

**KOOMPAAHTOO LOCAL ABORIGINAL LAND COUNCIL & ANOR v SANPINE
PTY LTD & ANOR (S221/2007)**

Court Appealed from: New South Wales Court of Appeal

Date of Judgment: 2 November 2006

Date of Grant of Special Leave: 24 April 2007

This appeal raises the following issue: whether the conduct of the innocent party is a relevant factor to be considered by a court in determining whether the requisite repudiatory intention exists.

The first appellant ("Koompahtoo") is a Local Aboriginal Land Council incorporated under the *Aboriginal Land Rights Act* 1983 (NSW) and at all material times owned a parcel of land near Morisset (Lot 556). Koompahtoo entered into a joint venture with the first respondent ("Sanpine") to develop some of Lot 556 on 14 July 1997. A supplemental agreement amending the joint venture was executed on 17 October 2000. Koompahtoo and Sanpine held a 50 per cent interest in the joint venture, Koompahtoo contributing its land and Sanpine as development manager contributing its services. On 25 February 2002 the second appellant was appointed the administrator of Koompahtoo under the *Aboriginal Land Rights Act*. On 12 December 2003 he asserted that Sanpine by its conduct had repudiated the joint venture agreement, such conduct being accepted by the second appellant as terminating the agreement. Sanpine sought declaratory relief in the Supreme Court of New South Wales to the effect that the joint venture agreement was valid and subsisting. Campbell J identified nine distinct breaches of the joint venture agreement as varied and rejected a case based on waiver or estoppel. His Honour found that the breaches amounted to repudiatory conduct entitling Koompahtoo to terminate the agreement.

Sanpine appealed. It did not attack the factual findings made by Campbell J, but rather focused its case on a claim that some breaches were excused by waiver or estoppel and that even if the breaches were made out, that Campbell J erred in holding that it had repudiated the agreement. Sanpine's appeal was allowed by the Court (Giles, Tobias and Bryson JJA). Giles JA gave the majority judgment. Bryson JA dissented.

Giles JA noted that the primary judge's decision appeared to be based on the finding that Sanpine evinced an intention to carry out the contract as and when it suited it. His Honour further noted that when the party in breach has by its conduct shown the sort of intention enabling termination to occur, an evaluation of the conduct in all the circumstances was required. This included the conduct of the party not in breach and required consideration of the extent to which Koompahtoo had been complicit or acquiescent in the departures from the agreement and their continuance. Giles JA found that the breaches found against Sanpine did not amount to a repudiation and did not in all the circumstances show an intention to carry out the agreement only in a manner substantially inconsistent with its obligations and not in any other way. His Honour found that Sanpine was working to achieve the central objective of the joint venture and that whilst there was a failure to strictly comply with the agreement in some aspects, in the circumstances of constant communication and informal provision of information, lack of formal adherence to the agreement was not repudiatory. His Honour noted various instances of acquiescence by Koompahtoo in departures from the agreement.

In dissent, Bryson JA noted that the authorities on repudiation did “not speak with uniformity or precision” and that as with other legal standards, “repudiation calls for judicial decision on whether conduct has passed a boundary although the precise location of the boundary is not clear.” His Honour held that the circumstances found by Campbell J were a “full and clear basis upon which the conclusion that there had been a repudiation was open.”

The grounds of appeal include:

- The Court of Appeal erred by allowing its deliberations regarding repudiatory intent to be governed by extraneous matters concerning the first appellant's acts or omissions, in circumstances where the first appellant's conduct was not held to be sufficient to constitute a waiver of the first respondent's numerous breaches.
- In the absence of any findings that the first appellant waived (or was estopped from denying) the first respondent's multiple breaches of the Joint Venture Agreement, the Court of Appeal erred in considering and attributing any significance to the first appellant's conduct in determining the question of the first respondent's repudiatory intention.