SUPREME COURT OF QUEENSLAND

CITATION:	*Bert & Ors v Red 5 Limited & Anor* [2017] QCA 233
PARTIES:	**JEAN-CLAUDE BERT** (first appellant) **GABRIELLE BERT** (second appellant) **ISABELLE BERT** (third appellant) **CAROLINE BERT** (fourth appellant) **v** **RED 5 LIMITED** ACN 068 647 610 (first respondent) **COLIN JACKSON** (second respondent)
FILE NO/S:	Appeal No 1139 of 2017 SC No 1467 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal (Leave Granted)
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 302 (Applegarth J)
DELIVERED ON:	13 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2017
JUDGES:	Sofronoff P and Morrison JA and Atkinson J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CORPORATIONS – FINANCIAL SERVICES AND MARKETS – MARKET MISCONDUCT AND OTHER PROHIBITED CONDUCT – MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT – where the appellants were shareholders in the first respondent – where the respondent's main asset was an open cut gold mine – where the Board of the company resolved to raise $15,000,000 for working capital and $10,000,000 for exploration – where the second respondent was the director of the first respondent – where the first appellant claimed that the second respondent told him that the capital was being raised for the purpose of exploration – where the first appellant claimed that the second respondent never told him that working capital was being raised – where the second respondent denied that he misled the first appellant as alleged

– where the trial judge found the second respondent to be a more credible witness than the first appellant – whether the trial judge erred in accepting the second respondent's evidence over the first appellant's evidence

CORPORATIONS – FINANCIAL SERVICES AND MARKETS – DISCLOSURE – where the appellants claim that the first respondent failed to disclose the significant presence of groundwater in the mine – whether the first respondent breached its disclosure obligations under s 674 of the *Corporations Act*

CORPORATIONS – FINANCIAL SERVICES AND MARKETS – MARKET MISCONDUCT AND OTHER PROHIBITED CONDUCT – MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT – where the first respondent initially stated that the pit dewatering process was complete and later stated that it was not complete – where the first respondent was aware that water levels had increased – whether the statements regarding pit dewatering were misleading or deceptive

Corporations Act 2001 (Cth), s 674(1), s 674(2)

Bert v Red 5 Limited [2016] QSC 302, affirmed
Dearman v Dearman (1908) 7 CLR 549; [1908] HCA 84, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
R v Noble [2002] 1 Qd R 432; [2000] QCA 523, cited

COUNSEL: N H Ferrett for the appellants
D L K Atkinson for the respondents

SOLICITORS: Broadley Rees Hogan for the appellants
Hopgood Ganim for the respondents

[1] **SOFRONOFF P:** The appellants were shareholders in the first respondent, Red 5 Limited. The first appellant, Mr Jean-Claude Bert, had first bought shares in Red 5 in 2004 for himself and for his wife and children. They are the other appellants. Mr Bert was a person who took an active interest in the share market and in the activities of the company in which he had invested his family's money. Mr Bert was financially qualified. As the learned trial judge, Applegarth J, found, Mr Bert had held teaching positions in economics in France for more than 17 years.[1] He had a special interest in investment. He modelled his approach upon that of the influential American stock market expert and author, Benjamin Graham. Mr Bert operated a blog in which he explained his investment approach for those who may be interested. He was the person who was in charge of his family's financial affairs and it was he who made investment decisions on behalf of his family.

[2] The main asset of Red 5 was an open cut gold mine in the Philippines called "Siana". It had been closed in 1990 and the pit had filled with water so that it became a veritable lake. A major task for Red 5, when it acquired the project, was to dewater the pit.

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1 *Bert v Red 5 Limited* [2016] QSC 302 at [20].

[3] By 6 February 2012 these efforts had borne fruit and the company began to produce gold. Red 5 then went to the market to raise capital. It wished to raise $25,000,000. The money raised by an issue of shares was to be used as to $15,000,000 for working capital and as to $10,000,000 for exploration. The Board of the company had resolved to that effect on 15 March 2012. The second respondent, Colin Jackson, was a director of the company and was the Chairman of its Board of Directors. He explained in evidence that the capital raising was to be by way of private placement. This meant that a prospectus did not need to be issued.

[4] Mr Bert was acquainted with Mr Jackson. He sent Mr Jackson an email on 15 March 2012 which said:

> "I just saw the trading halt announcement in regard to a capital raising and I have a small comment and a question.
>
> I am wondering why a capital raising now? after [sic] the recent consolidation, at a time the company should become Cash Flow positive and when the share price seems still really undervalued (from what the analysts are saying) just before a re-rating.
>
> I am sure there is a logical explanation but for the moment I am completely lost on why a capital raising would be decided at this present time."

[5] Mr Jackson responded to say that he would call Mr Bert that afternoon and he did so. The conversation that followed was a crucial issue at the trial.

[6] For his part, Mr Bert alleged in the statement of claim, one he had drafted himself, that Mr Jackson had told him:

> "(a) that he had a meeting with representatives of BHP and Rio Tinto;
>
> (b) during that meeting the second defendant [Mr Jackson] and the representatives of BHP and Rio Tinto discussed the potential and the prospect for copper which the first defendant has on its tenements in the Philippines.
>
> (c) the purpose of the capital raising was to accelerate the exploration for copper on the first defendant's tenements in the Philippines."

[7] Mr Bert went on to plead that these statements were false and that the company's conduct in publishing them was deceptive. He alleged that the respondent had no intention to use the $15,000,000 capital raising to accelerate the exploration for copper. He alleged that Mr Jackson made the representations fraudulently.

[8] Mr Bert repeated the substance of the allegations about the representations in the summary of evidence that he furnished to the respondents before the trial. However, when he gave oral evidence he acknowledged that Jackson had not said that he had met with representatives from BHP or Rio Tinto. He acknowledged that he had not been told that Mr Jackson and these representatives had discussed the company's copper prospects. Instead, he said that Mr Jackson had told him that he had attended an industry conference and that representatives of BHP and Rio Tinto had also been there. He said that Mr Jackson had told him that at the conference a bullish sentiment for copper had been expressed. Crucially, he continued to maintain that Mr Jackson had told him that the purpose of the capital raising was to

raise money for copper exploration and so that the company could prove that it had copper on its tenements. He said that Mr Jackson had not told him about any intention on the part of the company to use any of the capital raised as working capital.

[9] Mr Jackson also gave oral evidence. He said that he had spoken to numerous potential investors for the capital raising by telephone. For that purpose he had a written script that he followed. His conversations with these investors, he said, were all substantially the same. At the time that he spoke to Mr Bert, the planned capital raising was for a sum of $25,000,000 to be divided as to $15,000,000 for working capital and $10,000,000 for further exploration. He said that he informed potential investors that the working capital was needed because the commissioning of the gold mine was taking longer than had been allowed for. He accepted that he had probably told Mr Bert that part of the money would be used for exploration for copper and gold. He denied that he had said anything about going to a conference or about anything that he had heard at any such conference.

[10] It can be seen that the essence of the alleged misrepresentation was that Mr Bert was told that the one and only purpose of the capital raising proposed by the company was copper exploration whereas in fact the purposes had included a use of the money for working capital and later that became the sole purpose.

[11] Following that conversation Mr Bert emailed Mr Jackson saying he wished to acquire 165,000 shares in the placement process. Accordingly, Mr Jackson referred Mr Bert's email to consultants engaged in assisting the company in its capital raising. In due course, on 19 March 2012, E.L. & C. Baillieu, a firm of stockbrokers, wrote to Mr Bert offering him an opportunity to subscribe for shares in the company by way of the private placement process.

[12] It is necessary to explain some steps that were taken by the company between the date of Mr Bert's conversation with Mr Jackson and the day on which Mr Bert received the stockbroker's letter. In the course of speaking to potential investors, Mr Jackson had talked to representatives of JB Management in London and of Gabelli Gold Fund in the United States. These two companies already held shares in Red 5. Their representatives told Mr Jackson that, while they supported the capital raising, they only wished to participate if the money raised was devoted to working capital. They gave reasons for this. These conversations took place on 15 March 2012.

[13] On 18 March 2012 the Board of the company met and Mr Jackson reported upon the progress of the capital raising. He informed the Board about the opinions expressed by JB Management and Gabelli Gold Fund. The Board resolved that the capital raising would be reduced to $15,000,000 and that that sum would be devoted for use as working capital.

[14] On the following day, Monday 19 March 2012, trading in shares of the company was suspended at the request of the company.

[15] On the same day, Mr Bert received the letter from E.L. & C. Baillieu. Evidently believing that Mr Bert was qualified to participate in the private placement, the stockbrokers had sent to Mr Bert an offer to subscribe for shares. Page 2 of the letter contained two relevant paragraphs. The first of these paragraphs read as follows:

"**2.2 Use of proceeds**

The Company has stated that net funds raised pursuant to the Offering will be used to:

- provide a working capital buffer, as a prudent measure during completion of the commissioning phase and ramp up of production, at the Company's Siana gold mine;
- fund plans to accelerate exploration on existing tenements; and
- fund new project generation."

[16] The other relevant paragraph on page 2 stated:

"**3. Offer**

3.1 Firm Commitment

You have been allocated the following participation in the Offering, subject to the terms set out in this letter, (**Firm Commitment**).

Number of Shares	Price per share	Total Amount (A$)
165,000	A$2.12	A$349,800.00

If the Company proceeds with the Offering, your allocation of Shares (which is set out in section 3.1 of this letter) will be issued on the basis set out in your Application Form subject to compliance by you with your obligations referred to in this letter.

In completing your Application Form and providing it to your Placement Agent you acknowledge and agree with the terms and conditions of the Firm Commitment contained in this letter."

[17] In oral evidence Mr Bert denied that he had read the letter fully. He said that he had not read page 2 of the letter.

[18] Mr Bert was not qualified to participate in the private placement and did not do so.

[19] On 20 March 2012 the company made a further announcement to the market. Relevantly, its first three paragraphs stated as follows:

"**Red5 has placed $15 million in equity to existing institutional shareholders.**

A syndicate comprising Casimir Capital (lead) and Petra Capital placed 7.1 million shares (a 6% increase in issued capital) at $2.12 per share to current institutional shareholders to raise $15.0 million before fees.

The proceeds will be allocated to a working capital contingency for the next six months when extensive open pit stripping continues. Based on the current earth moving schedule the fleet unit numbers will be significantly reduced early in calendar 2013."

[20] Trading in shares of the company had been suspended on 19 March 2012 pending the release of an announcement. On 20 March 2012 the ASX announced that that suspension "will be lifted immediately" following the company's announcement from which I have just quoted. It was after this that Mr Bert bought 165,016 shares for a total price of $350,164.

[21] Mr Bert also denied that he had read the company's announcement on 20 March 2012.

[22] Later, the company issued to the market its quarterly activities report on 30 April 2012. Relevantly, that report said:

> "An equity placement, representing a modest 6% increase in issued capital, was conducted to provide a working capital contingency in light of early operational performance."

[23] In evidence Mr Bert admitted that he had read this report. He explained that he read the above sentence as meaning that it was only after the money had been raised that the company decided for the first time to apply the funds for use as working capital only.

[24] Similarly, the company's annual report issued on 26 September 2012 stated:

> "However, with production delays of an unknown duration during the early silt removal programme, the Company opted to raise $15 million in additional working capital."

[25] Notwithstanding these publications about the purpose of the capital raising, made both before and after he acquired the shares, Mr Bert made no complaint to the company about its intended use of the money or about having been misled.

[26] From April 2012 the company's share price began to fall. It fell to a price below $2 by the end of April. Mr Bert began to buy more shares pursuing a strategy of "averaging down" the price of his shares. In this way, the average price of the shares that he held as at 16 April 2013 became $1.607.

[27] The price of the shares continued to fall. In November 2012 the company's managing director resigned. Mr Bert persisted with his strategy of averaging down and bought more shares. By the end of January 2013 the price of the company's shares had fallen to about $1. On 13 May 2013 the company announced that milling operations at the mine had been suspended because a tailings dam wall had been compromised. On 13 June 2013 the company announced that it had been required to cease processing operations by the Philippines government. On 19 July 2013 the company announced a rights issue at $0.35 per share to raise money to permit the company to recommence production. Mr Bert sent Mr Jackson an email saying:

> "I will not be participating to the capital placement as I have already lost our home."

[28] The company's shares remained in suspension until 1 November 2013 when trade reopened at about $0.10 per share.

[29] On 24 October 2013 Mr Bert wrote to Mr Jackson claiming compensation for the money that he had invested in March 2012 and thereafter.

[30] Mr Bert acted for himself in this litigation. His first language is French. However, Applegarth J observed that although English is Mr Bert's second language, he "shows no sign of any great difficulty in communicating in written English".

[31] Mr Bert made an allegation of actual dishonesty against Mr Jackson. Even in cases of innocent misrepresentation it is imperative, as Applegarth J observed, that a plaintiff proves what was said with a reasonable degree of precision. A plaintiff is not obliged to prove the precise words which were used. In *R v Noble*[2] Pincus JA said:

> "There is, in my respectful opinion, no rule that a witness who does not claim to remember the words spoken in a conversation must attempt to give it in direct speech, manufacturing a conversation from a recollection of its effect. Of course, the ideal is that the exact words be given, but it is so unlikely that [the witness] could have remembered anything other than the substance of the conversations that the judge plainly erred in attempting to have him give evidence using direct speech. The erroneous idea that people can accurately recall conversations in direct speech, long after their occurrence, appears to have been encouraged by practices observed by some magistrates and police, in days gone by. That it is erroneous can be easily demonstrated, if one tries to perform this feat oneself."

[32] Pincus JA quoted the following passage from *Wigmore on Evidence*:[3]

> "The general rule, universally accepted, is therefore that the substance or effect of the actual words spoken will suffice, the witness stating this substance as best he can from the impression left upon his memory. He may give his 'understanding' or 'impression' as to the net meaning of the words heard."

[33] Mr Bert's problem in this case was not an inadequate or imperfect recollection of what Mr Jackson had said to him. It was that his version of the conversation was rejected by his Honour. Applegarth J said:

> "[65] In my view, Mr Bert is unreliable in his recollection of the conversation. Mr Bert's version of the conversation, as pleaded and as reformulated in his oral evidence, has all the hallmarks of a reconstruction. There are no contemporaneous documents supporting his version of the conversation and there is no other satisfactory corroboration.
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> [66] If Mr Jackson misled Mr Bert, as Mr Bert alleges, then the absence of complaint until 24 October 2013 is remarkable. It has not been satisfactorily explained. I have noted the various announcements that were made about the purpose of the capital raising. The public, including Mr Bert, was informed that the funds raised would be used for working capital. These included a letter sent by the brokers to Mr Bert on 19 March 2012, an ASX announcement on 20 March 2012, and an ASX quarterly report released on 30 April 2012. The first two of

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2 [2002] 1 Qd R 432 at [20].

3 *Wigmore on Evidence*, Chadbourn Revision, at [2097], quoted in *R v Noble* [2002] 1 Qd R 432 at [18].

these important documents were received by Mr Bert before he made his significant investment on 20 March 2012.

…

[75] Mr Bert was an unimpressive witness. His evidence about the content of the conversation changed. He departed from his pleaded case and the evidence in his affidavit. He was evasive in a number of his answers under cross-examination. For someone who professed a good recollection of what was said in the conversation, he claimed not to recall if the figure of $25 million, $15 million or some other figure was mentioned in the conversation. If his recollection was sound, then the figure would have been $25 million. But then he would have had to explain why he did not react when reading the different figure of $15 million on 19 March 2012. His lack of recollection on this point was a convenient one. If, however, his recollection was poor, then he probably could not recall years after the conversation what was said about working capital. He has reconstructed a recollection in which nothing was said about working capital.

[76] In summary, I am not persuaded by Mr Bert's version of the conversation. I conclude that Mr Jackson's recollection is far more reliable. It is probable that Mr Jackson mentioned both the working capital and the exploration purposes to Mr Bert.

[77] The result is that the plaintiffs have failed to prove either the pleaded representations or the different and unpleaded version of what was said. I find that Mr Bert was in fact informed on 15 March 2012 that the board of Red 5 intended to raise $25 million from institutional investors, being $15 million for working capital and $10 million to fund exploration."[4]

[34] Mr Jackson impressed Applegarth J as an honest witness. His Honour also found that, although Mr Jackson's memory of the specific words used in the conversation was limited, his recollection of what he conveyed as the purpose of the capital raising was more likely than Mr Bert's.

[35] The primary case depended wholly upon this credit finding. It has been said that the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. The Court is obliged to rehear the case, albeit that the rehearing is limited to the written record.[5]

[36] In *Dearman v Dearman*[6] Isaacs J explained the effect of the limitation as follows:

> "[B]ut where *viva voce* evidence is taken there is a large amount of material upon which the primary Judge acts that is altogether outside the reach of the appellate tribunal. The mere words used by the witnesses when they appear in cold type may have a very different

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4 *Bert v Red 5 Limited* [2016] QSC 302.
5 *Fox v Percy* (2003) 214 CLR 118 at [28] per Gleeson CJ, Gummow and Kirby JJ.
6 (1908) 7 CLR 549 at 561-562.

> meaning and effect from that which they have when spoken in the witness box. A look, a gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving evidence, will often lead a Judge to find a signification in words actually used by a witness that cannot be attributed to them as they appear in the mere reproduction in type. And therefore some of the material, and it may be, according to the nature of the particular case, some of the most important material, unrecorded material but yet most valuable in helping the Judge very materially in coming to his decision, is utterly beyond the reach of the Court of Appeal. So far as their judgment may depend upon these circumstances they are not in a position to reverse the conclusion which has been arrived at by the primary tribunal."

[37] In such cases, as McHugh J said in *Fox v Percy:*[7]

> "there must be something that points decisively and not merely persuasively to error on the part of the trial judge in acting on his or her impressions of the witness or witnesses."

[38] In this case the materials that are available tend to support his Honour's assessment of Mr Bert's credit. As his Honour found, Mr Bert was an assiduous and devoted student of the stock market. He had met Mr Jackson at an "Investors' Expo" in 2004. He studied the business of Red 5 in great detail. He was a disciple of Benjamin Graham who, according to Mr Bert, asserted that investing was "like buying a business". The inference is that a purchaser of shares must be zealous in knowing the business of the company. The evidence shows that Mr Bert indeed was such an investor. Upon notification by the company that it was contemplating a capital raising, Mr Bert immediately emailed Mr Jackson, the Chairman of the Board, directly to enquire about the reasons for the capital raising. The burden of proof lay upon Mr Bert to prove the elements of his case. Forensically, that required Mr Bert to persuade his Honour that, apart from what was said to him, he had not read the announcement to the market made on the day that he bought the shares and which had alone justified the raising of the trading suspension while explaining the precise purpose to which the money raised would be put.

[39] In addition, on their face, Mr Bert's claims about the content of the conversation were inherently improbable. There was no conceivable reason why Mr Jackson should have decided dishonestly to mislead a minor individual shareholder.

[40] In short, the appellants have failed to demonstrate any error in the learned trial judge's findings.

[41] I am not satisfied that his Honour's findings about Mr Bert's credit and his Honour's resulting conclusions about the terms of the disputed conversation were affected by any error.

[42] The appellants also relied upon a second cause of action. They alleged that the company had failed to disclose "the presence of significant quantities of groundwater flowing into the Siana pit".[8] They alleged that this breached the company's

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7 *supra* at [90].

8 See paragraph 22 of the Further Amended Statement of Claim.

continuous disclosure obligations imposed upon it by the ASX Listing Rules and s 674(1) and s 674(2) of the *Corporations Act* 2001 (Cth) ("the Act").

[43] Relevantly, s 674 of the Act obliged Red 5 to disclose information in its possession if the information was not generally available and was information that a reasonable person would expect, if it were generally available, to have a material effect on the price of its shares.

[44] As I have already said, after the mine was decommissioned in 1990, the pit filled with water to create a deep lake. This water had to be removed for the mine to be capable of being worked. In addition, there was an ongoing flow into the pit of ground water and rainfall.

[45] The pre-feasibility report published in 2006 to shareholders, which Mr Bert had read, said:

> "**Pit dewatering**
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> The existing flooded pit is estimated to contain 8.2GL of water. Data recorded during the previous mining operation provided a useful basis for estimating the water flows into the pit area. The pit operations are susceptible to flooding due to heavy rainfall, as well as groundwater inflows. …
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> In a recently updated mine groundwater model the annual inflow is estimated at 6.8GL/yr, including rainfall. The rainfall is estimated at an average rate of 3600mm/yr over an area of 28.4ha equivalent to 1GL/yr.
>
> The pit will be dewatered in two stages using in-pit pumps and external bores. Stage one is to dewater the pit over a four month period … The total volume to be pumped including inflows is estimated to be 9.64GL over 120 days, allowing for 50% of the groundwater inflow to be taken up by external water bores.
>
> Stage two comprises ongoing pumping from bores and in-pit pumps."

[46] Thus, when "dewatering" was spoken of it concerned both the initial removal of the water constituting the lake and the ongoing removal of a constant inflow of ground water and rainfall.

[47] The appellants' case was that the company should have disclosed "that there were significant quantities of groundwater flowing into the Siana mine which prevented complete dewatering of the pit". They claimed that dewatering of this kind had been delayed in late 2011 and early 2012. They alleged that the amount of groundwater flowing into the mine prevented complete dewatering of the pit so that groundwater remained at the bottom of the pit at the time of the capital raising.

[48] Mr Gary Meyer was a hydrogeologist who had been retained by Red 5 to assist in dewatering. On 9 January 2012 he offered to investigate the efficiency of the dewatering at the pit. Red 5 retained him to visit the site and he did so from 5 March 2012 to 9 March 2012. He found that the system which he had earlier devised was not being properly implemented. He provided a written report which

explained what steps had to be taken. Mr Meyer gave oral evidence and explained that he was confident that, provided the steps that he had outlined were taken, dewatering would proceed successfully. Contemporaneous documents show that on 13 March 2013 the Managing Director spoke to Mr Jackson about Mr Meyer's report. Mr Jackson's notes, which he took at the time, record that he was told that the equipment was working reasonably well with some minor exceptions. The issue was discussed at a Board meeting on 13 March 2012. The Managing Director reported to the Board that:

> "The dewatering situation has been clarified by our consultant hydrologist and with the test work undertaken over the past few weeks there is a good plan to have the last of the water removed as soon as possible."

[49] Accordingly, on 30 April 2012, the company advised the market, relevantly, that:

> "Pit dewatering progress behind schedule due to groundwater ingress at base of pit – additional pumping now operational."

[50] Later, on 6 June 2012, the company issued a further report which stated, relevantly:

> "Dewatering performance is now steadily improving with the base of the original pit totally exposed with the water table below the current working benches. The entire northeast bench of the pit has been levelled and is free of silt."

[51] On 31 July 2012 a further report stated that:

> "… pit dewatering completed behind schedule due to ground water ingress at base of pit …
>
> … The current pit has now been successfully dewatered …"

[52] Against this background of disclosures, in my respectful opinion Applegarth J was right to find that there had not been a material nondisclosure by the company. The appellants' case was that although significant quantities of groundwater had been flowing into the mine so as to prevent complete dewatering of the pit, and although dewatering was critical to the expected production, the market was not informed of these facts. However, as his Honour correctly found, an announcement that there was a significant volume of groundwater flowing into the pit would not tell the market anything it did not know. The relevant issue was whether operations were under way to deal with the problem. The market was so informed in April 2012. Indeed, Mr Bert himself knew this. The contemporaneous documents, including Mr Meyer's report, did not suggest that the quantities of groundwater flowing into the mine prevented it from being dewatered so as to permit production. On the contrary, the company had a planned approach to deal with the problem. The disclosure of the fact that the company had plans to deal with a problem known to the market was rightly considered by his Honour as not being information that would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to dispose of shares or to acquire them.

[53] In my view there was nothing in this cause of action and his Honour was right in his conclusion.

[54] The third cause of action relied upon by the appellants also related to dewatering.

[55] On 31 October 2011 the company reported in respect of its activities for the three months ended 30 September 2011. In the course of making that report, it stated:

> "Pit dewatering complete – total of 14 billion litres discharged, remaining water to be used in wet commissioning."

[56] Subsequently, on 15 March 2012, in its announcement to the market which preceded the capital raising, the company stated:

> "Dewatering of pit – almost complete."

[57] As to the first statement, the appellants argued that it was misleading and deceptive because on 30 October 2011 the company was aware that water levels had increased by about 14 metres.

[58] In my opinion, his Honour was undoubtedly correct in concluding that the statement made in a quarterly report for the period ending 30 September 2011 was not misleading in referring to pit dewatering being complete with remaining water to be used in wet commissioning. That there was remaining water so to be used implied that the pit was not empty. There is no suggestion in the evidence that the bulk of the water had not been discharged.

[59] As to the second statement, the report of Mr Meyer, which was in evidence, showed that a rise in water had occurred by the end of 30 October 2011 but that it had been eliminated by March 2012. Otherwise, the statement that dewatering the pit was almost complete was substantially true.

[60] Having regard to these conclusions, it is not necessary to consider the issues of causation and quantum upon which the appellants also failed. As his Honour's reasons show, the appellants had serious problems in proving causation and what they had lost.

[61] In my view none of the grounds of appeal have been established and the appeal should be dismissed.

[62] **MORRISON JA:** I have read the reasons of Sofronoff P and agree with those reasons and the order his Honour proposes.

[63] **ATKINSON J:** I agree with the order proposed by Sofronoff P and with his Honour's reasons.