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High Court of Australia

United Dominions Corporation Ltd v Brian Pty Ltd [1985] HCA 49; (1985) 157 CLR 1 (1 August 1985)

HIGH COURT OF AUSTRALIA

UNITED DOMINIONS CORPORATION LTD. v. BRIAN PTY. LTD [1985] HCA 49; (1985) 157 CLR 1

Partnership

High Court of Australia

Gibbs C.J.(1), Mason(2), Brennan(2), Deane(2) and Dawson(3) JJ.

CATCHWORDS

Partnership - Fiduciary relationship - Proposed joint venture agreement - Duties of intending co-adventurers - "Collateralization clause" in mortgage charging joint venture land with any debt owed by one co-adventurer to mortgagee - Other co-adventurer unaware of clause - Effect.

HEARING

1984, November 13; 1985, August 1. 1:8:1985

APPEAL from the Supreme Court of New South Wales.

DECISION

GIBBS C.J.: I have had the advantage of reading the reasons for judgment prepared by Mason, Brennan and Deane JJ. and am in general agreement with them.

2. The critical question in the present case was whether the appellant, United Dominions Corporation Limited ("UDC"), stood in a fiduciary relationship to the first respondent, Brian Pty. Limited ("Brian") on 24 October 1973, the date on which the second respondent, Security Projects Limited ("SPL"), gave to UDC a mortgage which contained the "collateralisation clause" - a clause by which the land was charged "with all amounts from time to time advanced by the Mortgagee to the Mortgagor on any account whatsoever or otherwise owing by the Mortgagor to the Mortgagee and whether advanced to the Mortgagor solely or jointly with any other person and whether for money lent or paid on account of the Mortgagor or for any sum or sums a liability to pay which may have been incurred by the Mortgagee on behalf of the Mortgagor and whether present future or contingent ... ". The effect of the clause was to charge the land with indebtedness incurred by SPL in transactions with which Brian had nothing whatever to do.

3. The agreement between SPL, UDC, Brian and others, when executed on 23 July 1974, described the parties as engaging in a "joint venture", but that term was used in the not uncommon sense of a partnership for one particular transaction, and the agreement was plainly a partnership agreement.

4. In Lindley on Partnership, 15th ed. (1984), at p.480, it is said that the "obligation to perfect fairness and good faith" is not confined to persons who actually are partners, but "extends to persons negotiating for a partnership, but between whom no partnership as yet exists ... ". This statement, which also appeared in earlier editions, is criticized in Higgins and Fletcher, The Law of Partnership in Australia and New Zealand, 4th ed. (1981), at p.50, on the ground that it is not supported by the authorities cited. The decision of Lord Lyndhurst L.C. in Fawcett v. Whitehouse [1829] EngR 859; (1829) 1 Russ & M. 132 (39 ER 51) is 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. Hichens v. Congreve [1829] EngR 100; (1828) 1 Russ & M. 150 (39 ER 58) is a similar case. Other authorities, cited by Lindley, concerned promoters of companies, but

there is an analogy between the position of company promoters and that of persons who invite others to join in a partnership. The principle was stated generally in Directors, etc. of Central Railway Co. of Venezuela v. Kisch (1867) LR 2 HL 99, at p 113:

"It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterize their published statements."

although not cited by Lindley, appears to support his proposition; Lord Atkin said, at p 227:

> "Ordinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The principle of caveat emptor applies outside contracts of sale. There are certain contracts expressed by the law to be contracts of the utmost good faith, where material facts must be disclosed; if not, the contract is voidable. Apart from special fiduciary relationships, contracts for partnership and contracts of insurance are the leading instances. In such cases the duty does not arise out of contract; the duty of a person

> proposing an insurance arises before a contract is made, so of an intending partner." (Italics supplied)

I do not understand this passage to mean that the only remedy for a failure by an intending partner to disclose a material fact is rescission. The passage does suggest that an intending partner, like a partner, owes a duty of the utmost good faith.

5. It is clear enough that SPL, which was acting on behalf of Brian and others in executing the mortgage, stood in a fiduciary relationship to Brian. For the purpose of considering whether UDC also stood in a fiduciary relationship, it is unnecessary to decide whether persons negotiating for a partnership always stand in a fiduciary relationship; I have no doubt that they may sometimes do so. The parties in the present case had, on 24 October 1973, proceeded beyond the stage of mere negotiation. The situation was accurately described as follows by Samuels J.A. in his judgment in the Court of Appeal:

> "Both Brian and UDC had undertaken to accept an interest in each development. UDC had made payments on account of its share (as equity participant) of the cost of each venture; and Brian had paid its share of the cost of the hotel project. SPL had embarked upon its duties as manager, and was expending moneys to advance this business, with the knowledge and approval of both Brian ... and UDC. Brian knew that SPL would mortgage the lands in order to secure the necessary funds from UDC; and assumed by the 24th October 1973 that a mortgage had been given to UDC for that purpose. UDC undoubtedly knew that Brian was involved."

Samuels J.A. went on to point out that the inference was inescapable that all the parties regarded the expenditure being made and the other steps being taken as consistent with the terms of the formal agreement they intended to execute, and therefore done in furtherance of the joint venture. When the mortgage was given UDC was fully aware that the land registered in the name of SPL was held in circumstances which required SPL to account to the intended partners. The evidence shows also that before that time UDC had become aware that "a joint venture agreement ... in identical terms and conditions as the Brookfield project" was in the course of preparation - SPL, UDC and others, not including Brian, were parties to an agreement made on 28 March 1973 regarding a similar venture at Brookfield. The Brookfield agreement provided that all moneys (other than contributions payable under par.5) required for the purposes of the joint venture would be borrowed, "upon such terms ... as the parties shall unanimously agree" and that the parties authorized SPL to execute any mortgage "which the parties shall unanimously agree should be given or (entered into) in respect of the (joint venture)". The same provisions appeared in the agreement when it was executed on 23 July 1974. UDC was not a financier dealing at arm's length with SPL and entitled to leave it to SPL to disclose the terms of the mortgage to the persons, including Brian, for whom SPL was acting, but was in a relationship with those persons which, if not one of partnership, was one between persons who, intending to become partners, had already embarked on the partnership venture, of which the execution of the mortgage was an incident. Moreover, UDC knew that it would be contrary to the understanding between the parties, later to be elevated into a formal agreement, if SPL were to grant the mortgage on terms to which Brian did not agree and for purposes unconnected with the joint venture. There was no reason to believe that Brian had agreed or would agree to the inclusion of the collateralisation clause, which was so obviously adverse to its interests. Although it is not easy to attempt to define the circumstances in which a fiduciary relationship will be found to exist (see the discussion in Hospital Products Ltd. v. U.S. Surgical Corporation [1984] HCA 64; (1984) 58 ALJR 587, at p 596 et seq.; [1984] HCA 64; 55 ALR 417, at p 431 et seq.) there was, in the circumstances of the present case, a relationship between UDC 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.

6. Once it is held that UDC was in a fiduciary relationship to Brian, there can be no doubt that UDC was in breach of its fiduciary obligations. It obtained for itself an advantage at the expense of and without the knowledge or consent of Brian, and is therefore bound to account to Brian for the improper advantage which it obtained. It is not to the point that it would have been possible for Brian or its advisers to have discovered that the mortgage contained the "collateralisation clause" if they had made the necessary investigations.

7. I agree that the appeal should be dismissed.

MASON, BRENNAN, DEANE JJ.: This is an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales (Hutley, Samuels and Mahoney JJ.A.) upholding an appeal by the respondent Brian Pty. Limited ("Brian") from a judgment of Waddell J. dismissing an action brought by Brian in the Equity Division of the Supreme Court. In the action, Brian sought to recover from the present appellant ("UDC") its "share" of the surplus of a "joint venture" in which Brian, UDC and others had been participants. The other companies and persons named as respondents to the appeal are seen as interested parties because they were either participants in the joint venture or claim some interest in its proceeds as the result of assignment. The somewhat complicated facts are set out at length in the judgment of Waddell J. at first instance and in the judgments of Hutley J.A. and Samuels J.A. in the Court of Appeal. It suffices, for the purposes of the present appeal, to state them in summary form.

2. During 1973, the respondent Security Projects Limited ("SPL") was engaged in promoting two distinct but related "joint ventures" involving the development of land which it was purchasing in the Brisbane suburb of Redcliffe. One proposed joint venture, which was intended ultimately to lead to the transfer of part of the land to a company in which the participants would be shareholders, involved the development of that part of the land (not then defined) as an hotel. The other involved the development of the residue of the land as a shopping centre. By September 1973, the participants in each of the proposed ventures had been settled. Brian was to have a 20% share in the hotel venture and a 5% share in the shopping centre venture. SPL was

to be the main participant in each proposed joint venture. UDC was also to be a participant in both. Draft joint venture agreements had been circulated among the proposed participants but not finalized and it was not until July 1974 that a formal agreement in respect of the shopping centre venture was executed. It was anticipated that approximately 90% of the finance for each project would be provided by borrowings from UDC with the remainder being contributed by the proposed participants according to their respective shares. The prospective parties to the hotel project had, by September 1973, all made payments to SPL as the project manager: Brian had contributed $43,503.00 (of which $6,503.00 was later refunded as an overpayment) in August 1973. The prospective participants in the shopping centre project, other than Brian which had not been accepted as a participant until August 1973, had also made financial contributions: Brian's first payment was made in November 1973 when it made a payment of $25,585.00. On 24 October 1973, SPL mortgaged the Redcliffe land as security for borrowings from UDC for the proposed joint ventures. Two further mortgages, each of a subsequently acquired adjoining parcel, were executed by SPL in UDC's favour in November 1973 and September 1974 respectively.

3. In August 1974, the hotel project was abandoned. Thereafter, the whole of the land was devoted to the shopping centre project. The "shares" of the various "partners" were "rationalized" with the result that the shares in the ongoing shopping centre project were: SPL 58.4%, UDC 10%, Brian 9.2% and others 22.4%. In due course, the shopping centre was built and the complex was sold at a substantial profit. Brian has, however, received neither repayment of the money it contributed to the project (more than $88,000) nor payment of its "share" of the profit. UDC claims to be entitled to retain the whole of the proceeds of sale by reason of what has been described as a "collateralisation clause" which, unknown to Brian, was contained in each of the three mortgages executed by SPL in favour of UDC to secure borrowings for the joint venture. According to their terms, the effect of the "collateralisation clauses" was that the whole of the relevant land was mortgaged to secure, in addition to borrowings made under the mortgages for the purposes of the joint venture, "all amounts from time to time advanced by (UDC) to (SPL) on any account whatsoever or otherwise owing by (SPL) to (UDC) and whether advanced to (SPL) solely or jointly with any other person". UDC claims that, under the clauses, it is entitled to retain the surplus proceeds of the sale of the shopping centre complex and to apply them in reduction of amounts owing to it by reason of borrowings made by SPL and others in relation to two other projects with which Brian had no connection whatsoever.

4. The ground upon which UDC failed in the Court of Appeal appears not to have been placed in the forefront of the case made against it at the trial and, no doubt for that reason, was not the subject of detailed discussion by Waddell J. in his judgment at first instance. Simply stated, that ground is that the three mortgages upon which UDC seeks to rely were, to the extent that they would authorize UDC to retain Brian's share of the surplus of the "joint venture", given by SPL and accepted by UDC in breach of the fiduciary duty which each owed to Brian. The conclusion to which we have come is that UDC's appeal to this Court must fail on that same ground. That being so, it is unnecessary that we consider or determine any of the other questions, including questions of equitable fraud and equitable estoppel, which were raised in the course of argument in this Court.

5. The term "joint venture" is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill. Such a joint venture (or, under Scots' law, "adventure") will often be a partnership. The term is, however, apposite to refer to a joint undertaking or activity carried out through a medium other than a partnership: such as a company, a trust, an agency or joint ownership. The borderline between what can properly be described as a "joint venture" and what should more properly be seen as no more than a simple contractual relationship may on occasion be blurred. Thus, where one party contributes only money or other property, it may sometimes be difficult to determine whether a relationship is a joint venture in which both parties are entitled to a share of profits or a simple contract of loan or a lease under which the interest or rent payable to the party providing the money or property is determined by

reference to the profits made by the other. 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 (but cf. per Cardozo C.J., Meinhard v. Salmon (1928) 164 NE 545, at p 546). 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 of the obligations which the par# ties to it have undertaken. If the joint venture takes the form of a partnership, the fact that it is confined to one joint undertaking as distinct from being a continuing rela# tionship will not prevent the relationship between the joint venturers from being a fiduciary one. In such a case, the joint venturers will be under fiduciary duties to one another, including fiduciary 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 (see, generally, Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd. [1929] HCA 24; (1929) 42 CLR 384, at pp 407-409).

6. In the present case, it is apparent that the relationship between the participants in the shopping centre venture was a fiduciary one at least from the time when the formal agreement was executed. Under the agreement, 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 upon trust. The participants indemnified the managing participant (SPL) against losses. The policy of the joint enterprise was ultimately a matter for joint decision. Apart from the absence of any reference in the agreement to "partnership" or "partners", the relationship between the participants under the agreement exhibited all the indicia of, and plainly was, a partnership (cf. Canny Gabriel Castle Jackson Advertising Pty. Ltd. v. Volume Sales (Finance) Pty. Ltd. [1974] HCA 22; (1974) 131 CLR 321, at pp 326-327). It is true that UDC came to the joint venture in the role of prospective financier and, in so far as borrowings from it by the SPL group on behalf of the partnership were concerned, occupied the role of lender as well as that of partner. In so far as the property which was the subject of the joint venture was concerned however, the fact that UDC was a lender to SPL on behalf of the partnership did not absolve it from the ordinary fiduciary obligations of a partner.

7. It was submitted on behalf of UDC that no fiduciary relationship existed and no fiduciary duties arose between the prospective participants in the joint venture until the joint venture agreement was actually executed in July 1974. To the extent that that submission involves a general legal proposition that the relationship between prospective partners or joint venturers cannot be a fiduciary one until a formal agreement is executed, it is clearly wrong. A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them. In particular, a fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of the partnership business or venture before the precise terms of any partnership agreement have been settled. Indeed, in such circumstances, the mutual confidence and trust which underlie most consensual fiduciary relationships are likely to be more readily apparent than in the case where mutual rights and obligations have been expressly defined in some formal agreement. Likewise, the relationship between prospective partners or participants in a proposed partnership to carry out a single joint undertaking or endeavour will ordinarily be fiduciary if the prospective partners have reached an informal arrangement to assume such a relationship and have proceeded to take steps involved in its establishment or implementation.

8. In the present case, the relationship between UDC, Brian and SPL had plainly assumed a fiduciary character prior to 24 October 1973 when SPL gave the first of the mortgages to UDC. By that time, the arrangements between the prospective joint venturers had passed far beyond the stage of mere negotiation. Each had, by then, agreed to be, and been accepted as, a participant in each of the proposed joint ventures, if both or either of them went ahead. Each had made or agreed to make financial contributions towards the costs of the project or projects in which it or he had agreed to participate. SPL was acting as agent for the

proposed joint venturers in relation to the establishment of each of the joint ventures and as trustee of those funds with which it had already been entrusted. In so far as Brian was concerned, it was a fundamental element of the substratum of the fiduciary relationship that then existed that the subject land, which was being purchased with joint venture funds for joint venture purposes, would be held available to be devoted to any ensuing joint venture or joint ventures and that Brian, as an accepted joint venturer who had already made financial contribution towards the proposed hotel joint venture, was and would remain able to participate in the net profits in accordance with its share in the relevant joint venture. To transpose the words of Dixon J. in Birtchnell (at pp.407-408), the participants in each of the then proposed joint ventures were "associated for ... a common end" and the relationship between them was "based ... upon a mutual confidence" that they would "engage in (the) particular ... activity or transaction for the joint advantage only". It matters not, for present purposes, whether that relationship is seen as that which may exist between prospective partners or joint venturers before the terms of any partnership or joint venture agreement have been settled or whether it is seen as a limited preliminary partnership or joint venture to investigate and explore the possibilities of an ultimate joint venture or ventures. On either approach, it was a fiduciary one.

9. That being so, the proposed participants in each joint venture were under fiduciary obligations to one another in relation to the proposed project at the time when the first of the mortgages was given and accepted. In particular, 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 assent of the other participants. "The subject matter over which the fiduciary obligations" extended must be "determined by the character of the venture or undertaking for which" the relationship between the prospective joint venturers existed (per Dixon J., Birtchnell, at p.408 in a partnership context but equally applicable here). It included the land which was the subject of the proposed joint ventures and whose purchase had been funded by moneys contributed by the prospective participants or borrowed by SPL for the purposes of the proposed ventures. By that mortgage, SPL and UDC combined to apply the property the subject of the proposed joint venture to their own collateral purposes in a manner which involved the obtaining of a collateral advantage for themselves and which was, both potentially and in the event, destructive of the whole interest of the other joint venturers including Brian. In combining to apply the property to their own collateral purposes and in giving and obtaining those collateral advantages without the knowledge or consent of Brian, SPL and UDC each acted in breach of its fiduciary duty to Brian.

10. In these circumstances, UDC is precluded from relying upon the benefit of the bill of mortgage of 24 October 1973 to secure, against the profits to which Brian would otherwise be entitled, extraneous debts owing by SPL and its associates in some other venture. A similar position applies in relation to the "collateralisation clause" in each of the two subsequent mortgages. It is unnecessary for Brian to assert a constructive trust of the benefit of those mortgages or of their proceeds. All that Brian need assert against UDC is its entitlement to its share of the surplus proceeds of sale under the joint venture agreement, to which both UDC and it were parties. UDC cannot resist that claim of Brian by relying upon the "collateralisation clause" which it obtained and retained in breach of the fiduciary duty which SPL and it owed to Brian for the reason that, to the extent of those clauses, the three mortgages were and are unenforceable by UDC against Brian (cf. Thorne v. Thorne (1893) 3 Ch. 196, at pp 203-204).

11. The appeal should be dismissed.

DAWSON J.: I have had the advantage of reading the reasons for judgment of Mason, Brennan and Deane JJ. and agree with those reasons and with their conclusion that at the time each of the mortgages was given, United Dominions Corporation Limited ("UDC") was in the position of a fiduciary as regards Brian Pty. Limited ("Brian") and that, as a consequence, the mortgages were and are unenforceable by UDC against Brian.

2. The agreement which was eventually concluded between UDC, Brian and the other participants in the development project was described as a joint venture. I agree that, despite this description, it, and the other joint venture initially proposed, nevertheless answered the description of a partnership.

3. Whilst the concept of a joint venture is said to be the creation of American courts (see 46 Am. Jur. 2d., Joint Ventures, s.2), it is a term which is widely used and it is well known in Scottish law where it is regarded as a variety of association, partnership or not, in which no firm name is used and the association is confined to a particular adventure, speculation, course of trade or voyage: Encyclopaedia of the Laws of Scotland (1931), vol.XI, par.67, at p.32. It is true, however, that the joint venture is a form of association which has been put to considerable use in the United States, largely because in that country a corporation may not, generally speaking, join a partnership. The view is taken there that the officers and directors of a corporation in partnership may not be able to carry out their responsibilities and that the corporate assets may be jeopardized in an ultra vires manner: Williston on Contracts, 3rd ed. (1959), vol.2, s.318B, at p.598 et seq.

4. That view has never been taken here, but it explains why in the United States a clear differentiation is made between a joint venture, which involves a single business transaction, and a partnership, which involves general and continuing business of a particular kind. Notwithstanding the difference, even in the United States a joint venture may comprehend a business to be continued over a considerable period of time and the distinction between a partnership and a joint venture is not always easy to discern: 46 Am. Jur. 2d., Joint Ventures, s.4. This is of no present significance, because in the United States participants in joint ventures are nevertheless subjected to fiduciary duties akin to those of partners: Meinhard v. Salmon (1928) 249 N.Y. 458 (164 NE 545).

5. Although in this country a partnership is defined in the Partnership Acts as the relation which subsists or exists between persons carrying on a business in common with a view of profit, the requirement that a business should be carried on provides no clear means of distinguishing a joint venture from a partnership. There may be a partnership for a single adventure or undertaking, for the Acts provide that, subject to any agreement between the partners, a partnership, if entered into for a single adventure or undertaking, is dissolved by the termination of that adventure or undertaking. See, e.g., Partnership Act 1892 (N.S.W.), s.32(b).

6. A single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business: Smith v. Anderson (1880) 15 ChD 247, at pp 277-278; In re Griffin; Ex parte Board of Trade (1890) 60 L.J. QB 235, at p 237; Ballantyne v. Raphael (1889) 15 VLR 538. Whilst the phrase "carrying on a business" contains an element of continuity or repetition in contrast with an isolated transaction which is not to be repeated, the decision of this Court in Canny Gabriel Castle Jackson Advertising Pty. Ltd. v. Volume Sales (Finance) Pty. Ltd. [1974] HCA 22; (1974) 131 CLR 321 suggests that the emphasis which will be placed upon continuity may not be heavy. Certainly each of the enterprises which were to be undertaken and the enterprise which was finally undertaken in this case, was to have an operation which was sufficiently extended to amount to the carrying on of a business and, since the association was with a view to profit, the conclusion is warranted that the parties were either in partnership or were negotiating partnership at the relevant time.

7. 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. It is, however, unnecessary to pursue that matter here.

8. Although the relationship between participants in a joint venture which is not a partnership will be governed by the particular contract rather than extrinsic principles of law, the relationship may nevertheless be a fiduciary one if the necessary confidence is reposed by the participants in one another. Of course, in a partnership the parties are agents for each other and this may constitute a separate reason for the fiduciary character of a partnership. There may be no such agency between participants in a joint venture but, as Dixon J. pointed out in Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd. [1929] HCA 24; (1929) 42 CLR 384, at pp 407-408, even in a partnership it is really the mutual confidence between partners which imposes

fiduciary duties upon them and the same confidence may, in appropriate circumstances, be found to exist between participants in a joint venture.

9. The only other thing which I wish to add is that in my view 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. This is the view expressed in Lindley on Partnership, 15th ed. (1984), at p.480, and it seems to me that as a matter of principle it must be correct.

ORDER

Appeal dismissed with costs.