

expert update

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Not all experts agree that ‘no news is good news’!

Kim Riley in his capacity as trustee of the Ker Trust v Jubilee Mines NL [2006] WASC 199
Jubilee Mines NL v Riley [2009] WASC

The facts

In December 1993, the Ker Trust held 0.8 million fully paid, and 2.6 million partly paid shares in Jubilee Mines NL (“Jubilee”). Mr Riley had previously been a director of Jubilee but resigned from that role with effect from 31 December 1993. On Mr Riley’s evidence, it was his intention to sell the fully paid shares on the market in order to fund a break from employment. The partly paid shares would, he said, have been retained as an investment.

At that time, Jubilee was a junior miner engaged in exploration for Gold deposits. Throughout 1994 and 1995, these exploration efforts had not borne fruit, and Jubilee was in dire financial straits, undertaking a number of capital raisings and reconstructions as a result. Also at that time, WMC operated a large Nickel mine on an adjacent tenement.

On 1 August 1994, the company received a letter from WMC indicating that, as a result of a boundary line being incorrectly marked on a survey map, WMC had inadvertently drilled onto a tenement belonging to Jubilee (the McFarlanes Find tenement). The letter provided details of the drilling results but, significantly, no interpretation of those results. The significance of the data and whether it constituted material that ‘a reasonable person would have expected to have a material impact on the share price’, was the central question in the case. On one view, it was argued that data would be meaningless to anyone but a geophysicist. Alternatively, the data was clear enough to suggest that future nickel exploration may have been worthwhile.

Whatever the arguments, the letter was reviewed by Jubilee’s managing director, but was not otherwise disclosed to the board. It was decided to make no announcement to the market as to the letter’s content, or significance.

Mr Riley became disappointed with the continual problems encountered by the company and its poor share price performance and as a result, between September

When it comes to determining the market significance of information, and its impact on the share price, it appears that parties continue to call upon a wide variety of witnesses, both expert and lay, to assist in finding the answer to this difficult question

1994 and July 1995, he sold 3.2 million shares at around 9c each, realising some \$290,000.

In June 1996, WMC rekindled an earlier interest in acquiring the McFarlanes Find tenement, and met with Jubilee's directors on 7 June. At this meeting Jubilee's directors say they saw, for the first time, the results and interpretation of WMC's 1994 drilling data. On 11 June (the intervening days being a long weekend), Jubilee made an announcement to the ASX that:

significant sulphide nickel mineralisation has been located...following a boundary survey it has been discovered that four diamond holes drilled by Western Mining in 1994 were collared inadvertently on Jubilee ground.

On that day, Jubilee's share price closed at 27c, an increase of 38 per cent.

By September 1997, Jubilee's fortunes looked secure and it announced 'spectacular results from the drilling of its wholly owned Cosmos deposit', which fuelled an increase in the share price to around \$1.50¹.

Mr Riley claimed damages of \$3.2 million on the basis that the WMC letter contained market sensitive information which ought to have been released to the market in 1994, and if it had been released:

- Jubilee's share price would have risen.
- He would have sold 0.5 million shares in 1995 at a higher price than that actually achieved.
- He would have retained 2.9 million shares until 1997, and sold them at around \$1.50 per share, being the actual share price at that time.

The experts

The central question in the case was whether the data constituted material that 'a reasonable person would have expected to have a material impact on the share price', but a number of other questions were addressed, including:

- If the information contained in the letter was material, what impact would release of that information in 1994 have had on the share price?
- When the information was actually released in 1996, what impact did that have on the share price?

¹ The footnote to this story is that, on 1 February 2008, Jubilee became part of Xstrata Nickel Australia following acceptance of a A\$23 per share takeover offer.

- Was the actual information released in 1996 different in nature to the information available in 1994?
- Were market or company circumstances in 1994 any different to those in 1996?

To address these matters, the parties called a large number of witnesses, including experts from a number of different fields.

Mr P's evidence

Mr P was retained by the plaintiff. He was the director of an investment bank and corporate finance group, and had behind him many years experience as a mine geologist. The tenor of his evidence was to examine what might have happened to the share price if the data had been disclosed in 1994. Mr P employed an 'empirical event study' in which he examined the impact of the release of price sensitive information by Australian listed companies engaged in Nickel exploration. Master Sanderson, however, pointed to the lack of comparable companies announcing information about nickel exploration around that time:

While I would accept that the study undertaken by [Mr P] is of interest and that it does offer some support for the view that if an announcement had been made in September or October 1994 by the defendant the price of its shares would have risen, I would regard it as of no more than peripheral interest. I would accept that [Mr P], as a well qualified expert, was of the opinion that the WMC information was significant and would affect the price of the defendant's shares...

His evidence has helped to confirm my overall conclusions. But it has not played a central part in the reasoning that has led to the eventual outcome in this case.

In examining the impact of the actual release of information, Mr P observed the 20-day window surrounding the announcement and found a weighted average increase in the share price of nine per cent. In Master Sanderson's opinion this was a 'scientific and measured approach' and provided an indication that the information was significant.

Applying this same logic, Mr P opined that had the information been released in 1994, the actual weighted average price in 1994 (37 cents), would also have increased by 9 per cent (to 40 cents). Again, Master Sanderson referred to this as a 'reasonable calculation'.



Dr R's evidence

Dr R was retained by the plaintiff. He had a PhD in mining economics and was the director of an investment bank with experience as a resources stockbroking analyst and was the author of *The Mining Valuation Handbook*.

It was Dr R's opinion that the information would have had a material impact on the share price if it was released in 1994, largely because it was known that the tenement was in a 'nickel province' where other nickel operators were already in production. In Dr R's view, release of the information in 1994 would have led to an increase in the share price of approximately 10 cents, effectively applying the 38 per cent actual price increase which occurred in 1996. Master Sanderson held that:

... I am not satisfied that his calculation of an increase of 10 cents per share is supported by the evidence. ...In my view, the use of some weighted average calculation is more appropriate and produces a more likely outcome.

Finally Dr R said that even though the drilling results indicated that the nickel 'was of marginal economic value' nevertheless it would still be reasonable to expect a material effect on share price, simply because most exploration results released by miners don't result in discoveries.

Dr B's evidence

Dr B was retained by the defendant. He had a PhD in science and extensive experience as a field geologist, including M&A and mining project assessments.

His opinion was that the drilling data was of no importance to the defendant due to the depth, and low grade of the Nickel mineralisation. Further, he suggested the data had no strategic importance to the defendant because WMC had no need to promptly acquire the defendant's ground. In addition, he pointed out that, "to have issued a notice to the ASX upon receipt of the WMC exploration results in 1994 ... would have been ill advised and misleading, if it had been either in terms similar to the notice issued on 11 June 1996, or otherwise suggesting any significance in the Information".

In addition, in relation to the actual 1996 announcement, he said 'my impression of that is that it's a quite bullish statement. ... I wouldn't have made that statement'.

Master Sanderson referred to Dr B's evidence in the following terms:

[Dr B] was an impressive expert witness. He was eminently qualified and very experienced. However, in concluding as he did that the WMC information ought not to have been the subject of an ASX announcement, I am not satisfied he gave enough consideration to factors other than the grade of the intercept. In particular, he does not seem to me to have looked at the position from the point of view of a cash strapped junior explorer... I am not prepared to accept [Dr B's] view that the WMC information was of no significance and should not have been released.

Mr A's evidence

Mr A was retained by the defendant. He had some 30 years of experience in the stockbroking industry and as a share market adviser.

In his opinion, the improved market sentiment in 1996 meant that the influence of the June 1996 announcement was far greater than the effect a release in 1994 would have had. Further, because Jubilee was a gold explorer the market would not have seen nickel as of any interest and that the market was aware that the company was struggling for funds. Mr A concluded that the impact on the share price would have been "negligible" and that release of the information would not have influenced investors to buy and sell shares.

Master Sanderson held in relation to these opinions as follows:

I accept that as an experienced stockbroker, [Mr A] was in a position to give an expert opinion as to what effect on the share price an announcement in September / October 1994 may have had. But I do not accept his conclusion that it would have had no influence. In my view, the evidence of [Mr P] and [Dr R] on this point is to be preferred. In reaching this conclusion, I have been persuaded by what actually did occur when the announcement was made in 1996. While I accept that prevailing circumstances and perhaps the market sentiment were different, I am still satisfied that an announcement, if made in 1994, would have resulted in a movement in the stock price.

The decision

It seems that the overwhelming factor which persuaded Master Sanderson to make the above finding was the fact that actual release of the information in 1996 led to an increase in the share price, thus providing the best evidence that a reasonable person would have expected the drilling data to have a material impact on the share



price. On this basis the finding was that the material should have been released in 1994. Total damages of \$1.86 million were awarded, after various discounts for uncertainties.

The appeal

An appeal judgment was handed down in April 2009 by the Court of Appeal of Western Australia, unanimously overturning Master Sanderson's earlier decision.

The Court held that there was no necessity to disclose information which is incomplete:

... the evident purpose of each of the listing rule and the relevant statutory provisions is to ensure an informed market in listed securities. ... It would be entirely contrary to that evident purpose to construe either the listing rule or the statutory provisions as countenancing the disclosure of incomplete or misleading information.

Further:

The disclosure regime does not countenance disclosure of incomplete information just because that information alone would influence persons who commonly invest to buy or sell shares.

The Court also held that the Master erred in taking into account a course of action which Jubilee might have undertaken, despite the fact that no such decision was in fact taken.

...the obligations imposed by the listing rules and the relevant statutory provisions are limited to the disclosure of information. The obligations do not extend to include, for example, making business decisions which might or even should be made as a result of the receipt of the information. At points in the argument advanced on behalf of Mr Riley, and in the Master's reasons, it seems to be supposed that if Jubilee should have attached greater significance to the drill hole data it received and should have immediately undertaken exploratory drilling (perhaps by raising funds to enable that to occur), it was somehow a breach of the continuous disclosure provisions for Jubilee not to announce and take that course. Plainly, the obligations of continuous disclosure do not go that far.

In respect of opinions about the significance of the information itself, the Court observed:



The significance of the WMC information was a matter for expert opinion. Expert opinions held in good faith on reasonable grounds may differ. An expert opinion on the significance of the WMC information would in my view be a part of the 'information' concerning the appellant of which its executive officers...were aware or ought reasonably to have been aware. That is so because the common investor in s 1001D [Corporations Law] is not a relevant expert and neither is the hypothetical reasonable person in [Listing Rule] r 3A who in my view is an objective outsider.

Significance

The fact that the decision at first instance was so fundamentally different to that reached on appeal is perhaps an indication of the difficulty of determining cases relating to continuous disclosure. To date, there have been few reported cases which provide judicial guidance on the extent to which the Courts will rely on experts in determining such cases.



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Where the expert question relates to the identification of what 'information' was, or should have been, disclosed, and that information is of an accounting nature (for example profit forecasts, release of results, misleading accounting treatments), it is perhaps reasonably settled that some form of expert accounting assistance will be required. This is certainly this firm's experience. However, where the question relates to determining the market significance of that information, and its impact on the share price, it appears that parties continue to call upon a wide variety of witnesses, both expert and lay, to assist in finding the answer to this difficult question.

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