

Care in the drafting of pleadings

Susan Cirillo reports on *Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Limited v Australian Securities and Investments Commission* [2012] HCA 39

The High Court unanimously upheld appeals by Fortescue Metals Group Limited (Fortescue) and its chairman and chief executive, Andrew Forrest against claims made by ASIC. The decision highlights the care that needs to be given to the drafting of pleadings.

Background

In late 2004, Fortescue, a publicly listed company, signed three agreements titled 'Framework Agreement', each with one of three state-owned bodies of the People's Republic of China, known by their acronyms as CREC, CHEC and CMCC. The agreements together related to a proposed mining project to consist of a mine, a port and a railway to link the two.

The three agreements were substantially identical. For example, the CREC agreement, among other things, provided for the parties to 'jointly develop and agree' on certain matters including 'a General Conditions of Contract suitable for a Build and Transfer type contract' and contained a clause stating that the 'document represents an agreement in itself', recognising that a 'fuller and more detailed agreement', 'will be developed later'.¹

After signing the CREC agreement, Fortescue sent a letter and a media release about it to the Australian Stock Exchange (the ASX) dated 23 August 2004. During argument in the High Court, ASIC's central case was treated as sufficiently identified by reference only to the 23 August 2004 communication. The press release began:

[Fortescue] ... is pleased to announce that it has entered into a binding contract with ... [CREC] ... to build and finance the railway component of the Pilbara Iron Ore and Infrastructure Project.

In 2006, ASIC commenced proceedings alleging that, by describing the agreements as 'binding contracts', Fortescue contravened,

- s 1041H of the *Corporations Act 2001* (the Act) by publishing notices in relation to a financial product (shares in Fortescue) that were misleading or deceptive or likely to mislead or deceive; and
- the continuous disclosure requirements of s 674 of the Act.

ASIC alleged also that, Mr Forrest had not exercised his powers or discharged his duties as a director

of Fortescue with the degree of care and diligence required by s 180(1) of the Act.

Summary of the result

At trial, Gilmour J dismissed ASIC's claims. Keane CJ, Emmett and Finkelstein JJ upheld ASIC's appeals.

In a joint judgment, French CJ, Gummow, Hayne and Kiefel JJ allowed the appeals finding that ASIC did not establish that Fortescue engaged in misleading or deceptive conduct contrary to s 1041H, and consequently, failed to establish a contravention of the continuous disclosure provisions or a breach of Mr Forrest's directors' duties. Heydon J agreed that the appeals should be allowed on different reasoning.

The pleadings

The plurality noted that at trial, ASIC alleged that Fortescue and Forrest had been dishonest in making the impugned statements, that is, ASIC's allegations were taken to be allegations of 'fraud'. Gilmour J rejected the allegations, finding that the impugned statements were an expression of an honestly and reasonably held opinion. However, in the full court and High Court, ASIC advanced its case on the footing that the impugned statements were misleading or deceptive.²

The plurality observed that ASIC pleaded that Fortescue had represented to potential investors that:

- Fortescue 'had entered a binding contract' with CREC, CHEC or CMCC 'obliging' that company to build and finance the relevant infrastructure element, and
- Fortescue 'had a genuine and reasonable basis for making' the relevant statement.³

Their honours stated that the latter allegation added nothing to the case of misleading or deceptive conduct which ASIC sought to make. In such a case, 'reference to Fortescue's state of knowledge was unnecessary and inappropriate' and distracted from the two critical questions in a misleading and deceptive conduct case, which are:

- What do the impugned statements convey to their intended audience?; and
- Is what is conveyed misleading or deceptive, or likely to mislead or deceive?⁴

The plurality also observed that the above pleading gave rise to further confusion where it was then pleaded that the impugned statements were false and misleading or deceptive because:

- the agreements ‘did not *state* that [CREC, CHEC or CMCC] *would*, nor did it have the *legal effect of obliging*’ CREC, CHEC or CMCC to do certain things; and
- Fortescue ‘did not have a genuine and/or reasonable basis for making’ the impugned statement because it was aware of the terms of the agreements and ‘knew, or ought reasonably to have known’ that the parties had not agreed on all of the necessary terms to compel the building and transfer of the relevant infrastructure.⁵

The plurality described the latter allegation as a ‘further and radically different sub-paragraph’:

On their face, these allegations mixed two radically different and distinct ideas: that Fortescue *knew* that the statements were false (it had no *genuine* basis for making them) and that Fortescue *should have known* that the statements were false (it had no *reasonable* basis for making them). At common law the first idea is expressed in the tort of deceit and the second in liability for negligent misrepresentation.⁶

This was ‘no pleader’s quibble’ with the plurality emphasising the fundamental requirements for the fair trial of allegations of contraventions of law; that is, the making of clear and distinct allegations.⁷ ASIC could not plead a case of fraud as a ‘fallback’ claim in anticipation that Fortescue might claim that the impugned statements were expressions of opinion not fact – it being fundamental that a case of fraud is to be pleaded specifically and with particularity.⁸

The plurality disposed of the appeals by deciding only the misleading or deceptive conduct allegations. In doing so, their honours emphasised the necessity of examining what the statements conveyed to their audience.⁹ The audience was identified as ‘investors (both present and possible future investors) and, perhaps as some wider section of the commercial or business community’.¹⁰

The plurality held that this audience would take what was said as a statement of what the parties to

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the agreements understood that they had done and *intended* would happen in the future.¹¹

In contrast, there was no evidence led at trial to show that this audience would understand the statements as also conveying that the agreements would be enforceable in an Australian or other court.¹² Therefore, the statements conveyed what a ‘commercial audience’ would describe, as a ‘binding contract’¹³ and that the parties intended the agreements to be legally binding.¹⁴

Their Honours rejected the assumption in the full court that the statements, by use of the words ‘contract’ or ‘agreement’,¹⁵ conveyed something about their legal quality. Given the international features of the agreements, it would be ‘extreme or fanciful’ to attribute to an ordinary or reasonable member of the audience the understanding that, if the parties later disagreed, the only question would be one of enforcement in an Australian court.¹⁶

Heydon J

His Honour found that the impugned statements were statements of opinion rather than fact because the question of whether an agreement is a binding contract is a question of law, which is a question of opinion.¹⁷

His Honour rejected the allegations of fraud against Fortescue because, among other reasons, ASIC had conceded that the parties intended the agreements to be legally binding.¹⁸ His Honour also rejected the argument that Fortescue had no reasonable basis for stating that the agreements were binding. This question turned on whether the audience understood that Fortescue said that the parties had agreed on all of the necessary terms for it to be practicable to force compliance with the agreements.¹⁹ His Honour held that the audience would not have understood the statements in this manner and so the statements were not misleading or deceptive.²⁰

Endnotes

1. See *Forrest* [2012] HCA 39 at [12] where the plurality identified seven important common features of the agreements. See also Heydon J at [87] – [88].
2. *Forrest* [2012] HCA 39 at [18] and [28].
3. *Forrest* [2012] HCA 39 at [20].
4. *Forrest* [2012] HCA 39 at [23].
5. *Forrest* [2012] HCA 39 at [21].
6. *Forrest* [2012] HCA 39 at [22]; compare Heydon J at [95].
7. *Forrest* [2012] HCA 39 at [25]; see also at [27] and [70].
8. *Forrest* [2012] HCA 39 at [24] and [26].
9. *Forrest* [2012] HCA 39 at [33].
10. *Forrest* [2012] HCA 39 at [36]. See also Heydon J at [105].
11. *Forrest* [2012] HCA 39 at [37].
12. *Forrest* [2012] HCA 39 at [39]. However, see also Keane CJ's postulation on the 'curiosity' of ASIC's omission to lead evidence in this regard: (2001) 190 FCR 364 at [201].
13. *Forrest* [2012] HCA 39 at [58]; compare Heydon J at [90]–[91].
14. *Forrest* [2012] HCA 39 at [40]; ASIC conceded at trial that the parties intended the agreements to be legally binding (see at [40]).
15. ASIC disclaimed any special reliance on the use of the word 'binding'; see *Forrest* [2012] HCA 39 at [41].
16. *Forrest* [2012] HCA 39 at [50].
17. *Forrest* [2012] HCA 39 at [94].
18. *Forrest* [2012] HCA 39 at [96] – [101].
19. *Forrest* [2012] HCA 39 at [104].
20. *Forrest* [2012] HCA 39 at [105].

Restrictive immunity

Natalie Zerial reports on *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission* [2012] HCA 33

In accordance with the conventional doctrine of foreign state immunity, domestic governments have long granted immunity to foreign states from domestic court proceedings.¹ There are several historical rationales for the doctrine, most notably the principle of respect for the equality of foreign sovereigns. However, as states began increasingly to engage in transnational commercial activities, the restrictive theory of immunity was developed. Under this approach, the immunity does not extend to cases concerning a foreign state's commercial (rather than governmental) activities.²

It is not always clear where or how to draw the line between 'commercial' and 'governmental' activities. In its 1984 *Report on Foreign State Immunity*, the Australian Law Reform Commission observed that arguments in favour of restrictive immunity 'do not point to a single distinction between immune and non-immune cases as appropriate or necessary, whether it is a distinction between 'private' and 'public' law, or between 'commercial' and 'governmental' transactions.'³

The line between 'public' and 'private' law in this context was explored in *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission*⁴. The issue in the case was whether the commercial transactions exception to foreign state immunity

applied to proceedings brought by a governmental regulator seeking the imposition of civil penalties for the alleged breach an Australian statute prohibiting anti-competitive conduct affecting Australian markets. The appellant (Garuda) argued that the proceedings fell outside of the commercial transactions exception on the basis that they were public proceedings that were not seeking to vindicate any private right. The High Court rejected this argument, and indicated scepticism of the public / private law distinction on which Garuda's submissions relied.

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Background

Garuda is 95.5 per cent owned by the Indonesian Government. The remaining 4.5 per cent is held by government-controlled corporations and, at the relevant times, four out of five members of Garuda's board were senior officials of the Indonesian Government.

In its Statement of Claim dated 2 September 2009,