- the merits and benefits of the proposed work programs;
- the proposed expenditure;
- the likelihood that the work programs will be carried out;
- the effect the proposed exploration will have on public safety;
- the benefit of the proposed exploration relative to its economic, social and environmental impact; and
- the technical and financial resources available to the applicant.

Future developments

Tendering for exploration permits closed on 11 October. According to the relevant Department, the Government received 'well over a dozen' applications. Some exploration areas have more than one applicant, while other areas will obviously remain vacant following the process. Further details of the tender process will be available in early 2007, when the Government plans to issue the first exploration licences. The Government is yet to decide whether the remaining blocks will be offered through a similar tender process next year, or if they will be made available on a 'first come, first served' basis.

Unresolved issues

Some unresolved issues remain to be addressed under the Act or the Regulations. For example, the Act and Regulations do not deal specifically with the interaction of geothermal interests with potentially conflicting mining or petroleum interests. It will be interesting in due course to see whether such issues need to be resolved once exploration/extraction of geothermal energy commences.

TRIGGERING OF RIGHT OF PRE-EMPTION IN JOINT-VENTURE AGREEMENT*

Beaconsfield Gold NL & Anor v Allstate Prospecting Pty Ltd & Anor [2006] VSC 320 (8 September 2006)

Pre-emption right—change of ownership—meaning of 'subsidiary'--Joint venture agreement.

Introduction

Beaconsfield Gold NL & Anor v Allstate Prospecting Pty Ltd & Anor is a recent decision of the Supreme Court of Victoria. The case was heard by Justice Hargrave. It centred around a pre-emptive rights clause in an unincorporated Joint Venture Agreement. The clause provides that if a Joint Venturer ceases to be a 'subsidiary of another corporation', a right of pre-emption in favour of the other Joint Venturers to acquire that Joint Venturer's interest is triggered. The case turned on whether the clause is limited in its reach to a Joint Venturer ceasing to be a subsidiary of its immediate or direct holding company, or whether it extends to changes in ownership further up the relevant corporate chain. The term 'subsidiary' is not expressly defined in the Joint Venture Agreement, even though a definition of 'related corporation' is present.

---

* Igor Bogdanich, Senior Associate; and Victoria Wark, Articled Clerk, Allens Arthur Robinson.

Facts

Two wholly-owned subsidiaries of Allstate Explorations NL (together, the *Allstate Venturers*) are Joint Venturers in the unincorporated Beaconsfield Gold Mine Joint Venture, established under a Joint Venture Agreement dated October 1992 (*JVA*). The other current Joint Venturers are Beaconsfield Gold NL and its wholly-owned subsidiary, Beaconsfield Tasmania Pty Ltd (together, *Beaconsfield*).

Each Joint Venturer owns an interest, as a tenant in common in proportion to its participating share in the Joint Venture, in respect of the well known Beaconsfield mine in the Tamar Valley, Tasmania. Beaconsfield holds, in aggregate, a 48.49 per cent interest in the Joint Venture. The Allstate Venturers hold the remaining 51.51 per cent interest.

Over half the issued shares in Allstate Explorations NL – the immediate and direct holding company of the Allstate Venturers – are owned by two other companies. Each of those companies is, in turn, a wholly-owned subsidiary of Otter Gold Mines Pty Ltd. Through a series of 100 per cent or majority shareholdings in intermediate companies, Newmont Mining Corporation Ltd is the ultimate holding company of Otter Gold Mines Pty Ltd, Allstate Explorations NL and the Allstate Venturers (see diagram infra).

In July 2006, Allstate Explorations NL sought expressions of interest for a possible transaction involving the Allstate Venturers' 51.51 per cent joint venture interest in the Beaconsfield mine. In particular, Allstate Explorations NL sought expressions of interest from a party willing to purchase a controlling shareholding in Allstate Explorations NL; the idea being that shares in Allstate Explorations NL (not shares in the Allstate Venturers) would be placed with the purchaser. Allstate Explorations NL would remain the immediate holding company of the Allstate Venturers even after any proposed transaction, and the Allstate Venturers would therefore not cease to be subsidiaries of Allstate Explorations NL.

Beaconsfield Gold NL (the *Plaintiff*) took issue with this proposal. The Plaintiff claimed that the restructuring triggered pre-emptive rights under the JVA. The Plaintiff relied on clause 20.5:

> Where a Joint Venturer is, at any time *a subsidiary of another corporation* and, by reason of any transaction or event, *ceases to be a subsidiary of that corporation*, the Joint Venturer must, within thirty days of the transaction or event, offer to sell its percentage Interest to the other Joint Venturers pro rata to their respective Joint Venture Interests… [emphasis added].

The Plaintiff maintained that, although the Allstate Venturers would continue to be fully-owned by Allstate Explorations NL, they would cease to be *subsidiaries of another corporation* – namely, the Allstate Joint Venturers would cease to be subsidiaries of Otter Gold Mines Pty Ltd (and presumably each other corporation in the corporate 'family tree' above Allstate Explorations NL). This would, therefore, trigger the Plaintiff's right to purchase the Allstate Venturers' interests under clause 20.5 of the JVA.

Allstate Explorations NL and the Allstate Venturers (the *Defendants*) disputed the scope of clause 20.5 of the JVA. The Defendants maintained that, in ordinary language, the words 'subsidiary of another company' mean a company in which another company, the parent or holding company, holds a majority of the voting rights attached to its issued shares. The words do not extend beyond this relationship to include companies further up the 'corporate tree', which, through corporate

holdings, have the ability to control a majority of votes at a meeting of the subsidiary or control the composition of the board of the subsidiary.

The Defendants also submitted that the legislative history of 'subsidiary' confines the concept to a direct relationship between a company and its immediate holding company.

Judgment

Justice Hargrave found in favour of the Plaintiff. His Honour was prepared to grant a declaration that the Allstate Venturers were each a subsidiary of Otter Gold Mines Pty Ltd for the purposes of the JVA. It follows that the Plaintiff's pre-emptive rights under the JVA would be triggered by Allstate Explorations NL's proposal.

The parties' submissions and the Court's decision focussed on whether the Allstate Venturers could be said to be subsidiaries of any company other than the direct holding company of the Allstate Venturers. Justice Hargrave held that the Allstate Venturers could be said to each be a subsidiary of each company above them in the relevant corporate 'family tree' and not just a subsidiary of their immediate holding company. The judgment relies on technical reasoning relating to the use and definition of the word 'subsidiary', as well as, more pointedly, Justice Hargrave's view of the 'business commonsense' underlying the operation of pre-emptive rights provisions. The key arguments and reasoning from the judgment are summarised below.

(a) *Meaning of 'subsidiary' – Corporations Law*

Justice Hargrave dismissed the Defendants' submission that the meaning of subsidiary at the time the JVA was entered into was limited to the direct or immediate relationship between a company and its holding company. Justice Hargrave maintained that the relevant legislative meaning of subsidiary in the (then) Corporations Law [1] - in operation at the time the JVA was entered into - included a wider concept of control, including controlling the composition of the board, as a sufficient basis to satisfy the meaning of 'subsidiary'. His Honour maintained that the 'circumstances in which a company will be taken to control the composition of the board of another company are not limited…[and] they can include relationships other than that between a company and its immediate holding company.'[2]

The Court also referred to the term 'related corporation', which was used in the JVA. This term was defined by reference to section 50 of the Corporations Law, which itself referred to the definition of 'subsidiary' used in the Corporations Law (which was taken to be expansive, as just noted). Justice Hargrave observed that it would be an 'odd result indeed' if, when considering whether a company is a 'related corporation' for the purposes of the JVA, the statutory definition of 'subsidiary' from the Corporations Law was relied upon, but the term 'subsidiary' was to be given a different meaning when referred to on a 'stand alone' basis in the JVA.

(b) *Ordinary meaning of 'subsidiary'*

Justice Hargrave stated that 'the ordinary meaning of the word "subsidiary" extends well beyond the relationship between a company and its immediate holding company'.[3] Justice

1 Sections 46 and 47 of the *Corporations Law.*
2 *Beaconsfield Gold NL & Anor v Allstate Prospecting Pty Ltd & Anor,* 43.
3 *Beaconsfield Gold NL & Anor v Allstate Prospecting Pty Ltd & Anor*, 44

Hargrave also considered that this was the *commercial* understanding of the term 'subsidiary'. His Honour referred to case law that supported this commercial perception of the term 'subsidiary' including specifically the comments of Justice Barrett that:

> …the term subsidiary when used today by commercial people in relation to corporations generally indicates a situation in which the corporation described as subsidiary is subject to the control of another corporation…[and] 'ordinary and intelligent commercial persons would probably say they would know control when they saw it.'[4]

Justice Hargrave observed that Otter Gold Mines Pty Ltd has the capacity to control the casting of a majority of votes at general meetings of the Allstate Venturers, and thus to control the composition of their respective boards of directors. Accordingly, it was held, each of the Allstate Venturers is a subsidiary of Otter Gold Mines Pty Ltd.

(c) *Business commonsense*

The Defendants' argued that the Plaintiff's position was commercially absurd because it would require a Joint Venturer to monitor its shareholdings up the 'corporate tree' to ensure that it meets its obligations when it ceases to be a subsidiary of any company in the 'corporate tree'. Justice Hargrave rejected this argument, and suggested that the Defendants' contention 'does not accord with business commonsense'[5]. This is because, if the Defendants' contention was correct, it would mean that the sale of shares in any intermediary holding companies would not trigger the pre-emptive rights under the JVA even though the commercial effect of the transaction would be identical to a sale of shares in the immediate holding company (which would trigger the right).

(d) *Purpose of pre-emption provisions*

The focal point of the judgment appears to be Justice Hargrave's discussion of the purpose of pre-emptive rights provisions in joint venture agreements:

> Given the importance of the identity, financial capacity and reliability of participants in a joint venture, pre-emptive rights operate to ensure that existing participants are empowered to exclude new participants by purchasing the outgoing participant's interest if they so desire. They also permit a joint venturer who may take the view that it has expended a significant amount of money in a high risk area to have an opportunity to increase its interest if another joint venturer desires to withdraw from the joint venture. This allows an enhanced opportunity to reap the rewards from past risk-taking and expenditures.[6]

Justice Hargrave seemed to be of the view that, in interpreting pre-emptive rights provisions, a court should keep the purposes of such provisions, as described, firmly in mind, and that the objectives should not be defeated by a narrow interpretation. His Honour referred to clause 20.5 as, in effect, an 'anti-avoidance' provision.

---

4 *Opal Group Holdings (Aust) Pty Ltd v Franklins Ltd* [2005] NSWSC 718, 8.
5 *Beaconsfield Gold NL & Anor v Allstate Prospecting Pty Ltd & Anor*, 52.
6 *Beaconsfield Gold NL & Anor v Allstate Prospecting Pty Ltd & Anor*, 33.

Implications

The judgment contains some technical reasoning, relating to the intended meaning of the term 'subsidiary' – this term was not expressly defined in the JVA. In this respect, we consider that the judgment may not carry broader implications, as the relevant reasoning principally turned on the exact wording of the JVA and the specific facts of the case.

The point of interest in the judgment – of potential application to all joint venture agreements – is that Justice Hargrave made much of the *purpose* of the assignment and pre-emptive rights provisions. His Honour also indicated that pre-emptive rights provisions should be interpreted broadly, not narrowly, having regard to their purpose. On one view, this departs from an existing line of authority, under which courts have tended to interpret pre-emptive rights provisions on a literal basis.[7]

This judgment suggests that, *where several interpretations of a pre-emptive rights clause in a joint venture agreement are reasonably open, the interpretation that accords with the objective purpose of the provision should be preferred.* In this regard, the judgment also endorses the view that pre-emptive rights provisions should be viewed as having 'an obvious anti-avoidance purpose'.[8] Some commercial parties may take issue with any assumption that pre-emptive rights provisions have an 'anti-avoidance purpose', and would maintain that the purpose of those provisions is to regulate only the conduct expressly described in them. In the present case, the fact that the key term 'subsidiary' was not defined left the pre-emptive rights provision open to interpretation.

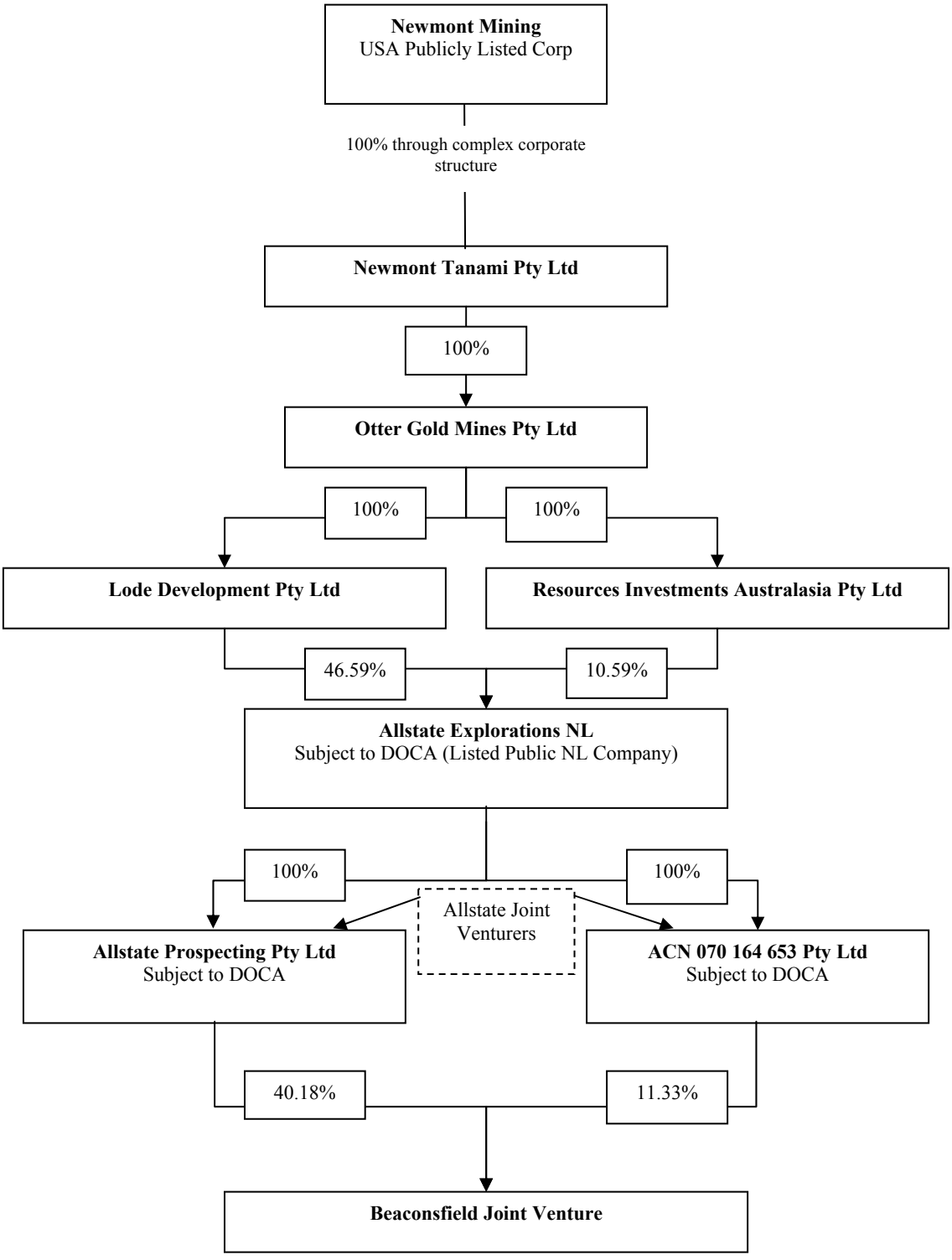
We understand that the Defendants have appealed the decision. In light of the existing line of authority noted above, it will be interesting to see how the Victorian Supreme Court of Appeal responds.

---

7 See, for example, *Mount Isa Mines Ltd v Seltrust Mining Corporation Pty. Limited,* unreported decision Supreme Court of Western Australia, 5 July 1985

8 *Beaconsfield Gold NL & Anor v Allstate Prospecting Pty Ltd & Anor*, 32

Corporate Structure (as shown in the judgment)



- the merits and benefits of the proposed work programs;
- the proposed expenditure;
- the likelihood that the work programs will be carried out;
- the effect the proposed exploration will have on public safety;
- the benefit of the proposed exploration relative to its economic, social and environmental impact; and
- the technical and financial resources available to the applicant.

Future developments

Tendering for exploration permits closed on 11 October. According to the relevant Department, the Government received 'well over a dozen' applications. Some exploration areas have more than one applicant, while other areas will obviously remain vacant following the process. Further details of the tender process will be available in early 2007, when the Government plans to issue the first exploration licences. The Government is yet to decide whether the remaining blocks will be offered through a similar tender process next year, or if they will be made available on a 'first come, first served' basis.

Unresolved issues

Some unresolved issues remain to be addressed under the Act or the Regulations. For example, the Act and Regulations do not deal specifically with the interaction of geothermal interests with potentially conflicting mining or petroleum interests. It will be interesting in due course to see whether such issues need to be resolved once exploration/extraction of geothermal energy commences.

TRIGGERING OF RIGHT OF PRE-EMPTION IN JOINT-VENTURE AGREEMENT*

Beaconsfield Gold NL & Anor v Allstate Prospecting Pty Ltd & Anor [2006] VSC 320 (8 September 2006)

Pre-emption right—change of ownership—meaning of 'subsidiary'--Joint venture agreement.

Introduction

Beaconsfield Gold NL & Anor v Allstate Prospecting Pty Ltd & Anor is a recent decision of the Supreme Court of Victoria. The case was heard by Justice Hargrave. It centred around a pre-emptive rights clause in an unincorporated Joint Venture Agreement. The clause provides that if a Joint Venturer ceases to be a 'subsidiary of another corporation', a right of pre-emption in favour of the other Joint Venturers to acquire that Joint Venturer's interest is triggered. The case turned on whether the clause is limited in its reach to a Joint Venturer ceasing to be a subsidiary of its immediate or direct holding company, or whether it extends to changes in ownership further up the relevant corporate chain. The term 'subsidiary' is not expressly defined in the Joint Venture Agreement, even though a definition of 'related corporation' is present.

---

* Igor Bogdanich, Senior Associate; and Victoria Wark, Articled Clerk, Allens Arthur Robinson.