

BETWEEN

JOHN ANDREW HENRY FORREST

Appellant

and

10 AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION First Respondent

FORTESCUE METALS GROUP LTD
(ACN 002 594 872)

Second Respondent

APPELLANT'S REPLY SUBMISSIONS

Part I: Certification that the submissions are in a form suitable for publication on the internet

20 1. I certify that the submissions are in a form suitable for publication on the internet.

Part II: The Appellant's Reply submissions

The Changing Nature of ASIC's Case

2. At paragraph 21 of ASIC's submissions in the FMG appeal, it says:

'ASIC's primary allegation was that, objectively, the public statements by FMG and Forrest misrepresented the terms and the effect of the framework agreements. The trial judge did not address ASIC's primary claim in his reasons.'

30 3. At paragraph 23 of the Appellant's submissions before this Court, the Appellant stated:

ASIC says: *"The gravamen of ASIC's case is that, if such a comparison is performed, [between the terms of the agreements and the public announcements] the discrepancies between the framework agreements and the announcements is obvious, and no reasonable person could have honestly believed that the announcements accurately described either the terms, or the legal effect, of the framework agreements"* [ASIC's Summary of Argument at [11]]. The primary judge dealt with this argument and rejected it [TJ18, 19, 25, 41, 49, 71, 257, 259, 266ff].

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| Filed on behalf of: | | The Appellant | |
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Thus it is clear that that the primary judge fully addressed ASIC's primary claim in his detailed reasons.

4. ASIC does not address the fact that the author of the framework agreements, Heyting, believed that the releases were accurate. The Appellant dealt with the importance of the evidence of Heyting and Kirchlechner in his submissions before this Court (see paragraphs 29 to 35). ASIC has failed to address the issue of how it is that the evidence of Heyting and Kirchlechner was consistent with the gravamen of ASIC's case or its pleaded case.
5. As stated previously, ASIC was not able to adduce evidence from any individual who believed that the representations were either inaccurate or, more particularly, consistent with ASIC's pleaded case.
6. In relation to ASIC's submissions that the Appellant's belief has been described in a "very oblique way", the Appellant's case has been put throughout in a consistent and detailed. The Appellant's counsel commenced address at trial as follows:

'Your Honour, the essence of the case that my learned junior and I put on behalf Mr Forrest is that he acted honestly and reasonably throughout the period with which your Honour is concerned and in relation to each of the events of which complaint is made.' (emphasis added) [TT P-915.41-44]

7. Further, the Appellant has maintained that ASIC has failed to prove its pleaded case against both FMG and the Appellant. It was also the Appellant's case that the Chinese entities considered themselves bound by the Framework Agreements to build, finance and transfer the infrastructure as represented.
8. It is telling that ASIC's submissions fail to refer to its statement of claim or reference any of its allegations or submissions concerning its pleaded case. Further, ASIC has failed to respond to the Appellant's submissions that it has departed from its pleaded case.

Release of the terms of the Framework Agreements

9. ASIC contends that compliance *'with s674(2) could have been achieved by the simple expedient of publishing the actual terms of the framework agreements or the agreements themselves'* (see paragraph 27 of ASIC's submissions). ASIC's submission is untenable in a practical sense and fails to consider the real world impact of its position on investors. ASIC's submission would lead to the necessity for an investor to seek independent legal advice on the effect of the terms released to the market. How can it be said that the market is informed if the effect of the agreements is a matter that the investor is burdened with the responsibility of determining? It also leads to the prospect of investors obtaining differing legal advice regarding the effect. Indeed, as the primary judge noted, ASIC itself put forward two alternative interpretations of the legal effect of the framework agreements [TJ19]. This is an unsatisfactory practical result of the interpretation that ASIC seeks to place on s674(2).

Forrest's opinion at 27 August 2004

10. At the conclusion of the Appeal, the Full Court ordered that consolidated submissions be filed. Contrary to paragraph 42 of ASIC's submissions, in his consolidated written submissions to the Full Court, Forrest made the submissions set out below:

"139. *The trial judge was taken to TB420. ASIC made submissions about that document for the first time in oral Reply [AT354.37]. ASIC said (emphasis added):*

10 *'Mr Myers referred at volume 9 tab 420 to the 27 August minutes where Mr Forrest made a report to the board that is minuted about the CREC framework agreement. The report says that it's an agreement whereby CREC has entered a contract at a fixed price fully warranted. Where does one get "fully warranted" from, let alone "fixed price"? You don't find it in the provisions of the framework agreements. That was Mr Forrest's opinion. It is not reasonably founded in anything. It's more likely that it's where he hoped to get to at the end of the negotiation, rather than the fact. That doesn't support his state of mind as one of honest and reasonable belief in the existence of binding commitments to build and finance as of August, nor that there was a fixed price agreement.'*

The minutes also record (emphasis added):

20 *'A key topic was the binding agreement signed with China Railway Engineering Corporation "CREC" whereby CREC will deliver a fully commissioned iron ore railway on a fixed price, fully warranted basis.'*

140. *This meeting took place on 27 August 2004. The belated acknowledgement by ASIC that Forrest had the opinion that the 'contract' with CREC was for a 'fixed price' ends a number of disputes raised by ASIC:*

140.1 *ASIC's primary contention in this entire proceeding is that FMG and Forrest 'knew' as a fact, as of 19 August 2004, that the Agreement was not a contract whereby CREC would deliver a fully commissioned railway.*

30 140.2 *The same applies, with respect to CHEC and CMCC, as from 5 November 2004.*

140.3 *The opinion that Forrest had about a 'fixed price' necessarily includes an opinion that CREC would deliver a fully commissioned railway. That is what he told the Board. That is what the Board told the market. Forrest held this opinion even though an actual dollar price had yet been determined.*

140.4 *The submission from ASIC that Forrest held this opinion is consistent with the finding of the trial judge that ASIC failed to establish that FMG and Forrest had deliberately and knowingly misled the market.*

40 140.5 *The opinion reflects the same state of mind Forrest expressed in the 23 August press conference, the Business Sunday interview and that FMG*

represented in the 23 August release. Forrest referred to price in the press conference. He also referred, at page 7, to full warranties. Fully warranted simply means that CREC would ensure that the railway was in working order.

140.6 The submission from ASIC that Forrest held this opinion makes clear that it is not 'self-evident' from a reading of the Agreement that ASC20 is correct.

140.7 It shows that the documents before 23 August, relied upon by ASIC to demonstrate that an MOU was being prepared, had been superceded."

- 10 11. Further, in paragraph 41 of ASIC's submissions, the significant sentence '*The report says that it's an agreement whereby CREC has entered a contract at a fixed price fully warranted*' is omitted. This sentence is important to an understanding of the ASIC submission below upon which the Appellant relies. As ASIC's counsel said below, it was the Appellant's opinion that CREC had entered into a contract at a fixed price, fully warranted.

Legal advice

12. The Appellant has extensively dealt with the issue of legal advice and oversight in paragraphs 53 to 57 of his submissions before this Court. Accordingly, the Appellant only makes the following responsive submissions.
- 20 13. In relation to paragraph 33 of ASIC's submissions, the relevant extracts from the email of 3 October 2004 [TB578] are:
- 13.1 '*You may know that we signed a very similar B.T. deal with China Harbours as we did with Rail. It is at this stage non-binding, but is intended to become binding on the 20th of this month at a signing ceremony in Beijing.*';
- 13.2 '*we have enough time to set up a similar BT contract with China Metallurgy – and shoot to have it signed on the 20th as well.*';
- 13.3 '*we should get the vice chairman of MCC ... and ask him ... is he kindly disposed to signing a binding contract in ceremony with Harbours on the 20th.*';
- 30 13.4 '*these three contracts will be a positive development adding another Chinese government layer of financial credibility onto FMG.*'; and
- 13.5 '*that means that on the back of our signed MOU with Harbours, we go and approach all of the usual subcontractors to get them excited about subcontracting to them (like we did with Rail).*'
14. Clearly the Appellant believed that the Framework Agreements were binding contracts and that he regarded those contracts as being MOUs until such time as they were approved by the respective Boards. As at the date of this email, 3 October 2004, the contract with CHEC had not yet been approved. That approval took place on 20 October 2004. However, the Appellant wanted his team to start approaching

subcontractors on the basis that the contract would be approved by the respective Boards imminently.

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15. Paragraph 34 of ASIC's submissions attempt to respond to paragraph 56 of the Appellant's submissions before this Court. The purported factual foundation for ASIC's submission in that paragraph is that there was no evidence that Huston considered the terms of the Framework Agreements prior to the 5 November 2004 announcement being made. It is a glaring omission that ASIC fails to address Huston's involvement in the 8 November 2004 release (which was found by the primary judge at [TJ46]). The irresistible conclusion is that Huston considered the terms of the Framework Agreements prior to his meeting with Walsh and also in order to prepare the 8 November 2004 release.

Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd (2000) 22 WAR 101

16. The relevance of that proceeding was raised by Huston himself during the Board meeting of 22 January 2005. He regarded that successful judgment to be relevant to the issue at hand. What would ASIC say about the Appellant's knowledge of that case, if Anaconda had been unsuccessful?
17. By 30 March 2005 the AFR article had been published, but the Appellant and FMG were maintaining the accuracy of their earlier representations. By his email of 30 March 2005, Huston again raised the *Anaconda* decision and stated:
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- 'Thus if journalists want to know why Andrew considers the MCC agreement to be binding, he is amongst other things, relying on his own direct experience from this Supreme Court case.'*
18. That is, Huston was informing others why it was legitimate for the Appellant to continue to assert the accuracy of his earlier representations. FMG's General Counsel was explaining why the Appellant could continue to make the representations about which ASIC complain. ASIC has failed to deal with this point.

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M Thangaraj

24 November 2011