The Law Society
OF WESTERN AUSTRALIA
The **voice** of the **legal profession** in Western Australia

29 March 2018

Ms Larissa Strk
The Principal Registrar
Supreme Court of Western Australia
Level 14, David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000

Dear Principal Registrar Larissa,

PRACTICE DIRECTION 4.1.2.2 – CMC LIST USUAL ORDERS

I refer to the decision in *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [No 15] [2017] WASC 339 (**Decision**).

In the Decision, Justice Kenneth Martin suggested an amendment to the Supreme Court Practice Directions, and a copy of the decision is **enclosed** for your ease of reference.

At paragraph [58] of the Decision, His Honour noted that from a case management perspective, a late hearsay objection taken during trial, against masses of pricing data underlying an expert report where such challenge had not been identified as an outcome of the joint pre-trial expert conferral, was not satisfactory. He noted in those circumstances, were the objection upheld, it may have been seriously disruptive to the duration and running of the trial.

His Honour at paragraphs [59] and [60] then made the following comments suggesting an amendment to the usual orders set out in Supreme Court Practice Direction 4.1.2.2:

> *[59] In an attempt to avoid such a situation ever arising again in future, this court's standard pre-trial practice directions for experts, I suggest, should be amended to explicitly require that any objection to an expert's utilised source data be expressly identified as an outcome of the expert conferral process - if that truly is a matter in serious dispute at the conclusion of the conference.*
>
> *[60] To that end the Supreme Court of Western Australia's Consolidated Practice Directions might be amended to address the situation under practice direction 4.1.2.2 at par 55, by a new par 55(d) requiring:*
>
> > *55(d) a clear identification of any facts or materials upon which an opposing expert has based their opinion(s) and which are not accepted by other experts as reliable, then which as a consequence of that disagreement, will need to be formally proved at an ensuing trial, in order for the expert's opinion to be founded.*

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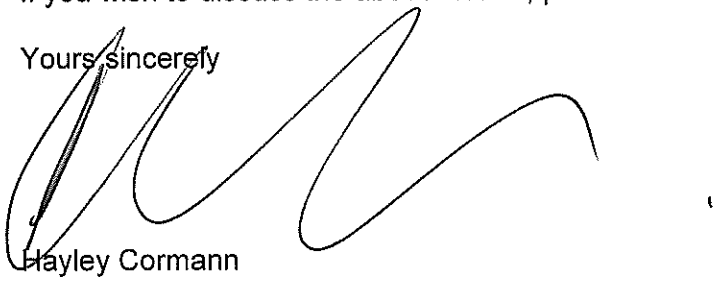
[61] *That position has to my understanding been the civil trial practice long followed in Western Australia as regards the outcomes of expert conferrals. But an explicit direction would assist in rendering the position express to anyone possibly unfamiliar with the approach.*

The Law Society respectfully agrees that Supreme Court Direction 4.1.2.2 ought be amended, and proposes a new paragraph 55(d) be added as suggested in the Decision.

The Society would be grateful for your consideration of this proposal.

If you wish to discuss the above further, please do not hesitate to contact me.

Yours sincerely



Hayley Cormann
President

Encl.

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	:	MINERALOGY PTY LTD -v- SINO IRON PTY LTD [No 15] [2017] WASC 339
CORAM	:	KENNETH MARTIN J
HEARD	:	20 JUNE 2017
DELIVERED	:	20 JUNE 2017
PUBLISHED	:	24 NOVEMBER 2017
FILE NO/S	:	CIV 1808 of 2013
BETWEEN	:	MINERALOGY PTY LTD Plaintiff AND SINO IRON PTY LTD First Defendant KOREAN STEEL PTY LTD Second Defendant CITIC LTD (formerly CITIC PACIFIC LTD) Third Defendant

Catchwords:

Evidence - Expert evidence - Underlying facts to ground opinions - Hearsay objection to underlying facts - Exception to hearsay rule - Non-specific hearsay as exception to general rule excluding hearsay

Legislation:

Nil

Result:

Objection dismissed

Category: B

Representation:

Counsel:

Plaintiff	:	Mr T J Bradley QC, Mr T R March & Mr K S Byrne
First Defendant	:	Mr C M Scerri QC, Mr S H Parmenter & Ms T Spencer Bruce
Second Defendant	:	Mr C M Scerri QC, Mr S H Parmenter & Ms T Spencer Bruce
Third Defendant	:	Mr C M Scerri QC, Mr S H Parmenter & Ms T Spencer Bruce

Solicitors:

Plaintiff	:	Kane Jones
First Defendant	:	Allens
Second Defendant	:	Allens
Third Defendant	:	Allens

Case(s) referred to in judgment(s):

Bodney v Bennell [2008] FCAFC 63; (2008) 167 FCR 84
Borowski v Quayle [1966] VR 382
Clambake Pty Ltd v Tipperary Projects Pty Ltd [No 2] [2007] WASC 244
H v Schering Chemicals Ltd [1983] 1 WLR 143
Jango v Northern Territory of Australia [No 4] [2004] FCA 1539; (2004) 214 ALR 608
Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141
Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 5) [2015] FCA 571

Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6) [2015] FCA 825; (2015) 329 ALR 1
Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16] [2017] WASC 340
Pownall v Conlan Management Pty Ltd (1995) 12 WAR 370
PQ v Australian Red Cross Society [1992] 1 VR 19

KENNETH MARTIN J:

(These reasons for judgment were delivered extemporaneously on 20 June 2017 during the trial and have subsequently been edited from the transcript prior to publication. The reasons are to be read with the definitions in ***Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16]*** [2017] WASC 340.

Introduction

1 These are summary reasons in relation to a ruling which I am required to give during trial in respect of hearsay admissibility objections raised by the CITIC defendants against the various sources of data used by the plaintiff's expert, Mr Brierley, in a report which Mineralogy (the plaintiff) proposes to rely upon at this trial.

2 In accord with standard practice directions of this court (see *Consolidated Practice Directions* 4.1.2.2 par 54) pre-trial directions were earlier issued by me as case manager. I made the standard direction that there was to be a conferral between the respective experts on each side, prior to the trial commencing and then a report from those experts.

3 After a process of conferral as between the respective experts had been undertaken and concluded (Mr Brierley for Mineralogy and Dr Fisher, Mr Buckley and Mr Barkas for the CITIC defendants), they together produced a joint expert memorandum dated 2 June 2017, which they all signed (exhibit 1.6).

4 The 10-page joint expert memorandum is comprehensive and spans some 60 paragraphs. It identifies major issues agreed upon as between the experts, as well as issues upon which the four experts remain in fundamental disagreement.

5 It is apparent from the joint expert memorandum that there remains a fundamental disagreement as between the experts as regards Mr Brierley's approach, in terms of his methodologies and so called generalised assumptions made towards his deriving FOB prices (expressed in US dollars per DMTU) (dry metric tonne unit) for a use in the Royalty Component B (RCB) formula elements 'PP' and 'CP'. These elements form part of a royalty calculation formula agreed upon in two written agreements (MRSLAs) of March 2006, which afford Mineralogy the right to receive RCB from Sino Iron and Korean Steel on a quarterly basis, under cl 8.2(a) of each MRSLA.

6 Areas of expert disagreement are identified in the joint memorandum, commencing at par 27. Various reasons for the disagreement are elaborated upon, particularly in reference to Mr Brierley's use of a Platts IODEX 62% (Fe) fines index price and his various other data pricing sources. Objections raised by the CITIC defendants' experts extend to Mr Brierley's manipulation and use of freight pricing data which he sourced from the Baltic Exchange. Mr Brierley has also used other iron ore product pricing data sourced from Umetal for the pellet prices. Another pricing data source he used were the published product prices as obtained from Rio Tinto.

7 The CITIC defendants' experts challenged these sources of data as inappropriate for use by Mr Brierley. Some iron ore product pricing data sourced from Vale SA, which Vale SA identifies under its published financial reports issued from time to time, is challenged in terms of prices as inappropriate for use in the exercise that was undertaken by Mr Brierley. He was seeking to determine US dollars per DMTU pricing rates for two reference products at issue, ie, the chosen pellets and fines as referred to in PP and CP respectively in the RCB formula in each MRSLA.

8 Those rival expert positions were clearly expressed in the joint memorandum. But there was no suggestion at all within that post conferral joint expert memorandum document that Mr Brierley's pricing source materials, namely the underlying data he had gathered together and then used in his calculations from sources including the Platts indices, the Baltic Exchange, or from Umetal, Rio Tinto or Vale SA internal published publications was, as between the four experts, a subject of any level of expert impugnment - on a basis that this sourced pricing information and data as accessed and assembled by Mr Brierley within his reports was not genuine pricing data, or that it was somehow unreliable, or was somehow otherwise not accepted within the world iron ore industry, or that the pricing data Mr Brierley had gathered was wrong or likely to mislead in any respect.

9 The issues of expert concern seen raised by the joint memorandum on behalf of the CITIC defendants' experts was only over how Mr Brierley had gone about manipulating and applying all this gathered pricing and freight data to reach his ultimate US dollars per DMTU price rate opinions for the two reference products used in PP and CP in the RCB formula. Nothing adverse had been raised by the CITIC defendants' experts in the joint memorandum as to the need for the formal proof of the

data or the credibility or underlying reliability of the pricing data itself which Mr Brierley had gathered and used.

10 A reading of the joint expert memorandum shows not the slightest hint of any expressed concerns by the CITIC defendants' experts over the reliability of any of Mr Brierley's utilised underlying data. In fact, a strong sentiment that emerges is very much to the contrary. In that regard, see the reference at par 6 of the joint memorandum, referring to daily spot prices for iron ore fines assessed and published by Platts from June 2008.

11 The joint expert memorandum relates that the Platts IODEX 62% (Fe) fines price has been the principal iron ore price reference since April 2010 and that the Platts index prices were published in US dollars per DMT (meaning a dry metric tonne).

12 Paragraph 11 of the joint expert memorandum says:

> [A] published price is one that has been reported or promulgated by an appropriate, reliable source in a publicly accessible way, including subscription services such as those provided by Platts and the Baltic Exchange.

13 Thereafter, par 14 and par 15 of the joint expert memorandum states:

> The Baltic Exchange is a reliable supplier of published spot ocean freight rates quoted in $US/wmt [which I read as wet metric tonne].
>
> Spot freight rates, including those published by the Baltic Exchange and Platts, may not necessarily represent the actual freight costs incurred in transporting particular cargoes of iron ore.

14 All the above references from the expert memorandum are consistent with the CITIC defendants' experts' demonstrable express recognition and acceptance of the credibility of the pricing data as used by Mr Brierley in his reports, especially the data from the Platts index and Baltic Exchange.

15 What is seen stated in the joint expert memorandum was the pre-trial position settled upon as between the CITIC defendants' three experts and by Mr Brierley after their pre-trial conferral meeting in Perth.

16 Had there been any serious pre-trial controversy arising between the parties' respective experts, in terms of, say, the accuracy or the general reliability of the Platts or Baltic Exchange pricing and freight data that was sourced and used by Mr Brierley in preparing his expert report for Minerology, then the settled joint expert memorandum (identifying major issues, areas of agreement and areas of disagreement as between the

respective parties' experts) was the place for any such underlying controversy over all that data to manifest - so that everybody concerned, including myself, would be made explicitly cognisant of such a looming data proof dispute well before the trial began.

17 Nevertheless, despite all that pre-trial work between the experts, an objection was taken against the use of Mr Brierley's underlying data on hearsay grounds. This objection only emerged, on my understanding as the trial judge, from the CITIC defendants on day two of the trial.

18 The CITIC defendants' late hearsay admissibility objection then led to two lengthy tranches of written submissions from the CITIC defendants articulating the objection. The first tranche of submissions was received about 10.00 am on Friday, 16 June 2017, being day three of the trial. A further tranche of submissions was received at the commencement of business on Monday, 19 June 2017, on day four of the trial.

19 Correlatively, Mineralogy and its legal advisers then needed to consider and respond to this late hearsay objection raised against much of the reference product pricing source data assembled and relied upon by Mr Brierley in reaching his opinions as expressed in his trial expert report. The objection issue clearly needed to be urgently resolved before Mr Brierley's evidence at trial.

20 Minerology provided in due course written submissions responding to the CITIC defendants' hearsay objections. They were received at about 5.00 pm on day three of the trial.

The hearsay objection raised against the source pricing data used by Mr Brierley

21 The late admissibility objection raised by the CITIC defendants is a legal objection of some magnitude, given its potential trial ramifications. It carries a challenge that is very different in character to the as articulated and understood disagreements of principle as raised by the CITIC defendants' experts against Mr Brierley's derivative US dollars per DMTU FOB pricing methodology, used by him for deriving the US dollars per DMTU quarterly price rate inputs that would fit within PP and CP to be used as elements of the RCB calculation formula, or the challenged assumptions made by Mr Brierley underlying his approach. Those areas of expert disagreement are extensively identified and canvassed within the 10-page joint expert report as settled by the four experts after their pre-trial conferral in Perth.

22 The late hearsay objection by the CITIC defendants effectively would see Mr Brierley's trial report wholly undermined - unless there was formal proof of all the underlying sources of data that Mr Brierley collects and works upon in reaching his US dollars per DMTU FOB price rate opinions for pellets and fines - namely, the Platts index data, the Baltic Exchange data concerning world shipping freight prices, and Rio Tinto and Vale SA's internal publications and accounts, containing iron ore market product price or their freight price information. The CITIC defendants now say that all that underlying data collected by Mr Brierley needs to be formally proved at this trial.

23 How that high level of formal proof could now actually be achieved by Mineralogy towards all the underlying price data at this trial to the satisfaction of the CITIC defendants poses some challenging forensic issues. Clearly, it raises time, cost and resourcing issues all bearing upon how this trial can be efficiently run and completed in the time allocated.

24 If, say, it were hypothesised that the CEOs of Platts and the Baltic Exchange, along with a number of their employed iron ore pricing analysts, were all flown out (business class) to Western Australia so as to be subjected to cross-examination by the CITIC defendants' trial lawyers over the reliability, accuracy and content of their massive amounts of collected price and freight data that has since been accessed and relied upon by Mr Brierley, I doubt that even then the CITIC defendants would be satisfied. No doubt, there would still be objections over whether the data source witnesses had recorded things correctly or brought with them all the underlying source data - concerning their collections of data from multiple daily worldwide iron ore sale or freight transactions which their organisations professionally collect, assess and aggregate - to publish what are their well respected and widely used international world pricing and freight index publications.

25 It is easy to foresee that taking a path down such a formal proof road for all that pricing or freight data would create an almost never-ending saga - in terms of putting the international publishers of a product pricing index strictly to proof of all collated underlying transactions used in the index - if that is what the law requires within an exercise such as the present.

26 Fortunately, by my assessment, that is not what I assess the law to require - in order for the massive amounts of assembled international underlying transactional pricing and freight data as collected by Mr Brierley to be legitimately used by him at this trial in his expert

reports for the purposes of deriving US dollars per DMTU FOB figures. I reach that conclusion urgently and mid-trial.

Trial context

27 For this particular trial, and I emphasise that every individual case must be evaluated by regard to its own unique presenting issues, what Mr Brierley's expert evidence is endeavouring to attempt, is to ascertain the quarterly calculation inputs needed to be used within the RCB algebraic calculation formula that is found within the two MRSLAs as entered between the plaintiff and Sino Iron Pty Ltd and Korean Steel Pty Ltd on 21 March 2006.

28 Clause 8.2(a) in each MRSLA sees Sino Iron and Korean Steel each separately promise Mineralogy that it will be paid a 'Mineralogy Royalty'. This is said to be an enduring royalty promised to Minerology by each of Sino Iron and Korean Steel and payable each quarter. It has two stated components, being Royalty Component A (RCA) and RCB. I am only presently concerned with RCB.

29 The RCB calculation formula displays internal input elements within cl 8.2(a) referred to as 'PP' and 'CP' (effectively meaning 'Pellet Price' and 'Concentrate Price', respectively). The relevant PP and CP inputs are world market iron ore product reference prices. They are expressly specified to be used within the overall quarterly RCB calculation formula. They are the prices for the two independently selected MRSLA reference products (namely Brazilian pellets for export and Mt Newman fines for export) expressed in US dollars per DMTU price rates. They are the FOB prices for these two reference iron ore products (meaning prices of the iron ore goods delivered 'free on board' a carrying ship at the shipment port).

30 The RCB formula's chosen world market pricing regime sought to be captured by PP and CP seeks to draw upon the world market prices for the two products which the seller of an identified iron ore reference product charges the purchaser. This is the price sought to basically deliver the iron ore product into the ship's hold and for the ship to then leave the iron ore product shippers' destination to sail to the destination of the iron ore product purchaser's nominated world port.

31 Within the MRSLA definitions for PP and CP, there has emerged a basal trial issue - in relation to ascertaining the amounts of the two required RCB reference US dollars per DMTU formula input product

prices (for PP and CP) for injection into the RCB calculation formula to be worked out each quarter.

32 The definitions of PP and CP used within the RCB calculation formula in cl 8.2(a) refer to the 'prevailing published annual FOB price' towards Brazilian pellets for export (as PP) and then for Mt Newman fines for export (as CP).

33 Mr Brierley's report for Minerology is at base directed towards deriving the amounts of these US dollars per DMTU pricing inputs for a use in PP and CP of the RCB formula. I emphasise at this point in the early stages of the trial that I have read but I have not formed any view, and so have expressed no views as to my ultimate post trial acceptance or otherwise, of Mr Brierley's expert evidence, or views upon its weight overall within the context of all trial issues. Nor do I express any views now on any of the many conceptual expert criticisms all directed at Mr Brierley's work, as expressly made in the CITIC defendants' experts' reports. Such expert challenges grounded upon concept and principle put against Mr Brierley's approach all raise in themselves difficult enough questions.

34 The trial will determine in due course, after I have had the benefit of all evidence and arguments, what is the true meaning of the market reference pricing phrase (MRP phrase) found commonly used within PP and CP of the RCB formula (ie, 'prevailing published annual FOB price' which is expressed in US dollars per DMTU). By law there can only be one true meaning. And this will be a meaning ascertained as applicable at the time the two MRSLAs were perfected at 21 March 2006. The true meaning as to the MRP phrase words used in the written MRSLA agreements will be reached by the court applying a clinical and objective approach, directed at finding a true meaning for the MRP phrase.

35 Mr Brierley is a trained mining engineer. He is someone very familiar by his CV with workings of the world iron ore industry. He has practised for many years as a local analyst in relation to mining deals, including in the international iron ore sphere. He can bring all that acquired industry knowledge and personal experience to bear in his attempts at deriving US dollars per DMTU FOB prices for a quarterly use as inputs within the PP and CP elements of the RCB formula.

36 That is the context in which Mr Brierley's expert report, based upon his collected sources of pricing data, is sought to be introduced for Minerology at the trial.

37 In his reports, Mr Brierley uses and works on price and freight data from various world marketing pricing sources in order to derive figures that are as near as practicable to the MRP phrase for use within PP and CP in the RCB calculation formula. That is so that US dollar amounts can then be derived for RCB. Mineralogy then argues at the trial that it should have received those amounts as RCB payments each quarter from Sino Iron and Korean Steel since 14 January 2014.

The hearsay admissibility objection argument of the CITIC defendants considered

38 For necessary convenience, I will attach as schedules A and B to these reasons the two tranches of written submissions as received from the CITIC defendants and then, as schedule C, Mineralogy's responsive written submissions. Together it will then be seen that those submissions canvass and incorporate many sources of law in respect of this hearsay objection as raised by the CITIC defendants.

39 An academic article heavily canvassed by the written submissions presents as an influential publication on both sides. The article has been referred to by the Full Court of the Supreme Court of Western Australia, and by first-instance judges, both of this court and in the Federal Court of Australia. All judges referred with evident approval to this obviously significant article entitled 'Expert Opinion Evidence Based on Hearsay' in [1982] *Criminal Law Review* 85 by Dr Pattenden.

40 Anderson and Ipp JJ, when members of the Full Court of the Supreme Court of Western Australia, in ***Pownall v Conlan Management Pty Ltd*** (1995) 12 WAR 370, made reference to components (93) and (95) of the Pattenden article. Plainly it is a compilation of a great deal of Anglo-Australian evidentiary admissibility case authority in this field. Dr Pattenden also collects a body of American authority, citing Wigmore.

41 Towards resolving the present hearsay objection controversy, I will note passages from the Dr Pattenden article seen at page 93 (as did Anderson J in ***Pownall*** at 388), and where it was said:

> Provided the hearsay on which the expert relies is of a sufficiently general nature to be regarded as part of the corpus of knowledge with which an expert in his field can be expected to be acquainted, no objection will be taken to his evidence on this ground. (See Megarry J's decision in ***English Exporters (London) Ltd v Eldonwall Ltd*** [1973] 1 Ch 415.)

42 And (also at page 93):

> Non-specific hearsay, as this exception to the hearsay rule may be called, is important when the expert attempts to assess the significance, from the point of view of his discipline, of the specific facts which form the factual premise of his opinion. (footnotes omitted)

43 Dr Pattenden summarised two common law hearsay exceptions at page 95. Those observations were later cited with approval by EM Heenan J in ***Clambake Pty Ltd v Tipperary Projects Pty Ltd [No 2]*** [2007] WASC 244 at [43] in these terms:

> There are two common law hearsay exceptions peculiar to experts. The first relates to technical data widely used by members of the expert's profession, not confined in relevance to the facts of the case about which he is testifying and regarded as reliable. The second relates to knowledge which the expert can be assumed to have and on which he draws to formulate his opinion and to express working truths but which he has not learnt through personal experience. To some extent these exceptions overlap.

44 Later, Edelman J, in ***Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 5)*** [2015] FCA 571 [13] referred to Dr Pattenden's observations in the same article from (86 - 87) upon non-specific hearsay, with evident approval. Dr Pattenden had said:

> It is unobjectionable [to admit this non-specific hearsay evidence] because when the expert relates the basis of his opinion to the court he does so in order to explain why he formed a particular opinion - not to prove that which he was told out of court. It is desirable because without knowing on what information the expert drew in forming his opinion the weight to be placed on his opinion cannot begin to be assessed. Further, the fact that the opinion rests on facts learnt at second-hand may be an important factor in deciding how much weight to attach to the opinion. (footnotes omitted)

45 I also note, by reference to Edelman J's further reasons of 14 August 2015 after a substantive trial, his Honour's observation that rulings upon admissibility issues at common law, can be revisited. See his Honour's remarks at [232] in ***Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)*** [2015] FCA 825; (2015) 329 ALR 1, in the Federal Court of Australia. (The same Pattenden passage from pages 86 - 87 had earlier been cited by EM Heenan J in ***Clambake*** at [40], again with evident approval.)

46 Augmenting the same line of case authority concerning hearsay exceptions for experts as regards non-specific hearsay, I will next mention the observations found in ***Bodney v Bennell*** [2008] FCAFC 63; (2008) 167 FCR 84 in the joint reasons of Finn, Sundberg and Mansfield JJ, a 2008 decision of the Full Federal Court of Australia. Their Honours

discussed at [92] the common law position prior to the uniform *Evidence Act 1995* of the Commonwealth and of New South Wales.

47 ***Bodney*** was concerned with a body of expert anthropological evidence concerning the occupation and use of Australian land prior to European settlement. An issue arose at trial in the context of a native title claim, in that federal context. Objections were taken against an asserted hearsay nature of proposed expert anthropological material.

48 At trial, the admissibility objections based upon hearsay had been upheld.

49 However, on the appeal in ***Bodney*** it was held that the hearsay objections at trial were wrongly allowed. At [92] in the joint reasons, their Honours observed:

> Before the *Evidence Act*, it was well established that experts are entitled to rely upon reputable articles, publications and material produced by others in the area in which they have expertise, as a basis for their opinions. In ***Borowski v Quayle*** [1966] VR 382 at 386 [a case referred to during argument] (***Borowski***) Gowans J, quoting from *Wigmore on Evidence* (3rd ed) Vol 2, 784 - 785, said that to reject expert opinion because some facts to which the witness testifies are known only upon the authority of others, 'would be to ignore the accepted methods of professional work and to insist on finical and impossible standards'. Experts may not only base their opinions on such sources, but may give evidence of fact which is based on them. They may do this although the data on which they base their opinion or evidence of fact will usually be hearsay information, in the sense they rely for such data not on their own knowledge but on the knowledge of someone else. The weight to be accorded to such evidence is a matter for the court. (citations omitted)

50 Their Honours in ***Bodney*** refer to numerous other case authorities in this area, including ***Borowski v Quayle*** [1966] VR 382, 385 - 387; ***PQ v Australian Red Cross Society*** [1992] 1 VR 19, 34 - 35; ***H v Schering Chemicals Ltd*** [1983] 1 WLR 143, 148 - 149; ***Milirrpum v Nabalco Pty Ltd*** (1971) 17 FLR 141, 161 - 163 and ***Jango v Northern Territory of Australia [No 4]*** [2004] FCA 1539; (2004) 214 ALR 608 [8]. That body of law was not displaced under the *Evidence Act 1995* (Cth): see ***Bodney*** [93].

51 There is, accordingly, a highly respectable body of Australian and international case authority which bears against upholding the hearsay objections now raised by the CITIC defendants. It stands to the effect that experts, whilst they are engaged in expressing opinions in their respective fields of expertise, are fully permitted to rely upon and use well-known,

respected or reputable articles, publications and materials as a legitimate basis to found their opinions.

52 As mentioned, the pre-trial as settled upon joint expert memorandum tendered at this trial as exhibit 1.6, makes direct reference to, without any criticism of their reliability, the Platts index and the Baltic Exchange data, as used by Mr Brierley. Such pricing data gathered and used by Mr Brierley fits squarely, in my view, within the genre of reputable data that is accepted within the international iron ore industry as reliable, reputable and credible. If the product pricing data as used by Mr Brierley were not accepted by the industry as being of that reliable standard, then no doubt the index publishers would not enjoy the status or the level of industry recognition and acceptance that they do, as witnessed between this panel of four experts.

53 In summary, therefore, the pricing data sources of evidence and freight data, all gathered and used by Mr Brierley and applied to reach his ultimately derived US dollars per DMTU FOB prices for the two RCB reference products, namely for the RCB reference product pellets and fines, is, on my view, admissible. It should be admitted at trial either on a basis that it is identifiable published market pricing information concerning the two RCB reference products, or is adduced, in effect, as evidence of international product prices identifiable and applicable within world iron ore product markets at relevant times in the past.

54 The source data as used by Mr Brierley could be viewed as being used not so much to show the truth of its content (ie, a price rate at a point in time) but, rather, to prove that such product prices were published and known about within the world iron ore product trading marketplace and were identifiable in that world market at those times.

55 But second and my preferred basis to support the admissibility for this pricing data as used by Mr Brierley is as non-specific hearsay, which is a category of recognised exception to the rule. The data falls within a category of admissible material that underlies Mr Brierley's expert opinion. The underlying pricing data as used by Mr Brierley enjoys an accepted status and is of wide overall acceptance within an area of specialist expertise. Had the data not enjoyed that accepted status of reliability and acceptance, the joint expert memorandum would surely have said so. Mr Brierley as an expert is therefore entitled to rely upon this pricing data in the process of reaching his ultimate opinions.

56 Accordingly, I would reject the defendants' hearsay objection. I emphasise that my ruling says nothing at all about any ultimate assessment of Mr Brierley's end opinions in the trial context. My ruling is necessarily given in circumstances where I have not yet reached even provisional views about the true meaning of the MRP phrase as used in the definitions of PP and CP within cl 8.2(a) to arrive at RCB amounts under the RCB formula.

57 Whether Mr Brierley's derivation of US dollars per DMTU FOB prices for the reference pellets and fines is ultimately accepted, given the challenges to his methodology and to his assumptions made by the CITIC defendants' experts, are further questions all to be resolved after the trial. Presently, I merely reject the CITIC defendants' late plenary hearsay admissibility objections raised as against Mr Brierley's utilised sources of pricing and freight data.

Postscript

58 A late hearsay objection taken during trial against masses of internationally collected pricing data underlying an expert's report, in circumstances where that challenge was not identified as an outcome of the pre-trial joint expert conferral that took place, was unsatisfactory from an overall case management perspective. It may have been seriously disruptive to the duration and running of the trial, if upheld. The surprise at trial experience should not be repeated in modern litigation.

59 In an attempt to avoid such a situation ever arising again in future, this court's standard pre-trial practice directions for experts, I suggest, should be amended to explicitly require that any objection to an expert's utilised source data be expressly identified as an outcome of the expert conferral process - if that truly is a matter in serious dispute at the conclusion of the conference.

60 To that end the Supreme Court of Western Australia's *Consolidated Practice Directions* might be amended to address the situation under practice direction 4.1.2.2 at par 55, by a new par 55(d) requiring:

> 55(d) a clear identification of any facts or materials upon which an opposing expert has based their opinion(s) and which are not accepted by other experts as reliable, then which as a consequence of that disagreement, will need to be formally proved at an ensuing trial, in order for the expert's opinion to be founded.

61 That position has to my understanding been the civil trial practice long followed in Western Australia as regards the outcomes of expert conferrals. But an explicit direction would assist in rendering the position express to anyone possibly unfamiliar with the approach.

SCHEDULE A

IN THE SUPREME COURT OF WESTERN AUSTRALIA
COMMERCIAL AND MANAGED CASES LIST

CIV 1808 of 2013

BETWEEN

MINERALOGY PTY LTD
ACN 010 582 680

Plaintiff

SINO IRON PTY LTD
ACN 058 429 708

First Defendant

KOREAN STEEL PTY LTD
ACN 058 429 600

Second Defendant

CITIC LTD

Third Defendant

DEFENDANTS' OUTLINE OF SUBMISSIONS REGARDING OBJECTIONS TO THE PLAINTIFF'S EXPERT EVIDENCE

INTRODUCTION

1. The CITIC Parties object to the expert report of Robert Brierley dated 28 April 2017[1] (***Brierley Report***), and his two subsequent reports,[2] because the opinions in the reports are based upon hearsay, because parts of them are irrelevant, and because Mr Brierley is not qualified to give that opinion evidence. The qualification objection can be deferred until Mr Brierley is called to give evidence. The relevance objection is addressed in paragraph 24 below.

2. In short, Mr Brierley's opinions are stated to be based on facts of which Mineralogy provides no admissible evidence, namely the actual prices at which iron ore fines and pellets were sold to China during the period 2013-2016, and the freight components of each of those prices. Mr Brierley's report amounts to no more than manipulation of the inadmissible data in accordance with his instructions. It is little more than subtraction (of the assumed freight component from the assumed CFR prices) and the averaging of the results of the

[1] Annexure RB-01 to the affidavit of Robert Brierley affirmed 29 April 2017 (***Brierley Affidavit***) [Document 12, Volume 2].
[2] Annexure RB-03 to the affidavit of Robert Brierley sworn 11 May 2017 and Annexure RB-04 to the affidavit of Robert Brierley sworn 17 May 2017. Mr Brierley's affidavit sworn 11 May 2017 appears to have been omitted from the tender bundle.

subtractions. Mineralogy has not filed the primary evidence upon which opinion evidence must be based.

3. The CITIC Parties also object to the expert report of Scott Birkett dated 3 May 2017[3] (***Birkett Report***), because it is founded upon Mr Brierley's inadmissible opinions, and because parts of it are irrelevant.

4. The CITIC Parties have previously made clear that they reserved their position in relation to the admissibility of Mineralogy's expert evidence.[4] The Court has previously rejected an earlier version of Mineralogy's expert evidence which purported to quantify Royalty Component B for the purpose of an interlocutory application.[5]

RELEVANT PRINCIPLES

5. In *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, Heydon J stated (at [90]) that:

> If the expert's conclusion does not have some rational relationship with the facts proved, it is irrelevant. That is because in not tending to establish the conclusion asserted, it lacks probative capacity. Opinion evidence is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise. The bridge cannot stand if the primary evidence end of it does not exist. The expert opinion is then only a misleading jumble, uselessly cluttering up the evidentiary scene.

6. In *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370, Ipp J (with whom Malcolm CJ agreed) discussed at some length the principles relating to the extent to which an expert may rely upon hearsay evidence as a basis for his or her opinion, including the distinction between 'non-specific hearsay' and 'specific hearsay'.[6] Ipp J discussed this at 374ff. At 375 his Honour stated that:

> ...a valuer may not give factual evidence of transactions of which he has no direct knowledge "whether per se or whether in the guise of giving reasons for his opinion as to value."

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[3] Annexure SB-02 to the affidavit of Scott Birkett affirmed 3 May 2017 [Document 13, Volume 2].
[4] Letter from Allens to Mineralogy dated 9 May 2017; letter from Allens to Mineralogy dated 16 May 2017; email from Allens to Mineralogy dated 22 May 2017; letter from Allens to Mineralogy dated 23 May 2017 (copies attached).
[5] The CITIC Parties objected to the affidavit of Steven Sorbello sworn 27 November 2014 in the context of the CITIC Parties' application for an interlocutory injunction made by Amended Chamber Summons dated 30 September 2014. Justice Chaney upheld the CITIC Parties' objection, holding that the foundation upon which the opinion expressed by Mr Sorbello was based was not properly established by admissible evidence: *Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 6]* [2015] WASC 80 at [58].
[6] At 374-8.

7. In *Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd* (No 2) (2009) 261 ALR 179, Martin CJ (with whom Buss and Newnes JJ agreed) stated that:[7]

> ...where specific transactions are relied upon as the basis for the expression of an opinion, they must be established to the court by admissible evidence, if the opinion is to be admissible. The issue is, with respect, one of admissibility, not weight. Second, the fact that the valuer, in this case Mr Liggins, gave evidence to the effect that he had made inquiry and satisfied himself of the facts pertinent to the transactions said to be comparable is, with respect, irrelevant. Evidence from the valuer of what he was told by others, or in this case, of general conclusions he had drawn from what he was told by other unidentified persons is plainly hearsay and inadmissible. Where a specifically comparable transaction is relied upon, it must be proven to the court by admissible evidence, and no admissible evidence was adduced in respect of the particular transactions relied upon by Mr Liggins in relation to commercial property.

8. In this case, it is worth emphasising the obvious point that data does not become admissible simply because it has been aggregated:[8]

> The aggregated data from five, ten or twenty transactions, none of which is proven, does not become admissible because it is aggregated.

9. An expert opinion based entirely on inadmissible evidence is inadmissible.[9]

10. A ruling on admissibility in relation to an objection of this nature should not be deferred.[10]

THE BRIERLEY REPORT

11. The Brierley Report sets out Mr Brierley's opinions as to the 'prevailing published annual FOB price' (***Price***) for Mt Newman Fines (***Fines***) and Brazilian Pellets for export (***Pellets***), that is, he calculates (by subtraction and averaging) values for each of those Prices.

12. Mr Brierley opines that it is possible to convert daily CFR prices derived from published index data into Prices for Fines by performing a series of calculations based upon published data derived from the Platts 62% IODEX CFR China price index (***Platts Index***) and the Baltic Exchange Capesize Index (***Baltic Index***). It should be noted that the Platts Index and the Baltic Index are not indices at all.

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[7] At [87].
[8] *Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd* (No 2) (2009) 261 ALR 179 at [81] per Martin CJ (Buss and Newnes JJ agreeing).
[9] *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370 at 377 per Ipp J (Malcolm CJ agreeing); *Automasters Australia Pty Ltd v Bruness Pty Ltd* [2004] WASCA 229 at [29] per Steytler J (Murray and Wheeler JJ agreeing).
[10] *Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd* (No 2) (2009) 261 ALR 179 at [98] to [98] per Martin CJ (Buss and Newnes JJ agreeing).

They are absolute values expressed in US dollars, not index values (like, for example, the Consumer Price Index) expressed as numbers by reference to a base value. They are an assessment by the providers that the specified CFR price or the specified freight rate applied on each particular day. They are statements as to matters of fact.

13. For present purposes, it is sufficient to note that Mr Brierley's calculations involve a number of steps, and include Mr Brierley subtracting an estimated freight rate (derived from the Baltic Index) from CFR prices derived from the Platts Index. In undertaking these calculations, Mr Brierley also adopts a series of factual assumptions in relation to matters such as average moisture content, iron grade, and the exclusion of incomplete data points.[11]

14. Critically, no primary evidence has been led to prove the CFR prices referred to in the Platts Index nor the freight rates referred to in the Baltic Index. They are classic pieces of hearsay evidence; they amount to no more than Mr Brierley 'hearing' the daily prices and freight rates announced by the publishers of the two indices.

15. The same issue arises with Mr Brierley's reliance upon data published by Rio Tinto for what he describes as a 'cross-check' of his calculations.[12] The Rio Tinto data is also derived from the Platts Index,[13] and no primary evidence has been led as to that data nor as to its derivation by Rio Tinto.

16. The Platts Methodology and Specifications Guide - Iron Ore (***Platts Guide***) is annexed to the Brierley Report.[14] It sets out what the publisher says that the Platts Index is based upon, including confirmed trades, firm bids, firm offers, expressions of interest to trade, indicative values, '*reported transactional activity heard across the market*', and '*other data that may be relevant to Platts assessments, such as supply/demand fundamentals and other factors affecting the price of a particular commodity.*'[15] It is clear from that description that the Platts Index does not, and does not purport to, accurately reflect the precise details of actual prices, let alone the actual prices for Fines. Rather, Platts' price

[11] Brierley Affidavit, page 9.
[12] Brierley Affidavit, page 7.
[13] See Annexure JPB-10 to the affidavit of John Pallister Barkas sworn 16 May 2017, [102]. Also see Brierley Affidavit, pages 83 to 85 (Rio Tinto Ltd FY16 Results Extract)
[14] Brierley Affidavit, pages 93 to 106.
[15] Brierley Affidavit, page 95.

assessments are only designed to be '*representative of market value, and of the particular markets to which they relate.*'[16]

17. In this regard, the Platts Index is not merely an aggregation of data (some of which does not comprise completed transactions, as noted above), but it also involves a sampling and normalisation process which is subject to the individual judgment of editors and market reporters as to the quality, priority and suitability of transactional information used to formulate end-of-day price assessments.[17] In the absence of any primary evidence as to how Platts arrives at its reported indicative, representative prices, it is not possible to assess what, if any, weight to give to Platts' price assessments. It appears to be second or third hand hearsay. The exclusion of such unreliable and untested 'evidence' is precisely the reason for the hearsay rule.

18. Further, the Platts Guide notes that '*Platts cannot make any guarantee in advance about how and whether market information received and published but not fully adhering to its defined methodology will be incorporated in its final assessments.*'[18]

19. No information as to the methodology employed in compiling the Baltic Index has been annexed to Mr Brierley's report or otherwise led by Mineralogy. However, the CITIC Parties have adduced expert evidence[19] that the Baltic Index is an opinion-based assessment from a panel of shipbrokers, rather than actual details of trades in the freight market, meaning that it is not necessarily an accurate indication of market freight costs.[20] Mr Brierley acknowledges that the Baltic Index may not necessarily represent the actual freight costs incurred in transporting particular cargoes of iron ore.[21] It follows that the matters noted above in relation to the Platts Index apply with equal force to the Baltic Index.

20. Mr Brierley does not purport to have any direct knowledge of the details of the specific transactions and transaction data underlying the Platts Index and Baltic Index, nor of the methodology adopted in their compilation.

21. The same problems apply to Mr Brierley's calculations in respect of Prices for Pellets. Mr Brierley relies upon data published by Vale S.A. including as to its

[16] Brierley Affidavit, page 94.
[17] Brierley Affidavit, pages 94, 98.
[18] Brierley Affidavit, page 95.
[19] Annexure DJB-4 to the affidavit of Damon John Buckley affirmed 3 May 2017.
[20] Annexure DJB-4 to the affidavit of Damon John Buckley affirmed 3 May 2017, [44].
[21] Joint Memorandum by Expert Witnesses Robert Brierley, Brian Fisher, Damon Buckley and John Barkaa dated 2 June 2017, [15].

average realised pellet revenue and its CFR/FOB sales mix,[22] but Mineralogy has adduced no primary evidence as to the transactions underlying this data. The Vale data as sought to be relied upon by Mr Brierley is hearsay evidence. As a cross-check, Mr Brierley adopts a similar calculation methodology as he employs for Fines, subtracting Baltic Index freight rates from index pellet prices sourced from UMetal.[23] Like the Platts Index data, the UMetal index data upon which Mr Brierley relies is unproven by primary evidence and the process by which the data is derived by UMetal unexplained. As sought to be relied upon by Mr Brierley, it is hearsay evidence.

22. The indices, the specific transactions and transaction data underlying the indices, and the other data sought to be relied upon by Mr Brierley must all be established by admissible primary evidence if they are to form the basis for admissible opinion evidence. In the absence of such evidence, Mr Brierley's opinions as to the value of the Prices for Fines and Pellets contravene the rule against specific hearsay in *Pownall* and lack foundation in order to be admissible, as required by the High Court in *Dasreef*.

23. This objection applies to all parts of the Brierley Report which rely on hearsay, including for example: the last six paragraphs on page 6, the fifth to ninth paragraphs on page 7, the first to fourth paragraphs on page 8 and appendices A, B, C, D and F of the Brierley Report.

24. A further ground of objection to various parts of the Brierley Report is on the ground of relevance.[24] This ground of objection applies to Part B of the Brierley Report, which does not relate to any pleaded issue.

THE BIRKETT REPORT

25. As Mr Birkett's opinions are founded upon Mr Brierley's inadmissible opinions as to the Prices, Mr Birkett's opinions are similarly inadmissible. This applies to all of the Birkett Report.[25]

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[22] Brierley Affidavit, page 7.
[23] Brierley Affidavit, page 7.
[24] This issue was raised in correspondence between the parties: Letter from Allens to Mineralogy dated 5 May 2017; Two letters from Mineralogy to Allens dated 8 May 2017; Letter from Allens to Mineralogy dated 9 May 2017; Letter from Mineralogy to Allens dated 11 May 2017; Letter from Allens to Mineralogy dated 12 May 2017 (copies attached).
[25] See, for example, the Birkett Report at paragraphs 2.1(a), (c), (d) and (f), 2.2, 2.3, 3.1(c), (d) and (g), and sections 4 and 5.

26. A further ground of objection to various parts of the Birkett Report is on the grounds of relevance. The issue is the same as the relevance issue in relation to the Brierley Report.

27. The parts of the Birkett Report to which this ground of objection relates are paragraphs 3.1(g), 4.5, 4.6, 5.4 and 5.5.

16 June 2017

C M SCERRI

S H PARMENTER

T SPENCER BRUCE

ALLENS

SCHEDULE B

IN THE SUPREME COURT OF WESTERN AUSTRALIA
COMMERCIAL AND MANAGED CASES LIST

CIV 1808 of 2013

B E T W E E N

MINERALOGY PTY LTD (ACN 010 582 680)

Plaintiff

and

SINO IRON PTY LTD (ACN 058 429 708)

First Defendant

and

KOREAN STEEL PTY LTD (ACN 058 429 600)

Second Defendant

and

CITIC LIMITED (formerly CITIC Pacific Limited)

Third Defendant

DEFENDANTS' OUTLINE OF REPLY SUBMISSIONS
REGARDING THEIR OBJECTIONS TO THE PLAINTIFF'S EXPERT EVIDENCE

Case manager:	The Honourable Justice Kenneth Martin
Date of document:	19 June 2017
Filed on behalf of:	The Defendants
Date of filing:	19 June 2017

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Introduction

1 This outline of submissions is filed in reply to the plaintiff's outline filed on 16 June 2017.[1]

[1] That outline was erroneously dated 15 June 2017.

Admissibility

Primary facts not established

2 It is important to observe at the outset that the 'facts' identified and relied upon by Mr Brierley are not said to be actual prices and actual freight rates (which themselves ought to be proved by primary evidence), but rather the fact that Platts, the Baltic Exchange, Rio Tinto, UMetal and Vale have made statements about their assessment of those prices, rates or related matters.

3 The lack of any primary evidence in support of the bases underlying Mr Brierley's evidence is stark. This applies to all parts of Mr Brierley's report which rely upon hearsay in his responses to Parts A and B of the questions he was asked to address.

4 As explained below, the plaintiff's response to the objections which have been made to its expert evidence is not furthered by the cases to which it has referred. Rather, on proper analysis, those cases provide further support for the defendants' objections.

5 In *Borowski v. Quayle*[2] the expert was permitted to say, from his knowledge, that 'Evacillin' was a form of penicillin. That bears no relationship to the nature of the objections made in the present case. More relevantly, the statement 'that Glaxo Laboratories packed penicillin for Evans Medical (Australia) Pty. Ltd. for sale by it as "Evacillin"' was held to be 'inadmissible by a valid application of the hearsay rule'.[3]

6 Nor does *PQ v. Australian Red Cross Society*[4] aid the plaintiff's cause. That case concerned 'information in authoritative scientific publications'[5] and 'learned scientific journals'[6]. The data in issue in the present case does not constitute such material.

7 Further, as *PQ* makes clear:[7]

> *"When an expert witness bases evidence on data in an authoritative scientific publication it is the evidence of the witness which is thus put before the court. **The publication itself is not evidence of the truth of statements it makes as to data.**"*
>
> [emphasis added]

8 The emphasised statement in the quote above is apposite here. The plaintiff seeks to rely upon the statements from Platts, the Baltic Exchange and others[8] as truth of the statements

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[2] [1986] VR 382 (Gowans J) (*Borowski*), referred to in the plaintiff's outline at [18] and footnotes 4 and 5.

[3] *Borowski* at 387.

[4] [1992] 1 VR 19 (McGarvie J) (*PQ*), referred to in the plaintiff's outline at footnotes 4 and 7.

[5] *PQ* at 34.

[6] *PQ* at 35.

[7] *PQ* at 34-5.

which they make as to data. Mr Brierley has no personal knowledge of the details of the prices and rates referred to by Platts and the Baltic Exchange. In turn, the Platts Index is Platts' assessment of other unknown data about which there is no evidence before the Court, and the same applies to the statements made by the Baltic Exchange.

9 In addition, and also fatal to the admissibility of the plaintiff's evidence in the present case, is the distinction drawn in *PQ* between evidence of 'facts of general application' and evidence of 'facts peculiar to the particular case'.[9] The latter 'have to be proved by evidence admissible under the ordinary rules'.[10]

10 The plaintiff's reliance upon *H v. Schering Chemicals Ltd*[11] is also misplaced. In that case, articles were only permitted to be tendered to show 'the state of general professional knowledge',[12] which was relevant to a negligence claim. That is far removed from the issue in this case.

11 The plaintiff also refers to *Clambake Pty Ltd v. Tipperary Projects Pty Ltd (No. 2)*,[13] but a number of points should be noted about that case.

12 First, it concerned an application for orders to facilitate the proof of disputed allegations of fact which underlay certain expert evidence. No such application has been made by the plaintiff in the present case.

13 Second, there was said to be an 'exception' to the common law rule in *Pownall v. Conlan Management Pty Ltd*[14] and similar cases (that each party relying on expert evidence is required to prove those underlying facts the expert relies upon) in relation to 'notorious facts, even arcane facts'.[15] That exception is not applicable here.

14 Third, it was held that a court must examine essential issues in the case as presented by the parties on the basis of admissible evidence.[16] In this regard (and in the context of the particular application which was in issue in that case), a question may arise as to whether there is sufficient cause to put an allegation in issue.[17] Here, the Platts, Baltic Exchange and

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[9] See the defendants' principal outline dated 16 June 2017 at [15] (regarding data published by Rio Tinto) and [21] (regarding data published by Vale and UMetal).

[9] *PQ* at 36.

[10] *PQ* at 35.

[11] [1983] 1 All ER 849 (*Schering*), referred to in the plaintiff's outline at footnote 4.

[12] *Schering* at 145C-D.

[13] (2007) 35 WAR 394 (EM Heenan J) (*Clambake*), referred to in the plaintiff's outline at footnote 8.

[14] (1995) 12 WAR 370.

[15] *Clambake* at [38].

[16] *Clambake* at [55].

[17] *Clambake* at [57].

other data and the use to which it can be put are fundamental issues in the case. The use to which this data can be put is one of the central issues between the respective expert witnesses. That expert evidence is the foundation for the plaintiff's claim for many millions of dollars. All elements of that significant claim must be required to be established by admissible evidence.

15 The plaintiff's sweeping statement at [20] of its outline is not supported by the cases to which it has made reference there.

16 Finally, and contrary to the plaintiff's submissions,[18] the issue is not one of the weight to be accorded to the expert evidence in question, it is one of admissibility.[19]

17 It follows that the objections should be upheld for the reasons set out in the defendants' principal outline.

Relevance

18 Mr Brierley's response to Part B of the questions he was asked to address – regarding the current market price for magnetite concentrate – does not relate to any pleaded issue.[20] The same applies to various paragraphs of Mr Birkett's report.[21]

19 No part of the defendants' case regarding an implied term for a fair and reasonable royalty, and the determination of the fair and reasonable royalty by the Court, makes reference to the current market price for magnetite concentrate or to a calculation of the Mineralogy Royalty by reference to the value of magnetite concentrate shipped.[22]

20 To advance such a case and adduce evidence in relation to it, the plaintiff must have pleaded it. The plaintiff has not done so. To the contrary, it has:

(a) included an allegation that any fair and reasonable royalty is to be determined by an expert (not the Court),[23] making no reference to the current market price for magnetite concentrate nor to a calculation of the Mineralogy Royalty by reference to the value of magnetite concentrate shipped; and

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[18] Plaintiff's outline at [19].

[19] *Professional Services of Australia Pty Ltd v. Computer Accounting and Tax Pty Ltd (No. 2)* (2009) 261 ALR 179 at [67] per Martin CJ, with whom Buss and Newnes JJA agreed.

[20] See the defendants' principal outline at [24].

[21] See the defendants' principal outline at [26]-[27].

[22] See the Defence to the Fifth Further Amended Statement of Claim and Sixth Further Amended Counterclaim dated 6 February 2017 at [26(b)].

[23] Reply to the Defence to the Fifth Further Amended Statement of Claim and Defence to the Sixth Further Amended Counterclaim dated 10 February 2017 (*Reply*) at [20(c)].

(b) otherwise denied the defendants' allegation that there is an implied term that the Mineralogy Royalty should be the royalty that is fair and reasonable.[24]

Timing of objections regarding inadmissibility on the basis that primary facts not established

21 Although the defendants maintain that the timing of notification of the objections was appropriate in the circumstances set out below, they appreciate that the Court clearly considers that these objections should have been identified earlier. Although the timing of the objections is regrettable in light of the Court's concerns, that issue of case management does not affect the inadmissibility of the evidence.

22 The relevant circumstances as to timing are the following.

23 The plaintiff sought no orders for a time for the filing and service of objections to expert evidence, and no such orders were made.

24 The trial was provisionally listed to commence on 14 June 2017. The plaintiff's proposed trial timetable provided to the Court and the defendants in early June had Mr Brierley scheduled to give evidence on 19 June; the defendants' timetable proposed that he give evidence on 21 June.

25 The defendants filed and served opening submissions on the afternoon of 12 June 2017. At that time, the plaintiff had not filed and served any opening submissions (and nor had it indicated any intention to do so). It filed and served its opening submissions on the following day, and only after receipt of a request from the Court to do so.

26 Paragraph 4 of the defendants' opening submissions served on 12 June 2017 stated that:

> *"In contrast, Mineralogy contends that there is currently approximately US$149 million of Mineralogy Royalty outstanding, and seeks payment of that sum. There is no basis for the sum sought by Mineralogy, both because it is founded upon an entirely untenable construction of the contract* ***and also because it is not established by the evidence upon which Mineralogy seeks to rely. In particular, Mr Brierley's opinion evidence (and correspondingly, Mr Birkett's opinion evidence) is based on facts not established by the evidence.***"
>
> [emphasis added]

27 There was also a conferral by telephone between the parties' respective junior counsel at 4:30pm on 12 June 2017 regarding objections to lay evidence (which was a process that had been provided for in the programming directions for trial). The discussions regarding the lay evidence objections were conducted on a without prejudice basis. On an open basis, there was a short discussion about the objection now made to the plaintiff's expert evidence. Paragraph 10 of the plaintiff's outline paints an incomplete picture of that discussion: specific

[24] Reply at [28].

reference was made to the fact that the plaintiff had not proved the facts underlying Mr Brierley's opinions, by reference to the Platts and other data upon which Mr Brierley's report relies. However, there is no need for the Court to make any determination in relation to what was discussed in that conferral, and nothing turns upon it.

28 The plaintiff sought no further information regarding the nature of the objection after receipt of the defendants' opening submissions and the conferral between junior counsel.

29 In any event, as explained below, the plaintiff's submissions as to the timing of the objection are no longer relevant to the issue at hand.

30 The plaintiff asked the Court for, and was given, the full extent of the time which it sought in order to respond to the defendants' principal outline of submissions which were served on the morning of 16 June. The plaintiff has filed its outline. It has not said that it needed more time to do so, nor has it said that it needs additional time to take any other step. The hearing of the objections was deferred until 19 June 2017.

31 The plaintiff has not said that it has suffered any prejudice by reason of the timing of the objection. It has not said that, if the objection had been notified earlier, it would have filed further lay evidence seeking to provide a foundation for the opinions of Mr Brierley. Nor has it now sought an opportunity to do so. It has not said that its lawyers overlooked the need to lead the evidence providing the necessary foundation, and that it should be relieved from the consequence of that oversight. Rather, its position is simply that the foundational evidence is not necessary and the objection should be dismissed. In these circumstances, it is evident that the position in which the plaintiff finds itself is the result of the forensic choices which it has made.

32 The onus was always upon the plaintiff to file all necessary admissible evidence in support of its case. It should not have assumed (if it did so) that in defending a claim of such critical importance, the defendants would not take all proper objections.

DATED: 19 June 2017

C M SCERRI

S H PARMENTER

T SPENCER BRUCE

ALLENS
Solicitors for the Defendants

SCHEDULE C

IN THE SUPREME COURT OF WESTERN AUSTRALIA
COMMERCIAL AND MANAGED CASES LIST

No 1808 of 2013

BETWEEN

MINERALOGY PTY LTD (ACN 010 582 680)	Plaintiff
and	
SINO IRON PTY LTD (ACN 058 429 708)	First Defendant
and	
KOREAN STEEL PTY LTD (ACN 058 429 600)	Second Defendant
and	
CITIC LTD (formerly CITIC PACIFIC LTD)	Third Defendant

PLAINTIFF'S OUTLINE OF SUBMISSIONS
OBJECTION TO EXPERT OPINION OF ROBERT BRIERLEY

Case Manager:	The Hon Justice Martin		
Date of document:	15 June 2017		
Date of filing:	15 June 2017		
Filed on behalf of:	The Plaintiff		
Prepared by and address for service:	Kane Jones Level 8 380 Queen Street Brisbane Qld 4000	Telephone: Facsimile:	(07) 3832 2044 (07) 3832 2021
Email:	k.jones@mineralogy.com.au		

[1] The following is an outline of the submissions of the plaintiff filed in reply to the outline of the defendants dated 16 June 2017.

Summary

[2] The Hearsay Objection should be refused.

Background

[3] The defendants object to certain aspects of the report of Mr Brierley dated 29 April 2017 (**Brierley Report**) and of the two subsequent reports dated 11 May 2017 and 17 May 2017.

[4] The objection is placed on the following bases:

a. the opinion is allegedly based on hearsay (**Hearsay Objection**);

b. parts of the opinion are said to be irrelevant (**Relevance Objection**).

[5] The Brierley Report was served on 2 May 2017.

[6] The Court's timetable of programming steps to trial required provision of expert opinion evidence by 3 May 2017.

[7] An expert opinion of a witness retained by the defendants, Mr Barkas, responding to the Brierley Report was provided to the plaintiff on 17 May 2017.

[8] A conferral between experts occurred on 23 May 2017.

[9] A joint expert report prepared by Mr Brierley, Mr Barkas and a Mr Fisher (another expert retained by the defendants) was provided on 2 June 2017. The joint expert report records agreement the experts' agreement that:

a. the Platts IODEX 62% fines price has been the principle iron ore price reference since April 2010 (at [6]).

b. the Baltic Exchange is a reliable supplier of published spot ocean freight rates, quoted in US$/wmt. (at [12]).

[10] At approximately 4:40pm (WST) on 12 June 2017, during an otherwise without prejudice conferral between counsel regarding objections to lay evidence, the plaintiff's junior Counsel were notified by the defendants' junior Counsel on an open basis that the defendants' submissions contained a single sentence regarding an objection to the Brierley Report and an objection would be pressed at trial.

[11] At approximately 3:50pm WST, the defendants' written opening had been served in an unreadable electronic form. The written opening was not able to be comprehended as a document until after it had been downloaded, compiled through a number of technical electronic steps and then opened. The written opening contains a single sentence regarding the objection without any elaboration.

Principles

[12] Order 36A of the *Supreme Court Rules* concerns expert evidence. The rules do not prescribe conditions of admissibility.

[13] Admissibility is determined by the rules of evidence at common law.

[14] In *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, Heydon JA (as his Honour then was) set out (at [85]) the requirements for expert evidence to be admissible. His Honour's remarks were made in the context of section 79 of *Evidence Act 1995* (NSW), which provides for the admissibility of expert evidence as an exception to the opinion evidence rule. Relevantly, Heydon JA stated (at 743 [85]):[1]

> ... so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way;

[15] The reasoning in *Makita* was further explained in *ASIC v Rich* (2005) 218 ALR 764. Chief Justice Spigelman stated (at [105]):

> "Although expressed in terms of 'usefulness', the starting point for Heydon JA's detailed analysis of the case law on admissibility does not suggest any focus on the true historical process by which the expert first formed the relevant opinion. The focus of attention — the 'prime duty' — is to ensure that the court, as the tribunal of fact, *is placed in a position where it can examine and assess the evidence presented to it*. That can occur without adopting the true factual basis approach. What Heydon JA identified as the expert's 'prime duty' is fully satisfied if the expert identifies the facts and reasoning process which he or she asserts justify the opinion. That is sufficient to enable the tribunal of fact to evaluate the opinions expressed."

The Hearsay Exception

[16] There are two common law hearsay exceptions peculiar to experts. The first relates to technical data widely used by members of the expert's profession, not confined in relevance to the facts of the case about which he is testifying and regarded as reliable. The second relates to knowledge which the expert can be assumed to have and on which he draws to formulate his opinion and to express working truths but which he has not learnt through personal experience.[2]

[17] It was well established that experts are entitled to rely upon reputable articles, publications and material produced by others in the area in which they have expertise, as a basis for their opinions.

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[1] More recently discussed in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588.
[2] Dr Rosemary Pattenden 'Expert Opinion Evidence Based on Hearsay' [1982] Criminal Law Review 85; cited with approval in *Pownall v Conlan Management Pty Ltd.*

[18] In *Borowski v Quayle*[3] at 386 (**Borowski**) Gowans J, quoted, with approval, a passage from Wigmore on Evidence, 3rd ed, Little, Brown, Boston, 1940, vol 2, pp 784–5, which provided that:

> "The data of every science are enormous in scope and variety. No one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths. Hence a reliance on the reported data of fellow-scientists, learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men ... In general, the considerations which define the latter are (a) a professional experience, giving the witness a knowledge of the trustworthy authorities and the proper source of information, (b) an extent of personal observation in the general subject, enabling him to estimate the general plausibility, or probability of soundness, of the views expressed, and (c) the impossibility of obtaining information on the particular technical detail except through reported data in part or entirely. The true solution must be to trust the discretion of the trial judge, exercised in the light of the nature of the subject and the witness' equipments. The decisions show in general a liberal attitude in receiving technical testimony based on professional reading."

[19] Experts may not only base their opinions on such sources, but may give evidence of fact which is based on them. They may do this although the data on which they base their opinion or evidence of fact will usually be hearsay information, in the sense they rely for such data not on their own knowledge but on the knowledge of someone else. The weight to be accorded to such evidence is a matter for the court.[4]

[20] An expert may express an opinion based upon the research and writings of others, including unpublished statistical material.[5]

[21] The court must be able to test, or at least assess the reliability, of the material assumed by the expert as the basis for his opinion. If that material is numerical data collected by others, the expert may still be able to express an opinion. In *Abadon v R* [1983] 1 WLR 126 at 129 the English Court of Appeal said:

> In the context of evidence given by experts it is no more than a statement of the obvious that, in reaching their conclusion, they must be entitled to draw upon material produced by others in the field in which their expertise lies. Indeed, it is part of their

[3] [1966] VR 382.
[4] See generally: *Borowski* at 385–7 , *PQ v Australian Red Cross Society* [1992] 1 VR 19 at 34–5; *H and another v Schering Chemicals Ltd and another* [1983] 1 All ER 849; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [69].
[5] *Borowski*; *R v Abadon* [1983] 1 WLR 364.

> duty to consider any material which may be available in their field, and not to draw conclusion merely on the basis of their own experience, which is inevitably likely to be more limited than the general body of information which may be available to them. Further, when an expert has to consider the likelihood or unlikelihood of some occurrence of factual association in reaching his conclusion, as must often be necessary, the statistical results of the work of others in the same field must inevitably form an important ingredient in the cogency or probative value of his own conclusion in the particular case. Relative probabilities or improbabilities must frequently be an important factor in the evaluation of any expert opinion and, when any reliable statistical material is available which bears upon this question, it must be part of the function and duty of the expert to take this into account.[6]

[22] Relevant data includes facts and opinions stated in articles or reports in scientific publications or in statements by organisations, public authorities or persons regarded by experts as having knowledge and expertise in the relevant area. Such data includes facts in tables or statistical material on which such experts ordinarily rely.[7]

[23] Part of the expertise of an individual specialist is to know where to look and to know how much reliability can be given to various sources of reference and, on occasion, when to reject or to question information coming from those sources.[8]

Discussion

[24] Principally, the proceeding concerns the construction of the formula in clause 8.2 of the MRSLAs. Specifically, the construction of the words:

a. prevailing published annual FOB price (expressed in US dollars per DMTU) for pellets established by the largest supplier or seller of pellets in Brazil for export;

b. prevailing published annual FOB price (expressed in US dollars per DMTU) for Mount Newman fines for export.

(Prevailing Prices).

[25] The construction of clause 8.2 is a question of law. It is a question of fact as to whether pricing inputs are presently ascertainable for use in the formula, properly construed.

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[6] Cited with approval in *Pownall v Conlon Management Pty Ltd* (1995) 12 WAR 370; *Woods v the Director of Public Prosecutions (Wa)* [2008] WASCA 188; *Hannell v Amaca Pty Ltd (Formerly James Hardie and Co Pty Ltd)* [2006] WASC 310 at [270].

[7] *PQ v Australian Red Cross Society* [1992] 1 VR 19.

[8] *Clambake Pty Ltd v Tipperary Projects Pty Ltd* [no 2] [2007] WASC 244 at [39].

[26] Resolution of the objection requires identification of the necessary primary facts upon which the Brierley Report is based.

[27] The first necessary primary fact is clause 8.2 of the MRSLA and the Prevailing Prices.

[28] The Brierley Report provides an expert opinion identifying data which is captured by the Prevailing Prices. It does so by reference to words of the Prevailing Prices, as they appear in the MRSLA.

[29] The Brierley Report relies on published data widely accepted in the industry. The joint expert report confirms Platts and the Baltic Exchange are the 'principal' and 'reliable' sources respectively. Further, Platts is relied on in regulation 86AD of the *Mining Regulations 1981* (WA) as a reference price (and freight index price).[9]

[30] The formula in clause 8.2 requires identification of "published" prices. Necessarily, that requires reliance upon publicly available prices published by third parties. The exception to the hearsay rule for expert evidence is directly apposite to the identification of Prevailing Prices.

[31] The task of Mr Brierley was to independently identify published data. It would antithetical to the nature of the expert opinion required in this proceeding for Mineralogy to have provided the alleged primary facts (ie, the 'Platts' and 'Baltic Exchange' data) to Mr Brierley upon which he could then base his opinion.

As to the timing of the objection

[32] The defendants' late notice of the Hearsay Objection is all the more curious given their apparent cognisance of the overarching obligations of participants in litigation, when on 9 May 2017 in the context of an objection regarding relevance they purported to remind Mineralogy's solicitor personally and Mineralogy of '*the objectives of the Commercial and Managed Cases List and the obligations of the parties and of their representatives to act in a manner consistent with achieving those objectives.*'.

[33] There is no identifiable basis for withholding the Hearsay Objection.

Relevance Objection

[34] The plaintiff will respond to the Relevance Objection when its basis is more fully articulated by the defendants.

[9] Regulation 86AD prescribes a mechanism for an FOB netback calculation for iron ore.

T Bradley QC

T R March

K S Byrne

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