POWNALL & ORS -v- CONLAN MANAGEMENT PTY LTD

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Case No:	FUL:146/1993	**Heard:**	2 & 3 February 1995
Coram:	MALCOLM IPP ANDERSON	**Delivered:**	15/03/1995
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Parties:	KATHLEEN POWNALL CHRISTOPHER ROBIN LADYMAN JACKADDER HOLDINGS PTY LTD GOLDEN CIRCLE NOMINEES PTY LTD CONLAN MANAGEMENT PTY LTD THE KALBARRI TRUST
Other Judges:	MALCOLM ANDERSON Summary
Author:	IPP J

IN THE SUPREME COURT) Heard: 2 & 3 February 1995

OF WESTERN AUSTRALIA) Delivered: 15 March 1995

THE FULL COURT

CORAM: MALCOLM CJ, IPP & ANDERSON JJ

Appeal No 146 of 1993

B E T W E E N :

KATHLEEN POWNALL, CHRISTOPHER ROBIN LADYMAN, JACKADDER HOLDINGS PTY LTD and GOLDEN CIRCLE NOMINEES PTY LTD

Appellants

(Defendants)

and

CONLAN MANAGEMENT PTY LTD AS TRUSTEE FOR THE KALBARRI TRUST

Respondent

(Plaintiff)

Mr E M Heenan QC and Mr R Richards (instructed by M A Bibby)appeared for the appellants.

Mr C L Zelestis QC and Mr G H Lawton (instructed by Lawton Gillon)appeared for the respondent.

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IPP J

This appeal concerns an assessment of damages by the learned trial Judge. The damages his Honour was required to assess were those said to have been sustained by the respondent in consequence of a breach of contract by the appellants, which led to the respondent terminating the contract in question.

That contract was constituted by the respondent exercising an option to purchase shares in Australian Chalk and Mineral Resources NL ("Australian Chalk"). By exercising the option the respondent became entitled to acquire 73 per cent of the shares in Australian Chalk. The remaining 27 per cent of the shares was held by the proprietor of the respondent. The purchase price paid by the respondent for the shares was $542,500.

Australian Chalk was a mining company which owned certain mining tenements which were prospective for chalk. Under the deed the appellants gave a number of warranties to the effect that Australian Chalk was the sole owner of the mining tenements in question, that all payments and works required in connection with the tenements had been carried out, and (save for relatively unimportant exceptions, not presently relevant) there were no claims relating to, or encumbrances against, the tenements. The tenements were the sole assets of Australian Chalk and it had, generally speaking, no liabilities save for those directly related to its rights to the tenements. Thus the value of the total issued share

capital of the company could be said to be equivalent to the value of the tenements, and the value of 73% of the shares in the company could be said to be equivalent to 73% of the value of the tenements.

The respondent brought proceedings against the appellants arising out of the latter's breach of contract, and, in a trial of the issues relating to liability, it was held that the respondent had validly terminated the contract for the

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purchase of the shares, being entitled so to do by reason of the appellants' repudiation of it. Thereafter, a separate hearing took place, after which the learned Judge made the order for the assessment of damages, which is now the subject of this appeal.

In the assessment proceedings the damages were quantified as being $187,500 and judgment was granted in favour of the respondent in that sum. The learned Judge arrived at that amount by determining that a fair valuation of the tenements owned by Australian Chalk was $1 million and a 73 per cent interest therein would have a value of $730,000. That amount represented the value of the shares in Australian Chalk which the respondent purchased, but did not receive. The learned Judge, accordingly, assessed the damages suffered by the respondent as being the difference between $730,000 and $542,500 (the purchase price of the shares in question), thereby arriving at $187,500.

In so determining the quantum of damages the learned Judge relied solely upon the evidence of Mr R A Adam, a mining engineer. Two other experts gave oral testimony, namely Mr I D Cowden and Mr J S F Dunlop, but the learned Judge found that he was unable to place reliance upon their evidence. As regards the latter two witnesses his Honour observed:

"[They] gave their opinion as to the value of the tenements based, in substantial part, upon financial models and calculations

which were neither tendered nor specifically identified. In my opinion the evidence of Messrs Cowden and Dunlop failed in several respects to measure up to the criteria for admissibility."

Evidence of two other expert witnesses, namely Mr R K Duncan and Mr C B Lee, which was in the form of written reports, was admitted. The Duncan report had been commissioned by the appellants but was tendered by the respondent. The Lee report had been commissioned by the respondent and

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was also tendered by it. These two reports were tendered by the respondent solely for the purpose of establishing the extent of the chalk resource on the tenements concerned (although each of these reports contained, in addition, expressions of opinion as to the value of the tenements).

In his reasons for judgment the learned Judge observed that "these reports were not tested in cross-examination before me and I can, therefore, accord very little weight to them." This was in the context of determining which expert's valuation should be preferred. Lee's valuation of the tenements was far lower than that of Adam, and the appellants complained that his Honour erred in not taking Lee's report into account when assessing the value of the tenements, and submitted that the learned Judge's remarks revealed a misunderstanding on his part. It was said that the appellants did not cross-examine Lee as they were content with Lee's valuation; it was accordingly inappropriate to accord little weight to his evidence on the ground that he was not cross-examined. It is strongly arguable, however, that the learned trial Judge, in referring to the fact that Lee was not cross-examined, was merely intending to express the view that he preferred the oral testimony of Adam to the written report of Lee. In any event, as Lee's report was admitted only for the limited purpose that I have mentioned, it cannot (without Lee having been called to prove his report) be used for the additional purpose of establishing

his valuation. As Gibbs J said in Hughes v National Trustees Executors & Agency Co of Australasia Ltd (1979) 143 CLR 134 at 153:

"[In] general, it is the duty of a judge to reach his decision on evidence that is legally admissible, and to put evidence only to those uses which the law allows. When a statement is admitted, not as evidence of its truth but simply as original evidence, the mere fact of its admission cannot enable it to be given an additional probative value which the law denies."

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Only that part of the Lee statement that concerned the extent of the chalk resource constituted admissible evidence; the remainder could not be given any probative value.

The appellants' main ground of appeal was, however, that the report of the expert, Adam (which was received as an exhibit and which set out the valuation of the tenements on which the learned Judge relied) was based substantially on inadmissible hearsay information supplied by persons who did not give evidence. The appellants contended that:

"Adam, on his own admission relied entirely on information given to him by other persons, those persons being neither identified nor called to give evidence, and no written statement from them being tendered."

The respondent, by notice of contention, attempted to counter this ground by arguing that:

"[A] value for the tenements consistent with the value found by his Honour can be supported by ... the evidence given by Cowden, Dunlop and Adam at the trial."

Thus, the respondent sought support from the evidence of Cowden and Dunlop (that had been rejected by the learned Judge) and the oral

testimony of Adam (as opposed to the testimony contained in his report).

The case at trial was conducted on the basis that the value of the tenements (and hence the value of the shares) depended upon an evaluation of a project to mine, extract and market chalk deposits contained in the tenements. Adam, Cowden and Dunlop based their valuations on cash flow analyses of the project as an operating and producing chalk deposit. An assessment on this basis was somewhat difficult as the infrastructure for the project was a long way from completion and forecasts and estimates had to be made. Valuations were required of the extent of the chalk resource, the quality

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of the chalk that could be extracted, the time that would be taken and the cost that would be incurred in establishing the necessary infrastructure to exploit the chalk, the price that would be realised for the chalk, the capital costs involved, including those required to provide a ship loading facility for transporting the chalk by sea to potential buyers, operating costs, government charges and royalties.

These valuations involved different areas and disciplines and a multitude of facts and calculations. It is accordingly not surprising that Cowden, Dunlop and Adam, in varying degrees, relied upon information provided by others for the bases of their opinions. This lies at the root of the decision of the learned Judge to hold that the evidence of Cowden and Dunlop could not be relied upon; the information on which they based their opinions being inadmissible. As regards Adam, the learned Judge observed that "his evidence was sufficiently based upon his own observations and upon proven data to render it admissible, albeit its weight must be affected by the fact that his opinion was to some extent based upon material not proved before me."

The principles relating to the extent to which an expert may rely upon hearsay evidence as a basis for his or her opinion were dealt with in detail by Megarry J in English Exporters (London) Ltd v Eldonwall Ltd [1973] 1 Ch 415. At 420 his Lordship said:

"As an expert witness, the valuer is entitled to express his opinion about matters within his field of competence. In building up his opinions about values, he will no doubt have learned from transactions in which he has himself been engaged, and of which he could give first -hand evidence. But he will also have learned much from many other sources, including much of which he could give no first-hand evidence. Textbooks, journals, reports of auctions and other dealings, and information obtained from his professional brethren and others, some related to particular
(Page 7) transactions and some more general and indefinite will all have contributed their share."

Mr Zelestis QC, senior counsel for the respondent, relied particularly on the proposition that an expert valuer might rely upon "information obtained from his professional brethren and others, some related to particular transactions ..." In my opinion, however, by these remarks Megarry J was saying no more than that information obtained by a valuer from others, relating to particular transactions, forms part of his general experience, knowledge and expertise upon which he can draw "to formulate his opinion and to express working truths": Pattenden, Expert Opinion Evidence Based on Hearsay (1982) Crim L R 85 at 95. Hearsay information of this kind may be used by a valuer, for example, to give a general exposition of the subject, to assess market trends, or to determine whether a particular transaction is aberrant or consistent with overall market conditions: see English Exporters (London) Ltd v Eldonwall Ltd at 421.

Hearsay evidence of this character (termed "non-specific hearsay" by Pattenden op cit at 93) is to be contrasted with

hearsay evidence of particular comparable transactions that are used to infer the value of the property that is directly in issue (termed "specific hearsay" by Pattenden op cit at 93). Hearsay information of the latter kind, which is not otherwise proved by direct evidence, cannot be used by the valuer, unless otherwise proved by direct evidence. As Megarry J observed (at 421):

"Basically the expert's factual evidence on matters of fact is in the same position as the factual evidence of any other witness." For that reason, 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."

Megarry J concluded (at 422):

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"It therefore seems to me that details of comparable transactions upon which a valuer seeks to rely in his evidence must, if they are to be put before the court, be confined to those details which have been or will be, proved by admissible evidence, given either by the valuer himself or in some other way. I know of no special rule giving expert valuation witnesses the right to give hearsay evidence of facts ... "

A similar conclusion was arrived at by the Court of Appeal in R v Turner [1975] 1 All ER 70. Lawton LJ (who delivered the judgment of the court), remarked (at 73):

"[T]hose who call psychiatrists as witnesses should remember that the facts on which they base their opinions must be proved by admissible evidence."

His Lordship then referred to a contention that counsel was entitled to ask questions which would entitle the expert witness to express views based on hearsay information, without actually mentioning the hearsay material, and said (at 73):

"What [counsel] was proposing to do was to use a common forensic device to overcome objections of inadmissibility based on hearsay. The use of this device was criticised by Lord Devlin in Glinski v McIver [1962] AC 726 at 780-781: he thought it was objectionable. It is certainly unhelpful. Before a court can assess the value of an opinion it must know the facts on which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. In our judgment counsel calling an expert should in examination -in-chief ask his witness to state the facts on which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination."

R v Turner was followed by Reg v Abadom [1983] 1 WLR 126, where Kerr LJ (who delivered the judgment of the Court of Appeal) said (at 131):

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"Where an expert relies on the existence or non-existence of some fact which is basic to the question and which he is asked to express to opinion, that fact must be proved by admissible evidence."

It was held that primary facts relied upon by an expert for his opinion had to be proved before the expert's opinion could be admitted into evidence.

The approach of Australian courts has been largely similar. In English Exporters (London) Ltd v Eldonwall Ltd (at 422 to 423) Megarry J adopted the reasoning in Wright v Sydney Municipal Council (1916) 16 SR (NSW) 348. In the latter case Sly J rejected the contention that an expert valuer was entitled to give hearsay evidence of sales. His Honour said (at 395) that the valuer could testify that he had kept in touch with sales not made by himself in the district, to show that

he was competent to give evidence of values of the district:

"But he has no privilege beyond any other witness to speak in detail of the prices realised for other lands unless he can give legal evidence of such sales, or that evidence has already been given by the witnesses. It would be a most dangerous thing to allow an expert to speak of the details of sales of which he really knows nothing, and see the difficulty the plaintiff in a case like this would be in if he had to answer such evidence not knowing whether the sales were really existent or not. I think the same principle applies whether the evidence is given in chief or in reply." (See also 365 per Gordon J and 366 per Ferguson J.)

In the frequently cited case of Ramsay v Watson (1961) 108 CLR 642, a medical officer gave evidence that he had examined 21 of the plaintiff's co-workers with a view to determining whether they suffered from lead poisoning. Counsel for the defendant sought to ask the medical officer what the workers had told him about their medical history in order to strengthen the evidence of the witness that in his opinion those workers had not been affected

by lead. Counsel for the plaintiff objected on the ground that the medical history was hearsay and the workers themselves should be called. Counsel for the defendant did not undertake to call the workers. The trial Judge upheld the objection. The High Court accepted (at 649) that in the circumstances the trial Judge "could properly refuse to admit [the] evidence."

See also Paric v John Holland (Constructions) Pty Limited (1985) 59 ALJR 844 at 846; and Sych v Hunter (1974) 8 SASR 118 where Bray CJ (at 119) excluded opinion evidence based on hearsay.

Mr Zelestis conceded that the expert witnesses who had testified on behalf of the respondent had, at least to some

extent, relied on hearsay information, but submitted in effect that the information in question was non-specific hearsay and its use was not objectionable. The validity of this submission depends on an analysis of the evidence itself and I will proceed to this shortly. In an alternative submission, Mr Zelestis argued that even if parts of the evidence was based on inadmissible hearsay, that did not taint the whole of the evidence and that part of the evidence that was admissible was sufficient to support the findings of the learned Judge. Finally, Mr Zelestis submitted that even if an expert opinion is based on inadmissible hearsay, that does not render the opinion itself inadmissible; merely the weight of the opinion is affected thereby.

As regards evidence that contains a mixture of objectionable hearsay and legitimate material, obviously there may be instances where the evidence will be trimmed, with the objectionable material being discarded so that the legitimate evidence remains. But there may be cases where the inadmissible and the admissible evidence are so intertwined that they cannot readily be separated. In such event, the entire body of evidence will be rejected. The same result follows where it is not possible to say which of the evidence is

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admissible and which not, or to what degree the witness has relied on the inadmissible evidence.

Steffen v Ruban [1966] 2 NSWLR 623 illustrates these principles. In this case an expert expressed opinions partly derived from what he had been told by the mother of the plaintiff (who was a child) and who, although called as a witness, was too emotionally affected to give any more than very brief evidence of the child's condition. The child was not called as a witness. Jacobs JA ordered a new trial saying:

"I cannot be clear from Dr Bailey's evidence whether he was expressing conclusions based on his own observations or based on what he had been told by the boy's mother. If his conclusions were mainly based on what he had been told by the boy's mother then there is no evidence from her that what she told the doctor was correct, and in the present case this is of vital importance. If any part of Dr Bailey's evidence were sufficiently clearly based on his own observations or tests ... one could say that, despite deficiencies in proof of the history of the plaintiff, nevertheless, the medical evidence was clear, there might be no occasion to interfere with the jury's verdict. However, I find it quite impossible to say this on Dr Bailey's evidence." (At 626)

His Honour concluded:

"If his evidence is such that it is impossible to analyse and determine what are conclusions based on his own observation and what are conclusions based on what he has been told, then in such a case as the present one the danger of a mistrial becomes very great (cf Ramsay v Watson (1961) 108 CLR 642 and Evans v Hartigan (1941) 41 SR (NSW) 179." The Court of Appeal found that the hearsay evidence upon which the medical officer based his opinions should have been held to have been inadmissible.

As regards Mr Zelestis's final proposition, it is to be noted that in R v Schafferius [1977] Qd R 213 at 217 the Queensland Court of Criminal

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Appeal appears to have assumed that the trial judge has a discretion to exclude opinion evidence based on inadmissible hearsay, or to admit it and attach to it whatever weight is merited by the circumstances. A similar inference could be drawn from Gordon v R (1982) 41 ALR 64. On the other hand English Exporters (London) Ltd v Eldonwall Ltd, Wright v Sydney Municipal Council, Sych v Hunter, R v Turner, Reg v Abadom and Steffen v Ruban are contrary to that

proposition. They are to the effect that opinion evidence based on unconfirmed specific hearsay is inadmissible and should be excluded.

In my opinion, expert opinion based entirely on inadmissible evidence is itself inadmissible and there is no discretion to admit it. I form this view as to admit such an opinion would be to admit, indirectly, the inadmissible evidence itself. If an opinion, based solely on evidence that the court by law is required to exclude, is itself admitted, the inadmissible evidence would have some influence over the court's decision. Such a result would defeat the purpose of the law that excludes the inadmissible evidence. If the primary facts on which the evidence is based are not admissible, the opinion is valueless and irrelevant and, in my opinion, should be excluded. It is for this reason that the Court of Appeal in R v Turner observed (at 73) that an expert in examination-in-chief should be asked to state the facts on which his opinion is based, and that it was wrong to leave it to the other side to elicit the facts by cross-examination. It is only when the primary facts upon which the opinion has been based are established that the opinion should be admitted into evidence.

On the other hand, where the expert opinion is based only partly on inadmissible testimony and that inadmissible testimony can readily be ascertained and discarded, the opinion should be admitted subject to weight. The opinion of the expert in R v Schafferius appears to have been of this kind

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and explains the attitude of the Queensland Court of Criminal Appeal in regard to the discretion vested in the trial judge. Gordon v R can also be explained on this basis.

Where the expert opinion is based on a combination of admissible and inadmissible material, and it is impossible to determine what conclusions are based on the expert's own observations and what conclusions are based on what he has been told, or to what degree

the expert has been influenced by the hearsay material, the evidence should be excluded: Steffen v Ruban.

I turn now to the application of these principles to the evidence adduced at the hearing at which the damages were assessed.

As I have mentioned, the learned Judge observed that the testimony of Adam was sufficiently based upon his own observations and upon proven data to render it admissible, albeit that its weight must be affected by the fact that his opinion was to some extent based upon unproven material. A large part of Adam's testimony was contained in his written report, and I shall examine, firstly, that report.

The opening summary of the report stated that the valuation contained therein was "based upon the assessment of the technical risks associated with the project and upon previous offers to purchase part of the project." The report contained two references to purchase offers that were made. The offers were not proved by admissible evidence and the learned Judge observed that "[to the extent that Mr Adam placed reliance upon offers ... his evidence was based upon inadmissible evidence." In its notice of contention the respondent sought to attack this conclusion. While mention was made in the report of some of the terms of those offers, the full terms were not set out and it is not possible to determine the weight that can be attributed to them. In any event as

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Gibbs J observed in Gregory & Anor v Commissioner of Taxation of the Commonwealth of Australia (1971) 123 CLR 547 at 562:

"Authorities in this Court establish that in determining the value of land or shares, evidence of a price offered for the property in question, in the course of negotiations which do not result in a concluded contract, is not admissible." Accordingly, in my view, the learned Judge was entirely correct in holding that the evidence of the offers was inadmissible. This finding has implications

as regards the admissibility of the report as a whole. Assuming that the conclusions of the author were based on admissible material as well as the offers, it is essential to know the extent to which he was influenced by the inadmissible offers, and, in particular, whether it could be said that his conclusions were "mainly" or even "clearly" based on admissible material: Steffen v Ruban at 626. Both the report and the oral testimony of Adam were silent in this respect.

In the report, under the heading "Project Timing", the following was stated:

"A project development and construction schedule has been produced, Sunkar (1992), which provides for production of saleable product after approximately two years from commencement of feasibility studies."

According to the report, the schedule provided for certain activities to be undertaken such as environmental assessment studies, further resource drilling, final feasibility and infrastructure, design and construction. It was said that "[t]hese activities are based upon the pre-feasibility study carried out by Merz Australia (July 1992) which provides further delay of the requirements but no indication of timing." Neither the material from "Sunkar" or "Merz Australia" was put into evidence. This material related specifically to the project required to be valued (i.e. it had been commissioned for the project) and was unconfirmed hearsay. In my view, therefore, the opinion relating to project timing, based as it was on the information from Sunkar and Merz Australia, was inadmissible.

Under the heading "Capital Costs" reliance was placed on "estimates of the capital costs for the project ... provided by Merz", other estimates by Merz, an assessment by "Proteus Consultants" and "various anecdotal estimates." This material is unconfirmed specific hearsay and is inadmissible. While the author stated that two of the estimates were "reasonable" (and it is not clear how many estimates Adam obtained) it is not possible to determine what part of those particular

estimates themselves concerned hearsay information, and in what manner they were determined to be reasonable. In particular it is not possible to ascertain whether, in expressing the view that the estimates were reasonable, Adam relied entirely on his own knowledge and expertise, or whether he accepted the truth of facts expressed in the estimates and assessments, or some of them, and proceeded then to form his own opinion. In all the circumstances, in my view, this part of the report is inadmissible, as is the opinion as to capital costs.

The "Operating Costs" were said to "have been provided from a number of sources." The principal sources were set out and these were said to be "Eltin Limited" and "Merz Australia". The entire section of the report dealing with operating costs is based on unconfirmed specific hearsay evidence (save for management costs, and it is not clear how the opinion as to management costs was arrived at). In my view the opinion as to operating costs is inadmissible.

Under the heading "Product Price", reference was made to studies undertaken by "Merz" and "Sunkar", as well as one Ratneeser, and reliance was placed thereon. Reference was also made to "expressions of interest" received by "Conlan Management" for the supply of various kinds of material to be mined at particular prices. The author stated:

"Based upon the documents presented these prices are considered reasonable for inclusion in a pre-feasibility level study." The "documents presented" (being presumably the material from Merz, Sunkar, Ratneeser and the expressions of interest from Conlan Management) were unconfirmed hearsay relating to primary facts. This part of the report is accordingly inadmissible, and so is the opinion, in the report, as to product price.

A section of the report dealt with "Project Cash Flow." It was based on a 10-year mine production life. It was said that "this life is based upon the expressions of interest received by Conlan Management which require a 10-year supply." This too is unconfirmed specific

hearsay.

The elements of project timing, product price, capital costs, operating costs and project cash flow were all critical to the final opinion as to value that was arrived at in the report. Without these elements the foundation of the opinion expressed in the report is nullified. In addition, it is not possible to ascertain from the report the extent to which Adam was influenced by the inadmissible offers to which reference is made at the commencement of the report, and on which the report is said to be partly "based". In all the circumstances, in my view the report is fatally defective.

Mr Zelestis submitted, however, that in relation to "each aspect of his valuation", Adam - as was arguably apparent from his oral testimony - made some assessment of his own or relied upon admissible information in expressing opinions as to the extent of the chalk resource, the quality of the chalk, the mining method, capital and operating costs and the likely market

price of the product. Mr Heenan QC, senior counsel for the appellants, accepted that there was independent evidence of the extent of the resource and did not make any submissions in regard to the quality of the chalk. However, he challenged the submission that there was adequate evidence in regard to the other "aspects", including the timing of the project, product price, capital costs, operating costs and project cash flow.

The timing of the project was an essential element in the final conclusion expressed by Adam. In his report he said that for the purposes of financial analysis "a two year development time frame has been assumed with sensitivity cases using 2.5 and 3 years." The time frame had an important bearing upon the valuation arrived at by Adam, as critical to the latter was the date by which "saleable product" would be produced. I have previously pointed out that the

opinion in the Adam report as to project timing, based as it was on the unconfirmed information from Sunkar and Merz Australia, was inadmissible. Adam, in his oral evidence, was not asked about the timing of the project, and Mr Zelestis did not argue that there was anything in the oral testimony that might render admissible the material in the Adam report on this issue.

Similarly, Mr Zelestis made no submissions as regards the project cash flow calculations carried out in Adam's report. The evidence was that the cash flow was compiled on the basis of inferences and estimates made by Adam, personally, in regard to all the aspects which he considered, and the admissibility of the cash flow projection is dependent upon the admissibility of those inferences and estimates and the facts upon which they were based. It is sufficient to deal with only one aspect of the cash flow and that is Adam's estimate of the life of the proposed mine. As he based his estimate of 10 years "upon the expressions of interest received by Conlan Management"

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(unconfirmed specific hearsay material that was neither particularized nor identified, and which in any event would be excluded: Gregory & Anor v Commissioner of Taxation of the Commonwealth of Australia), the very basis of the project cash flow as determined by Adam is inadmissible.

In relation to the capital and operating costs Mr Zelestis referred to a number of passages in Adam's oral testimony. Adam was asked, "Where did the information in relation to the cost of individual items come from for the purposes of your work?" He replied:

"A number of reports, quotations, assessments, were provided by Conlan Management from various sources, various reputable engineers basically Merz Australia; a budget style quotation was provided by Eltins, who are a major earthmoving surface mining contractor. These costs were reviewed and examined by myself and where

they were considered appropriate, based on experience with other projects and one or two minor cases, I actually developed costs from first principles by calculating the number of vehicles and what have you that would be required and the typical costs of operating those." Adam said also that he would know in broad terms what costs were involved.

In relation to the proposed ship handling facility Adam said:

"The costing is basically the same as costing any other rock construction, in that it's very easy to develop for first principles, but I have been involved in actually quoting for the construction of a number of these facilities off the coast of Western Australia."

In relation to operating costs he stated:

"If one looks at the costs that prevail in the aggregate industry, then you will find the salary levels, the number of people and the equipment costs levels that I have used are directly comparable with those that prevail in the aggregate of the industrial mineral sector, as opposed to the goldmining sector."

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This testimony has to be read with Adam's written report. As I have mentioned, Adam makes it clear therein that, in coming to the conclusions that he did on capital costs, he relied significantly on reports provided by Merz and an estimate by Proteus Consultants. When Adam's oral testimony is considered together with his written report it is extremely difficult to determine to what extent he verified the hearsay material he otherwise relied upon. His oral testimony was very much in general terms. The hearsay materials on which he relied were not admitted as exhibits at the trial. It is therefore not possible to determine with any confidence what precise items comprised the capital costs, whether they were capable of verification by Adam or whether they were of such a nature that they required direct evidence for their proper proof, whether he

possessed the expertise to verify them, and, generally, whether the independent work that Adam said in his oral evidence he carried out would justify the admission of his overall opinion. Take for example the following passage in the written report:

"The cost estimates provided by Merz for this facility are based upon the requirement to supply 3.0 metric tonnes per annum of lump product. At this point in the project development this amount of lump product cannot demonstrably be produced. Thus, for the purposes of generating the project cash flow a smaller lighter duty facility to produce crushed chalk is considered appropriate. Various anecdotal estimates for this type of facility have been obtained, Conlan (1992) of $3 to $4 million. This end estimate is considered to be reasonable and a cost of $4 million for the crushing and screening facility is used in the project cash flow."

Plainly, Adam relied heavily on "anecdotal estimates" that were obtained. He did not primarily rely on his own knowledge, as otherwise, it would not have been necessary for him to obtain the anecdotal estimates. The kind of general

testimony given by Adam, orally, does not warrant the admission of his estimate of $4 million for the crushing and screening facility.

Another example is the reference in the written report to Adam's view that:

"The cost of power reticulation and other services and facilities required for the project are estimated by Merz to be $1.1 million.This estimate is considered reasonable and has been used in the project cash flow."

Again it is simply not apparent to what extent Adam was able to use his own knowledge to verify the Merz estimate. Nothing in his oral

testimony throws light on this particular detail.

Without the primary material on which Adam relied having been produced, it is simply not possible to determine to what extent he was able personally to verify the information on which he relied.

A similar position obtains in relation to operating costs. According to the report Adam relied on budget cost estimates provided by Eltin Limited for contract mining. Again, without oral evidence from Adam as to what these budget costs involved, and how he verified them, it is not possible to determine whether they were capable of verification by Adam, whether they required direct testimony from others for their proper proof, whether he possessed the expertise to verify them, and to what extent he relied upon the hearsay information.

The same comments apply to an estimate by Merz on which Adam relied, concerning the costs of operating and maintaining the crushing plant.

In regard to the ship loading costs the following was said in the written report:

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"The Merz pre-feasibility study provides for $0.22/tonne as the cost of operating the ship loading facility, a total of $500,000 per annum. This sum has been used to calculate the operating cost of the ship loading facility for 2.0 metric tonne per annum as $0.25/tonne."

No details were given as to how these estimates were arrived at. According to the report they were simply accepted by Adam. His oral testimony, while suggesting that he relied on his own experience in considering these details to be reasonable, was insufficiently explicit to enable a court to determine whether any of

the material in the Merz report, and, if so, which, could properly be verified by Adam, so as to allow his views to be admitted.

A further example of the deficiencies in the testimony as to the estimated costs of the operation, is the reference in the Adam report to the requirement by the proposed ship loading facility for tugs to be used for berthing the incoming bulk carriers. The report stated:

"A cost of $2.50 per tonne has been calculated by Merz as the cost of providing the required tugs. This is based upon hire of tugs on an 'as required basis'."

There was nothing in Adam's oral testimony which supported this particular item, and there was no evidence that he was qualified to express a view as to the cost of providing tugs. The shipping market is notoriously sensitive and forecasts of shipping costs require specialised knowledge and experience. However, no evidence was led as to Adam's qualifications for accepting and relying upon Merz's calculations of the costs of obtaining tugs.

The problems with Adam's evidence are underlined when it comes to "the likely market price." His oral testimony was as follows:

"How did you deal with the available marketing information that was available to you for the purposes of your valuation - just in general terms?---Rather suspectly, because one of the big problems with all these types of projects where you are producing

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something which has a reasonably low value - the variation in price is - I should say, the actual price that anybody gets is a confidential matter. The broad range of prices I ascertained by private inquiry from a number of people, as to similar products. So I viewed the information as being indicative of likely price available. But you say you treated it suspectly, or that your - ?---Or circumspectly, in that I wasn't prepared to rely - in fact, I placed

no reliance on it until such time as I had ascertained that it was in the correct range of prices that were potentially available.... Is the suspect nature of the information made provision for in some other way in your valuation?---No; other than that I did determine what is a likely price, by enquiries from other sources. Are there other market transactions relating to industrial materials, not involving this project, that you could use as being a useful indication of the valuation parameters?---Not that I am aware of, in this State. There have been a number of transactions in the hard facing stone industry over recent years. I don't think any of those are particularly applicable because of the peculiar nature of the industry. Its a very - most of the transactions have tended to be sought of between one family member and another - the ones that I am aware of."

It is apparent from Adam's report that, in coming to a conclusion as to likely product price, he relied on "studies undertaken by Merz", "an expression of interest obtained by Conlan Management from an overseas consumer interested in the commodity", "market studies by Sunkar ... and Ratneeser", "expressions of interest of which Conlan Management were in receipt", and "the documents presented". This material was simply inadmissible and Adam's oral testimony takes the matter no further.

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In the circumstances I conclude that all of Adam's testimony relating to his opinion as to the valuation of the tenements, whether written or oral, is inadmissible and should be rejected.

I turn now to the evidence of Cowden and Dunlop. Although this evidence was rejected by the learned Judge, it was submitted by Mr Zelestis that an analysis of their testimony discloses that they gave evidence based on their personal knowledge of the extent of the resource, the quality of the chalk, the mining method, the capital and operating costs and the likely market price, and that evidence

of this kind should have been admitted. I shall refer only to the evidence of Cowden and Dunlop as to costs and price; these being critical issues having regard to the conclusions to which I have come concerning Adam's testimony.

When asked how he determined the estimated market price, Cowden said:

"What was done is that where there were offers of intent to enter into contractual agreements regarding purchase of product on certain conditions, certain chemical specifications over certain periods of time, these were looked at and examined, and when we had satisfied ourself (sic) that these were reasonable documents and were on letterhead (sic) of established trading houses, we then used those as the basis for the marketing scenario ..." (AB 160).

He also testified, "[w]e assumed a market scenario based on letters of intent that were provided to us", and "[i]t was a market analysis based on the letters of intent ...". The letters of intent were inadmissible.

In cross -examination Cowden said that he had obtained "budget figures" from Eltin Contractors. This material was unconfirmed specific hearsay. He obtained information from Conlan Management as to the "scope of the mining". This, too, was unconfirmed specific hearsay. He said that one of the factors on which he based his opinion on the estimated mine life was

"unpublished reports". These were never identified or proved. When asked whether a port could be built at the site, he said that he had seen "correspondence which tells me that people such as Marine and Harbours believe it can be built." He also said that he had seen "one hydrographic survey which said it should not present any unforeseen difficulties - that the conditions are known and can be catered for." This material was all unconfirmed specific

hearsay.

Accordingly, Cowden's opinions as to capital and operating costs and market price, being dependent on inadmissible hearsay, have to be excluded.

There is a further reason which precludes this court from placing any reliance on the testimony of Cowden. The learned Judge did not have regard to his evidence as he considered it to be inadmissible. It was therefore not necessary for his Honour to make any credibility finding in regard to Cowden. It is, however, apparent that there was, during the trial, an issue in this respect. I shall refer to a few examples. Cowden was cross-examined about certain sampling done by one Margetic of Merz. There was no reference in his report to the sampling. He first said that he had omitted it because it was not relevant, but then accepted that it was relevant and said that it was incorrect and that was why it was omitted. He was cross-examined about other material emanating from Margetic that was not in his report and said that he had omitted it because it was irrelevant. He was cross-examined about doubts expressed by Merz as to the quality of the product and was asked why he had omitted reference to these doubts in his report. He replied that the concerns of Merz were "not well-founded." There were other instances of a like kind which made it plain that the appellants were suggesting that his credibility was in issue. This court, not having seen and heard Cowden, is not in a position,

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itself, to make any finding as to the reliability of Cowden as a witness, and cannot determine the weight to be attached to his evidence.

The evidence of Dunlop was sought to be used by the respondent largely to provide a foundation for the opinions expressed by Cowden. As I consider that Cowden's evidence cannot be used in these

proceedings to support the respondent's case, Dunlop's evidence on which the respondent sought to rely takes the matter no further. Further, having read the evidence of Dunlop, and adopting the approach of Jacobs JA in Steffen v Ruban, nothing that was said on behalf of the respondent persuades me that the learned Judge was incorrect in holding that the evidence of Dunlop was inadmissible. Finally, Dunlop, was also cross-examined in such a way that the reliability of his testimony became an issue. For example, according to his report, he relied for the determination of his capital costs on several documents prepared by others. When he was cross-examined about these documents he discounted their importance. He testified that one of these documents was merely mentioned because it "was provided to us", another document was mentioned as it provided "background." Another document he said he did not rely on in any way, and yet another he said he referred to in his report "because it was documentation that was available." Again, without having seen and heard the evidence of Dunlop, and not being able to assess its reliability, it would be inappropriate for this Court to make any finding based thereon.

In my opinion, therefore, the evidence on which the respondent relied was either entirely based on unconfirmed specific hearsay material or was inextricably mixed with material of that kind, with the result that no reliance can be placed thereon.

I would accordingly uphold the appeal.

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When objections were taken to the admissibility of evidence other than that of Adam, the learned Judge was invited to mark the material in question for identification and, in effect, to decide the issue later. Counsel for the appellants then objected to the Adam report and relevant oral testimony from Adam. The Adam report was marked for identification and the learned Judge indicated that he would decide upon the issues raised concerning the admissibility of

Adam's testimony at a later stage. Counsel did not demur with this procedure. In the result, the learned Judge's final decision as to the admissibility of that testimony was only made known when his reasons for judgment were published. All the evidence was led without any final decision on the admissibility questions being made. In all the circumstances, I consider that justice would best be served if a new trial were to be ordered:
Steffen v Ruban at 630-631; Balenzuela v De Gail (1959) 101 CLR 226 at 245.