importance of this will become more evident in due course in discussing the primary judge's treatment of some of the provisions of the Hope Downs Deed. It is sufficient to say at this point that it would generally be wrong for the Court to examine an argument in a form of summary disposal application, and, if it were thought that an asserted case, in terms otherwise falling within the scope of the agreement, was sufficiently weak not to be "sustainable", not to refer the matter to arbitration. That would be to usurp the role of the arbitrator. The Court's role in s 8 is not to act as a court of summary disposal filtering the matters that are suitable for arbitration.

150 Thus, we would differ from aspects of her Honour's expression of the principle. We do agree with her Honour's approach as to whether there is an apparently valid arbitration agreement against which one undertakes a process of characterisation of the matters in dispute. In particular, we agree with her Honour's approach of not deciding on a final basis the wide ranging factual matters said to give rise to a right to set aside the deeds in question and the particular issues of the interpretation of releases, covenants and acknowledgements which make up the rights of the parties from the deeds, and precisely how these questions affect the wide-ranging facts in dispute. As will be further discussed, we disagree with her Honour's treatment of the question of the sustainability or triability of issues in relation to certain arguments.

151 It is also important to recognise the different issues that may arise on an application under s 8. The proof of an apparently valid arbitration agreement, as here, may be beyond argument. The substantial issue in contest between the parties is whether by reason of the matters pleaded the terms of the deed apply, and from the matters pleaded whether such agreements are "null and void etc". That the first question (the existence of an apparently valid arbitration agreement) should be proved to the required level to satisfy a court that it has authority to engage the power in s 8 does not mean that the Court should or must embark upon detailed consideration as to the operation of the deeds or as to the attack on the deeds or the arbitration agreements. The need for the existence of an arbitration agreement does not mean that the Court should not take a broad view characterising the disputes to assess whether they are the subject of an arbitration agreement, such enquiry not engaging substantially in the merits of the case.

152 How these matters work themselves out can be seen in the resolution of the appeals and cross-appeals on this point. The proper approach will be elucidated in the discussion of the

parties' contentions as to the primary judge's approach. Further, as we discuss below, the correct focus of generality or particularity with which to examine the "matter" the subject of the arbitration agreement will be affected by the proper construction of that agreement.

The 2005 Deed of Obligation and Release, the Hope Downs Deed and the 2007 HD Deed, their arbitration agreements and what matters are the subject thereof

153 The terms of the relevant arbitration agreements in these deeds are set out at [69] and [79] above. The crucial words in cl 20 are "any dispute under this deed". The same phrase is found in cl 9 of the 2007 HD Deed. (The Deed of Obligation and Release in 2005 uses the phrase "all disputes hereunder".)

154 We leave to section E below the question of the relief sought against entities which were not parties to relevant agreements: RHIO, HDIO, MDI and MDIO under the extended definition of the word "party" in s 2 of the *CA Act.*

155 At [553]-[558] of her Honour's reasons, the primary judge discussed the organisation of the relevant "matters" for the application of s 8(1). Her Honour began with the third parties: RHIO, HDIO, MDI and MDIO, and then organised the disputes into 11 categories, as follows:

> 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.

156 The division of the *disputes* into these 11 categories, while certainly helpful for organisational purposes, should not deflect attention from looking at the question whether there is a "matter" or "matters" the subject of any arbitration agreement, by the resolution of the central constructional issue in respect of each deed as it relates to s 8 – the meaning of the arbitration agreement in question. The width or narrowness of the scope of the agreement is central to the ascertainment of the matter subject of it. At [93]-[97] of her Honour's reasons, the primary judge said the following about the word "matter" in s 8:

> 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".

157 No one argued that the above statement contained any error of principle. That said, any overly fine dissection of different "disputes" within a wide-ranging and interlocking controversy may lead to overly refined categorisation or classification of disputes falling within and without the arbitration agreement in question. When looked at holistically, the substance of a dispute in its interconnected character may well fall within the arbitration agreement. It is fundamental to recall, however, that the proper construction of the arbitration agreement is relevant to the focus one applies to the meaning of the word "matter" in any given circumstance. If the proper construction of the agreement requires a focus on individual disputes or requires a certain connection between the necessary resolution of an

issue with the operation of an operative document, then close attention will be required to each individual issue or dispute to identify that connection, and so to identify the "matter". If, on the other hand, the proper construction of the agreement requires a broader focus on the overall dispute more generally characterised, then the "matter" will likewise be broader. This is the significance of what was said in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; 157 FCR 45 at 105-106 [235], cited by the primary judge at [96] (see [156] above).

158 Here, at one level, the overall dispute can, without intended disrespect to the parties, be described as follows. The applicants accuse their mother of wholesale breaches of equitable and contractual duties in wrongfully transferring hugely valuable commercial assets from the control of entities that owned the assets significantly for the benefit of the children to entities and ownership structures controlled by Mrs Rinehart. The companies controlled by Mrs Rinehart are said to have been legally complicit in these wrongs. Mrs Rinehart and the companies concerned set up various provisions of the deeds in answer to these claims, deeds that are said to have been entered by the applicants when they were adults and after proper advice. Very often, even if not always, the answer to the claims is said to be a complete answer. The applicants, in turn, deny those matters, and apart from pointing to what they say is the limited operation of the deeds, say that all the deeds should be set aside for various reasons based on equity, common law and statute.

159 Thus, how one analyses the dispute or disputes, and whether it is legitimate to divide or subdivide the matter into the 11 disputes identified by the primary judge will depend upon the proper construction of the arbitration agreements (the clauses).

160 After deciding (correctly – see section C above) that the disputes and the arbitration were and was commercial, the primary judge turned to the construction of the arbitration agreements and the question whether the disputes, organised in the way described above, were subject to them.

161 At [579]-[587] of her Honour's reasons, the primary judge discussed the principles applicable to the construction of arbitration agreements and the meaning of the phrase any dispute "under this deed". Her Honour's conclusions can be summarised as follows. First, the construction placed on cl 20 of the Hope Downs Deed by the New South Wales Court of Appeal in the leading judgment of Bathurst CJ in *Rinehart v Welker* [2012] NSWCA 95 was the determining authority. Secondly, the decision of the House of Lords in *Fiona Trust &*

Holding Corporation v Privalov [2007] UKHL 40; [2008] 1 Lloyd's Rep 254 should not be followed to the extent that her Honour saw it as stating a rule as to the construction of arbitration agreements different from ordinary principles of construction and interpretation of contracts. In this regard, her Honour followed what Bathurst CJ had said in *Rinehart v Welker*. Thirdly, and flowing from the first and second matters, the phrase "under this deed" limited arbitral disputes only to disputes the outcome of which was "governed or controlled" by the deed. As we explain below, we cannot agree with this construction. It fails to give the necessary liberal width to the phrase "under the deed" and it fails to focus on the correct phrase, "any dispute under the deed", and by so doing fails to take account of the consequences of the liberal width of the phrase "any dispute". The consequence of this narrow construction was that her Honour was required to examine individual disputes to ascertain whether each was "governed or controlled" by the deed.

162 Before turning to *Rinehart v Welker* it is appropriate to set out the approach to the proper construction and interpretation of arbitration agreements.

163 The construction of any arbitration clause in a contract (and such, by the principle of separability and s 16(2) of the *CA Act*, of an arbitration agreement) is governed by the principles of the common law of Australia attending the construction and interpretation of contracts. The construction and interpretation of written contracts is to be undertaken by an examination of the text of the document in the context of the surrounding circumstances known to the parties, including the purpose and object of the transaction or of the subject matter of the agreement and by assessing how a reasonable person would have understood the language in that context: *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; 210 CLR 181 at 188 [11]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; 218 CLR 451 at 461-462 [22]; *Zhu v Treasurer of the State of New South Wales* [2004] HCA 56; 218 CLR 530 at 559 [82]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 at 179 [40]; *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; 234 CLR 151 at 160 [8] and 174 [53]; *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; 251 CLR 640 at 656-657 [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; 256 CLR 104 at 116-117 [46]-[52]; *Victoria v Tatts Group Ltd* [2016] HCA 5; 328 ALR 564 at 575 [51]; and *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; 343 ALR 58 at 61 [7].

164 In his Honour's judgment in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; 149 CLR 337 at 351, Mason J referred to the speech of Lord Wilberforce in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 996 that included the following passage:

> … when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.

165 The assessment of what reasonable persons would have in mind in the situation of the parties can be influenced by what courts have said about such contracts or the market or environment in which they are made. How one approaches the construction and interpretation of contracts may well thus be affected by such considerations. It is not to put a gloss on the High Court cases to which we have referred, but to reflect the expression of principle in them.

166 In *Comandate* 157 FCR 45, Allsop J (with whose judgment Finn and Finkelstein JJ agreed) discussed the approach to the construction and interpretation of arbitration clauses, the clause there being a standard form shipping contract used in the international shipping market for the time chartering of vessels. Notwithstanding the different market, context and international character of the clause in that case, the judgment of the Court was to the effect that arbitration clauses should be read against the sensible presumption (in effect a rational assumption of reasonable people) that the parties do not intend the inconvenience of having possible disputes being heard in two places. This approach was not novel. It reflected the reasoning of Gleeson CJ (with whom Meagher and Sheller JJA agreed) in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways* (1996) 39 NSWLR 160 at 165-166, where Gleeson CJ used the expression the "correct general approach to problems of this kind".

167 The existence of a "correct general approach to problems of this kind" does not imply some legal rule outside the orthodox process of construction; nor does it deny the necessity to construe the words of any particular agreement. But part of the assumed legal context is this correct general approach which is to give expression to the rational assumption of reasonable people by giving liberal width and flexibility where possible to elastic and general words of the contractual submission to arbitration, unless the words in their context should be read more narrowly. One aspect of this is not to approach relational prepositions with fine shades of difference in the legal character of issues, or by ingenuity in legal argument (Gleeson CJ in *Francis Travel* at 165); another is not to choose or be constrained by narrow metaphor when giving meaning to words of relationship, such as "under" or "arising out of" or "arising

from". None of that, however, is to say that the process is rule-based rather than concerned with the construction of the words in question. Further, there is no particular reason to limit such a sensible assumption to international commerce. There is no reason why parties in domestic arrangements (subject to contextual circumstances) would not be taken to make the very same common-sense assumption. Thus, where one has relational phrases capable of liberal width, it is a mistake to ascribe to such words a narrow meaning, unless some aspect of the constructional process, such as context, requires it.

168 Before turning to *Fiona Trust* and the judgment of Bathurst CJ in *Rinehart v Welker*, three further comments should be made about the correct general approach. First, Gleeson CJ in *Francis Travel* at 165 approved not only the decision, but also the reasoning of Hirst J in *Ethiopian Oilseeds & Pulses Export Corporation v Rio Del Mar Foods Inc* [1990] 1 Lloyd's Rep 86. Although Hirst J was dealing with the phrase "arising out of", his reasoning is important because it reflected a refusal to be bound by any narrowness of approach which assumed the temporal existence of a contract before something could arise out of it. This temporal vision is not required by the words. This has a distinct resonance when we come to the meaning of "any dispute under the deed" and whether the idea that for a dispute to be under a deed its resolution necessarily assumes the contract's validity such that the dispute must be governed or controlled by the deed, and whether that construction conforms to the correct general approach, or whether such a construction is unnecessarily narrow and suggested by a narrow spatial metaphor or vision derived from the word "under".

169 The second comment is that in coming to the meaning of "under" or "hereunder" the decision of the Court of Appeal (Lord Denning MR and Diplock and Russell LJJ) in *Mackender v Feldia AG* [1967] 2 QB 590 should be recalled at all times. There, a dispute as to whether an insurance policy could be avoided for breach of the common law duty of non-disclosure was found to be a dispute "under" the contract of insurance. The Court unequivocally held that a claim as to the invalidity of a contract (by avoidance for non-disclosure and illegality) was "under the contract".

170 The third comment concerns some features of *Comandate*. Whilst the focus in that case was on the phrase "arising out of", there was a rejection of the reasoning of Emmett J in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (*The Kiukiang Career*) [1998] FCA 1485; 90 FCR 1 to the extent that it had rejected the approach of the primary judge who had relied on Hirst J in *Ethiopian Oilseeds*: see *Comandate* 157 FCR at 92 [183] and [184]. It is also to

be noted that in *Comandate* 157 FCR at 92 [183] Emmett J's reliance on the decision of French J in *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* [1993] FCA 494; 43 FCR 439 was part of the reason to say that his Honour's approach was wrong.

171 In *Paper Products*, French J was dealing with a clause being "any dispute… arising under this agreement". His Honour dealt with an argument that arbitration clauses should be read liberally, but found that the words before him left little room for movement saying at 43 FCR 448:

> 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.
>
> (emphasis added)

172 It is sufficient at this point to say that we disagree with the proposition that (context aside) there is little or no elasticity in the phrase "any dispute … arising under the agreement", and that they are a "restricted form of words". They may, in terms, be less widely framed than other words, but they are not restricted.

173 We turn to *Fiona Trust*. As we explain below, we do not consider the arguments about *Fiona Trust* to be critical to the resolution of the appeals. The case is, however, of general importance, and should not be left diminished. The importance of *Fiona Trust* lies in two respects: first, in relation to the proper construction of arbitration clauses; and secondly, in the expression of the general law principle of separability of arbitration agreements. We here deal with the first of these matters. We deal with the second in due course.

174 The case concerned the arbitration clause in the well-known time charter form Shelltime 4. There were a number of such charters all containing arbitration clauses dealing with disputes "arising under this charter" and "out of this charter". The owners asserted that the charters had been procured by bribery and rescinded the charters. When the arbitration clauses were invoked by the charterers in proceedings to determine the efficacy of the rescission, the

owners sought to restrain the arbitration proceedings. The charterers then sought a stay of the court proceedings.

175 The Court of Appeal (Tuckey, Arden and Longmore LJJ, in a judgment delivered by Longmore LJ: *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA 20; [2007] 2 Lloyd's Rep 267) examined the major English authorities (appellate and first instance) dealing with differently expressed arbitration clauses. The decision succinctly, but closely, examined different cases and different approaches. Lord Justice Longmore noted that in *Heyman v Darwins* [1942] AC 356 both Lord Wright (at 385) and Lord Porter (at 399) said that "arising out of" was wider than "arising under"; but that in *Union of India v E B Aaby's Rederi A/S (The Evje)* [1975] AC 797 both Viscount Dilhorne (at 814H) and Lord Salmon (at 817A) could see no difference between the phrases. His Lordship also referred to *Mackender v Feldia* and the Court's view that rescission of a contract was a dispute thereunder. Importantly, Longmore LJ referred to two cases reflecting a narrow and precise approach to the arbitration clauses in question, and he said the following at [2007] 2 Lloyd's Rep 271:

> *Fillite (Runcorn) v Aqua-Lift* decided that claims for negligent misrepresentation (whether in tort or in contract under the Misrepresentation Act 1967) or for breach of a collateral contract did not fall within an arbitration clause referring any dispute "arising under these heads of agreement". Slade LJ held (page 76) that the phrase "disputes arising under a contract" was not wide enough to include disputes which do not concern obligations created by or incorporated in that contract. He approved the dicta of Evans J in *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63 at page 67 drawing a distinction between clauses relating to disputes about rights created by the contract itself and clauses showing an intention to refer some wider class of dispute. Nourse LJ agreed saying that the word "under" meant "as a result of and with reference to". Hollings J agreed with both judgments. *Mackender v Feldia* was not cited; nor was *The Playa Larga.* It is difficult to think that if they had been cited the judgments would have been expressed in the terms they were. The contract was moreover a specially negotiated contract for services and was not a common form of commercial agreement.

176 At 271-72 [17]-[20], Longmore LJ reflected on the unhappy state of litigation in which words of prepositional phrases were pored over with attention being given to an ever-growing number of precedents. In a plea for a fresh start and a broader, more liberal, construction, he said this at 272 [18]:

> … Although in the past the words "arising under the contract" have sometimes been given a narrower meaning, that should no longer continue to be so. Since both phrases are used in the present case there is, in any event, no need here to differentiate between them but the proposition that the phrases "under" and "out of" should be widely construed is to my mind strongly supported by *Mackender v Feldia.*

177 The appeal to the House of Lords was dismissed and their Lordships took up Longmore LJ's plea. Lord Hoffmann said the following at [2008] 1 Lloyd's Rep 256 [6]-[8]:

> [6] In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.
>
> [7] If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.
>
> [8] **A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause.** But the same policy of giving effect to the commercial purpose also drives the approach of the courts (and the legislature) to the second question raised in this appeal, namely, whether there is any conceptual reason why parties who have agreed to submit the question of the validity of the contract to arbitration should not be allowed to do so.
>
> (emphasis added)

178 With respect, nothing in these paragraphs goes beyond the essence of the judgment of Gleeson CJ in *Francis Travel*; indeed, it is fully in accord with it.

179 Lord Hoffmann went on at [11] to summarise the differences in approach to the clauses. It is worthy of repetition because the expressions in the cases reflect much of the argument before us. He said at [2008] 1 Lloyd's Rep 256-257 [11]:

> With that background, **I turn to the question of construction.** Your Lordships were referred to a number of cases in which various forms of words in arbitration clauses have been considered. Some of them draw a distinction between disputes "arising under" and "arising out of" the agreement. In *Heyman v Darwins Ltd* (1942) 72 Ll L

> Rep 65; [1942] AC 356 at page 399 Lord Porter said that the former had a narrower meaning than the latter but in *Union of India v E B Aaby's Rederi AS (The Evje)* [1974] 2 Lloyd's Rep 57; [1975] AC 797 Viscount Dilhorne, at page 814, and Lord Salmon, at page 817, said that they could not see the difference between them. Nevertheless, in *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63 at page 67, Evans J said that there was a broad distinction between clauses which referred "only those disputes which may arise regarding the rights and obligations which are created by the contract itself" and those which "show an intention to refer some wider class or classes of disputes". The former may be said to arise "under" the contract while the latter would arise "in relation to" or "in connection with" the contract. In *Fillite (Runcorn) Ltd v Aqua-Lift* (1989) 45 BLR 27; (1989) 26 Con LR 66, at page 76, Slade LJ said that the phrase "under a contract" was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract. Nourse LJ gave a judgment to the same effect. The court does not seem to have been referred to *Mackender, Hill and White v Feldia AG* [1966] 2 Lloyd's Rep 449; [1967] 2 QB 590, in which a court which included Lord Denning MR and Diplock LJ decided that a clause in an insurance policy submitting disputes "arising thereunder" to a foreign jurisdiction was wide enough to cover the question of whether the contract could be avoided for non-disclosure.
>
> (emphasis added)

180 Lord Hoffmann eschewed at [12] any analysis of these cases because they contained distinctions which "reflect no credit upon English commercial law". His Lordship referred to their need "to make a fresh start". But he did not abandon the process of construction. It was the approach to construction with which he was concerned. In referring to s 7 of the *Arbitration Act 1996* (UK) (the equivalent of s 16(2) of the *CA Act*) Lord Hoffmann said the following at [2008] 1 Lloyd's Rep 257 [12]:

> …But section 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations. The approach to construction therefore needs to be re-examined.

181 At [2008] 1 Lloyd's Rep 257 [13] he expressed what he saw as the correct approach:

> In my opinion the construction of an arbitration clause should start from the assumption 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. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so".

182 We do not see how this departs from the approach of Gleeson CJ in *Francis Travel*. Indeed, it is reflective of it. The assumption to be made is identical. To require that language be clear to move the assumption should not be read as a legal rule beyond one that gives work to do for the assumption. It is a text based construction, but one in which the assumption has a real

role to play – not the subject of a nod, before fine textual analysis takes place using legal and linguistic ingenuity differentiating prepositional phrases using spatial and temporal metaphors derived from, or imposed on, the words. The assumption of an appropriate common sense contextual framework is not foreign to, but part of, an orthodox approach to construction.

183 Lord Hope of Craighead, Lord Scott of Foscote, Lord Walker of Gestingthorpe and Lord Brown of Eaton-under-Heywood agreed with Lord Hoffmann.

184 Lord Hope wrote a concurring speech (with which Lord Brown agreed). His Lordship's additional comments should not be viewed as qualifying his "entire" agreement with the speech of Lord Hoffmann. After dealing with the clause in question, Lord Hope referred to a number of decisions from Germany, the United States and Australia (*Comandate)*. It is true that the German decision, and perhaps some of the expression in the United States decision can be seen as the expression of a legal rule that to a degree dominates the process of construction, but Lord Hope expressed himself as dealing with construction. He said the following at [2008] 1 Lloyd's Rep 260 [31]:

> In [*Comandate*]…the Federal Court of Australia said that a liberal approach to the words chosen by the parties was underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places, particularly when they were operating in a truly international market. This approach to the issue of construction is now firmly embedded as part of the law of international commerce. I agree with the Court of Appeal that it must now be accepted as part of our law too.

185 That Lord Hope used the word "presumption" (and not "assumption") does not reflect the imposition of a legal rule upon the process of construction. We do not see any disconformity between the approach of the House of Lords in *Fiona Trust* and that of the New South Wales Court of Appeal in *Francis Travel* or of the Full Court of this Court in *Comandate*. Neither did the majority of the Western Australian Court of Appeal in *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66; 298 ALR 666 at 683-686 [50]-[63]; nor the New South Wales Court of Appeal in *United Group Rail Services Ltd v Rail Corporation of New South Wales* [2009] NSWCA 177; 74 NSWLR 618 at 622 [3]; *Global Partners Fund Ltd v Babcock & Brown Ltd (in Liq)* [2010] NSWCA 196; 79 ACSR 383 at 398-399[61]-[66]; and *Lipman Pty Ltd v Emergency Services Superannuation Board* [2011] NSWCA 163 at [6].

186 As French CJ and Gageler J said in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; 251 CLR 533 at 550 [16] in answer to an argument that Australian arbitration agreements contained an implied term that the authority of the arbitral tribunal is limited to a correct application of the law:

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

Their Honours cite *Comandate* 157 FCR at 87-93 [162]-[187] and *Fiona Trust* [2008] Lloyd's Rep at 256-257 [5]-[14].

187 It is in this light that the decision of the New South Wales Court of Appeal in *Rinehart v Welker* is to be examined.

188 *Rinehart v Welker* [2012] NSWCA 95 concerned the appeal from the orders of Brereton J (delivered *extempore* in a duty judge application) refusing to stay the proceedings brought by Ms Rinehart, Mr Hancock and Ms Welker seeking information about the trusts and orders under the *Trustees Act 1962* (WA), including the removal of Mrs Rinehart as trustee. The stay application was brought to enforce the dispute resolution clauses in the Hope Downs Deed and the Deed of Obligation and Release. The appeal raised issues of construction and interpretation of the same clauses of the deeds, between the very same parties to the deeds. There was a defence filed on behalf of Mrs Rinehart which put the allegations of misconduct in issue and also relied on provisions of the Hope Downs Deed, in particular cll 6 and 7. The *CA Act* and s 8 thereof was not the subject of the judgment.

189 The arguments in *Rinehart v Welker* [2012] NSWCA 95 were pitched at a number of levels. They relied on the liberal approach based on the assumption referred to in *Francis Travel.* Reliance was placed on *Fiona Trust* as reflected in [77] of the judgment of Bathurst CJ:

> Senior Counsel for GHR also submitted that fine distinctions between expressions such as "arising out of", "in connection with" or "arising under" should not be made in this field. In this regard, in addition to the cases relied on in the written submissions, he placed particular reliance on what was said by Lord Hoffmann in *Fiona Corporation* supra, that there should be a "fresh start" in the construction of arbitration clauses and that they should be construed with a presumption that the parties did not intend their disputes to be dealt with in two separate tribunals.

190 Also, the submissions focused on the most narrow construction as reflected in [69] of the judgment of Bathurst CJ:

> GHR submitted that once the dispute involved the contention that it was not legally open to the respondents to pursue in court the claims made in the amended summons, there was a dispute under the Settlement Deed even giving these words their narrowest meaning. She submitted that once this part of the dispute was a dispute under the Settlement Deed, the whole dispute is a dispute under the Settlement Deed.

191 The construction and scope of cl 20 of the Hope Downs Deed is dealt with by Bathurst CJ at [114] and following. The Chief Justice commenced with the proposition that the contract is to be construed according to the principles set out in *Toll v Alphapharm*. So much is both clear and uncontroversial.

192 Reference was made, without criticism, to the approach set out in *Francis Travel*, *Comandate*, *Global Partners* and *Lipman.* The Chief Justice, however, saw discordance in the approach of the House of Lords in *Fiona Trust*, saying at [121]-[122]:

> 121 It follows that it is not appropriate for this Court to adopt what Lord Hoffman described in *Fiona Corporation* supra at [12] as a "fresh start" and construe clauses **irrespective of the language** in accordance with the presumption that the parties are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal unless the language makes it clear certain questions were intended to be excluded: *Fiona Corporation* supra at [13]. Whilst the presumption that parties intended the same tribunal to resolve all their disputes may justify a liberal approach consistent with the plain meaning of the words in question, the approach suggested by Lord Hoffman is contrary, in my opinion, to the approach laid down by the High Court as to the construction of commercial contracts.
>
> 122 In reaching this conclusion I am conscious that the Court of Appeal in Western Australia in *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110 cited the speech of Lord Hoffman in *Fiona Corporation* supra with approval, stating at [39] that: "It was inconsistent with the approach taken in Australia". To the extent their Honours were stating that the approach was reflective of the liberal approach to which I have referred above, that is uncontroversial. However, to the extent their Honours were suggesting a particular rule of construction be applied irrespective of the plain meaning of the words, I am unable to agree.
>
> (emphasis added)

193 We respectfully cannot agree that *Fiona Trust* says that arbitration clauses should be construed irrespective of the language used or that it says anything different in substance from *Francis Travel* and *Comandate*. We agree with Martin CJ in *Cape Lambert* in that respect. Lord Hoffmann and Lord Hope were refusing (just as Longmore LJ preferred to approach the matter) to engage in semantic debates about relational prepositional phrases capable of throwing up fine distinctions, often based on the temporal or visual metaphor from the language "under", "arising under", "out of", "arising out of", "in relation to" and "in

connection with". Context will almost always tell one more about the objectively intended reach of such phrases than textual comparison of words of a general relational character. None of the phrases is linguistically stable or fixed. It may be that past cases decided in recognised markets with stable standard forms admit of, and may demand, necessary textual consistency: *Federal Commerce and Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)* [1978] AC 1 at 7-8. Far more important, however, is the correct general approach referred to by Gleeson CJ in *Francis Travel* – that sensible parties do not intend to have possible disputes that may arise heard in two places. Effect is given to that assumption by interpreting words liberally when they permit that to be done. As some of the cases discussed in *Fiona Trust* (in the Court of Appeal and the House of Lords) reveal, the phrase "under this agreement" is amply able to encompass a dispute concerned with a claim to rescission of the agreement. Seeking to give the phrase some amplitude one would construe the phrase as including a dispute that contained a substantial issue that concerned the exercise of rights or obligations in the agreement, or a dispute that concerned the existence, validity or operation of the agreement as a substantial issue, or a dispute the resolution of which was governed or controlled by the agreement. That is not meant to be a prescriptive definition, but rather an illustration of a liberal reading of an arbitration clause using the correct general approach as an aspect of context in conventional contractual construction that can be found in *Francis Travel*, *Comandate*, *United Group Rail*, *Global Partners Fund*, *Lipman* and *Cape Lambert Resources*, and, in our respectful view, *Fiona Trust*. Disputes governed or controlled by the deed and its operation can be seen as part of the meaning of the phrase, but it is difficult to see why the meaning should be so limited.

194 Nevertheless, the dispute as to *Fiona Trust* does not matter. The Chief Justice, in terms, applied the liberal approach. He concluded at [123], however, that the words "under this deed" had "consistently been given a narrower construction than phrases such as 'arising out of the deed' or 'in connection with the deed'". He referred to *Samick Lines Co Ltd v Owners of the Antonis P Lemos* [1985] AC 711 at 727, *Paper Products*, *BTR Engineering (Australia) Ltd v Dana Corporation* [2000] VSC 246 at [27] and *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Limited* [2009] VSC 553 at [34]. He concluded from these authorities at [125] that:

> It seems to me that consistent with the authorities to which I have referred, if the outcome of the dispute was governed or controlled by the Settlement Deed, then there would be a dispute under the Settlement Deed irrespective of whether the claimant was invoking or enforcing some right created by the Settlement Deed.

195 Nothing in *The Antonis P Lemos* dictates this conclusion. Lord Brandon at the page cited ([1985] AC at 727) stressed the importance of context. So much can be accepted. His Lordship was dealing with another context of the relational reach of prepositional phrases defining *in rem* Admiralty jurisdiction. Here the context is one which leads to liberality of meaning.

196 The authorities to which Bathurst CJ referred included the decision of Warren J in *BTR Engineering* (the particular clause in that case being "a dispute involving their respective rights and obligations under this [agreement]"). Warren J held that the word "under" meant "governed, controlled, or bound by; in accordance with". This expression of the matter came from the Shorter Oxford Dictionary. With respect, it is a limited and confined meaning not dictated by the word itself. Further, the words, in the claim before Warren J, that preceded the prepositional phrase, "involving their respective rights and obligations" gave some narrower focus to what followed. Nor is it a complete reflection of the dictionary meanings. The dictionary meanings of the word "under" as a preposition are many. They include "controlled, restrained or bound by"; "in a state or condition of; having regard to, taking account of"; and "subject to the authority, control, direction or guidance of": Shorter Oxford Dictionary (2007), vol 3. We do not find *BTR Engineering* persuasive.

197 The decision in *TCL Airconditioner v Castel Electronics* followed *BTR Engineering* and is for the above reasons unpersuasive.

198 To the extent that Bathurst CJ also relied upon the narrow construction of the phrase "any dispute…arising under this agreement" by French J in *Paper Products*, we disagree with the premise of French J's conclusion that the words used are "restricted".

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

200 Though in another universe of discourse, the breadth of potential meaning of "under", can be seen in the jurisprudence concerned with the phrase in s 76(ii) of the Constitution "arising under a law of the Parliament": see, eg. *Felton v Mulligan* [1971] HCA 39; 124 CLR 367. That is not to resort to constitutional jurisprudence in aid of a contractual meaning; it is only to say that one meaning of the word "under" should not necessarily control the meaning of the phrase "dispute under this deed". The word "under" is capable of varied relational reach, depending on the context. The broader construction which we have suggested above can be taken as an example.

201 Further, the phrase to be construed is "any dispute under the deed", not "under the deed". Just as the relevant prepositional phrase ("under the deed") should be read liberally, so should any other relevant part of the arbitration agreement if to do otherwise would overly refine and narrow the coverage of the agreement over the parties' disagreements. The word "dispute" or the phrase "any dispute" in cl 20.2 of the Hope Downs Deed and cl 9 of the 2007 HD Deed can be understood as a disagreement or argument, in its wholeness, a controversy between parties. There is every reason in this context not to confine "dispute" narrowly to issues or parts of a dispute or of a controversy. The primary judge recognised this at [636] in another context. The dispute under the deed, the argument or controversy between the parties, is not limited to arguments about the operative provisions of the deed; it includes a dispute as to whether the deed in which those operative provisions are located has been or is to be rescinded. To construe "dispute" in a way that brings the substantive defence, but not the substantive reply (being two related aspects of the whole dispute), into the purview of the arbitration clause is to construe the clause in a manner to provide for dispute resolution in two places. This is contrary to principle. On the other hand, a construction of "any dispute" as any whole dispute or controversy, reinforces the broader construction of "under this deed". Indeed, the better way to construe both clauses is not to divide the relevant phrases up into "any dispute" and "under this deed", but rather to view them as one phrase "any dispute under this deed". Doing so recognises that if a whole dispute involves not only the defence to a claim, but also the attack on the availability of the defence (viewed as a matter of substance) then that part of the agreement expressed as "under the deed" cannot be limited to disputes (really parts of the dispute) governed or controlled by the operation of the deed itself.

202 The meaning of "any dispute under this deed" may be narrower than the meaning of other phrases, such as "a dispute in connection with this deed". So much can be accepted. Nothing

in *Francis Travel*, *Comandate*, or *Fiona Trust* required the meaning of words to be set to one side for a rule. What these cases say is that the correct general approach is to give liberal amplitude to available meaning. That one phrase has a narrower meaning than another, does not mean that the first has a narrow meaning.

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

204 Considering the assumption referred to in *Francis Travel* and *Comandate*, a liberal construction of an arbitration agreement containing the words "any dispute under this deed" can be seen to cover a dispute which is framed by claims that are said to be met by pleading the deed, which in turn is said to be liable to be set aside for wrongful conduct that does not amount to a plea that the deed never existed whether by a plea of *non est factum*, or some other circumstance. In these circumstances, the deeds, in their operation if valid, and by reason of their invalidity if not, lie at the heart of the dispute. Reading the words liberally, we cannot see how such a dispute is not to be viewed as a dispute under the deed if those words are read with liberality and with the meaning discussed above. Thus, at this level of abstraction, there is little difficulty in concluding that all the substantive and validity claims fall within any clause framed "any dispute under this deed".

205 We are acutely aware that our views differ from those of Bathurst CJ (with whom Young AJA agreed) in *Rinehart v Welker*. In our respectful view, we are persuaded to the necessary point of clarity that his Honour's construction is not correct. First, he applied earlier cases in which different phrases were construed and which revealed, in our respectful view, an overly narrow, dictionary-based meaning to an elastic relational phrase. Secondly, the whole phrase "any dispute under this deed" was not the subject of focus, and were it to have been, a liberal construction of "any dispute" as "controversy" would have militated against any narrow relationship between the operation of the deed and the dispute. Thirdly, the objective context of the execution of the Hope Downs Deed and the 2007 HD Deed reinforce the objectively wide meaning to the extent it can be given to the phrase "any dispute under the deed".

206 We now turn to the specifics of the deeds, the findings and conclusions of the primary judge and the arguments of the parties.

207 It is convenient to follow the structure of the primary judge's reasons from [597]-[661].

Matters subject of cl 14 of the 2005 Deed of Obligation and Release

208 At [597]-[608], the primary judge concluded that all the substantive claims of Mr Hancock being the prayers for relief 1 to 34 and being the disputes referred to in [556(1)-(5)] (see [155] above) fell within the scope of the arbitration agreement in cl 14 (for the terms of which see [69] above – "all disputes hereunder") because of the releases said to have been given by Mr Hancock in cll 2 and 3.

209 The discussion that follows necessarily sees the use of the word "dispute" in the narrow sense employed by the primary judge.

210 That conclusion was reached by the reasoning that did not seek to give a final view to the scope of the releases; rather, there was a sustainable argument that the deed (assuming it not to have been set aside) provided the answer to Mr Hancock's claims concerning events prior to 1 April 2005 even if they had not been articulated, because of the width of cll 2 and 3.

211 These conclusions are the subject of appeal by para 13 of the applicants' notice of cross-appeal. The first complaint is that the primary judge failed to construe cll 2 and 3 on a final basis and viewed the matter from the perspective of a sustainable argument. For the reasons given earlier, this approach of the primary judge was not in error. She was not obliged to resolve the question whether these provisions were an effective release: that is an aspect of the dispute that was the subject of the arbitration agreement. In our view, these disputes were

the subject of the arbitration agreement because the operation of provisions of the deed were said to be an answer to the claims if the deed was not set aside and the dispute was sustainable.

212 Secondly, it is said that without a finding that there is a sustainable argument that cll 2 and 3 **will** govern or control the outcome, the dispute cannot be under the deed. This raised the question whether "disputes under the deed" meant only disputes that would, not may, be resolved by the operation of the deed. To limit the clause in this fashion would reveal most starkly a failure to apply the correct general approach referred to by Gleeson CJ in *Francis Travel*. The primary judge, correctly (subject to the reservations we have about the expression "sustainable argument") concluded that a sustainable argument that the releases would be an answer to his claims, assuming the deed to be valid, was a dispute under the deed.

213 Thirdly, it was said that because four of the five matters referred to at [556(1)-(5)] of the judgment included events after 1 April 2005, the releases could not act as a defence. That may be true. The releases, however, may operate at least in relation to essential facts occurring before 1 April 2005. It will be a matter for resolution, but a real and substantial issue as to the effect of the releases is raised such that a decision will be required on the operation of the deed – this is a dispute under the deed.

214 The primary judge did not separately consider whether the validity claims relating to the 2005 Deed of Obligation and Release were "disputes hereunder". For the reasons given below as to the validity claims relating to the Hope Downs Deed and the 2007 HD Deed, the validity claims as to the 2005 Deed of Obligation and Release were, and are, part of the dispute that involves the application of the deed.

215 Further, there is a sustainable argument that (subject of course to the validity of the Hope Downs Deed) cll 6(a), (b) and (c) and 7(b) of that deed released the validity claims in relation to the 2005 Deed of Obligation and Release.

The substantive claims being matters the subject of cl 20.2 of the Hope Downs Deed, and cl 9 of the 2007 HD Deed

Clause 4

216 At [625]-[630], the primary judge rejected the argument of Mrs Rinehart and HPPL that cl 4 of the deed (the acknowledgment) was the foundation of a sustainable argument that the

dispute was covered by cl 20.2. The argument was that cl 4 governed or controlled the outcome for relief by reason of an estoppel by deed. The primary judge referred to the conclusion of Bathurst CJ in *Rinehart v Welker* that the estoppel was by convention, not by the direct operation of the deed and so the dispute was not governed or controlled by the deed itself. Thus, there was no sustainable argument that cl 4 governs or controls the outcome of any claims for relief.

217 We disagree with this conclusion. The conclusion is illustrative of the narrowness of the construction placed on the phrase "under the deed" by the primary judge. If, as it should be, the phrase "dispute under the deed" is given a liberal meaning as including disputes in which the operation of the deed is a substantial issue, a dispute in which the deed played a substantial role in the formation of the conventional estoppel would be a dispute under the deed.

Clauses 6(a) and (b)

218 At [609]-[621] the primary judge rejected the argument that cl 6(a) and (b) of the Hope Downs Deed gave rise to a sustainable argument that the deed operated as a release and covenant not to bring the substantive claims.

219 Her Honour's conclusion in this regard focused upon whether there were "claims" as defined in cl 1.1(a) of the Hope Downs Deed. Her Honour referred at [611]-[613] to the consideration given to the clause by the Court of Appeal in *Rinehart v Welker* and by Bergin CJ in Eq in *Hancock v Rinehart* [2013] NSWSC 1352; 96 ACSR 76:

> 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].

220 Then, at [614]-[617], the primary judge referred to the arguments of the parties as to the correctness of these conclusions and to other aspects attending the proper construction of the clause.

221 At [618]-[621] the primary judge found that there was not a sustainable argument that any of the substantive claims was a "claim" within the meaning of cl 1.1 of the Hope Downs Deed:

> 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).

222 These paragraphs reveal, in our view, a misdirection of the task under s 8 of the *CA Act*. Here, the primary judge is concluding the dispute under the deed. The assertion was that the deed operated as a release. It was for the arbitrator to resolve the dispute one way or another. It was plainly sustainable that this aspect of the dispute was to be characterised as "under the deed" (even on a narrow construction of the phrase). What is being done here is a form of summary disposal.

223 In any event, we think that there was a sustainable argument. The meaning of "claim" in cl 1.1 may not require specificity of the kind to which her Honour referred, or at least there was a sustainable argument to that effect. This is especially so when one takes into account that in cl 1.1(d) "claim" is defined by reference to the unsigned draft affidavit itself. There was a sustainable argument that "claim" meant an assertion of an entitlement relating to a particular subject matter in the draft affidavit at least.

224 Further, we have already expressed the view that the draft affidavit was so broad as to implicitly include Roy Hill. It was a claim alleging wholesale breaches of trust over the assets. The draft affidavit contained assertions that mineral interests, identified and unidentified, had been taken from HFMF for the benefit of HPPL. Roy Hill was expressly articulated later, but squarely fell within and was an articulation of the broad and wide-ranging breaches asserted; or, at the least, there was a sustainable argument to that effect.

225 If there was (as we are of the view there was) a sustainable argument that all the substantive claims were claims for the purpose of cl 1.1 of the Hope Downs Deed, there was a clearly sustainable argument that Mr Hancock and Ms Rinehart had released and discharged the claims (by cl 6(a)) and irrevocably covenanted not to sue (by cl 6(b)).

Clause 6(c)

Mr Hancock

226 The primary judge accepted that there was a sustainable argument that cl 6(c) operated to bar and release all claims made by Mr Hancock (through his adoption of the deed in the 2007 HD Deed) based on allegations in the unsworn affidavit, with the exception of the Roy Hill Tenement claim. The apparent basis of this conclusion as to the exception of Roy Hill was her Honour's view that the Roy Hill Tenement claims were not (arguably) referred to in the unsworn affidavit. We have earlier ([63] above] commented upon the narrowness of this

view. But, in any event, cl 6(c)(ii) is wider than this. The proper question was whether the allegation arose in part directly or indirectly out of the subject matter of the "Proceedings" (which included the draft affidavit). In our view, they plainly did so arise. The affidavit asserted wholesale wrongs by Mrs Rinehart in dealing with all trust assets. The Proceedings were effectively for general administration of the trust.

227 There was a sustainable argument that cl 6(c) ("withdrawing and forever abandoning" allegations) operated as a release in relation to all substantive claims.

Ms Rinehart

228 The primary judge concluded (at [624]) that cl 6(c) had no relevant operation for any claims made by Ms Rinehart because she had not (whereas her brother had) made any relevant allegation that could be withdrawn. With respect, we cannot agree. Clause 6 applies to "each party hereto". Whilst linguistically "withdrawal" would often imply knowledge of something already done, here Mr Hancock had made serious allegations on behalf of all the children. The claims were capable of being so understood, even if not yet adopted by the sisters. Further, the claims in the Proceedings, by the definition of claim, included the unsigned draft affidavit. Clause 6(c) bars and releases all claims dependent on allegations arising directly or indirectly from the Proceedings, including the draft affidavit. The width of cl 6(c)(i)-(iii) whether known or unknown and whether presently in contemplation of Ms Rinehart (cl 6(c)(iv) and (v)) found a clearly sustainable argument that cl 6(c) provides a defence to Ms Rinehart's substantive claims.

229 Once again, this is an example of one aspect of a whole dispute, being examined on the merits by the primary judge in a form of summary disposal, going beyond the proper task of characterisation of the dispute.

230 Thus, we are of the view that there is a sustainable argument (subject again to the reservations we have about that phrase) that cl 6(c) founds a defence for all substantive claims (including Roy Hill) against both Mr Hancock and Ms Rinehart. Thus, all the disputes about all substantive claims are "under the deed".

The substantive claims insofar as they concern RHIO, HDIO, MDI and MDIO

231 The primary judge concluded that RHIO, HDIO, MDI and MDIO were not within the extended definition of "party" in s 2 of the *CA Act*, and so her Honour concluded that the claims for relief against them were not "matters the subject of an arbitration agreement

because they are claims made solely against respondents that are not party to any arbitration agreement": [553]. We deal with the argument on s 2 later.

232 To the extent that any dispute between the applicants and the respondent parties to the arbitration agreement concerns the non-parties' rights, such will be subject to the arbitration. This is particularly relevant to any dispute about cl 7(b): that the parties to the Hope Downs Deed will not challenge the right of any member of the Hancock Group to any of the Hancock Group Interests at any time.

Clause 7(b)

233 The definition of "Hancock Group" and "Hancock Group Interests" are (or are at least arguably) wide enough to cover RHIO, HDIO, MDI and MDIO and all the relevant tenements (as to RHIO, see the next paragraph). The primary judge correctly construed cl 7(b) as an unconditional covenant (by the parties to the deed) not to challenge the titles of the Hancock Group. Thus, that aspect of the dispute, between the parties to the deed, was "under the deed". This was based on the clearly sustainable argument that a covenant not to sue would be set up as a complete defence, as a plea in bar: *McDermott v Black* [1940] HCA 4; 63 CLR 161 at 186-188.

234 The primary judge, however, concluded that cl 7(b) did not cover RHIO because it was not in existence at the time of the Hope Downs Deed: [632]. There are two reasons why her Honour should have concluded that there was a sustainable argument that cl 7(b) was wide enough to cover RHIO: first, the futurity of "at any time", though related to the time of challenge, can be seen then to refer to related bodies corporate at that time; and secondly, to impugn RHIO's title necessarily involves an impugning of its predecessor in title, HPPL.

235 Thus, as between the parties to the Hope Downs Deed, there was a sustainable argument that the setting up of a defence under cl 7(b) in relation to all substantive claims was a dispute under the deed.

Ms Rinehart's cross-appeal as to cll 6(c), 7(b) and (e)

236 As referred to above, the primary judge concluded that because of the application of cll 7(b) and (e), both Mr Hancock's and Ms Rinehart's substantive claims in prayers 8 to 31 were disputes under the deed: [635]-[636].

237 The cross-appeal (grounds 14-18) attacks these findings. In part, the cross-appeal rests on the submission, which we have already rejected, that it is to be decided "on the balance of probabilities" whether cll 7(b) or (e) (or cll 6(a), (b) or (c), for that matter) apply. In particular, we reject the submission that her Honour was obliged to determine finally the construction and legal effect of cll 6(c), 7(b) and (e).

238 It was submitted that aspects of the reasoning in the Court of Appeal in *Rinehart v Hancock* [2013] NSWCA 326, especially at [12] and [13], as to cl 7(a) conclude the matter. There is no substantive reason why those passages in a judgment refusing leave to appeal which did not refer to cases such as *El-Mir v Risk* [2005] NSWCA 215 or *McDermott v Black* should be seen to be applicable in a determinative way such that there was no sustainable argument from the operation of cll 7(b) and (e). We do not repeat the reservations we have about the phrase "sustainable argument".

239 The cross-appellants also complain that the primary judge failed, in the light of the evidence available, to make an assessment of the sustainability of the utilisation of provisions of the deed as a defence, given the likelihood of the validity claims being successful. It was said that admissible evidence was required to rebut the presumption of undue influence. In this respect, the terms of [666(3)], dealing with the exercise of discretion, should be noted:

> 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:
>
> …
>
> (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.
>
> …

240 Ms Rinehart and the HPPL parties complain about these findings. For the reasons expressed below, we agree with those complaints. These conclusions go beyond the limits of the

proceedings bound by the orders made as to conduct of the hearing and the proper approach to an application under s 8 of the *CA Act*. The hearing was conducted on the basis that issues such as fully informed consent and undue influence were not to be decided. As the primary judge observed at [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.

241 The material before the Court and the structure of the hearing provided no basis for a conclusion that there was no sustainable argument to resist the validity claims.

242 Further, if the proper approach to the construction of the arbitration clause is taken, all these matters raised by the cross-appellants can be seen as part of the fabric of the overall dispute under the deed.

243 One further aspect of the debate about cll 6(c), 7(b) and (e) should be noted. The cross-appellants say that these are not releases that are subject of the pleas in bar provision (cl 11). We are satisfied that there is an available construction of cl 11 to the contrary. Nevertheless they are capable of being pleaded in equity: *McDermott v Black*. But the cross-appellants say that is the operation of Equity, not the deed, so the dispute is not "under the deed". We do not repeat our views as to this being emblematic of an overly narrow construction of the phrase "under the deed".

Conclusion as to substantive claims the subject of cl 20.2 of the Hope Downs Deed and cl 9 of the 2007 HD Deed

244 For the above reasons, we are of the view that all the substantive claims brought by Ms Rinehart and Mr Hancock fall within cll 20.2 and 9 of the two deeds.

The validity claims and the Hope Downs Deed and the 2007 HD Deed

245 The validity claims were comprised of the relief in prayers 35 to 47, based on the pleading in paras 275 to 506 of the statement of claim and summarised at [556(6)-(10)] by the primary judge. In large part, they are directed towards preventing the respondents from relying on releases, bars, covenants not to sue and arbitration clauses contained in the Hope Downs Deed and 2007 HD Deed. In substantive effect, they are an answer to Mrs Rinehart's and HPPL's reliance on the deeds.

246 Mrs Rinehart and the HPPL parties argued before the primary judge that the validity claims should be viewed as part of the dispute made up of the releases, bars and covenants not to sue, such that the whole dispute (not merely that part of it constituted by the pleas based on the provision of the deeds) came within the arbitration agreement. This was rejected at [645] as follows.

> 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.

247 We respectfully disagree for three reasons. First, in our view, a construction of "under the deed" as limited to governed and controlled by the deed itself is overly narrow and the product of an incorrect interpretation of the phrase "under the deed", for the reasons we have earlier expressed. The phrase is wide enough to cover a dispute in which the existence or validity of the deed is put in question.

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

249 Thirdly, related to the second point, arguably the claims to set the deeds aside are challenges to the rights of Hancock Group members to Hancock Group Interests and so can be seen to be themselves in breach of and controlled by the Hope Downs Deed. At least, there is a sustainable argument that they can be so characterised.

250 We are therefore of the view that all the validity claims fall within cll 20.2 and 9 of the Hope Downs Deed and 2007 HD Deed.

The miscellaneous claims about the "deployment" of the Hope Downs Deed and the 2007 HD Deed

251 In her summary of conclusions at [21(4)(c)], the primary judge concluded that the claims in prayers 48 to 51 and paragraphs 468 to 506 in sections 39 and 41 of the statement of claims were disputes under the deeds. There was no further discussion of these claims in the judgment.

252 The applicants complain that the use or deployment of these deeds has been to seek to place financial pressure on Ms Rinehart and Mr Hancock, to prevent the litigation being public, to prevent the beneficiaries seeking redress and to harass, threaten and intimidate. They say that

this is unconscionable conduct within the meaning of the *Australian Consumer Law* and is also a collateral abuse of process. Injunctive relief and damages are sought.

253 This is not a separate dispute; it is part of the one controversy. For the reasons that the validity claims are part of the dispute under these deeds, so are these claims.

The 2009 Deed of Further Settlement and the 2010 Deed of Variation

254 The 2009 Deed of Further Settlement and the 2010 Deed of Variation were only executed by Mr Hancock, Mrs Rinehart and HPPL. Clause 16 of the 2009 Deed of Further Settlement is set out at [90] above.

255 The words used in cl 16 are ample: "any dispute or claim arising out of or in relation to this Deed or the CS Deed". The 2007 CS Deed, being the side agreement to the 2007 HD Deed, was also only executed by Mr Hancock, Mrs Rinehart and HPPL. Clause 15 thereof (a covenant not to sue) was in the following terms:

> 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.

256 The primary judge (at [652]) concluded that the claims of Mr Hancock that arguably fall within the scope of the Hope Downs Deed also fell within the scope of cl 15 of the 2007 CS Deed. The cross-appellants complain that the primary judge should have come to a final view about the meaning of cl 15. For the reasons we have earlier given, we reject that submission.

257 The cross-appellants also submitted that the primary judge was wrong in [652] to conclude that merely because a claim falls within the covenant not to sue in cl 15 of the CS Deed, does not mean it is a claim arising out of or in relation to that deed. We reject this submission. It is founded upon the wafer-thin, and unrealistic, distinction between a lack of entitlement to bring a claim and being in breach of contract by bringing a claim. Both are "in relation to"

the deed. In our view, the covenant in cl 15 related to all allegations in connection with the allegations in the draft affidavit. These are all the substantive claims in our view.

258 In dealing with these two deeds, the primary judge descended (because of the arguments put) into the detail and complexity of the claims and the individual deeds.

259 At [656], the primary judge rejected the argument that the validity claims asserted by Mr Hancock did not fall within cl 16. At least insofar as they are claims of the validity of the 2009 Deed of Further Settlement, they plainly do fall within cl 16. So much was accepted by the cross-appellants.

260 We have already expressed our view that all validity claims directed to the Hope Downs Deed fall within the arbitration agreement of that deed.

261 Clause 15 of the 2007 CS Deed was a covenant not to sue in relation to any matter in respect of the matters the subject of release in the Hope Downs Deed (cl 6(a) and (b)) and provided for the withdrawal and abandonment of any and all allegations including in connection with the allegations in the draft affidavit. Given our view as to the width of cl 6(a) and (b) and the arguable release of claims thereunder, the validity claims to the Hope Downs Deed would be a matter in respect of those releases. Thus, the validity and substantive claims about, and covered by, the Hope Downs Deed are disputes or claims arising out of or in relation to the 2007 CS Deed for the purposes of cl 16 of the 2009 Deed of Further Settlement.

262 Clause 11(ii) of the 2010 Deed of Variation is set out at [91] above (any dispute or claim arising out of or in relation to this deed).

263 Recital E and cll 8 and 10 of the 2010 Deed of Variation sought to link that deed to the Hope Downs Deed. Recital E made clear that the parties wished to amend the 2007 Loan Agreement and make further funding available to Mr Hancock and for such funding to be repaid from payments due to him under the Hope Downs Deed. Clauses 8 and 10 dealt with this. The primary judge accepted that there was a sustainable argument that cl 11(ii) could be construed as including validity claims against the Hope Downs Deed and the 2007 HD Deed, because of an asserted estoppel from Recital E and cll 8 and 10 preventing Mr Hancock denying the validity of those deeds.

264 The cross-appellants complain about this conclusion, repeating their submissions as to the need to decide the question finally. For the reasons we have given, we reject this. They further argued that there was no sustainable argument as to the estoppel for various reasons:

the lack of a precise statement of fact in the deed, the failure to establish a sustainable argument that the 2010 Deed of Variation is not subject to an equitable right of rescission where the presumption of advancement existed, and where the cross-appellants had sought to adduce evidence suggesting the deed was procured by fraudulent concealment. Those complaints reflect the view of the requirement for a sustainable argument becoming an argument on the merits. The matters raised are properly characterised as apparently coherent arguments plainly falling within the clause. That suffices.

265 The cross-appellants also complain about the primary judge's conclusion that cl 11 covers the substantive claims by Mr Hancock. Though her Honour did not make it explicit, the conclusion can be founded upon the substantive claims directed to the 2007 CS Deed and 2009 Deed of Further Settlement being within the scope of cl 16 of the latter. These are in relation to the 2010 Deed of Variation because in cl 3 of the 2010 deed the parties confirmed the 2007 CS Deed and the 2009 Deed of Further Settlement and so they are claims in relation to the 2010 Deed of Variation. We agree for the reasons given that her Honour was correct in relation to her conclusions at [652].

266 We have earlier expressed the reservation and reluctance with which we depart from Bathurst CJ's construction of the arbitration agreements using the words and phrases "any dispute under" or "…hereunder". On the view we take, subject to the issue of the meaning of s 2 of the *CA Act*, all substantive and validity claims by both Mr Hancock and Ms Rinehart are part of the matter or matters variously the subject of the arbitration agreements in the Hope Downs Deed, the 2007 HD Deed, the 2005 Deed of Obligation and Release, the 2009 Deed of Further Settlement and 2010 Deed of Variation.

267 If, on the other hand, the construction that Bathurst CJ gave to the clause is correct, a complex position emerges. The validity claims as to the deed using the word "under" would not be the subject of the agreement. The substantive claims to the extent that they can be seen as either released or the subject of a bar (such as in cll 6 and 7 of the Hope Downs Deed) can be seen as governed or controlled by the deed – but only if the deed be valid. Thus, there is force in the cross-appellants' complaint that even if there is a sustainable argument about the deed providing a defence, that is not the deed governing or controlling the outcome, because the validity claims may cause the deed to be set aside. So either the whole of the claims stand outside the arbitration agreements of the three deeds using "under" or parts of

the dispute being the substantive claims as answered by provisions of the deeds stand within the arbitration agreement and the validity claims outside.

268 On the other hand, cl 16 of the 2009 Deed of Further Settlement and cl 11 of the 2010 Deed of Variation (affecting only Mr Hancock) use the phrase "arising out of or in relation to" deeds. As we have dealt with at [261]-[263] above, by reason of the interconnection between the Hope Downs Deed, the CS Deed and these two deeds, the validity claims would fall within these arbitration clauses. Thus, the narrow construction of "under" would have the validity claims in respect of some deeds not the subject of arbitration agreements, but the same clauses in respect of other deeds the subject of arbitration agreements. This is the very type of result that the common sense assumption and the "correct general approach to problems of this kind" should prevent.

E. (1) Whether any party that is not a party to the deeds and to the arbitration agreements can be referred to arbitration because they claim "through or under" entities who are parties;

(2) Whether the claims against the third party companies are part of the same "matter" within s 8(1) of the *CA Act*; and

(3) Whether WPPL should be granted leave to intervene

(4) Whether the claims against the third party companies should be stayed under the Court's general power

Introduction

269 This section of the reasons deals with the applicants' claims against RHIO, HDIO, MDIO and MDI. MDI has not appeared in the proceeding and it did not join in the application under s 8(1) of the *CA Act*. As we have said, MDI did indicate in correspondence that it consented to the substance of the relief sought by the HPPL respondents. The question whether it is able to take the benefit of any conclusions in favour of RHIO, HDIO and MDIO does not arise because of the conclusions we have reached. The claims against RHIO, HDIO and MDIO relate to the Roy Hill Tenements (RHIO), the Hope Downs Tenements (HDIO) and the Mulga Downs Tenement (MDIO) respectively. We have already referred to them (see generally section A) but in this section of the reasons it is necessary to outline the claims in more detail. It is convenient to refer to them as the third party companies. None of the third party companies are parties to a relevant arbitration agreement.

270 The submissions with respect to the position of third party companies were made by reference to the claims for relief set out in the applicants' originating application. The nature of these claims against the third party companies follows a pattern, as will become apparent. We should say that the analysis which follows is supported by the allegations in the statement of laim.

271 In relation to RHIO and the Roy Hill Tenements, the applicants' claims for relief are as follows:

> 1 A declaration that the Thirteenth Respondent (**RHIO**) holds, and has held since it acquired them, the mining tenements known as 'Roy Hill' (the **Roy Hill Tenements**) on constructive trust for the First Applicant (**BHR**), the Second Applicant (**JLH**), the Ninth Respondent (**HRW**) and the Tenth Respondent (**GHFR**).
>
> …
>
> 4 An order that RHIO 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 Roy Hill Tenements.
>
> 5 In the alternative to order 4, an order that RHIO pay equitable compensation to the Applicants for their loss of opportunity to earn profits from the exploitation of the Roy Hill Tenements.
>
> …

272 There are also claims for an account of profits and equitable compensation in relation to the Roy Hill Tenements against Mrs Rinehart (claims 2 and 3) and HPPL (claims 6 and 7). The primary judge held that none of the claims with respect to the Roy Hill Tenements fell within an arbitration agreement. For the reasons given above (at [63], [224] and [225]), we are satisfied (in the sense we have described) that the claims against the parties to the arbitration agreements fall within the arbitration agreements. The consequence of that conclusion is that claims 1 (insofar as it affects Mrs Rinehart and HPPL), 2, 3, 6 and 7 fall within an arbitration agreement.

273 The third party companies and other appellants submitted that claims 1 (insofar as it affects RHIO), 4 and 5 fall within an arbitration agreement because RHIO is within the extended definition of "party" in s 2(1) of the *CA Act*. For the reasons which follow, that submission fails. The alternative submission was that the claims against RHIO fall within an arbitration agreement because they are part of the same "matter" which is the subject of the agreement. There are two aspects to this submission. The first aspect is that the claims against RDIO fall within an arbitration agreement. For the reasons which follow, that submission fails. The

second aspect is that the dispute between the parties to an arbitration agreement includes a dispute between those parties as to whether the applicants can claim against RDIO. For the reasons which follow, that submission succeeds (see [232]-[235]).

274 In relation to HDIO and the Hope Downs Tenements, the applicants' claims for relief are as follows:

> …
>
> 15 A declaration that the Twelfth Respondent (**HDIO**) holds, and has held since it acquired them, the mining tenements known as 'Hope Downs' (collectively, the **Hope Downs Tenements**) on constructive trust for BHR, JLH, HRW and GHFR.
>
> …
>
> 18 An order that HDIO provide an account of profits to the Applicants in relation to the benefits obtained by it from the ownership, use, possession and exploitation of the Hope Downs Tenements.
>
> 19 In the alternative to order 18, an order that HDIO pay equitable compensation to the Applicants for their loss of opportunity to earn profits from the exploitation of the Hope Downs Tenements.
>
> …

275 Again, there are claims for an account of profits and equitable compensation in relation to the Hope Downs Tenements against Mrs Rinehart (claims 16 and 17) and HPPL (claims 20 and 21). The primary judge held that claims 15, 16, 17, 20 and 21 fell within an arbitration agreement. The claim made in paragraph 15 appears to be a claim against HDIO. Why then did the primary judge hold that it was within an arbitration agreement? We think the answer is that her Honour considered the claim to have a dual aspect partly involving a party to an arbitration agreement and partly involving a non-party to an arbitration agreement. We think that this is what her Honour was saying in the following passages in her Honour's reasons (at [553]-[554]):

> 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.

276 This construction of the primary judge's reasons is supported by her Honour's approach in relation to MDIO. In that case, her Honour held that the claim for a declaration of constructive trust was not within an arbitration agreement in circumstances where there was no claim for an account of profits or equitable compensation against Mrs Rinehart or HPPL.

277 In relation to HDIO, the submissions of the third party companies and other appellants challenging her Honour's conclusions were the same as they were in relation to RHIO and we reach the same conclusions.

278 In relation to MDIO and the Mulga Downs Tenement, the claims for relief are as follows:

> …
>
> 32 A declaration that the Fourteenth Respondent (**MDI**) and the Fifteenth Respondent (**MDIO**) hold, and have held since they acquired them, their interests in the mining tenements known as 'Mulga Downs' (collectively, the **Mulga Downs Tenements**) on constructive trust for BHR, JLH, HRW and GHFR.
>
> 33 An order that MDI and MDIO provide an account of profits to the Applicants in relation to the benefits obtained by them from their ownership, use, possession and exploitation of the Mulga Downs Tenements.
>
> 34 In the alternative to order 33, an order the MDI and MDIO pay equitable compensation to the Applicants for their loss of opportunity to earn profits from the exploitation of the Mulga Downs Tenements.
>
> …

279 As we have said, in the case of the Mulga Downs Tenement, there are no express claims for an account of profits and equitable compensation against Mrs Rinehart or HPPL. The primary judge held that claims 32, 33 and 34 did not fall within an arbitration agreement.

280 The submissions of the third party companies and other appellants challenging her Honour's conclusions were the same as they were in relation to RHIO and HDIO and we reach the same conclusions.

The application for leave to intervene by WPPL

281 Before turning to consider the parties' submissions, the applications for leave to intervene by WPPL and DFD Rhodes Pty Ltd and Matthew John Keady and Dorothea Margaret Campbell by chain of Executors of the Estate of Donovan Frances Duncan Rhodes (the Rhodes parties) must be addressed. On 7 December 2016, the Chief Justice made identical orders with

respect to the respective applications for leave to intervene. Relevantly, those orders were as follows:

> 1. The applications by Wright Prospecting Pty Ltd (**WPPL**) and DFD Rhodes Pty Ltd, and Matthew John Keady and Dorothea Margaret Campbell by chain of Executors of the Estate of Donovan Frances Duncan Rhodes (the **DFD Rhodes Parties**) to intervene in the hearing of the application for leave to appeal and any appeal be stood over to 13 February 2017 before the bench hearing the application for leave to appeal and the appeal.
>
> 2. On or before 20 January, the applicants for intervention file and serve joint written submissions of no more than 15 pages in font and spacing in accordance with Practice Note APP2 directed to, and only to, the subject matters in [36] and [37] of the submissions of WPLL [sic] of the intervention application.

The order in paragraph 2 refers to paragraphs 36 and 37 of WPPL's outline of submissions on the intervention application which were filed before the hearing on 7 December 2016. Those paragraphs are in the following terms:

> *(1) Who are the parties to the arbitration agreements (Agreed Question 8; NOA Grounds 6-7)*
>
> 36. On the assumption that HPPL's application for a permanent stay against WPPL will involve a consideration of whether WPPL's claims are made "through or under" a party to the arbitration agreements, WPPL would wish to make limited submissions on this question. Those submissions would be aimed at demonstrating that there is no sensible basis to contend that WPPL is required to arbitrate its claims.
>
> *(2) What matters are the subject of an arbitration agreement (Agreed Question 9; NOA Grounds 8-9;* CA Grounds 9)
>
> 37. WPPL would wish to make limited submissions on the proper characterisation of the "matters" the subject of any arbitration agreements. Those submissions would seek to address both the proper delineation between WPPL's claims and any "matter" the subject of an arbitration agreement and the implications of competing claims to a proprietary interest in an asset in characterising the arbitral "matters".

282 Joint written submissions dated 20 January 2017 were filed in accordance with the order in paragraph 2. The submissions of the Rhodes parties included the following:

> 41. Unless any party is contending or agitating **in this appeal** that
>
> a) the matters which are the subject of this appeal should cause the WASC litigation between the four competing groups of parties to be stayed or that the WASC proceedings are otherwise affected or bound by this appeal (which relates only to the arbitration agreements between BHR, JLH, HPPL and parties related to HPPL),
>
> b) the Rhodes Parties or WPPL are "statutory parties" under the Act on the basis that they are claiming "through or under" a party to the

relevant agreements,

c) the dispute in the WASC litigation, or parts of it, is a "matter" capable of arbitration, or

d) the WASC proceedings should be cross vested to the Federal Court,

then the Rhodes Parties do not need to make further submissions in this appeal.

283 At the beginning of the hearing before this Court, counsel for the Rhodes parties advised the Court that following correspondence between the parties, they no longer pressed their application for intervention. The application for leave to intervene by the Rhodes parties was dismissed with no order as to costs.

284 WPPL pressed its application for leave to intervene. The application is made pursuant to r 9.12 of the *Federal Court Rules 2011* (Cth) ("in a proceeding"), or r 36.32 ("in an appeal"). The criteria in each case are broadly the same.

285 The context in which WPPL makes its application for leave to intervene is as follows. WPPL has instituted two actions against HPPL and HDIO in the Supreme Court of Western Australia. Hamersley WA Pty Ltd is a third party to those actions. Those actions have been consolidated and they are being case managed with another action which has been brought by the Rhodes parties. In the actions by WPPL, it claims royalties payable upon iron ore from the Hope Downs mine and a 50% ownership interest in the Hope Downs Tenements. Counsel for WPPL told the Court that the property is actually a subset of those tenements which are normally referred to as the East Angelas Tenements. The four children were joined to the actions on or about 23 September 2016 and a trial date, which had been set commencing 31 October 2016, was vacated. The four children were joined to the actions because they were considered necessary parties to the actions: see *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd [No 7]* [2016] WASC 305. On or about 1 November 2016, HPPL and HDIO applied for an order in the actions that the parties or, in the alternative, the defendants, be referred to arbitration pursuant to s 8(1) of the *CA Act* and certain consequential orders. That application has been adjourned pending the outcome of these applications and appeals. The applicants in this proceeding have applied for an order that WPPL be joined as a party to this proceeding, but that application has been adjourned pending the outcome of these applications and appeals. WPPL submits that HPPL will use the outcome of this appeal, if it is favourable to their interests, to force WPPL to arbitration or to obtain a stay of WPPL's actions in the Supreme Court of Western Australia.

286 We consider that leave to intervene on the limited matters identified in paragraph 2 of the orders made by the Chief Justice on 7 December 2016 should be granted. The two matters raise difficult issues upon which we have found the submissions of WPPL of assistance. As is often the case with difficult issues, the precise way in which a proposition is put can be of importance and, in that context, we think that WPPL's submissions are different from those of the other parties. We do not think that WPPL's intervention has or had the potential to unreasonably interfere with the ability of the parties to conduct the applications and appeals as they wished.

287 We made it clear at the hearing and we reiterate it in these reasons that the Court is dealing with the rights and obligations of the parties before it. We are not dealing with the rights and obligations of WPPL.

288 With respect to the matters upon which we give leave to intervene, WPPL's submissions were directed to upholding the conclusions of the primary judge. In that respect, they took a similar position to that of the applicants. In the discussion which follows, we do not propose to differentiate between the submissions of WPPL and those of the applicants.

Whether any party that is not a party to the deeds and to the arbitration agreements can be referred to arbitration because they claim "through or under" entities who are parties

289 "Party" is given an extended meaning under the *CA Act* and includes a person "claiming through or under a party to the arbitration agreement": s 2(1). There is an equivalent provision in the *International Arbitration Act 1974* (Cth): s 7(4). The third party companies contended before the primary judge that they fell within the extended definition of party, but the primary judge rejected that contention.

290 The third party companies are respondents to the proceeding brought by the applicants and, although no defences have been filed, they are defending the proceedings. It is clear on the authorities that by advancing a defence, a person may be claiming through or under a party to an arbitration agreement within the extended definition: *Tanning Research Laboratories Inc v O'Brien* [1990] HCA 8; 169 CLR 332 at 342 per Brennan and Dawson JJ. The third party companies claim that by the defences to the applicants' claims which they propose to advance, they will be claiming through or under a party or parties to an arbitration agreement. We turn now to consider in more detail than we have considered previously the applicants' allegations against the third party companies.

291 HDIO was incorporated on 24 October 1995. It is a wholly owned subsidiary of Hancock Minerals Ltd which company is in turn a wholly owned subsidiary of HPPL. It is said to hold 100% of certain Hope Downs Tenements, and 50% of other Hope Downs Tenements as part of the Hope Downs joint venture with certain Rio Tinto entities. It is said to have acquired the Hope Downs Tenements from HPPL on or about 11 September 1997. Plainly, that was well before the Hope Downs Deed. The applicants' allegations are detailed and complex, but the effect of them is that as a result of conduct by Mrs Rinehart involving fraud and breaches of fiduciary and other duties, HPPL gained title to the Hope Downs Tenements. The applicants allege that HPPL was knowingly involved in the fraud and breaches of duty and that it participated in "a fraudulent and dishonest design". The applicants allege that because of these matters, HPPL held only legal title to the Hope Downs Tenements. They allege that HDIO knew of the breaches of fiduciary duty because Mrs Rinehart was a director and the controlling mind of HDIO. As we understand the applicants' case, it is that HDIO is a knowing recipient of trust property and the property is subject to a constructive trust. An account of profits is sought from HDIO in relation to the benefits received by HDIO during its ownership, possession, use and exploitation of the property. In the alternative, equitable compensation is sought.

292 RHIO was incorporated on 1 February 2007. That is, after the Hope Downs Deed. It is a wholly owned subsidiary of Roy Hill Holdings Pty Ltd and that company is in turn owned by Hanrine Holdings Pty Ltd, KJTC Pty Ltd and POSCO. Hanrine Holdings Pty Ltd is a wholly owned subsidiary of HPPL. It is said that HDIO acquired the Roy Hill Tenements on 16 November 2007. The applicants' allegations in relation to Roy Hill Tenements are broadly similar to those that are made in relation to the Hope Downs Tenements, namely, breaches of duty and fraud by Mrs Rinehart, knowing involvement and participation by HPPL and, as a result, HPPL holding only legal title to the Roy Hill Tenements. RHIO is alleged to have known of the breaches of fiduciary duty at the time it received legal title to the Roy Hill tenements because at all material times, Mrs Rinehart was a director of the company. The relief sought by the applicants against RHIO is a declaration of a constructive trust and an account of profits or equitable compensation.

293 MDIO was incorporated on 6 November 1997. It is a wholly owned subsidiary of Georgina Hancock (1965) Pty Ltd which in turn is a wholly owned subsidiary of HPPL. It is said that MDIO acquired 98% of the Mulga Downs Tenement from HRL on 10 February 2009. HRL became a subsidiary of HPPL in November 1995 and changed its name to Westraint

Resources Pty Ltd. The applicants' pleas in relation to the Mulga Downs Tenement are more complex and not as clear as the applicants' pleas in relation to the Hope Downs Tenements and the Roy Hill Tenements. On 27 March 1992, HRL held a 100% interest in the Mulga Downs Tenement. Mrs Rinehart, acting in breach of her duties, engaged in conduct which resulted in HPPL obtaining, indirectly, a 100% interest in the Mulga Downs Tenement. That conduct related to the transfer of the shares in HRL from HFMF to HPPL. On 10 February 2009, Mrs Rinehart caused the Mulga Downs Tenement to be transferred from HRL to MDI as to 2 shares, and to MDIO as to 98 shares. The applicants allege that the conduct concerning the Mulga Downs Tenement was in breach of fiduciary duty and pursuant to a dishonest and fraudulent design. The applicants allege, among other things, that both HRL and the Mulga Downs Tenement are held on constructive trust for the beneficiaries of the HFMF Trust. We have already set out the relief sought by the applicants against MDIO.

294 As we have said, the primary judge held that the third party companies were not claiming through or under any party to an arbitration agreement. We turn now to the primary judge's reasons for reaching that conclusion.

295 Her Honour discussed a number of authorities, including *Tanning Research Laboratories* and the decision of the Victorian Court of Appeal in *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd and Another* [2014] VSCA 166; 289 FLR 30. No party on these applications and appeals suggested that her Honour erred in her summary of the relevant authorities.

296 Her Honour then addressed the two main submissions made by the third party companies and other appellants with respect to HDIO. The first submission was that HDIO was entitled to the benefit of, or entitled to rely on, the express acknowledgement (cl 4), releases (cl 6) and undertakings (cl 7) in the Hope Downs Deed. As a further basis for this submission, HDIO sought to rely on s 11(2) of the *Property Law Act 1969* (WA) which is in the following terms:

> **11. Persons taking who are not parties**
>
> …
>
> (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.
>
> …

297 The primary judge rejected these submissions. She did not think that HDIO could rely on the Hope Downs Deed because it was not a party to the deed and she did not think that s 11(2) had been engaged because she did not accept that there was a sustainable argument that cl 4 or any other provision of the Hope Downs Deed "expressly in its terms purports to confer a benefit directly on" HDIO. Her Honour noted that the submission that s 11(2) applied was not developed before her. On the appeals, these submissions were repeated without any significant elaboration. In connection with s 11(2), the Court was referred to *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239; 225 FLR 1 at [3333]-[3373]; *Jaddcal Pty Ltd v Minson (No 3)* [2011] WASC 362 at 370-377 [47]-[54]; *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157; 44 WAR 1 at 669-672 [3438]-[3450] per Carr AJA, and in connection with HDIO's alleged right to rely directly on cl 4 of the Hope Downs Deed, the Court was referred to *Airberg Pty Ltd v Cut Price Deli Pty Ltd* (unreported, Federal Court of Australia, Lindgren J, 3 August 1998) and *Global Brand Marketing Inc v YD Pty Limited* [2010] FCA 323 at [34]-[35], [49]. Again, in the absence of any developed argument with respect to s 11(2), we would take the same approach as the primary judge. In any event, even if cl 4 confers a benefit within s 11(2), it does not follow that HDIO can invoke the arbitration clause which in its terms refers to the parties to the deed.

298 The second main submission which was put to the primary judge was that HDIO was claiming through or under HPPL (which was a party to the Hope Downs Deed) because it can take the benefit of a defence available to HPPL, being the release claimed in the deed. In other words, the submission was that in order for the applicants to succeed against HDIO, they must impeach the title of HPPL in the sense of establishing that the beneficial title lies elsewhere. HDIO will take the benefit of a defence available to HPPL being the releases in the Hope Downs Deed. Her Honour rejected this submission. With respect, her Honour's

reasons for doing so are more clearly expressed when she comes to deal with RHIO and MDIO than they are when she is dealing with HDIO.

299 With respect to RHIO, the same two submissions were made and were rejected by the primary judge. In relation to the first submission, the primary judge noted that RHIO was incorporated after the Hope Downs Deed and, therefore, was not a part of the "Hancock Group" within cl 7(b) at the time of the deed. As to the second submission, the primary judge said the following (at [539]):

> … 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.

300 With respect to MDI and MDIO, the submissions and approach of the primary judge were relevantly the same as they were with respect to RHIO. As to the second submission, the primary judge said that the fact that it would be said that MDI and MDIO obtained the tenement from HRL and that potentially HRL's beneficial interest was confirmed or otherwise protected by the Hope Downs Deed, did not mean MDI and MDIO were relying on a derivative defence. Her Honour said that rather, their defence arose entirely from their position as transferees of interests in the tenements from HRL.

301 It seems to us that what her Honour was saying may be put in two ways, either as alternative or cumulative matters. First, that the fact that in the course of defending the applicants' proceeding against them, each of the third party companies may, or will, raise the effect of the deeds on the transferor's title (ie., either HPPL or HRL) does not mean that they are relying on a defence they have derived from the transferor (ie., a derivative defence). Secondly, or in the alternative, as a matter of characterisation, the key feature of their defence to the applicants' claim is not the effect of the deeds on the transferor's title, but rather their position as transferees.

302 The third party companies and the other appellants advanced three submissions on the appeal. First, they submitted that the relationship between a subsidiary company (eg., HDIO, RHIO and MDIO) and its parent company (eg., HPPL, Westraint Resources Pty Ltd) is sufficient to establish that the former company is claiming through or under the latter company. Secondly, they submitted that cl 7(b) of the Hope Downs Deed, which was an undertaking by the parties to the deed not to challenge the right of any member of the Hancock Group to any

of the Hancock Group Interests at any time, entitles HPPL to obtain an injunction to restrain the applicants from pursuing the third party companies and entitles those companies to a stay of the proceedings while the injunction is being pursued. It is submitted that this ability to obtain a stay derives from a party to the arbitration agreement. Thirdly, they submitted that an essential element of their respective defences is that they obtained clear title from the transferors and at least one reason for that is the releases and other covenants in the deeds. Those releases and covenants are defences which are or were exercisable by parties to the arbitration agreements.

303 The first two submissions must be rejected and can be dealt with relatively briefly. The third submission is the burden of the appeals with respect to the extended definition of "party".

304 In support of their first submission, the third party companies and other appellants relied on the decision in *Roussel-Uclaf v GD Searle & Co Ltd and Anor* [1978] 1 Lloyd's Rep 225. In that case, Graham J held that a company which was a wholly owned subsidiary of a party to an arbitration agreement and which sold that party's products under its direction in the United Kingdom was claiming through or under the party to the arbitration. His Lordship said at [1978] 1 Lloyd's Rep 231:

> The argument does not admit of much elaboration, but I see no reason why these words in the Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming, as here, a right to sell patented articles which it has obtained from and been ordered to sell by its parent. Of course, if the arbitration proceedings so decide, it may eventually turn out that the parent company is at fault and not entitled to sell the articles in question at all; and, if so, the subsidiary will be equally at fault. But, if the parent is blameless, it seems only common sense that the subsidiary should be equally blameless. The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is "claiming through or under" the parent to do what it is in fact doing whether ultimately held to be wrongful or not.

305 The Court of Appeal said that the decision in *Roussel-Uclaf v GD Searle* was wrongly decided on this point in *City of London v Sancheti* [2009] 1 Lloyd's Rep 117. Collins LJ (with whom Laws and Richards LJJ agreed) said at [2009] 1 Lloyd's Rep 122 [33]-[34]:

> 33. In Mustill & Boyd, *Commercial Arbitration*, 2nd Edition (1989), it is said (at page 137) that the decision can perhaps be explained on the basis of agency, and otherwise it is difficult to see how the subsidiary could have taken any part in the arbitration, and elsewhere (at page 472) the decision is described as "curious". In *Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabah* [1995] 1 Lloyd's Rep 374 Mance J (as he then was) said (at page 451) that he did not find it easy to extract any principle from the reasoning.

> 34. … But even without such a distinction I do not consider that *Roussel-Uclaf v GD Searle & Co Ltd* assists Mr Sancheti. In my judgment, it was wrongly decided on this point and should not be followed. A stay under section 9 can only be obtained against a party to an arbitration agreement or a person claiming through or under such a party and a mere legal or commercial connection is not sufficient.

306 In *Tanning Research Laboratories,* the High Court held that the liquidator of a company was claiming through or under a party to an arbitration agreement when he sought to rely on grounds of defence which were available to the company and that company was a party to an arbitration agreement with the plaintiff. Brennan and Dawson JJ (with whom Toohey J agreed) noted that that factual decision had not arisen before and they referred to previous cases where the courts had held that a person was claiming through or under a party to an arbitration agreement. Their Honours said at 169 CLR 341-342:

> In statutes similar to s. 7 of the Act, the phrase "through or under a party" or its equivalent has been construed to apply to, inter alios, a trustee of a bankrupt's estate (*Piercy v. Young*), an assignee of a debt arising out of a contract containing an arbitration clause (*The "Leage*"), a company being a subsidiary of a parent company which is party to an arbitration agreement (*Roussel-Uclaf v. Searle*; but cf. *Mount Cook (Northland) v. Swedish Motors*) and a company being a parent of a subsidiary company which is party to an arbitration agreement when claims are brought against both companies based on the same facts: *J.J. Ryan & Sons v. Rhone Poulenc Textile. S.A.*
>
> (citations omitted)

307 In *Flint Ink*, Nettle JA sitting as a member of the Victorian Court of Appeal, followed *Roussel-Uclaf v GD Searle* to the extent of saying that if the rights of the person and the rights of the party to the arbitration agreement are closely related, then the former is "claiming through or under" the latter. His Honour said at 289 FLR 50 [74]:

> It follows in 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. So, too, in terms of Graham J's analysis in *Roussel-Uclaf*, Huhtamaki Australia is claiming through or under Huhtamaki NZ because, on the facts of the case, Huhtamaki Australia's rights against Flint Ink are so closely related to Huhtamaki NZ's rights against Flint Ink that is right to hold that Huhtamaki Australia is 'claiming through or under' Huhtamaki NZ.

As far as we can see, the Victorian Court of Appeal was not referred to *City of London v Sancheti.*

308 In *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd and Another* [2008] FCA 551 168 FCR 169 at 176-177 [14]-[15], Finkelstein J made it clear that there are two requirements, not just one, before the extended definition of "party" is satisfied and they are that there is a relationship of sufficient proximity between the party to the arbitration agreement and that the person claiming through or under that party and the claim or defence must be derived from that party. A similar point was made by Bergin CJ in Eq in *nearmap Ltd v Spookfish Pty Ltd* [2014] NSWSC 1790 at [45].

309 With respect, we would not follow *Roussel-Uclaf v GD Searle*. Not only has it not been followed in England, but it seems to us to be inconsistent with the two decisions mentioned in the previous paragraph. It was not, as was submitted by the third party companies and other appellants, approved by Brennan and Dawson JJ in *Tanning Research Laboratories*. In the passage set out above (at [306]), their Honours were merely listing examples of circumstances in which the courts had previously held that a person was claiming through or under a party to an arbitration agreement. Furthermore, we note that in that passage, their Honours also referred to an authority which distinguished *Roussel-Uclaf v GD Searle*: *Mount Cook (Northland) Ltd v Swedish Motor Ltd* [1986] 1 NZLR 720. Most importantly, in our respectful opinion, the principles identified by Brennan and Dawson JJ are not consistent with the adoption of such a test. In what in our respectful view is the critical passage in their reasons dealing with this issue, their Honours said at 169 CLR 342:

> In the first place, as sub-s. (2) speaks of both parties to an arbitration agreement, a person who claims through or under a party may be either a person seeking to enforce or a person seeking to resist the enforcement of an alleged contractual right. The subject of the claim may be either a cause of action or a ground of defence. **Next, the prepositions "through" and "under" convey the notion of a derivative cause of action or ground of defence, 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.
>
> (emphasis added)

310 Gaudron and Deane JJ wrote separate joint reasons. Their Honours agreed with the other members of the Court in the result, but expressed themselves differently, although whether the differences are material differences is not a matter which needs to be addressed. Their Honours said at 169 CLR 353:

> 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.
>
> … In so doing, the liquidator stands precisely in the position in which Hawaiian 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 T.R.L. So standing, the liquidator claims the benefit of the defences and answers which would otherwise have been available to Hawaiian, and thus claims through or under Hawaiian….

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

312 The second submission of the third party companies and other appellants seems to be a reformulation of the argument put below based on *Airberg v Cut Price Deli.* It seems to us that it must be rejected. Even if it be assumed that HPPL could, based on cl 7(b) of the Hope Downs Deed, seek an injunction restraining the applicants from proceeding against the third party companies, that is a right in HPPL, not in any of the third party companies. It is true that that might form the basis for an application for a stay by the third party companies, but there is no right to a stay and whether or not a stay is granted may be influenced by a whole range of considerations. In any event, we do not think that the possibility or even likelihood of a stay being granted can be characterised as a defence in the hands of the applicant for a stay. Beyond that, it is a *Trident General Insurance Co Limited v McNiece Bros Proprietary Limited* [1988] HCA 44; 165 CLR 107 issue, if we may call it that, and that issue was not developed on the appeals.

313 The third submission is at the heart of the matter. The third party companies and other appellants contend that they will be claiming through or under a party to an arbitration agreement because they will be relying on a defence of such a party, being the releases and other covenants in the deeds, which defence has the following characteristics: it is an essential element of the defence and it is exercisable by the party to the arbitration agreement.

314 For their part, the applicants submitted that the third party companies have not foreshadowed a defence derived from a party to an arbitration agreement. The "persons" claiming under the extended definition and the "parties" to the arbitration agreements might be closely related, but that in itself is not sufficient.

315 The applicants also submitted that the third party companies do not derive a defence from a party to an arbitration agreement because the constructive trust which they allege against the third party companies in this case is a remedial constructive trust rather than an institutional constructive trust: see *Bathurst City Council v PWC Properties Pty Limited* [1998] HCA 59; 195 CLR 566 at 584-585 [40]-[41]. We find that submission somewhat surprising, having regard to the allegations in the statement of claim, but, in any event, it is not clear to us how a digression into this area of the law advances the matter, particularly as it is a key allegation of the applicants that the transferors at no stage held the beneficial interest in the relevant tenements.

316 The applicants submitted that its argument that the third party companies are not "claiming" through or under a party to an arbitration agreement is supported by the fact that the liability of a knowing assistant or knowing recipient is direct and not indirect or derivative. The nature or quantum of liability of a defaulting fiduciary and a knowing assistant or knowing recipient need not necessarily coincide. Although a knowing assistant or recipient's liability may be described as accessorial liability, that only means that an element of the liability is a breach of fiduciary duty. As the applicants correctly submitted, these propositions in the case of a knowing assistant are supported by the decision of the High Court in *Michael Wilson & Partners Limited v Nicholls and Others* [2011] HCA 48; 244 CLR 427 at 455-458 [100]-[106] per Gummow A-CJ, Hayne, Crennan and Bell JJ. We agree with the applicants that there is no reason why a similar analysis does not apply in the case of a knowing recipient. In our opinion, the nature of a knowing recipient's liability does support the conclusion that the third party companies are not claiming through or under the defaulting fiduciaries.

317 We return to the sentences which we have emphasised in the passage from the joint reasons of Brennan and Dawson JJ set out above (at [309]). As was the case in *Tanning Research Laboratories*, we are not aware of any prior authorities which have addressed the situation before this Court. The third party companies and other appellants relied on the second of the two sentences and submitted that, in this case, they will rely on a defence which a party to an

arbitration agreement has a right to exercise and which includes as an essential element, the releases and other covenants in the deeds. We reject this submission. We would not have thought that the third party companies have a derivative defence in the ordinary sense of that term. We recognise that the cases have made it clear that the extended definition of "party" is not restricted to cases where there has been an assignment or other means of transfer, but it is relevant that there is no legal relationship between the party to the arbitration agreement and the third party companies relevant to the defence. The fact that they are related parties might explain why the transfer of property took place, but is in itself not sufficient. The only relationship is purely factual, being the transfer of the property from a party to an arbitration agreement to a third party company. Furthermore, we do not consider that the releases and other covenants in the deeds are an essential element of the defences of a party to the arbitration agreements and of the third party companies in the relevant sense. It may be accepted that, as a matter of fact, they are highly likely to raise the defences, but they are not bound to do so. A defaulting fiduciary and a knowing recipient may raise different defences and just as the liability of a knowing recipient is not derivative (see *Michael Wilson & Partners* at 244 CLR 455-458 [100]-[106]), neither are their defences.

318 For these reasons, we do not think that the third party companies are claiming through or under a party to an arbitration agreement within the extended definition of party in s 2(1) of the *CA Act*. Although the primary judge expressed herself differently, we think that her Honour's approach to the matter is similar to the approach which we think should be taken.

319 It is not to the point to consider whether the above approach is consistent with the approach taken by the Victorian Court of Appeal in *Flint Ink* because this Court must follow *Tanning Research Laboratories.* We would note, however, that *Flint Ink* involved a cause of action by the third party, Huhtamaki Australia, against the party to the arbitration agreement (Flint Ink NZ) with some unique features. The only acts of breach by Flint Ink NZ were said to be those directed towards Huhtamaki NZ (the other party to the arbitration agreement) (see Warren CJ at 289 FLR 38 [26]) and to found its cause of action, Huhtamaki Australia relied on contractual and common law obligations owed by Flint Ink NZ to Huhtamaki NZ. As Nettle JA put it, Huhtamaki Australia's third party claim was "critically dependent upon and derivative from the contractual and common law obligations alleged to have been owed by Flint Ink to Huhtamaki NZ" (at 289 FLR 50 [76]; see also Mandie JA at 289 FLR 50 [148]). To the extent that the case cannot be distinguished by reference to those matters, we would respectfully decline to follow it.

320 In each appeal, the applicants filed a notice of contention which contained the following grounds:

> …
>
> 2. The primary judge's finding that neither HDIO, RHIO, MDI nor MDIO is a "party" to any relevant arbitration agreement (Judgment [535], [540], [541]) should be upheld for the additional reason that, in the absence of a filed defence from any of those parties or any evidence as to their proposed defences, there is no adequate basis for a finding that any of those parties will defend the claims against it "through or under" a party to any relevant arbitration agreement, and therefore no basis for a finding that any of those parties falls within the definition of a "party" in the uniform commercial arbitration legislation.
>
> 3 The primary judge's finding that MDI is not a "party" to any relevant arbitration agreement (Judgment [541]) should be upheld for the additional reason that MDI, having not entered an appearance in the proceeding, has not made any written or oral representation as to how it proposes to defend the claims against it, thus there is no basis for finding that it will defend the claims against it "through or under" a party to any relevant arbitration agreement.
>
> ...

321 It is not strictly necessary for us to deal with these contentions. We can indicate that had it been necessary to do so, we would reject the second ground. The applications for orders under s 8(1) of the *CA Act* were brought at an appropriate stage in the proceeding and we refer back to what we have said as to the proper approach to an application under s 8 (at [141]-[152]).

322 We have already addressed the matter raised in the third ground.

323 In our opinion, HDIO, RHIO and MDIO are not or would not be claiming through or under HPPL or one of its other related parties. On that basis, the claims for relief against those companies would not be stayed under s 8(1) of the *CA Act*. What should happen to them bearing in mind that as a result of this Court's decision, there will be no proviso hearing and there will be a stay under s 8(1) of the *CA Act* in relation to the balance of the applicants' claims? Before the primary judge, the third party companies and other appellants argued that even if they are wrong and the conclusion is that the third party companies did not fall within the extended definition, then nevertheless the proceeding against them should be stayed pending the arbitration. The primary judge did not address the argument, almost certainly because of the order her Honour ultimately made. We will address the argument after addressing the next issue.

Whether the claims against the third party companies are part of the same "matter" within s 8(1) of the CA Act

324 It is important at the outset to distinguish between two propositions. The first proposition is that the claims of a party to an arbitration agreement against a non-party fall within an arbitration clause and an unwilling party or an unwilling non-party can be required to bring those claims or defend them in an arbitration. The second proposition is that the parties to an arbitration agreement are in dispute and that dispute falls within the arbitration agreement and includes a dispute about whether one of the parties can bring or make claims against non-parties. The burden of the appellants' submissions was directed at the second proposition and not the first. However, we will address the first proposition for the sake of completeness.

325 The primary judge said at [553] of her Honour's reasons that the claims made solely against the third party companies were not the subject of an arbitration agreement because they are claims made against respondents that are not parties to any arbitration agreement. That addresses the first proposition because it involves pursuing the claims in the arbitration against the third parties. In our respectful opinion, her Honour was correct.

326 Section 7 of the *CA Act* defines an "arbitration agreement" for the purposes of the Act as *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. The provisions of the Hope Downs Deed are set out above (at [79]). Those provisions and, in particular, cl 20 make it clear that the dispute which is the subject of the arbitration agreement is a dispute between the parties to the deed.

327 Section 8(1) of the *CA Act* directs attention to whether the action before the Court is brought "in a matter which is the subject of an arbitration agreement". In *Tanning Research Laboratories*, Gaudron and Deane JJ (at 169 CLR 351) said that a matter does not necessarily encompass all the claims within the scope of the controversy in the court proceedings and in addressing the phrase "matter … capable of settlement by arbitration" in the *International Arbitration Act*, said it requires "some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy". In *Comandate* Allsop J said of the word, "matter" in s 7(2) of the *International Arbitration Act* the following at 157 FCR 106-107 [235] and [238]:

> 235 … 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* 169 CLR 332 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. …

The "body of differences" in this case are the differences between the parties to the arbitration agreement and they do not include the applicants' actual pursuit of claims against the third party companies.

328 However, none of the foregoing is to say that there cannot be a dispute between the parties to an arbitration agreement about or concerning the right of one of the parties to pursue claims against a non-party. This is the second proposition. A party to an agreement containing an arbitration agreement may have an enforceable contractual right to prevent the other party from pursuing claims for relief against a non-party. A dispute between the parties as to the existence of that right may be a dispute within an arbitration clause. To illustrate this point, we take the applicants' claims against HDIO as an example. The HPPL and other parties to the Hope Downs Deed contend that by cl 7(b) the applicants have promised not to challenge the right of, among others, HDIO to, among other interests, the Hope Downs Tenements. The applicants purport to do that in claims 15, 18 and 19, and HPPL and Mrs Rinehart, for example, dispute their right to do that. We are satisfied to the required level that that dispute is a dispute between the parties under the deed. The HPPL and other parties to the Hope Downs Deed submitted that the same point can be made with respect to other clauses in the various deeds, but we do not need to address those clauses. The point is sufficiently made by reference to cl 7(b) of the Hope Downs Deed. We would also observe that the fact that there may need to be some elaboration in the arbitration of the relief claimed by HPPL and Mrs Rinehart does not detract from these conclusions.

329 As to RHIO, we agree with the submissions of the appellants that there is an arguable case to the required level to the same effect as there is with HDIO, even though RHIO was incorporated after the execution of the Hope Downs Deed. As we have already said at [234], clause 7(b) refers to a challenge to the right of any member of the Hancock Group to any Hancock Group Interests *at any time* and it is arguable that that includes future members of

the Hancock Group. It is also arguable to the required level that even if the Hancock Group does not include future members, the challenge to RDIO's title necessarily involves impugning the title of RDIO's predecessor in title, HPPL. It may be said (as the appellants submitted) that such a construction makes commercial sense and it cannot have been objectively intended that the operation of cl 7(b) would depend on whether there was a change in the member of the HPPL Group which held the relevant tenements. As we have explained in Section D, the fact that there are arguments, even cogent arguments, to the contrary does not detract from the conclusion that there is a dispute between the parties under the deed.

330 As to MDIO, similar arguments apply as those we have identified with respect to RHIO.

331 In our opinion, whilst the dispute between the applicants and the third party companies is not within an arbitration agreement, there is a dispute between the parties to the agreements which is within the arbitration agreements about the applicants' right or ability to pursue claims for relief against the third party companies.

Whether the claims against the third party companies should be stayed under the Court's general power

332 At [160]-[163] of her Honour's reasons, the primary judge concluded that the Court had a general power to control its own proceedings which extended to ordering a stay of its own proceedings. Her Honour referred to *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 193 at 203 (per French J, who had referred to Bowen CJ in *Hughes Motor Services Pty Ltd v Wang Computers Pty Ltd* (1978) 35 FLR 346 at 351, who in turn had referred to the Full Court in *Grollo Darwin Management Pty Ltd v Victor Plaster Products Pty Ltd* (1978) 33 FLR 170, and to Toohey J in *Muller v Fencott* (1981) 53 FLR 184 at 189) and to *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* [2000] FCA 547; 100 FCR 420.

333 In *Recyclers*, Merkel J said at 100 FCR 420 [65]-[66]:

> 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). 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 *McConnell Dowell Smith East Asia Pty Ltd v State Electricity Commission (Vic)* (unreported, Supreme Court, Vic, Beach J, No 5035 of 1996, 24 November 1998).

334 These principles were not the subject of debate on appeal. They appear basal and correct.

335 These principles were applied by Jagot J in *Casaceli v Natuzzi S.p.A.* [2012] FCA 691; 292 ALR 143 at 158-159 [48]-[49] where the "principal" claims were to be the subject of arbitration and the other claims were stayed.

336 We have decided that there should be a stay of the proceeding under s 8(1) of the *CA Act* as to all of the claims, except for the actual claims against the third party companies. The dispute between the applicants and the HPPL and other parties to the arbitration agreements as to whether the applicants can claim relief against the third party companies is within the arbitration agreements. That means that the only claims not within the stay to be granted under s 8(1) of the *CA Act* are the actual claims against the third party companies. If both the arbitration and the legal proceedings with respect to these claims proceed at the same time, then there is a risk of inconsistent findings and the incurring of unnecessary expense. The claims which will proceed to arbitration are fairly described as the principal claims, and, in the exercise of the Court's general power to control its own proceedings, in the interests of justice and to avoid unnecessary expense, the actual claims against the third party companies should be stayed to permit the arbitration to proceed first.

F Whether the applicants have engaged the proviso to s 8(1) by a relevant attack on the arbitration agreements

G Whether the power to refer any attack on the arbitration agreements to arbitration is mandatory or discretionary

H To the extent that the power to refer any attack on the arbitration agreements to arbitration is discretionary, how that discretion should be exercised

337 These questions raise a number of issues, including the meaning of the phrase "null and void, inoperative, or incapable of being performed", the principle of separability (or, as sometimes

referred to, the principle of severability), the character of the necessary attack on the arbitration agreement for the proviso to s 8(1) (being the words following from "unless" in the last two lines) to be engaged, and the principle of competence of the arbitral tribunal.

338 The primary judge dealt with some of these questions in answering agreed questions 10 and 12 at [116]-[145] and agreed question 11 at [662]-[668]. Her Honour began with agreed question 10 (at [116]-[124]) and concluded, correctly in our view for the reasons at [141]-[152] above and as discussed below, that the Court was not necessarily required to deal with the proviso, the arbitral tribunal can be allowed to deal with it.

339 In answering question 12 (at [125]-[140]), the primary judge concluded that the phrase "null and void, inoperative or incapable of being performed" encompassed claims that the agreement was affected by undue influence, duress, unconscionability, fraudulent concealment, misrepresentation, misleading and deceptive conduct and fraud on a power. (It is necessary to read [125]-[140] in conjunction with [662] to recognise that all these types of claims were found by her Honour to be capable of falling within the proviso.)

340 At [662]-[668], in dealing with question 11, the primary judge concluded that there were relevant attacks on the arbitration clauses that should be heard by the Court: this applied to the Hope Downs Deed, the 2007 HD Deed, the 2005 Deed of Obligation and Release, the 2009 Deed of Further Agreement and the 2010 Deed of Variation. We disagree with her Honour's approach to the answering of question 11, though we do not disagree with many of the statements of principle to which her Honour referred.

Separability

341 It is necessary to begin by discussing the doctrine of separability. To a degree it underpinned questions 10, 11 and 12 dealt with by the primary judge although there was no question placed before her Honour about it.

342 Subsections 16(1), (2) and (3) of the *CA Act* are in the following terms:

> (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.

343 These provisions (based on Art 16(1) of the *Model Law*) embody two related principles. The first is the principle of separability reflected in s 16(2). The separability principle is a rule, reached and laid down pragmatically, rather than logically, by courts in common law and civil law jurisdictions over decades and found in arbitral rules and conventions, that the agreement to arbitrate in the arbitration clause and the substantive agreement in which one finds the clause should be viewed as separate and distinct agreements. The invalidity of the main contract does not necessarily entail the invalidity of the arbitration clause. One significance of the doctrine is that an attack by one party on the validity of the whole agreement is not taken necessarily to be an attack on the arbitration agreement (which is separate). The importance of this is that the arbitrator has authority to decide that the (separate) substantive agreement is invalid or void or voidable, without, by such a conclusion, destroying his or her own authority to act as an arbitrator. Thus, the doctrine (as we discuss below) requires that there be a distinct and separate attack on the arbitration clause itself for the validity of the arbitration agreement (arbitration clause) to be brought into question. We will come shortly to the significance of this for the appeal.

344 The New York Convention of 1958 did not contain any provision concerning separability, but the principle was well-known before the creation of the *Model Law* in 1985. Article 18(2) of the *European Convention Providing a Uniform Law on Arbitration* done at Strasbourg 20 January 1966 stated that "[a] ruling that the contract is invalid shall not entail *ipso jure* the nullity of the arbitration agreement contained within it": see van den Berg AJ, *The New York Arbitration Convention of 1958* (Kluwer, 1981) at 146.

345 In 1963, the French Cour de Cassation in *Gosset* recognised the principle in broad terms (referred to in Blackaby N and Partasides C, *Redfern and Hunter on International Arbitration* (6th ed, Oxford, 2015) at 105 [2.106]):

> In international arbitration, the agreement to arbitrate, whether concluded separately or included in the contract to which it relates, is always save in exceptional circumstances…completely autonomous in law, which excludes the possibility of it being affected by the possible invalidity of the main contract.

346 In 1967, the United States Supreme Court in *Prima Paint Co v Flood Conklin Manufacturing Corporation* 388 US 395 (1967) at 402-406 recognised the principle in State and federal courts.

347 Article 16(1) of the *Model Law* was based on Arts 21(1) and (2) of the *UNCITRAL Arbitration Rules 1976*:

Arts 21(1) and (2) of the UNCITRAL Arbitration Rules 1976:

> 1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
>
> 2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Art 16(1) of the *Model Law 1985*:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

348 The second principle within s 16(1) is the principle of competence (sometimes referred to as the principle of *kompetenz-kompetenz* or *compétence-compétence*) of the arbitrator, not just to decide upon the validity of the main agreement, but also to decide upon the existence or validity of the arbitration agreement – that is on his or her own authority to decide. We will come to the significance of this second aspect of the principle in due course when we discuss whether the Court must, or should, deal with any separate attack on the arbitration clause, and when we discuss the Constitutional validity of s 8(1) of the *CA Act*. For clarity, we will refer to the first aspect of Art 16(1) as the separability principle, and to the second as the competence principle.

349 The relationship of these aspects of the separability and competence principles can be seen in s 16(1), (2) and (3) of the *CA Act*: subs (1) deals with competence to decide jurisdiction, whether partial (ie the scope or reach of the arbitration agreement) or total (the existence or validity of the arbitration agreement); subs (2) expresses the related foundation for subs (1) of the independence (separateness or autonomy) of the arbitration agreement; and subs (3) expresses the lack of consequence, through separateness, of a decision as to the invalidity of the main contract upon the arbitration clause within it. The inter-relationship of these aspects of the principles can be seen in the wholeness of the drafting in Art 16(1) of the *Model Law*.

350 The separability principle that founded the authority or competence of the arbitrator to decide upon the validity of the main agreement was not fully accepted into Anglo-Australian general

law until the 1990s. The views expressed by the House of Lords in *Heyman* at [1942] AC 366-367, 382-383 and 395 (though *obiter dicta*) were to the effect that the invalidity of the whole agreement (for example by its avoidance *ab initio*) necessarily destroyed the arbitration clause as part of it, and so the arbitrator's authority to decide this question. In 1991, in delivering the leading judgment for the majority (Clarke and Handley JJA) in *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, Clarke JA said at 485:

> … Particular reliance was placed in these submissions upon the power now granted to the court under s 87 of the Act to declare contracts void ab initio. The significance of this power is that the effect of a declaration that a contract, which contains an arbitration clause, is void ab initio is that there was never a contractually valid submission to arbitration: see *Heyman v Darwins, Ltd* [1942] AC 356 at 367, 383 and 395 and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 364.
>
> The received doctrine is that for this reason an arbitrator has no jurisdiction to determine whether or not a contract containing the arbitration clause under which he was appointed was, or should be declared to have been, void ab initio. If, the argument proceeds, that is the well-recognised law then an intention to grant to an arbitrator power to exercise extensive powers, including the power to declare the contract void ab initio, should not be attributed to the parties.

351 In 1994, the New South Wales Court of Appeal (in a bench that included Clarke JA) in *Ferris v Plaister* (1994) 34 NSWLR 474 unanimously disavowed *IBM*. We will not cite the comprehensive judgments of the members of the Court of Appeal (Kirby P, Mahoney and Clarke JJA). It suffices to say that the reversal by Clarke JA of his own views was based on the recognition of the powerful statements on the doctrine of separability in cases such as *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 980 per Lord Diplock and 998 per Lord Scarman and on the influential and comprehensive judgment of Steyn J (as his Honour then was) in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] Lloyds Rep 81. The further course of the matter in England and the vindication of Steyn J's views by the Court of Appeal was described in the reasons of Allsop J in *Comandate* 157 FCR at 102-103 [221]-[222], which we need not repeat. The reference to the judgment of Mason J in *Codelfa*, by Clarke JA in *IBM* should not be understood as revealing High Court authority inconsistent with *Ferris v Plaister* for the reasons given by Allsop J in *Comandate* 157 FCR at 103-104 [225]-[227].

352 This change of view by the New South Wales Court of Appeal brought their expression of the principle into conformity with that by judges of this Court in *QH Tours Ltd v Ship Design*

and Management (Aust) Pty Ltd (1991) 33 FCR 227 per Foster J and *Morton v Baker* (unreported, Federal Court of Australia, Einfeld J, 25 March 1993).

353 The reasons of Steyn J and of the Court of Appeal in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701 referred to the influential article by Judge Schwebel "The Severability of the Arbitration Agreement" in *International Arbitration* (1987), pp 1-60. That paper, as noted by Leggatt LJ in the Court of Appeal: [1993] QB at 717, not only pointed out the lineage of the doctrine in the United States to the *Arbitration Act 1925*, but also pointed out the important feature of it that to set aside the arbitration agreement requires a direct and particular attack on that agreement.

354 The doctrine of separability was statutorily recognised in England by s 7 of the *Arbitration Act 1996* which provides:

> Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

355 Meanwhile, in 1989, the Commonwealth Parliament gave the *Model Law* the force of law in the *International Arbitration Act 1974* (Cth) in which Art 16 embodied the principles of separability and competence.

356 In 2007, the House of Lords dealt with s 7 of the *Arbitration Act 1996 (UK)* and the separability principle in *Fiona Trust*. Lord Hoffmann addressed the question at [2008] 1 Lloyd's Rep 257 [17]-[19] of his reasons. His Lordship recognised (at [17]) that there may be cases in which the ground of invalidity of the main agreement is identical to that of the arbitration agreement. He gave the examples of forgery and of a complete lack of authority to enter any agreement at all. But he noted, importantly, that the arbitration agreement was invalid not because the main agreement was invalid, but because the signature on the separate arbitration agreement was either forged or placed there without authority. However, a lack of authority may be limited to the main agreement. Lord Hoffmann's discussion at [2008] 1 Lloyd's Rep 257 [18] recognised that the question as to whether there is or is not a separate attack on the arbitration clause depended on the nature of the complaint, and a clear understanding of it:

> On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement. It

> would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to ente4r into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

357 The facts in *Fiona Trust* concerned bribery of the person charged with responsibility for entry into such contracts in order to obtain favourable terms for charterers. At [2008] 1 Lloyd's Rep 258 [19], Lord Hoffmann said:

> … But that does not show that he was bribed to enter into the arbitration agreement. It would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been. Mr Butcher QC, who appeared for the owners, said that but for the bribery, the owners would not have entered into any charter with the charterers and therefore would not have entered into an arbitration agreement. But that is in my opinion exactly the kind of argument which section 7 was intended to prevent. It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.

358 Lord Hope dealt with responsibility at [32]-[35] of his reasons in like terms. His Lordship gave as an example impersonation or forgery as "unlikely to be severable from the arbitration clause": see [2008] 1 Lloyd's Rep 260 [34]. His Lordship put the matter with great clarity at [2008] 1 Lloyd's Rep 260-261[35] as follows:

> That is not this case, however. The appellants' argument was not that there was no contract at all, but that they were entitled to rescind the contract including the arbitration agreement because the contract 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 to the main agreement will not do. That being the situation in this case, the agreement to go to arbitration must be given effect.
>
> (emphasis added)

359 The points made by Lord Hoffmann and Lord Hope are central to the arguments here. It can be accepted that there may be allegations or complaints about the validity of the main agreement in question that are relevant to any attack on the arbitration agreement. But this is not because of any argument based on causation that since the main agreement is invalid, so

is the arbitration agreement; rather it is because the nature of the allegation is that it stands as an independent ground of impeachment of the separate arbitration agreement directly related to the arbitration agreement. In a valuable passage in Joseph D, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd ed, Sweet and Maxwell, 2015) at 127-129 [4.40] there is a discussion of examples of circumstances where the same ground can be seen to impeach both the main agreement and the arbitration agreement: *non est factum*, illegality of a kind that is directed to the arbitration agreement such as a consumer protection statute, lack of signature and some kind of fundamental mistake (about the arbitration agreement). Fraud, if fundamentally impeaching any consent, may be independently directed to the arbitration agreement: see *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 Lloyd's Rep 784 at 797. In *El Nasharty v J Sainsbury PLC* [2007] EWHC 2618 (Comm); [2008] 1 Lloyd's Rep 360, however, duress not specifically directed to the arbitration clause was not sufficient to prevent a stay. The fact that the main agreement may be vulnerable to avoidance because of misrepresentation, unconscionable behaviour, or non-disclosure will not amount to a distinct and separate attack on the arbitration agreement.

360 The doctrine of separability recognised by s 16 of the *CA Act* was in fact part of the common law of Australia as enunciated by the Court of Appeal of New South Wales in *Ferris v Plaister* and the Full Court of this Court in *Comandate*. That position conforms with the common law of England enunciated at least since the Court of Appeal in *Harbour Assurance* and with the recognised position in many civil law countries.

Is there an attack on the arbitration clause here?

"null and void"

361 Mrs Rinehart and the HPPL interests submitted that there was no relevant attack on the arbitration agreement here for the purposes of s 8 for at least two reasons: first, that the pleading did not disclose a separate and distinct attack on the arbitration agreements in question; and, secondly, that "null and void" was a narrow expression meaning devoid of legal effect (at all, or at least at the time the Court becomes seised of the issue) and the pleading did not assert this.

362 We will come to the pleading in due course.

363 At [128]-[136] of her Honour's reasons, the primary judge helpfully set out the following as to the approaches of the commentators, this Court and the American and English courts:

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.

364 The primary judge dealt with the question of "null and void", in particular in relation to the *TP Act*, at [128]-[140] of her Honour's reasons. Her Honour concluded as follows at [137]-[140]:

> 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.

> 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*.

365 It was submitted that her Honour erred in concluding that the phrase was wide enough to encompass the effect of a (later) declaration by reason of a vitiating factor going to the commencement of the agreement.

366 There is a degree of imprecision in the expressions of principle in the commentary and cases set out by the primary judge. There can, it is true, be seen to be a logical difference between an agreement having no effect in that it never existed because of, say, forgery or utter and complete lack of authority and an agreement vitiated from the outset by some legally relevant consideration such as fraud, duress, unconscionability, undue influence, misrepresentation, such that the law will either recognise or perform an act of avoidance, after which the agreement is taken no longer to be, or to have been, in existence. We are not dealing, however, with logic, we are dealing with the meaning of words that have their origins in an international instrument affecting different legal systems and different legal traditions.

367 Article 8 of the *Model Law* and s 8 of the *CA Act* must be read with Art 16 and s 16, respectively. As a matter of construction, the word "finds" in Art 8 and s 8 does not mandate that the Court hear the question whether the arbitration agreement is "null and void, inoperative or incapable of being performed". We refer to what we have said at [147]-[148] above.

368 The competence principle that is reflected in Art 16(1) and s 16(1) was discussed by Lord Collins of Mapesbury JSC in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763 at 829-835 [79]-[98]. It has its modern origins in what was said by Devlin J in *Christopher Brown*

Ltd v Genossenschaft Österreichischer [1954] 1 QB 8 at 12-13. For a general discussion of the principle, see Born G, *International Commercial Arbitration* (2nd ed, Wolters Kluwer, 2014) vol 1, ch 7.

369 The expression of the principle in Art 16 and s 16 is amply wide enough to encompass an objection to jurisdiction on the basis that the arbitration agreement did not come into existence. The article and section use the word "existence". It should not be narrowly read to exclude from the word "existence" the question whether the agreement ever existed at all. Conformably with the competence principle, there are well-known examples of tribunals hearing questions of the basal existence or not of the arbitration agreement. Examples include the arbitration tribunals in *Dallah*, *Christopher Brown*, *China Minmetals Materials Import and Export Co Ltd v Chi Mei Corpn* 334 F 3d 274 (3d Cir, 2003) discussed in *Dallah* by Lord Collins at [92]. For a recent example, see *Yegiazaryan v Smagin* [2016] EWCA Civ 1290; [2017] 1 Lloyd's Rep 102.

370 Further, the competence principle does not exclude the Court from reviewing any decision that may be made by the arbitral tribunal. In his valuable discussion of the competence principle in *Dallah*, Lord Collins made this point.

371 The proviso in Art 8 and s 8 is dealing with circumstances when the Court will not stay the proceedings and in that way refer the dispute to arbitration, because it finds that the agreement is null and void or inoperative or not capable of being performed. The scope of the proviso may be affected by understanding whether it is mandatory for the Court to hear the proviso question. As we have said, we do not consider that s 8 should be so read. There are, however, passages in some cases that suggest that if the arbitration agreement is separately impeached (so as to satisfy the separability principle) and that attack is to the effect that it was never formed or is now void, such should only be heard by the Court. In *Harbour Assurance* at [1992] 1 Lloyd's Rep 86, Steyn J (as he then was) said:

> … 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 arbitrator's jurisdiction. …

See also on appeal: *Harbour Assurance* [1993] QB at 712D (Ralph Gibson LJ) and cf at 717G, 718D per Leggatt LJ and 723 per Hoffmann LJ. See also the discussion of the matter

by Allsop J in *Comandate* 157 FCR at 99 to 101 [206]-[217] and especially at [216] and the cases there referred to.

372 It can be seen both as a practical mistake and as contrary to the statute (s 16(1)) to conclude that, if the question is (by the framing of a separate attack on the arbitration agreement) whether the arbitration agreement is in existence or is invalid or is void, the arbitral tribunal in the agreement attacked cannot (as opposed to should not in the circumstances) hear the challenge.

373 It is a practical mistake for the reasons expressed by Devlin J in *Christopher Brown* [1954] 1 QB at 12-13. It can be accepted that the view of the tribunal is not final. (We will return to this issue when we deal with the Constitutional question.)

374 The practical consequences of the contrary view are that any challenge framed to attack the existence of the arbitration agreement, whether because it was never formed, or has been avoided, would demand that the Court rule on the arbitrator's jurisdiction in advance. Depending upon the factual circumstances, this would, or may, impede the arbitral process, depending on the relationship of the grounds of the separate attack on the arbitration agreement to the grounds of and issues in the arbitration.

375 The contrary view would also require s 16(1) of the *CA Act* to be significantly read down, which not only does violence to the words, but which is contrary to, or inconsistent with, the competence principle that the provision was embodying.

376 This approach is in accordance with the tenor of international jurisprudence on Art 8(1) discussed in Born, *op cit* vol 1, §7.03(A)(2), noting expressly p 1095.

377 The real issue in any case is whether the Court *should* hear the separate attack or permit the arbitral tribunal to hear it, by staying its own proceeding. The proper answer to this question will depend on the nature of the attack and all the circumstances.

378 Thus, the words of Art 8 and s 8 should be read and given content against the background, first, that the Court is not required to decide the matters in the proviso; secondly, that the competence principle is wide enough to permit the arbitral tribunal to decide any question of jurisdiction, including whether the arbitration agreement came into existence; and, thirdly, that that decision by the arbitral tribunal is not final, the Court having the final say on the question. A further consideration is that s 8 should, conformably with its language, be construed to facilitate, not impede, the process of arbitration: s 1C(1) of the *CA Act*.

379 There is no textual reason to limit the Court's authority under the proviso to circumstances where the agreement is, at the time the Court is seized of the matter, *already* null and void. A Court may *find* that an arbitration agreement *is* null and void by finding that it should be so considered by avoiding it for reasons which vitiate it *ab initio*. This can be labelled avoiding a voidable agreement, but the ultimate conclusion is that the agreement is not in existence. We would not construe an international instrument as turning on the difficult and contentious distinction of "void" and "voidable". One only needs to reflect upon what Dixon J said in *Posner v Collector for Inter-State Destitute Persons (Victoria)* [1946] HCA 50; 74 CLR 461 at 483 (albeit about administrative decisions) to understand the unsatisfactoriness of an approach to construction that relied on a clear distinction between "void" and "voidable":

> … [W]hen a party is entitled as of right upon a proper proceeding to have an order set aside or quashed, he may safely ignore it, at all events, for most purposes. It is, accordingly, natural to speak of it as a nullity whether it is void or voidable, and, indeed, it appears almost customary to do so. Further, the observation of Sir Frederick Pollock about the use of the word "void" in relation to contracts is even more true of its use in connection with orders and judgments: - "The use of the word *void* proves nothing, for it is to be found in cases where there has never been any doubt that the contract is only voidable. And as applied to other subject-matters it has been held to mean only *voidable* in formal instruments and even Acts of Parliament" (*Principles of Contract*, 10th ed. (1936), p. 56).

380 There is as good reason not to refer a dispute to an arbitrator if the arbitration agreement was brought about by deception as there is if the execution of the agreement was a forgery or made utterly without authority. The relevant question is whether the Court *should* embark on that hearing.

381 We do not consider that the above expression of the matter is contrary to anything in the jurisprudence of other Courts. The phrase "null and void" is to be limited as the Third and Eleventh Circuits said in *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v Lauro,* 712 F. 2d 50 (3rd Cir, 1983) and *Bautista v Star Cruises* 396 F. 3d 1289 (11th Cir 2005) to circumstances where it is commonly internationally recognised that the consequence of the vitiating consideration is to nullify or render void a contract, such as in the consequence of duress, mistake, fraud, or fundamental policies. What is unnecessary to such a recognition, however, is some strict temporal limitation that the state of nullity or voidness already be in existence at the time the Court becomes seized of the issue.

382 The cases relied on by Mrs Rinehart and the HPPL interests to draw that distinction do not do so. They are concerned as much with the question of proof and, when, as a matter of discretion, the Court should order a separate trial of the matter: *Golden Ocean Groups Ltd v*

Humpuss Intermoda Transportasi Tbk Ltd [2013] EWHC 1240 (Comm); 2 Lloyd's Rep 421 at 436-440 [54]-[59], *JSC BTA Bank v Ablyazov* [2011] EWHC 587 (Comm); 2 Lloyd's Rep 129 at [47]-[50], and *Berezovsky* at [2013] 1 Lloyd's Rep 259 [80].

383 The submission was put that the words "null and void" should be construed so as to avoid the vice of a de facto determination of the substantive claims under the guise of a preliminary determination of the validity of the arbitration agreements. We agree wholeheartedly that this result is to be avoided, if it can be. It should be a powerful, indeed, likely overwhelming, consideration in any choice made by the Court as to whether to hear a trial of the proviso issue or to leave it to the arbitral tribunal to deal with. But construing the words narrowly is not necessarily directly related to that sensible objective. There may, for instance, be an attack on the arbitration agreement properly distinct that satisfies the separability principle and that is founded on a mixture of fraud and unconscionability which may be seen to make voidable the agreement which has nothing to do with the main dispute. It may be entirely sensible for the Court to hear such an attack. If the submission of Mrs Rinehart and the HPPL parties be correct, however, that circumstance would not fall within the proviso – a consequence that would be surprising. It would answer the description of the Court finding that the agreement is void.

384 Thus, we do not consider that the primary judge erred in relation to her Honour's construction of the phrase "null and void" or her conclusion as to what claims fell within the proviso. The phrase is intended to encompass assertion by the relevant law that the arbitration does not exist, in that it is found to be "null and void". That meaning does not turn on the unstable distinction between void and voidable. Any such distinction, depending on the circumstances, may well affect whether the Court or the arbitral tribunal is the more appropriate venue for a consideration of the validity of the arbitration.

The pleading

385 At [99]-[105] above, we have described the validity claims. It is unnecessary to set out the repetitive and formulaic pleading any further than we have already. There is no allegation of lack of consent. There are, of course, ample and repetitive allegations of being misled and of unconscionable conduct, of fraudulent concealment, and undue influence and duress, together with assertions that rescission has been effected or that it is relief to which there is an entitlement.

386 It is doubtful whether there can be said to be any independent attack whatsoever on the arbitration agreement. Virtually the entirety of the validity claims are directed without discrimination to both the main agreement and the arbitration agreements. There are only two matters (identified in paras 288 and 290 of the pleading – see [99] and [100] above) which can possibly be seen as directed to the arbitration agreements distinctly and specifically: that there was some misrepresentation or lack of disclosure (though the matter is not clearly pleaded) concerning the fact that the arbitration process would be private (and so lack "public scrutiny") and that the process would have to be paid for. On one view, these are descriptions of the arbitral process not the foundation for any attack on the arbitration agreements. We are, however, prepared to proceed on the basis that the pleading, together with the argument before us, somehow wove these considerations into an attack on the arbitration agreements, distinct from all the other complaints made against the deeds.

387 All the other factual elements of the attacks on the various deeds are unrelated to the arbitration agreements and relate to the substantive aspects of the deeds and their disadvantages.

388 Thus, to the extent that there can be said to be any separate attack on the arbitration agreements, such attack is limited to the asserted misleading of Ms Rinehart and Mr Hancock by not telling them that the arbitration process would be private and would have to be paid for, unlike court process, or by saying that the arbitration process was in their best interests, notwithstanding these features. All the other factual complaints are directed to the substantive deeds and are not separately directed to the arbitration clauses.

389 Thus, any such attack is in narrow compass.

The question of who should hear any attack on the arbitration agreement

390 We would not depart from anything said by Colman J in *A v B* referred to at [148] above. That passage is of considerable assistance because it throws up the point that it is a practical question not a logical question with which we are dealing.

391 We have come to views different in important respects from the views of the primary judge. As is clear from what we have said earlier, we disagree with her Honour's construction of the arbitration clauses. That is because, with the utmost respect, we are persuaded (to the relevant extent of departing from his view about the same clause) that the construction given by Bathurst CJ to the relevant clauses was wrong. The conclusion to which the primary

judge came as to the meaning of the clauses in question meant that the nature of the "matters" the subject of the clauses using the words "under" or "hereunder" was narrow. This led to a significant division of issue falling within and outside the arbitration agreements, and considerable complexity in the judgment and in the submissions on appeal. In such circumstances there is a much greater likelihood that a court will retain the hearing of issues that concern the validity of the arbitration agreement given the extent of issues that will, in any event, have to be heard in the Court.

392 A further disagreement that we have with the primary judge is the extent to which her Honour found that there was an independent impeachment of the arbitration agreements. At [126]-[127] of her Honour's reasons, the primary judge set out the correct approach from the separability principle of needing to identify an identifiably separate attack on the arbitration agreement. However, at [662]-[663], the primary judge concluded that the arbitration agreements had been impeached on all bases of the validity claims. For the reasons we have given we cannot agree. With the exception of the two matters to which we have referred, all the complaints that found the validity claims are wholly directed to the validity of the deeds and are, to use Lord Hope's phrase, parasitical to that and are not specific or distinctive to the arbitration agreements.

393 This means that it is unnecessary to deal with the primary judge's exercise of discretion to the effect that the Court should hear the proviso application about the arbitration agreements. Thus, we must consider the question afresh. In our view the relevant considerations are in short compass. The separate attack is ill-formulated, resting on the narrow foundation identified above. As such it has an inherent lack of apparent strength given that the two features are well-understood characteristics of commercial arbitration. Further it may conceivably in argument (though we do not think it validly should) become entangled in matters of complaint against the substance and validity of the deeds, or at least the context of these matters. The parties to the litigation have displayed an intensity of application to every matter in dispute that makes us consider that the prospect of holding the parties to a short hearing centred upon these two issues is unlikely.

394 For these reasons, we think it preferable to allow the proviso question to be permitted to be determined by the arbitrator. Such an approach also conforms to the significant legal policy reflected in s 1C of the *CA Act.*

I The Constitutional validity of s 8(1) of the *CA Act*

395 The Constitutional issue is directly related to the constructional issue as to whether s 8(1) of the *CA Act* requires the Court to hear the proviso issue. If, as we consider is the case, s 8(1) does not require that to occur, it was submitted that any discretion to permit the arbitrator to decide the question of jurisdiction would be to permit the arbitrator, indeed to confer power upon the arbitrator, to decide a question in the exercise of judicial power. No submission was put that s 16 is unconstitutional. No notice was given to the Attorneys-General under s 78B of the *Judiciary Act* of any such argument.

396 The *CA Act* is a State Act. Section 79 of the *Judiciary Act* will pick up the provisions of the *CA Act* which confer powers on courts or which govern or regulate the power of a court: *Rizeq v Western Australia* [2017] HCA 23; 91 ALJR 707 at 729 [103]. Section 8(1) is one such section. Section 16, on the other hand, applies of its own force as State law.

397 The ultimate source of the arbitrator's power to decide matters in dispute between the parties is contractual: *TCL Air Conditioner*. Section 16(1), reflecting the common law competence principle, is also a source of statutory authority. If the Court exercises its power under s 8(1) it does not refer or move anything in court to the arbitrator. Rather, it stays its own proceedings, leaving the parties to deal with an arbitrator where one party asserts that the arbitrator has contractual authority to deal with the question and the other party denies that proposition.

398 The common law, at least since *Christopher Brown*, has seen the wisdom of permitting the arbitrator to deal with the question of his or her jurisdiction, though always open to being reviewed by the Court.

399 The arbitrator in those circumstances is not exercising judicial power. He or she is a person purportedly appointed to a position by contractual agreement of others, who concludes that he or she cannot proceed with the appointment because of the invalidity of the arbitration agreement. If he or she decides that there is no jurisdiction, he or she has either correctly or incorrectly concluded that the reference was without foundation. If that is the wrong conclusion it was submitted that the *CA Act* had no mechanism to appeal or review that conclusion that the arbitration agreement was null and void. (This was in contrast to a conclusion that there was jurisdiction, a conclusion which could be reviewed under s 16(9), s 34(2)(a)(i) or s 36(1)(a)(i)). Thus, it was submitted the arbitrator's view was unreviewable, so final, and so an exercise of judicial power. The matter is discussed in Born *op cit* vol 1

§ 7.03[A][4](a) at 1101-1105. He expresses the view that a conclusion of jurisdiction should be embodied in a preliminary award, rather than the arbitrator merely declining to entertain the matter. The authority for such a preliminary award would be Art 16(1), and, depending upon the reasons why the arbitration agreement was found by the arbitrator to be null and void, possibly the contract (entered into but since avoided) containing an implication of authority deriving from the competence principle at common law. There are suggestions in Singaporean, Hong Kong and Kenyan decisions referred to by Born *op cit* vol 1 at 1104 fn 323 that the arbitrator's view is final and is not subject to review. In our view, for the kinds of considerations of justice to which Born refers, it cannot be that an incorrect denial of arbitral jurisdiction by an arbitrator cannot be corrected. It may be, as Born suggests, that Art 34(2)(a)(iv) is wide enough to encompass this question. In our view, it would need the clearest and most emphatic words in legislation (or the *Model Law*) to lead to the conclusion that the Court could not review such a conclusion, for instance on an application for declaratory relief. Section 5 of the *CA Act* provides, of course, that "[i]n matters governed by this Act, no Court must intervene except where so provided by this Act". We would not view that provision as clear enough to destroy what should be seen as a feature of the competence principle and an aspect of supporting, not impeding, the arbitral process – review by the Court of the question of authority of the arbitrator where authority has been denied. This could be done by an application for declaratory relief that a tribunal did have jurisdiction, if the tribunal decided that it did not.

400 We see no invalidity in s 8(1) if it be construed, as we consider it should be, as not requiring the Court to hear the proviso application, at least before the arbitrator does.

J. The applications by the applicants to amend their notices of contention and to adduce fresh evidence

Introduction

401 The applicants made an application to this Court for leave to amend their Notices of Contention in the two appeals and two applications to adduce fresh evidence.

402 The applicants also challenged the primary judge's decision to refuse to allow them to re-open their case to adduce further evidence. That challenge raises similar issues to at least one of the applications referred to in the preceding paragraph and it is convenient to deal with it in this section of our reasons.

Background

403 It seems to us that all of the applications relate, in one way or another, to the primary judge's reasons for deciding that there should be a trial on the application of the proviso to the arbitration agreements in the various deeds. Her Honour took a number of matters into account in reaching her decision. Two matters are presently relevant and they are the public nature of a trial in this Court compared with a confidential mediation and (to a point) the merits of the applicants' claims as to the invalidity of the deeds.

404 After pointing out six matters that her Honour considered supported the conclusion that the appellants raised serious challenges to the applicants' claims of undue influence, duress and other species of misconduct (at [664]), her Honour said, as to the two matters we have identified, the following (at [666]):

> 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:
>
> …
>
> (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.
>
> …
>
> (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
>
> …

The application to amend the notice of contention and the first application to adduce fresh evidence

405 We refused this application during the course of the hearing and these are our reasons for doing so.

406 The applicants sought leave to amend their Notices of Contention to add a new para 4.7 as follows:

> 4. The primary judge's exercise of discretion in favour of ordering a trial on the question whether each of the arbitration agreements relied on by the First and Second respondents (aside from the Porteous settlement deed) is "null and void, inoperative or incapable of being performed" within the meaning of section 8(1) of the *Commercial Arbitration Act 2010* (NSW) (**NSW Act**) or the *Commercial Arbitration Act 2012* (WA) (**WA Act**) (Judgment [666] – [668]) should be upheld on the basis that
>
> …
>
> 4.7 by reason of the joinder of the First and Second Respondents to proceedings in the Supreme Court of Western Australia, some of the most serious allegations made against the Appellants will be made in open court in any event, which attenuates the asserted prejudice to the Appellants of conducting a proviso hearing, and tilts the balance of prejudice to the parties further in favour of the First and Second Respondents (Judgment [666(5)]).

407 The first application to adduce fresh evidence which, in effect, accompanied the application to amend the notices of contention was narrowed down in the course of oral submissions so that what the applicants sought to do was tender Exhibit TRP2 to the affidavit of Mr Timothy Randolph Price sworn on 21 October 2016. That Exhibit is a further amended substituted statement of claim in the consolidated actions in the Supreme Court of Western Australia and it is dated 30 September 2016. The Court's attention was directed to para 78 which is in the following terms:

> Alternatively if as Bianca Rinehart and John Hancock allege in Federal Court proceeding NSD1124/2014, entry into the 1995 Deed was undertaken pursuant to a fraudulent and dishonest design perpetrated by HPPL together with Mrs Georgina Rinehart from on or about 9 March 1993 until transferred to HPPL on or about 26 July 1996 as set out in paragraph 79 below, the East Angelas ELs were an asset or interest of WPPL as to 50% and as to the balance were an asset of the person or persons who were beneficially entitled to them by reason of them having been acquired originally by HML for itself and WPPL in equal shares and were held by HDL on trust for WPPL and that person or those persons.

408 As we understood the applicants' submission, it is that this evidence showed that there was even less reason to be concerned about the allegations in this proceeding being made public

as a matter of prejudice to the appellants because the allegations will, in any event, be aired in the Supreme Court of Western Australia.

409 The joinder of the children to the Western Australian actions and the filing of the further amended substituted statement of claim occurred after her Honour delivered her decision and she could not have taken them into account. This is not a matter which can be raised by a notice of contention. As far as the evidence is concerned, it did not take the matter very far and we already had evidence about the Western Australian actions in connection with the application for leave to intervene by WPPL.

The application by the applicants to the primary judge to re-open their case to adduce further evidence.

410 On 18 May 2016, the applicants made an application to re-open their case to adduce further evidence. The primary judge heard the application immediately before she delivered judgment on 26 May 2016. Her Honour refused the application saying that it was not in the interests of justice to allow it. The applicants challenge this decision in their notices of cross-Appeal (ground 18) and notices of contention (ground 5). The further evidence which the applicants wished to adduce became available to them by reason of proceedings in the Supreme Court of New South Wales and it was not available to them earlier. The evidence consisted of letters from legal advisers to Mrs Rinehart in August 2006 about the execution by her of the Hope Downs Deed. Two of the letters were dated 21 August 2006 and 22 August 2006 respectively. The applicants referred in particular to para 2 of the letter dated 21 August 2006 and submitted that it showed that whereas Bianca Rinehart was being told that there was urgency in the signing of the Hope Downs Deed, there was in fact no urgency. The applicants also referred to paras 11 and 12 of the advice dated 22 August 2006 and submitted that those paragraphs showed that Mrs Rinehart was advised that she should not execute the Settlement Deed and if she did so, she would be acting in breach of her duties and obligations as trustee as set out in the Trust Deed. It is important to note that these are allegations at this stage. These matters were said by the applicants to be relevant to the exercise of the discretion whether to order a trial on the application of the proviso. They were said to tend to negate the six matters her Honour found to support the conclusion that the appellants raised serious challenges to the claims of undue influence, duress and other species of misconduct and to bolster the findings her Honour made in [666(3)].

411 We reject the challenge to her Honour's decision not to allow the applicants to re-open their case. The applicants have not identified a *House v King* [1936] HCA 40; 55 CLR 499 error. Furthermore, to receive the evidence would be contrary to the order the primary judge made on 15 April 2015 (see [240] above).

412 As far as the re-exercise of the discretion is concerned, we have dealt with that in Section H. Furthermore, it is simply not relevant to hear detailed evidence in order to engage in fine assessments of the strengths of particular allegations.

The second application by the applicants to adduce fresh evidence

413 The applicants have received further documents of a similar nature to those which it sought to advance on their application to re-open their case. In particular, they wish to tender the email dated 18 August 2006 which is referred to in the letter dated 21 August 2006.

414 The application should be refused. The fresh evidence is not relevant to the exercise of the discretion which we have addressed in Section H. Again, we make the point that it is not relevant to the exercise of the discretion to hear detailed evidence in order to engage in fine assessments of the strengths of particular allegations.

K Orders

415 For the above reasons, we are of the view that the applications for leave to appeal should be granted, the appeals allowed, and the cross-appeals and notice of contentions dismissed. In lieu of the orders of the primary judge, we would order the proceedings brought by the applicants be stayed under s 8(1) of the *CA Act*, save and except for those claims made against those entities that are not parties to the arbitration agreement, being HDIO, RHIO, MDI and MDIO (the twelfth through to fifteenth respondents in the underlying proceedings). However, given that the claims against these parties are fundamentally adjectival to those involving the parties to the arbitration agreements, we would also stay these claims as necessary to do so in the interests of justice.

416 We set out below the orders that we presently consider should be made. If any party considers we have overlooked any matter or wishes to put anything on the form of the orders, then he, she or it has leave within 14 days and after consultation with the other parties to the litigation, to file an index of no more than one page in length of topics said to be appropriate for further submissions. This leave is not an invitation for re-argument, but is a reflection of

the complexity of this appeal should we have overlooked anything. The Court will then list the matter, if appropriate, for argument.

417 The substantive orders that we would make are as follows:

1. Leave to appeal be granted.
2. The appeals be allowed.
3. The cross-appeals be dismissed.
4. The notice of contentions be dismissed.
5. The orders of the Court made on 26 May 2016 be set aside and in lieu thereof order that the proceedings brought in the Court by the applicants being NSD1124/2014 be stayed under s 8(1) of the *Commercial Arbitration Act* pending any arbitral reference between the parties or until further order, save and except for those claims made against those entities that are not parties to the arbitration agreement, being Hope Downs Iron Ore Pty Ltd, Roy Hill Iron Ore Pty Ltd, Mulga Downs Investments Pty Ltd and Mulga Downs Iron Ore Pty Ltd.
6. The claims made by the applicants in the underlying proceedings against Hope Downs Iron Ore Pty Ltd, Roy Hill Iron Ore Pty Ltd, Mulga Downs Investments Pty Ltd and Mulga Downs Iron Ore Pty Ltd be stayed on the same terms as the stay in order 5.
7. Subject to the stays in order 5 and 6 above, the matter be remitted to the primary judge for any application properly available in the light of the stays.
8. The respondents pay the appellants' costs of appeal including the costs of the application for leave to appeal, subject to Hope Downs Iron Ore Pty Ltd, Roy Hill Iron Ore Pty Ltd, Mulga Downs Investments Pty Ltd and Mulga Downs Iron Ore Pty Ltd paying the costs related to the question as to whether those entities are parties to the arbitration agreement pursuant to s 2 of the *CA Act.*
9. Leave be granted *nunc pro tunc* to Wright Prospecting Pty Ltd to intervene on the condition that they bear their own costs of intervention.

I certify that the preceding four hundred and seventeen (417) numbered paragraphs are a true copy of the Reasons for Judgment herein

of the Honourable Chief Justice Allsop and Justices Besanko and O'Callaghan.

Associate:

Dated: 27 October 2017

SCHEDULE A – SCHEDULE OF PARTIES

Party	**NSD1124/2014 (Underlying Proceeding)**	**NSD916/2016 (HPPL's Appeal)**	**NSD922/2016 (Mrs Rinehart's Appeal)**
BIANCA HOPE RINEHART	First Applicant	First Respondent/First Cross-Appellant	First Respondent/First Cross-Appellant
JOHN LANGLEY HANCOCK	Second Applicant	Second Respondent/Second Cross-Appellant	Second Respondent/Second Cross-Appellant
GEORGINA HOPE RINEHART (IN HER PERSONAL CAPACITY AND AS TRUSTEE OF THE HOPE MARGARET HANCOCK TRUST AND AS TRUSTEE OF THE HFMF TRUST	First Respondent	Third Respondent	First Applicant
HANCOCK PROSPECTING PTY LTD ACN (008 676 417)	Second Respondent	First Applicant	Third Respondent
HANCOCK MINERALS PTY LTD (ACN 057 326 824)	Third Respondent	Second Applicant	Fourth Respondent
HANCOCK FAMILY MEMORIAL FOUNDATION LTD (ACN 008 499 312)	Fourth Respondent	Fourth Respondent	Eleventh Respondent
TADEUSZ JOSEF WATROBA	Fifth Respondent	Third Applicant	Fifth Respondent
WESTRAINT RESOURCES PTY LTD (ACN 009 083	Sixth Respondent	Fourth Applicant	Sixth Respondent

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HMHT INVESTMENTS PTY LTD (ACN 070 550 104)	Seventh Respondent	Fifth Applicant	Seventh Respondent
150 INVESTMENTS PTY LTD (ACN 070 550 159)	Eighth Respondent	Fifth Respondent	Second Applicant
HOPE RINEHART WELKER	Ninth Respondent	Sixth Respondent	Twelfth Respondent
GINIA HOPE FRANCES RINEHART	Tenth Respondent	Seventh Respondent	Thirteenth Respondent
MAX CHRISTOPHER DONNELLY (IN HIS CAPACITY AS TRUSTEE OF THE BANKRUPT ESTATE OF THE LATE LANGLEY GEORGE HANCOCK)	Eleventh Respondent	Eighth Respondent	Fourteenth Respondent
HOPE DOWNS IRON ORE PTY LTD (ACN 071 514 308)	Twelfth Respondent	Seventh Applicant	Ninth Respondent
ROY HILL IRON ORE PTY LTD (ACN 123 722 038)	Thirteenth Respondent	Sixth Applicant	Eighth Respondent
MULGA DOWNS INVESTMENTS PTY LTD (ACN 132 484 050)	Fourteenth Respondent	Ninth Respondent	Fifteenth Respondent
MULGA DOWNS IRON ORE PTY LTD (ACN 080 659 150)	Fifteenth Respondent	Eighth Applicant	Tenth Respondent

SCHEDULE B – SCHEDULE OF QUESTIONS PROVIDED TO PRIMARY JUDGE

(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 [Mrs Rinehart] 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 [Mrs Rinehart] 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 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 [Mrs Rinehart] 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 [Mrs Rinehart] 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 [Mrs Rinehart] 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 deed 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 purpose of s 8(1), on any one or more of the following grounds:

(a) undue influence;

(b) duress

(c) unconscionability;

(d) fraudulent concealment;

(e) misrepresentation;

(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 [Mrs Rinehart] 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?