CASE NOTES

APPEALING THE CLASH OF PERMITTED ASSIGNMENT PROVISIONS

Aquila Steel P/L v AMCI (IO) P/L & Anor; BD Coal P/L & Anor v AMCI (BC) P/L and Ors (Supreme Court of Queensland, Court of Appeal, 21 December 2007, McMurdo P, Jerrard JA, Keane JA) [2007] QCA 456)

Interpretation of joint venture agreement assignment and pre-emptive rights provisions – Whether assignment provisions operated independently – Whether corporate restructure between related companies "as of right" amounted to a "change in control" – Whether other participants had an option to purchase the joint venture interest a change of control

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BACKGROUND

The pivotal issue in this case was the interpretation of clause 14, an assignment and pre-emption clause contained in two essentially identical joint venture agreements (JVAs). The first of these, dated 14 February 2005, was the Premium Iron Ore Joint Venture Agreement (PIO JVA), a mineral exploration and mining venture between Westiron Pty Ltd (Westiron) and Aquila Steel Pty Ltd (Aquila). The second, dated 7 April 2005, was the Belvedere Coal Joint Venture Agreement (BC JVA), a venture for similar purposes between Belcoal Pty Ltd (Belcoal) and BD Coal Pty Ltd (BD Coal).

Clause 14 of these JVAs regulated assignments and transfers by the participants of their interests in the relevant joint venture. Except as permitted by this clause, assignments and transfers (broadly defined) were prohibited. Relevantly, clause 14.2 permitted a participant to transfer its joint venture interest directly to a related body corporate "as a matter of right". In addition, clause 14.5 granted pre-emptive purchase rights to a participant in the event of a "Change in Control" of the other participant to a person who was not a party at the relevant JVA commencement date.

At the date of execution of the JVAs, both Westiron and Belcoal were part of the AMCI group of companies. The ultimate group holding company was AMCI International AG (AMCI International), a Swiss company which held 99.9 percent of the shares in AMCI Investments Pty Ltd (AMCI Investments). AMCI Investments then held all of the issued shares in AMCI Holdings Pty Ltd (AMCI Holdings). In turn, AMCI Holdings was the sole shareholder of both WA Resources Pty Ltd (WA Resources) and AMCI (BP) Pty Ltd (AMCI BP). Finally, WA Resources held the entire issued share capital in Westiron and AMCI BP held the same in Belcoal.

Pursuant to a corporate restructure of the AMCI group undertaken over a year later, Westiron transferred its interest in the PIO JVA to its newly created wholly owned subsidiary, AMCI (IO)

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(Pty Ltd) (AMCI IO). Additionally, on the same date and immediately prior to this transfer, Westiron transferred its entire shareholding in AMCI IO to AMCI (WA) Pty Ltd (AMCI WA), a wholly owned subsidiary of AMCI Investments.

Belcoal also transferred its interest in the BC JVA to its newly created wholly owned subsidiary, AMCI (BC) Pty Ltd (AMCI BC). Also on the same date and immediately prior to this transfer, Belcoal transferred all of its shares in AMCI BC to AMCI (SEQ) Pty Ltd (AMCI SEQ), a wholly owned subsidiary of AMCI Investments.

In addition, AMCI Holdings subsequently transferred its entire shareholding in WA Resources to AMCI WA and its complete interest in AMCI BP to AMCI SEQ. Finally, AMCI Investments transferred its entire shareholding in AMCI Holdings to CVRD International SA (CVRD), a company unrelated to any of the AMCI group entities.

The net effect of this restructure was to remove AMCI Holdings from the AMCI group and to transfer interests in its subsidiaries (including those holding the joint venture interests) to AMCI Investments. Relevantly, AMCI IO and AMCI BC (transferees of the joint venture interests) at all times remained as wholly owned subsidiaries of AMCI WA and AMCI SEQ, which in turn continued to be wholly owned by AMCI Investments. In addition, the ultimate group holding company, AMCI International, remained as such throughout the entire transaction.

Following the transfers, Aquila and BD Coal commenced proceedings in Western Australia, seeking a declaration that there had been a change in control under clause 14.5 of the JVAs as a result of the AMCI group restructure. On the same day, proceedings were also initiated in Queensland by AMCI IO and Westiron together with AMCI BC and Belcoal seeking a declaration that, upon the proper construction of clause 14.2 of the JVAs, they were entitled to transfer, and had transferred, their joint venture interests. They further sought a declaration that there had been no change in control of the relevant companies within the meaning of clause 14.5. All parties subsequently agreed to have the matter heard in Queensland and the primary decision was handed down by Muir J of the Supreme Court of Queensland on 4 September 2007.[1] The central issues for decision in this case were:

- whether clause 14.2 operated independently of 14.5; and
- whether a “Change in Control” had occurred which triggered the operation of clause 14.5.

Aquila and BD Coal Arguments

Aquila and BD Coal, respondents in the case at first instance, argued that clauses 14.2 and 14.5 operated concurrently and claimed that the pre-emptive rights provisions of clause 14.5 had been triggered as a result of the AMCI group restructure. They submitted that a plain reading approach should be taken to the interpretation of clause 14.5 and emphasised that these provisions would be triggered if a person, who was not in control of a participant at the joint venture commencement date, subsequently obtained this type of control.

On the facts, such a change in control of both AMCI IO and AMCI BC had occurred as a result of the restructure, including by virtue of Westiron’s transfer of its interest in the PIO JVA to AMCI IO and Belcoal’s transfer to AMCI BC of its interest in the BC JVA on the same date. Following

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1 *AMCI (IO) P/L & Westiron P/L v Aquila Steel P/L; AMCI (BC) P/L & Belcoal P/L v BD Coal P/L, Aquila Resources Ltd and Ors* [2007] QSC 238. For the detailed facts and finding of this case, please see the case note by John Grace “The Clash of Permitted Assignment Provisions” (2007) 26 ARELJ 414.

these transfers, AMCI WA and AMCI SEQ were able, for the first time since the commencement of the joint venture, to exercise the kind of control of a participant contemplated by clause 14.5. As a result, the pre-emptive right in clause 14.5 had been triggered, granting Aquila and BD Coal an option to purchase the interests of AMCI IO and AMCI BC in both joint ventures.

AMCI Arguments

Conversely, AMCI IO and AMCI BC, plaintiffs in this instance, argued that clause 14.2 operated independently of clause 14.5 and provided a separate and autonomous mechanism for transferring a participant's joint venture interest to a related company. Compliance with clause 14.2 was therefore sufficient to validly effect a transfer and this could not subsequently be overridden by clause 14.5 so as to deny the new participant its interest. They maintained that it could not have been the intention of the parties that transfers "as a matter of right" to a related body corporate undertaken in accordance with clause 14.2 would result in forfeiture of the joint venture interest.

Rather, the purpose of clause 14.5 was to protect the joint venturers against the intrusion of unwanted or unknown third parties. This conclusion was demonstrated by the restriction set out in clause 14.2(a)(i)(B) which required a transferee to re-transfer the interest to the transferor in the event that it ceased to be a related body corporate. Applying Aquila and BD Coal's argument, a transfer to a related body corporate would only ever be permitted, without triggering the pre-emptive right, on the joint venture commencement date. This, AMCI IO and AMCI BC argued, offended common business sense.

In addition, clause 14.5 extended beyond a "Change in Control" to a "Change in Control of a Participant". The definition of "Participant" in each JVA included permitted successors and assigns, including AMCI IO and AMCI BC. Aquila and BD Coal's argument did not address the fact that there had been no change in the parties since they became participants and that "the seat of ultimate or effective control always remained the same", ie the holding companies, AMCI Investments and ultimately AMCI International, did not change throughout the entire transaction.

PRIMARY FINDINGS

At first instance, Muir J agreed with AMCI IO and AMCI BC and held that clause 14.5 did not operate to qualify or fetter the transfer rights granted under clause 14.2.[2] Moreover, his Honour remarked that the ability of a participant under clause 14.2 to transfer to a related body corporate "as a matter of right" "strongly suggests that its operation is not qualified by clause 14.5. The 'right' would be significantly circumscribed if a consequence of its exercise was to trigger the right to exercise an option under clause 14.5".

Muir J found that the arguments raised by Aquila and BD Coal focused "unduly on 'Change in Control' ", whereas clause 14.5 operates only where there has been "Change in Control of a Participant who holds a Joint Venture Interest". In this case, AMCI IO "was not a 'Participant' until such time as a transfer to it was effected in compliance with clause 14.2" which occurred

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[2] Or under 14.3 or 14.6. His Honour noted that a transfer undertaken under clause 14.3 with the written consent of the other participant would not invoke clause 14.5. Clause 14.3 permitted a transfer of a venture interest with the written consent of the other participants and required compliance with the provisions of clause 14 and other clauses in the JVA. Clause 14.6 permitted a transfer of a venture interest to any person (Proposed Transferee), subject to a right of first refusal, on the same terms, granted to the other participant. Prior to any transfer, the transferor was required to procure that the Proposed Transferee enter into a covenant, on terms satisfactory to the continuing participant, to comply with the terms of the JVA.

after its shares were acquired by AMCI WA.

His Honour drew a distinction between the intended purposes of clauses 14.2 and 14.5. The intention of the parties in clause 14.2 was to "confer freedom" to transfer joint venture interests to related companies. In addition, it protected against unwanted changes in control of an assignee by attaching conditions to related company transfers, namely that that the assignee was required to remain related and the assignor continued to be bound by the terms of the JVA following the assignment. Muir J noted the absence of any such obligation in clause 14.5. His Honour therefore concluded that it was "unlikely that the contractual intention was that clause 14.5 would override the operation of clause 14.2".

His Honour observed that the "related Body Corporate" test set out in the *Corporations Act 2001* (Cth) did "not correspond precisely" with the test for "Change in Control" in the JVAs. His Honour considered it "quite improbable" that the intention of the parties was to allow clause 14.5 to govern events under clause 14.2(a)(i)(B) given that the circumstances in which a transferee ceased to be a related body corporate of the transferor would then be measured by a "change in control" test rather than a "related body corporate" test.

His Honour remarked that "no sensible reason would be served by triggering the operation of clause 14.5 merely because a transferee of a Participant's interest, although a related company of the Participant at the time of the transfer, had not always enjoyed that status".

Ultimately, Muir J held that there had been no change in control as alleged by Aquila and BD Coal and that the transfers of joint venture interests from Westiron to AMCI IO and from Belcoal to AMCI BC had not triggered the pre-emptive rights in clause 14.5 of the JVAs. His Honour made the principal declarations sought by AMCI IO and AMCI BC, dismissed a counter-claim by Aquila and BD Coal and ordered costs against Aquila and BD Coal.

APPEAL

Aquila and BD Coal (Appellants) subsequently appealed, claiming that the primary judge had erred in concluding that clause 14.2 operated to the exclusion of clause 14.5. They challenged Muir J's finding that no change in control had occurred, that clause 14.5 (and the entitlement to pre-emptive purchase rights) did not apply and that the transfers by Westiron and Belcoal were transfers to related bodies corporate as permitted under clause 14.2.

In separate judgments, with McMurdo P concurring, Jerrard JA and Keane JA unanimously upheld the decision of the primary judge and dismissed the appeals. The Appellants were ordered to pay the Respondents'[3] costs of the appeals, assessed on the standard basis.

No Change in Control

The Appellants maintained that a change in control had occurred and submitted that the transactions were designed, amongst other things, to remove (for sale to CVRD) AMCI Holdings as the holding company of both of the original joint venture participants, Westiron and Belcoal. However, on this point Jerrard JA noted that this was undertaken only after the previous subsidiaries had been removed from it and new subsidiaries had been created to hold the relevant joint venture interests.

Jerrard JA found that clause 14.5 applied to "changes in external control of a participant" and that

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[3] The respondents in this case were AMCI IO, Westiron, AMCI BC, Belcoal, AMCI Holdings, Rio Doce Australia Limited and CVRD International SA.

the object of this clause was "to protect joint venturers from being forced to continue in a joint venture with a party with whom they would not willingly venture their capital."

His Honour referred to the definition of "Change in Control" in each of the JVAs and noted the express exclusion of a change in control of Westiron (under the PIO JVA) and Belcoal (under the BC JVA) where it occurred as a result of a change in control of AMCI Holdings or its controlling entities. His Honour found that such a change in control of Westion had occurred as AMCI WA had gained the capacity to control the composition of the boards of both WA Resources (Westiron's holding company) and AMCI IO, who was now a participant in the joint venture. His Honour found that this change in control had occurred as a consequence of a change in control of AMCI Holdings.

Accordingly, his Honour reasoned that under the terms of the PIO JVA, Aquila had already agreed with Westiron that this occurrence would not constitute a "Change in Control". His Honour then applied this same reasoning to the BC JVA and found that BD Coal and Belcoal had also already reached agreement on this same point. Consequently, his Honour found the specific exception relating to a change in control of Westiron or Becoal to be "fatal to these appeals".

In conclusion, Jerrard JA agreed with the trial judge and found that "on the facts, there was no 'change in control' which triggered the operation of Clause 14.5 of the Joint Venture Agreement. The ultimate holding company remained the same".

However, the Appellants maintained that the exception of changes in control of Westiron and Belcoal was irrelevant to both appeals as it related to a separate change of control, being a change in control of AMCI IO when AMCI WA became its holding company, at which point AMCI IO had become a participant in the PIO JVA. Therefore, they challenged the validity of the primary judge's construction of clause 14 and his Honour's finding that that clause 14.5 "did not apply to fetter or limit the rights given by clauses 14.2, 14.3 or 14.6". The Appellants conceded that Muir J's interpretation was correct in so far as it applied to clauses 14.3 and 14.6 but disagreed that it applied to clause 14.2.

Clause 14.2 Operated Independently of Clause 14.5

In argument, the Appellants referred to a statement of the High Court in *Toll (FGCT) PL v Alphapharm P/L*[4] which found that: "The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction." On this point, Keane JA noted that it was "apparent" that Muir J had "considered that both textual and commercial considerations favoured the respondents' interpretation of clause 14."

However, the Appellants emphasised the central importance of the language used by the parties to express the terms of their agreement and the need to give effect to that language, rather than attempting to rewrite the contract. They criticised the primary judge for ascribing significance to the difficulty in identifying a "sensible reason" for triggering the operation of clause 14.5 "merely because a transferee of a Participant's interest, although a related company of the Participant at the time of the transfer, had not always enjoyed that status". The Appellants submitted that it was not the role of the court to speculate as to the reasons behind the terms chosen by commercial parties to frame their bargains.

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[4] HCA 52, November 11, 2004.

Further, the Appellants argued that the primary judge's interpretation of clause 14 was inconsistent with the object of the JVAs as expressed in the text of those agreements. Clause 14.5 was not expressed to be subject to clause 14.2, nor did it carve out any exemption from the general prohibition on the transfer of an interest. Rather, it permitted a participant to obtain another participant's joint venture interest in the event of a change in control of that participant. Therefore, to the extent that clause 14.5 was a provision designed to avoid attempts to indirectly achieve changes in control over joint venture interests, it should be read widely.

The Respondents, on the other hand, reiterated that clause 14.2 was unaffected by the change in control provisions of clause 14.5 and emphasised that clause 14.2 expressly provided for, and permitted, situations such as the current one at issue in this case. This was evidenced by clause 14.2(a)(i)(B)[5] and by clause 14.2(a)(ii).[6]

On this issue, Keane JA considered it possible to accept that the purpose of the JVAs was to forge a relationship between the original participants, who had an ongoing interest in the identity of any incoming participants. However, his Honour found with "equal force" that the original parties would have been able to agree that their interest, in ensuring that control of the other participant's venture interest did not "fall into unacceptable hands", would not be "unacceptably affected" by a transfer to a related party, which party would continue to remain related. His Honour observed that the issue was therefore whether this was actually the effect of the bargain in this case. In reaching a conclusion on this issue, his Honour remarked that "it is relevant, though not decisive, that there is no discernible commercial reason which justifies reading clause 14.2 so as to allow 14.5 to defeat a transfer to a related entity merely because that transferee is under the control of a related corporate entity which did not exist when the joint venture commenced."

Keane JA ultimately concluded that there were "powerful textual indications that clause 14.2 was intended by the parties to operate independently of clause 14.5". Firstly, clause 14.2 expressly permitted direct transfers of venture interests by participants to related corporations, whereas clause 14.5 entitled a participant to prevent an indirect change in the effective control of another participant's joint venture interest caused by a change in control of that participant.

Secondly, clause 14.2 was not expressed to be subject to clause 14.5. His Honour drew a parallel between clause 14.2 and clauses 14.3 and 14.6 and noted the Appellants' acceptance that clauses 14.3 and 14.6 "cannot possibly be understood as if they were subject to clause 14.5". His Honour therefore found it "difficult to see why clause 14.2 should be understood as if it were, uniquely within the transfer-facilitating provisions of clause 14, subject to clause 14.5."

Thirdly, clause 14.2 was expressed to operate "as a matter of right". His Honour remarked that the Appellants' argument "fails to recognise that clause 14.5 must be understood in its context. That context includes clause 14.2 which manifests an intention that a Participant may transfer all or part of its Venture Interest as a matter of right to a Related Body Corporate." His Honour noted that a body corporate "may be related to another by reason of qualities which are not the equivalent of the indicia of control in clause 14.5." Therefore, "On its face clause 14.2 confers upon a Participant a right to transfer a Venture Interest to a related body corporate."

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5 Which expressly contemplated situations in which a related body corporate transferee subsequently ceased to be a related body corporate of the transferor. In this instance, a transferee would be required to re-assign the venture interest to the transferor.

6 Under this clause, a joint venture participant transferor would not be relieved of its obligations if the related body corporate failed to perform them.

Keane JA remarked that if the Appellants' reasoning were applied, a participant would be able to rely on clause 14.5 in order to prevent a transfer by another participant to its related body corporate "merely because the transferee was not also historically subject to the control of the transferor at the time of the commencement of the joint venture". His Honour concluded that: "Acceptance of this argument involves a substantial derogation from the right conferred by clause 14.2 which depends only on the existence of relatedness between transferor and transferee."

His Honour noted the Appellants' response to this objection: that a transfer as a "matter of right" simply indicated that the transferor was not required to seek the prior consent of another participant. However, his Honour rejected this argument, finding that:

> "a right is not properly described as a right if its exercise is apt to be rendered nugatory by the later act of another person. If it were the case that a transfer by a Participant to a Related Body Corporate could not be effective because clause 14.5 permits another Participant to claim the Venture Interest the subject of the transfer, the right conferred by clause 14.2 would be rendered illusory; it would be a travesty to speak of it as a 'right' at all."

Finally, his Honour referred to clause 14.2(a)(i)(B), which he noted explicitly considered the prospect of a related company transferee ceasing to be related. His Honour found this provision to be "a strong indication" that the transfer right in clause 14.2 was a "self-contained facility" and that "the existence and maintenance of relatedness between transferring Participant and transferee marks the limit of protection for Participants against the participation of strangers in the joint venture". His Honour found this to be a "compelling indication that the maintenance of related status, rather than all of the indicia of control, is the relevant condition of an effective transfer under clause 14.2".

In conclusion, Keane JA found that "the language of clause 14 as a whole" clearly indicated that the parties did not intend that the right conferred by clause 14.2 was to be subject to the "expansive concurrent operation of clause 14.5" as claimed by the Appellants.

His Honour therefore held that Muir J was correct to reject the interpretation of the JVAs submitted by Aquila and BD Coal and dismissed the appeals.

The same conclusion was reached by Jerrard JA, who agreed with Keane JA's comments on the construction of clause 14 and also dismissed the appeals.