IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **No P.45 of 2011**
BETWEEN:

FORTESCUE METALS GROUP LTD
Appellant

and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
First Respondent

JOHN ANDREW HENRY FORREST
Second Respondent

APPELLANT'S SUBMISSIONS IN REPLY TO FIRST RESPONDENT'S WRITTEN SUBMISSIONS ("1RS")

1. This submission is in a form suitable for publication on the internet.

2. **Re 1RS[7], [58.3]:** The framework agreements were entered into after the decision to move the focal point of mining operations to Christmas Creek had been made. The earlier position is irrelevant.

3. **Re 1RS[8], [58.2]:** There *was* evidence of a meeting with CHEC in April 2004: TB 121. The events from 3-6 August are the subject of findings at J[145]-[147]. 1RS[8] trivialises what took place. It is apparent from e.g. TB282 that many matters relating to the Project were discussed at the meeting. **Re 1RS[9] and [15]:** ASIC does not attack the inferences drawn by Gilmour J. at J[155] and [177]-[181]. These conclusions were plainly open, and reflect the better view of the evidence (and ASIC's position at trial: J[153]). There was no requirement for the 23 August letter to be approved by CREC. The matters in the letter were in any event also in the media release. The last sentences of 1RS[9] and [15] are irrelevant; it is not contended that the announcements of 23 August and 5 and 8 November were unauthorised.

4. **Re 1RS[11]:** See the submission at AS Annexure B, Schedule 2. **Re 1RS[12]:** The question of a Chinese equity interest *was* raised before 9 November 2004. The question of a Chinese *majority* interest was not raised until after the announcements in November 2004. **Re 1RS[13] and [19]:** See the submission at AS[73]-[78]. **Re 1RS[14]:** TB582 suggests that CMCC delegates were to visit FMG in October 2004 to do "due diligence" on CMCC's intended involvement in the Project.

5. **Re 1RS[17]-[18]:** The 8 November letter does not suggest that the matter in the last two sentences of AS[18] is "a clause in the framework agreement".

6. **Re 1RS[31]-[43]:** No doubt the conduct impugned must be identified before it can be determined whether s.1041H was contravened (cf 1RS[31]-[32]). ASIC contended in its final Statement of Claim ("ASC") that FMG engaged in misleading conduct by misstating the "legal effect, if any", of the 3 agreements (see eg ASC 20, 27 and 28). That is why AS[26]-[80] seeks to demonstrate that the 3 agreements did have the effect of obliging the

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Chinese contractors to build etc.[1]

7. 1RS[33]-[34] in suggesting that a representation concerning the terms or effect of an agreement should not ordinarily be treated as based on an opinion about the legal effect of the agreement, oversimplifies the position. If a person represents that an agreement with a particular effect has been made, the person would ordinarily be expressing a view as to the represented legal conclusion. An unqualified representation about the terms or effect of an agreement does not always convey that the represented terms or effect will be found, if necessary by a Court, to be precisely as represented. The Full Court's approach, also manifest in 1RS[33]-[42], errs in drawing a stark distinction between representations of fact and opinion about agreements as if such representations fall neatly into either category.

8. A statement about the terms or effect of an agreement can be made in assertive or categorical terms without necessarily conveying that the maker guarantees that the agreement will be held to have the represented terms or effect if the issue were tested in Court. In that sense, the person represents no more than an opinion. In another sense, the person represents an apparent fact but without conveying any message that the fact is undeniably true.[2] It cannot be said that the issue is determined by first characterising the representation as one of fact or opinion and then applying a particular test which depends on that simple characterisation.

9. After all, a person engages in misleading or deceptive conduct or conduct likely to do so if the person leads the recipient into error: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198. Ordinarily, a recipient of announcements about agreements that a publicly listed company has made would not be led into the erroneous conclusion that the company was guaranteeing or warranting its view about the legal effect of the agreements. The issue under s.1041H is not simply whether the 3 agreements would have been held by a Court to be binding agreements to build etc the infrastructure but rather whether FMG honestly and reasonably believed that this was the position.

10. The circumstances mentioned in 1RS[36] do not point to the inevitable conclusion that an investor would have concluded that FMG's announcements were representations that the 3 agreements were guaranteed to be binding. Instead the announcements would have led the investor to conclude that FMG believed (on reasonable grounds) the Chinese contractors had agreed to build etc the infrastructure on the basis that FMG only had to provide initial funding for 10% of value, that FMG had overcome its funding difficulties, and that the Chinese contractors were going to perform. In the light of the evidence considered by the judge and, in particular, the Chinese contractors' attitude to the project, FMG did not lead any investor into error.[3]

11. Contrary to 1RS[37], the "unqualified" nature of the announcements would not have lead a reasonable investor to conclude that a categorical or warranted fact was stated. The Full Court's error of principle was in taking too narrow a view of the issue, drawing a false dichotomy as to the applicable test depending on whether the representation is one of fact or opinion, and concluding that the risk of error had been taken by FMG: FC[108]-[117].

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[1] If the 3 agreements did contain such obligations, the impugned conduct could not have been misleading (on any view of the announcements and whatever test is applied in considering whether s.1041H was contravened).

[2] Particularly when reasonable but differing views can often exist with respect to the legal effect of an agreement.

[3] Indeed, Keane CJ noted the curiosity that there was no evidence that any investor was misled, prompting him to raise the question of whether the case "was a game worth the candle" (FC[201]; see also FC[217]).

12. **Re 1RS[48]-[49], [55]-[56]:** ASIC's contentions decline to recognize that Recitals A and B are definitional, and identify the "Works" referred to in cll.1.1, 1.2, 2.1, 2.2, 3.4 and 4 of the CREC agreement. They are to be used in interpreting the agreement; they cannot just be dismissed. They also record that the parties have agreed for the performance of the matters as there referred to. The terms of the agreement are to be considered in that light.[4]

13. **Re 1RS[50]-[51], [54]:** ASIC's reliance on an assertion that cl.1.1 is the "principal operative provision" and that the remaining provisions did not affect that principal obligation does not give sufficient weight to the fact that, as cl.7 said, there was to be a "fuller and more detailed" agreement, but one "not different in intent". Clauses 1.1 and 1.2 were the mechanism to bring that fuller agreement into effect. See AS[50]-[63]. There is no express provision that all other provisions are subject to cl.1.1. If there was no more than an agreement to negotiate, there would have been little point in cl.7.

14. **Re 1RS[57]-[59]:** The assertions in these paragraphs should be rejected. **Re 1RS [58.1]:** There are findings, at J[134] and [136], as to what took place on the January 2004 visit to China. TB82 bears them out.

15. **Re 1RS[62]:** The submissions in the second to fourth sentences of RS[62] do not sit well with, e.g., the pricing information given by Mr Spragg of Barclay Mowlem in his email of 24 February 2004 to Mr Heyting (TB92). That information, including the appropriate margin, was developed from a number of recent and relevant tenders and actual projects.

16. **Re 1RS[61], [64], [65]:** There was no uncertainty as to price. CREC agreed to build the railway required for the project. Price was to be agreed, failing which, it would be determined by a third party under cl.1.2 or set reasonably, as AS([56]-[60]) demonstrate. *Hall v Busst* (1960) 104 CLR 206 does not stand in FMG's way. If it be necessary, however, FMG maintains its attack on *Hall v Busst*.

17. **Re 1RS[63]:** It is incorrect that cl.3 was of no assistance unless price was agreed. Price, if not agreed, was to be set under the mechanism agreed in cl.1.2, or was to be a reasonable price. **Re 1RS[67], [75]:** "major, complex and unique piece of infrastructure". This expression, and its repetition do not assist ASIC. Lengthy the railway may be, it does not seem particularly complex and documents such as TB92 belie its uniqueness.[5]

18. The suggestion in 1RS[67] that the 3 agreements were uncommercial is quite unsupported by evidence and does not assist the proper construction of the agreements. The elements are not unfair to either party. They accord with business commonsense: they contain binding obligations to build etc the infrastructure, where the core obligations were agreed (namely, the Works and the terms for payment) and where there was an express intention that a fuller agreement would be made where the detail could be spelt out, but where any deadlock could be resolved by third party determination or by applying principles of reasonableness.

19. **Re 1RS [73]-[80]:** The argument that FMG was aware of the *terms* of the framework agreements and that the announcements represented a different position (1RS[73], [75]) makes an assumption that FMG should have been aware of what is now ASIC's

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[4] Isaacs J's dissenting opinion in *B Bebarfald & Co Ltd v Macintosh* (1912) 12 CLR 139 at 161-3 does not support ASIC. The majority in that case held that the lessee there had the benefit of the proviso in s.11 of the *Sydney Corporation (Amendment) Act* 1908 precisely because Griffith CJ and O'Connor J used the recitals to construe the lease: at 149.8, 155.5.

[5] As appears at AS[36], fn12 agreements for large projects may be in a short form and, in particular may make provision for further agreements.

contention as to the effect of the agreements. The judge found otherwise and found that FMG reasonably believed the agreements were binding to require the Chinese contractors to build the infrastructure: J[54], [353]-[465].

20. ASIC's pleaded case was that FMG did not have a genuine and/or reasonable basis for making the announcements.[6] FMG denied this and thus an issue arose on which ASIC bore the onus, namely to show that FMG did not honestly and reasonably believe the agreements were binding to construct the infrastructure. The issue was clearly raised on the pleadings: 1RS[74] is incorrect.

21. **Re 1RS[76]:** Neither the Listing Rules nor s.674(2) imposed an obligation on FMG to obtain legal advice. Rather they imposed an obligation to disclose price sensitive information of which FMG was "aware": *Jubilee Mines Ltd v Riley* (2009) 40 WAR 299 at 322 [89]-[90].

22. The suggestion that the evidence on which FMG relies does not show the reasonableness of FMG's belief should be rejected. The judge reviewed a significant volume of material and drew clear conclusions. No document indicates that FMG believed that the 3 agreements were not binding first agreements to construct the infrastructure. If, as ASIC pleaded, FMG did not genuinely and/or reasonably believe the agreements were binding, one would have expected FMG's internal records to disclose that.[7] The judge drew his conclusion as to the genuineness of FMG's belief from all of the evidence.

23. **Re 1RS[83]:** These submissions do not give sufficient weight to the fact that ASIC bore the burden of showing an absence of honest and reasonable belief.

24. It is clear that the email of 20 October 2004 [TB705] related to *performance* of the CREC agreement, not whether it had been made. See the findings at J[161]-[163], [174]. 1RS[83.1] is incorrect.

25. 1RS[83.2] does not engage with the findings at J[149], [395], [397], [413]. A similar position exists in relation to the November agreements: see J[176]-[180], [404]-[405]. The evidence underlying these findings belies the contention that the contents of the media releases were not of importance to the Chinese companies.

26. **Re 1RS [83.5]:** The terms of the CREC – Barclay Mowlem MoU (TB454) speak for themselves. What they say supports the submission at AS[100], rather than that at 1RS[83.5].

27. **Re 1RS [83.8]:** The relevance of Heyting and Kirchlechner's evidence was that they, as relevant employees or officers of FMG, also held and reflected the general view of the company that the 3 agreements were effective to bind the Chinese contractors to build, to perform their contractual obligations. ASIC called these witnesses to disprove this and failed. It now seeks to downplay their importance.

28. **Re 1RS[84]-[88]:** FMG relies on its submissions in AS[117]-[129].

29. **Re Notice of cross-appeal 1RS[89]-[94]:** Section 674(2) is contravened if a listed disclosing entity *fails* to disclose to ASX material price sensitive information that is not

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[6] ASC 28(d), 33(d), 39(d), 45(b), 48(b), 53(b), 58(c), 79(d), 79(e), 85(d), 85(f), 90(h), 90(i), 95(d), 95(e), 106(e), 106(f), 112(d), 112(e), 115(d), 115(e), 118(d), 118(e), 122(d), 122(e).

[7] ASIC had used its statutory powers to obtain documents and examine officers of FMG. As to fn 9 to RS[78], it should be noted that ASIC had seen the material over which legal professional privilege was claimed well before the action was commenced.

generally available. It is necessary to consider what information was *omitted* from disclosure and then determine whether that information was material.

30. If ASIC is correct that the 3 agreements were only agreements to negotiate, a factual issue arises whether information as to entry into mere agreements to negotiate was, in terms of s.677, information that would have, or be likely[8] to have, influenced persons who commonly invest in securities in deciding whether to acquire or dispose of FMG's shares.

31. Gilmour J. applied the commonsense test (J[482]-[483]). He concluded that, if the 3 agreements were unenforceable or merely agreements to negotiate then - given the highly contingent nature of the project - information that FMG had entered into such agreements would not have influenced or likely influenced common investors in deciding to acquire FMG securities: J[484]-[486]. He considered ASIC's expert evidence on the topic and rejected it: J[504], [521], [528]-[529].

32. The Full Court appreciated the difference between the case that FMG had to disclose ASIC's characterisation of the 3 agreements and the *alternative* case that FMG had to correct the position after its initial incorrect disclosures: FC[182]-[183]. The Full Court's view was that there was only one contravention of s.674(2) as regards each of the 3 agreements (namely, the failure to correct the position after the initial announcements), albeit one which continued until March 2005: FC[183], [187].[9]

33. ASIC needs special leave to cross-appeal. Given the purely factual but quite complex issues raised by the cross-appeal the trial judge's conclusion on the issue and the Full Court's view, no issue of principle arises on the cross-appeal. Neither ASIC nor FMG contests the application of a commonsense test to the determination of the factual issue, which will depend on the circumstances of the relevant company. ASIC itself recognises that the issue has to be considered "in context": 1RS[91]-[93]. Special leave to cross-appeal should be refused.

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[8] In a provision such as s.677 the word "likely" should be treated as meaning "probable" (or more likely than not) and not merely "possible". That is its natural meaning: *Boughey v R* (1986) 161 CLR 10 at 14, 42-4; see also at 20-22.

[9] The words in parentheses in para 2.2 of the Full Court's order make clear that the order was directed to ASIC's case that corrective disclosure was required; no correction would have been required *before* the initial announcements. Without the words in parentheses, the different case that FMG contravened s.674(2) by failing to announce ASIC's characterisation of the 3 agreements would also have been included. Further, it is unclear whether by the cross-appeal ASIC wishes to contend that FMG contravened s.674(2) six times, as opposed to three times, once with respect to each agreement, as the Full Court found. ASIC pleaded its cases as to the contravention of s.674(2) as *alternative* cases. If they are alternative cases, the object of the cross-appeal is not clear.