Future act agreement — proceedings to enforce

Brownley v Minara Resources Ltd [2006] WASC 93

Master Sanderson, 25 May 2006

Issue

This case dealt with an application by Minara Resources Ltd (the company) in the Supreme Court of Western Australia to:

- stay an action (the main proceedings) brought by Elvis Stokes and others (the first plaintiff) and North East Independent Body Aboriginal Corporation as trustee for the Wongatha Aboriginal Charitable Trust (the second plaintiff); and
- to strike out certain paragraphs of the statement of claim file in the main proceedings.

Background

In 1997, the company entered into negotiations with Bibila Lungutjarra Native Title Claimant Group (the Bibila people) and the Goolburthunoo Native Title Claimant Group (the Goolburthunoo people) as part of the process of developing a laterite nickel and cobalt project at Murrin Murrin.

The company negotiated an agreement with the Goolburthunoo people recorded in a deed dated 8 July 1998 (the ancillary agreement). Under clause 6.1 of the ancillary agreement, Anaconda Nickel NL (Anaconda, the company's predecessor) was to make annual payments of $1 million to the charitable trust established by the North East Independent Body (the NEIB trust) as defined in the ancillary agreement.

The ancillary agreement provided that, if the NEIB trust was not established by 30 June 1998, then an independent charitable trust would be established on terms determined by an independent arbitrator appointed by, and acceptable to, the native title parties (as defined in the ancillary agreement), Anaconda and the NEIB.

The NEIB trust was not established by 30 June 1998. On 14 August 2003, Anaconda advised that it was rescinding the ancillary agreement. On 10 November 2004, the plaintiffs executed an agreement (the funding agreement) with IMF (Australia) Ltd (IMF) and Insolvency Litigation Fund Pty Ltd (ILF) with respect to funding these proceedings. The second plaintiff (the Wongatha Aboriginal Charitable Trust) alleged (among other things) it had suffered loss as a consequence of the company not making payment of the sum of $1 million per annum.

Whether the second plaintiff should be a party

The company argued that the second plaintiff should not be a party because it was not the NEIB Trust contemplated by the ancillary agreement, i.e. it was neither

established prior to 30 June 1998 nor was it established after the appointment of an independent arbitrator as contemplated by clause 6.2(1) of the ancillary agreement.

The court decided it was not appropriate to remove the second plaintiff as a party to the proceedings and that the issues raised were really a question of the construction of the ancillary agreement. Without wishing to 'say too much' about the proper interpretation of that agreement, Master Sanderson noted that:

- the clause of the ancillary agreement that defined the NEIB trust had no 'temporal qualification';
- while clause 6.2 of the ancillary agreement did say that, if the NEIB trust was not established by 30 June 1998, then some other charitable trust 'will be established', this again was without 'temporal qualification' and 'just when such a trust is to be established is not specified';
- therefore, it was arguable that the second plaintiff satisfied the criteria that would allow it to be recognised as the NEIB Trust—at [14].

The company also argued that:

- the ancillary agreement required that the principal objects of the NEIB Trust must be for the purpose of furthering the social, economic, business development, educational and cultural welfare of the Aboriginal people of the north-eastern goldfields region of Western Australia;
- the trust established had objects that related solely to the Wongatha people;
- there was no evidence to establish that the 'Wongatha people' and 'the Aboriginal people of the north eastern goldfields area' were descriptions of the same people.

The court declined to strike out reference to the second plaintiff on this basis, again noting that to do so would involve construction of the agreement—at [16].

Application to stay proceedings as champertous

The remaining question was whether or not the fact that the action was being funded by a third party 'litigation funder' warranted granting a stay on the basis that the arrangement was champertous and an abuse of the court's process. Determining this question involved a consideration of a line of cases referred to as the *Clairs Keeley* cases, which Master Sanderson cited and discussed briefly at [18].

It was noted that the approach taken in those cases by the Full Court of the Supreme Court of Western Australia 'has not met with universal approval' in other states and is currently the subject of an appeal to the High Court. However, as there was 'no doubt' that the *Clairs Keeley* cases were the law in WA at present, Master Sanderson noted they pointed to the critical question being the level of control the litigation funder had over the litigation—at [19] to [20].

In this case, it was found that:

- the terms of the funding agreement with IMF and ILF (the litigation funder) left the plaintiffs in control of the litigation;
- the plaintiffs appointed their own independent solicitors well before the involvement of IMF and ILF;

- therefore, the plaintiffs' interests were not subservient to those of the litigation funder and the funder is not a 'mere cipher';
- the plaintiffs were in a contractual position where they can make informed decisions about the litigation—at [20].

The defendant's argument that the court could go behind the clear wording of the agreement and conclude that the litigation funder controlled the proceedings was rejected because, 'as a matter of law', control rested with the plaintiffs—at [21].

Decision

The court found that it was not appropriate to grant a stay of the proceedings. The defendant's application was dismissed.