

# RECENT DEVELOPMENTS

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## NEW SOUTH WALES

### TERMINATION OF JOINT VENTURES\*

***Mainland Civil Developments Pty Ltd v Zambito Pty Ltd and Anor*** ([2006] NSW SC1435, White J, 14 December 2006)

*Termination of joint venture – Anticipatory breach of contract by company by disabling itself from future performance.*

#### **Facts**

Mainland and Zambito entered into a joint venture for the development and subdivision of certain land in New South Wales. Disputes arose which lead to proceedings being instituted in 2004 by Mainland for dissolution of the joint venture. The dispute was resolved by the making of consent orders in June 2004. Consent orders included the court noting an agreement between the parties under which each joint venturer shall be entitled at its cost to the transfer of, or at its option, to the net proceeds of the sale of three specified lots to the exclusion of the other parties and that there be mutual releases between Mainland and Zambito (the CO Agreement). Zambito sought to transfer three of its specified lots to a nominee Jainti Pty Ltd.

Mainland brought these proceedings to restrain Zambito from transferring the three lots to the nominee on the basis that Zambito was not entitled to do so.

The joint venture agreement contains provisions to the effect that each joint venturer was liable for 50% of the costs in respect of the joint venture and that upon completion of the project the joint venturers must procure that a general account is taken of the assets and liabilities of the joint venture. The joint venture was expressed to commence on the date of the agreement and to continue until completion unless earlier terminated in accordance with the provisions of the agreement. The completion of the project was defined to include the ultimate distribution of profits to the joint venturers following the payment of all expenses and repayment of any loans.

#### **Issues**

The court considered the following issues:

1. Whether Zambito was entitled to direct a transfer of the specified lots to its nominee, Jainti.
2. Whether the joint venture agreement was discharged by the CO Agreement; and
3. If no to both 1 and 2, whether Zambito has committed a breach or anticipatory breach of the joint venture agreement by directing that the three lots be transferred to Jainti such that registration of that transfer should be restrained.

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\* Tony J Wassaf, Partner, Allens Arthur Robinson.

## Conclusions

As to point 1, the court indicated that the ordinary rule is that an ordinary contract of sale is not only to convey to the purchaser but to convey as the purchaser shall direct. So *prima facie* Zambito was entitled to nominate Jainti as the transferee of the lots. However, if the joint venture agreement remained on foot then there would be an implied term of the CO Agreement that the parties would not exercise their rights under the agreement in a way which would constitute a breach or anticipatory breach of the joint venture agreement. Such a term is necessarily implied in order to give business efficacy to the agreement. The CO Agreement could not have been intended to expose one party to the risk of loss under the joint venture agreement. Hence, if the nomination of Jainti as a transferee was a breach or anticipatory breach by Zambito of the joint venture agreement then such a nomination was not authorised by the CO Agreement.

As to 2, Zambito submitted that the joint venture agreement was terminated as a result of the CO Agreement. The court did not agree. The consent orders did not explicitly discharge the joint venture agreement and in effect dealt with only one aspect, namely, how the profits of the joint venture should be distributed as between the joint venturers. There were other issues still to be dealt with such as payment of outstanding expenses. The court therefore concluded that the joint venture agreement remained in force and was not discharged.

As to 3, the court noted that a party to a contract commits at least an anticipatory breach of contract if it disables itself from future performance. Zambito remained liable to contribute 50% of the expenses of the joint venture which remained outstanding. It was accepted that by transferring the lots to Jainti, Zambito would be without any assets to meet its obligations under the joint venture agreement. Consequently, the proposed transfer was an anticipatory breach of contract. Consequently, the transfer to Jainti was not authorised by the CO Agreement.

## Court Orders

The court ordered that Zambito be restrained from taking steps to register the transfer of the three lots to Jainti but noted that if circumstances changed such that Zambito would still be able to meet its share of expenses under the joint venture agreement while at the same time transferring the lots to Jainti then there would be no reason for continuing such an order. Liberty to apply to discharge the injunction in the event that circumstances changed was granted.

## DUTY OF CO-OPERATION AND COMMERCIAL COMMON SENSE\*

*Maitland Main Collieries Pty Ltd v Xstrata Mt Owen Pty Ltd* ([2006] NSW SC1235, Bergin J, 23 November 2006)

*Implied duty to co-operate and implied duty to act reasonably and in good faith – Declarations*

This case is a continuation of the legal proceedings being brought by Maitland Main Collieries Pty Ltd (MMC) against Xstrata Mt Owen Pty Ltd (XMO) with a view to enforcing a Deed of Release and Indemnity (the Deed).<sup>1</sup>

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\* Tony J Wassaf, Partner, Allens Arthur Robinson.

Allens Arthur Robinson (J Parker, Partner) are representing MMC in these proceedings.

<sup>1</sup> An earlier decision was reported at (2006) 25 ARELJ 227.