HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

Matter No P44/2011

JOHN ANDREW HENRY FORREST — APPELLANT

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION & ANOR — RESPONDENTS

Matter No P45/2011

FORTESCUE METALS GROUP LTD — APPELLANT

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION & ANOR — RESPONDENTS

Forrest v Australian Securities and Investments Commission
Fortescue Metals Group Ltd v Australian Securities and Investments Commission
[2012] HCA 39
2 October 2012
P44/2011 & P45/2011

ORDER

In each matter:

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 18 February 2011 as varied on 20 May 2011 and, in their place, order that the appeal by the Australian Securities and Investments Commission to that Court be dismissed with costs.*

3. Special leave to cross-appeal granted, treated as instituted and heard instanter, and dismissed with costs.

On appeal from the Federal Court of Australia

Representation

A J Myers QC with M Thangaraj SC for the appellant in P44/2011 and the second respondent in P45/2011 (instructed by Gadens Lawyers)

D F Jackson QC with B Dharmananda SC for the appellant in P45/2011 and the second respondent in P44/2011 (instructed by Corrs Chambers Westgarth)

N J Young QC with M K Moshinsky SC, J A Thomson and A D Pound for the first respondent in both matters (instructed by King & Wood Mallesons)

CATCHWORDS

Forrest v Australian Securities and Investments Commission
Fortescue Metals Group Ltd v Australian Securities and Investments Commission

Corporations law – Misleading or deceptive conduct – Fortescue made agreements with Chinese state-owned entities to build, transfer and finance mining infrastructure – Forrest and Fortescue made public statements that binding agreements entered into – Whether statements were of opinion or fact – Whether ordinary or reasonable member of audience would understand statements as making representation about enforceability of agreements in Australian law – Whether statements misleading or deceptive or likely to mislead or deceive.

Corporations law – Continuous disclosure – Fortescue made statements to Australian Securities Exchange about agreements without publishing actual agreements – Whether obliged to disclose actual terms of agreements.

Practice and procedure – Pleadings – Statement of claim pleaded numerous allegations in alternative – Whether drafting of statement of claim in this manner desirable or appropriate.

Words and phrases – "binding contract", "extreme or fanciful", "misleading or deceptive", "opinion", "ordinary or reasonable member of audience".

Corporations Act 2001 (Cth), ss 180(1), 674, 1041H.

1 FRENCH CJ, GUMMOW, HAYNE AND KIEFEL JJ. In 2004, Fortescue Metals Group Ltd ("Fortescue") was a public company whose shares were listed on the Australian Stock Exchange Limited ("the ASX"). Mr John Andrew Henry Forrest was chairman and chief executive of Fortescue and a substantial shareholder in the company.

2 The Australian Securities and Investments Commission ("ASIC") alleged that Fortescue and Mr Forrest contravened the *Corporations Act* 2001 (Cth) when, at various times in 2004 and 2005, Fortescue gave information to the ASX about a proposed mining project in Western Australia called the Pilbara Iron Ore and Infrastructure Project. The project was to consist of a mine in the Pilbara region of Western Australia, a port at Port Hedland and a railway to connect the mine to the port. ASIC alleged that, contrary to s 1041H of the *Corporations Act*, Fortescue engaged in misleading or deceptive conduct in relation to a financial product (shares in Fortescue) by publishing notices in relation to that financial product that were misleading or deceptive or likely to mislead or deceive. ASIC further alleged that Fortescue contravened the continuous disclosure requirements of s 674 of the *Corporations Act* and that, contrary to s 180(1) of the *Corporations Act*, on each occasion Fortescue contravened the *Corporations Act* Mr Forrest had not exercised his powers or discharged his duties as a director of Fortescue with the degree of care and diligence required by s 180(1).

3 The case which ASIC sought to make against both Fortescue and Mr Forrest hinged on announcements Fortescue had made (by letter and media release) concerning agreements it had made with China Railway Engineering Corporation ("CREC"), China Harbour Engineering Company (Group) ("CHEC") and China Metallurgical Construction (Group) Corporation ("CMCC"). Each of those bodies is based in the People's Republic of China, and they were described by Fortescue as "three of the largest state owned companies in China". The CREC agreement was signed on 6 August 2004, the CHEC agreement was signed on 1 October 2004 and the CMCC agreement was signed on 20 October 2004. Each bore the heading "Framework Agreement".

4 During August and November 2004, Fortescue sent letters to the ASX and made media releases about these agreements which said, among other things, that Fortescue had made binding contracts with each of CREC, CHEC and CMCC to build, finance and transfer the railway, port and mine for the project. Each media release and one of the letters referred to the Chinese Government owning the relevant company or companies. In addition, Fortescue and Mr Forrest made various other communications during 2004 and 2005 which referred to the agreements that Fortescue had made with each of CREC, CHEC and CMCC.

5 In March 2005, an article was published in the financial press suggesting that the contracts which Fortescue had made were not binding contracts to build, finance and transfer the railway, port and mine. In response to the ASX's request for comment, Fortescue then provided to the ASX a copy of the framework agreement with CMCC.

6 In March 2006, ASIC commenced proceedings in the Federal Court of Australia making the allegations that have been described. At first instance, Gilmour J dismissed[1] ASIC's claims. ASIC's appeal to the Full Court of the Federal Court (Keane CJ, Emmett and Finkelstein JJ) was allowed[2] and declarations of contravention were made. Questions about penalty for contravention were remitted for consideration by a single judge.

7 By special leave, Fortescue and Mr Forrest now appeal to this Court seeking the reinstatement of the orders made at first instance. The appeals should be allowed and the consequential orders sought by Fortescue and Mr Forrest should be made.

8 These reasons will demonstrate that the impugned statements were not misleading or deceptive or likely to mislead or deceive. Because the impugned statements were not misleading or deceptive or likely to mislead or deceive, ASIC failed to demonstrate that Fortescue contravened the continuous disclosure requirements of s 674 of the *Corporations Act*. There being no breach by Fortescue of either s 1041H or s 674, it was not shown that Mr Forrest failed to exercise his powers or discharge his duties as a director with the degree of care and diligence required by s 180(1) of the *Corporations Act*.

ASIC's pleaded claim of misleading or deceptive conduct

9 As finally formulated, the body of ASIC's statement of claim (excluding schedules) was 108 pages long. For its case that Fortescue had contravened s 1041H by making misleading or deceptive statements ASIC identified 13 different communications:

(a) a letter dated 23 August 2004 from Fortescue to the ASX about the CREC framework agreement together with an associated media release;

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1 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201.

2 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364.

(b) a press conference conducted by Mr Forrest by telephone on 23 August 2004;

(c) Fortescue's Annual Financial Report for the year ended 30 June 2004 sent to the ASX on 27 August 2004;

(d) a television interview Mr Forrest gave on 17 October 2004;

(e) Fortescue's Annual Report for 2004 sent to the ASX on 25 October 2004;

(f) Fortescue's Quarterly Report for the period ending 30 September 2004 sent to the ASX on 29 October 2004;

(g) a letter dated 5 November 2004 from Fortescue to the ASX together with an associated media release;

(h) a letter dated 8 November 2004 from Fortescue to the ASX;

(i) a slide presentation Fortescue made to investors, a copy of which Fortescue sent to the ASX and published on Fortescue's website on 24 November 2004;

(j) Fortescue's Quarterly Report for the period ending 31 December 2004 sent to the ASX on 31 January 2005;

(k) a slide presentation Fortescue made to investors, a copy of which Foretscue sent to the ASX on 10 February 2005 and published on Fortescue's website on 11 February 2005;

(l) a presentation Mr Forrest made on behalf of Fortescue at a conference on 22 February 2005; and

(m) a further presentation Mr Forrest made on behalf of Fortescue at a conference on 28 February 2005, a copy of which Fortescue sent to the ASX on 28 February 2005 and published on Fortescue's website on 1 March 2005.

10 Although there were some variations in the allegations made about those 13 communications, the central case which ASIC sought to make under s 1041H was treated in argument in this Court as sufficiently identified by reference only to Fortescue's letter to the ASX and media release sent and made on 23 August 2004 after the signing of its agreement with CREC.

11 Reference to the statements about the CREC agreement was sufficient because all of the impugned statements were evidently intended to describe what was set out in one or more of the three substantially identical framework agreements. And the allegations made by ASIC about each of the impugned statements substantially followed the pattern set by its allegations about Fortescue's letter of 23 August 2004 (and the associated media release) concerning the CREC agreement.

The CREC framework agreement

12 The Full Court set out[3] the complete text of the CREC framework agreement in its reasons for judgment. For present purposes it is enough to notice the following seven features of the agreement.

(a) Recital A identified "the Works" as being to "carry out and complete the Build and Transfer of the railway ... for the Pilbara Iron Ore and Infrastructure Project";

(b) Recital B recorded that CREC had submitted an offer to execute "the Works" and Fortescue had "accepted the CREC's offer and the parties now wish to evidence their agreement";

(c) Clause 1 was headed "FRAMEWORK" and provided for the parties to "jointly develop and agree" on certain matters including "a General Conditions of Contract suitable for a Build and Transfer type contract", "The Scope of Work to be included in the Contract", "Scheduling of the Works" and "Determination of the Value of Works";

(d) Clause 2 was headed "SCOPE OF WORK" and set out a list of matters included in "the Works" including "Earthworks", "Civil works", "Above track works", "Signals and communications" and "All rolling stock with the exception of locomotives";

(e) Clause 3 provided that some provisions about payment terms were to be included in the General Conditions of Contract. Fortescue was to provide security to CREC of a specified kind "to the value of the Works". Fortescue was to "make a down payment of 10% of the value of the Works in exchange for a bank guarantee of the same value from CREC" and the remaining 90 per cent of the value of the Works was to be paid in four instalments the last of which (being 50 per cent of the value of the

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3 (2011) 190 FCR 364 at 372-374 [17].

Works) was to be due "on the third anniversary of the issue of the Certificate of Practical Completion";

(f) Clause 5 provided that:

> "This agreement will become binding upon the approval of both the Board of Directors of CREC and the Board of Directors of [Fortescue]. Such approval must be given before 31 August 2004";

(g) Clause 7 provided that:

> "This document represents an agreement in itself, and it is recognised a fuller and more detailed agreement not different in intent from this agreement will be developed later."

The CREC announcement

13 On 23 August 2004, Fortescue sent to the ASX a letter headed "China Signs to Build Railway" which said, among other things:

> "Fortescue Metals Group Ltd ('FMG') is pleased to announce that *it has entered into a binding contract with China Railway Engineering Corporation (CREC) to build and finance the railway component of the Pilbara Iron Ore and Infrastructure Project.*
>
> *The 'Build and Transfer' (BT) contract* covers the railway from the Company's iron ore tenements in the Chichester Ranges to the export hub at Port Hedland. The contract covers all earthworks, culverts, bridges, rail, sleeper and rolling stock requirements, with the exception of locomotives which will continue to be sourced internationally and may form an addition to this agreement.
>
> CREC is China's largest construction group, having constructed 40,000 kilometres of rail networks throughout the country. FMG is confident in CREC's ability to build the heavy axle load railway in the Pilbara pursuant to the BT contract. CREC plans to become Asia's top construction company within 3 to 5 years and this contract provides them with a platform for further international growth. CREC has commenced discussions with Australian based engineering and construction groups with a view to forming local joint ventures to meet its obligations pursuant to the contract." (emphasis added)

14 Much of the argument in the appeals focused upon what was conveyed to the intended audience of this announcement by the words "Fortescue ... has

entered into a binding contract with [CREC] to build and finance the railway component of the Pilbara Iron Ore and Infrastructure Project". But in addition to ASIC complaining that the statement was misleading or deceptive when it described the framework agreement as "a binding contract", ASIC alleged, and sought to maintain on appeal to this Court, that it was also misleading or deceptive to say of the agreement that it was "to build and finance" the railway and that it was a "'Build and Transfer' (BT) contract".

15 It is convenient to deal at once with the allegations about describing the agreement as an agreement to "build and finance" the railway, or as a "Build and Transfer" agreement. As already noted, cl 3 of the framework agreement provided that some provisions about payment terms were to be included in the General Conditions of Contract. Those terms would require Fortescue to make a first payment of 10 per cent of the value of the Works (in return for a bank guarantee from CREC) and to pay the balance by instalments over time. The last instalment of 50 per cent was not to be due until the third anniversary of the issue of the Certificate of Practical Completion. Payment arrangements of that kind were aptly described in the announcement as CREC agreeing to "build and finance" the railway.

16 As for the announcement's description of the agreement as a "'Build and Transfer' (BT) contract", that was the description the parties gave to their arrangements both in the recitals to the framework agreement and in cl 1 of that document. And the expression was an accurate general description of the agreement they had then made. As ASIC observed, the framework agreement provided that the parties would "jointly develop and agree on ... a General Conditions of Contract suitable for a Build and Transfer type contract". But contrary to ASIC's submission it does not follow from the fact that there were to be these further steps that the agreement the parties had made and recorded in the framework agreement was not accurately described as a "'Build and Transfer' (BT) contract".

17 ASIC's allegations about "build and finance" and "Build and Transfer" should be rejected. Attention, therefore, can be confined to ASIC's principal complaint about the announcement's description of the framework agreement as a "binding contract". But before turning to consider that issue, it is desirable to describe more fully the several ways in which ASIC put its case.

ASIC's claims

18 At trial, ASIC alleged that Fortescue, its board of directors and Mr Forrest in particular had been dishonest in making the impugned statements. In his

reasons for judgment, the trial judge recorded[4] ASIC's allegations as having been:

> "that [Fortescue] did not have a genuine and/or reasonable basis for making [the] disclosures concerning the framework agreements [and] ... that [Fortescue] engaged in a course of knowing and deliberate conduct to make the disclosures, by the notifications to the ASX and other statements, which were false, unqualified and emphatic as to the significance and effect of the framework agreements".

19 This understanding of ASIC's case depended on, and reflected, the way in which the case had been conducted at trial. But it was an understanding of the case which, although open on ASIC's statement of claim, was not the only way in which the case that was pleaded could have been understood.

20 Although there were variations in the way in which ASIC pleaded its case in respect of each of the 13 communications which it alleged were misleading or deceptive, there were important common elements. Having identified the relevant communication, ASIC pleaded in respect of each communication that (in the circumstances in which those communications were made "and against the background" of certain matters ASIC identified as information previously made available to the market or more generally) Fortescue "represented to, further or alternatively, created the impression for, reasonable investors in the ASX's financial market and persons obtaining access to [Fortescue's] website" that:

(a) Fortescue "had entered a binding contract" with CREC, CHEC or CMCC "obliging" that company to build and finance the relevant elements of infrastructure, and

(b) that Fortescue "had a genuine and reasonable basis for making" the relevant statement.

21 The pleading then alleged that the impugned statements were "in the manner specified below, false, and were misleading or deceptive, or were likely to mislead or deceive". Several sub-paragraphs specified how the relevant impugned statement was said to be false and misleading or deceptive. So in the case of statements about the framework agreements, it was alleged that the relevant framework agreement "did not *state* that [CREC, CHEC or CMCC] *would*, nor did it have the *legal effect of obliging*" CREC, CHEC or CMCC to do certain things (emphasis added). But there was then added a further and radically

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4 (2009) 264 ALR 201 at 209 [12].

different sub-paragraph which alleged that Fortescue "did not have a genuine and/or reasonable basis for making" the impugned statement "in that [Fortescue] was aware of the terms" of the relevant framework agreement and "the list of matters contained therein requiring further agreement between the parties", and "knew, or ought reasonably to have known", that the parties to the agreement "had not agreed on all of the terms necessary for it to be practicable to force" the opposite party to design, build, transfer and finance the relevant infrastructure.

22 On their face, these allegations mixed two radically different and distinct ideas: that Fortescue *knew* that the statements were false (it had no *genuine* basis for making them) and that Fortescue *should have known* that the statements were false (it had no *reasonable* basis for making them). At common law the first idea is expressed in the tort of deceit and the second in liability for negligent misrepresentation. And since at least 1889 and the well-known decision of the House of Lords in *Derry v Peek*[5], it has been firmly established that a false statement, made through carelessness and without reasonable grounds for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. As four members of this Court said in *Krakowski v Eurolynx Properties Ltd*[6]: "In order to succeed in fraud, a representee must prove, inter alia, that the representor had *no honest belief in the truth of the representation* in the sense in which the representor intended it to be understood." (emphasis added)

23 The confusion in ASIC's statement of claim, of allegations of fraudulent misrepresentations with allegations of negligent misrepresentations, finds its origins in ASIC's combination of two allegations: first, that the relevant statements conveyed to their intended audience that Fortescue had made binding contracts; and second, that those statements also conveyed to the audience that Fortescue "had a genuine and reasonable basis for making" the relevant statement. The second allegation added nothing to the case of misleading or deceptive conduct which ASIC set out to make. As explained in this Court, ASIC's case was that the impugned statements conveyed facts which ASIC said were not true. If that was ASIC's case, the reference to Fortescue's state of knowledge was unnecessary and inappropriate. The allegation served only to distract attention from two questions critical to ASIC's misleading or deceptive conduct case: first, what ASIC alleged that the impugned statements conveyed to

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5 (1889) 14 App Cas 337.

6 (1995) 183 CLR 563 at 578 per Brennan, Deane, Gaudron and McHugh JJ; [1995] HCA 68.

their intended audience; and second, whether what was conveyed was misleading or deceptive or likely to mislead or deceive.

24 ASIC sought to explain and justify the inclusion in its statement of claim of a plea that Fortescue had no genuine or reasonable basis for making the statements as a plea that anticipated Fortescue alleging that the impugned statements were expressions of opinion not fact. But it was neither necessary nor appropriate for ASIC to attempt to use its statement of claim to meet an answer that had not been made.

25 This is no pleader's quibble. It is a point that reflects fundamental requirements for the fair trial of allegations of contravention of law. It is for the party making those allegations (in this case ASIC) to identify the case which it seeks to make and to do that clearly and distinctly. The statement of claim in these matters did not do that.

26 Contrary to ASIC's submissions in this Court, a case of fraud cannot properly be seen as a "fallback" claim to be made against the possibility that the party accused of engaging in misleading or deceptive conduct by publishing notices in relation to a financial product may seek to characterise them as statements of opinion, not fact. It is fundamental, and long established, that if a case of fraud is to be mounted, it should be pleaded specifically and with particularity[7]. A pleading of fraud will necessarily focus attention upon what it was that the person making the statement intended to convey by its making. And the pleading must make plain that it is alleged that the person who made the statement knew it to be false or was careless as to its truth or falsity. If an alternative case of misleading or deceptive conduct is to be advanced, it is necessary to identify that claim as separate from the allegation of fraud. And for the purposes of the misleading or deceptive claim the pleader must identify what it is alleged that the impugned statements conveyed to their intended audience. Of course there may be circumstances in which it is appropriate to plead alternative cases of misleading or deceptive conduct or alternative cases of fraud and misleading or deceptive conduct. But it is greatly to be doubted that it will ever be appropriate to pile, one on top of the other, as many alternative allegations as were made in this case. Doing so risks contravention of what, in *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in Liquidation)*[8], Isaacs

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7 *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697, 701, 704, 709; *Banque Commerciale SA, en Liquidation v Akhill Holdings Ltd* (1990) 169 CLR 279 at 285; [1990] HCA 11.

8 (1916) 22 CLR 490 at 517; [1916] HCA 81.

and Rich JJ said was "the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him" which requires that "pleadings should state with sufficient clearness the case of the party whose averments they are".

27 The task of the pleader is to allege the facts said to constitute a cause of action or causes of action supporting claims for relief. Sometimes that task may require facts or characterisations of facts to be pleaded in the alternative. It does not extend to planting a forest of forensic contingencies and waiting until final address or perhaps even an appeal hearing to map a path through it. In this case, there were hundreds, if not thousands, of alternative and cumulative combinations of allegations. As Keane CJ observed in his judgment in the Full Court[9]:

> "The presentation of a range of alternative arguments is not apt to aid comprehension or coherence of analysis and exposition; indeed, this approach may distract attention from the central issues".

28 As already noted, ASIC's allegations were taken, at trial, to be allegations of fraud. Yet on appeal to the Full Court of the Federal Court, and again on the appeals to this Court, ASIC advanced its case on the wholly different footing that the impugned statements should be found to be misleading or deceptive. That is, whereas the case that was presented at trial focused upon the honesty of Fortescue, its board and Mr Forrest, the case which ASIC mounted on appeal focused on what it was that the impugned statements would have conveyed to their intended audience.

29 It will be recalled that one of the alternative cases that ASIC pleaded was that the impugned statements were misleading or deceptive because the relevant framework agreements did not say what the impugned statements said was contained in them. A central difficulty with this aspect of ASIC's case can be illustrated by reference to the CREC framework agreement. ASIC pleaded that Fortescue had made the framework agreement with CREC and that by that agreement "the parties agreed ... in relation to the Project" various matters. These included not only that the CREC framework agreement would become "binding" upon the approval of both the board of directors of CREC and the board of directors of Fortescue but also that the CREC framework agreement "represented an agreement in itself and it was recognised that a fuller and more detailed agreement not different in intent would be developed later". And

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9 (2011) 190 FCR 364 at 371 [16].

although the pleader chose not to refer expressly to the recitals to the CREC framework agreement which recorded (among other things) that CREC had submitted an offer to execute "the Works" ("the Build and Transfer of the railway"), Fortescue had accepted CREC's offer, and "the parties now wish to evidence their agreement", the pleader did set out in the statement of claim the substance of the several provisions of the framework agreement which said that CREC would:

(a) build and finance the railway component of the project;

(b) construct the railway on a Build and Transfer basis; and

(c) complete the works stated in the framework agreement and set out in the statement of claim.

30 To the extent to which ASIC's statement of claim alleged that the CREC framework agreement did not *state* certain matters, it was a pleading inconsistent with not only the facts but also ASIC's allegations of what the CREC framework agreement provided. The allegation that the CREC framework agreement did not state the matters alleged should not have been made. There was no foundation for the allegation. Its inclusion was embarrassing to the fair trial of the proceedings.

31 These reasons now turn to the determinative issue in the appeal: what did the impugned statements convey to their intended audience when they said that the parties to each framework agreement had made a "binding contract"?

A "binding contract"

32 Three possibilities must be considered: first, that the statements conveyed a message about what the agreements said; second, that they conveyed some message about "legal enforceability"; and third, that they conveyed a message which was a mixture of elements drawn from the first two possible constructions of what was said. It is the first possibility that is decisive of these appeals: the statements conveyed to their intended audience what the parties to the framework agreements had done and said they had done.

33 As has already been noted, ASIC's argument in this Court hinged on the proposition that the impugned statements conveyed to their intended audience a view about the legal enforceability of the framework agreements. ASIC sought to describe what was conveyed as a matter of fact, submitting that "the words 'agreement' or 'binding agreement' convey that it is an agreement containing all of the essential elements that would constitute a contract under Australian law". While it is to be doubted that the proposition which ASIC identified is

accurately, or at least sufficiently, described as a statement of "fact", it is ultimately unprofitable to attempt to classify the statement according to some taxonomy, no matter whether that taxonomy adopts as its relevant classes fact and opinion, fact and law, or some mixture of these classes. It is necessary instead to examine more closely and identify more precisely what it is that the impugned statements conveyed to their audience.

34 It is convenient to begin that examination by noticing how the Full Court dealt with the issue. The Full Court concluded[10], first, that the impugned statements "would have been understood as conveying the historical fact that agreements containing terms accurately summarised in the announcements had been made between the parties". Second, regardless of the subjective intentions of the parties, the question of whether the parties had made contracts of the kinds described was to be determined by taking an objective view of the agreements[11]. Third, objectively assessed, the agreements would be held by an Australian court to be incomplete, because they did not provide for the subject matter, scheduling and price of the work to be done or any mechanism for determining those matters[12]. And fourth, because the Full Court concluded that the agreements were incomplete in these respects, it was misleading or deceptive, or likely to mislead or deceive, to describe them each as a "binding contract"[13].

35 The critical step taken by the Full Court was from the first to the second. The Full Court did *not* conclude that the impugned statements had not accurately summarised what the framework agreements said. Rather, the Full Court moved from the identification of what the impugned statements conveyed about what had been said and done by the parties (properly described as matters of "historical fact") to an examination of the *legal* consequences that were to be attached to what those parties had said and done. The Full Court took this step on the basis that the examination of that question was necessary in order to decide whether what was said and done amounted to the making of "contracts". That is, the Full Court treated the references in the impugned statements to the parties having made a "binding contract" as conveying more than the message that the parties had made an agreement which *they* described as a "binding contract". Importantly, the Full Court treated the references to "binding contract"

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10 (2011) 190 FCR 364 at 407 [117]; see also at 430 [214]-[215], 431 [218].

11 (2011) 190 FCR 364 at 408-409 [126], 430 [215], 431 [218].

12 (2011) 190 FCR 364 at 421-422 [176], 430 [215], 432-433 [226]-[229].

13 (2011) 190 FCR 364 at 422 [177], 430 [215], 431 [218].

as conveying *more* than the message that the parties had made an agreement which the commercial community (or some relevant section or sections of it, such as "investors") would describe in the terms Fortescue had used in its statements. And critically, the Full Court assumed that the impugned statements conveyed the message to the intended audience that the parties had made what an *Australian* court would decide to be a "binding contract". That is, the Full Court found, in effect, that it would be (and in this case was) misleading or deceptive or likely to mislead or deceive to say that the parties to the framework agreements had made "binding contracts" unless the parties had made bargains that could be and would be enforced by action in an Australian court.

36 There are at least two difficulties in the Full Court's analysis. Both stem, ultimately, from the need to identify the intended audience for the impugned statements and the message or messages conveyed to that audience. The intended audience can be sufficiently identified as investors (both present and possible future investors) and, perhaps, as some wider section of the commercial or business community. It is not necessary to identify the audience more precisely. When that audience was told that Fortescue had made binding contracts with identified Chinese state-owned entities, what would they have understood?

37 Would they, as the Full Court assumed, ask a lawyer's question and look not only to what the parties had said and done but also to what could or would happen in a court if the parties to the agreement fell out at some future time? Or would they take what was said as a statement of what the parties to the agreements understood that they had done and *intended* would happen in the future? The latter understanding is to be preferred.

38 The Full Court's conclusion hinged on the use of the word "contract" or "agreement" in each of the impugned statements. The Full Court assumed that, by using one or other of those terms, the impugned statements conveyed to their intended audience a message about the *legal* quality (as determined by reference to *Australian* law) of the contract or agreement referred to in the relevant communication. And the relevant *legal* quality was identified as future enforceability in the event of a dispute between the parties. That is, the Full Court assumed that the words "contract" and "agreement" necessarily conveyed a message about legal enforceability in an Australian court. But that is too broad a proposition. First, it is necessary to examine the whole of the impugned statements to see the context in which reference was made to the making of a contract or agreement. Second, it is necessary to undertake that task without assuming that what is said must be put either into a box marked "fact" (identified according to whether an Australian court would enforce the agreement) or into a

box marked "opinion" (identified according to whether the speaker *thought* that an Australian court could or would enforce the agreement).

39 There was no evidence led at trial to show that investors or other members of the business or commercial community (whether in Australia or elsewhere) would have understood the references in the impugned statements to a "binding contract" as conveying not only that the parties had agreed upon what they *said* was a bargain intended to be binding, but also that a court (whether in Australia or elsewhere) would grant relief of some kind or another to one of the parties if, in the future, the opposite party would not carry out its part of the bargain.

40 The very words of the impugned statements made two points abundantly clear. First, there can be no doubt that the impugned statements conveyed to their intended audience that the parties had made agreements. Second, there can be no doubt that the impugned statements conveyed what the parties to the framework agreements had said in those agreements. And the provisions of the framework agreements showed (and ASIC expressly accepted[14] at trial) that the parties intended their agreements to be legally binding.

41 In argument in this Court, ASIC disclaimed any special reliance upon the use of the word "binding" as a description of the agreements that had been made. Consistent with the reasoning of the Full Court, the weight of ASIC's argument in this Court was placed on the proposition that "the words 'agreement' *or* 'binding agreement' convey that it is an agreement containing all of the essential elements that would constitute a contract under Australian law" (emphasis added). That is, ASIC submitted that, despite the parties' *stated* intention to make a legally binding contract, it was misleading or deceptive or likely to mislead or deceive to announce to investors, or some wider business or commercial audience, that the parties had made a contract (or binding contract) unless the agreement they had made would withstand legal challenge in an Australian court.

42 The validity of that proposition must be determined assuming that the parties stated intention of making a legally binding agreement was genuinely shared by them. ASIC did not establish its allegation that Fortescue did not believe that the framework agreements were binding. That allegation was

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14 (2009) 264 ALR 201 at 277 [343].

rejected[15] at trial and the trial judge's findings on that issue were not set aside on appeal to the Full Court.

43 Once it is accepted, as it must be, that the parties genuinely intended to make a legally binding agreement, the breadth of ASIC's submission (and the Full Court's conclusion) becomes apparent. For the submission was that, although the impugned statements accurately recorded that the parties to each framework agreement had made an agreement which said that the bargain was, and was intended by the parties to be, legally binding, the impugned statements were misleading or deceptive or likely to mislead or deceive because they also conveyed to their intended audience a larger message. This was that the agreements the parties had made were not open to legal challenge in an Australian court. That broader proposition should not be accepted. The impugned statements conveyed to their intended audience what the parties to the framework agreements had done and said they had done. No further message was shown to have been conveyed[16] to an "ordinary or reasonable" member of that audience.

44 There is a second and no less fundamental difficulty in adopting the Full Court's analysis. The Full Court's conclusion[17] that the agreements were incomplete and for that reason unenforceable, and ASIC's argument in this Court in support of that conclusion, assumed that the legal character or effect of the framework agreements was to be determined by Australian domestic law. That assumption was not justified.

45 The intended audience for the impugned statements would have recognised from the very content of the statements that the agreements to which they referred had important international features. Although it may readily be assumed that many, perhaps most, in that audience had some immediate association with Australia or the Australian share market, it by no means follows that such an audience would have understood the impugned statements as inviting any attention to what the courts of Australia could or would do if a party to one of the agreements did not perform its part of the bargain.

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15 (2009) 264 ALR 201 at 214 [49].

16 *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 86-87 [105]; [2000] HCA 12.

17 (2011) 190 FCR 364 at 411 [135], 419 [161], 421-422 [176], 430 [212], 432-433 [226]-[229].

46 The framework agreements related to infrastructure that would be constructed in Australia for use by one or more Australian companies. But as the impugned statements made plain, the work referred to in the framework agreements was to be done by companies that were state-owned entities of a foreign government — the People's Republic of China, and indeed, the agreements were executed at signing ceremonies held in Beijing. No consideration was given, at any point of the Full Court's analysis, to the significance, if any, of the fact that the counter-party to Fortescue in each agreement was a foreign state-owned entity. More significantly, the agreements contained neither a choice of law nor a choice of forum clause. The only provision in the agreements relating to the question of applicable law provided that the relevant agreement "will conform with all relevant Australian and Chinese laws and regulations" and that "[a]ny difference that may exist will be negotiated in good faith and will not impact the effectiveness of the other clauses". Yet no consideration was given, at any point of the Full Court's analysis, to what law governed the agreements.

47 Both the place of the signing ceremonies and the status of Fortescue's counter-parties as state-owned entities point to the real and lively possibility that the formal and essential validity of the agreements might be governed by the law of the People's Republic of China, not Australia. It would have been neither extreme nor fanciful for those who read or heard the impugned statements either to consider the possibility or even to assume that the law of the People's Republic of China governed the agreements. And regardless of whether questions about the validity of the framework agreements were governed by the law of Australia, there was an immediate question of the manner and extent of enforceability presented by the fact that Fortescue's counter-parties were state-owned enterprises. In Australia that question would be governed by the *Foreign States Immunities Act* 1985 (Cth), but no attempt was made by any party to explore whether there may have been some relevant and applicable Chinese law.

48 It is, however, necessary to bear firmly in mind that the impugned statements were made to the business and commercial community. What would *that* audience make of the statement that Fortescue had made a binding contract with an entity owned and controlled by the People's Republic of China?

49 It is surely relevant to ask whether the public expression of acceptance by such a state-owned entity of what were described as "binding" obligations may not have been a much more powerful spur to performance of its obligations than any possible legal action instituted by Fortescue. Again, for that audience to

form such an understanding would be far from "extreme or fanciful"[18]. But these issues were not explored, because the Full Court and ASIC incorrectly assumed, rather than demonstrated, that an inquiry into the "effect" of the agreements required an inquiry into their legal effect under Australian law.

50 Instead, the central tenet of ASIC's case was that the impugned statements conveyed a message to their intended audience (a) that, in the words of ASIC's statement of claim, it was "practicable to force" the counter-parties to perform their part of the bargain and (b) that whether it was "practicable to force" performance was to be determined according to the same principles as would be applied to an agreement for the sale of a suburban block of land or the construction of a house in suburban Australia. ASIC established neither of those propositions. The impugned statements conveyed to their intended audience what the parties to the framework agreements said they had done — make agreements that they said were binding — and no more. ASIC did not demonstrate that members of the intended audience for the impugned statements would have taken what was said as directed in any way to what the parties to the agreements could do if the parties were later to disagree about performance. ASIC did not demonstrate that the impugned statements conveyed to that audience that such a disagreement could and would be determined by Australian law. And given that the impugned statements did accurately convey what the parties to the framework agreements had said in those agreements, it *would* be extreme or fanciful for the audience to understand the impugned statements as directing their attention to any question of enforcement by an Australian court if the parties later disagreed. Such an extreme or fanciful understanding should not be attributed[19] to the ordinary or reasonable member of the audience receiving the impugned statements.

51 It is, then, not to the point to observe, as the Full Court did[20] and as ASIC sought to emphasise in this Court, that the framework agreements did not fix either the work to be done or a price for the work to be done with any greater particularity than the list of items recorded in the framework agreements.

52 Nor is it necessary to decide whether, as Fortescue and Mr Forrest submitted, the framework agreements did provide for mechanisms by which those matters could be determined. It is enough to say that, contrary to the

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18 *Campomar* (2000) 202 CLR 45 at 86-87 [105].

19 *Campomar* (2000) 202 CLR 45 at 86-87 [105].

20 (2011) 190 FCR 364 at 411 [135], 430 [212], 432-433 [226]-[229].

arguments of Fortescue and Mr Forrest, the better view would appear to be that cl 1.2 of the framework agreements did not provide such a mechanism. That clause, on its more natural construction, provided only that Fortescue would have the opportunity (with the co-operation of its counter-party) to conduct its own "[i]ndependent review of the schedule and value of the Works" which, as cl 1.1 expressly provided, the parties were to "jointly develop and agree".

53 One further aspect of the reasoning of the Full Court requires separate consideration. It will be recalled[21] that each framework agreement provided that the parties "recognised a fuller and more detailed agreement not different in intent from this agreement will be developed later". As the Full Court recorded[22], Fortescue prepared and sent to CREC a draft "Advanced Framework Agreement" and CREC responded with its amended draft of that document. The trial judge considered[23] CREC's proposed amendments to be "powerful evidence" that CREC regarded the initial framework agreement as a legally binding agreement. By contrast, the Full Court regarded[24] the exchange of competing drafts as showing "that the parties were not *ad idem* as to the manner in which the works were to be valued". Further, the Full Court concluded[25] that the proposals made by CREC showed that CREC "firmly believed securing finance was an issue" for Fortescue.

54 Both the Full Court[26] and ASIC in argument in this Court, emphasised an email which Mr Forrest had sent to the person who was to conduct the relevant negotiations with CREC and to Fortescue's in-house counsel. In this email Mr Forrest set out what he wanted those negotiations to achieve, and described the points as "all hard asks".

55 Contrary to the conclusion reached[27] by the Full Court and urged by ASIC in this Court, that this email demonstrated that the framework agreement with

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21 See above at [12].

22 (2011) 190 FCR 364 at 412 [137].

23 (2009) 264 ALR 201 at 298 [459].

24 (2011) 190 FCR 364 at 415 [147].

25 (2011) 190 FCR 364 at 415 [147].

26 (2011) 190 FCR 364 at 411-412 [136].

27 (2011) 190 FCR 364 at 411 [135]-[136].

CREC was not a binding contract, this email showed only that Mr Forrest sought to use the negotiations to improve Fortescue's position. Neither the fact that Fortescue sought to negotiate with CREC to achieve new or different terms, nor the fact that the parties differed about what their further agreement should say, sheds any light upon any question about what the framework agreements were or what they provided.

56 When commercial enterprises make an agreement which records that it is intended to be a binding contract, those parties can be assumed, unless fraud is proved, to expect and to intend that the agreement will be performed. But it by no means follows that the parties will thereafter refrain from any attempt to strike a better bargain. And the fact that one or both of the parties tries to strike a better bargain does not, without more, show that the parties are not bound to the bargain that has been made. Nor does it show that the parties did not intend to be bound to that bargain.

57 When Fortescue set about the negotiation of the further agreement which each framework agreement said would be made, it is plain that it sought to strike a better bargain with CREC than the bargain recorded in the framework agreement. No doubt there were risks in pursuing that kind of course. But Fortescue's attempts to better its commercial position do not suggest, let alone demonstrate, that Fortescue did not consider the framework agreements to be binding.

58 The letter which Fortescue sent to the ASX about having made the framework agreement with CREC was not misleading or deceptive and was not likely to mislead or deceive. That letter accurately recorded what the framework agreement provided. The letter did not convey to its intended audience any message about whether an Australian court would conclude that the agreement could be enforced. It conveyed to its intended audience that the framework agreement between Fortescue and CREC was what those parties had described (and a commercial audience would describe) as a "binding contract".

59 Having regard to the way in which ASIC presented its argument in this Court, it is not necessary to consider separately the other impugned statements to which ASIC referred in its statement of claim. It is also unnecessary to give separate consideration to the "likely to mislead or deceive" limb of s 1041H. In the Full Court, Emmett J expressly based his reasons on this ground. His Honour concluded[28] that the statements "were, at least, likely to mislead or deceive an

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28 (2011) 190 FCR 364 at 430 [215].

ordinary and reasonable member of the investing public who read the [impugned statements]". But the inquiry into how an ordinary or reasonable member of the intended audience would receive a message is of its nature hypothetical. That inquiry is therefore apt to answer both whether conduct *is* misleading or deceptive and whether it is *likely* to mislead or deceive. Separate consideration of this limb of s 1041H is therefore not necessary once it is decided that an ordinary or reasonable member of the audience would not have understood the impugned statements to have conveyed anything other than what the parties did and intended, and that the statement made about those matters was neither misleading nor deceptive.

60 ASIC did not establish that Fortescue engaged in misleading or deceptive conduct contrary to s 1041H of the *Corporations Act*.

Contravention of s 674?

61 The conclusion that Fortescue's statements were not misleading or deceptive, or likely to mislead or deceive, is enough to dispose of ASIC's primary case of contravention of the continuous disclosure requirements of s 674. ASIC's primary allegations of contravention of s 674 proceeded from the premise that the impugned statements made by Fortescue had misrepresented the effect of the framework agreements. As Keane CJ put[29] the point:

> "Once it is accepted that [Fortescue's] announcements contravened s 1041H of the Act, [Fortescue], having made misleading statements to the ASX, was obliged by s 674(2) to *correct* the position." (emphasis added)

62 The premise for ASIC's argument about the application of the continuous disclosure requirements, and for the Full Court's conclusions about those issues, was not established. Once it is decided that Fortescue's statements that it had made binding contracts were not misleading or deceptive or likely to mislead or deceive, it is not to be supposed that, despite Fortescue lawfully making those statements, the continuous disclosure requirements nonetheless required Fortescue to tell the market that the agreements were *not* binding contracts.

63 Consistent with its general approach to this litigation, ASIC sought to advance an alternative case of contravention of s 674 by giving notice of a proposed cross-appeal in this Court. ASIC claimed that the Full Court's conclusion that Fortescue contravened s 674 was to be supported even if,

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29 (2010) 190 FCR 364 at 425 [189].

contrary to its primary submissions, the impugned statements were not misleading or deceptive.

64 The premise for this alternative argument about the application of s 674 was that, if the impugned statements were expressions of Fortescue's opinion about the effect of the framework agreements, Fortescue was bound to disclose the terms of the agreements themselves, not just issue statements about what it thought to be the effect of the agreements.

65 For the reasons already given, the premise for ASIC's alternative argument about the application of s 674 was not established. The impugned statements did not express any relevant opinion. The impugned statements accurately conveyed to their intended audience what the agreements provided. That is reason enough to reject ASIC's alternative argument. Fortescue's statements having described accurately what the framework agreements provided, it is not to be supposed that s 674 nonetheless required Fortescue to publish the very text of those agreements. ASIC should have special leave to cross-appeal but its cross-appeal should be dismissed.

66 There being no failure to disclose, it is neither necessary nor appropriate to consider the arguments advanced by the parties with respect to the application of s 674(2A) concerning the liability of directors and officers where there has been a breach of the continuous disclosure requirements, or the arguments advanced with respect to the reach and application of the excusing provisions of s 674(2B).

Contravention of s 180(1)?

67 ASIC's allegations that Mr Forrest breached the duties imposed by s 180(1) of the *Corporations Act* on directors and officers depended upon it demonstrating that Fortescue had contravened s 1041H or s 674. Having failed to do that, ASIC's claim of contravention of s 180(1) also fails.

Conclusion and orders

68 In the Full Court, Keane CJ observed[30] that "the approach adopted by the trial judge artificially limits the protection afforded to the investing public by the Act by giving effect to a distinction [between statements of 'opinion' and 'fact'] which is not drawn by the legislation and not warranted by the facts of the case". These reasons have not endorsed the approach adopted by the trial judge, but, lest

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30 (2011) 190 FCR 364 at 406 [116].

it be suggested that the conclusions reached in this case "artificially limit the protection afforded to the investing public", it is important to make the following points.

69 First, these reasons do not establish any general proposition to the effect that any public statement that Company A has made a contract with Company B necessarily conveys to its audience a message only about what the contractual document contains. That proposition is too broad. What message is conveyed to the ordinary or reasonable member of the intended audience cannot be determined without a close and careful analysis of the facts. In this, as in so many other areas[31], the facts of and evidence in the particular case are all important.

70 Second, any concern about "artificially limiting" the protections conferred by prohibitions upon misleading or deceptive conduct would be driven largely, perhaps even entirely, by a concern with cases of fraud or dishonest attempts to characterise wrongly the effect of what has been said. But if a party says something knowing that what is conveyed by the statement is false, or reckless as to its truth or falsity, that party is guilty of deceit. And for the purposes of a claim of misleading or deceptive conduct, if a person seeks to characterise a public statement as a representation about the content of a document, the critical question will be what the statement conveyed to its intended audience, not what the party concerned says that it was intended to convey. Concerns about dishonesty provide no reason to distort settled understandings about misleading or deceptive conduct.

71 Each appeal should be allowed with costs. In each appeal, ASIC should have special leave to cross-appeal but that cross-appeal should be dismissed with costs. In each appeal, the orders of the Full Court of the Federal Court of Australia should be set aside and in their place there should be orders that ASIC's appeal to that Court is dismissed with costs.

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31 See, for example, *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522; 286 ALR 501; [2012] HCA 17.

72 HEYDON J. At its heart this case is much simpler than it appears to be at first sight. The central question is whether Fortescue[32] contravened s 1041H of the *Corporations Act* by engaging in conduct that was misleading or deceptive or likely to mislead or deceive.

Factual background

73 In 2004, Fortescue had rights to mine iron ore in the Pilbara region of Western Australia. It developed a plan to mine iron ore at its tenements, build a railway to transport the ore to Port Hedland, and build a port facility there. It furthered that plan by entering three agreements, each with a State enterprise owned directly or indirectly by the People's Republic of China.

74 The agreements which Fortescue made with CREC, CHEC and CMCC in late 2004 filled no more than 12 pages. At times ASIC treated them as only scraps of paper.

75 What did the law require Fortescue to tell the market, through the ASX and the media, about its agreements? It could have permitted Fortescue to say nothing. It could have compelled Fortescue to release the agreements. Or it could have compelled Fortescue to release a summary of the agreements.

76 The first possibility was not available. Low though ASIC's esteem was for the agreements, if Fortescue had said nothing about them it would probably have been in breach of the ASX listing rules.

77 To some extent, in its case on s 1041H, ASIC toyed with the idea that it is not possible to say anything about a contract without setting it out in full. It put that case explicitly in respect of s 674 of the *Corporations Act*, which obliges listed companies to disclose information in accordance with the ASX listing rules. However, the submission in respect of s 1041H must be rejected, even though the Full Court gave it some passing approval[33]. If the law compelled Fortescue to have released the totality of the agreements, it would have compelled other companies making much more bulky agreements to do the same. That would not have assisted the cause of ensuring a speedily informed market. It would often be extremely inconvenient. It could require members of the target audience to procure expert assistance to analyse what particular agreements said.

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32 It is convenient to adopt the majority judgment's statement of the background to the appeals and to use the abbreviations of statutory and corporate names which it employs.

33 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at 406 [116].

78 That left Fortescue with the third course. It took that course. In relation to the CREC agreement, for example, it released to the ASX a short summary, and to the media a longer summary.

ASIC's s 1041H case on the CREC agreement and the ASX announcement

79 ASIC's pleaded case, and the way it was presented forensically, was lengthy and complex. But it boiled down to two allegations in respect of each agreement. These allegations can be illustrated by ASIC's case on the CREC agreement, which related to railway infrastructure. One allegation was that Fortescue had falsely represented that it had entered a binding contract of a specified kind with CREC. The other, alternative, allegation was that even if Fortescue had merely stated an opinion to that effect, it had no "genuine and/or reasonable basis" for stating that opinion because it "knew, or ought reasonably to have known, that the parties to the CREC [agreement] had not agreed on all the terms necessary for it to be practicable to force CREC to design, build, transfer and finance the railway".

80 It is convenient to analyse how these allegations were presented in relation to a 23 August 2004 release to the ASX by Fortescue. That release began as follows:

> "Fortescue … is pleased to announce that it has entered into a binding contract with … [CREC] … to build and finance the railway component of the Pilbara Iron Ore and Infrastructure Project.
>
> The 'Build and Transfer' (BT) contract covers the railway from [Fortescue's] iron ore tenements in the Chichester Ranges to the export hub at Port Hedland. The contract covers all earthworks, culverts, bridges, rail, sleeper and rolling stock requirements, with the exception of locomotives which will continue to be sourced internationally and may form an addition to this agreement."

81 Paragraph 19 of the statement of claim pleaded some of the terms of the agreement. Paragraph 20 pleaded the "legal effect, if any" of those terms. Sub-paragraph (a) alleged that the agreement "did not by its terms oblige CREC to build or transfer a railway facility". Sub-paragraph (b) alleged that the agreement "did not by its terms oblige CREC to finance the construction of a railway facility". Paragraph 24 pleaded that Fortescue's 23 August 2004 announcement to the ASX, which both the ASX and Fortescue published generally, "in effect informed the ASX" that:

> "(a) [Fortescue] had entered into a binding contract with CREC to build and finance the railway component of the Project;

(b) this contract, which was described as a 'Build and Transfer' contract, covered the railway from [Fortescue's] iron ore tenements in the Chichester Ranges to the export hub at Port Hedland;

(c) this contract covered all earthworks, culverts, bridges, rail, sleeper and rolling stock requirements, with the exception of locomotives which would continue to be sourced internationally and may form an addition to the contract."

Paragraph 27 pleaded that Fortescue thereby "represented" or "created the impression" that:

"(a) [Fortescue] had entered a binding contract with CREC obliging CREC to build and finance the railway component of the Project;

(b) [Fortescue] had a genuine and reasonable basis for making the statements in paragraph 24 above."

Paragraph 28 pleaded that the statements listed in par 24 and the representations and impressions listed in par 27 were "false", "misleading or deceptive", or "likely to mislead or deceive" in four respects. The first three were that the agreement "did not state that CREC would, nor did it have the legal effect of obliging CREC" to do the three things alleged in par 24(a)-(c). The fourth was that contrary to par 27(b), Fortescue did not have "a genuine and/or reasonable basis for making the statements pleaded in paragraph 24 … in that [Fortescue] was aware of the terms of the [agreement] and, in particular, the list of matters contained therein requiring further agreement between the parties and knew, or ought reasonably to have known, that the parties to the [agreement] had not agreed on all of the terms necessary for it to be *practicable to force* CREC to design, build, transfer and finance the railway". (emphasis added)

82 Two matters should be noted briefly at this point, and returned to later. The first concerns the two pleas in par 27. They were not separated by the word "or". Counsel for Mr Forrest relied on this to submit that the whole of ASIC's case had to fail unless it proved the fraud allegation inherent in par 27(b). This submission was forensically resourceful in seeking to manoeuvre ASIC onto distasteful and dangerous ground from which it would be difficult for ASIC to succeed. However, the two pleas must be read as leading to alternative allegations. The first alternative treats the par 24 statements as statements of fact. The second alternative treats them as statements of opinion. That must be so, because if they were untrue statements of fact the circumstance that Fortescue had a genuine and reasonable basis for making them would be no answer to a contention that they fell within s 1041H of the *Corporations Act*. But if they were incorrect statements of opinion, that circumstance would be an answer to that contention according to a commonly accepted understanding. That construction of par 27 is supported by par 28(d), which uses the words "genuine

and/or reasonable basis". The significance of this first matter is that ASIC's approach, though criticised in the Full Court of the Federal Court of Australia, was not only common but endeavoured to set up the case which Fortescue had to meet[34]. The second matter is the expression "practicable to force" in par 28(d) of the statement of claim. That casts light on what ASIC alleged the representations made and impressions created were and the respects in which they were "false"[35].

83 The Full Court upheld the allegations in pars 27(a) and 28(a)-(c), and the equivalent allegations for the other two agreements. It held that the agreements could not accurately be described as being agreements to build, finance and transfer the infrastructure for the project[36]. The Full Court therefore made declarations that Fortescue had engaged in conduct that was misleading or deceptive or likely to mislead or deceive investors in that company by misrepresenting the material terms and effect of each of the agreements.

ASIC's allegations answered: summary

84 There are three points which together operate as complete answers to ASIC's allegations regarding the CREC agreement.

85 First, leaving aside issues relating to what was "contractually binding", the agreement was an agreement calculated to ensure that CREC built and financed a railway by compelling the parties to enter further negotiations about the further detailed agreements necessary to make certain that the railway was built within the framework – what cl 7 called the "intent" – of the agreement. Secondly, even if the agreement was not a "binding contract" to build the railway, it was a "binding contract" to engage in the necessary further negotiations and enter the necessary further agreements. Thirdly, so far as Fortescue had represented that there was a "binding contract" to build the railway, the statement was one of opinion, and only fell within s 1041H if ASIC established that Fortescue did not hold that opinion, or, if it did, that it had no reasonable basis for stating it. ASIC did not establish either proposition.

Independently of whether the agreement was contractually binding, what was agreed?

86 Whether or not Fortescue had entered a contract, the agreement described itself as an agreement "to build and finance the railway component of the

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34 See further at [94].

35 See below at [104]-[108].

36 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at 422 [177].

Project" as alleged in par 24(a) of ASIC's statement of claim. The railway proposed in the agreement was to extend over the distance alleged in par 24(b). And the agreement covered the matters alleged in par 24(c).

87 So far as the par 20(a) question of whether the agreement was an agreement to "build" the railway is concerned, Recital A of the agreement provided:

> "*CREC* has represented that it has the necessary skills, personnel and equipment to successfully carry out and complete the Build and Transfer of the railway (the 'Works') for the Pilbara Iron Ore and Infrastructure Project (the 'Project') and [Fortescue] is relying on the *CREC's* representation." (the emphasis in this and other quotations from the agreement is in the original)

Recital B provided:

> "*CREC*, having closely examined all proposed documents, has submitted an offer to execute the *Works* and [Fortescue] has accepted the *CREC's* offer and the parties now wish to evidence their agreement."

The reference to "Works" in Recitals A and B was amplified in cl 2.1:

> "The *Works* include the following:
>
> - Earthworks for the formation including level crossings.
> - Civil works associated with the construction of culverts and bridges.
> - Above track works including ballast, sleepers, ties and rail.
> - Signals and communications.
> - All rolling stock with the exception of locomotives."

Clause 4 provided:

> "*CREC* has agreed to assist [Fortescue] to accelerate the procurement of materials, equipment and their technical understanding of the relevant Australian Standards and work practices inherent in this Project such that the target delivery date for first shipment of ore is last quarter 2006 … To expedite the *Works CREC* have agreed to supply sufficient engineering support from the signing of this *Agreement* such that it will allow *CREC* to competently expedite its role in the provision of the *Works*."

This promise by CREC to supply sufficient engineering support to allow it competently to expedite its role in the provision of the works was a promise to complete the works. Clause 5 provided that the agreement would "become binding" when approved by the parties' boards. Clause 7 reinforced that by providing that the "document represents an agreement in itself, and it is recognised a fuller and more detailed agreement not different in intent from this *agreement* will be developed later." Hence there was an agreement to "build and transfer" the railway.

88 So far as the par 20(b) question of whether the agreement was an agreement to "finance" the railway is concerned, cl 1.1 provided, inter alia, that the parties would "jointly develop and agree on … a General Conditions of Contract suitable for a Build and Transfer type contract in good faith". And cl 3.1 dealt with payment, inter alia, as follows:

> "The Parties agree that the following will be included in the General Conditions of Contract:
>
> - [Fortescue] will provide security to *CREC* in the form of a JORC classified resource to the value of the *Works*.
>
> - [Fortescue] will make a down payment of 10% of the value of the *Works* in exchange for a bank guarantee of the same value from *CREC*. The bank guarantee to be returned when the parties agree 10% of the *Works* have been completed.
>
> - Remaining payment terms are:
>
> - 10% upon issue of Certificate of Practical Completion.
>
> - 15% on the first anniversary of the issue of the Certificate of Practical Completion.
>
> - 15% on the second anniversary of the issue of the Certificate of Practical Completion.
>
> - 50% on the third anniversary of the issue of the Certificate of Practical Completion."

Hence while Fortescue had to pay 10 per cent at the outset, the works were to be carried out on credit terms under which the works did not have to be paid for in full for three years after the works were completed. As Mr D F Jackson QC, counsel for Fortescue, submitted, if "[t]hat is not financing … that is a rather unusual view of financing."

89 The above reasoning renders false the allegations in par 28(a)-(c) that the agreement "did not state that CREC would … build and finance the railway", or

"construct it on a 'Build and Transfer' basis", or "complete any works". It also renders false the allegations in par 20(a) and (b) that the agreement "did not by its terms oblige CREC" either to "build or transfer a railway facility" or "to finance the construction of a railway facility". Mr D F Jackson QC submitted that leaving aside the question of contractual effect, "with respect, the contention that that is not the effect of the agreement is absolute nonsense." This submission was entirely correct in content, style and tone.

90 In short, by a process of unattributed quotation, paraphrase and summary, the ASX release had correctly represented the effect of the agreement, leaving aside the question of its contractual force. In particular, it correctly represented that there was agreement, and that it was in the view of the parties binding from the time of board approval. It did not follow from the fact that some matters were left to be the subject of "a fuller and more detailed agreement", particularly matters concerning general conditions of contract, that other matters were not the subject of a binding agreement.

91 ASIC was contending in this part of the case that Fortescue was incorrect in saying that there was an agreement to build to completion and finance the railway. If that contention were correct, Fortescue's ASX announcement should have said: "Fortescue has not entered any agreement with CREC to build to completion and finance a railway." To say that would have been not only untrue, but absurd.

Was the agreement a binding contract?

92 ASIC's case thus boils down to the question whether Fortescue was right to call the agreement a binding contract. It was certainly a binding contract to negotiate further contracts within the intent of the agreement which would result in the railway being built.

93 Was the agreement a binding contract to build the railway? Fortescue advanced numerous arguments for the view that it was because the parties had agreed, or provided for agreement on, all essential terms. There is force in many of those arguments, but difficulty in some. It is not necessary to decide the question posed. This is because the impugned statement about the contract being binding was a statement of opinion rather than fact, and ASIC must fail because it did not establish that Fortescue did not genuinely and reasonably hold that opinion.

Opinion

94 At least in the context of this case, whether an agreement is a binding contract involves a question of law – that is, a question of opinion. That is the

alternative way in which ASIC's case was put – the way it was put in pars 27(b) and 28(d). It was the way the trial judge approached the case[37]. The ASX announcement was not expressly stated in the language of opinion, but what it said about the CREC agreement being a "binding contract" was identifiable as an opinion. The binding quality of an alleged contract is an inherently controversial matter of professional judgment. It is distinct from the historical facts that negotiation occurred and a written agreement was signed. In its early days, the Full Court of the Federal Court, in a judgment to which Bowen CJ was party, said[38]:

> "An expression of opinion which is identifiable as such conveys no more than that the opinion expressed is held and *perhaps* that there is basis for the opinion. At least if those conditions are met, an expression of opinion, however erroneous, misrepresents nothing." (emphasis added)

The Full Court in this case appeared to disagree with this approach when it said that the distinction between "fact" and "opinion" was not drawn by the legislation[39]. It is a cliché in the United States to speak of the characteristic vagueness of antitrust enactments, and of their similarity to constitutions in this regard. In Australia, that vagueness extends not only to our antitrust enactments but also to s 52 of the *Trade Practices Act* 1974 (Cth), which was the model for s 1041H and many other enactments. There are many doctrines applying to the more general enactments of this kind which, though not expressly stated in the legislation, are nevertheless necessary implications in it. ASIC acted on that view in pars 27(b) and 28 of the statement of claim. Whether or not the statement of claim was the place to raise the issue, it was not incorrect to raise it. It is a more controversial question whether a statement of opinion is misleading unless there is some basis for it: the passage quoted above flagged a query or a doubt with the word "perhaps"[40].

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37 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201 at 341 [684].

38 *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 88 per Bowen CJ, Lockhart and Fitzgerald JJ. This has been followed by Toohey J sitting in the Federal Court: *James v Australian and New Zealand Banking Group Ltd* (1986) 64 ALR 347 at 372.

39 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at 406 [116].

40 See below at [102]-[103].

Did Fortescue believe the agreement was a binding contract to build a railway?

95 The allegation that Fortescue had no "genuine and/or reasonable basis" for saying that there was a binding contract is not entirely clear, but the word "or" suggests that the allegation is divisible into two parts. The first is that Fortescue knew the agreement was not a binding contract. The second is that while Fortescue believed it was a binding contract, it ought reasonably to have known that the parties had not agreed on all the necessary terms and that hence the agreement was not a binding contract.

96 The first part of the allegation is an allegation of fraud. It must be approached with the caution appropriate to examining an allegation of fraud. It must fail for the following reasons.

97 First, the trial judge said that ASIC "conceded that, as a matter of objective inference, the agreements were intended to be legally binding"[41]. ASIC's supplementary notice of appeal to the Full Court contained 60 paragraphs and was 19 pages long, but no ground of appeal challenged that finding. In a practical sense, it is difficult to contend that where a party to an agreement intended it to be legally binding, it knew it was not legally binding.

98 Secondly, to allege that a party knew an agreement described as binding was not a binding contract when it claimed in public that it was a binding contract, is to allege dishonesty on the part of that party and anyone responsible for what that party said. The trial judge found that there was "no basis for ASIC to assert dishonesty on the part of [Fortescue], its board and in particular, [Mr] Forrest."[42] The Full Court did not expressly overturn that finding. It did, however, point to some efforts of Mr Forrest, both in an internal email of 27 October 2004 and in dealings between Fortescue and CREC, to achieve particular results through an "Advanced Framework Agreement". It also pointed to CREC's response. The Full Court suggested that these facts revealed "subjective beliefs" of Fortescue and Mr Forrest which were inconsistent with a belief in the contractual character of the agreement[43]. This conduct involved nothing more than attempts to arrive at the "fuller and more detailed" agreement contemplated by cl 7 – attempts in which each side sought to advance its own interests. They do not establish dishonesty on the part of Fortescue or

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41 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201 at 277 [343].

42 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201 at 214 [49].

43 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at 411 [136].

Mr Forrest. The Full Court also stated that the trial judge had not referred to a statement by Mr Forrest on 23 August 2004 at a press conference that "the price of the railway line … is confidential, but … competitive". It did not say why this showed dishonesty. The background is that a journalist asked Mr Forrest: "What happens if the project is budgeted to spend cost 500 million and it costs 700 million or something?" Mr Forrest replied: "That's all, well if it costs 300 million … we agree the price and the performance specifications in advance and naturally you would appreciate that further questions along this line aren't going to be answered, they'll be commercial-in-confidence". A little later, in response to another question, Mr Forrest said: "[T]he price of the railway line and rolling stock is confidential but we are pleased to say it is competitive." Read in context, the latter statement was a representation of Mr Forrest's opinion or prediction that the mechanisms in the agreement would ensure that the price, when determined, would be competitive.

99 Thirdly, the view that Fortescue believed that the CREC agreement was contractually binding is supported by near contemporary minutes of a Fortescue board meeting on 28 August 2004. Those minutes referred to the view that it was a "binding agreement signed with CREC whereby CREC will deliver a fully commissioned iron ore railway on a fixed price, fully warranted basis". Counsel for Mr Forrest took the Full Court to that passage. The Full Court did not refer to it. The view that Fortescue believed that the agreement was binding is also supported by other contemporary internal communications (for example, emails of 20 August 2004, 3 October 2004, 5 October 2004 and 4 November 2004), communications with CREC (for example, a letter of 31 August 2004), communications with other commercial third parties (for example, a letter to GE Commercial Finance dated 2 September 2004 and an email to Wolfgang Pesec dated 2 November 2004), and communications with the Western Australian Minister for State Development (for example, a letter of 13 September 2004). Fortescue's belief was also shared by potential co-contractors of CREC (for example, Barclay Mowlem Construction Ltd's press release of 16 September 2004).

100 Fourthly, ASIC called Mr Heyting, a former Fortescue employee who had become hostile to the company, as a witness. Mr Heyting had prepared the CREC agreement. He described how he was instructed to draft a contract and described various drafting techniques he had employed to achieve enforceability. One of them was the use in Recital B of the words "offer" and "acceptance". For ASIC this was an unhappy episode. ASIC opened the case at trial by saying: "Mr Heyting will say that there was no offer as such". However, Mr Heyting's written statement of evidence in chief more narrowly said only that "*to my knowledge* no *written or formal* offer was made by CREC or accepted by [Fortescue]" (emphasis added). And in cross-examination Mr Heyting conceded that there was an oral offer. Mr Heyting also referred to the agreement as a contract in a communication with third parties. Thus though the ASIC opening suggested that Mr Heyting had been called to demonstrate that not even the

author of the agreement believed it to be a binding contract, Mr Heyting in fact gave evidence in cross-examination which was radically opposed to ASIC's case.

101 Fifthly, the view that Fortescue thought the agreements were contractually binding is supported by the fact that CREC, CHEC and CMCC appeared to share the same view. They arranged and participated in the solemnities of three signing ceremonies attended by important Chinese officials. The Chinese companies never protested about, and probably gave advance approval to, Fortescue's assertions that there was a binding contract in the wide press coverage that the agreements received. And the trial judge found that when, on 17 January 2005, the Chairman of CMCC described the CMCC agreement as only a memorandum of understanding, he was doing no more than adopting a negotiating tactic: what he said did not represent the Chinese view of the agreements. Similarly, the assertion by Chinese interests in an *Australian Financial Review* article on 24 March 2005 that the agreements were not binding was a commercial tactic, not a reflection of their actual views. The Chairman of CMCC maintained that the agreements were binding as late as September 2005.

Did Fortescue have a reasonable basis for believing that the agreement was a binding contract to build a railway?

102 It is appropriate now to raise a question which the parties did not raise explicitly. The question is whether Fortescue must fail if it lacked a reasonable basis for its opinion that there was a binding contract to build a railway. It is often said that to state an opinion one does not hold misleads the audience about one's state of mind. That is understandable. It is also often said that to state an opinion which one does hold implies that one has reasonable grounds for holding it. In some circumstances that may be so[44], but why should it be so in all? Assume that two people are asked: "In your opinion, is that document a contract?", one answers "Yes", and the other answers "Yes, and I have reasonable grounds for that view." The two answers are different. The first answer does not imply the second, unless there are special circumstances indicating that it should.

103 As noted above, the case which originated the fact/opinion distinction in this field offered no support for the requirement that there be grounds, let alone reasonable grounds, for an opinion if it were not to be misleading[45]. In passing, Mr D F Jackson QC cast doubt on the existence of the requirement by giving it a less than ringing endorsement. He said that if a statement "conveys a belief, the belief has actually to be held and *there is something to be said for the view* that it

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44 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 321 [33]; [2009] HCA 25.

45 See above at [94].

requires that there be a reasonable basis for … it." The matter calls for examination on some future occasion. Certainly, the creation of a widespread duty to have reasonable grounds if offering an opinion is but one example of the way the model for s 1041H, namely s 52 of the *Trade Practices Act* 1974 (Cth), has been widened since its inception. Liability has widened. Curial jurisdiction has widened. And the power of judges, in every sense of those words, has widened – perhaps with Actonian effects.

104 Because the question just raised was not discussed, little attention was given to whether, and why, Fortescue's statement of opinion implied that it had reasonable grounds for stating it. Even if it is assumed that Fortescue did, the question whether Fortescue had reasonable grounds for saying what it did depends on what it said. What it should be taken to have said depends on what its audience must have understood it to have said. According to ASIC's statement of claim, that audience understood Fortescue to have said that the parties had agreed on all the terms necessary for it to be "practicable to force CREC to design, build, transfer and finance the railway"[46]. Would that audience have done so?

105 Fortescue's remarks were not directed to the public as a whole. They were directed to a section of the public. It comprised superannuation funds, other large institutions, other wealthy investors, stock brokers and other financial advisers, specialised financial journalists, as well as smaller investors reliant on advice. This was not a naive audience. It was not an audience in whom the adjectives "Western Australian", "mining" and "Chinese" would excite a sudden certainty about the imminent creation of wealth beyond the dreams of avarice. It was an audience conscious of the difficulties of creating infrastructure for mining projects in the harsh conditions of Western Australia. It was an audience conscious of their vast expense. It was an audience conscious of the problems of doing so in cooperation with a Chinese group described in the ASX announcement as China's largest construction group. And it would have learned – not from the announcement itself but from the simultaneous media release – that CREC was "a State-owned enterprise in China", the state in question being the People's Republic of China. The audience was sufficiently tough, shrewd and sceptical to know something of the difficulties of "forcing" a builder to build and finance anything. Whether an agreement can "force" one party to it to do something depends on whether another party can get the state to

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46 It is possible that the Full Court overlooked the need for ASIC to prove its case in view of passages in which it spoke of s 1041H making a reallocation of the risk of loss arising from erroneous statements and placing that risk on the respondent: see *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at 406 [114]-[115]. What the Full Court said may be true, but it does not entail any reversal of the onus of proof.

employ any "force" against that first party to do that thing. While it is easy for the state to inflict pain on people who do not do what it wants, it is in fact extraordinarily difficult for the state to "force" anyone to do anything. It is particularly difficult to force parties to agreements to perform them. Australian courts can grant injunctions and decrees of specific performance. But what if they are ignored? Those courts can fine or sequestrate the property of people who do not carry out injunctions or decrees of specific performance (and, in the case of natural persons, gaol them). Those courts can nominate persons to do what a party to an agreement ought to have done. But it is only exceptionally that the courts will decree specific performance of building contracts[47]. ASIC contends that Fortescue's target audience was being misled in being persuaded that the agreement put Fortescue into a position in which it was practicable for it to force CREC to design, build, transfer and finance the railway. But an audience which read Fortescue's statements that way might be expected to ask: how is a State-owned enterprise of the People's Republic of China to be forced to do anything? When Bismarck was asked during the war of 1870 how he would force the British Army to surrender if it landed on the Baltic Coast, he said he would send a police constable to arrest it. Fortescue's target audience would have known that it would be very much less easy for Fortescue to deal with the People's Republic of China. It would have known that the idea that CREC would perform the agreement against its will was idle. It would also have known that even if the expression "force CREC to design … the railway" were used less strictly to mean "sue it for damages for breach of contract", then difficulties of execution would mean that Fortescue could not force CREC to conform with its will by those means. These considerations suggest strongly that Fortescue's target audience would not have understood the representations in the way ASIC wished. It would have understood them as being less high and less intense.

106 ASIC bore the burden of proving, to use the language of the statement of claim, both "representation"/"impression" and "false representation"/"false impression". What the representation and impression were depended on the audience. ASIC did not establish that the relevant audience had taken from the ASX announcement (or the media release) either the representation or the impression that the parties had entered a binding contract in the sense that they had "agreed on all the terms necessary for it to be practicable to force CREC to design, build, transfer and finance the railway". ASIC's case so far as it rests on the representation inherent in par 28(d) of the statement of claim must fail. That representation is one which Fortescue's target audience would not have understood Fortescue to be making. Strictly speaking, ASIC's case should fail at that point. But even if the representation was less extreme, its case must fail.

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47 *Wolverhampton Corp v Emmons* [1901] 1 QB 515 at 524-525.

107 It was probable that Fortescue's target audience would consider that Fortescue's representation did not suggest that the agreement had terms which "forced" either the People's Republic of China or CREC to do anything, because even the tightest of terms would not do that. Instead the target audience probably took the representation to be that there was a binding contract containing machinery capable of procuring the result that CREC would voluntarily design, build, transfer and finance the railway even if it was impossible to force it to do so. The agreement was a binding contract containing that machinery – duties to conduct future negotiations leading to future agreements. Under cl 7, those future agreements had to be consistent with the original agreement's "intent". For that reason there were reasonable grounds for Fortescue's representation, whether or not it thought that it was making a higher and stronger representation. The agreement was not concerned with mechanisms of legal enforcement like choice of law clauses or choice of jurisdiction clauses. It was concerned with practical progress through future negotiations which the parties were contractually obliged to undertake with a view to entering future contracts within the intent of the agreement. ASIC did not establish that any possible construction of the representation more favourable to its case was made out.

108 It follows that Fortescue's conduct was not misleading, not deceptive, and not likely to mislead or deceive. Accordingly, s 1041H of the *Corporations Act* does not apply.

109 Counsel for Mr Forrest complained that the Full Court had failed to refer sufficiently to 122 documents relied on to support the trial judge's conclusion about the honesty and reasonableness of the view that the agreement was a binding contract; to the exculpatory evidence of certain witnesses; and to his submissions on these subjects. In view of what has been said above, it was not necessary to refer to all this evidence, though some has been mentioned. The approach of this Court to the case has differed from that taken at trial and in the Full Court.

110 Because the trial judge and the Full Court were not directing their attention to the narrower representation which ASIC did not plead but which has just been considered, there is no finding about whether Fortescue believed in its truth. But it is encompassed within the wider representation with which they were dealing. The reasoning stated earlier which upheld the trial judge's conclusions and departed from those of the Full Court suggests that Fortescue believed in the truth of the narrower representation as far as it went.

Other ASIC allegations in relation to s 1041H of the Act

111 The above discussion has concentrated largely on the CREC agreement and the ASIC release of 23 August 2004. ASIC made many more criticisms of the releases by Fortescue, in relation to both the CREC agreement and the other two agreements. Most of those criticisms fail for reasons similar to those

advanced above. The balance concern what are on their face statements of opinion – estimations, predictions – which were not shown to be misleading to the target audience. It would serve no good purpose to deal with the issues in the detailed way they were presented by ASIC and refuted by Fortescue.

112 The Full Court also found that Mr Forrest was involved in Fortescue's contravention of s 1041H within the meaning of s 79(c) of the *Corporations Act*. That finding cannot stand with the rejection of the s 1041H findings against Fortescue.

Section 674 of the *Corporations Act*

113 ASIC argued that if s 1041H were contravened, s 674 obliged Fortescue to disclose that fact. But s 1041H was not contravened.

114 ASIC further argued, in support of an application for special leave to cross-appeal, that even if Fortescue had made no public announcements, it was obliged to disclose the terms of the agreements. Nothing in s 674 supported the existence of any such obligation in relation to the facts of the case as postulated by ASIC. On that case, the agreements were no more than unenforceable agreements to agree. If that were true, they would have been of trivial significance – not likely to influence the share price. To grant special leave would require an analysis of expert evidence called by ASIC which the trial judge rejected, which the Full Court did not consider, and which was not the subject of detailed submissions in this Court beyond a single, near-illegible footnote. In those circumstances, the application for special leave to cross-appeal should be refused.

Section 180(1) of the *Corporations Act*

115 ASIC argued that if Fortescue contravened ss 1041H or 674, Mr Forrest was in breach of s 180(1). But since Fortescue had not contravened those provisions, Mr Forrest was not in breach of s 180(1).

Notice of contention

116 ASIC filed a notice of contention in support of the argument that the Full Court ought to have found that Fortescue and Mr Forrest had no reasonable basis for believing that their public announcements accurately described the agreements. The Full Court did make that finding, at least in relation to the s 674 case, where ASIC did not bear the burden of proof. However, in relation to s 1041H, ASIC did bear the burden of proof. For reasons given above, ASIC did not discharge it.

Orders

117 The appeals should be allowed with costs and consequential orders made. The application for special leave to cross-appeal should be refused with costs.