NORANDA AUSTRALIA LIMITED V. LACHLAN RESOURCES N.L.[1]

Joint ventures are a leading vehicle for the development and exploitation of Australia's primary resources. One such vehicle was the Conjuboy Joint Venture, the mineral exploration and development project whose ownership was the subject of this case. Given the importance of the primary resource sector to the Australian economy and the dawning importance of the joint venture in other sectors of the business world (such as car manufacturing), case law developing the relationship between joint venturers is of obvious interest.

Do the words 'joint venture' have a legal significance of themselves, as a 'partnership' does? Or is it instead purely a convenient reference term for a wholly contractual relationship? If the former, the question for Mr Justice Bryson of the Supreme Court of New South Wales was whether fiduciary duties were necessarily a part of this legal definition. If the latter, the case would turn solely on the provisions of the Joint Venture Agreement itself. In the course of the decision, Bryson J. alluded to the existence of duties inherent in a joint venture relationship, but came down firmly on the side that the joint venture is a creature ultimately governed by the document of its creation.

THE FACTS

The Conjuboy Joint Venture is a mineral exploration/development venture near Charters Towers, Queensland. The Agreement establishing the Venture was made on 22 April, 1982 between Geopeko (being Peko-Wallsend Operations Limited), Peko Exploration Limited, Jones Mining N.L., and the plaintiff, Noranda. These signatory companies were divided into three camps:

(i) Noranda and Jones Mining were collectively referred to as the 'Conjuboy Associates';
(ii) Peko, a signatory but not a member of the Joint Venture; and
(iii) Geopeko, whose original 100% participating interest in the Venture could eventually be split evenly with that of the Conjuboy Associates (whose original participating interest was stated to be zero). The accumulation by Conjuboy Associates of a participating interest hinged upon the fulfilment of 'an elaborate array of conditions'.[2]

By March 1986 the interests of Geopeko and Conjuboy Associates stood at 50% each. Thereupon Geopeko disposed of its interest to the defendant, Lachlan. This transfer was friendly and agreed to by all interested parties.[3]

In December 1987 Lachlan informed Noranda that it desired to sell its interest in the Conjuboy Venture and that Lachlan regarded Noranda as 'the obvious purchaser'.[4] Noranda representatives at that time and subsequently expressed a willingness to buy Lachlan's interest, but at no time did Noranda make any formal offer. Informally, Noranda proposed a purchase price of $750,000 to $1,000,000 which Lachlan indicated it would consider. Lachlan thereafter informed Noranda that 'your bid is not within millions of what we can get. We are presently involved in discussion with another party.'[5] Noranda representatives proposed on 23 March 1988 a bid of one and a half million plus an additional half million if and when a decision to mine was taken. Both parties' representatives agreed to consult their boards.

On 28 March Lachlan's board met representatives of Triako, the other party with whom Lachlan had been negotiating. A $2,000,000 cash offer was proposed and accepted at that time. Noranda, who was not privy to Triako's identity as the competition, was not informed of this development unitl — and after much prodding — Lachlan revealed on 14 April that a deal had been done. Noranda filed suit the next day.[6]

[1] (1988) 14 N.S.W.L.R. 1, Supreme Court of New South Wales, Bryson J. in equity.
[2] *Ibid.* 3.
[3] *Ibid.* 3-4.
[4] *Ibid.* 7. Lachlan actually wished to dispose of an unrelated interest as a package with the Conjuboy interest.
[5] *Ibid.* Words attributed to the managing director of Lachlan.
[6] *Ibid.* 8.

THE CASE

Noranda sought an injunction to prevent the sale of Lachlan's interest to Triako (the second defendant). Third defendant Jones Mining, Noranda's fellow Conjuboy Associate, did not actively participate in this case, its barely-addressed misdeed being a failure to join Noranda in opposing the sale to Triako. Noranda's arguments were alternate, although not mutually exclusive:[7]

1. Fiduciary duties arise between co-venturers, which duties were breached by Lachlan, and by Jones Mining;[8] and
2. The sale or assignment clause[9] of the Joint Venture Agreement was breached by Lachlan, who did not give Noranda the chance to match or better any bid for Lachlan's venture interest.

A crossclaim by Lachlan provided the Court with an opportunity to expound on the reasonableness of Noranda's refusal of Triako as a co-venturer and assignee of Lachlan.[10] These three aspects of the case are dealt with in turn.

THE DECISION

Are joint venturers fiduciaries?

What is the relationship between parties to a joint venture? Is it altered by the inclusion (or omission) of a clause in the joint venture agreement declaring the parties to be fiduciaries? The Conjuboy Joint Venture had such a declaration in clause 7.8:

> Conjuboy Associates and Geopeko will each do all things reasonably necessary on its behalf to enable the operator to discharge all the obligations and duties of the operator under this agreement and each of Conjuboy Associates and Geopeko shall at all times act in relation to the joint venture in a bona fide manner to the intent that the relationship of the parties shall be fiduciary in nature and neither Conjuboy Associates nor Geopeko shall act in a manner calculated to derive an unfair advantage from the joint venture at the expense of the other.[11]

What exactly that clause means in the face of more specific duties and obligations imposed on the venturers by other clauses in the Agreement (such as the sale and assignment clause) was the question for Mr Justice Bryson; could the general govern the specific? As a matter of general contract law the answer would be probably not, and his Honour was similarly inclined:

> Clause 7.8 creates general obligations the operation and content of which in any particular state of facts is not always readily to be perceived or stated. For many points in the parties' relationship the joint venture agreement states in much greater particularity how the parties are to stand in relation to each other, and where there are such provisions I am of the view that they take effect according to their terms as contractual provisions, and that their meaning as contractual provisions is not qualified by an immanent obligation found in cl. 7.8.[12]

And thus was disposed the issue of a contractual general fiduciary duty. What remained to be determined, however, was whether some concept of fiduciary duty, not contractual in nature but rather one which attaches by virtue of a joint venture relationship and which might supersede provisions in a joint venture agreement, did in fact exist. The notion of such an amorphous fiduciary duty did not find favour with the Court:

[7] These issues are addressed by the Court in the opposite order.

[8] The Jones Mining aspect of the case may be the most interesting from an academic perspective. This case presented a perfect opportunity to explore the levels of duty owed by and between inactive signatories (Peko), co-venturers (Noranda, Lachlan, and Jones Mining), and the further, but undefined in the decision, relationship of the Conjuboy Associates (Noranda and Jones Mining). Perhaps unfortunately, Bryson J. leaves this discussion for another day.

[9] This clause is set out *infra*.

[10] Although the course of events is not set out in the decision, it seems reasonable to assume that, Noranda's suit notwithstanding, Lachlan attempted to follow the proper procedure as it understood it and presented Triako to the venturers for their approval. The sale and assignment clause requires that venturers have 'not unreasonable' grounds for refusing a substitution of one of them.

[11] (1988) 14 N.S.W.L.R. 1, 13. The obligations of Geopeko become those of Lachlan by assignment.

[12] *Ibid.* 14.

> It is in no way difficult but is ordinarily to be expected that a person under a fiduciary obligation to another should be under that obligation in relation to a defined area of conduct, and exempt from the obligation in all other respects. Except in the defined area, a person under a fiduciary duty retains his own economic liberty.[13]

This concept seems quite consistent with the manner in which Noranda, Lachlan, and the other parties to the Conjuboy Joint Venture Agreement were to conduct their affairs if the Venture was successful:

> Once the parties receive the product of a mining operation, which they are to share, they can go out into markets and have no more regard for the interests of each other in the markets than they are obliged by law to have for the interests of other competitors.[14]

Thus, from whichever angle Bryson J. approached the issue, he always returned to the Joint Venture Agreement itself. The relationship of the parties was no more or less than that to which they had themselves agreed.[15] There being no victory for Noranda on the basis of grand legal theory, it remained for the Court to interpret the sale and assignment clause to settle the rights of the parties.

The sale and assignment clause

The second aspect of the case dealt specifically with the interpretation of the sale and assignment clause of the Joint Venture Agreement, the terms of which his Honour abbreviated as:

> 14.1
> (i) Neither party shall sell, assign or otherwise dispose of any interest in the joint venture to any person firm or corporation not being a party unless such person firm or corporation enters into an agreement with the remaining party by which it agrees unconditionally to become a party to this agreement. . . .
> (ii) Either party may sell or assign the whole of its interest in the joint venture at any time for any price to an affiliate. . . .
> (iii) Subject to pars (i) and (ii) a party may sell or assign its interest or any part thereof in the joint venture at any time and for any [consideration to]
> (a) the other party or
> (b) any purchaser or assignee not already being a party which meets with the approval of the other party with approval shall not be unreasonably withheld,
> PROVIDED THAT a party shall not negotiate with any prospective purchaser or assignee not already a party without first notifying the other party of its intention and affording the other party the like opportunity to offer to purchase the interest proposed to be sold.[16]

The parties naturally came to opposing conclusions as to the meaning of this clause. Noranda contended that:

> [parties] could sell or assign their respective interests or any part thereof in the joint venture at any time and for any price to
> (a) the other or;
> (b) any purchaser or assignee not already being a party subject to the approval of the other party such approval not to be unreasonably withheld provided that the selling party not effect any such sale or assignment without first notifying the other of its intention to do so and affording the other the opportunity to match or better any offer made to it by a purchaser or assignee.[17]

Lachlan, however, argued that a selling venturer:

> . . . was required to give the other members of the joint venture the opportunity to make an offer to acquire that interest at the time or prior to the time when such party commenced to solicit offers from third parties but was not obliged to accept any offer made by such other member or members of the joint venture.[18]

[13] *Ibid.* 15, with further citation in support: *Birtchnell v. Equity Trustees Executors and Agency Co. Ltd* (1929) 42 C.L.R. 384, 408; *Phipps v. Boardman* [1967] 2 A.C. 46, 110; *Hospital Products Ltd v. United States Surgical Corporation* (1984) 156 C.L.R. 41, 97.

[14] (1988) 14 N.S.W.L.R. 1, 14-5.

[15] *Ibid.* 17: '[I]n my opinion it would not be right to impose on the parties fiduciary obligations wider or different to those which in careful terms they imposed on themselves.'

[16] *Ibid.* 4.

[17] *Ibid.* 6.

[18] *Ibid.* 7.

It readily becomes clear that the contentious wording in the proviso is 'the like opportunity'. If Lachlan's construction were accepted, then the December 1987 to March 1988 period during which Noranda could have made, but did not make, a formal offer to Lachlan would be sufficient opportunity and more. But Bryson J. poses the question that Lachlan's construction cannot answer: How is the opportunity of one like the opportunity of another if no terms are provided to the party to be given that like opportunity?[19] The logic is not inescapable, but it does point up a major shortcoming in Lachlan's argument not present in that of Noranda (whose construction was accepted by the Court). Upon that construction, Lachlan was in breach for failing to reveal to Noranda the terms of Triako's offer before that offer was accepted.

While acceptance of Noranda's view of the sale and assignment clause may have been enough to ensure for it at least a technical victory, note that the words which follow 'the like opportunity' are 'to offer to purchase'. Bryson J. was very careful to note that Noranda must be given only the opportunity to offer, Lachlan need not accept that offer, even if it be more attractive than other offers received.[20]

A reasonable refusal

The third aspect of the case was the result of a cross claim by Lachlan alleging Noranda had unreasonably refused its consent to the assignment to Triako. Although the entire discussion is clearly *dicta*, it provides valuable insight into the Court's approach to contractual interpretation.

Sale or assignment of an interest in the Venture, under clause 14, must be approved by the other Venturers. This approval cannot be unreasonably withheld.[21] Noranda's claim against Jones Mining was solely that Jones Mining had not opposed the assignment. His Honour disposed of this point by noting that even if it were reasonable for Noranda to refuse, there is no corresponding obligation not to unreasonably approve:

> Approval [of Lachlan's sale to Triako] may be granted even though there are reasonable grounds for withholding approval. [Noranda's position would] be no basis on which Jones Mining could be said to be in breach of any obligations in not taking the same position.[22]

Was Noranda reasonable? It gave two principal reasons for withholding approval.

1. Triako lacked knowledge and experience in the field and this might hamper Noranda's exploration and development of the Venture tenements, and
2. Triako did not have a satisfactory capital position.[23]

The Joint Venture Agreement does not delimit what factors a venturer may consider, and while Bryson J. considered that some bound of immateriality must exist, it was not tested by Noranda.[24] Even though Noranda would itself need to engage consultants (and this is quite common in the industry), that did not preclude Noranda from considering what Triako could bring to the Venture in the way of expertise.

As to the second reason, his Honour gave little credence to Noranda's submissions which sought to show that Triako would be a financial hindrance to the Joint Venture. Noranda had 'plainly overstated Triako's need to raise working capital'.[25] Nonetheless, capitalization is such an important part of the health of a joint venture that it would not be unreasonable to refuse a proposed venturer who might be only financially adequate:

> It will be reasonable to take the view that if there is to be a change in the identity of a co-venturer, the capital position [of the venture] might as well be improved.[26]

19 *Ibid.* 10.
20 *Ibid.* 12-3.
21 This clause is set out *infra*.
22 (1988) 14 N.S.W.L.R. 1, 18.
23 *Ibid.* 22.
24 *Ibid.* 20-1.
25 *Ibid.* 22.
26 *Ibid.* 23.

The conclusion to be drawn from this is that the Court is quite willing to accommodate the wishes of joint venturers who possess even the trappings of an argument where the joint venture agreement allows that the parties need only not act unreasonably.

CONCLUSION

Joint ventures are not partnerships. They are a set of contractual rights and obligations drawn up for a specific set of parties and circumstances. *Noranda*'s case is one of several recent decisions which reserve to venturers almost complete power to decide for themselves their relative rights and obligations.[27] The imposition of fiduciary duties as inherent to a joint venture would have reduced this freedom. Similarly, a restrictive approach to the simple contractual stipulation that one venturer not unreasonably refuse approval of an act by another would have also reduced the potential usefulness of joint ventures. The value of the joint venture is its wide adaptability to the wants and needs of the prospective venturers.

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[27] See, *e.g. Australian Oil & Gas Corp. Ltd v. Bridge Oil Ltd & Ors* (Ct. App. N.S.W., released 12 April 1989); *United Dominions Corp. Ltd v. Brian Pty Ltd* (1984-85) 157 C.L.R. 1, 10-1 (*per* Mason, Brennan and Deane JJ.): 'The most that can be said is that whether or not the relationship between joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken.'

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JEFFREE V. NATIONAL COMPANIES & SECURITIES COMMISSION[1]

INTRODUCTION

As a result of a decision of the Full Court of the Supreme Court of Western Australia this year, the duties of directors under Australian company law may be somewhat extended. This expansion consists of a duty towards not only shareholders and present creditors of the company, but also to prospective creditors of the business. The implications, both legal and economic, may be far reaching.

THE FACTS

Jeffree was charged by the N.C.S.C. under a breach of s. 229(4) of the Companies Code.[2] He was a director of Wanup Pty Ltd which was trustee of the Jeffree family trust. This company carried on business selling swimming pools. Wanup entered into a contract with Leighton Contracts Pty Ltd to construct a pool. There were serious defects in the pool and arbitration ensued to determine who was responsible for the defects.

Fearing an adverse award from the arbitration, the board of Wanup, acting on solicitor's advice, incorporated a new company, Cassidy Holdings Pty Ltd, with the same trustee structure, directors and shareholders as Wanup. Cassidy then purchased Wanup's assets. The trial judge had found that

> The transaction was designed to put Wanup in a position where any liquidation of the company consequent upon any substantial award in the pending arbitration would reap no benefit for Leighton.[3]

[1] (1989) 15 A.C.L.R. 217.

[2] 'An officer or employee of a corporation shall not make improper use of his position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation.'

[3] (1989) 15 A.C.L.R. 217, 224.