Future act agreement — proceedings to enforce

Ashwin v Minara Resources Ltd [2006] WASC 75

Master Sanderson, 10 May 2006

Issue

The issues considered in this matter included:

- the proper plaintiff in proceedings brought in the Supreme Court of Western Australia on behalf of a native title claim group to enforce a future act agreement;
- whether those proceedings should be struck out because the agreement they relied upon was enforceable.

Background

The Wutha people made two claimant applications under the old Act provisions of the *Native Title Act 1993* (Cwlth) (NTA) in 1996. Both were registered and Raymond Ashwin (one of the plaintiffs in this case) was the registered native title claimant and, therefore, a native title party in any future act proceedings for both: see *Dimer/Askins/Western Australia* [2006] NNTTA 70, summarised in this issue of *Native Title Hot Spots* Issue 20). After the new Act commenced in September 1998, both claims were amended and passed the registration test.

At around the same time (mid-1990s), Minara Resources Ltd's predecessor, Anaconda Nickel NL (Anaconda), as part of the development of the Murrin Murrin nickel project, reached agreement with a number of native title parties (including Mr Ashwin as the representative of the Wutha People) about the grant of various tenements. Around September 1996, an ancillary agreement and a state deed made for the purposes of s. 31(1)(b) of the NTA were signed by Anaconda (as the grantee party) and Mr Ashwin. Subsequently, the State of Western Australia (the government party) granted the various tenements covered by those future act agreements to Anaconda—at [6] to [7].

Master Sanderson noted that Anaconda was at all times 'content' to deal with Mr Ashwin and that:

> Given the scheme of the ... [NTA], it is difficult to see how Anaconda could have dealt with anyone other than Mr Ashwin ... who [as the native title party] held ... the right to negotiate... . [S]o far as Anaconda were concerned, the relationship between Mr Ashwin and the Wutha People was of no consequence—at [8].

In March 1998, both of the Wutha People's claimant applications were amended to add Geoffrey Alfred Ashwin, Ralph Edward Ashwin and June Ashwin as registered native title claimants along with Raymond Ashwin. All four (referred to below as the Ashwins) were the plaintiffs in the case summarised here.

Master Sanderson set out, in general terms, the issue between the parties:

> [T]he defendant [Minara Resources Ltd] has achieved everything it sought in its dealing with the Wutha People. On the other hand, the Wutha People say that the benefits they were to receive under the agreement ... have not been provided by the defendant—at [13].

As a result, the plaintiffs brought proceedings in the court (the main proceedings) to have Minara Resources Ltd (the company) comply with the terms of the ancillary agreement. In the case dealt with here, the company applied for:

- a stay of the main proceedings pending the identification of the proper plaintiffs; and
- strike out of the whole or in part of the statement of claim on a number of grounds.

Stay application—proper plaintiff

In seeking a stay of the proceedings, the company complained that:

- documents filed in the proceedings named a different plaintiff and/or named that plaintiff in a different capacity;
- it was entitled to know 'who its adversary is ... and what case is being made ... against it'; and
- the documents filed made it impossible to ascertain those two things—at [14] and [17].

At issue was the fact that:

- in the original writ of summons and statement of claim, Raymond Ashwin was named as the plaintiff but only the heading of the writ stated he sued 'for and on behalf of the Wutha People';
- in the amended writ and statement of claim, the other three Ashwins were added as plaintiffs and the reference to the Wutha People was removed;
- in an affidavit, Raymond Ashwin deposed that he and the three other named plaintiffs were all authorised to represent to Wutha People and to conduct the proceedings—at [14] to [17].

Proper plaintiff and representative proceedings

Before considering the specific issues raised, it was noted that:

- the company's position was that these were representative proceedings to which O 18 r 12(1) of the Supreme Court Rules applied;
- that rule states (among other things) that representative proceedings may be commenced and continued by 'any one or more' of those people who have the same interest in the proceedings and as representing all or some of those people;
- it is for the party commencing and continuing the proceedings to decide whether the rule applies unless the court orders otherwise and there is no requirement for court approval to do so;
- the factors the court takes into account in deciding whether proceedings commenced under the rule should continue include whether representative proceedings would be more expensive and prejudicial, whether the relevant group's consent is required, the right of members of that group to opt out,

alterations in the description of the group and the provision of notice to various members of that group—at [18] to [20] and [23].

Master Sanderson was of the view that, against this background, there was 'probably no other realistic way to proceed' than by way of representative proceedings because:

- it would never be possible to determine 'with precision' who was included in the expression 'Wutha People';
- undertaking exhaustive inquiries into this would be expensive, time consuming and 'ultimately unnecessary';
- if the company was concerned that particular individuals may not be included in the proceedings, those individuals could be joined separately as plaintiffs;
- at present, there was no question of any direct monetary benefit passing to any of the Ashwins, noting that, if there had been, representative proceedings may not have been appropriate since the particular circumstances of each individual may need to be taken into account in that case—at [21] to [22].

Therefore, the master held that it was for the company, as defendant, to demonstrate that representative proceedings were inappropriate—at [24].

The company submitted that, because the action was originally commenced in the name of Mr Ashwin, the other three people could not be joined as plaintiffs without taking proper steps to do so. The Ashwins argued that:

- the four of them, in their capacity as the registered native title claimant, were the proper plaintiffs; and
- naming Mr Ashwin alone in some documents was a misdescription that had been rectified.

Master Sanderson considered this 'an entirely arid argument' because, as was noted earlier, Mr Ashwin could commence these proceedings alone in any case. The fact that there were now four plaintiffs made no difference. Orders were made to regularise the position—at [25].

The company also argued the proceedings were defective because the representative capacity of the parties was not stated in the title to the action. Master Sanderson said this was also an 'arid' point because where, as in this case, the representative nature of the proceedings was entirely apparent from the statement of claim, there was no need for the title to the proceedings to mention the representative capacity in which they were brought—at [26].

Fiduciary duty plea

The company challenged the assertion in the statement of claim that the ancillary agreement established a fiduciary relationship between the plaintiffs and the defendants. Master Sanderson considered the ancillary agreement, noting that the relevant clause (clause 11) anticipated negotiations conducted in good faith with the native title party 'with the object of reaching agreement on, but not limited to' certain identified matters.

The court concluded that the anticipation of negotiations in good faith could not alone give rise to a fiduciary relationship. 'There would need to be something more.' However, as there may be material facts that could establish there was a fiduciary relationship, the plaintiffs were given unconditional leave to replead their claim to fiduciary duty—at [30].

Strike out on ground of unenforceable agreement

The company argued that:

- clause 11 of the ancillary agreement was merely an 'agreement to agree' at some time in the future that did not give rise to any legal obligations and was, therefore, unenforceable;
- even if it was not to be characterised as an unenforceable 'agreement to agree', it was not enforceable because there was no process to resolve any disagreement between the parties;
- in the absence of such a process, either party may break off negotiations at any time for any reason, even where there was an obligation to act in good faith—at [31] to [33], referring to Australian authorities for the first point and English case law for the second.

The court noted that 'the strength of the defendant's argument must be acknowledged' since the authorities appeared to cast real doubt on the enforceability of clause 11 and the plaintiffs had 'no convincing argument' to put in answer to the defendant's case—at [34].

However Master Sanderson was not, on balance, satisfied that the pleadings ought to be struck out. This case was to do with native title and, while the master noted there was no separate branch of jurisprudence dealing with native title and nothing to suggest that common law principles of contract law were not applicable to native title agreements, 'care must be taken in what is a new and evolving area of the law'—at [35].

This was particularly so because, in economic terms:

> [I]f the defendant's argument succeeds, the right to negotiate provisions contained in the [NTA] which can [lead] ... to economic benefits to native title claimants will amount to nothing [which is] ... an outcome which should be reached only after careful consideration of all relevant evidence. It is not a matter which should be determined on a pleading summons—at [35].

Decision

Orders were made to regularise the representative proceedings and allow the present four named plaintiffs to maintain the proceedings. The statement of claim was struck out only in relation to the plea of a fiduciary duty, with leave to replead that claim.