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Article

FIDUCIARY DUTIES OWED BY CO-VENTURERS IN A JOINT VENTUREMichael W. **Sharp**.

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Case: Pacific Coal Pty Ltd v Idemitsu Queensland Pty Ltd (Unreported-Queensland)

Subject: PARTNERSHIPS

Keywords: Fiduciary duty; Joint ventures; Queensland

Abstract: Queensland judgment clarifying duties of joint venturers.

*321 In *Hospital Products Ltd v United States Surgical Corp. and Others* [FN1] a producer of goods sued its Australian distributor for breach of contract and breach of its fiduciary obligations. The High Court of Australia unanimously held that there was a breach of contract, but the majority refused to impose fiduciary obligations on a distributor/manufacturer relationship that was governed by a commercial agreement entered into at arms' length. In the same year, the High Court of Australia unanimously held in *United Dominions Corp. Ltd v Brian Pty Ltd and Others* [FN2] that joint venturers owed fiduciary duties to one another. The consequences of this decision was limited, however, by the Court's unanimous view that the joint venture was, in fact, a partnership. The recent decision of Ryan J of the Supreme Court of Queensland in *Pacific Coal Pty Ltd v Idemitsu Queensland Pty Ltd and Others/Agipcoal Australia Pty Ltd v Idemitsu Queensland Pty Ltd and Others* [FN3] is clear authority that joint venturers, even though not partners, may owe fiduciary duties to one another.

Facts

On 13 January 1984 the Ensham Joint Venture entered into an Investigation Agreement to:

- (a) investigate the feasibility of developing and exploiting deposits of coal in the Ensham area of the Bowen Basin in Central Queensland; and
- (b) develop and exploit the area if the parties decided this was viable.

The Ensham Joint Venture consisted of the following parties:

- Pacific Coal Pty Ltd ('Pacific Coal')
- Idemitsu Queensland Pty Ltd ('Idemitsu')
- Bligh Coal Ltd ('Bligh')
- Lucky-Goldstar International (Australia) Pty Ltd ('Lucky-Goldstar')
- Agipcoal Australia Pty Ltd ('Agip')
- AQC (Ensham) Pty Ltd ('AQC')
- Rheinbraun Australia Pty Ltd ('Rheinbraun')

The Queensland Minister for Mines granted an Authority to Prospect to the parties for a period of three years from 23 February 1984. On 23 February 1987, the Authority to Prospect was renewed for a further term of three years. Almost immediately following this renewal of the Authority to Prospect senior officers of Idemitsu met with senior Ministers of the Queensland Government in order to press on them the need to develop the coal deposits as soon as possible. They asserted that if this were not done they would lose Japanese markets that they had secured. Idemitsu did not inform its co-venturers of these meetings.

(Cite as: I.C.C.L.R. 1992, 3(9), 321-323)

Idemitsu informed various government ministers that the venture had split into two groups: one, consisting of Idemitsu and Lucky-Goldstar, was serious about developing the mine and recognised the need for quick development to secure Japanese markets; the other, consisting of Pacific Coal and Agip, was negative about developing the mine. In mid-1988 the Minister for Mines and Energy wrote a letter to all the Ensham Joint Venture participants encouraging them to develop the Ensham project. The letter was drafted by Idemitsu.

Meanwhile, Pacific Coal was concerned that Idemitsu was pressing for development when it was not clear that this was economically viable. Furthermore, there were doubts about the financial strength of Bligh and AQC. Pacific Coal decided that it must gain a controlling share in the project. This would also, it believed, solve any potential Foreign Investment Review Board (FIRB) problems. Pacific Coal therefore announced its intention to acquire all the shares in Bligh. After attempts by the other participants to dissuade Pacific Coal failed, Idemitsu made an offer for Bligh's shares. Pacific Coal then wrote to the FIRB informing them that if Idemitsu were successful the venture would offend FIRB guidelines. Pacific Coal later denied that it was advocating that the FIRB should not give its approval to Idemitsu's bid - it was merely advising the FIRB of all the issues.

The battle for Bligh was won by Idemitsu who eventually offered 51¢ per share - Pacific Coal's original offer had been 31¢ per share.

This clash between Idemitsu and Pacific Coal had important repercussions. First, Pacific Coal was unhappy at having been thwarted. Second, Agip had believed that if Idemitsu were successful the Bligh equity would be distributed in accordance with the participants' preemptive rights. Idemitsu denied it had ever represented it would do this. Pacific Coal also demanded the Bligh equity be distributed in accordance with the participants' preemptive rights. The dispute over the distribution of the Bligh equity became a long term and major sticking point in discussions between the Ensham Joint Venture participants.

Idemitsu continued to speak with government ministers, stressing the need to develop the project in order to take advantage of secured Japanese markets. These secured markets were evidenced by letters of intent from Japanese buyers. Later, in court, it was revealed that there were side letters from all the providers of the letters of intent that so qualified the letters of intent that they were, in effect, meaningless. The side letters were never shown to the government, its ministers nor, of course, to the other participants. This behaviour on the part of Idemitsu founded the plaintiffs' claim for misleading and deceptive conduct.

On 6 October 1989 a Project Report was distributed. The Investigation Agreement provided for a 120-day period for the parties to consider the Report. Idemitsu, Bligh and Lucky-Goldstar unsuccessfully attempted to shorten this time period due to opposition from Pacific Coal and Agip. On 6 February 1990, 120 days after the distribution of the Project Report, the joint venture parties met. Idemitsu, Bligh and Lucky-Goldstar stated they were ready to proceed. Pacific Coal and Agip both stated further issues needed to be resolved before they were interested in proceeding. In particular there were no signed contracts and the project was economically *322 marginal. Both Pacific Coal and Agip referred to the Agreement which, in effect, gave them a further 60 days to decide whether they would take part in a determination to proceed. Idemitsu immediately informed the government of these events.

On 23 April 1990, the Minister for Resource Industries refused the Joint Venture's application for a renewal of the Authority to Prospect and also rejected a Mining Lease Application from the parties. On 9 May 1990, the Queensland Government announced that they had invited Idemitsu, Bligh and Lucky-Goldstar to apply for an Authority to Prospect in relation to the same area as the Ensham Joint Venture had previously been granted an Authority to Prospect. An exploration permit was granted to these three parties on 8 November 1990.

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The plaintiffs, Pacific Coal and Agip, in similar claims, alleged that Idemitsu, Bligh and Lucky-Goldstar had communicated regularly with the Queensland Government and its various Ministers and encouraged the government not to renew the Authority to Prospect to the Ensham Joint Venture but instead to grant it to Idemitsu, Bligh and Lucky-Goldstar. The plaintiffs alleged, essentially, that the defendants had breached:

- (a) the Investigation Agreement;
- (b) section 52 of the Trade Practices Act (which deals with misleading and deceptive conduct by a corporation); and
- (c) their fiduciary obligations to the plaintiffs.

This report concentrates on the fiduciary obligations claimed to be owed by and to joint venture participants.

Fiduciary Relationship

Claim

The plaintiffs alleged that the defendants owed certain fiduciary duties:

- (a) a duty not to place themselves in a position where their interests conflicted with their duties to other parties to the joint venture;
- (b) a duty to account to other joint venture parties for any property, benefit or gain obtained or received by the use of, or by reason of, the party's position as a joint venturer or of any opportunity or knowledge resulting from the same; and
- (c) a duty not to use its position to gain an advantage for itself or so as to act in its own interest and/or to the prejudice of the interests of the other participants.

Defence

The defendants denied that they owed any fiduciary duty in the circumstances. Mr Sofronoff QC, for the defendants, argued:

- (a) the agreement was negotiated at arms' length between experienced commercial parties and the nature and extent of the obligations that they were prepared to undertake had been set out in the agreement. In the circumstances, the court should not superimpose fiduciary obligations;
- (b) no participant in the Ensham Joint Venture had undertaken to act in the interests of the others. The most that could be said was that they had undertaken to act in the interests of the joint venture;
- (c) the parties expressly agreed that they were not partners and that they were severally but not jointly liable;
- (d) no one participant has a power of discretion conferred on it the exercise of which affected the rights of the others (except the power to vote);
- (e) no one participant was in a position of power or vulnerability.

The defendants relied particularly on the case of Hospital Products. Sofronoff QC referred to Gibbs CJ who held that in that case:

The fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arms' length and on an equal footing has consistently been regarded by this Court as important, if not decisive, in indicating that no fiduciary duty arose.

Ultimately, a majority of the High Court (Gibbs CJ, Wilson and Dawson JJ) in Hospital Products held that there was no fiduciary duty, essentially because it was a commercial transaction entered into at arms' length and in which there was no disadvantage, vulnerability or undue influence that could be relied on by the plaintiff to establish the existence of a fiduciary duty.

Plaintiffs' argument

The plaintiffs supported their argument for the existence of a fiduciary relationship by referring to the

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High Court case of UDC v Brian. In this case, the High Court was unanimous in holding that the parties to a joint venture owed one another fiduciary duties. However while the parties had referred to their undertaking as a joint venture, and the judgments do refer to the parties' joint venture, the court was unanimous in holding that the relationship between the parties was, in fact, a partnership. The majority judgment of Mason, Brennan and Deane JJ noted that:

The term 'joint venture' is not a technical one with a settled common law meaning ... The term is, however, apposite to refer to a joint undertaking or activity carried out through a medium other than a partnership; such as a company, a trust, an agency or joint ownership ... 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.

Dawson J, in a concurring, but separate, judgment held that:

Although the relationship between participants in a joint venture which is not a partnership will be governed by the particular contract rather than extrinsic principles of law, the relationship may nevertheless be a fiduciary one if the necessary confidence is reposed by the parties in one another ... As Dixon J pointed out in *Birtchnell v Equity Trustees, Executors & Agency Co. Ltd*: "Even in a partnership it is really the mutual confidence between partners which imposes fiduciary duties upon them and the same confidence may, in appropriate circumstances, be found to exist between participants in a joint venture."

***323** Decision in this case

Ryan J held that the question of whether the Investigation Agreement in this case created a fiduciary relationship need not be resolved by determining whether the relationship between the parties was a partnership. The judge held that there was a fiduciary relationship in the circumstances of this case "having regard to the form which the Joint Venture takes and the obligations assumed by the participants". The judge rejected the defendant's arguments (based on the view of the majority in *Hospital Products*) that a commercial agreement entered into by parties at arms' length precluded the existence of a fiduciary relationship:

By the Investigation Agreement, the parties put themselves in a position where they placed reliance upon the undertakings of the others so as to further the objectives of the Joint Venture. Though Mason J dissented from the majority decision in the *Hospital Products* case, I consider that he said nothing contrary to the views of the majority when he stated that "the critical feature of these [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interest of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power of discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position". In the present case, I consider that the participants undertook to act so as to further their joint interest in the venture and not to act so as to prejudice that joint interest. They placed a mutual confidence in one another and each was vulnerable to abuses of power by the others.

Ryan J held that a fiduciary relationship among the participants was established by the Investigation Agreement. Any conduct by a participant which sought to deprive the other participants of their interest in the tenements while the Investigation Agreement was in force would amount to a breach of fiduciary obligations. The conduct of Idemitsu did amount to such a breach and Idemitsu and Lucky-Goldstar therefore acquired a benefit as a result of the breach.

The judge then stated that the benefit is held on constructive trust for those who were deprived of it, unless those who were deprived are disentitled from insisting on their rights. The defendants argued that the plaintiffs were disentitled because following their failure to acquire Bligh they had deliberately frustrated the joint venture by refusing to negotiate with the defendants until they were given some distribution of the

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Bligh equity. Ryan J held that it would be unconscionable in the light of this conduct (which breached clause 11.1 of the Investigation Agreement) to grant a constructive trust. Pacific Coal had not breached the Investigation Agreement, however, and ultimately, Ryan J ordered Idemitsu, Idemitsu Kosan and Bligh to pay \$29.5 million damages (being a measure of 19 per cent of the joint venture) for breach of contract, breach of fiduciary duty and damages pursuant to the Trade Practices Act to both Pacific Coal and Agip.

Conclusion

In *Hospital Products*, a producer of goods sued its Australian distributor for breach of contract and breach of its fiduciary obligations. The court unanimously held there was a breach of contract but the majority refused to impose fiduciary obligations on a distributor/manufacturer relationship that was governed by a commercial agreement entered into at arms' length. The fundamental difficulty for the establishment of a fiduciary relationship in this case was the nature of the manufacturer/distributor relationship.

In *UDC v Brian* the High Court unanimously held that the joint venturers owed fiduciary duties to one another. However, the consequences of this decision for joint venturers is limited by the court's unanimous view that the relationship between the joint venturers, although called a joint venture, was in fact a partnership. Nevertheless the judgments of the majority and also Dawson J clearly stated that fiduciary relationships may be established in joint ventures that were not partnerships.

The decision of Ryan J in *Pacific Coal* is a clear authority that joint venturers who are not partners may owe fiduciary obligations to one another. The decision also clearly states that the existence of a contract entered into at arms' length by parties with equal bargaining power does not preclude the existence of a fiduciary relationship. While Ryan J's judgment may be criticised for its extensive reference to the dissenting judgment of Mason J in *Hospital Products*, it is clear that his judgment is consistent with the decision of the High Court in *UDC v Brian*. Ryan J follows the majority in *UDC v Brian* by stressing the same three points: the form of the joint venture agreement; the content of the obligations undertaken by the parties; and the participants' placement of mutual trust and confidence in one another.

Ryan J's judgment involves a thorough and lengthy analysis of the facts and the joint venture agreement, however it would be dangerous to conclude that this decision is restricted to the facts of the case and the terms of this joint venture agreement. Neither are particularly unusual. This case has clarified the circumstances in which fiduciary duties may be established between co-venturers and will therefore have important consequences for all parties to joint venture agreements.

FN1. (1984-5) 156 CLR 41.

FN2. (1985) 157 CLR 1.

FN3. Unreported. Supreme Court of Queensland, 21 February 1992.

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