CASE NOTE

UNITED DOMINIONS CORPORATION LTD V. BRIAN PTY LTD AND ORS.

The decision in *United Dominions Corporation Ltd* v. *Brian Pty Ltd and Ors*[1] makes significant contributions to two important and rapidly developing areas of law. It provides an invaluable examination of the basis of the fiduciary obligation and in so doing, establishes a useful yardstick for determining whether a relationship which is not within an established category, is fiduciary in character. The decision is notable also for a welcome discussion of the relationship between parties to a joint venture.

Less than a year before *Brian*'s case, the High Court handed down its decision in the *Hospital Products* case[2] in which it expressed difficulty in making general statements about the circumstances in which a fidicuary relationship could be said to exist. For example, Gibbs C.J., said that whilst there were certain relationships which were axiomatically fiduciary in character, such as the relationships between trustee and beneficiary or between partners, there was no reason to suppose that these categories were closed. The difficulty as he saw it was to "suggest a test by which it may be determined whether a relationship not within the accepted categories was a fiduciary one". These words were to be echoed by the Chief Justice in *Brian*'s case.[3] His Honour went on to say that the fact that the arrangement was commercial in character was "an insuperable obstacle" to the contention that a fiduciary relationship existed between the parties.[4]

Dawson J. did not appear to share the strong bias exhibited in the other majority judgments against commercial transactions. He said that "The difficulty in identifying and classifying those qualities in individual relationships which give rise to fiduciary obligations is well recognized. There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting on the conscience of the other".[5] He held that such a position did not exist in the case before him, but, with hindsight, these observations have proved significant in the decision in *Brian*'s case[6].

The High Court's decision in *Brian*'s case is interesting in light of the comments of Mason J. who disagreed on this point in the *Hospital Products*

[1] (1985) 60 A.L.R. 741.
[2] *Hospital Products Ltd* v. *United States Surgical Corporation.* (1984) 55 A.L.R. 417.
[3] (1985) 60 A.L.R. 741, 744.
[4] (1984) 55 A.L.R. 417, 435.
[5] Ibid. 488.
[6] For an excellent case note on the Hospital Products case see A. O'Connell (1985) 59. L.I.J. 228.

case. He said that "an entitlement to act in one's own interests is not an answer to the existence of a fiduciary relationship, if there be an obligation to act in the interests of another". His Honour went on to say: "There has been an understandable reluctance to subject commercial transactions to the equitable doctrines of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which a person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arms' length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth every such transaction must be examined with a view to ascertaining whether it manifests the characteristics of fiduciary relationship.

The disadvantages of introducing equitable doctrine into the field of commerce, which may be less formidable than they were, now that the techniques of commerce are far more sophisticated, must be balanced against the need in appropriate cases to do justice by making available relief in specie through the constructive trust, the fiduciary relationship being a means to that end."[7]

In *Brian*'s case when the High Court was faced with a situation in which the arrangement was commercial in character, and the parties were at arms' length and entitled to act in their own interests, it had no hesitation in recognizing the existence of a fiduciary relationship.

The facts of *Brian*'s case may be summarised briefly. The relationship between the parties commenced in 1973. Throughout that year they negotiated with a view to entering a formal relationship which they described as a "joint venture". It is important to stress that at the relevant time, that is, when the facts giving rise to the dispute arose, no formal relationship existed between the parties. Therefore, whatever the nature of their eventual formal relationship, the arrangement at the critical time was not within one of the established categories of fiduciary relationships. A formal agreement was entered into only subsequent to this. The nature of the parties' relationship before hand was therefore in issue.

At the relevant time it was agreed that Brian, Security Projects Ltd (S.P.L.) and United Dominions Corporation Ltd (U.D.C.) would all be participants in a land development venture. S.P.L. owned the land. U.D.C. was to contribute 90% of the finances, with the other participants, including Brian, contributing the remainder. S.P.L. mortgaged the land to U.D.C. as security for its large advance. When the project was eventually completed and a substantial profit realized, Brian called upon U.D.C. to account to it for its contributions to project finances and for a share of the profits. Both requests were refused. U.D.C. sought to justify its refusal by relying upon so-called "collateralisation" clauses in the mortgages executed in its favour by S.P.L.

[7] (1984) 55 A.L.R. 417, 456-7.

These clauses had the effect that the mortgages secured not only the monies advanced for the project in which Brian was involved, but also other monies loaned by U.D.C. to Brian for other purposes with which the latter had no connection. These clauses, which were clearly to Brian's disadvantage, were never brought to its attention.

Brian argued that the relationship between the parties was, even before final agreement, fiduciary in character and that in obtaining the collateral advantages for itself, without the consent of Brian, U.D.C. was in breach of its fiduciary obligation. On the other hand, U.D.C. argued that whatever the nature of the eventual formal relationship between the parties there was no preceding fiduciary relationship. (For simplicity the term "joint venture" is used in discussing this aspect of the decision, as it was used by the parties. The question this raises will be discussed below.

The High Court, comprised of Gibbs C.J., Mason, Brennan, Deane and Dawson J.J., was unanimous in finding for Brian and dismissed U.D.C.'s argument as "clearly wrong".[8] Although all members of the court, except Brennan J., decided the *Hospital Products* case, Gibbs C.J. alone referred to it. His reference was to the difficulties there expressed in finding a definition of the circumstances in which a fiduciary relationship will be found to exist.[9] Apparently no member of the court considered the fact that the undertaking was commercial in character as presenting any obstacle at all, let alone one which was "insuperable". Indeed, though this, even before formal agreement, was an arrangement contemplating individual profit, no member of the court adverted to any difficulty arising from this.

In deciding that the relationship between the parties at the critical time was fiduciary in character, the court was unanimous in stressing the concept of "mutal confidence and trust".[10] Mason, Brennan and Deane JJ. went so far as to say that "mutual confidence was more likely to exist in circumstances such as these than in the case where a formal agreement was a fact concluded".[11]

Their Honours decided that the arrangement between the parties to the proposed "joint venture" had by the critical time — the time of the execution of the mortgage — progressed "far beyond the stage of mere negotiations".[12] It had reached the stage of what might be called (although their Honours did not expressly put it this way) an expectation that all parties would be participants in the proposed joint ventures and, in Brian's case in particular, the justifiable expectation that having made its contribution it would participate in any eventual profits. In other words, the participants were "associated for . . . a common end" and the relationship between them was "based upon a mutual confidence" that they would engage in [the] particular

[8] (1985) 60 A.L.R. 747.
[9] Ibid. 744.
[10] Ibid. 747.
[11] Ibid. 747.
[12] Ibid. 748.

. . . activity or transaction for the joint advantage only".[13] Their Honours went on to define the nature of the fiduciary obligation arising in the present case. They said each participant was "under a fiduciary duty to refrain from pursuing, obtaining or retaining for itself or himself any collateral advantage in relation to the proposed project without the knowledge and informed consent of the other participants".[14] With this definition of the duty it was not difficult to conclude that S.P.L. and U.D.C. were plainly in breach. They had obtained a "prohibited collateral advantage" for themselves and in so doing had ultimately destroyed Brian's interest. As their Honours summed up: "In continuing to apply the property to their own collateral purposes and in giving and obtaining those collateral advantages without the knowledge or consent of Brian, S.P.L. and U.D.C. each acted in breach of its fiduciary duty to Brian."[15]

Gibbs C.J.'s judgment was more restricted in its approach, and his conclusion that a fiduciary relationship existed at the critical time was dependent on his classification of the eventual final relationship as a partnership. Mason, Brennan and Deane JJ. clearly did not consider the classification of the final agreement significant in this respect. Indeed, they considered that a fiduciary relationship could exist even where no formal agreement was ever concluded. Gibbs C.J.'s decision was, therefore, based upon a narrower principle, as expressed in *Lindley on Partnership*,[16] that the obligation to perfect truth and good faith is not confined to persons who actually are partners but extends to persons negotiating for a partnership. His Honour recognised the criticism of this statement made by Higgins and Fletcher,[17] but went on to say that *Fawcett* v. *Whitehouse*[18] was clear authority for the proposition that "a person who is negotiating for himself and his future partners as an agent for the intended partnership and who clandestinely receives an advantage for himself must account for that advantage to the partnership when it is formed".[19] His Honour went on to conclude that the relationship between the parties being one which "if not one of partnership was between persons who, intending to become partners had already embarked on the partnership venture of which the execution of the mortgage was an incident".[20] He said U.D.C. well knew that it was contrary to the understanding between the parties, to enter into a mortgage with S.P.L. upon terms with which Brian did not agree and which were

[13] Ibid. 748. Their Honours were here transposing the words of Dixon J. in *Birtchnell* v. *Equity Trustees Executors and Agency Co. Ltd.* (1929) 42. C.L.R. 384.

[14] 1985 60 A.L.R. 741, 748.

[15] Ibid.

[16] 15th Ed. (1984) 480.

[17] P. F. Higgins and K. L. Fletcher: The Law of Partnership in Australia and New Zealand 4th Ed. (1981) at p.50.

[18] ([1829] 1 Russ and M 150; 39 E.R. 58).

[19] (1985) 60 A.L.R. 741, 743. The other authorities cited by the Chief Justice were *Hitchens* v. *Congreve* (1828) 4 Russ and M 562; 39 ER 58, *Directors etc. of Central Railway Co. of Venezuela* v. *Kisch* (1867) L.R. 2 H.L. 99, 113 and *Bell* v. *Lever Bros* [1932] A.C. 161, 227.

[20] (1985) 60 A.L.R. 741, 744.

unconnected with the joint ventures. That Gibbs C.J.'s judgment is based upon comparatively narrow partnership principles is emphasized by his final statement on the matter: [T]here was, in the circumstances of the present case, a relationship between U.D.C. and Brian based on the same mutual trust and confidence, and requiring the same good faith and fairness, as if a formal partnership deed had been executed."[21]

The Chief Justice was content to say that the final executed agreement, though described as a joint venture, was "plainly a partnership agreement".[22] His fellow judges, however, considered the question of categorisation in more depth. In so doing, they canvassed issues of contemporary significance in relation to the distinction between partnerships and joint ventures and the question of whether a fiduciary relationship could exist between parties to a joint venture.

The joint venture is a popular choice when groups of people combine for the purposes of a joint undertaking with a view to profit. It is particularly common in the financing of mining ventures.[23] The observations of those members of the Court who considered the question are therefore welcome.

Mason, Brennan, Deane JJ. began by observing that the term "joint venture" was not a technical one "with a settled common law meaning".[24] They said that "as a matter of ordinary language", it connoted an association of persons for the purposes of a particular trading, commercial. mining or other financial undertaking with each participant making contributions of money, property and skill.[25] Such a joint venture would often be, in law, a partnership. In such a case the relationship, being a partnership, is axiomatically fiduciary in character and the participants would, as their Honors pointed out, "be under fiduciary duties to one another, including duties in relation to property the subject of the joint venture, which are the ordinary incidents of the partnership relationship, though those fiduciary duties will be moulded to the character of the particular relationship".[26] Their Honours went on to recognize that fiduciary relationships can exist in the case of joint ventures other than partnerships, though "one would need a more confined and precise notion of what constitutes a joint venture than that which the term bears as a matter of ordinary language before it could be said by way of general proposition that the relationship between joint venturers is necessarily a fiduciary one . . . 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 or (sic) the obligations which the parties to it have undertaken".[27]

[21] Ibid.
[22] Ibid. 742.
[23] Nicholls "A Review of Some Aspects of the Organisation and Financing Mineral Resource Ventures" (1976) 1 U.W.S.W.L.R. 271 provides a comprehensive coverage.
[24] (1984) 60 A.L.R. 741, 746.
[25] Ibid.
[26] Ibid. 747.
[27] Ibid. 746.

Their Honours concluded that the eventual form of agreement between the parties was a partnership. Apart from the absence of the words "partnership" or "partners" in the agreement it exhibited, they said "all the indicia of and plainly was a partnership".[28] Those indicia were stated to be as follows: "The participants were joint venturers in a commercial enterprise with a view to profit. Profits were to be shared. The joint venture property was held on trust. The participants indemnified the managing participant (S.P.L.) against losses. The policy of the joint enterprise was ultimately a matter for joint decision."[29]

Dawson J.'s judgment takes a significant step towards the recognition of "joint ventures" as a legal rather than popular term.

He began by observing that the joint venture is a form of association which, whilst not a creation of American courts, has been put to considerable use in the United States. He suggested that the reason for this and for the clear differentation between a joint venture involving a single business transaction and a partnership involving continuing business which exists in the United States, is that a company may not in the United States join a partnership. Dawson J. went on to say that whilst the Australian Partnership Acts define a partnership as a relationship existing between persons carrying on a business in common, the requirement of carrying on a business does not provide a clear means of distinguishing a joint venture from a partnership. A partnership may be formed for a single undertaking. Citing the decision of the High Court in *Canny Gabriel Castle Jackson Advertising P/L* v. *Volume Sales (Finance) Pty. Ltd.*,[30] he said that "whilst 'carrying on a business' contained an element of continuity or repetition in contrast with an isolated transaction which is not to be repeated, ... the emphasis ... placed upon continuity may not be heavy."[31] In this case, however, since the enterprises were sufficiently extended to amount to the carrying on of a business and since the association was with a view to profit, the conclusion that the parties were either in partnership or negotiating a partnership was justified. In conclusion upon this point, he said that:

> "Perhaps in this country, the important distinction between a partnership and a joint venture is, for practical purposes, the distinction between an association of persons who engage in a common undertaking for profit and an association of those who do so in order to generate a product to be shared among the participants. Enterprises of the latter kind are common enough in the exploration for and exploitation of mineral resources and the feature which is most likely to distinguish them from partnerships is the sharing of product rather than profit".[32]

Finally, Dawson J. re-emphasised the significance of mutual confidence and summed up by saying:

[28] Ibid. 747.
[29] Ibid.
[30] (1974) 131 C.L.R. 321.
[31] (1985) 60 A.L.R. 741, 750.
[32] Ibid.

> "that it is quite clear that a fiduciary relationship may arise during negotiations for a partnership or, for that matter, a joint venture, before any partnership or joint venture agreement has been finally concluded if the parties have acted upon the proposed agreement as they had in this case. Whilst a concluded agreement may establish a relationship of confidence, it is nevertheless the relationship itself which gives rise to fiduciary obligations. That relationship may arise from the circumstances leading to the final agreement as much as from the fact of final agreement itself".[33]

The decision in *Brian*'s case makes a welcome contribution to a growing body of law regarding fiduciary relationships between parties to commercial ventures. It also goes some of the way towards recognition of the joint venture as a legal concept.

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