SUPREME COURT OF WESTERN AUSTRALIA

David Malcolm Justice Centre
28 Barrack Street
Perth WA 6000

Media Contact: Manager, Media & Public Liaison
Ph: (08) 9421 5303; Mob: 0439 953 898

MINERALOGY PTY LTD V SINO IRON PTY LTD [No 15]
[2017] WASC 339
MINERALOGY PTY LTD V SINO IRON PTY LTD [No 16]
[2017] WASC 340

(CIV 1808 of 2013)

JUDGMENT SUMMARY

What follows below is a non-curial summary of the Court's more detailed reasons in this action which together are in the order of 248 pages.

This summary is issued by the Court and is provided as an aid to obtaining a prompt understanding of the reasons delivered. It is not an addition to, or qualification upon, those reasons and has no purpose or effect beyond that stated.

Today the Court published two sets of reasons for decision in this action, ***Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 15]*** and ***Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16]***, which was tried over 10 hearing days during June 2017 before Justice Kenneth Martin.

The reasons in ***Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 15]*** were given verbally by Justice Martin at the trial on 20 June 2017. The decision concerns the admissibility of data sources relied upon by Mineralogy's expert. Justice Martin ruled at the trial that the data sources relied upon by Mineralogy's expert were admissible evidence. ***Mineralogy Pty Ltd v Sino Iron***

Pty Ltd [No 15] is the revised and published reasons for that evidence admissibility ruling at the trial.

More significantly, ***Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16]*** is Justice Martin's reserved reasons after the trial concerning the royalty dispute between the parties which went to trial.

Justice Martin's reasons have been published to allow the parties to consider the reasons and what orders they would seek to be issued. A special appointment for the hearing of orders that should be issued has been set down for Thursday, 30 November 2017. No judgments or orders have yet been issued under ***Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16]***.

The main issue at trial was a purely clinical contractual construction of some words used within the parties' written contracts which were entered in March 2006. Specifically, the dispute concerned the wording of a royalty payment formula set down in 2006.

Mineralogy claimed a sum of $US149,413,470 in total from the first and second defendants, Sino Iron and Korean Steel. It contended that this sum was due and payable to it as part of its royalty entitlement under the parties' contracts. Mineralogy also sought to recover this amount from the third defendant, CITIC, as guarantor of Sino Iron and Korean Steel's obligations under the parties' contracts.

At trial, the defendants collectively rejected Mineralogy's contention that it was entitled to any amount of royalty money.

A summary of Justice Martin's conclusions can be found at Part I of ***Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16]***, commencing at par 840. Ultimately, Justice Martin preferred Mineralogy's interpretation of the words in the royalty formula in the parties' contracts.

For reasons summarised below and explained in detail in ***Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16]***, Justice Martin found that Mineralogy's RCB money claims against Sino Iron and Korean Steel were established.

As for Mineralogy's claims against CITIC as guarantor of Sino Iron and Korean Steel's obligations under the parties' contracts, these claims remain to be determined: see Part G of the judgment, commencing at par 782.

Background facts

Around 1985, the State of Western Australia granted Mineralogy mining leases in the Pilbara region of Western Australia in the Cape Preston area. The mining leases gave Mineralogy rights to use, occupy and explore that land for mining purposes.

In 2001, Mineralogy subleased those mining leases to its subsidiary companies. This included Sino Iron and Korean Steel, which companies were Mineralogy's subsidiaries at the time.

Around 2005, the Hong Kong listed corporation CITIC sought to secure a long-term supply of iron ore for its related entities' specialty steel mill businesses in China. CITIC became aware of a possible investment opportunity in the mining leases which Mineralogy held at Cape Preston.

In October 2005, a Mr Clive Palmer for Mineralogy and CITIC's representatives began negotiating over potential project proposals. The negotiations evolved to discuss a 50/50 joint venture by early November 2005. The 50/50 proposal was eventually rejected.

Around 29 January 2006, Mr Palmer and CITIC's representatives began negotiating again over an 80/20 project proposal. Under the 80/20 proposal, CITIC would have held an 80% interest in a joint venture project company while Mineralogy would have held a minority 20% interest. Once again, the

80/20 proposal could not be agreed upon. But the parties continued negotiations.

In March 2006, Mineralogy and CITIC finally agreed to a 100% CITIC takeover proposal whereby all shares in two of Mineralogy's subsidiaries, Sino Iron and Korean Steel, would be acquired by CITIC for $US415 million. Furthermore, there were promises to pay a 'Mineralogy Royalty' comprised of two components - Royalty Component A (RCA) and Royalty Component B (RCB). An announcement was made by the Board of CITIC to the Hong Kong Stock Exchange to that effect.

The parties' promises were embodied in the two identical written contracts known as Mining Right and Sites Lease Agreements (MRSLAs). The MRSLAs were executed between Mineralogy and Mineralogy's subsidiary companies prior to all the shares in the subsidiaries being purchased by CITIC under the subsequent takeover agreements with Mineralogy.

In October 2008, CITIC executed a Fortescue Coordination Deed (FCD) under which it guaranteed the obligations of Sino Iron and Korean Steel to Mineralogy under the MRSLAs, including specifically their royalty payment obligations to Mineralogy.

At the time the MRSLAs were perfected in March 2006, an international product pricing system widely used in the world iron ore market was the annual benchmark pricing system (ABPS). It specified the prices for these products in US dollars per DMTU (meaning dry metric tonne unit). The unit was for 1% of iron only. The ABPS became obsolete in April 2010 as the world iron ore market moved to an index pricing system, following China overtaking Japan as the world's largest consumer of iron ore.

Demise of the ABPS in 2010 and the repercussions of that change upon RCB lie at the heart of the parties' royalty dispute at trial.

The major dispute at trial

The core dispute at trial concerned Mineralogy's claims for RCB amounts (approximately $US150 million) that it said were due and payable to it by Sino Iron and Korean Steel. Mineralogy also claimed the same amounts from CITIC as the guarantor of Sino Iron and Korean Steel's obligations under the MRSLAs.

RCB is a component of the royalty that Mineralogy was promised by Sino Iron and Korean Steel under the MRSLAs (cl 8.2(a)). RCB is a royalty payment linked to the volume of 'Product' produced and exported at Cape Preston by Sino Iron and Korean Steel.

In cl 8.2(a) of the MRSLAs, RCB is seen to be a complex calculation formula. It can be found set out in full at par 323 of the judgment.

The formula for RCB has multiple input components that must be determined at the end of each quarter before an RCB amount due to Mineralogy can be calculated.

Not all components of the RCB calculation formula were in dispute between the parties at the trial.

The key dispute concerned the true meaning of the phrase 'prevailing published annual FOB price' (the MRP phrase). That phrase appears in the MRSLA definitions for two elements of the RCB calculation formula, namely 'PP' and 'CP'. PP and CP refer to the price of two iron ore products, pellets and fines respectively. Inputs for PP and CP must be derived before an RCB calculation can be completed.

Sino Iron, Korean Steel and CITIC (the CITIC defendants) claimed that at the time the MRLSAs were perfected in March 2006, the MRP phrase exclusively referred to the prices published under the ABPS. As such, they contended that RCB could not be ascertained after April 2010 due to the demise of the ABPS leaving the RCB calculation formula dysfunctional.

Accordingly, the CITIC defendants said that RCB should be cut away (severed) from the MRSLAs. That would leave Mineralogy with only RCA as its Mineralogy Royalty. Alternatively, they contended RCB should be implied to be just a fair and reasonable royalty for Mineralogy, to be determined by the court and having regard to all relevant circumstances.

Mineralogy however, argued that the correct meaning of collective adjectives making up the MRP phrase meant that the phrase was only a pricing standard - that was used to pick up the levels of market reference prices for the two iron ore reference products (pellets and fines) used in the formula in each quarter into the future.

The MRSLAs were long-term, possibly 25 years plus, contracts.

Mineralogy contended that while the MRP phrase could have captured the ABPS in March 2006, it did not mean, correctly understood, only ABPS world iron ore product prices exclusively. Accordingly, Mineralogy contended that RCB could still be viably worked out each quarter into the future and that it was owed RCB due to it in the quarters from December 2013 to the quarter ended March 2017.

Hence, the main dispute at the trial was the true meaning of the MRP phrase used by the parties in 2006 within the cl 8.2(a) RCB calculation formula in each MRSLA.

Justice Martin's findings

Undertaking an objective contractual interpretation of the language used in the 2006 MRSLAs, Justice Martin preferred Mineralogy's suggested meaning for the MRP phrase in the RCB formula.

Justice Martin accepted that the MRP phrase did not refer exclusively to the ABPS. He accepted that the phrase referred to prevailing published prices for the two iron ore products which are still actively traded on a daily basis in

the international iron ore market. Their market prices from quarter to quarter into the future remain capable of being derived and ascertained, by an expert if necessary, to calculate RCB.

The language used in the RCB formula that was ultimately settled upon in the MRSLAs did not mention the ABPS.

Absent an express reference to the ABPS in the RCB formula, Justice Martin held that it could not be said that the parties, objectively assessed, had intended RCB to **only** refer to the ABPS - at the time they entered into the MRSLAs in March 2006.

Justice Martin also said that even if the CITIC defendants' meaning of the MRP phrase were to be accepted, he would have still rejected the CITIC defendants' further contentions that RCB could be cut out from the MRSLAs, while leaving them otherwise fully operative.

Justice Martin found that RCB was an essential aspect of the Mineralogy Royalty. He said removing it out from the MRSLAs would deliver a seismic alteration to the parties' 2006 MRSLA agreements.

Justice Martin also rejected the CITIC defendants' fall-back arguments about a fair and reasonable royalty only for Mineralogy as being too far out of alignment with the parties' 2006 royalty bargain.

Justice Martin assessed that the trial reports undertaken by Mineralogy's experts in deriving and calculating an RCB amount were in accord with an approach expected to be taken by an expert who had been appointed under the parties' MRSLA cl 33 expert determination process to resolve any future RCB disputes (see cl 8.6 of the MRSLAs).

Justice Martin also found that future disputes arising between the MRSLA parties over RCB (or RCA) could be resolved through the informal expert determination process as provided for in the MRSLAs: see Part E of the judgment, commencing at par 477.

The MRSLAs' terms put the parties under continuing good faith obligations to one another. Justice Martin noted that this would extend to require the parties to co-operate in future with each other in referring any future RCB disputes to an expert for informal determination.

Accordingly, Justice Martin concluded that Sino Iron and Korean Steel must severally pay Mineralogy the unpaid amounts for RCB, being the sum of $US74,706,735 each ($US149,413,470 in aggregate).

The final position as to CITIC as guarantor of Sino Iron and Korean Steel's RCB payment debts is to be the subject of further submissions by the parties concerning Mineralogy's failure to date to formally plead out the written demands it had issued to CITIC under the FCD, for it to pay the RCB amounts not yet paid to Mineralogy by Sino Iron and Korean Steel.

The full judgment of the Court is available under the Judgments section on the Supreme Court of Western Australia website at http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/main.xsp.