*Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes (No 3)*
[2007] NTSC 70

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| PARTIES: | ALCAN (NT) ALUMINA PTY LTD (ACN: 095 409 260) |
| | v |
| | COMMISSIONER OF TAXES |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | LA 12 of 2006 (20608545) |
| DELIVERED: | 14 December 2007 |
| HEARING DATES: | 3-6 September & 7 November 2007 |
| JUDGMENT OF: | MILDREN J |

**CATCHWORDS:**

TAXES AND DUTIES – stamp duties – land valuation – appropriate method of valuation – whether value of "land" includes option to renew – Taxation (Administration) Act (NT) s 4(1)

**Statutes:**
*Interpretation Act*, s 13, s 15(1)
*Law of Property Act 2000*, s 40(1), s 221
*Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968*, s 8, s 12
*Mining Act*, s 173(2A)(2), s 191(9)
*Northern Territory Justice Act 1884* (SA), s 2
*Partition Act 1881* (SA)
*Taxation (Administration) Act* (NT), s 4(1), s 52A(3), s 56N
*Taxation (Administration) Ordinance* (NT), s 4(1)
*Sources of Law Act 1985* (NT)

**Citations:**
***Applied:***
*Abrahams v Federal Commissioner of Taxation* (1945) 70 CLR 23
*Mercantile Credits Ltd v The Shell Company of Australia Limited* (1976) 136 CLR 326
*Spencer v The Commonwealth* (1907) 5 CLR 418
*The Broken Hill Pty Co Ltd v Deron* [1998] NSWSC 59
***Referred to:***
*Associated Minerals Consolidated Ltd & Anor v Wyong Shire Council* (1974) 4 ALR 353
*Garnett v Bradley* (1878) 3 App Cas 944
*Ngatoa & Anor v Ford & Anor* (1990) 19 NSWLR 72
*Nullagine Investments Pty Ltd v The Western Australian Club Incorporated* (1993) 177 CLR 635
*O'Grady v The North Queensland Company Limited* (1990) 2 Qd R 243
*Re Boulos* (1985) 2 Qd R 165
*Re Permanent Trustee Nominees (Canberra) Limited* (1989) 1 Qd R 314
*Rogers v Squire* (1978) 23 ALR 111
*Rose v Hvric* (1963) 108 CLR 353
*Solicitor for the Northern Territory v Moketarinja* (1996) 5 NTLR 206
*South-Eastern Drainage Board (SA) v The Savings Bank of South Australia* (1939) 62 CLR 603
*Williams v Legg* (1993) 29 NSWLR 687

**REPRESENTATION:**

*Counsel:*

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| Appellant: | D Russell QC with D Jackson QC |
| Respondent: | T Slater QC with T Anderson |

*Solicitors:*

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| Appellant: | Clayton Utz |
| Respondent: | Solicitor for the Northern Territory |

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| Judgment category classification: | B |
| Judgment ID Number: | mil07417 |
| Number of pages: | 21 |

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes (No 3)*
[2007] NTSC 70
No. LA 12 of 2006 (20608545)

BETWEEN:

**ALCAN (NT) ALUMINA PTY LTD (ACN: 095 409 260)**
Appellant

AND:

**COMMISSIONER OF TAXES**
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 14 December 2007)

[1] On 15 February 2007 I published my reasons (the February 2007 reasons) in this matter in which I made certain findings and indicated that I would hear parties as to the formal orders required. These were finally settled on 24 April 2007 when, by consent, I ordered that the proceedings be stood over for further evidence and argument as to the value of the land in the Territory to which Gove Alumina Limited (GAL), on 30 January 2007 (the relevant date), was entitled, consistent with those reasons as published.

[2] The facts are as set out in the February 2007 reasons and it is not necessary to repeat them.

[3] Since then, I have heard expert evidence and received expert reports from Professor Stephen Gray, called by the appellant, and from Mr Wayne Lonergan, called by the respondent. There is no issue between the parties as to the correctness of the calculations prepared by the experts. The issue is which set of calculations is relevant.

[4] In order for the appellant to be liable to pay stamp duty on the relevant transactions the value of GAL's 30 per cent interest in the leases, as at 30 January 2001, excluding the value of the options to renew, must exceed 60 per cent of the total value of its non-excluded assets. In the February 2007 reasons I found that the total value of GAL's non-excluded assets for the purposes of s 56N of the Taxation (Administration) Act (NT) ("the Act") was $761 million (at para [98]). Therefore, the cut-off point is $456.6m (the cut-off point). Consequently, if the true value of GAL's interest in the leases is less than $456.6m no tax is payable and the appeal must be allowed. The appellant's case is that this figure is not exceeded.

[5] The respondent's submission is that the true value is $520m. As the amount assessed, on the basis that "land" included the options, was $575m, the respondent concedes that the appeal should be allowed in part and that the Court should vary the objection decision by substituting for it a decision to allow the objection in part and reduce the assessed amount to $520m.

[6] The issue for determination is, therefore, what was the value of GAL's 30 per cent interest in the leases, excluding the value of the options to renew the leases as at 30 January 2001.

**Three possible approaches**

[7] It is not in dispute that the appropriate test is "… the price which a willing but not anxious vendor could reasonably expect to obtain and a hypothetical willing but not anxious purchaser could reasonably expect to have to pay for the (land) if the vendor and the purchaser had got together and agreed on a price in friendly negotiations…" (per Williams J in *Abrahams v Federal Commissioner of Taxation* (1945) 70 CLR 23 at 29; see also *Spencer v The Commonwealth* (1907) 5 CLR 418 at 432; 441. It is also common ground amongst the expert witnesses that the only sensible way to arrive at a valuation in the present circumstances is to assess it by reference to the present net value of future cash flows calculated as at the relevant date. The main dispute between the experts – and the parties – is, to adopt Mr Lonergan's description, in Ext R4 at p 3, 'the manner in which we allocate the total enterprise value to '"land" and non land assets' (although this is not the only area of disagreement).

[8] The way the case was argued gave rise to three possible scenarios:

**(1) Professor Gray's Approach**

Put simply, Professor Gray's calculation is based upon the "top-down" method, i.e. by deducting from the total value of the non-

excluded property ($761m) the sum of the value of the chattels, working capital, intellectual property and the value of the right to renew the leases to arrive at what is left, i.e. the value of the land. An essential aspect of this method of valuation is an assumption that the options will in fact be exercised and that, therefore, capital expenditure will continue to be made and profits generated as if the owners of the business continued to exploit the leases until the resource was exhausted or the new term, created by the exercise of the option, came to an end.

**(2) Mr Lonergan's Approach**

Basically, Mr Lonergan's valuation ignored the rights to renew the leases. His approach was to assess the cash flows that could be generated from exploiting the leases (ignoring the right to renew) based on their expected cash flows which they could expect to generate, taking into account all the rights and privileges available to them as an owner of the assets. These cash flows included the amounts the primary leaseholder could obtain by selling the fixtures, chattels and intellectual property on an arms' length basis to another party in 2010-2011 and from realising the working capital (see Ext R4, p 2) (this is referred to as the "removal right"). One obvious and very stark difference in this approach is that it assumes that the owner of "the land" has no option to exercise in 2011, but that the

other joint tenant would exercise the option and carry on the business.

**(3) The Third Approach**

The assumption made in this scenario is that at the end of the existing term there would not be any further mining activity and the hypothetical vendor and purchaser would assume, in 2001 that, in 2011, the purchaser would terminate operations on the leases, leave the fixtures to the landlord and not seek to recover any part of their value by severance or by sale to the landlord.

**Construction of Taxation (Administration) Act**

[9] In order to decide which approach is correct, it is necessary to consider the purpose of the definition of "lease" contained in s 4(1) of the Act. The definition provides:

> ""lease" includes a lease granted under an Act, a sub-lease, and an agreement for a lease or sub-lease, but does not include –
>
> (a) – not relevant
>
> (b) – not relevant
>
> (c) an option to renew a lease;"

[10] In the February 2007 reasons, I concluded that an option to renew a lease is ordinarily an interest in land, but that the definition of 'lease' had the effect that an option to renew a lease is not "land" as defined by s 4(1) of the Act:

see paras [61] – [62]. The evident purpose of the exclusion contained in subparagraph (c) from the definition of 'lease' is to exempt for taxation purposes the value of an option to renew a lease.

[11] The definition of 'lease' is in the same form at the relevant date as it was when the Taxation (Administration) Ordinance (as it was then called) was first enacted in 1978. There is nothing in the Minister's second reading speech or in the debates of the Legislative Assembly to indicate why options to renew were to be so excluded. However, I think the most probable reason was that, in many if not most, cases, it would not be possible to know in advance whether the option was ever likely to be exercised. Ad valorem duty was at that time payable on a transfer or conveyance of lease; so it might be supposed that if and when an option is exercised a specifically enforceable agreement for a further term in the land is created (*Mercantile Credits Ltd v The Shell Company of Australia Limited* (1976) 136 CLR 326 at 337-338, 344-345) and consequently ad valorem duty would be paid on the new lease at that time as a "conveyance", which as then defined, meant "a lease, a transfer or assignment of a lease… etc". Thus, the intention of the exclusion was also to prevent double taxation.

[12] As at the relevant date, the definition of "dutiable property" included an option to purchase dutiable property or an interest in dutiable property and 'dutiable property' included "land". Stamp duty was payable on a 'conveyance of dutiable property' which included, by virtue of s 4(1) of the Act a transfer or assignment (or an agreement to transfer or assign)

"…whereby dutiable property… is transferred or assigned to… a person, but does not include the grant of a lease". Section 52A(3) of the Act enabled the Commissioner to treat two or more instruments as one transaction, the purpose being to avoid double taxation.

[13] There is nothing in the Act as at the relevant date to indicate that the true nature of the transaction can be ignored and that, for taxation purposes, a valuation of the "land" as defined meant that, for the purposes of arriving at the value of the land, the options were to be entirely ignored as if they did not exist; the definition of "land" meant no more than the value of the option was not be taken into account.

[14] In the February 2007 reasons, in para [62], I said:

> "The purpose, it seems to me, of these definitions is to exclude from what is "land" those things which are excluded from the definition of "lease" which, relevantly to this case, means that the options to renew are not part of the lease and must be ignored."

[15] This may have given rise to some misunderstanding. I did not say, nor did I mean to convey by this, that the assumption must be made that there are no options at all; only that the options are not "land"; but that does not mean that the options do not have a value: see para [63] of the February 2007 reasons. Indeed, Mr Slater QC in para (5) of his written submissions accepted that proposition.

[16] If this is correct, it follows that there is no justification for an assumption that the lessees (including GAL) would not exercise their options. On the

contrary, the evidence is all one-way that the options will be exercised in 2011. Both Mr Lonergan and Professor Gray proceeded on the assumption that there was a 100 per cent probability that the options would be exercised. In my opinion, the facts support this conclusion, for the simple reason that the bauxite reserves, which are extremely valuable, will not be exhausted until 2035 and mining and refinery operations will remain profitable in the future. It would be economic irrationality to do otherwise. This was also accepted by Mr Slater QC in his written submissions (footnote 18). Neither party sought to take into account my findings at para [78] of the February 2007 reasons. I assume that the reason for this is that the problem there raised is not in issue.

[17] Consequently, there is no basis for an assumption that mining operations will cease in 2011, or that the appellant's interests will come to an end such that the appellant will seek to recoup from a hypothetical buyer, or anyone else, the value of the fixtures, etc in 2011.

[18] In this case, I accept that the "top-down" approach to the valuation is the fairest and best method of valuation. For the reasons given above, I accept as correct the approach of Professor Gray and reject the criticisms made of his approach by Mr Lonergan. I also reject both the approach of Mr Lonergan and what I have described in para [8](3) above as the "third approach".

[19] Counsel for the respondent's argument was that the valuation should be based on there being a notional purchaser of the land assets only. This is contrary to the facts. The appellant, when it acquired the shares in GAL effectively acquired a 30 per cent interest in GAL's interests in the leases and the options (as well as other non-land assets). There was not in contemplation in 2001 a purchase of only the "land" assets and there was never a buyer of the leases expiring in 2011 without the options. I do not accept the respondent's premise that a hypothetical buyer of GAL's interests in the leases only is necessary.

[20] The appellant, in its written reply to the respondent's written submissions states:

> "7. On the one hand, the respondent accepts (and it is agreed between the parties) that the Act does not require that it be assumed that the rights to renew do not exist. It would be erroneous to value GAL's assets on that assumption. To this point, the respondent and the appellant agree that what is to be valued are the assets that do exist in fact, including the leases and the options. Separating their values is the question at hand. It is also common ground between the parties that the options will be exercised and would have been treated by any hypothetical negotiating parties on that assumption at 2001.
>
> 8. However, the respondent then refuses to accept the consequences of accepting that the options do exist and that they will be exercised for the purpose of assessing the value of the leases. Upon exercise of the options, the option holder has vested in it the executory right to the renewed term of the leases. As such, the option holder is not in the position where it needs to purchase any removal right in order to enjoy the rights of occupation of the leases including the bauxite treatment plant or refinery or other fixtures as from May 2011. The renewal or extension of the term of the lease necessarily extinguishes any

removal right which is dependent upon the term of the lease having expired.

9. Inconsistently with the conclusion, the respondent contends that its hypothetical "successor occupier" could be the option holder. This point was expressly raised in the appellant's submissions and is not dealt with in the respondent's submissions in response at all.

10. Once it is recognised that the "successor occupier" who might pay any sum of money to acquire the removal right will not be the option holder, it is highlighted that the respondent's hypothetical transaction of sale or acquisition of the removal right can only take place where it is assumed that there are no options or it is assumed that the options are not exercised. The respondent's approach on this point denies the existence of the option which as a matter of fact will be exercised. The only model of transaction, as at 2001, which fits both the existence of the options and the fact that the options will be exercised, is Professor Gray's model. It assumes that the parties would participate in the Gove Joint Venture ("GJV"), and generally behave, as they always intended – and this supports the forecasted cash flow series that reconciles with the transaction price. The appellant's valuation framework simply involves disaggregating the actual transaction price (as representing a 30% interest in the assets as used in the GJV) into that which was paid in relation to the primary leases and that which was paid in relation to the options to renew and other non-land assets being chattels, working capital and IP.

11. So great is the respondent's confusion about this point that it completely inverts the appellant's submissions about it. The appellant's case is clear: first, it contends that (as at 2001) <u>because</u> the options exist <u>and</u> because they will be exercised, the removal right for which the respondent contends as a valuable asset will never come into existence and because of that there will be no negotiation over it in 2011 or 2001; secondly, the hypothesis required for any valuable removal right is that there is no option which will be exercised, and that means that the respondent's hypothetical "successor occupier" is necessarily a party who will take a fresh right to occupy and operate the refinery upon the expiration of the leases in 2011 (which is why the appellant cross-examined Mr Lonergan on the footing that to

secure a further term would require negotiation and involve cost).

12. It is not the appellant's but respondent's position on this critical point which is self-contradictory. On the one hand, the respondent accepts that the valuation should be carried out on the footing that the options do exist and that they will be exercised. On the other hand, the respondent does no deal with the inconsistency between that position and any suggested sale or acquisition at 2011 of the removal right. The appellant submits that the effect of the inconsistency is to destroy utterly the respondent's contention as to a valuable removal right. Nowhere does the respondent deal with that question."

[21] Mr Slater QC's answer to this is that the appellant has posed the wrong question. The true question, as he puts it, is what would a willing purchaser pay for, and what would a willing seller expect to receive (in terms of *Abraham's* case) ("the price") for the land only without the options. In my opinion that is not the correct question. The correct question is what is the price for the land ***with*** the options and how much of that price should be attributed to the land and how much to the options. I accept the appellant's submission as set out in paragraph [20] above as correct and reject the respondent's contention. In addition, Professor Gray's approach is simple. It does not require difficult and complex assumptions to be made as is necessary in Mr Lonergan's approach. A simple solution is more likely to be right than a complex one (the principle of Ockham's razor – see for example *The Broken Hill Pty Co Ltd v Deron* [1998] NSWSC 59.

[22] It is not in dispute that if Professor Gray's valuation is correct, the value of the "land" does not reach the cut-off point and that therefore GAL is not a

"landholder" for the purposes of s 56N and the appeal must be allowed and the assessment set aside.

**Other issues**

[23] In view of the conclusion I have reached so far, it is not necessary for me to resolve the other issues between the parties. However, in case I am wrong and in view of the lengthy submissions made by the parties, I think it is desirable that I deal with them.

[24] The appellant submitted a number of what I called "cascading propositions", all of which must be resolved in favour of the respondent if the assessment is to stand. The first is what is called "Case 1" in the respondent's submissions. This is what I have called "the third approach" in para [8](3) above. Mr Slater QC concedes that on this basis, there is no contest that the value of the "land" is between $388m and $401m. Both figures are below the cut-off point. If this scenario is correct, GAL is not a land-owner for s 56N purposes and that has the result that the appeal must wholly succeed. Neither party supported "Case 1", but for different reasons. In my opinion "Case 1" is incorrect for the same reasons as I have rejected Mr Lonergan's valuation. However, if these reasons are incorrect, "Case 1" is more likely to be correct than "Case 2" (Mr Lonergan's approach) because the only assumption which needs to be made is that the hypothetical purchaser of the land would not attempt to recover any part of the value of the fixtures, for the reasons discussed below.

[25] The second of the appellant's cascading propositions is that a removal right is not legally possible, that this means that Mr Lonergan's valuation must be adjusted to remove that consideration and the effect of doing so is to reduce the valuation for land to an amount below the cut-off point.

[26] The appellant submits that the possibility of a removal right is denied both by the terms of the Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968 (the 1968 Gove Ordinance) and by the conditions of Special Mining Lease 11 (SML 11) and the Gove Joint Venture Agreement (GJVA).

[27] Section 8 of the 1968 Gove Ordinance provides:

> "No lease, sub-lease, license, easement or other title granted or assigned under or pursuant to the Agreement shall be –
>
> (a) subject or capable of partition whether by agreement or by decree or order of any court of competent jurisdiction or otherwise; or
>
> (b) subject to the making of an order for sale under the Partition Act 1881, of the State of South Australia in its application to the Territory."

[28] Section 12 of the 1968 Gove Ordinance provides:

> "This Ordinance prevails over any inconsistent statute or rule of practice of law or equity."

[29] The Partition Act 1881 (SA) was in force in the Northern Territory until its repeal by s 221 of the Law of Property Act 2000, which commenced on 1 December 2000.

[30] Section 40(1) of the Law of Property Act 2000 provides:

> "(1) Despite any other Act… if property… is held in co-ownership, the Court may, on the application of any of the co-owners, appoint trustees of the property and vest the property in the trustees… to be held by them on a statutory trust for sale…"

[31] Section 173(2A)(a) of the Mining Act provides:

> "On the commencement of the Law of Property Act 2000 –
>
> (a) that Act applies to estates, interests and any other rights in or in respect of land granted, created or taking effect under this Act, but if there is an inconsistency between the provisions of that Act and a specific provision of this Act, this Act prevails."

[32] In the February 2007 reasons (at para [86]) I held that s 191(9) of the Mining Act continued SML 11 as if the Mining Act had not come into operation. Consequently, s 173(2A)(a) of the Mining Act does not apply in this case.

[33] A necessary step in Mr Russell's argument is that the reference to the Partition Act 1881 in s 8 of the Gove Ordinance must now be read as a reference to s 40 of the Law of Property Act 2000 by virtue of s 13 and s 15(1) of the Interpretation Act. Mr Slater QC submitted that s 15(1) did not apply because s 40 of the Law of Property Act did not re-enact any of the provisions of the Partition Act. However, I do not accept that submission because s 15(1) by its express terms refers to "re-enacts, with or without modification" of the provisions of the former Act. I accept that there are

differences between the provisions, but whether those differences are such as to lead to the result contended by either party is doubtful and would require close analysis of the legislative provisions and the effect of statutory alteration to the right to partition by the Planning Act, a consideration of the correctness of *Rogers v Squire* (1978) 23 ALR 111 as to the effect of the Northern Territory Justice Act 1884 (SA) s 2 and the Sources of Law Act 1985 (NT), as well as other matters which have not been argued before me.

[34] Mr Russell QC, for the appellant, submitted that the words "despite any other Act" in s 40(1) of the Law of Property Act were general words only and insufficient to effect a repeal of s 8 and s 12 of the 1968 Gove Ordinance. It is clear that s 12 of the 1968 Gove Ordinance does not by itself protect it from an implied repeal by a later Act: *South-Eastern Drainage Board (SA) v The Savings Bank of South Australia* (1939) 62 CLR 603; *Rose v Hvric* (1963) 108 CLR 353.

[35] However, as was explained by Dixon J in *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (supra) at 625, in interpreting any later enactment which might otherwise be thought to be inconsistent with the earlier enactment, the Court should treat general expressions as not overriding a specific provision unless the later Act contains clear language to show that it is intended that the later Act will apply. Although his Honour did not specifically say so, I understand him to be referring to the principle of construction that a general provision does not impliedly repeal a specific provision: generalia specialibus non derogant. For that principle to apply,

s 8 of the 1968 Gove Ordinance must be irreconcilable with s 40 of the Law of Property Act: see *Solicitor for the Northern Territory v Moketarinja* (1996) 5 NTLR 206 at 209. In my opinion, the two provisions are irreconcilable. The intention of the former Act was to preclude an order for partition or for sale whereas the later Act empowers the Court to do the opposite and it is difficult to see how the two provisions can operate together. Clearly s 8 of the 1968 Gove Ordinance is a special provision designed to effect only the leases granted pursuant to the Agreement set out in the Schedule to the Ordinance ("the Gove Agreement"), i.e. the leases that are the subject of this action, whereas s 40 of the Law of Property Act is of a general kind applying to all property other than chattels held in co-ownership.

[36] Nevertheless, the question remains whether the intention of the Legislature was to abrogate s 8 of the 1968 Gove Ordinance. Section 40(1) of the Law of Property Act begins with the words "despite any other Act". Does this mean that the legislature intended to override a special provision such as was included in the Gove Ordinance? In my opinion, it is arguable that the answer to this question is 'no' for two reasons. First, the legislature specifically provided, in s 173(2A)(a) of the Mining Act, that to the extent of inconsistency between the Mining Act and the Law of Property Act, the former prevails. This is an indication that the words "despite any other Act" were not intended to have a completely overriding effect in the case of special legislation. Secondly, the 1968 Gove Ordinance is, in substance and

effect, a private legislative bargain for the benefit of the parties to the Gove Agreement, which should not be disturbed by later general legislation: *Garnett v Bradley* (1878) 3 App Cas 944 at 968 per Lord Blackburn; *Associated Minerals Consolidated Ltd & Anor v Wyong Shire Council* (1974) 4 ALR 353 at 359 per Lord Wilberforce. Consequently, in my opinion, it is arguable that a "removal right" is not legally possible.

[37] The third proposition was that even if the Court could make an order for sale under s 40(1) it would not, in the exercise of its discretion, do so. The appellant submits that the Court will not make such an order in the face of the express covenants contained in the GJVA and which could expose the trustees for sale to forfeiture for breaching the conditions of the lease.

[38] The relevant provision of the GJVA is cl 12.4:

> "Neither participant shall without the prior consent of the other Participant partition, waive, release, surrender or forfeit or permit to be partitioned, waived, released, surrendered or forfeited the whole or any part of its interest in the Gove Rights, seek to terminate this Agreement, or make or attempt to make any application to any Court or otherwise to have the joint property or any part thereof partitioned or vested in a trustee for sale."

[39] There are also other provisions of relevance: cl 12.1, which prevents the disposition of a participant's interest in the joint property without the consent of the other participants; cl 12.7, which gives a right of first refusal in the event that a participant wishes to sell its interest; and cl 2.5, which also specifically prevents partition and/or sale of the Gove Rights (which are defined to include SML 11). Further, the GJVA requires certain decisions to

be made unanimously by a Board (cl 8.6) which includes any decision to remove the Bauxite Treatment Plant (cl 8.6(a)(i)) or to place in jeopardy the Gove Agreement, the Special Mineral Lease or the Other Property Rights (cl 8.6(g)).

[40] So far as the lease conditions are concerned, SML 11 provides by cl 6(k) that the provisions of the 1968 Gove Ordinance apply as if those provisions were incorporated into the lease and, so it was put, that this included the provisions of s 8. Further, it was pointed out that cl 5(6) of the Gove Agreement required Nabalco to maintain the bauxite treatment plant in operative condition, so that removal of the plant was a breach of that agreement.

[41] I was referred to a number of authorities, both in England and Australia, where Courts have held that it will not appoint trustees for sale in the face of a covenant which forbids such an application, or where the effect of the making of the order would be to sanction a breach of contract by the applicant, the principle being that he who seeks equity must do equity: see, for example: *Re Permanent Trustee Nominees (Canberra) Limited* (1989) 1 Qd R 314 at 317; 321; 322-328; *O'Grady v The North Queensland Company Limited* (1990) 2 Qd R 243 at 249; *Williams v Legg* (1993) 29 NSWLR 687 at 693-694; *Re Boulos* (1985) 2 Qd R 165 at 167; *Ngatoa & Anor v Ford & Anor* (1990) 19 NSWLR 72 at 76-77; *Nullagine Investments Pty Ltd v The Western Australian Club Incorporated* (1993) 177 CLR 635. I think that in the light of these authorities it is very doubtful whether a court

would make an order for the appointment of trustees for sale under s 40(1) of the Law of Property Act.

[42] The consequence of this line of argument is that I consider that a hypothetical purchaser would either not take the risk that a "removal right" existed and therefore negotiate with the seller on the basis that the mine would be operated to its maximum capacity until 2011 and the fixtures would be left to the landlord (the third approach) or discount the value attributed to the right to take into account the risks involved in the question being answered unfavourably to the buyer.

[43] It was submitted that Mr Lonergan's calculations do not fully take into consideration these risks and that the figure of $152m included in the calculation for the value of the fixtures should be further discounted. Assuming a discount of 50 per cent, the net result is the value of the "land" is reduced to $456m which is below the cut-off point by $0.6m. However, the appellant argued for a lower figure of $244m for the top of the bargaining zone for the fixtures, less 50 per cent equals $112m less 50 per cent is $56m which would reduce the figure below the cut-off point even further.

[44] In my opinion, the attempt to bring into the valuation a figure of half the value of the cash flows past 2011 as the starting point for the valuation of the fixtures is unsound because it is bringing into account earnings which are attributable to the period of the option once it is exercised. As those

earnings are not "land", no account can be taken of them. In Professor Gray's report (Ext A9) he says at p 13:

> "… my view is that it is inappropriate to move a portion of the post-2011 cash flows into the pre-2011 period and assume that they are properly characterised as land."

[45] I entirely agree. Whatever price is agreed upon in 2001 will be for all of the seller's rights, interests and obligations and this will include the right to renew the leases.

[46] However this may be, even if it is appropriate to bring into the calculation a figure for the value of the fixtures on the basis of a threat to seek an order for the appointment of trustees for sale, I agree with the argument of counsel for the appellant that it is not credible that any party would attribute $150m in value to the sale of a right that does not have a secure legal basis. Mr Lonergan plainly did not take this into account. His report gives no consideration to the terms of the GJVA and produces what, in my opinion, is the unreasonable result that the value of the "land" for 10 years is in the order of $600m, but the value of the option in only about $150m.

**Conclusion**

[47] Some other points were argued, concerning interest rates and the value of intellectual property, but in the light of the conclusions I have reached it is not strictly necessary to decide them. The interest rate chosen by Professor Gray is appropriate for the method of valuation he chose. Likewise, the interest rate chosen by Mr Lonergan is appropriate for the way he valued

“the land”. Nothing turns on this. As to the intellectual property, I consider that the IP had a value. In my opinion, the value ultimately arrived at by Mr Lonergan of $7m is to be preferred. However that does not affect the result. The appeal must be allowed and the assessment set aside. I will hear the parties as to costs.