Privy Council Appeal No. 31 of 1981

Newmont Proprietary Limited and others – – – *Appellants*

v.

Laverton Nickel N.L. and others – – – – – *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER 1982

Present at the Hearing:

LORD DIPLOCK

LORD KEITH OF KINKEL

LORD ROSKILL

SIR JOHN MEGAW

SIR HARRY GIBBS

[*Delivered by* SIR HARRY GIBBS]

This is an appeal from a judgment of the Supreme Court of New South Wales (Needham J.) dismissing proceedings brought by the appellants (Newmont Proprietary Limited and others) against the respondents. In those proceedings, the appellants sought, amongst other relief, an order for specific performance of an agreement in writing made on 3rd November 1978 between the appellants and the first and second respondents, Laverton Nickel N.L. ("Laverton") and Nickel Mines Limited ("Nickel Mines"), whereby the parties to the agreement agreed, subject to the conditions stated in the agreement, to associate in a joint venture to prospect and explore for, and if warranted develop and exploit, any mineral deposits discovered within certain mining leases at Liontown, near Charters Towers, in Queensland, of which one or other of Laverton and Nickel Mines was the registered lessee. It will be convenient to refer to this agreement as "the Newmont Agreement".

The transcript record of proceedings placed before their Lordships for the purposes of the appeal contained much material to which it was unnecessary for counsel to refer and which appeared to be of no relevance to the arguments that the parties intended to raise. It was the responsibility of the Registrar of the Supreme Court, and of the legal agents of the parties, to endeavour to exclude from the record of documents those that were not relevant to the subject-matter of the appeal (see Rule 8 of the Order in Council of 2nd April 1909 regulating appeals from the Supreme Court of New South Wales). Their Lordships hope that in future greater efforts will be made to avoid the inclusion in the record of irrelevant material.

The facts of the case, so far as they need to be stated, were as follows. Nickel Mines, Laverton and the third respondent, Leonora Nickel N.L. (" Leonora "), were associated companies. One James Joseph Lynch held shares which gave him a controlling interest in Nickel Mines and that company held half of the shares in each of Laverton and Leonora. On 22nd May 1978 the Attorney-General for the State of New South Wales presented to the Supreme Court of that State a petition for the winding up of Laverton. The petition stated that the Corporate Affairs Commission had reported to the petitioner that it was of the opinion that it was in the interests of the public and of the shareholders of the company that Laverton should be wound up. On the same day the Supreme Court appointed Mr. William James Hamilton to be the provisional liquidator of Laverton. Subsequently, Mr. Hamilton, as provisional liquidator of Laverton, petitioned for the winding up of Nickel Mines on the grounds that Nickel Mines was indebted to Laverton and was insolvent, and on 29th June 1978 he was appointed provisional liquidator of Nickel Mines also. The directors of Nickel Mines then applied to the Supreme Court for orders that the appointment of Mr. Hamilton as provisional liquidator of Nickel Mines be revoked and that Laverton be restrained from proceeding with the petition for the winding up of Nickel Mines. The application came before Needham J., who refused the second order sought, but held that it was undesirable that Mr. Hamilton should remain provisional liquidator of two companies which were in conflict with each other, and accordingly removed Mr. Hamilton from office as provisional liquidator of Nickel Mines and appointed Mr. Laurence Brian Hunter in his stead.

Section 231A(2) of the Companies Act 1961, of the State of New South Wales, which enables the Court to appoint a liquidator provisionally at any time after the commencement of proceedings for winding up and before the making of a winding up order, provides that " the provisional liquidator shall have and may exercise such functions and powers as may be prescribed by the rules or as the Court may specify in the order appointing him ". The respective orders appointing Mr. Hamilton and Mr. Hunter both contained provisions as follows:

> " 2. The Provisional Liquidator be at liberty to carry on the business of the Company.
>
> 3. The Provisional Liquidator shall have and exercise the powers and authorities conferred by Section 236(2)(a) to (j) inclusive of the Act."

The powers conferred by Section 236(2) include a power to sell the real and personal property and things in action of the company (see paragraph (c)).

It appeared to Mr. Hamilton, as provisional liquidator of Laverton, that the only substantial assets of that company which could readily be realised were the Liontown leases, and that it would be beneficial to enter into a joint venture or farm-in agreement with respect to them. After some negotiation, agreement was reached as to the terms of a proposed agreement between the appellants and Laverton and Nickel Mines (by their respective provisional liquidators). Mr. Lynch then applied to the Supreme Court for orders restraining Mr. Hamilton from entering into the proposed agreement. The application came before Needham J. on 3rd November 1978 and was refused. In the course of his reasons for judgment Needham J. said:

> " Although the court has the power to control the exercise by provisional liquidators of the powers granted in the order appointing them I think that control will be exercised adequately by the court investigating all relevant material when the application is made by the provisional liquidators to have the agreement with Newmont Pty. Limited approved . . . . .

I think that one of the matters which will be of importance when the application is made to approve the contract is the likelihood of any other company making a better offer than Newmont has made in respect of the joint venture."

The Newmont Agreement was executed on 3rd November 1978 by the appellants and by Laverton and Nickel Mines by their provisional liquidators. The agreement contained detailed provisions for the carrying out of the joint venture, but only a few of those provisions need be mentioned. Clause 2.1 contained the following definition:—

"2.1.2 'Commencement date' means the date on which this Agreement ceases to be conditional in terms of Clause 3.1 hereof and upon that date this Agreement shall be deemed to relate back to and take effect from the First Day of November 1978."

Clause 3.1.2 was in the following terms:

"This Agreement is conditional on the following:—

3.1.2.1 the approval of the Reserve Bank of Australia;

3.1.2.2 the Treasurer not making an order under Part II of the Foreign Take-overs Act, 1975;

3.1.2.3 the approvals or consents of the Equity Division of the Supreme Court of New South Wales;

3.1.2.4 the approval or consent of the Hon. Minister for Mines and Energy in the State of Queensland.

If any one of such consents or approvals is not granted or if the Treasurer shall make an order as aforesaid within twelve (12) months of the date hereof, this Agreement shall cease to have any force or effect, provided always however that any payments made pursuant to Clause 5.4 hereof shall remain the property of Laverton and Nickel Mines."

By Clause 3.1.3 the agreement was also conditional upon the execution of a further agreement in the form of the Third Schedule. Clauses 3.1.4 and 3.1.5 of the agreement provided as follows:

"3.1.4 Subject to the provisions of Clause 11.11.2 hereof, in the event that this Agreement ceases to have full force and effect under Clause 3.1.2 or 3.1.3 the Mining Titles will forthwith revert to the original holders and expenditure during the twelve (12) month period shall be borne by each Party in accordance with their respective Contributing Proportions;

3.1.5 Newmont covenants to make all applications for approval which it considers necessary pursuant to Clause 3.1.2.1, 3.1.2.2 and 3.1.2.4 and Laverton and Nickel Mines covenant to make all applications for approval and do all such other acts and things related thereto which they, Newmont, ICI or HCS consider necessary pursuant to Clause 3.1.2.3 as soon as practicable but not later than two (2) months after the date hereof and they shall advise the other Parties in writing as soon as practicable after the receipt of any consent so applied for."

(Newmont, ICI and HCS are the present appellants.)

The agreement went on to fix the respective interests of the parties in the joint venture, and to provide for the appointment of a manager who was to submit programmes of work to a meeting of representatives of the parties. The parties were required to contribute to the expenditure on approved programmes, but Laverton and Nickel Mines were not required to contribute until the appellants had contributed $2,800,000 over a period of 60 months. Under certain conditions the interest of a party could

be assigned. Unless sooner terminated by mutual agreement or pursuant to specific provisions contained in the agreement, the joint venture was to continue until the expiry of the last of the mining leases—a period of about 15 years. Laverton and Nickel Mines warranted that they were the beneficial owners of the mining leases.

Clause 11.11.2 provided as follows:

> " Laverton and/or Nickel Mines as the case may be hereby covenant with the other Parties hereto that no later than fifteen (15) days from the date on which the last of the consents referred to in Clause 3.1.2 hereof are obtained, they will deliver to the Manager executed documents of transfer in relation to each of the Mining Titles as will, subject to the approval of the Hon. Minister for Mines and Energy in the State of Queensland, if required, effect a transfer of interest in each of the Mining Titles to the other Parties in proportion to the Parties' respective interests pursuant to Clause 3.3.1 hereof."

At the time when the Newmont Agreement was signed, other companies were interested in making an agreement with Laverton and Nickel Mines in relation to the Liontown leases. On 17th November 1978 Mr. Hamilton obtained directions from Needham J. that he was justified in calling for tenders from such other companies. Thereupon, on 6th December 1978, Newmont Proprietary Limited made application to the Supreme Court for a declaration that the Newmont Agreement was binding on Laverton and Nickel Mines and for an injunction restraining the provisional liquidators from calling for tenders for the exploitation of the mining leases. This application came before Needham J. and was dismissed. The learned judge held that the provisional liquidators had the power to apply to the court and that the court had the power to control the exercise of the powers of the provisional liquidators and to give directions in the matter. He concluded that the action taken by the provisional liquidators in accordance with the directions of the court to obtain further tenders could not be in conflict with their obligations under the agreement.

An appeal from this decision was brought to the Court of Appeal of the Supreme Court, but the appeal was eventually dismissed by consent.

On 21st December 1978 each of the provisional liquidators filed a summons seeking the approval of the court to the Newmont Agreement. However, before these summonses came on for hearing, the provisional liquidators had entered into negotiations with the fourth respondent, Esso Exploration & Production Australia Inc (" Esso "), and these negotiations had resulted in the preparation of a draft agreement whereby Laverton, Nickel Mines and Esso agreed to establish a joint venture for the exploitation and development of the Liontown leases. On 21st February 1979 Mr. Hamilton swore an affidavit in which he said that this draft agreement had not been finally considered by himself and his advisers, but that in his opinion it represented the best commercial proposition for the development of Liontown which had been, or was likely to be, forthcoming.

The hearing of these summonses was fixed for 22nd February, and the Court ordered that the three appellants, Mr. Lynch and Esso be joined as respondents. On 22nd February, Mr. Hamilton issued a further summons seeking directions as to whether he should execute an agreement with Esso.

The hearing of the petition for the winding up of Laverton had also been fixed for 22nd February, and when it came on for hearing counsel for the Attorney-General sought to withdraw the petition. It had appeared as early as September 1978 that if certain conditions (which related *inter alia* to Mr. Lynch's control of the companies) were satisfied the Attorney-General would consent to the petition against Laverton being withdrawn.

On 22nd February counsel for the Attorney-General said that because the necessary agreements had been made and undertakings given it was no longer in the public interest that a winding up order should be made. Counsel for the present appellants submitted that the court should consider the applications for approval of the agreements before the petition was dismissed. The solicitor for the provisional liquidator stated that he was neutral on that question, but counsel for Laverton, instructed by the board of directors of that company, supported the application of the petitioner to have the petition dismissed forthwith.

Needham J. held that he had no power to postpone the dismissal of the petition. He accordingly dismissed the petition. He further held that once the petition had been dismissed the provisional liquidator of Laverton necessarily ceased to hold that office and that the summons which he had brought for approval of the agreements must also be dismissed.

On 5th March 1979, the petition for the winding up of Nickel Mines was dismissed on the application of the petitioner, Laverton. The summons filed by Mr. Hunter seeking approval of the Newmont Agreement was thereupon also dismissed.

Subsequently, on 10th April 1979, an agreement was executed between Laverton, Nickel Mines, Leonora and Esso for the establishment of a joint venture in relation to Liontown. The presence of Leonora as a party is explained by the fact that that company claims to be beneficially entitled to certain of the leases. It is clear that this agreement (" the Esso Agreement ") is more favourable to Laverton and Nickel Mines than was the Newmont Agreement. It is also more favourable than the draft agreement with Esso to which Mr. Hamilton referred in his affidavit of 21st February.

On 2nd April 1979 the appellants commenced the proceedings in which Needham J. gave the judgment from which the present appeal is brought. In that judgment Needham J. dealt only with the appellants' claim for specific performance of the Newmont Agreement. He held that the appellants were not entitled to specific performance. Their Lordships do not find it necessary to refer to all of the questions which were canvassed by Needham J. in the course of his judgment. The question which is critical for the purposes of the present appeal is whether the fact that the court's approval or consent had not been given as required by clause 3.1.2.3 meant that the agreement was incapable of specific performance. In relation to this question Needham J. said that he agreed with the submission of the appellants that Laverton was in breach of the agreement by consenting to the withdrawal of the petition against it. He said that that consent made it impossible for the condition to be satisfied and that whether or not clause 3.1.5 of the agreement expressly obliged Laverton and Nickel Mines to do whatever was reasonably necessary to ensure that the contractual terms were fulfilled, such a term should be implied. However, he held that although the appellants were entitled to treat the breach as a repudiation of the contract and to sue for damages, the court could not grant specific performance, since the condition stated in clause 3.1.2.3 had not been fulfilled.

A preliminary question which is raised by the cases for the respondents is whether it was within the power of the provisional liquidators to enter into the Newmount Agreement. It seems at first sight surprising that a provisional liquidator, whose powers will come to an end immediately either a winding up order is made or the petition for the winding up of the company is dismissed, should have authority to enter into an agreement which would commit the company to contractual obligations which might extend over many years and might require the expenditure by the company of large sums of money. However, their Lordships do not

consider that it would be right to decide whether the provisional liquidators had power to bind the companies by the Newmont Agreement. The respondents, by their pleadings in the action, did not contest that the Newmont Agreement was binding when made; their case, as pleaded, was that the agreement ceased to bind the parties because the approval of the Supreme Court required by clause 3.1.2.3 was not, and could not be, granted. It appears that after all the evidence had been called the question whether the provisional liquidators had power to enter into the agreement was raised for the first time by the learned judge, and that counsel for the respondents then submitted formally that the agreement was beyond power. The extent of the power of the provisional liquidators depended *inter alia* on the meaning and effect of the order giving them liberty to carry on the business of the company. It is possible, although it may be thought unlikely, that if this point had been raised on the pleadings evidence might have been given as to the nature of the business of the companies, and that such evidence might have prevented the respondents from succeeding in their contention that the agreement was beyond the power of the provisional liquidators. In these circumstances, and since the appeal can be decided on other grounds, their Lordships do not determine this question.

This submission made on behalf of the appellants was that the judge was correct in finding that the fact that the court did not give its approval or consent to the agreement was due to a breach of contract by Laverton and Nickel Mines, but that he was wrong in holding that the court could not order specific performance of the Newmont Agreement. Their submission was that in the circumstances the condition stated in clause 3.1.2.3 should be treated as having been fulfilled, or, to put the matter in another way, that Laverton and Nickel Mines, having brought about the failure of the condition, could not insist upon its performance.

The foundation of the appellants' argument, namely that the failure of the condition was due to a breach of contract on the part of Laverton and Nickel Mines, is by no means clearly established. It is doubtful whether the actions of Laverton in refusing to consent to an adjournment of the petition presented by the Attorney-General, and in withdrawing the petition for the winding up of Nickel Mines, constituted a breach of the agreement. If there was a breach, it is doubtful whether it has been shown that it led to the failure of the condition, since the judge might in any case have dismissed the petition of the Attorney-General, or, if he had decided to adjourn the petition for the purpose of considering whether the Newmont Agreement should be approved, might have withheld his approval. In the course of his reasons for judgment the learned judge said that if the evidence remained as it was he would have given approval to the Esso Agreement rather than the Newmont Agreement. It appears, however, that he was referring to the agreement finally made with Esso rather than the draft agreement with Esso which had been prepared at the time when the petition was dismissed, and that the question whether the Newmont Agreement was more or less favourable than the original draft agreement with Esso is an arguable one. Nevertheless, it remains a matter of speculation whether the judge would have given his approval to the Newmont Agreement if the petitions had not been dismissed. If there was a breach, the appellants would seem to have lost no more than a chance that the condition might be fulfilled. However, their Lordships are content to assume, without deciding, that the learned judge was correct in holding that Laverton and Nickel Mines were guilty of a breach of contract which made it impossible for the condition stated in clause 3.1.2.3 to be fulfilled. The question for decision on this appeal is whether, on that assumption, it was possible to grant specific performance of the agreement.

The condition expressed in clause 3.1.2.3 was not a condition precedent to the coming into existence of any contract; that is shown by provisions such as clauses 3.1.4 and 3.1.5. However, it was a condition precedent to the commencement of the joint venture, and to the performance of the obligation under clause 11.11.2 to deliver executed documents of title, which the appellants now seek to have specifically performed. The condition was not one which was imposed solely for the benefit of Laverton and Nickel Mines; its main purpose was the protection of the contributories and creditors of those companies. Moreover, it was not a condition which Laverton and Nickel Mines themselves could fulfil or whose fulfilment they could procure. The condition contemplated that the court should exercise an independent judicial discretion in deciding whether or not the agreement should be approved, and it was clear before the agreement was executed that the judge considered that the agreement would not be carried out unless the court approved it. The nature of the condition was such as to indicate that its fulfilment was an essential condition to the coming into existence of the obligations which the appellants now seek to enforce. Since it was not fulfilled the action for specific performance must fail.

In argument counsel for the appellants cited cases such as *Mackay v. Dick* (1881) 6 App. Cas. 251 in support of the submission that where one party makes it impossible for a condition of the contract to be fulfilled, the condition is to be taken as satisfied. That is true in some cases, but not in all; whether the performance of a condition precedent is excused where a party has prevented its performance must depend on the nature of the condition and the circumstances of the case. In some cases the nature and purposes of the condition will themselves be sufficient to indicate that the parties must have intended that the obligations which are expressed to be dependent on the fulfilment of the condition will come into existence only if the condition is fulfilled, and that it will not be enough that performance of the condition has been prevented by the wrongful act of one of the parties. In the present case, Laverton and Nickel Mines had no power to dispense with performance of the condition which was imposed for the benefit of others, and the Newmont Agreement, on its proper construction, had the effect that the obligations now sought to be enforced did not arise unless the condition was fulfilled. The case is not one in which the parties can be ordered to do whatever they reasonably can to bring about the fulfilment of the condition, for it is common ground that the condition is now impossible of fulfilment.

For these reasons their Lordships consider that the appellants were not entitled to an order for specific performance, and will humbly advise Her Majesty that the appeal should be dismissed with costs.

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In the Privy Council

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DELIVERED BY
SIR HARRY GIBBS

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