SUPREME COURT OF QUEENSLAND

CITATION:	*Vale Belvedere Pty Ltd v BD Coal Pty Ltd & Anor* [2012] QCA 77
PARTIES:	**VALE BELVEDERE PTY LTD** ACN 128 403 645 (appellant) **v** **BD COAL PTY LTD** ACN 113 623 439 (first respondent) **VALE BELVEDERE (BC) PTY LTD** ACN 124 113 873 (second respondent)
FILE NO/S:	Appeal No 6207 of 2011 SC No 10364 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2011
JUDGES:	Fraser and White JJA, and Fryberg J Separate reasons for judgment of each member of the Court, Fraser and White JJA concurring as to the order made, Fryberg J dissenting in part
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the parties are joint venture partners in a coal mining project governed by a written contract – where the contract provided a process for determining a price for the interests of the respondents – whether a valuation obtained by the first respondent as part of that process was in accordance with the contract – whether the valuation lacked contractual effect for its alleged errors PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE *UNIFORM CIVIL PROCEDURE RULES* AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where the primary judge struck out the amended statement of claim of

the appellant – where the appellant contends that the amended statement of claim disclosed a viable case that ought to have been permitted to have the benefit of proper disclosure by the first respondent and proceed to trial – where the appellant alleges fundamental errors in the reasoning of the primary judge in striking out the amended statement of claim – whether the primary judge erred in striking out the amended statement of claim

Uniform Civil Procedure Rules 1999 (Qld), r 171

Beevers v Port Phillip Sea Pilots Pty Ltd [2007] VSC 556, considered
Hickman & Co v Roberts [1913] AC 229, considered
Jones v Kaney [2011] 2 WLR 823; [2011] UKSC 13, cited
Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314, considered
Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd [2008] QCA 160, cited
Vale Belvedere Pty Ltd v BD Coal Pty Ltd [2011] 2 Qd R 285; [2011] QSC 173, affirmed

COUNSEL: L F Kelly SC, with D G Clothier, for the appellant
B O'Donnell QC, with D O'Brien, for the first respondent
No appearance for the second respondent

SOLICITORS: Baker & McKenzie for the appellant
Mallesons Stephen Jaques for the first respondent
No appearance for the second respondent

[1] **FRASER JA:** The appellant ("Vale"), the first respondent ("BD Coal"), and the second respondent ("BC", a company associated with Vale) constitute the Belvedere Joint Venture ("JV") under a joint venture agreement ("JVA"). Vale, which holds a 51 per cent interest in the JV, exercised an option under the JVA to acquire the 24.5 per cent interests of each of BD Coal and BC at "Fair Market Value".

[2] The procedure for the determination of Fair Market Value, the price at which each of BD Coal's and BC's "Venture Interest" was to be transferred to Vale, is set out in cl 15 of the JVA:

> "15.1 The Fair Market Value of a Venture Interest for the purposes of clauses 7.9, 7.11, 8, 12, 14 and 18.8(b) shall be determined in accordance with the procedure set out in the remainder of this clause 15.
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> 15.2 The Relevant Participants shall each appoint a Valuer within 10 Business Days after the requirement to determine a Fair Market Value having arisen.
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> 15.3 Each Valuer must be instructed to make a final determination of Fair Market Value within 20 Business Days of its appointment. The Relevant Participant appointing such Valuer must provide a copy of their Valuer's determination to all other Participants within

5 Business Days of receiving the Valuer's final determination.

15.4 If the determinations of Fair Market Value by each Valuer are within 10% of each other, the Fair Market Value for the purposes of this clause shall be set as the average of those determinations.

15.5 If the determinations of Fair Market Value by the Valuers differ by more than 10%, and the Relevant Participants are not able to agree a Fair Market Value within 10 Business Days of being provided the last of the Valuers' reports under clause 15.3, the Relevant Participants must agree upon a further Valuer ('Determining Valuer'). The Relevant Participants must jointly appoint and instruct the Determining Valuer to:

(a) undertake an assessment of the values determined by each Valuer based upon its own skills and experience in coal development projects similar to the nature of the Joint Venture; and

(b) make its own determination of Fair Market Value after assessing the appropriate assumptions to be utilised in determining Fair Market Value, provided that the Determining Valuer's determination of Fair Market Value must not be less than the lowest Fair Market Value determined by any Valuer.

15.6 The Determining Valuer must make a final determination of Fair Market Value within 20 Business Days of its appointment. The Relevant Participants must provide a copy of the Determining Valuer's determination to any other Participants within 5 Business Days of receiving the Determining Valuer's final determination.

15.7 A final determination of Fair Market Value by the Determining Valuer shall be deemed to be the Fair Market Value for the purposes of this clause 15.

15.8 The Relevant Participants must co-operate fully with the Valuers and any Determining Valuer and acknowledge that:

(a) the Valuers and any Determining Valuer act as an experts and not as arbitrators; and

(b) except in the case of manifest error:

(i) the Fair Market Value determined in accordance with clause 15.4; or
(ii) the determination of the Determining Valuer,

shall be final and binding on the Relevant Participants."

[3] The parties agreed that it was not necessary for each of BD Coal and BC to appoint a valuer and that only BD Coal would do so. Vale produced a valuation report

under cl 15.3 by Citigroup Global Markets Australia Ltd and BD Coal produced such a valuation report by RBC Capital Markets. Each of Citigroup and RBC was a "Valuer" for the purposes of cl 15. That term is defined in cl 1 of the JVA:

> "Valuer" means a reputable international investment bank that:
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> (a) has its foreign currency long term rating assessed by at least one of the ratings agencies below at a minimum of:
> (i) Standard & Poor's – "A-";
> (ii) Moody's – "A3"; and
> (iii) Fitch Ratings - "A-"; and
>
> (b) is ranked in the top ten investment banks in the league table issued by Thomson Financial or, in its absence, a reputable international database manager, considering concluded mergers and acquisitions transactions worldwide in the mining sector in the two years prior to the Valuer's appointment,
>
> or such other appropriately experienced and reputable person approved by the other Participants prior to that person's appointment."

[4] The determinations of "Fair Market Value" in the valuation reports under cl 15.3 were not within 10 per cent of each other, Vale's Citigroup valuation being lower than BD Coal's RBC valuation. In that situation, cl 15.5 apparently obliged the parties to appoint a "Determining Valuer" to undertake an assessment of the values determined in the valuation reports of Citigroup and RBC and to make its own determination of Fair Market Value. Vale alleged, however, that the occasion for appointing a Determining Valuer had not arisen because the RBC valuation report did not determine Fair Market Value in accordance with the following definition of that term in the JVA:

> "1.1 In this Agreement except to the extent that the context otherwise requires:
>
> …
>
> 'Fair Market Value' means, in relation to a Venture Interest, the amount that a willing but not anxious buyer would pay, and a willing but not anxious seller would accept, for the Venture Interest when they are both acting freely, carefully and with complete knowledge of the Venture Interest and all other relevant facts, determined as at the relevant date in accordance with the applicable standards prescribed by the Australasian Institute of Mining and Metallurgy for the valuation of interests in coal projects and following the procedure set out in clause 15. In making his valuation, the Valuer shall:
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> (a) assume that a reasonable time is available in which to obtain a sale of the Venture Interest in the open market;
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> (b) without limiting the valuation methodologies to be utilised by the Valuer, have regard to:
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> (i) the estimated discounted future cash flows associated with the Venture Interest calculated, unless agreed otherwise by the Participants, using a discount rate

that references the average of the weighted average cost of capital of the independent listed coal companies in Australia (calculated by reference to publicly available information), adjusted appropriately for the level of risk associated with the Project as at the date of valuation; and

(ii) other recent similar acquisitions concluded under comparable terms and conditions and on an arm's length basis for coal deposits, resources and reserves, and considering the quality and quantity of the deposits, resources and reserves, development scenarios and inherent risks, mining type, location, proximity to and availability of infrastructure and ownership structure;

(c) assume the development of the Project will be undertaken in accordance with the Joint Venture Principles; and

(d) have regard to the assumptions set out in the Feasibility Study (if any) approved under clause 6.1 with respect to the Project Area, to the extent they remain appropriate based on the best information available as at the date of valuation."

[5] Vale sought declarations that the RBC valuation report was not a determination of the Fair Market Value in accordance with, or for the purposes of, the JVA and that BD Coal had not provided a valuation as required. BD Coal defended the claim.

[6] Vale subsequently applied for an order for disclosure of documents by BD Coal and BD Coal applied to strike out parts of the statement of claim which were essential to the cause of action relied upon by Vale. BD Coal contended that Vale's pleaded case was an impermissible attack upon the merits of the RBC valuation and that the pleaded facts did not support Vale's challenge to the impartiality of RBC.

[7] The primary judge held that the pleading did not disclose any cause of action and should be struck out, and that Vale's application for disclosure should be dismissed for that reason.[1] Vale contends that in striking out its pleading the primary judge misconstrued the JVA, failed to apply the stringent standard which is applicable in a summary determination of this kind, and made other errors.

Vale's pleading

[8] The primary judge summarised Vale's pleaded case in the following terms:[2]

"[9] The plaintiff makes many complaints about the RBC Report. But in essence it says that the RBC value was too high because of two things. The first is that the amount of the so-called coal resource, that is to say the coal able to be extracted from the mines held by or for the joint venture, was overstated. The second concerns the extraction of coal seam gas. The RBC value was upon the premise that there would be no net cost to the joint venture of extracting the

1 [2011] 2 Qd R 285.
2 [2011] 2 Qd R 285 at [9]-[23].

gas, which is a necessary step prior to permitting coal mining to safely proceed. The plaintiff says that an impartial and rational valuer would have found that there was a very large net cost involved in extracting the gas.

[10] As to the amount of coal, RBC was briefed by the first defendant with, amongst other things, two reports described respectively as the 2008 SRK JORC Resources Report and the 2010 Salva JORC Resources Report. The estimate of the coal resource in the former was more than half as much again as the estimate in the latter report. The plaintiff pleads that the latter report was based on more extensive and current exploration, information and analysis and was 'on the basis of any rational, expert view, a more reliable and up to date report'. Accordingly, the plaintiff alleges, it superseded the 2008 Report. It further alleges that the first defendant's parent company, Aquila Resources Ltd, had said just that to the investing public in March 2010.

[11] Nevertheless, the plaintiff pleads, the RBC valuation adopted the estimate of coal resource which was within the 2008 Report. The pleading sets out what are said to have been RBC's reasons for doing so. One was that the 2008 Report used data from some 73 drill holes from an exploration program in 2005-06, whereas the 2010 Report used data from but 53 drill holes, from an exploration program in 2008-09 and did not consider the data from the 2005-06 program. Further, RBC reasoned, the 2008 Report included coal seams of a thickness greater than 1.5 metres, whereas the 2010 Report limited the coal resource to coal seams which were at least 2 metres in thickness.

[12] The plaintiff pleads that by using the estimated coal resource in the 2008 Report, RBC did not determine the Fair Market Value of a 49 per cent Venture Interest in accordance with the JVA. That is alleged to be so firstly because what RBC had said about the data used in the 2010 Report was 'incorrect and wrong as a matter of objective fact' on the face of the 2010 Report and another document, with which RBC had also been briefed, which is described as the 2010 Prefeasibility Report.

[13] The RBC valuation is also claimed to be 'incorrect as a matter of objective fact', on the face of another document which was briefed to RBC, which was the so-called '24 February email' (from Salva Resources to the company which was the manager under the JVA). The effect of this email is said to have been that the adoption of a threshold of a 1.5 metre minimum coal seam thickness, rather than a 2 metre threshold, would add only an immaterial amount to the estimated coal resource. Therefore, the plaintiff pleads, RBC was wrong to have concluded that the 2008 estimate was correct because it was based upon the 1.5 metre threshold.

[14] Further, the plaintiff pleads that RBC thereby proceeded upon an estimate of the coal resource which 'was the most favourable to and slanted in favour of [the first defendant]…' and which 'would not have been made by a willing but not anxious buyer and a willing but not anxious seller'. It alleges that it thereby acted irrationally and inconsistently with the required assumption that the buyer and seller would know all the relevant facts, because to know all the relevant facts would be to know that the 2008 Report had been superseded. It is claimed that the RBC Report did not 'identify a sound, correct, rational or valid reason' for preferring the 2008 Report. Upon those premises, the plaintiff alleges that the RBC Report was '…manifestly careless and had no rational basis' and did not determine the amount that the hypothetical buyer and seller would pay and accept.

[15] Then there is a further variation upon this theme by the allegation that in using the 2008 Report, RBC acted upon information 'which was wrong and inaccurate in an objective sense…' and upon which the hypothetical buyer and seller would not have acted. It pleads that RBC thereby 'failed to act rationally and in accordance with objectively known facts. But importantly, the plaintiff goes further by alleging that in using the 2008 Report, RBC 'failed to act impartially'. The particulars of that allegation are as follows:

> 'The failure to act impartially is inferred from the gross and serious nature of the inaccuracies, the fact that such inaccuracies favoured the interest of [the first defendant] and [certain other conduct].'

The other conduct referred to in the particulars has to some extent been mentioned already, and otherwise involves the plaintiff's complaints about RBC's treatment of coal seam gas extraction, to which I will come.

[16] Lastly on this subject, it is alleged that the use of the 2008 Report resulted in a non-compliance with the so-called VALMIN Code, which was one of the 'applicable standards prescribed by the Australasian Institute of Mining and Metallurgy', as referred to in the definition of Fair Market Value. It is unnecessary to discuss the ways in which the VALMIN Code is said to have been disregarded. In essence, the plaintiff's complaints in this respect are that the 2008 Report was plainly out of date and could not have been considered as reliable.

[17] Within these many variants of the plaintiff's case, four types of complaint can be identified. Each involves more than a complaint that the valuer was simply in error. One is to the effect that RBC was wrong 'as a matter of objective fact'. The point here seems to be that this is more than a question of a valuer's opinion; rather the valuer was wrong on

important factual matters. Secondly, there is the complaint that it was irrational to rely upon the 2008 Report. Thirdly, there is the complaint that the reliance upon the 2008 Report was 'manifestly careless'. Fourthly, there is the allegation of partiality or, if it was intended to be something different, the allegation that RBC used an estimate of the coal resource which was 'slanted in favour of' the first defendant. Of the first three of those complaints, only the third is in terms resembling a 'manifest error' which, according to cl 15.8 of the JVA, is the exceptional circumstance where the relevant valuation or valuations will not be 'final and binding'. Even then, the pleading does not clearly relate the allegation to cl 15.8.

[18] I come then to the complaints about coal seam gas. The plaintiff pleads that the 2010 Prefeasibility Report contained a detailed analysis of the need to extract coal seam gas prior to mining for coal, in the interests of the safe operation and productivity of the mine. The document is said to contain conclusions as to the estimated revenue to be generated from the gas and the costs of extracting it over the life of the mine, the effect of which is that the costs would exceed the revenues by about $1.7 billion.

[19] The RBC Report made an assumption that gas would be 'economically extracted and monetised by a third party', at no net gain or loss to the joint venture. This assumption is said to have been adopted because of 'an unidentified analysis' or 'unidentified discussions with unidentified management of Aquila'. As purported particulars of that allegation, there is only this:

> '[The plaintiff] requires disclosure to provide particulars of the analysis engaged in by RBC, if any, and of the content of the discussions with management of Aquila and the identities of the people involved in those discussions.'

[20] It is alleged that this assumption adopted by RBC was not justified by anything other than the 'unidentified analysis' and 'unidentified discussions', it was 'wrong and inaccurate in an objective sense' having regard to the 2008 Prefeasibility Report, it was something which the hypothetical buyer and seller would not have acted upon and it involved a 'failure to act rationally and in accordance with objectively known facts. It is then alleged that the 'unidentified management of Aquila' had no expertise or competence upon this subject and were not 'experts' or 'specialists' upon whom RBC could have relied consistently with a provision of the VALMIN Code. There is also a complaint that the RBC Report did not identify the nature and contribution of these informants from Aquila, again contrary to the VALMIN Code.

> [21] Then there is an allegation that this assumption was 'most favourable to and slanted in favour of [the first defendant]'. In making the assumption, it is alleged, RBC did not determine the amount which the hypothetical buyer and seller would pay and accept with complete knowledge of all relevant facts. And again there is an allegation that RBC failed to act impartially, the particulars being:
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> > 'The failure to act impartially is inferred from the gross and serious nature of the divergence from the contents of the 2010 Prefeasibility Report, the absence of any sound or valid reason for such departure, the fact that such divergence favour [sic] the interest of [the first defendant] and the other conduct [relating to estimating the coal resource].'
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> [22] So again, although it has many variants, this part of the case can be seen to involve complaints of certain kinds. They are the same kinds of complaints which are made in relation to the estimate of coal resources, except that here there is no allegation of 'manifest carelessness'.
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> [23] There are two other parts of the pleaded case, each involving an alleged failure to comply with the VALMIN Code. Clause 32 of that Code is said to require the valuer, 'if more than one valuation method is used and, in consequence, different valuations result, … [to] comment on how the valuations compare and the reason(s) for selecting the value adopted'. It is alleged that the RBC Report used more than one valuation method but did not comply with that clause. Secondly, there is said to have been a non-compliance with cl 9 and cl 46 of the VALMIN Code, which provide that a valuer must disclose and explain within a report any departures from the Code and must declare in the report that it has otherwise been prepared in accordance with it." (citations omitted)

[9] Vale submitted that paragraph 9 of those reasons misstated its case, which was not merely that the RBC value was too high, but that the effect of the errors in it was that it did not amount to a determination of Fair Market Value for the purposes of cl 15. It is nevertheless accurate to say that Vale complained that the RBC value was too high for the reasons summarised by the primary judge. That précis also did not indicate any misapprehension about the issue before the primary judge. His Honour had earlier referred to Vale's claim that the RBC valuation "…was not made according to the JVA and, in particular, was inconsistent with the definition of Fair Market Value", so that "…the occasion for appointing the Determining Valuer has not yet arisen and [BD Coal and BC] are obliged to cause a valuation to be made which does comply with the requirements of the JVA."[3] Furthermore, after the primary judge had summarised Vale's pleaded case, his Honour turned to consider BD Coal's submission "…that none of the alleged errors in the RBC Report could have the consequence that it is not a valuation for the purposes of cl 15

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3 [2011] 2 Qd R 285 at [5].

of the JVA."[4] There is no merit in Vale's submission that the primary judge misstated its case.

[10] Vale also submitted that paragraph 9 incorrectly stated that it had made "many complaints" about the RBC Report because the number of complaints was "confined" and the pleading alleged only errors of fact and not errors in valuation judgments. A quick reading of the pleading is sufficient to dispose of the proposition that Vale did not make many complaints. That is so regardless of the question, to which I will return, whether the complaints involved only factual matters rather than opinion.

[11] Vale criticised the primary judge's reference, in paragraph 21 of the reasons, to Vale's allegation that RBC did not determine the amount which the hypothetical buyer and seller would pay and accept with complete knowledge "of all relevant facts". The point was that the primary judge omitted to refer to the subsequent words in the definition of Fair Market Value, "… in accordance with the applicable standards prescribed by the Australasian Institute of Mining and Metallurgy for the valuation of interests in coal projects …". The primary judge did not overlook those words. His Honour had earlier quoted the full text of the definition[5] and, in paragraph 16, referred to Vale's case concerning non-compliance with the VALMIN Code, and, in particular, its contention that the code "…was one of the 'applicable standards prescribed by the Australasian Institute of Mining and Metallurgy', as referred to in the definition of Fair Market Value." The primary judge discussed the same topic in paragraphs 20 and 23, and in subsequent paragraphs of the reasons. There is no merit in Vale's criticism of paragraph 21 of the primary judge's reasons.

[12] Nor do I accept Vale's criticisms of the primary judge's characterisations of the pleading in paragraph 17 of his Honour's reasons. Notwithstanding the strength of the attacks upon RBC's valuation, the pleading does not make any allegation of manifest error or clearly relate any allegation to cl 15.8. It is a different question whether Vale's pleading might be re-cast in those terms.

Alleged defects in the valuation

[13] I will consider Vale's case that RBC's valuation was vitiated by its failure to act impartially after I have first discussed the contention that errors in RBC's valuation rendered it ineffective as a determination of Fair Market Value for the purposes of cl 15.

The primary judge's reasons

[14] In concluding that the amended statement of claim did not mount a viable challenge to the RBC valuation on grounds other than partiality, the primary judge referred to the following well known passage in McHugh JA's reasons in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*[6]:

> "In my opinion the question whether a valuation is *binding* upon the parties depends in the first instance upon the terms of the contract, express or implied. … It will be difficult, and usually impossible,

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4 [2011] 2 Qd R 285 at [24].
5 [2011] 2 Qd R 285 at [8].
6 (1985) 1 NSWLR 314 at 335-336.

> however, to imply a term that a valuation can be set aside on the ground of the valuer's mistake or because the valuation is unreasonable. The terms of the contract usually provide, as the lease in the present case does, that the decision of the valuer is 'final and binding on the parties'. By referring the decision to a valuer, the parties agree to accept his honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision. … But as between the parties to the main agreement the valuation can stand even though it was made negligently. While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract."

[15] The primary judge considered it necessary to interpret the contract in each case not only to decide whether the parties had agreed to be bound by the expert determination (requiring an assessment of what the parties agreed that the expert should do) but also to assess "…what the parties agreed should be the consequence, if any, of the expert not doing everything which they had agreed he would do."[7] His Honour acknowledged that the requirements of the definition of Fair Market Value could not be ignored, the question being what the parties agreed was the consequence of non-compliance with them. The answer to that question was revealed by what the parties expressly agreed in cl 15.8 should be the basis for challenging a valuation by which the price would be fixed (i.e. "manifest error").[8]

[16] The RBC valuation is not such a valuation since, as the primary judge pointed out, neither of the two situations governed by cl 15.8(b) exists in this case. The valuations were not within 10 per cent of each other and there had not been a determination by a Determining Valuer. The primary judge held that cl 15.8 was nevertheless critical to the construction of cl 15, since "[i]t cannot have been intended that where the amount of a valuation *does* matter in the quantification of the price, there should be a more limited scope for its review (i.e. manifest error) than where, as here, the amount of the valuation price will not affect in any way the quantification of the price."[9]

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7 [2011] 2 Qd R 285 at [36].
8 [2011] 2 Qd R 285 at [38].
9 [2011] 2 Qd R 285 at [41].

[17] The primary judge also rejected Vale's argument that a failure to comply with the requirements within the definition of Fair Market Value might result in a valuation being ineffective even though the failure is not reflected in a "manifest error":

> "The evident intent of cl 15.8 is to limit the circumstances in which the valuation could be challenged, rather than to widen them. The parties have agreed to balance the competing considerations of accuracy against certainty and finality by depriving the valuation of effect but only where there is a manifest error. That is not only because such an error would be apparent, without the need for any substantial factual inquiry, but also because it could be promptly corrected. An error in complying with the requirements imposed within the definition of Fair Market Value would make the valuation ineffective for the purposes of cl 15 as long as it was a manifest error."[10]

[18] The primary judge went on to observe that, because Vale's Citigroup valuation was the lower of the two valuations, it might constrain the determination of Fair Market Value by the Determining Valuer. For that reason, a manifest error in Vale's valuation could provide a basis for challenging the Determining Valuer's determination "…if it affected what otherwise would have been that determination", but the RBC valuation could not have that or any other effect.[11]

[19] The primary judge then turned to the question of what was sufficient as a determination of Fair Market Value under cl 15.4 or cl 15.7. After referring to the terms of the definition of Fair Market Value which required a determination of "the amount that a willing but not anxious buyer would pay, and a willing but not anxious seller would accept, for the Venture Interest when they are both acting freely, carefully and with complete knowledge of the Venture Interest and all other relevant facts", his Honour concluded as follows:

> "The valuer must treat the hypothetical buyer and seller as fully informed of the relevant facts. But if the valuer itself is mistaken as to any of those facts, the outcome remains a determination, or in other words a professional opinion, of the amount that would be paid and accepted under the required hypothesis. … The parties have agreed that the valuer should make its determination according to the requirements within the definition of Fair Market Value, beginning with the requirement that the value be determined in accordance with the applicable standards. But they have agreed that an error in complying with those requirements or some other error absent the case of manifest error, will not make the determination ineffective for any of the steps within cl 15."[12]

[20] Accordingly, the primary judge held that Vale's pleading proceeded upon an incorrect interpretation in two respects. The JVA did not limit the complaints to alleged "manifest errors" in the RBC report and, to the extent that Vale pleaded "something of that kind (i.e. manifest carelessness)", the pleading did not reveal how any such error would matter to the determination of the Determining Valuer. [13]

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10 [2011] 2 Qd R 285 at [40].
11 [2011] 2 Qd R 285 at [41].
12 [2011] 2 Qd R 285 at [42].
13 [2011] 2 Qd R 285 at [43].

The arguments

[21] Vale argued that the primary judge had unduly narrowed the available challenges to valuations under cl 15.3. It argued that the primary judge erred in concluding that, for the purpose of deciding whether the expert determination is one by which the parties have agreed to be bound, it was necessary to assess not only what the parties agreed that the expert should do, but also "what the parties agreed should be the consequence, if any, of the expert not doing everything which they had agreed he would do."[14] In Vale's submission, that involved an erroneous failure to draw a distinction between a valuation that was not in accordance with the terms of the JVA (which was therefore ineffective for the reasons given by McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*), and a valuation which was in accordance with the terms of the JVA but was nonetheless susceptible to challenge under cl 15.8.

[22] Vale emphasised its allegations that there were very significant errors, including departures by RBC from the VALMIN Code allegedly incorporated in the definition of Fair Market Value as an "applicable standard", and its argument that the errors concerned "objective facts" rather than "valuation opinions". It submitted that it cannot have been the contractual intention that such egregious mistakes, as it alleged, have no contractual significance, and that such a construction treated the express requirements for the determination of Fair Market Value as having no meaning.

[23] In Vale's submission, the primary judge misstated Vale's case by referring to a valuation which can be shown to depart from the requirements in the definition of Fair Market Value "only after an extensive factual inquiry"; the primary judge overstated the extent of the "relevant facts" because the definition of "Fair Market Value" qualified "relevant facts" by the expression "determined as at the relevant date in accordance with the applicable standards …". Vale argued that this qualification substantially reduced the scope of the necessary enquiry into the relevant facts. Vale pointed out that its pleading alleged that one of the relevant standards is the VALMIN Code, cl 16 of which incorporates a concept of "materiality"; a definition in cl D16 of that Code provides that, in the case of "quantitative issues", materiality of data "can be assessed in terms of the extent to which the omission or inclusion of an item could lead to changes in total value of …"; and the following table states that for "less than 5 per cent" the "Item is generally not Material".

[24] Vale argued that the primary judge's construction was not commercially workable and did not give effect to the parties' bargain since a valuer could ignore, misstate, and reach quite wrong conclusions about any, "relevant facts", notwithstanding the express requirement in the definition of Fair Market Value to attribute knowledge of all relevant facts to the hypothetical buyer and seller; that could occur without there being any consequence and notwithstanding the importance and incontrovertibility of the facts in issue. By way of example, Vale argued that on the primary judge's construction a valuation of the wrong mine could not be challenged.

[25] Vale also argued that the trial judge should not have determined the meaning of the JVA on a final basis in a summary way. It emphasised the principle that the power to summarily strike out a pleading in its entirety should be exercised sparingly and

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14 [2011] 2 Qd R 285 at [36].

with considerable caution,[15] and that the pleaded facts should be assumed to be correct in that exercise.[16] It submitted that "the magnitude and materiality of the alleged errors of objective fact"[17] required consideration in the broader context of the mining project, the question being whether the parties should be presumed to have intended that errors of that magnitude would affect the contractual validity of a valuation.

[26] BD Coal submitted that Vale's construction would permit pointless litigation about alleged errors in a determination under cl 15.3 which has no binding effect in fixing the price at which a Venture Interest is to be transferred, and even though such errors would be corrected in the Determining Valuer's determination without resort to litigation. It submitted that the primary judge's construction best gave effect to the text of cl 15 of the JVA and to commercial common sense.

Consideration

[27] The primary judge referred to a contention by BD Coal that the VALMIN Code was not an "applicable standard" within the definition of Fair Market Value, but observed that the outcome of the application should not depend upon that question, which would necessarily involve a factual enquiry.[18] I do not accept Vale's argument that this might reveal a factual dispute which rendered the summary striking out of the pleading inappropriate. The expression in the definition, "determined as at the relevant date in accordance with the applicable standards … and following the procedure set out in cl 15", appears to describe one aspect of the manner in which Fair Market Value is to be determined. Other relevant aspects are included in paragraphs (a) – (d) of the definition. But it does not necessarily follow that departure from any of those requirements marks the resulting determination as one which may be challenged by a disappointed party. The primary judge in terms accepted that the parties had "agreed that the valuer should make its determination according to the requirements within the definition of Fair Market Value, beginning with the requirement that the value be determined in accordance with the applicable standards."[19] But, as his Honour went on to observe, the parties had also agreed "…that an error in complying with those requirements or some other error absent the case of manifest error, will not make the determination ineffective for any of the steps within cl 15." On the primary judge's construction of cl 15, it was unnecessary to resolve the question whether that the VALMIN Code was an "applicable standard" within the definition of Fair Market Value.

[28] Vale did not plead that the meaning of the relevant provisions of the JVA might be affected by any extrinsic fact and the primary judge's conclusion inevitably flowed from his Honour's construction of the JVA. It was open to the primary judge to form and act upon a final view in that respect, notwithstanding the summary nature of the proceeding.[20]

[29] The construction propounded by Vale produces the unreasonable consequences identified by the primary judge:

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15 *General Steel Industries Inc v Commissioner for Railways NSW* (1964) 112 CLR 125.

16 *Jones v Kaney* [2011] 2 WLR 823 at 827 [3].

17 Vales' outline of argument, para 19.

18 [2011] 2 Qd R 285 at [29].

19 [2011] 2 Qd R 285 at [42].

20 See, for example, *Sunbird Plaza Pty Ltd v Boheto Pty Ltd* [1983] 1 Qd R 248 at 255-256 per McPherson J.

> "On the plaintiff's case, a valuation which, perhaps only after an extensive factual enquiry, can be shown to depart in some respect from the requirements expressed within the definition of Fair Market Value is not one which has any effect under cl 15. For example, if the valuer was ignorant of and therefore did not consider some fact which would be relevant to the hypothetical buyer and seller referred to in that definition, then the valuation would not be one of Fair Market Value. The results of this interpretation could be highly problematical. The entirety of the 'relevant facts' might not be ascertainable by the valuer, at least within the relatively short period of 20 business days allowed for the exercise. And whether such a fact was considered by the valuer might never become apparent, or at least until well after the agreed sequence of events by which the price is to be determined and paid. A further problem is that many of the requirements imposed on a valuer involve matters of professional judgment. The plaintiff's argument appears to accept, as it must, that valuers could reasonably differ upon such matters. But it argues that a valuation will be ineffective where there is some step in the valuer's reasoning which has no reasonable basis. That provides a very considerable scope for investigating the valuer's reasoning, an investigation which might be lengthy as well as expensive. Considerations such as these show the tension between the plaintiff's interpretation of these terms of the JVA and their apparent object of providing a means for fixing a price, where it cannot be agreed, by a process which will provide, not only fairness, but also will resolve a disagreement rather than compounding it."[21]

[30] Contrary to one of Vale's arguments, the primary judge did not describe the plaintiff's case as being that a valuation which can be shown to depart from the requirements in the definition of Fair Market Value "only after an extensive factual inquiry". Rather, his Honour identified that as a consequence of acceptance of the plaintiff's case. I respectfully agree with the primary judge's reasons on this point.

[31] The primary judge's construction does not deprive the text of cl 15 of meaning. Clause 15.1 requires a determination of Fair Market Value in accordance with the procedure set out in the following provisions. It might readily be concluded that a valuation under cl 15.3 was ineffective as a determination if it was not produced in conformity with the procedure which clause 15 prescribes. Vale's pleading did not however allege any departure from that procedure. It did not allege that RBC was not a "Valuer" as defined in the JVA or that it was not duly appointed by BD Coal under cl 15.2, or that RBC was not duly instructed by BD Coal to make a final determination of Fair Market Value in accordance with cl 15.3. Nor does the primary judge's construction produce the very surprising result that a valuation of the wrong mine would be effective. Such a valuation would not be a determination of the amount which a buyer would pay and a seller would accept "for the Venture Interest".

[32] Vale's reference to the alleged significance and nature of RBC's mistakes does not identify any criterion derived from the terms of the JVA. The requirement for the valuer to attribute knowledge of "relevant facts" to the hypothetical seller and buyer is not qualified by reference to the importance or objective character of the facts.

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21 [2011] 2 Qd R 285 at [38].

The definition of "Fair Market Value" requires the valuer to attribute "complete knowledge of the Venture Interest and all other relevant facts …". The text of cl 15, read with the definition of Fair Market Value, does not provide that a failure to comply with such an instruction by overlooking or misstating some relevant fact requires the resulting determination to be disregarded, or does so if the error is important or concerns objectively ascertainable facts. As to the latter point, the distinction between fact and "valuation opinion" is also difficult to maintain where the alleged errors are in estimates of an underground coal resource, and the net cost of extracting coal seam gas taking into account future markets.

[33] The crux of Vale's argument on appeal is that a valuation qualifies as a determination under cl 15.3 only if the valuation was made in accordance with the contract. That refers to the test articulated by McHugh JA (as his Honour then was) in *Legal & General Life of Australia Ltd*. (In other cases the test has been expressed as being whether the expert performed the task which the contract entrusted to the expert.[22]) However, McHugh JA framed the test for the purpose of deciding "whether a valuation is binding upon the parties" and, as his Honour pointed out, the answer "…depends in the first instance upon the terms of the contract, express or implied."[23] The contract with which McHugh JA was concerned made a decision by a valuer "final and binding" in the determination of price and it did not identify the circumstances in which a valuation would not be effective. This is a very different case, since it is not alleged that RBC's valuation, or any error in it, has any bearing upon the price of BD Coal's Venture Interest, and cl 15.8 does identify circumstances in which a determination which does bear upon the price may be challenged.

[34] *Legal & General Life of Australia Ltd* and the numerous other cases concerning similar contractual schemes therefore do not dictate the construction of the JVA. In light of the different terms of the JVA, the primary judge was plainly right to hold that, for the purpose of deciding whether the expert determination is one by which the parties have agreed to be bound, it is necessary to assess not only what the parties agreed that the expert should do but also "…what the parties agreed should be the consequence, if any, of the expert not doing everything which they had agreed he would do."[24]

[35] It remains necessary to consider whether the alleged errors in the RBC valuation arguably might justify a conclusion that it does not have effect as a determination of Fair Market Value for the purposes of cl 15. The JVA is not entirely clear on this point. Its proper construction is to be determined by what a reasonable person in the parties' position would have understood the relevant provisions to mean having regard to the text, the surrounding circumstances known to them, and the purpose and object of the transaction;[25] and the construction which is chosen from the available meanings must accord with commercial efficacy and commonsense.[26]

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22 See, for example, *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173 at [43] per Nettle JA, Maxwell P and Bongiorno AJA agreeing, at [43], citing *Holt v Cox* (1994) 15 ACSR 590 at 597.

23 *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335.

24 [2011] 2 Qd R 285 at [36].

25 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; [2004] HCA 35; *Toll (FGCT) P/L v Alphapharm P/L* (2004) 219 CLR 165 at [40]; [2004] HCA 52.

26 See *Geroff & Ors v CAPD Enterprises Pty Ltd & Ors* [2003] QCA 187 at [36] and authorities there cited; *Gollin & Co Ltd v Karenlee Nominees P/L* (1983) 153 CLR 455 at 463; [1983] HCA 38; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at [22]; [2000] HCA 65.

[36] Clause 15.8 does not expressly deal with the present issue because RBC's valuation is not within either of the categories described in cl 15.8(b). However, Vale's argument that cl 15.8 merely adds an additional ground of challenge in the case of a determination by a Determining Valuer should not be accepted. Paragraph (b) does not limit the ground of challenge it provides to manifest error in the Determining Valuer's determination. The contrary is indicated by the fact that the topic of the provision is not confined to valuations by a Determining Valuer. The introductory words and paragraph (a) apply also to valuations under cl 15.3. Reading the whole clause in its context, "manifest error" in paragraph (b) comprehends manifest error in a cl 15.3 valuation, but only where the error influences a determination of Fair Market Value under sub-paragraph (i) or (ii). The rather unlikely prospect that it might prove impossible to establish whether or not manifest error in a valuation under cl 15.3 influenced the Determining Valuer's final determination is not sufficient to justify a different construction.

[37] The implication is thus available that valuations under cl 15.3 are not open to challenge merely on the ground of error by the valuer, whether manifest or otherwise, where the error has no bearing upon the final determination of Fair Market Value which fixes the price of the departing party's Venture Interest. Other features of the contractual scheme support that view. There is no provision for each party's valuer to receive the same instructions. The valuers, being appointed as experts rather than arbitrators, are not obliged to determine any issue judicially between the parties,[27] and each must provide its determination within only 20 business days. The scope for honest error must be significant, bearing in mind the magnitude of the valuers' task.

[38] In relation to the last point, assuming, without deciding, that the VALMIN Code is incorporated in the definition of Fair Market Value and that there is scope for the application of cl 16 and the definition in cl D16 in that code, that hardly justifies criticism of the primary judge's observation that "[t]he entirety of the 'relevant facts' might not be ascertainable by the valuer, at least within the relatively short period of 20 business days allowed for the exercise." Indeed, the (assumed) incorporation of the VALMIN Code, with the series of additional requirements in it to which Vale referred, makes it seem even less likely that the contractual intention was that failure by a valuer to adhere to the requirements of the definition of "Fair Market Value" would necessarily invalidate the valuation.

[39] Importantly, the provision for a Determining Valuer allows for the correction of any errors in the cl 15.3 valuations. On an objective analysis, the contemplation in the definition of "Valuer" that each valuer will be appropriately experienced and reputable, coupled with the requirement in cl 15.5 that the Determining Valuer assess the initial valuations and make its own determination, suggests that the contractual intention was that errors which are of such a character as might otherwise render a cl 15.3 valuation ineffective should instead be corrected in the final determination of Fair Market Value by the Determining Valuer jointly appointed and instructed by the parties. Considering the contractual scheme as a whole, it seems an unlikely contractual intention that the agreed process in cl 15 should be interrupted by litigation or arbitration about errors in a valuation which, apart from those errors, complies with the requirements of cl 15, and where the error

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[27] *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 336; *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160 at [88] per Muir JA, with whose reasons Mackenzie J agreed, at [88].

does not influence the determination of the price of the departing party's Venture Interest.

[40] In the result, the pleading is defective both because, regardless of the significance of any alleged error, the pleading does not confine itself to allegations of "manifest error" of the kind which cl 15.8 exempts from the final and binding nature of a valuation and, more substantially, because it does not allege that any alleged error has any bearing upon the final determination of Fair Market Value.

Failure to act impartially

The primary judge's reasons

[41] The primary judge struck out the allegations of partiality on the ground that the pleaded case was not the case intended to be mounted by Vale. His Honour reasoned as followed:[28]

> "As to the allegations of partiality, the first defendant argues that the pleaded case cannot succeed, without the addition of an allegation which attributes dishonesty to RBC. The plaintiff's counsel disavow a case of dishonesty, but submit that there was a partiality in the sense that RBC allowed itself to the overborne by the first defendant so that without realising it, RBC lost its independence and acted according to the first defendant's direction. The plaintiff argues that this was sufficient to invalidate the RBC Report, relying upon *Hickman & Co v Roberts*. In that case a builder sued the building owners claiming payment under a contract which provided that payment should be made on the certificate of the architect. The architect, under a misapprehension of his role, allowed himself to be influenced by the building owners and wrongly delayed issuing his certificates. In those circumstances, the building owners were held to be precluded from defending the action on the basis that the certificate was a condition precedent to the bringing of the action or that the final certificate, which was issued after its commencement, was conclusive as to the amount of the claim. Lord Loreburn LC said that it was not a case of fraud on the part of the architect, but that his error was that 'he mistook his position; that he meant to act as a mediator; that he had not the firmness to recognize that his true position was that of an arbitrator and repel unworthy communications made to him by the defendants'.
>
> In the passage which I have cited from McHugh JA's judgment in *Legal & General Life*, his Honour referred to the implication of a term that a valuation must be made 'honestly and impartially'. Counsel for the plaintiff submit that this shows that they are distinct requirements and that a valuation might be impeached for partiality whilst not being made dishonestly. In general, that must be accepted. An expert might be biased in favour of one side of a controversy without being necessarily corrupt. The difficulty here, however, is in understanding the pleading of RBC's partiality in that way. For example, there is no allegation of facts by which RBC came to this task with less than an open mind, such as by having considered the same questions upon a previous occasion. Nor is there any allegation

[28] [2011] 2 Qd R 285 at [30]-[31].

> that RBC was overborne by the defendants such that it misapprehended its role. As I read the pleading, the case is that no valuer could have made such serious errors and such baseless assumptions in the face of incontrovertible evidence, unless it was trying to help the defendants' cause. But that is the case which the plaintiff's counsel disavowed in argument. Accordingly, the pleaded case is not intended to be the plaintiff's case and the allegations of impartiality should be struck out." (citations omitted)

The arguments

[42] Vale repeated and elaborated upon the arguments which are summarised in the two paragraphs of his Honour's reasons quoted above. Vale maintained its disavowal of any allegation of conscious wrongdoing or dishonesty but contended that it had pleaded a viable case. It argued that the primary judge accepted the first leg of its submission, that dishonesty was not an essential element of "partiality", and that a valuation might be impeached for partiality without there being any element of dishonesty. In Vale's submission, that proposition was supported by the decision cited by the primary judge, *Hickman & Co v Roberts.*[29] Vale also relied upon *Beevers v Port Phillip Sea Pilots Pty Ltd*,[30] in which Dodds-Streeton J stated that the valuation in that case could be vitiated for "…fraud, dishonesty, partiality or want of independence", [31] and statements in other cases that a valuation is not binding if it is not made "honestly and impartially".[32] Vale submitted that its pleading comprehended a viable case that RBC's failure to act independently rendered its valuation ineffective for the purposes of the JVA.

[43] BD Coal submitted that the pleading does not allege that RBC did not have an open mind or approached its task in a way which favoured BD Coal, unconsciously or otherwise. Those are material facts which should be pleaded. To the extent that the alleged failure to act impartially might comprehend the case which Vale foreshadowed in argument, the particulars did not support it. In BD Coal's submission, the primary judge's decision was correct for the reasons given by his Honour.

Consideration

[44] Whilst the primary judge did not advance as a reason for striking out the allegations of partiality that Vale's disavowal of dishonesty rendered the case unviable, his Honour observed only that the submission that a valuation might be impeached for partiality, although it was not made dishonestly, must be accepted "[i]n general". The primary judge did not decide whether such a doctrine was consistent with cl 15.

[45] It may readily be accepted that a valuation which results from fraud or corruption will not qualify as a determination under cl 15 of the JVA,[33] but Vale disavowed any such case. As to RBC's alleged lack of independence, in *Hickman & Co v Roberts*,[34] Lord Loreburn LC stated that a certificate by an architect was

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29 [1913] AC 229.
30 [2007] VSC 556.
31 [2007] VSC 556 at [299].
32 See *Ceneavanue Pty Ltd v Martin* (2008) 106 SASAR 1 at [69] per Debelle J, with whose reasons Anderson J agreed, and the decisions discussed by his Honour.
33 Cf *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335 per McHugh JA.
34 [1913] AC 229.

ineffective although there was no element of "turpitude" or "fraud" where the architect "…mistook his position; that he meant to act as a mediator; that he had not the firmness to recogni[s]e that his true position was that of an arbitrator, and repel unworthy communications made to him by the defendants."[35] Similarly, Lord Ashbourne observed that the architect "did not preserve that attitude of judicial independence which was needed and required of him in the discharge of his responsible and possibly difficult duties;" that whilst it was not necessary to go so far as to use the words "turpitude" and "fraud", the architect "…had not present to his mind, and did not act upon, that need for judicial independence that is requisite for any one in his position …".[36] Lord Alverstone observed that the architect "…had forgotten his duty to act strictly judicially through the whole course of the proceedings …"[37]

[46] In that case, a building contract provided that the work should be done to the satisfaction of the architect and empowered the architect to order variations to the contract. Payment was to be made on the architect's certificates. The decision of the architect was made "final, conclusive and binding on all parties". The architect refused to issue a payment certificate on the instructions of the owner, despite the architect's own opinion that the certificate should be issued. It was held that the building owner could not defend the builder's action on the ground that the issue of the certificate was a condition precedent to the bringing of the action or conclusive as to the amount of the claim.

[47] *Beevers v Port Phillip Sea Pilots Pty Ltd*[38] was analogous to *Hickman*, particularly having regard to Dodds-Streeton J's conclusion that the valuer's approach to the valuation was informed by his misapprehension that he was acting as an auditor responsible to the Board of one party rather than as an independent expert certifying an opinion which would be binding on vendor and purchaser.[39]

[48] Those decisions do not govern the interpretation of the very different provisions of the JVA. However, having regard to the narrow basis upon which the primary judge decided this aspect of the case, and the lack of clarity in this aspect of Vale's pleading, it is not appropriate to express any final view upon the question whether the case which Vale wishes to pursue might be viable.

[49] I agree with the primary judge's conclusion that Vale did not plead the case which it told the primary judge it intended to run. Vale told the primary judge, accurately, that the pleading did not "expressly allege" any "wrongdoing on the part of the defendants in that they sought to have … RBC act other than independently"; and Vale agreed that it's "partiality case" was that "without wrongdoing on the defendants' part, [RBC] came to favour the defendants without [Vale] having to go as far as proving that they did so consciously."[40] But the pleading alleges that RBC failed to act "impartially", the ordinary meaning of which comprehends conscious wrongdoing in the form of actual bias and prejudice. (For example, the meanings of "impartial" given in the Macquarie Dictionary include "unbiased";[41] the meanings of "partial" include "biased or prejudiced in favour of a person, group, side, etc".[42])

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35 [1913] AC 229 at 233.
36 [1913] AC 229 at 234.
37 [1913] AC 229 at 235.
38 [2007] VSC 556.
39 [2007] VSC 556 at paragraph 308.
40 Transcript of hearing 8 April 2011 at 26.2, Appeal Book p. 51.
41 Definition of "impartial" in the Macquarie Dictionary online.
42 Macquarie Dictionary online, meaning 5.

Some of the available meanings arguably comprehend a mere absence of independence without any dishonesty or any moral turpitude, but that is not the meaning conveyed by the allegation that RBC "failed to act impartially" in the context of the particulars.

[50] As the primary judge considered, the pleading conveys that RBC was trying to help the defendants' cause, a case which was inconsistent with RBC's disavowal of conscious wrongdoing. The particulars, as presently framed, do not make out the case of absence of an independent mind without conscious wrongdoing, which Vale foreshadowed in rather general terms in its submissions. Bearing in mind that Vale was not precluded from seeking to re-plead to reflect its intended case with more clarity, I am not persuaded that we are justified in interfering in the primary judge's discretionary decision on this procedural point.

Disposition and orders

[51] I would affirm the decision to strike out the amended statement of claim. It follows that Vale's application for disclosure was also correctly dismissed by the primary judge.

[52] The appeal should be dismissed with costs.

[53] **WHITE JA:** The relevant facts and provisions of the Joint Venture Agreement between the parties are set out in Fraser JA's reasons with which I respectfully agree. Because of the different construction which Fryberg J has placed upon cl 15 of the JVA I will record my own observations.

[54] For convenience I set out cl 15.8:

> "The Relevant Participants must co-operate fully with the Valuers and any Determining Valuer and acknowledge that:
>
> (a) the Valuers and any Determining Valuer act as an experts [sic] and not as arbitrators; and
>
> (b) except in the case of manifest error:
>
> (i) the Fair Market Value determined in accordance with clause 15.4; or
>
> (ii) the determination of the Determining Valuer,
>
> shall be final and binding on the Relevant Participants."

[55] At first approach cl 15.8(b) does not appear to have any bearing on Vale's challenge that RBC's valuation was not a determination of Fair Market Value within the meaning of the JVA because it is not a Fair Market Value determined as the average of two valuations under cl 15.4 nor a determination by a Determining Valuer. Clause 15.8 does apply to a cl 15.3 valuation in as much as it requires the participants to co-operate fully with the valuers and stipulates that those valuers act as experts and not as arbitrators.

[56] Clause 15.4 provides:

> "If the determinations of Fair Market Value by each Valuer are within 10% of each other, the Fair Market Value for the purposes of this clause shall be set as the average of those determinations."

That, of course, has not occurred. However, the process provided for in cl 15.4 comprises the simplest of arithmetical calculations. It is quite unlikely that the parties intended to confine the "manifest error" to that calculation as a matter of common and commercial sense. It may be arguable that it is only if those values are within 10 per cent of each other that the "manifest error" argument can be employed. What seems more likely is that the parties intended that any challenge to a valuer's final determination of Fair Market Value can only be in the case of manifest error provided the valuer has broadly complied with his obligations. This construction is supported by the need for valuers to produce their valuations quickly in very complex factual circumstances. The means to fix the Fair Market Value through the further assessment of the Determining Valuer enables errors in the valuations to be considered and dealt with then.

[57] I agree with Fraser JA's conclusion that "manifest error" in cl 15.8(b) comprehends manifest error in a cl 15.3 valuation but only where the error influences a determination of Fair Market Value under either of the subparagraphs.

[58] I agree with Fraser JA's proposed order.

[59] **FRYBERG J:** Near the beginning of its outline of submissions for this appeal, Vale summarised its submissions thus:

> "6. The amended statement of claim made a first complaint that the RBC valuation was not made in accordance with the JVA between the parties because it was based upon an objectively incorrect identification of the subject matter being valued and therefore failed to comply with the specific and prescriptive requirements of the '*Fair Market Value*' definition. The second complaint was that the valuation had no contractual effect because RBC did not behave impartially."

The definition of fair market value

[60] The suggestion that the amended statement of claim alleged that the RBC valuation was based on an objectively incorrect identification of the subject matter being valued resonates with the sentence from McHugh JA's reasons quoted above: "A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties."[43] One can understand the forensic advantage aimed at by the submission. Instinctively one feels the dictum must be correct. However closer examination reveals that in the present case it is irrelevant.

[61] The essence of Vale's case was that the RBC determination did not constitute a determination for the purposes of cl 15.2 of the JVA, with the consequence that no occasion for making the agreement referred to in cl 15.5 arose. At no time has Vale made a case that it is the result of RBC having incorrectly identified the subject matter being valued. The subject matter being valued was a 49% "Venture Interest" in the JVA. Moreover, as Fraser JA points out, McHugh JA was framing a test for the purpose of deciding whether a valuation is binding upon the parties. That is not the issue here.

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43 Paragraph [14].

[62] One cannot evaluate Vale's submissions without construing the JVA. I agree with what Fraser JA has written on this question[44]: the construction must accord with commercial efficacy and commonsense. When I apply those standards to the JVA I reach a different construction from that of my colleagues.

Construction of the JVA

[63] The first question is whether a determination under cl 15.2 may be challenged only on the ground of "manifest error".

[64] Clause 15 discloses what is essentially a two-stage process for the determination of fair market value. For the first stage the relevant participants must each appoint a valuer and instruct it to make a final determination of fair market value. The valuer must be "a reputable international investment bank", an expression which, it must be assumed, is not an oxymoron. The bank must be rated in the top 10 for concluded mergers and acquisitions worldwide in the mining sector in the past two years prior to its appointment, and must satisfy a minimum credit rating standard from one of the named ratings agencies. There is no restriction on selecting a bank by reference to whether it normally acts for buyers or sellers, nor by reference to whether it has a reputation for optimism or pessimism. The bank acts as an expert, not as an arbitrator. There is no provision setting out what documents or other information is to be provided to it by the participant engaging it. No provision is made for any participant to give information or documents, or make submissions, to another participant's bank. Not only is there no provision for each bank to receive the same instructions[45]; the provision which is made virtually guarantees that they will receive different instructions.

[65] If one has regard to commercial reality, it must be concluded that the system is designed to enable the participants to obtain determinations at this stage which, while being independent, honest and arguable, are weighted in favour of the participant engaging the bank. These determinations are then averaged in order to set the fair market value unless they are not within 10% of each other. In short stage one offers each participant a constrained opportunity to influence the outcome to its own advantage. The constraints are important. Without them the process would become a free for all. With them extravagance in valuation may be avoided. It is very much in the parties' interests that stage one operate in accordance with the agreed contractual system.

[66] The second stage is different. It requires the appointment of another investment bank as determining valuer. It is obliged to assess the value determined by each of the participant's banks on the basis of its own skills and experience, assess the appropriate assumptions to be utilised (which is not something the participant's banks are expressly required to do) and to make its own determination of fair market value. Its determination is deemed to be the fair market value. Stage two therefore provides for an imposed solution in an environment where the participants are at substantial loggerheads.

[67] Stage one depends for its efficacy upon the participants and their banks adhering to the contractual constraints. Stage two depends upon the existence of a

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44 Paragraph [35].

45 Paragraph [37].

commercially effective mechanism for finally determining the issue. As a matter of commercial reality and commonsense one might expect the parties to have some mechanism for enforcing the application of the contractual constraints at stage one, but to have a limited scope for challenging the imposed solution at stage two.

[68] That expectation is borne out of the drafting of cl 15. Clause 15.8 makes the stage two determination final and binding on the relevant participants except in the case of manifest error. No such limitation is applied to the determinations made at stage one. If the averaging process under cl 15.4 takes place the fair market value so determined is also final and binding (with the same exception), but that applies only to the value so determined. In such a case any impeachable error would have to be manifest in the cl 15.4 process. Clause 15.8 has no application to the determinations of the participant's banks under cl 15.3.

[69] I therefore conclude that it is not necessary for Vale to plead and prove manifest error in the RBC determination.

[70] I also conclude that Vale does not have to demonstrate that any alleged error in the RBC determination has a bearing upon the final determination of fair market value. Vale is entitled to insist upon due process under the JVA. That requires compliance by the other participants in the procedures prescribed by cl 15.3 as properly interpreted. However as will appear below, that does not entitle it to roam through the determination criticising it wherever possible.

The statement of claim

[71] The next question is whether the statement of claim discloses no cause of action or has a tendency to prejudice or delay a fair trial.[46] If it does, it may be struck out. At this stage of the proceedings the matter must be viewed by reference to the case which Vale submitted was that which it had pleaded.[47]

[72] The starting point was para 31C:

> "31C. In order for the RBC Report to be a valuation of the *Fair Market Value* for the purposes of clauses 15.2 to 15.4 of the JVA it was necessary that the RBC Report determine a value:
>
> (a) in accordance with the assumption defined in the expression *Fair Market Value* that the buyer and seller referred to therein had acted 'carefully and with complete knowledge of the *Venture Interest* and all other relevant facts';
>
> (b) in accordance with the applicable standards prescribed by the Australasian Institute of Mining and Metallurgy for the valuation of interests in coal projects, those standards being those identified in paragraph 7 above being:
>
> (i) the JORC Code;
>
> (ii) the VALMIN Code;
>
> (c) impartially.

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46 *Uniform Civil Procedure Rules* 1999, r 171.

47 Paragraph [61].

Particulars

The requirements referred to in sub-paragraphs 31C(a) and (b) above are contained in the definition of Fair Market Value in clause 1.1 of the JVA. The requirement referred to in sub-paragraph 31C(c) above arose from the requirements of the VALMIN Code referred to in paragraph 7 above. It also arose from an implied term of the JVA to that effect, which term was implied by law out of necessity and in order to give business efficacy to the JVA."

The definition of "Fair Market Value" is set out above.[48]

[73] It will be observed at once that the pleading introduces an element not included in the definition: "the assumption defined in the expression *Fair Market Value* that the buyer and seller referred to therein had acted …". The introduction of the element puts a gloss on the definition and makes the pleading harder to read and understand. What in fact was necessary was for the "RBC report" to be a determination of fair market value, that is a determination of the amount that the buyer and seller referred to in the definition would pay and accept when they were both acting (among other things):

- carefully;
- with complete knowledge of the venture interest;
- with complete knowledge of all other relevant facts;

and which was a determination made in accordance with the applicable standards of the AIMM.

[74] Next, one would expect the pleaded case to identify how the determination failed to comply with the definition. Nowhere is this clearly pleaded. I am unable to identify any allegation that the amount determined was not what the hypothetical parties would pay and accept "with complete knowledge of the venture interest". That element of the definition does not seem to be separately invoked. Nowhere is it explicitly alleged why the amount determined was not the amount which the hypothetical parties would pay and accept when they were both acting carefully, distinguishing the case from that where they were not acting with complete knowledge of all other relevant facts and from the case where the determination was not made in accordance with the applicable standards. Instead, this is how the pleading continues:

"31D. The buyer and seller referred to in the definition of *Fair Market Value* in the JVA would, in being assumed to have acted carefully and with complete knowledge of the *Venture Interest* and all other relevant facts would necessarily be assured to have an accurate knowledge of the contents of:

(a) the 2008 SRK JORC Resources Report;
(b) the 2010 Salva JORC Resources Report;
(c) the 2010 Prefeasibility Report;
(d) the 24 February email pleaded in paragraph 25 above.

31E. Alternatively to paragraph 31D above, the buyer and seller referred to in the definition of *Fair Market Value* in the JVA

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48 Paragraph [4].

> would, in being assumed to have acted carefully and with complete knowledge of the *Venture Interest* and all other relevant facts, necessarily be assumed not to have an objectively wrong understanding of the contents of the documents pleaded in paragraph 31D above."

It then continues for a number of pages to allege errors, including errors "as a matter of objective fact" in the RBC document.

[75] My call for clarity in the provisions of the pleading is not purely the product of pedantry. If Vale is obliged to spell out the deficiencies which it alleges, it will become much easier to determine whether the alleged deficiencies are capable of sustaining its argument. If it is not so obliged the trial is likely to be distracted into side issues, to lose focus and to be delayed. That is unacceptable.

[76] For that reason I agree that the statement of claim should have been struck out. I would, however (in case it be necessary), vary the order below to grant liberty to replead.

[77] It would not be appropriate for me to attempt to draw what would be an acceptable pleading. However some general observations are pertinent:

- The ultimate issue is whether the RBC document is a determination within the meaning of the JVA. The mere presence of errors in it will not necessarily prevent its answering the description.
- The focus of the definition is upon the hypothetical buyer and seller. Inevitably this means that exercises of judgment and matters of opinion will be involved. An interpretation of the contract which opened the way for a routine and detailed merits examination of such issues would seem unlikely to be correct.
- Given the variability of the information which may be given to the valuing banks it seems unlikely that a determination could be challenged simply because an ignored fact subsequently turned out to be relevant. It is more likely that the question of what are "all other relevant facts" is one for the bank to determine, subject perhaps to the possibility of challenging a decision on the basis of *Wednesbury* irrationality.

Impartiality

[78] It will be apparent from the discussion earlier in these reasons that I am far from persuaded that the JVA contained an implied term that RBC would act impartially. However if the existence and breach of that term were properly pleaded, I might be persuaded to allow the question to go to trial. Whether such a term should be implied might depend upon matters of fact.

[79] The present statement of claim not only alleges no such facts, it does not even properly plead the existence of an implied term. The issue is referred to in the particulars to para 31C, but that is an entirely inappropriate way to raise a claim of this nature. That is sufficient in itself to warrant the approach taken below and by my colleagues in this division. But in any case, I agree that the ambiguity of the pleading also warrants its striking out. Again, from an abundance of caution, I would grant liberty to replead.

Orders

[80] I would vary para 1 of the orders made at first instance to add the words "with liberty to replead". Otherwise I would dismiss the appeal with costs.