SUPREME COURT OF QUEENSLAND

CITATION:	*QCoal P/L & Anor v Cliffs Australia Coal P/L & Anor* [2009] QCA 358
PARTIES:	**QCOAL PTY LTD** ABN 99 010 911 234 (first plaintiff/first appellant) **QCOAL SONOMA PTY LTD** ABN 72 117 116 784 (second plaintiff/second appellant) **v** **CLIFFS AUSTRALIA COAL PTY LTD** ACN 123 583 326 (first defendant/first respondent) **CLIFFS AUSTRALIA WASHPLANT OPERATIONS PTY LTD** ACN 123 748 032 (second defendant/second respondent)
FILE NO/S:	Appeal No 6807 of 2009 SC No 9591 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2009
JUDGES:	Holmes and Fraser JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Parties granted leave to file written submissions as to costs in accordance with Paragraph 37A of Practice Direction No. 1 of 2005.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where the appellant was developing a new coal mine and agreed to sell a share of the project to the respondent – where the agreed price to be paid by the respondent was subject to certain adjustments contained in the sale purchase agreement – where a certain adjustment in cl 6.9 required the respondent to pay an additional amount if the cost to the appellant of advancing the project to completion exceeded a specified figure – where the appellant invoked this clause to claim an increased purchase price from

the respondent – where the respondent disputed that the specified figure was exceeded, on the basis that an amount owed to a particular consultant was not included or had not been paid before completion of the contract of sale – whether the phrase 'amount expended by the Vendors' in cl 6.9 of the contract includes undischarged liabilities

TRADE AND COMMERCE – TRADE PRACTICES ACT 1974 (CTH) AND RELATED LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE CONDUCT GENERALLY – MISLEADING OR DECEPTIVE: WHAT CONSTITUTES – where respondent argued that the appellant's conduct in failing to disclose the consultant contract was misleading or deceptive under s 52 – where respondent counterclaimed for damages under s 82 – where trial judge held that, had the appellant succeeded, the respondent's counterclaim would have been successful – whether the appellant's failure to disclose the consultant contract was misleading or deceptive – whether this conduct also constituted a breach of warranty

TRADE AND COMMERCE – TRADE PRACTICES ACT 1974 (CTH) AND RELATED LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – CHARACTER OR ATTRIBUTES OF CONDUCT OR REPRESENTATION – RELIANCE, INDUCEMENT AND CAUSATION – whether the appellant's failure to disclose the consultant contract or the nature of that contract resulted in a loss of opportunity to the respondent to negotiate a reduction in the purchase price

Trade Practices Act 1974 (Cth), s 52, s 82

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36, cited
Australian Cement Holdings Pty Ltd v Adelaide Brighton Ltd [2001] NSWSC 799, cited
Australian Competition & Consumer Commission v Oceana Commercial Pty Ltd [2003] FCA 1516, cited
Campbell v Backoffice Investments Pty Ltd (2009) 257 ALR 610; [2009] HCA 25, cited
Daniels v Anderson (1995) 37 NSWLR 438, cited
Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31; [1992] FCA 557, cited
FAI Traders Insurance Company Ltd v Savoy Plaza Pty Ltd [1993] 2 VR 343, cited
Federal Commissioner of Taxation v James Flood Pty Ltd (1953) 88 CLR 492; [1953] HCA 65, cited
Fraser v NRMA Holdings Ltd (1995) 55 FCR 452, cited

Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd (1984) 2 FCR 82; [1984] FCA 180, cited
Heenan v Di Sisto [2008] NSWCA 25, cited
Henjo Investments Pty Limited v Collins Marrickville Pty Limited (No 1) (1988) 79 ALR 83, cited
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited
Neilsen v Hempston Holdings Pty Ltd (1986) 65 ALR 302, cited
New Zealand Flax Investments Ltd v Federal Commissioner of Taxation (1938) 61 CLR 179; [1938] HCA 60, cited
QCoal P/L & Anor v Cliffs Australia Coal P/L & Anor [2009] QSC 130, affirmed
Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd (1986) 12 FCR 477, cited
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332; [1994] HCA 4, cited
Sutton v AJ Thompson Pty Ltd (in liq) (1987) 73 ALR 233, cited
Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177; [1982] FCA 136, cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, cited
Warner v Elders Rural Finance Limited (1993) 41 FCR 399; [1993] FCA 117, cited

COUNSEL: W Sofronoff QC SG, with J Chapple, for the appellants
G J Gibson QC, with G D Beacham, for the respondents

SOLICITORS: Russell and Company for the appellants
Mallesons Stephen Jaques for the respondents

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and with the orders his Honour proposes.

[2] **FRASER JA:** On 29 May 2009 a judge in the Trial Division dismissed a claim by the appellants/plaintiffs ("QCoal") against the respondents/defendants ("Cliffs"), declared that QCoal was liable to repay to Cliffs an "Adjustment Amount" under cl 6.9 of their "Sale Purchase Agreement" dated 3 April 2007 (“the SPA”) in the sum of $276,453.82 together with interest on that sum pursuant to the SPA, and found that if QCoal's claim had succeeded QCoal would have been liable on Cliffs’ counterclaim for $120,000 as damages under s 82 of the *Trade Practices Act* 1974 (Cth) (“the TPA”) and for breach of warranty.

[3] QCoal’s appeal against the dismissal of its claim and the declaration made in favour of Cliffs turns upon the proper construction of cl 6.9 of the SPA, by which QCoal sold to Cliffs an interest in the assets of the "Sonoma Coal Project" near Collinsville. The second issue in the appeal, QCoal’s challenge to the primary judge’s finding that it was guilty of misleading or deceptive conduct and breach of warranty, requires resolution only if QCoal succeeds on the first issue.

The SPA and its background

[4] Upon completion of the SPA a joint venture agreement was to commence in accordance with terms which were annexed to the SPA. One of the Cliffs parties

(the second respondent) was to become the sole owner and operator of the washplant necessary for the project but Cliffs' interest in the joint venture was to be 45 per cent. The price under the SPA exceeded $35 million and the construction of the washplant, which Cliffs was to fund, was expected to exceed $100,000,000. Sonoma Mine Management Pty Ltd was to be the operator of the project and was to perform its obligations on a "cost recovery basis". The joint venturers were to bear those costs in proportion to their respective interests in the joint venture.

[5] The background against which the parties entered into the SPA and the issues at trial were succinctly summarised in the following passage of the primary judge's reasons:[1]

> "[1] For some years prior to 2007, the plaintiffs were pursuing what became known as the Sonoma Coal Project, which was a proposed new coal mine just south of Collinsville. By late 2006, they were well advanced in obtaining the necessary statutory approvals, applications for mining leases had been lodged and compensation agreements were in place with all but one of the relevant land owners. The plaintiffs estimated that in excess of $150,000,000 would be required to develop this project and they were seeking joint venture partners. They found the American company, Cleveland Cliffs, of which the defendants are subsidiaries. By a contract of sale dated 3 April 2007, the plaintiffs agreed to sell to the defendants a share of the project.
>
> [2] The agreed price was $35,202,680, subject to certain adjustments. This case is a dispute about the agreed adjustment according to what had been 'the amount expended by the Vendors to advance the Sonoma Project to its position at Completion [of the contract]'. If that amount exceeded $13,000,000, the purchasers were to pay an additional sum being 45 per cent of the excess. If it was less than $13,000,000, the vendors were to repay 45 per cent of the deficit. The figure of 45 per cent effectively represented the share in the project which was being purchased by the defendants (although they were buying different assets of the project in different shares and the asset which was to be the washplant for the coal mine was to be wholly owned by the second defendant).
>
> [3] The contract of sale was completed on 19 April 2007. The plaintiffs' case is that the amount expended by them to advance the project to its position at that date was $15,326,124.26. Accordingly, they claim 45 per cent of the difference between that sum and $13,000,000, which is $1,046,755.92.
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> [4] The defendants' case is that the amount expended was no more than $11,806,124.26. They counterclaim for 45 per cent of the difference between that sum and $13,000,000, which is $537,244.08. Alternatively they claim that they

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1 *QCoal P/L & Anor v Cliffs Australia Coal P/L & Anor* [2009] QSC 130 at [1] – [5], [7] – [8].

were misled and deceived by the plaintiffs as to the relevant expenditure, for which they should be awarded damages under s 82 of the *Trade Practices Act* 1974 (Cth).

[5] The difference between the respective amounts comprises what the plaintiffs contend was the alleged expenditure for five of their employees or consultants. Most of this difference consists of an amount of $2,700,000, which they say is the sum which is unpaid but owing by the first plaintiff ('QCoal') to Mr Christopher Wallin who, at all relevant times, has been its only shareholder and director. The defendants' case is that the alleged expenditures for these five people cannot be claimed either because the relevant amount was not actually paid, or at least paid prior to completion of the contract of sale, or because it was not an expenditure for the purpose of advancing the Sonoma Project.

...

[7] Mr Wallin is said to be owed $2.7 million under a written contract with QCoal dated New Year's Day 2004. Mr Wallin signed for each party. The agreement recited:

> 'QCoal Pty Ltd ('QCoal') is interested in developing the Sonoma coal deposit into a profitable mine. It recognises the need for skilled and experienced guidance over a range of areas.
>
> To do so will require:
>
> 1. further drilling to increase the resources and reserves;
> 2. detailed mine planning;
> 3. pre-feasibility and feasibility studies;
> 4. rail transport agreements;
> 5. port agreements;
> 6. off-take agreements with overseas steel mills and power stations;
> 7. setting up management and marketing departments to progress the project;
> 8. obtaining finance for development;
> 9. obtaining suitable joint venture partners;
> 10. obtaining all government approvals including mining leases, environmental authorities, etc.'

The work which Mr Wallin agreed to perform for his company was expressed as follows:

> 'Christopher Wallin will assist QCoal during the development and negotiation processes to achieve the above requirements by advising on the most

> appropriate exploration, engineering and financial transaction plans. At the proper time in the negotiations, Christopher Wallin is also prepared to supervise and co-ordinate with QCoal the activities of all consultants. Christopher Wallin will advise QCoal on all aspects of the Project and will prepare the necessary reports and analyses as requested and when appropriate. Christopher Wallin will participate in the negotiation process and will advise QCoal on valuation, price and negotiation tactics and will provide other advisory services as necessary or when requested.

The consideration for these services was to be a so-called 'Transaction Fee' which was to be:

> 'paid on [sic] connection with each completed direct or indirect acquisition of shares in the Sonoma Coal Project, or merger, joint venture or financing that involves the Project Development and QCoal.'

The 'Transaction' was to occur upon these events:

> '(i) grant of mining lease for the Sonoma Coal Project; and
>
> (ii) joint venture parties contribute funds to the project or finance is raised sufficient to meet the liability of $2.7 million.'

It was agreed that the Transaction Fee would be:

> 'equal to A$2.7 million provided the Transaction Value exceeds $50 million and proportioned down for lesser amounts.'

The 'Transaction Value' was to be:

> 'based on any amounts paid or committed for stock or assets … plus the value of any interest-bearing debt and on-interest-bearing long-term liabilities assumed by the buyer and any current assets retained by the seller as part of the consideration.'

The Transaction Fee was to be paid 'in cash at the same time as shares or ownership titles transfer on the closing date'.

[8] The defendants accept that the Transaction Value, having regard to elements of their transaction by which they will invest further funds above the purchase price, exceeds $50 million so that the Transaction Fee would be A$2.7 million. More generally they accept that this written agreement is authentic and that it gave rise to a contract intended to have effect according to its terms. This is notwithstanding that it was an agreement made by Mr Wallin with a company represented only by himself, and that none of QCoal's employees who

> gave evidence, including its CEO Mr Ever, had seen this agreement until after shortly before, or sometime after, the signing of the contract of sale. As it happens, although the 'Transaction' has occurred (the last of the mining leases was granted on 13 September 2007), Mr Wallin has not yet caused any of the $2.7 million to be paid to him."

[6] QCoal had entered into similar contracts to pay much smaller "Transaction Fees" to Mr White and GeoContext (Mr Pattison), but only Mr Wallin's Transaction Fee of $2.7 million is directly relevant in this appeal.

The proper construction of cl 6.9(a) of the SPA

[7] The first issue in the appeal turns upon the meaning of the words which I have emphasised in cl 6.9(a)(i) of the SPA:

"**6.9 Adjustment to Purchase Price post Completion**

(a) Within 30 Business Days after Completion, QCoal will provide a statement to the Purchasers setting out:

(i) **the amount expended by the Vendors** to advance the Sonoma Project to its position at Completion including (but not limited to) the following:

A. exploration and development costs;

B. costs incurred in making the Mining Lease Applications and all accompanying documentation and consents;

C. amounts paid under the Compensation Agreements (other than the amount payable under clause 3.1(b) of the Supplementary Compensation Agreement with the Watts);

D. amounts incurred to prepare the Cultural Heritage Management Plan and any amounts paid under that plan; and

E. amounts paid under each of the Mining Contracts, Service Contracts and Transportation Contracts,

("Final Pre-Development Costs"); and

(ii) the difference between the Final Pre-Development Costs and $13,000,000.00 ("Final Calculation").

(b) The parties agree that if the Final Pre-Development Costs is:

(i) more than $13,000,000.00 then the Purchase Price is increased by an amount equal to the JV Sale Interest of the Final Calculation; and

(ii) less than $13,000,000.00 then the Purchase Price is decreased by an amount equal to the JV Sale Interest of the Final Calculation,

("Adjustment Amount").

(c) If requested by either the Purchaser or the Washplant Purchaser ("Requesting Party"), QCoal must provide the Requesting Party and its Representatives (at the Requesting Party's cost) with access to its Records and employees for a period of 90 days ('Review Period') after receipt of the Final Calculation to:

(i) inspect the Records used to prepare the calculation of the Final Pre-Development Costs and the Final Calculation; and

(ii) speak with employees of QCoal for the sole purpose of reviewing the Final Pre-Development Costs and the Final Calculation.

(d) In carrying out its inspection and speaking with employees of QCoal in accordance with clause 6.9(c), the Requesting Party must, and must ensure that its personnel, act reasonably in seeking information including by limiting the number of requests so as to not unreasonably burden QCoal.

(e) Within 5 Business Days of the end of the Review Period:

(i) if the Final Pre-Development Costs are more than $13,000,000.00, the Purchasers must pay the Adjustment Amount to the Vendors; or

(ii) if the Final Pre-Development Costs are less than $13,000,000.00, the Vendors must pay the Adjustment Amount to the Purchasers."

[8] The primary judge concluded that the Final Pre-Development Costs included that which was spent both before and after completion up to the time of the statement provided under cl 6.9(a).[2] He also found that the "Transaction Fee" in Mr Wallin's contract with QCoal (the material terms of which are set out in paragraph 7 of the primary judge's reasons quoted earlier) was payable for the purpose described in cl 6.9(a)(i) of advancing the Sonoma Project to its position at completion. The primary judge rejected Cliffs' contentions that the contrary conclusion was required by the facts that (a) the Transaction Fee fell for payment only because the parties had entered into the SPA (which was a "Transaction" in terms of Mr Wallin's contract) and (b) because Mr Wallin was the only director and shareholder of QCoal he would have undertaken his work in advancing the Sonoma Project in any event, so that his Transaction Fee was not an inducement for that work.[3]

Does "amount expended by the Vendors" include undischarged liabilities?

[9] The primary judge nevertheless concluded that QCoal's claim failed because "Final Pre-Development Costs" did not comprehend liabilities which had not been discharged by payment before QCoal gave its statement under cl 6.9(a). That is the issue in the appeal.

[10] QCoal argued that the judge erred in construing the word "expended" in cl 6.9(a)(i) as requiring an amount to have been paid because he failed to give effect to the context in which the word was used in the sentence. QCoal emphasised that items

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2 [2009] QSC 130 at [29] – [32].

3 [2009] QSC 130 at [33] – [34].

B, C and D included costs or amounts which were "incurred" and "payable" and that the primary judge accepted that the word "incurred" can be used in relation to either an actual expenditure or a liability.[4] Accepting that is so, the primary judge was nevertheless plainly right in thinking that the ordinary meaning of the word "expended" in the phrase "amount expended" in cl 6.9(a)(i) connoted payment.[5] Depending upon context, the word "incurred" might connote an undischarged liability but it also might refer only to a liability discharged by payment. I agree with the primary judge's conclusion that, whilst the references to "costs incurred" in item B and "amounts incurred" in item D might, if considered alone, be thought to include amounts which were unpaid but for which the vendors were liable, in the context of cl 6.9(a)(i) they must be understood as instances of expenditure. QCoal's argument treated the word "incurred" in items B and D and the word "payable" in item C as indications that "expended" comprehended unpaid liabilities. The more natural construction is, as the primary judge put it, that "…by agreeing that within the amount expended by the vendors there would be certain costs or amounts which had been incurred, the parties were expressly including certain kinds of expenditure."[6] The word "including" in the introductory part of cl 6.9(d) conveys no more than that.

[11] QCoal referred the Court to a body of evidence to this effect: the parties intended to progress the mining lease applications and otherwise pursue the project after entry into the SPA; none of the mining leases had been granted as at the date of execution of that agreement on 3 April 2007; the SPA itself anticipated that further costs would be incurred in progressing those mining lease applications and otherwise pursuing the project after execution of the SPA; and the SPA transferred to Cliffs an interest in the benefit of the mining lease applications and the mining leases once they were granted. QCoal argued that where all parties appreciated that QCoal would incur liabilities in that way, some of which would probably not be due for payment or in fact discharged by payment before QCoal gave its statement under cl 6.9, it was inconsistent with a commercial construction of cl 6.9 that Cliffs would get the benefit of the work undertaken without bearing a proportion of the costs incurred merely on account of such non-payment. There are, however, competing commercial considerations. The primary judge appreciated, as cl 5.1 of the SPA required, that QCoal would continue to carry out activities from the date of the SPA until Completion, but noted that cl 6.9(a)(i) nevertheless allowed an adjustment calculated with reference only to "the amount expended" by QCoal in that period. That is consistent with a view that insistence upon payment rather than merely the incurring of a liability would provide more certainty and finality for Cliffs. Though, as QCoal pointed out, payment would not establish the legitimacy and reasonableness of a liability, payment could readily be demonstrated and it would provide some comfort that the liability was legitimate and reasonably incurred. It would also be odd if Cliffs were required to make an immediate payment to QCoal in respect of a liability, perhaps a very substantial liability, which QCoal itself might not be required to discharge until some date in the distant future. As the primary judge observed:

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4 [2009] QSC 130 at [25], citing *New Zealand Flax Investments Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 179 per Dixon J at 207, and *Federal Commissioner of Taxation v James Flood Pty Ltd* (1953) 88 CLR 492 at 507.

5 [2009] QSC 130 at [23], citing definitions of "expend" in the Shorter Oxford English Dictionary and the Macquarie Dictionary, and at [28]. Cliffs also cited the similar definition in Black's law Dictionary, 6th Ed.

6 [2009] QSC 130 at [25].

> "…It was within the vendors' ability to secure their entitlement to a contribution to these development costs by paying for them. It is more likely to attribute to the purchasers the intention that they would contribute to amounts in fact outlayed by the vendors, rather than making an immediate contribution to a liability which might not have to be discharged for some time. . . ."[7]

[12] Contrary to another of QCoal's arguments, the judge's reference to QCoal's ability to pay sums before issuing a statement under cl 6.9 did not involve the use of post-contractual conduct as an aid in interpretation of the contract.[8] Rather, it was a legitimate consideration of the consequences of the competing constructions of the ambiguous provisions in cl 6.9.[9] That may be contrasted with QCoal's failure to pay Mr Wallin's Transaction Fee before delivering the cl 6.9 statement, which might suggest that QCoal believed that the operation of that clause did not depend upon payment. Such an uncommunicated, subjective view of the meaning of a contract is irrelevant to its proper construction.[10]

[13] The trial judge also concluded that item D required what he thought was in any event the ordinary meaning of the clause, that Final Pre-Development Costs comprehended only amounts which had been paid. The primary judge said:[11]

> "…This must be so when item D is considered because the parties have agreed that what will be included are amounts incurred in the preparation of the Cultural Heritage Management Plan as well as amounts *paid* under that plan. There would be no sensible basis for an agreement to include only amounts *paid* under the plan but to include unpaid liabilities of its preparation, where the preparation of the plan would necessarily precede any payment under it."

[14] QCoal contended for error in this reasoning on the ground that its logical extension is that there would be no need for the parties to have expressly included amounts incurred. QCoal cited *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*[12] for the proposition that the resulting redundancy contravened the principle of construction that each word in the clause should be construed so that it operates harmoniously with the rest of the clause and the agreement as a whole. QCoal also argued that the primary judge had wrongly assumed that each aspect of preparation of the plan, and thus each amount incurred in preparing the plan, was necessarily complete and the liability crystallised on finalisation of the plan and before the performance of each task which was paid "under it". Cliffs responded that QCoal's construction would render redundant the expression "amount paid" so that its submission took the matter no further, and that the primary judge did not make the erroneous assumption asserted by QCoal. My own view on this topic coincides with that of the primary judge. QCoal did not argue that there was any evidence that all amounts incurred in preparing the plan had not in fact been incurred and paid before the SPA was made and before any

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7 [2009] QSC 130 at [28].

8 QCoal cited *FAI Traders Insurance Company Limited v Savoy Plaza Pty Ltd* [1993] 2 VR 343 for the proposition that this was contrary to principle.

9 See *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99 per Gibbs J at 109 – 110.

10 *Toll (FGCT) Pty Limited v Alphapharm Pty Ltd* (2004) 219 CLR 165 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at [40].

11 [2009] QSC 130 at [25].

12 (1973) 129 CLR 99 at 109.

amount was paid under the plan. There could be no sensible basis for the SPA to include only amounts paid under the plan but then also to include unpaid liabilities of its preparation, when the preparation of the plan would ordinarily be expected to precede payment under it.

[15] QCoal also argued that the broader interpretation of "expended" for which it contended derived support from the exclusion in item C from "amounts paid" under the compensation agreements of any "amount payable" under cl 3.1(b) of the Supplementary Compensation Agreement ("SCA") with the owners of the underlying freehold title to the land, Mr and Mrs Watts. Clause 3.1(a) of the SCA required QCoal to pay to Mr and Mrs Watts $500,000.00 within five business days of satisfaction of certain conditions precedent and cl 3.1(b) required a further payment of $8,750,000.00 within 50 business days of the grant of the relevant mining leases. Clause 3.2 provided that if the payments had not been made by 31 August 2007, then QCoal and another would pay Mr and Mrs Watts $60,000.00 per month until all of the payments had been made. The primary judge thought that item C of the SPA did not assist QCoal's argument because it provided that the amount of the payment under cl 3.1(b) of the SCA was an exclusion from amounts "paid". It was therefore difficult to see how the exclusion could affect the plain meaning of the words "paid" and "expended" in item C and the introduction of cl 6.9(a)(i). The expression "amount payable under cl 3.1(b)" identified an amount which, if paid by the relevant date for cl 6.9, would fall within the clause, but that was subject to the express exclusion of any amount paid to Mr and Mrs Watts' agreement to discharge what was then payable under cl 3.1(b).[13]

[16] QCoal attacked this reasoning on the basis that, because the conditions precedent referred to in cl 3.1(a) of the SCA were not required to be satisfied until 30 June 2008 (long after entry into the SPA on 3 April 2007), it could not have been contemplated that the amounts payable under cl 3.1 would have been paid by the date that the statement was provided under cl 6.9. Further, cl 3.1(b) required payment within 50 business days from the grant of mining leases, which had not been granted when the SPA was made. QCoal therefore argued that it was more probable that the parties did not intend the payment to have been made before the date of the statement. That argument does not satisfactorily answer the point made by the primary judge that item C itself contemplates that the only amounts under Compensation Agreements which might form part of the Final Pre-Development Costs are "amounts paid". That suggests that the SPA contemplated that some such amount might in fact be "paid" by the time of the statement under cl 6.9(a) and that Item C was specifically designed to exclude the payment of any such amount which was payable under cl 3.1(b) of the SCA. That this is so also derives some support from cl 14(b) of the SPA which, as Cliffs argued, contemplated that QCoal's obligation to pay the amount payable under cl 3.1(a) of the SCA might arise before the date of completion although it had not arisen when the SPA was made. Cliffs also pointed out that cl 14(a) of the SPA bound Cliffs to the Compensation Agreements (including the SCA with the Watts) on and from the date of completion and to the extent of Cliffs' Mine Sale Interest (8.33 per cent). As the primary judge reasoned,[14] the evident reason for the exclusion in item C was to preclude the possibility that, by a payment before the relevant date for adjustment of the price under cl 6.9, QCoal would be able to claim 45 per cent of the payment rather than the contribution of 8.33 per cent under cl 14.

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13 [2009] QSC 130 at [27].

14 [2009] QSC 130 at [27].

[17] I thought that the most persuasive of QCoal's arguments was that on the construction preferred by the primary judge at least some costs which were legitimately incurred by it to develop the project, an interest in the assets and benefit of which were transferred to Cliffs, would be borne solely by QCoal, the junior and inexperienced joint venture partner, merely because it had not paid for the costs before giving a statement to Cliffs under cl 6.9. As QCoal pointed out, if it had incurred but not discharged a liability to a contractor which had performed work essential to the advancement of the project the result of the construction preferred by the primary judge would be, at least in some cases, that the costs would be caught neither by SPA nor by the joint venture agreement, so that the joint venturers would take the benefit of the work whilst QCoal would bear sole responsibility for paying for it. However the countervailing considerations discussed in paragraph 11 of these reasons persuade me that QCoal's arguments based upon the commercial considerations are of insufficient strength to justify the necessary departure from what I think is the clear meaning of the words.

Conclusion as to the construction of cl 6.9

[18] I agree with the primary judge's conclusion, which in my respectful opinion best gives effect to what a reasonable person in the position of the contracting parties would have understood was conveyed by the words of cl 6.9(a) in the textual and broader context in which those words appeared.

Cliffs' counterclaim

[19] Because QCoal's claim in relation to the Transaction Fee for Mr Wallin was correctly disallowed by the primary judge, Cliffs' counterclaim for damages does not fall for decision. However the primary judge considered the claim in case he was found to be wrong about Mr Wallin's fee and I will adopt an analogous approach. What follows is expressed on that premise, that is to say, that Mr Wallin's Transaction Fee must be taken into account under cl 6.9 even though QCoal had not paid it before issuing the statement under cl 6.9(a).

[20] By the SPA, QCoal warranted that:

> "Except for any predictions or projections into the future, all information given by the Vendors or any Vendors' Representatives to the Purchasers or to the Purchasers' Representatives in the course of negotiations leading to this Agreement and Completion…(was) correct and not misleading as at the time of giving such information."

[21] Cliffs claimed that QCoal's failure prior to entry into and completion of the SPA to disclose anything of the contingent nature and quantum of fees which included the Transaction Fee payable to Mr Wallin was misleading or deceptive or likely to mislead or deceive in contravention of s 52 of the TPA and also constituted a breach of the warranty in the SPA. In each case Cliffs claimed damages for the loss of a chance to negotiate a contract which would specifically exclude the Transaction Fees from the operation of cl 6.9 or in which the price would be decreased to produce the same result.

[22] The primary judge explained that the onus might be upon Cliffs to prove that it was more probable than not that it would not have made a contract which allowed QCoal to recover 40 per cent of the Transaction Fees rather than merely proving the loss of the specified opportunity, but observed that no such point was made by QCoal. It defended the counterclaim on the ground that there was "simply no chance that

[QCoal] would have agreed to different terms."[15] The appeal was litigated upon the same basis, namely that Cliffs' proper claim was for damages for the loss of a commercial opportunity or chance of the kind discussed in *Sellars v Adelaide Petroleum ML.*[16]

[23] QCoal argued that the primary judge erred (a) in finding that QCoal's non-disclosure of Mr Wallin's contract was misleading or deceptive, and (b) in finding that QCoal's non-disclosure caused Cliffs to lose any opportunity to negotiate a reduction in the purchase price.

(a) The misleading or deceptive conduct and breach of warranty

[24] QCoal did not disclose the contracts for the Transaction Fees, including Mr Wallin's contract, until months after completion. The evidence to which we were referred established that Cliffs' reaction was one of immediate, sustained and consistent outrage. Cliffs' case at trial was that the contracts for the Transaction Fees were so extraordinary that they should have been disclosed during the due diligence process which the parties agreed upon before execution of the SPA. The primary judge was not persuaded that the agreements for the Transaction Fees with GeoContext and Mr White were so extraordinary as to make their non-disclosure misleading or deceptive, but accepted that in the case of Mr Wallin's contract there were additional features which required the conclusion that non-disclosure of it was misleading or deceptive or likely to mislead or deceive. The primary judge summarised those additional features in the following passage of his reasons:[17]

> "But in the case of Mr Wallin's agreement, as the defendants argue, there are additional features. The liability here hardly derives from an arms length transaction. It results from a meeting of Mr Wallin's personal and corporate minds.[18] And there is the feature that in this instance, the inclusion of Mr Wallin's fee would be the commercial equivalent of adding $1,215,000 to the overall benefit to the vendors' side of this transaction, because Mr Wallin was the sole shareholder of QCoal. This was not simply an agreement to pay for an employee's services contingent upon there being a transaction which provided the funds to do so.
>
> The question here is not whether Mr Wallin was entitled to the benefit of what the defendants concede was his contract. Nor is it a question of whether the amount of the fee, if considered as a payment for Mr Wallin's services over some years, was excessive. Although this was for services said to have been rendered by Mr Wallin, this was a sum which was payable to him only in the event of the completion of this sale. The transaction thereby advantaged the vendors' side, and at the purchasers' cost, in a way and to an extent of which the defendants were unaware. They were made to believe that they were paying, as a contribution to the pre-development expenses, a share of what the vendors had had to pay. In truth, they were also adding $1,215,000 to the net benefit of this transaction to the vendors' side of it. I am persuaded that the defendants could have

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15 [2009] QSC 130 at [53] – [54].

16 (1994) 179 CLR 332.

17 [2009] QSC 130 at [50] – [51].

18 The primary judge had earlier noted that Mr Wallin was the sole director and shareholder of QCoal and he signed the contract both on behalf of QCoal and for himself.

> reasonably expected the disclosure of the facts and circumstances of Mr Wallin's agreement, and that the plaintiffs thereby engaged in conduct which was misleading or deceptive or likely to mislead or deceive."

[25] The primary judge thought that QCoal's non-disclosure in those circumstances justified a finding of contravention of s 52 of the TPA in accordance with the principles expressed by Black CJ in *Demagogue Pty Ltd v Ramensky*:[19]

> "Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure: the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of 'mere silence' or of a duty of disclosure can divert attention from that primary question. Although 'mere silence' is a convenient way of describing some fact situations, there is in truth no such thing as 'mere silence' because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed."

[26] QCoal contended that the circumstances identified by the primary judge, when analysed in light of other evidence, did not individually or collectively justify a conclusion that Mr Wallin's contract was so extraordinary that its non-disclosure amounted to misleading or deceptive conduct. It is of course necessary to consider the overall effect of the circumstances taken as a whole rather than limiting the focus to any particular circumstance, but with that in mind I turn to the particular arguments.

[27] Mr Wallins gave evidence of his impressive qualifications as a geologist and that he had worked long hours in advancing the project for some three and a half years with no remuneration other than modest director's fees. QCoal pointed out that there was no issue that Mr Wallin provided those services; it was not proved or found that the $2.7 million fee was not reasonable for the services he did provide; and QCoal presumably would have incurred a similar amount of fees had the services been provided by a third party contractor. QCoal argued that because the fee payable to Mr Wallin under his contract with QCoal was a proper development expense its magnitude could not be a circumstance which gave Mr Wallin's contract an "extraordinary flavour". QCoal also contended that Mr Wallin's fee was relatively insignificant in comparison with fees for other, similar projects.

[28] Those material considerations must be assessed in the context of the other circumstances. The primary judge was right to conclude that reasonableness of the quantum of the fee was not determinative of the question whether non-disclosure was misleading where (a) QCoal did not disclose Mr Wallin's Transaction Fee of $2.7 million though it had embarked upon a course of disclosing material matters to Cliffs' in the course of the latter's due diligence investigation, (b) Mr Wallin contracted for his fee with himself as QCoal's representative, (c) the fee was payable upon a contingency which included the completion of the SPA, (d) the fee was a large one, (e) the fee was substantial in comparison with the amount

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[19] (1992) 39 FCR 31 at 32. At [2009] QSC 130 at [47] the primary judge referred also to *Warner v Elders Rural Finance Ltd* (1993) 41 FCR 399 at 401 – 402.

originally attributed to Pre-Development Expenses ($7.1 million), (f) the fee was substantial in comparison with the base figure of $13 million in the SPA for the Final Pre-Development Costs, (g) payment of the fee would result in a substantial commercial benefit ($1.215 million) for QCoal's side of the transaction and an equivalent cost for Cliffs, (h) Mr Wallin's contract expressed the fee as a lump sum with no specification of the manner of its calculation and (i) the same fee would become payable regardless of the date of the transaction which triggered its payment, so that the amount of the fee did not vary in accordance with the time occupied by Mr Wallin in earning it. (As to the last point, Mr Wallins' evidence was that when he made his contract with QCoal he anticipated that some three or four years would elapse before a sale which would trigger payment of the fee. The expressed uncertainty in that prediction neatly illustrated the point in (i).) Taken together and bearing in mind the matters upon which QCoal relied in argument, those circumstances persuade me that Cliffs' non-disclosure of the nature and magnitude of Mr Wallin's Transaction Fee was misleading.

[29] QCoal emphasised the primary judge's finding that, despite the absence from Mr Wallin's contract of an articulated basis for the calculation of the fee and that it was to be paid regardless of the time occupied by Mr Wallin, the purpose of the fee was as expressed in the contract.[20] But that is not to deny that those features remained relevant to the decision whether the nature and quantum of Mr Wallin's fee was so extraordinary that Cliffs was reasonably entitled to expect its disclosure in the due diligence process prior to execution of the SPA. The primary judge was also right to attribute significance to the feature that the fee was payable only in the event of completion of a transaction of a kind that included the SPA and then to the sole shareholder of QCoal. Though, as QCoal submitted, Mr Wallin's fee was not a success fee in the sense that a selling agent's commission is a success fee, nor was it a conventional salary or fee for service. As the primary judge considered, the effect of cl 6.9 of the SPA in relation to Mr Wallin's Transaction Fee was that QCoal was not merely paying a contribution to the Pre-Development Expenses but was also adding $1,250,000 (45 per cent of $2.7 million) to the "vendors' side" of the transaction. QCoal argued that this involved an erroneous convolution of QCoal's interests with those of Mr Wallin, but the primary judge was obliged to consider the commercial realities that Mr Wallins was QCoal's alter ego, his work presumably increased the value of the subject matter of the sale as well as (contingently) earning his salary, and the payment which fell due on completion of the SPA provided a very substantial benefit which otherwise would not have crystallised except upon completion of a transaction of that kind.

[30] QCoal referred to evidence and to the primary judge's findings to the effect that[21] (a) at the beginning of the negotiations in October 2006 QCoal responded to a request on behalf of Cliffs for details of Pre-Development Costs of $7.1 million shown on an information memorandum earlier provided by QCoal to Cliffs by providing a document categorising such expenses totalling $7,070,708 which included $1,776,933 against an item called "Geological" and $1,964,186 against an item called "Project Management & Administration"; (b) a representative of QCoal told a representative of Cliffs that Mr Wallin's time and that of Mr Pattison (of GeoContext) was within "Geological" and that Mr White's time was within the latter category; (c) on 22 December 2006 the parties prepared a "Terms Sheet" in which, against the description "Reimbursement of Pre-Development Expenses" QCoal

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20 [2009] QSC 130 at [34].

21 [2009] QSC 130 at [40], [41].

wrote that it would be reimbursed for the purchasers' share "of the A$7.1 million of project pre-development expenses and other bona fide project expenses that have been incurred by QCoal (i.e. A$3.2 million based on the purchasers' 45% interest)" (QCoal also pointed to evidence that this Terms Sheet acknowledged that QCoal had provided all documents requested by Cliffs in connection with the evaluation of the investment and would "make available any further documents requested by [Cliffs]", the fulfilment of which undertaking was accepted in the evidence of Cliffs' representatives; (d) on about 13 March 2007 QCoal, on Mr Wallin's instructions, provided a document to Cliffs which represented that Pre-Development Costs to 30 June 2006 had increased by $1,079,045 for "additional management fees not previously booked" to $8,511,899; and (e) that on 29 March 2007 QCoal's Mr Ever sent an email to Cliffs' lawyers referring to a "summary of spend until end March" headed "Total Costs incurred to date" and which represented that in the period from 13 October 2004 to 28 March 2007 those costs ("the spend") amounted to $15,772,157 and included a component of $4,920,955 attributed to "internal geological research & management". (The significance of the reference to "spend" was in issue in the parties' submissions. I consider that "spend" in this context connoted actual payment, but the contrary conclusion would not lead me to a different result on the present issue.)

[31] QCoal argued that this material demonstrated that Cliffs appreciated before entry into the SPA that the final Pre-Development Costs exceeded the base figure of $13 million, that they included a significant amount for "internal" geological research and management which included the cost of Mr Wallin's time and which costs had variously been described as "incurred", "spent" and "not previously booked", and that the parties proceeded on the convention that if Cliffs wanted any further information it would be provided by QCoal. Reference was also made to the fact that the parties appreciated that QCoal was a small mining operator with a handful of people constituting the internal management and geological team working on this project (so that references to the internal management fees and management and geological team naturally included reference to Mr Wallin), that the amount of Pre-Development Costs was proportionately small for a project of this size, that Cliffs was a sophisticated international company which had numerous, well-qualified people involved in the investigation and analysis of the transaction ultimately reflected in the SPA, and that Cliffs' Mr Kipfstuhl gave evidence that he would not have been surprised if the pre-development costs included some allocation of Mr Wallin's time.

[32] However, it was not put to any of Cliffs' witnesses that they appreciated that QCoal contingently owed Mr Wallin millions of dollars or that QCoal's liability to him was not incurred at arms length. The effect of the primary judge's findings on this topic[22] was that two categories of pre-development expenses described in an early version of a schedule produced by QCoal included Mr Wallin's time and the time of others in "Geological" and "Project Management & Administration" Expenses, that subsequent iterations of the schedules included those categories, and the figure of $4.9 million was described as "internal geological research and management" with no explanation, itemisation or attribution of the amounts comprising the figure. That fell considerably short of disclosure of the magnitude and nature of Mr Wallin's Transaction Fee. Cliffs would not become aware, and a reasonable person in its position would not become aware of the nature and extent of the commercial benefit in Mr Wallin's contract, simply by learning that internal

22 [2009] QSC 130 at [40].

geological research and management fees of $4,920,955, which must have included some time for QCoal's shareholder and controller, had been added to the Pre-Development Expenses. The matters identified by QCoal do not suggest error in the primary judge's findings or individually or collectively justify the conclusion that Cliffs appreciated or should have appreciated that the transaction possessed any of the main features which rendered its non-disclosure misleading.

[33] QCoal particularly emphasised evidence by Mr Kipfstuhl, who was Cliffs' representative primarily responsible in the due diligence process for gathering data from QCoal and sharing it with others within Cliffs' organisation. When he was asked about his attitude to the need to identify and consider items of pre-development costs Mr Kipfstuhl said that he saw no need at the time to look at the composition of QCoal's various estimates, he did not ask for the documents which lay behind the figures because Cliffs was basically looking at "bottom line numbers" needed for its various forecasts, and that Cliffs' understood that it would subsequently be able to audit the figures (inferentially, under cl 6.9). That and similar evidence by Cliffs' Mr Spoors explains why Cliffs did not make further enquiries which might have led to disclosure of the undisclosed Transaction Fee contracts, but it is not decisive. A plaintiff is not denied a remedy for breach of s 52 merely because the plaintiff failed to check the accuracy of a representation,[23] but I accept that the matters here relied upon by QCoal should be taken into account in determining whether Cliffs should reasonably have expected disclosure of Mr Wallin's contract. The fact that, in a context in which the parties proceeded on the footing that QCoal would respond to Cliff's requests for information, Cliffs was told enough about the $4.9 million attributable to "internal geological research and management" to put Cliffs on enquiry had that been of concern, is material in the determination whether or not the failure to disclose the information was misleading. That is so if and in so far as such conduct might suggest that further disclosure was not required. But in my opinion the concatenation of features of Mr Wallin's Transaction Fee summarised earlier so overwhelmingly called for disclosure of its nature and magnitude that this matter, even when taken together with the other matters upon which QCoal relied, does not falsify the primary judge's conclusion that the non-disclosure constituted misleading conduct.

[34] Cliffs relied also upon the primary judge's rejection of the claim of misleading conduct in relation to the much smaller Transaction Fees payable to Mr White and GeoContext on the grounds that the quantum of those fees did not concern Cliffs, that Cliffs would have made no complaint had they been paid over the period of service of those persons rather than upon completion of the transaction, and that Cliffs' unease about those fees appeared to be that it was "being asked to contribute towards the cost of selling a share of the plaintiffs' interest rather than something which would have been an appropriate expense in developing the mine had it then been in the hands of the joint venture". The trial judge concluded that in circumstances where those fees were paid in consideration of services for the development of the project it was not misleading or deceptive for QCoal not to have volunteered the agreements with those two parties.[24] But that does not detract from

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23 See *Australian Competition & Consumer Commission v Oceana Commercial Pty Ltd* [2003] FCA 1516 per Kiefel J at 75 [200]: *Neilsen v Hempston Holdings Pty Ltd* (1986) 65 ALR 302 at 309; *Sutton v AJ Thompson Pty Ltd (in liq)* (1987) 73 ALR 233 at 240 – 241; *Henjo Investments Pty Limited v Collins Marrickville Pty Limited (No 1)* (1988) 79 ALR 83; *Australian Cement Holdings Pty Ltd v Adelaide Brighton Ltd* [2001] NSWSC 799 at [72].

24 [2009] QSC 130 at [49].

the significance of the additional circumstances I have discussed which put Mr Wallin's Transaction Fee into an exceptional category.

[35] Ordinarily where there is an arms length contract of sale it might be very difficult to establish any reasonable expectation by a purchaser that the vendor will disclose material information, but such an expectation might more readily arise in a case where, as here, the vendor has embarked upon an extensive process of disclosing material information to the purchaser.[25] In that context, the numerous features concerning Mr Wallin's Transaction Fee which I have discussed justified a finding that non-disclosure of its nature and magnitude amounted to a misrepresentation and misleading or deceptive conduct in contravention of s 52. [26]

(b) Causation

[36] The primary judge would have allowed $120,000 as damages under s 82 of the TPA for QCoal's contravention of s 52 and breach of warranty in failing to disclose anything of the contingent nature and quantum of the Transaction Fee provided in Mr Wallin's contract. The primary judge reasoned that had the disclosure been made there was "more than a theoretical chance of some adjustment to the terms of the contract, at least in relation to Mr Wallin's fee"; that under cl 6.9 of the SPA the inclusion of that fee obliged Cliffs to pay QCoal an amount equal to 45 per cent ("the JV Sale Interest") of it; and that the valuation of the lost chance should be assessed at 10 per cent of that amount, namely $120,000.[27] The primary judge's reasons for that conclusion were encapsulated in the following passage:[28]

> "[54] However, there was no submission for the plaintiffs that the case should not be characterised as one of a loss of a commercial opportunity or chance. Rather they argued that there was simply no chance that the plaintiffs would have agreed to different terms. Mr Wallin gave evidence to that effect and claimed that his company was in a position to look to other parties in place of the defendants. He said that he would not have been willing to accept a joint venture partner who was prepared to question what he said were such relatively 'trifling' fees. Mr Wallin explained that this was during a favourable economic climate in which to attract investors in a coal mine. Indeed, in August 2007, when the defendants complained about the inclusion of these fees under cl 6.9, the plaintiffs made an open offer to buy back their interest at the price which they had paid. The offer was not accepted and from this the plaintiffs say that the contract made in April 2007 would have been in no different terms had these matters been disclosed.

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25 See the discussion in *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452 by Black CJ, von Doussa and Cooper JJ at 463 – 467.

26 See *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202; *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 88; *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477 at 504; *Henjo Investments Pty Limited v Collins Marrickville Pty Limited (No 1)* (1988) 79 ALR 83 at 93. A misrepresentation is not an essential finding for a finding of misleading or deceptive conduct: see *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25 at [103].

27 0.10 x 0.45 x $2,700,000, rounded down to $120,000: [2009] QSC 130 at [56].

28 [2009] QSC 130 at [54] – [55].

> [55] Accepting that the vendors were not in a weak bargaining position, it does not follow that they would not have been prepared to give way to some extent. I do not accept Mr Wallin's claim that it is certain he would have not gone ahead had Cliffs raised these fees in the course of the negotiations. After all this was a transaction in which Cliffs was not only agreeing to pay a price in excess of $35,000,000, but was agreeing to fund the construction of the washplant which, it was expected, would cost more than $100,000,000. It is unlikely that either side would have let this matter get in the way of a concluded contract. It is more likely that some compromise would have been reached. I find that there would have been little prospect that the plaintiffs would have agreed to exclude Mr Wallin's fee in its entirety. But the defendants would have had some advantage in those negotiations from the fact that, as the plaintiffs' accountant Mr Boyd explained, these agreements for fees were not reflected in the plaintiffs' accounts, and were added relatively late to the reports of expenses provided to the defendants during the period prior to the contract."

[37] Having regard to the way in which the case was litigated, the questions for the primary judge were whether Cliffs had proved on the balance of probabilities that QCoal's contravening conduct "caused the loss of a commercial opportunity which had some value (not being a negligible value)"[29] (or "a chain of causation that continues up to the point when there is a substantial prospect of acquiring the benefit"),[30] and then to ascertain that value "by reference to the degree of probabilities or possibilities".[31]

[38] Cliffs' written argument characterised QCoal's attack on the primary judge's conclusion as a very difficult challenge to an assessment on the probabilities and possibilities, but as I apprehended QCoal's argument it was that Cliffs had failed to establish the causal link between the failure to disclose Mr Wallin's contract or its nature and the claimed loss of opportunity to negotiate a reduction on the purchase price. That required Cliffs to prove, as the primary judge found, that on the balance of probabilities QCoal's contravening conduct caused Cliffs to lose a commercial opportunity which had more than a negligible value.

[39] One ground of QCoal's challenge lay in the evidence which suggested that Cliffs was not concerned about the quantum of the pre-development costs because it had the opportunity to audit the costs under cl 6.9. As to that, in light of my earlier discussion of that evidence it is sufficient here to observe that where Cliffs did not know of the particular features which rendered non-disclosure misleading, Cliffs' provisional acquiescence in the amount and details of the disclosed pre-development expenses did not negate the inference of reliance drawn by the primary judge. I will discuss the chain of causation accepted by the primary judge in the

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29 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 per Mason CJ, Dawson, Toohey and Gaudron JJ at 355. See also *Daniels v Anderson* (1995) 37 NSWLR 438 at 530; *Heenan v Di Sisto* [2008] NSWCA 25 at [32] – [34].

30 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 per Brennan J at 368.

31 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 per Mason CJ, Dawson, Toohey and Gaudron JJ at 355.

course of considering Cliffs' more substantial argument, which concerned QCoal's omission to call its decision maker, Mr Carrabba. In order to understand this argument it is necessary to refer to some of the evidence of other employees of Cliffs and its related corporations to which the Court was referred.

[40] Mr Gunning led the negotiations for Cliffs until the end of December 2006. His evidence was given in the form of a written summary tendered without objection at the trial. He said that, had QCoal disclosed the Transaction Fee contracts, he would have discussed them with Cliffs' Mr Spoors, who was responsible for the accounting, tax, legal, and valuation side of the due diligence work and heavily involved in the financial modelling process; Mr Gunning initially would have sought to persuade QCoal to abandon its claim to have the fees reimbursed. If that approach did not succeed he would have included the fees in Cliffs' financial model and negotiated for a position whereby any obligation in Cliffs to reimburse the fees did not involve it in assuming additional costs, that is, that Cliffs ultimately would pay no more than 45 per cent of the value of the mine (taking into account the fees) for a 45 per cent interest in the mine. (I interpolate here that QCoal developed an argument in its written outline that the proportionately small amount of Cliffs exposure to liability - $1,215,000, being 45 per cent of $2,700,000 - would not have had any material impact on the value of the project for Cliffs in light of the internal rate of return for the project of 39.59 per cent shown in its financial model. But no such proposition was put to Mr Spoors and it does not detract from the force of Mr Gunning's evidence that he initially would have sought to negotiate the abandonment by QCoal of the Transaction Fees.)

[41] The most senior of Cliffs' employees who gave evidence at the trial was Mr Mehan, who led those negotiations from 1 January 2007 and later signed the SPA on behalf of Cliffs. He gave evidence that he did not learn of the Transaction Fees until months after entry into the SPA and he was then "very concerned"; it was clear to him that, particularly in the case of Mr Wallin's contract, they involved "a substantial amount of money"; his view was that QCoal had engaged in "a totally inappropriate way of dealing with these internal QCoal contracts"; and he reacted by calling QCoal's Mr Ever to seek his support to have them removed as claimed pre-development costs because "these were not bona fide or genuine". Mr Mehan vigorously pursued that view, with the resulting dispute in the present litigation. Mr Mehan maintained his evidence under cross-examination. In response to the suggestion that he would not have jeopardised Cliffs' prospects of finalising the very substantial SPA he said that he would have negotiated "very strongly to have them removed and that remains my position". In a preface to a subsequent question, senior counsel for QCoal observed that he accepted that Mr Mehan would have tried to negotiate for a better position: as QCoal submitted, the cross-examination of Mr Mehan then proceeded on the expressed assumption that Cliffs would have sought to negotiate with QCoal about the inclusion of Mr Wallin's Transaction Fee. Then in response to the following suggestion, that Mr Mehan would not have pushed the negotiations to the extent that it might jeopardise the SPA, Mr Mehan disagreed. He answered that what was being claimed was "fundamentally wrong". He said that he would have gone "a very long way to deal with a matter of principle, as this was to us" and that he would not have "rolled over on this issue".

[42] In light of the primary judge's rejection of Mr Wallin's evidence that he would not have agreed to any renegotiation of the terms of cl 6.9,[32] which rejection was not

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32 [2009] QSC 130 at [54].

challenged in the appeal, Mr Gunning's and Mr Mehan's evidence must be seen as providing powerful support for the primary judge's findings concerning causation. The evidence justified the primary judge's inference that the parties would have negotiated a compromise in order to ensure that this very large transaction was completed.

[43] Cliffs relied upon Mr Mehan's evidence in further cross examination that before entering upon serious negotiations with QCoal about this issue he would have consulted with his superiors in the United States, particularly Mr Carrabba who, Mr Mehan agreed, would have had the final decision on what approach was to be taken to the negotiations in a practical sense. In re-examination Mr Mehan confirmed that he would have sought Mr Carrabba's position and that it would have been Cliffs' position. QCoal invoked *Jones v Dunkel*[33] for the proposition that, there being no explanation for the failure of Mr Carrabba to give evidence, the primary judge was entitled to infer that his evidence would not have assisted Cliffs. QCoal also argued that Mr Mehan's evidence that Mr Carrabba's position "would have been the company's position" meant that there was no evidence that Cliffs lost anything as a result of not knowing about Mr Wallin's contract.

[44] The primary judge, who had the advantage, denied to this Court, of seeing and hearing Mr Mehan and the other witnesses give evidence, was well placed to assess its effect. So far as the record reveals, Mr Gunning did not qualify his evidence by reference to any requirement to consult Mr Carabba and Mr Mehan did not clearly say that he would not have embarked on negotiations without Mr Carrabba's prior approval. There is also nothing to suggest that Mr Carrabba would have disavowed the negotiations which both senior employees strongly favoured. Mr Gunning's and Mr Mehan's evidence, and the large body of other evidence, including contemporaneous emails, which demonstrated Cliffs' immediate and sustained challenge in strong terms upon discovery of Mr Wallin's contract, justified the conclusion that, had QCoal disclosed the magnitude and nature of Mr Wallin's Transaction Fee before completion of the SPA Cliffs would have rejected that fee as part of the Final Pre-Development Costs. No doubt Mr Wallin would have forcefully put his position, but the primary judge was entitled to infer that Cliffs and QCoal ultimately would have agreed upon a negotiated resolution of the dispute to ensure completion of the SPA.

[45] Accordingly I conclude that the primary judge was entitled to act upon the evidence which demonstrated that Cliffs lost a commercial opportunity of some value as a result of the misleading non-disclosure by QCoal. Once that conclusion is reached there is no basis for challenge to the primary judge's modest assessment of 10 per cent as the appropriate valuation of the lost chance.

Conclusion as to Cliffs' counter-claim for damages

[46] QCoal has not made good its attack on the primary judge's finding that Cliffs would be entitled to recover $120,000 as damages if, contrary to the primary judge's conclusion, which I would affirm, Mr Wallin's Transaction Fee was recoverable under cl 6.9.

Proposed orders

[47] I would dismiss the appeal. As was foreshadowed by the Court at the hearing in response to a submission for QCoal, I would grant the parties leave to file written submissions in accordance with paragraph 37A of Practice Direction No. 1 of 2005.

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33 (1959) 101 CLR 298.

[48] **WHITE J:** I have read the reasons for judgment of Fraser JA and agree with his Honour's construction of cl 6.9 of the Sale Purchase Agreement of 3 April 2007 and with his Honour's analysis of the respondent's counterclaim. I agree with the orders which he proposes.