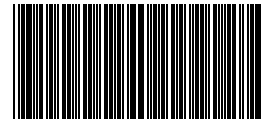




Filed: 13 September 2018 12:52 PM



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Defence to Amended Statement of Claim

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Equity General
Registry	Supreme Court Sydney
Case number	2017/00234966

TITLE OF PROCEEDINGS

First Plaintiff	Edgar George Tredrea
First Defendant	KPMG FINANCIAL ADVISORY SERVICES (AUSTRALIA) PTY LTD ACN 007363215

FILING DETAILS

Filed for	KPMG FINANCIAL ADVISORY SERVICES (AUSTRALIA) PTY LTD, Defendant 1
Legal representative	Stanley Lewis
Legal representative reference	
Telephone	9210 6500
Your reference	9129898

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Defence to Amended Statement of Claim (3445-4441-5499-v1 - Defence to Third Amended Statement of Claim 13.09.2018.pdf)

[attach.]

Form 7A (version 5)
UCPR 14.3

DEFENCE TO THIRD AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Equity General
Registry	Supreme Court Sydney
Case number	2017/00234966

TITLE OF PROCEEDINGS

Plaintiff	Alan Smith <u>Edgar George Tredrea</u>
Defendant	KPMG Financial Advisory Services (Australia) Pty Ltd (ACN 007 363 215)

FILING DETAILS

Filed for	KPMG Financial Advisory Services (Australia) Pty Ltd, the Defendant
Filed in relation to	Plaintiff's Claim
Legal representative	Stan Lewis, Corrs Chambers Westgarth
Legal representative reference	9129898
Contact name and telephone	Katrina Sleiman, 02 9210 6246
Contact email	katrina.sleiman@corrs.com.au

PLEADINGS AND PARTICULARS

To the third amended statement of claim filed 17 August 2018 ~~11 October 2017~~, the defendant (**KPMG Advisory**) says as follows (adopting the definitions therein except where otherwise stated).

Parties

- 1 It admits paragraph 1.
- 2 It admits paragraph 2.
- 3 It admits paragraph 3.
- 4 It admits paragraph 4.
- 5 It admits paragraph 5.

6 It admits paragraph 6.

7 It admits paragraph 7.

Non-binding, indicative take-over offer

8 Save that it says DML received a letter from CFC and CAD Fund dated 21 September 2013 which presented a non-binding indicative proposal, it does not admit paragraph 8.

9 Subject to reference to the full terms and effect of the Indicative Offer, it admits paragraph 9.

10 It does not admit paragraph 10.

11 It admits paragraph 11.

12 It admits paragraph 12.

13 Subject to reference to the full terms and effect of the announcement referred to in the particulars thereto, it admits paragraph 13.

Intention to make binding take-over bid

14 It does not admit paragraph 14.

15 Subject to reference to the full terms and effect of the announcement referred to in the particulars thereto, it admits paragraph 15.

Bidder's statement

16 Subject to reference to the full terms and effect of the Bidder's Statement, it admits paragraph 16 but says that the Offer was subject to various conditions set out in the Bidder's Statement.

17 Subject to reference to the full terms and effect of the Bidder's Statement, it admits paragraph 17.

18 Subject to reference to the full terms and effect of the Bidder's Statement, it admits paragraph 18.

19 Subject to reference to the full terms and effect of the announcement referred to in the particulars thereto, it admits paragraph 19.

20 It admits paragraph 20.

21 It admits paragraph 21.

KPMG Advisory report

22 It admits paragraph 22.

- 23 It admits paragraph 23.
- 24 Save that it says that at the time of preparing the KPMG Advisory Report, KPMG Advisory was aware that the Directors had expressed the view to the representatives of CFC and CAD Fund that the Offer was inadequate, it denies paragraph 24.
- 25 As to paragraph 25:
- (a) subject to reference to the full terms and effect of the KPMG Advisory Report, it admits paragraph 25.1; and
 - (b) save that it says KPMG Advisory formed the opinion that the Offer was neither fair nor reasonable, it denies paragraph 25.2.
- 26 Save that it says that the statement alleged referred to the Offer being “fair and reasonable” not “fair or reasonable”, and subject to reference to the full terms and effect of the KPMG Advisory Report, it admits paragraph 26.
- 27 It admits paragraph 27.
- 40% uplift for bottom of the Range*
- 28 It admits paragraph 28.
- 29 Subject to reference to the full terms and effect of the Technical Valuation Report, it admits paragraph 29.
- 30 It admits paragraph 30 and says that each of the values referred to therein were technical valuations.
- 31 Save that it says that the technical valuations ascribed by SRK to the mineral assets of DML were adopted in the KPMG Advisory Report and formed the starting basis for KPMG Advisory's assessment of appropriate market values having regard to other commercial and market related considerations, it denies paragraph 31.
- 32 Save that it says it applied a 40% premium to the Boseto Project Low Valuation, it admits paragraph 32.
- 33 It admits paragraph 33.
- 34 It admits paragraph 34.

Inflation and risk-free rates

35 As to paragraph 35:

- (a) it says that it instructed SRK to assume that:
 - (i) the United States inflation rate for 2013 and 2014 would be 2.0% and 2.2% respectively, and for 2015 onwards would be 2.3% per annum; and
 - (ii) copper and silver prices subsequent to 2017 would increase in nominal terms by the long term inflation rate for the United States, assumed to be 2.3% per annum; and
- (b) otherwise it does not admit the paragraph.

36 It does not admit paragraph 36.

37 As to paragraph 37:

- (a) it admits that it adopted a long term risk free rate of return of 1.8% in the KPMG Advisory Report for the purpose of calculating a cost of equity estimate for the Boseto Project; and
- (b) otherwise does not admit the paragraph.

Risks associated with "ramping up" and copper production

38 As to paragraph 38:

- (a) it admits that as at 19 November 2012, KPMG Advisory believed, based on information provided by DML to KPMG Advisory, that the Boseto Project was in the commissioning and ramp up stage; and
- (b) otherwise does not admit the paragraph.

39 It admits paragraph 39.

40 It admits paragraph 40.

41 It does not admit paragraph 41.

42 As to paragraph 42:

- (a) it says that:
 - (i) in preparing the KPMG Advisory Report and in reaching the KPMG Advisory Opinion, KPMG Advisory adopted an "alpha factor" for sovereign and development risk of 0.5% per annum on the low side

and 1.0% per annum on the high side for the purpose of calculating a cost of equity estimate for the Boseto Project; and

- (ii) the references on page 59 of the KPMG Advisory Report to applying an "alpha factor" for sovereign and development risk of 0.5% per annum on both the low side and the high side were typographical errors; and

(b) in the premises of sub-paragraph (a) above, it denies paragraph 42.

Target's Statement

43 Subject to reference to the full terms and effect of the Target's Statement, it admits paragraph 43.

44 As to paragraph 44:

- (a) it admits that the Target's Statement contained a statement to the effect that it was approved by a resolution passed by the Directors of the Target; and
- (b) otherwise does not admit the paragraph.

45 As to paragraph 45:

- (a) it admits that the Target's Statement included the KPMG Advisory Report as an annexure, and that the KPMG Advisory Report included as an appendix the Technical Valuation Report; and
- (b) otherwise does not admit the paragraph.

46 As to paragraph 46:

- (a) it admits that it knew that the KPMG Advisory Report (which included as an appendix the Technical Valuation Report) would be included as an annexure to the Target's Statement and consented to the KPMG Advisory Report being included in the Target's Statement; and
- (b) otherwise does not admit the paragraph.

47 As to paragraph 47:

- (a) it says page 3 of the Target's Statement states 'THE 3 REASONS TO REJECT THE OFFER', followed by 'REASON 1 THE OFFER OF \$1.70 PER SHARE IS INADEQUATE';
- (b) it says the chairman's letter at page 10 of the Target's Statement lists key reasons shareholders should reject the offer, with the first listed reason that

“the Independent Expert has concluded that the Offer is neither fair nor reasonable”; and

- (c) otherwise does not admit paragraph 47.

47A As to paragraph 47A:

- (a) it says that the Target’s Statement indicated that the negative condition set out in section 10(l) of the Offer (relating to change of control in Financial Arrangements) would be breached in light of the conditions of DML’s Debt Financing (as defined in the Target’s Statement);
- (b) it says that any admissions below to allegations concerning the alleged Potential Breach should be taken as admissions concerning the breach set out in sub-paragraph (a) above and otherwise as denials; and
- (c) otherwise, it denies paragraph 47A.

Supplementary statements and satisfaction of conditions

48 Subject to reference to the full terms and effect of the Supplementary Bidder’s Statement, it admits paragraph 48.

48A It admits paragraph 48A.

48B It admits paragraph 48B.

49 Subject to reference to the full terms and effect of the Second Supplementary Bidder’s Statement, it:

- (a) admits paragraph 49;
- (b) says further that the Second Supplementary Bidder’s Statement noted that CF Investment’s initial view was that the announcement by DML on 3 December 2012 regarding receipt of a notice from the Botswana Ministry of Mines, Minerals, Energy and Water Resources to cease the deepening of the Zeta open pit, apparently as a result of a localised failure of an interim pit wall situated in the hanging wall overburden at the Zeta open pit, could breach the “no material adverse effect” condition in section 10(h) of the Bidder’s Statement; and
- (c) says further that the Second Supplementary Bidder’s Statement noted that CF Investment considered Discovery’s disclosure regarding the Potential Breach to be a breach of the condition in section 10(l) of the Bidder’s Statement.

50 It admits paragraph 50.

- 51 As to paragraph 51:
- (a) it denies that the Supplementary Target's Statement referred to the KPMG Advisory Opinion as a reason to reject the Offer; and
 - (b) otherwise, subject to reference to the full terms and effect of the Supplementary Target's Statement, it admits paragraph 51.
- 52 Subject to reference to the full terms and effect of the Third Supplementary Bidder's Statement, it admits paragraph 52.
- 53 Save that it says CF Investment's voting power in DML as referred to in paragraph 53.3 was 14.41%, it admits paragraph 53.
- 54 It admits paragraph 54.
- 55 Subject to reference to the full terms and effect of the Fourth Supplementary Bidder's Statement, it:
- (a) admits paragraph 55; and
 - (b) says further that the Fourth Supplementary Bidder's Statement referred to the breach of the condition in section 10(l) of the Offer (change of control in Financial Arrangement) referred to in paragraph 47A(a) above and the potential breach of the condition in section 10(h) of the Offer (no material adverse effect) referred to in paragraph 49 above.
- 56 Subject to reference to the full terms and effect of the Second Supplementary Target's Statement, it admits paragraph 56.
- 57 As to paragraph 57, it:
- (a) does not admit that the Notice of Satisfaction of Offer Conditions was sent to DML on 29 January 2013;
 - (b) says that as at the date of the Notice of Satisfaction of Offer Conditions, CF Investment's voting power in DML was 15.18%; and
 - (c) otherwise admits paragraph 57.
- 58 Subject to reference to the full terms and effect of the Fifth Supplementary Bidder's Statement, it:
- (a) admits paragraph 58;
 - (b) says further that the Fifth Supplementary Bidder's Statement said that certain new and material disclosures included in the Second Supplementary Target's Statement raise material concerns; and

- (c) says further that the Fifth Supplementary Bidder's Statement referred to CF Investment's requirement to conduct appropriate due diligence to understand and address its concerns.

59 Subject to reference to the full terms and effect of the Third Supplementary Target's Statement, it:

- (a) admits paragraph 59; and
- (b) says further that the Third Supplementary Target's Statement noted that DML will not permit CF Investment to conduct due diligence.

59A Subject to reference to the full terms and effect of the Sixth Supplementary Bidder's Statement, it:

- (a) admits paragraph 59A; and
- (b) says that the Sixth Supplementary Bidder's Statement said that the conditions to the Offer in section 10(l) (change of control in Financial Arrangement) and section 10(h) (no material adverse effect) had been breached.

60 It admits paragraph 60.

61 It denies ~~does not admit~~ paragraph 61.

62 It ~~does not admit~~ denies paragraph 62.

63 ~~[Not used.]~~ It does not admit paragraph 63.

63A It does not admit paragraph 63A.

Offer lapses

64 It admits paragraph 64 and says that:

- (a) the Notice of Status of Conditions dated 8 February 2013 stated that only the conditions in sections 10(b), 10(c), 10(e), and 10(m) had been satisfied and that the condition in section 10(d) had been waived;
- (b) no further notice regarding the satisfaction of conditions in the Bidder's Statement was released to the market between 8 February 2013 and 15 February 2013; and
- (c) as at 15 February 2013, the conditions in sections 10(h) and (l) of the Offer remained unfulfilled.

Particulars

1. KPMG Advisory refers to the following documents in relation to conditions 10(h) and 10(l):

- (a) the Fourth Supplementary Bidder's Statement dated 9 January 2013;
 - (b) the letter from CF Investment Limited to the ASX dated 31 January 2013 attaching a Notice of New Date for Giving Notice of Status of Conditions; and
 - (c) the Sixth Supplementary Bidder's Statement dated 1 February 2013.
2. In relation to condition 10(l), KPMG Advisory also relies on the matters described in the Target's Statement regarding the impact of 'Change of Control' on its financing arrangements (pages 33, 37, 45 and 55).
3. In relation to condition 10(h), KPMG Advisory also refers to the following matters:
- (a) the breach by DML of clause 20.2(c) (Available Cash Covenant) of its US\$50 million revolving credit facility with Standard Bank and Standard Chartered Bank (**Revolving Credit Facility**) on 31 December 2012, being one of the breaches referred to in Notes 3 and 9 of DML's Half Year Financial Report for the six months ended 31 December 2012 released to the market on or about 19 February 2013 (**DML FY2013 Half Year Report**); and
 - (b) the breach by DML of clause 20.2(b) (the EBITDA/Sales ratio covenant) of the Revolving Credit Facility on 31 December 2012 being one of the breaches referred to in Notes 3 and 9 of the DML FY2013 Half Year Report.

Trading halt and administration

65 It does not admit paragraph 65.

66 As to paragraph 66 it:

- (a) says that DML requested a voluntary trading halt on 19 April 2013 pending an announcement in relation to its financing arrangements and was reinstated to official quotation on 21 May 2013; and
- (b) otherwise does not admit the paragraph.

67 As to paragraph 67:

- (a) it says that on 21 May 2013, DML released an announcement to the market titled 'Potential change of control process – Corporate updates', which

attached a letter from CF Investment dated 26 April 2013 presenting a non-binding, indicative proposal to acquire all shares of DML for cash consideration equal to AUD 0.35 to AUD 0.40 per share; and

(b) it otherwise does not admit paragraph 67.

68 Subject to reference to the full terms and effect of the DML ASX Announcement made on 21 May 2013, it admits paragraph 68.

69 It does not admit paragraph 69.

70 Save that it says between 21 May 2013 and 10 June 2013 no bids were made for DML's shares, it does not admit paragraph 70.

71 It admits paragraph 71.

72 It admits paragraph 72.

73 It admits paragraph 73.

74 It does not admit paragraph 74.

75 It does not admit paragraph 75.

ALLEGED NEGLIGENCE

A. Alleged duty of care

Alleged risk of harm

76 It does not admit paragraph 76.

77 It does not admit paragraph 77.

78 It does not admit paragraph 78.

KPMG Advisory's alleged duty of care

79 It does not admit paragraph 79.

80 As to paragraph 80:

(a) it admits that it was engaged by DML to prepare an independent expert's report for the purpose of assisting DML shareholders to make an informed decision whether to accept or reject the Offer and refers to and repeats paragraph 22 above; and

(b) it otherwise denies paragraph 80.

81 It denies paragraph 81.

82 It admits paragraph 82, and refers to and repeats paragraph 22 above.

83 It denies paragraph 83 and says that the KPMG Advisory Opinion was based on *inter alia* the sources of information specified on page 48 of the KPMG Advisory Report, including the Technical Valuation Report and various assumptions specified in the KPMG Advisory Report.

84 It admits paragraph 84.

85 It denies paragraph 85.

86 It denies paragraph 86.

87 It denies paragraph 87 and notes that the alleged duty of care is to avoid causing pure economic loss.

B. Alleged breaches of duty

40% uplift

88 It denies paragraph 88

89 It denies paragraph 89.

90 It denies paragraph 90.

Inflation and risk-free rates

91 It denies paragraph 91.

92 It denies paragraph 92.

93 It denies paragraph 93, and refers to and repeats paragraphs 35–37.

94 It denies paragraph 94.

Risk of prolonged ramp up period

95 It denies paragraph 95.

96 It denies paragraph 96, and refers to and repeats paragraph 42(a) above.

97 Save that it admits that, around the time the KPMG Advisory Report was prepared, the country risk profile prepared by Aswath Damodaran in January 2012 indicated a country risk premium on equity for Botswana in the order of 1.5% per annum, it denies paragraph 97.

98 It denies paragraph 98, and refers to and repeats paragraphs 95–97 above.

99 It denies paragraph 99, and refers to and repeats paragraphs 95–98 above.

100 It denies paragraph 100, and refers to and repeats paragraphs 95–99 above.

C. Alleged loss and damage

101 As to paragraph 101:

- (a) it admits that during the Relevant Period, the plaintiff and each of the Group Members held shares in DML; and
- (b) otherwise does not admit the paragraph.

102 It does not admit paragraph 102.

103 It does not admit paragraph 103.

104 It denies paragraph 104, and refers to and repeats paragraphs 89, 93 and 99 above.

105 It does not admit paragraph 105.

106 It does not admit paragraph 106.

107 It denies paragraph 107, refers to and repeats paragraphs 89, 93 and 99 above, and says further that:

(a) on the premises in paragraph 90, further or alternatively paragraph 94, further or alternatively paragraph 100 of the Third Amended Statement of Claim (which are denied), KPMG Advisory says that the plaintiff and each of the Group Members would not have been able to sell their shares in DML during the Relevant Period at \$1.69 per share;

(b) to the extent that the plaintiff and any Group Member did not sell their DML share on or shortly after 1 February 2013:

(i) any loss suffered as a result was not caused by any conduct of KPMG Advisory;

(ii) further or alternatively, they failed to take reasonable steps in mitigation of their loss; and

~~(a)(c)~~ the circumstances in which and reasons for which the plaintiff and Group Members made investment decisions with respect to DML shares are myriad and currently unknowable to the defendant KPMG Advisory, and some circumstances or reasons may be such that it cannot be said that any acts or omissions of the defendant KPMG Advisory caused any losses by them even if (which is denied) the defendant KPMG Advisory breached the alleged duty of care.

108 It denies paragraph 108, and refers to and repeats paragraph 107 above.

**ALLEGED CONTRAVENTIONS OF SECTION 670A OF THE *CORPORATIONS ACT 2001*
(CTH)**

- 109 It admits paragraph 109.
- 110 It admits paragraph 110.
- 111 It admits paragraph 111, and also refers to and repeats paragraphs 25, 28–34 and 88–89 above.
- 112 Save that it refers to and repeats paragraphs 35–37 and 91–94 above, it denies paragraph 112.
- 113 It denies paragraph 113, and refers to and repeats paragraphs 38–42 and 95–99 above.
- 114 It denies paragraph 114.
- 115 It denies paragraph 115.
- 116 It denies paragraph 116.
- 117 It does not admit paragraph 117.
- 118 It does not admit paragraph 118.
- 119 It denies paragraph 119, and refers to and repeats paragraphs 107 and 109–118 above.
- 120 It admits paragraph 120.
- 121 It admits paragraph 121.
- 122 It denies paragraph 122, and refers to and repeats paragraphs 109–121 above.
- 122A It says further that if the KPMG Advisory Opinion was misleading or deceptive as alleged:
- (a) it did not know that the KPMG Advisory Opinion was so misleading or deceptive;
 - (b) further or alternatively, KPMG Advisory placed reasonable reliance on the Technical Valuation Report; and
 - (c) in the premises of sub-paragraph (a) and/or sub-paragraph (b), KPMG Advisory is not liable as alleged in paragraph 122 by reason of s 670D of the *Corporations Act 2001* (Cth).
- 123 In answer to paragraph 123, it admits that common questions of fact or law arise, but say that it is premature to identify definitively what those questions are as at the date of this defence.

DEFENCES

Civil Liability Act

- 124 In respect of the claim for negligence made by the plaintiff, KPMG Advisory says as follows at paragraphs 125-128 below.
- 125 It is not appropriate for the scope of any liability on the part of KPMG Advisory to extend to the loss claimed, within the meaning of s 5D(1) of the *Civil Liability Act 2002* (NSW).
- 126 Further or alternatively:
- (a) in respect of each of the matters alleged by the plaintiff to have been in breach of the duty of care alleged to have been owed by KPMG Advisory, KPMG Advisory acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice, within the meaning of s 5O(1) of the *Civil Liability Act*; and
 - (b) accordingly, pursuant to s 5O(1) of the *Civil Liability Act*, KPMG Advisory is not liable for any loss as a result of that conduct.

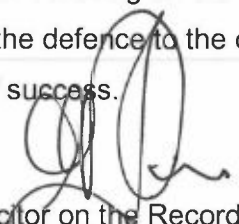
Section 1318 of the *Corporations Act*

- 127 This proceeding is a civil proceeding against KPMG Advisory acting as an expert in relation to DML for negligence, default or breach of duty in that capacity.
- 128 KPMG Advisory acted honestly at all material times.
- 129 If KPMG Advisory is liable to the plaintiff, having regard to all the circumstances of the case, KPMG Advisory ought fairly be excused for any negligence, default or breach.
- 130 In the premises of paragraphs 127-129 ~~129-132~~ above, the Court ought relieve KPMG, wholly or partly, from any liability pursuant to s 1318 of the *Corporations Act 2001* (Cth).

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature



Capacity

Solicitor on the Record

Date of signature

13 September 2018.

FURTHER DETAILS ABOUT FILING PARTY

Filing party

Name	KPMG Financial Advisory Services (Australia) Pty Ltd ACN 007 363 215
Address	KPMG Tower Two Collins Square Level 36, 727 Collins Street Docklands Victoria 3008

Legal representative for filing party

Name	Stan Lewis
Practising certificate number	7450
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