

FEDERAL COURT OF AUSTRALIA

Hancock Prospecting Pty Ltd v Rinehart (No 2) [2017] FCAFC 208

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: 15 December 2017

Catchwords: **ARBITRATION** – stay of proceeding brought in Court in favour of arbitration – making of orders

COSTS – appropriate order for costs – whether costs of stay application below and on appeal should follow the event – whether costs below and on appeal should be payable forthwith

Legislation: *Commercial Arbitration Act 2010* (NSW), s 8

Cases cited: *AED Oil Ltd v Puffin FPSO Ltd (No 2)* [2010] VSCA 109
Ancor Packaging (Australia) Pty Ltd v Boulderstone Pty Ltd [2013] FCA 253
Ansett Australia Ltd v Malaysian Airline System Berhad (No 2) [2008] VSC 156
Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2016] WASC 52 (S)
Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192; 157 FCR 45
Hancock Prospecting Pty Ltd v Rinehart [2017] FCAFC 170
John Holland Pty Limited v Kellogg Brown & Root Pty Ltd (No 2) [2015] NSWSC 564
Novawest Contracting Pty Ltd v Brimbank City Council [2015] VSC 679
Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd [2014] WASC 10 (S)
Re Ikon Group Ltd (No 2) [2015] NSWSC 981

Date of hearing: Determined on the papers

Date of last submissions: 29 November 2017

Registry: New South Wales

Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Category:	Catchwords
Number of paragraphs:	8
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Counsel for Wright Prospecting Pty Ltd (intervening) in each matter:	Mr AJ Myers AC QC, Mr J Rowland QC and Mr T Mehigan
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Solicitor for the DFD Rhodes Pty Ltd parties (intervening) in each matter:	G E Taylor & Associates

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: **15 DECEMBER 2017**

THE COURT ORDERS THAT:

1. Leave to appeal be granted.
2. The appeals be allowed.
3. The cross-appeals be dismissed.
4. The notices of contention be dismissed.
5. The orders of the Court made on 26 May 2016 be set aside and in lieu thereof order:
 - (a) that the proceeding brought in the Court by the applicants being NSD 1124 of 2014 be stayed under s 8(1) of the *Commercial Arbitration Act 2010* (NSW) (**CA 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 relevant arbitration agreements, 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; and
 - (b) the first and second applicants to the main proceedings (being the first and second respondents to the appeals) pay the costs of the moving parties to the interlocutory application filed on 3 November 2014 in proceedings NSD 1124 of 2014 in connection with paragraph 9 thereof and the costs of the moving parties to the interlocutory application filed on 24 December 2014 in those proceedings, 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.

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 orders 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 first and second 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.

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

REASONS FOR JUDGMENT

THE COURT:

1 On 27 October 2017 (*Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170) the Court published reasons including proposed draft orders dealing with the appeal arising from orders made by the primary judge on the application by (to use the relevant definitions in the earlier judgment) the HPPL Parties, Mrs Rinehart and 150 Investments to stay proceedings brought by Mr John Hancock and Ms Bianca Rinehart against the HPPL Parties, Mrs Rinehart, and 150 Investments and other parties.

2 We do not rehearse the detailed background that is in the earlier judgment.

3 Two issues arise: first, whether costs should be awarded against the first and second respondents (Bianca and John) in the application below, as well as on appeal, or whether the costs below be reserved to a time in the future; and secondly, whether costs (on appeal and below) should be payable forthwith.

4 Short submissions have been filed on these two questions. Our views are that the first and second respondents should pay the costs of both the appeal and the application below, but that no order for payment forthwith should be made.

5 Briefly our reasons are as follows. As to the first issue, the costs of the application and the appeals from it are related to the issues whether there should be a stay of the Court proceedings to refer the dispute to arbitration, and, as part of that question, whether there was any properly formulated attack on the arbitration agreements, and if so, what that attack was. These are issues different from whether or not the underlying claims are valid or not. The primary judge correctly approached the matter on the basis that the underlying claims were not to be decided. That is how the matter was approached on appeal. The respondents to the appeal contested and lost the stay and arbitration issues. Costs of that should follow the event. There is ample authority for treating the stay as separate in this way: *Ansett Australia Ltd v Malaysian Airline System Berhad (No 2)* [2008] VSC 156 at [20]; *Ancor Packaging (Australia) Pty Ltd v Baulderstone Pty Ltd* [2013] FCA 253 at [49]; *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 (S) at [33]; *Re Ikon Group Ltd (No 2)* [2015] NSWSC 981 at [25]; *Novawest Contracting Pty Ltd v Brimbank City Council* [2015] VSC 679 at [34]; *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52 (S) at [27]; *John Holland Pty Limited v Kellogg Brown & Root Pty*

Ltd (No 2) [2015] NSWSC 564 at [46]-[47]; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; 157 FCR 45 at 110-111 [253] and 111 [255]; and *AED Oil Ltd v Puffin FPSO Ltd (No 2)* [2010] VSCA 109 at [3] and [12].

6 As to the second issue, there is no reason why in justice these costs should be paid forthwith. The costs will be large. That is a result of how **both** sides have treated the applications. With some exception in oral address, no stone has been left unturned, no opportunity for opposition passed up, and no proposition in writing expressed otherwise than to the fullest. Should the costs be payable forthwith that would raise the real risk of stultification of the substantive complaints of the first and second respondents to the appeal. That would be a matter of some real injustice. If the first and second respondents' complaints are legitimate (whether to be vindicated in an arbitration or court proceeding) they would amount to very serious wrongs.

7 There were two interlocutory applications before the primary judge that sought to stay the proceeding brought in the Court by Ms Rinehart and Mr Hancock. The first was filed on 3 November 2014 by the HPPL parties. Paragraph 9 of that application sought an order that the proceeding be stayed. The remainder of that application sought suppression orders in respect of documents filed in the proceedings. The second application was filed on 24 December 2014 by Mrs Rinehart and 150 Investments. It sought orders staying the proceeding brought in Court by Ms Rinehart and Mr Hancock and, in its own terms, referring the proceeding or aspects of the proceeding to arbitration. In making orders as to costs below, it is important to recognise that there were two interlocutory applications. The costs of both of these applications were reserved in the orders made by the primary judge on 26 May 2016.

8 Thus, the orders 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 notices of contention be dismissed.
5. The orders of the Court made on 26 May 2016 be set aside and in lieu thereof order:
 - (a) that the proceeding brought in the Court by the applicants being NSD 1124 of 2014 be stayed under s 8(1) of the *Commercial Arbitration Act 2010* (NSW) (**CA 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 relevant arbitration agreements, 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; and

- (b) the first and second applicants to the main proceedings (being the first and second respondents to the appeals) pay the costs of the moving parties to the interlocutory application filed on 3 November 2014 in proceedings NSD 1124 of 2014 in connection with paragraph 9 thereof and the costs of the moving parties to the interlocutory application filed on 24 December 2014 in those proceedings, 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.
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 orders 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 first and second 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 eight (8) 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: 15 December 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
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150 INVESTMENTS PTY LTD (ACN 070 550 159)	Eighth Respondent	Fifth Respondent	Second Applicant
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HOPE RINEHART WELKER	Ninth Respondent	Sixth Respondent	Twelfth Respondent
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GINIA HOPE FRANCES RINEHART	Tenth Respondent	Seventh Respondent	Thirteenth Respondent
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MAX CHRISTOPHER DONNELLY (IN HIS CAPACITY AS TRUSTEE OF THE BANKRUPT ESTATE OF THE LATE LANGLEY GEORGE HANCOCK)	Eleventh Respondent	Eighth Respondent	Fourteenth Respondent
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HOPE DOWNS IRON ORE PTY LTD (ACN 071 514 308)	Twelfth Respondent	Seventh Applicant	Ninth Respondent
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ROY HILL IRON ORE PTY LTD (ACN 123 722 038)	Thirteenth Respondent	Sixth Applicant	Eighth Respondent
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MULGA DOWNS INVESTMENTS PTY LTD (ACN 132 484 050)	Fourteenth Respondent	Ninth Respondent	Fifteenth Respondent
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MULGA DOWNS IRON ORE PTY LTD (ACN 080 659 150)	Fifteenth Respondent	Eighth Applicant	Tenth Respondent
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