Australian Securities Commission v. SIB Resources NL[1]

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INTRODUCTION

On its face the *SIB Resources* case appears to be relatively straighforward.

Closer analysis indicates that the practical implications of the case are not clear, and, indeed, that the whole question of no-liability companies is a vexed one.

In this paper the case is briefly considered and then its practical implications are more closely analysed in the context of a hypothetical example.

FACTS

SIB Resources N.L. ("the Company") was registered as a no-liability company on 18 April 1991.

It was registered with a widely-drawn memorandum.

The Australian Securities Commission ("the Commission") sought an order pursuant to s. 1322(4) of the Corporations Law ("the Law") that the register kept by the Commission under s. 120 be rectified by removing from it the application for registration of the Company and the Company's memorandum and articles lodged with that application.

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1. (1991) 9 A.C.L.C. 1,147; (1991) 30 F.C.R. 221.

In other words, the Commission effectively sought that the incorporation of the Company be extinguished.

STATUTORY FRAMEWORK

It is useful to begin the analysis of Ryan J.'s decision in the case by setting out the applicable statutory framework.

Section 115(2) of the Law provides that a "mining company" may be registered as a no-liability company.

Section 9 of the Law defines "mining company" as:

> ". . . a company:
>
> (a) whose memorandum contains a provision stating the objects of the company; and
>
> (b) whose sole objects are mining purposes."

In the same section "mining purposes" is defined as:

> ". . . any or all of the following purposes:
>
> (a) prospecting for ores, metals or minerals;
>
> (b) obtaining, by any mode or method, ores, metals or minerals;
>
> (c) the sale or other disposal of ores, metals, minerals or other products of mining;
>
> (d) the carrying on of any business or activity necessary for, or incidental to, any of the foregoing purposes;
>
> whether in Australia or elsewhere, but does not include quarrying operations for the sole purpose of obtaining stone for building, roadmaking or similar purposes."

The Commission had issued a certificate of incorporation for the Company. Accordingly, s. 122 of the Law was relevant.

That section provides:

> "A certificate under the Commission's common seal stating that a specified company has been registered under this Division is conclusive evidence that:
>
> (a) all requirements of this Law in respect of:
>
> (i) registration of the company as a company under this Division; and
>
> (ii) matters preceding or incidental to the registration;
>
> have been complied with;
>
> (b) the company is duly registered under this Division; and
>
> (c) the day of commencement of the registration is the day (if any) specified as such in the certificate."

Section 1322(4)(b) of the Law entitles "any interested person" to make application to the court for an order directing the rectification of any register kept by the Commission.

Finally, s. 1322(6) provides that the court shall not make such an order unless satisfied that no substantial injustice has been, or is likely to be, caused to any person.

DECISION

Ryan J. held as follows:

1. Section 115 of the Law is a code exhaustively defining the types of companies entitled to be registered under Div. 1 of Pt 2.2.[2]
2. The express stipulation in s. 115(2) that a mining company may be a no-liability company denies that facility by implication to companies which are not mining companies as so defined.[3]
3. Whilst a "main objects" principle of construction has been applied to treat later widely-drawn paragraphs of a memorandum as merely ancillary or incidental to the main or dominant objects discernible in earlier paragraphs,[4] that principle can be excluded by clear words indicating that each paragraph is to be given full effect according to its ordinary meaning.[5]
4. Here the Company's memorandum by its express terms required that each object be interpreted independently. Thus the Company's objects included the borrowing and lending of money and the carrying on of business as an investment and trust company, whether or not those activities were necessary for or incidental to "mining purposes".[6]
5. Accordingly, not all of the Company's objects were "mining purposes", it was not a "mining company" as defined, and it was not entitled to be a no-liability company.[7]
6. So far as the Commission is concerned, at least when exercising its central functions, it retains the privileges and immunities of the Crown.[8]
7. Section 122 of the Law protects a company's incorporation from collateral attack by third parties, but is not binding on the Crown as represented by the Commission so as to preclude the Commission from mounting a direct attack on the validity of the Company's incorporation.[9]
8. Section 1322(4), having regard to its context and legislative history, does not evince an intention to grant to the court the power, on the application of the Commission, to deprive a company retrospectively of the corporate existence conferred on it by s. 123 of the Law.[10]

2. (1991) 9 A.C.L.C. 1,150.
3. Ibid.
4. Ibid. at 1,151.
5. Ibid.
6. Ibid.
7. Ibid.
8. Ibid. at 1,152.
9. Ibid. at 1,151-1,153.
10. Ibid. at 1,156.

9. However, since the Company's objects are wider than those permitted to a no-liability company, it is not entitled to remain on the register as a company of that class if those objects are not amended.[11]

10. Thus the application by the Commission would be adjourned to a date to be fixed to enable the Company to amend its memorandum or convert to a company limited by shares. If the Company did not avail itself of that opportunity, it would be liable to be wound up on the application of either the Commission or the Attorney-General.[12]

ISSUES RAISED

It is submitted that the decision of Ryan J. raises a number of issues.

In particular, the following issues will be examined:

1. Given that the Company had been incorporated as a no-liability company, and given that it was not entitled to be a no-liability company, what was its legal status at the time that the Commission brought the application?

2. In particular, what is the capacity of a no-liability company? Is the ultra vires rule abolished in relation to no-liability companies? Does their special status have the potential to affect contracts with third parties where those contracts are for purposes other than "mining purposes"?

3. Ryan J. suggested that the Company was liable to be wound up on the application of either the Commission or the Attorney-General. However, would either have standing to bring a winding up application in the circumstances of the case?

The simplest way of analysing the above issues is in the context of a hypothetical example.

Assume that Newco NL ("Newco") holds all the shares in Subsidiary NL ("Subsidiary"). Newco, in its memorandum, has as an object holding shares in other companies themselves incorporated for mining purposes. A further object in Newco's memorandum is supporting its subsidiaries by providing security for moneys lent to those subsidiaries.

Newco's and Subsidiary's commercial activities are otherwise quite separate.

Financier Ltd ("Financier") lends money to Subsidiary, and obtains a guarantee from Newco in relation to Subsidiary's consequent indebtedness.

11. Ibid. at 1,156-1,157.
12. Ibid. at 1,156-1,157.

SOME INITIAL PROPOSITIONS

Although the issue was not touched on in the *SIB Resources* case, it is submitted that the definition of "mining purposes" in s. 9 of the Law would be given a restricted interpretation by the courts, particularly the reference in that section to carrying on a business or activity "necessary for, or incidental to" the mining purposes specified in that section.

Further, it is submitted that a matter is incidental to another when it appertains to or follows on from that which is more worthy or principal.[13] It is also submitted that the business or activity must be incidental to the company's own mining purposes, rather than mining purposes in some general sense. Otherwise, a company which had as its sole business the lending of money to mining companies for their mining purposes would itself be a "mining company".

Accordingly, assuming all that is provided to Newco by Subsidiary are dividend streams from Subsidiary's mining activities, it is submitted that Newco's holding all the shares in Subsidiary is not a "mining purpose" as defined in the Law. It is submitted that here Newco is really making an investment in Subsidiary in the hope of a dividend return.

This reasoning is consistent with *Re European Society Arbitration Acts*[14] where a power to purchase a business similar to the business of the British Nation Association did not empower that association to buy the shares of the company that owned that business.

That case, it must be conceded, was slightly different to the case now being considered. Note, however, Professor Pennington's comment:

> "Were it not for the practice of conferring express power on companies to acquire shares in other companies, for example, it would not be possible for one company to be the holding company of another."[15]

Professor Pennington's comment is supported by the case he cites, *Re Barned's Banking Co.; Ex parte Contract Corporation*[16] where Cairns L.J. says:

> "The first objection taken to the order under appeal was, that it was ultra vires the *Contract Corporation* to take shares in any other trading corporation, and to apply its funds in payment for those shares. Generally speaking this would be so. It is at first sight beyond

13. There are many shades of meaning which might apply here. However, having regard to *Ashbury Railway Carriage & Iron Co. v. Riche* (1875) L.R. 7 H.L. 653 and *Attorney-General v. Eastern Rly Co.* (1880) 5 App. Cas. 473, it is submitted that the definition postulated is the appropriate one in the circumstances. It needs to be borne in mind that the relevant section in the Corporations Law uses the words "incidental" and "necessary". These words, it is submitted, are much narrower than the words "incidental or conducive to" which are often the subject of decisions on the ultra vires doctrine. See generally the definitions of "incident", "incidental", and "incidental or conducive" in *Stroud's Judicial Dictionary* (5th edn, 1986), pp. 1259-1262 and the references there cited; R. R. Pennington, *Company Law* (6th edn, 1990), pp. 12ff.
14. (1878) 8 Ch. D. 679.
15. Pennington, op. cit. 15.
16. (1867) 3 Ch. App. 105.

> the province of one trading corporation to become a shareholder in another, and to apply its funds for that purpose."[17]

Of course, in the context of no-liability companies the situation would be different, it is submitted, if the subsidiary company was formed to hold certain assets utilised by the holding company in developing and mining a particular mining project, or if the subsidiary supplied catering services to that project. There the holding of shares in the subsidiary might well be "necessary for, or incidental to" the "mining purposes" of the parent.

Similarly, it is submitted that the giving of the guarantee by Newco to Financier is not a mining purpose, since supporting Subsidiary's balance sheet where Subsidiary is an investment of the holding company is not a "mining purpose".

This view is supported by *Colman v. Eastern Counties Rly Co.*,[18] where the court rejected the proposition that a railway company might validly, within the terms of its constituting Act:

> "pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway and thereby to increase the profit to the shareholders."[19]

CAPACITY

If the grant of the guarantee and the holding of shares in Subsidiary by Newco is not a "mining purpose", on the reasoning of the *SIB Resources* case, does Newco have the capacity to undertake those matters?

Corporate capacity is dealt with in s. 161 of the Law. By that section companies are effectively given the legal capacity of a natural person.

However, s. 161(2)(a), states that s. 161(1) has effect in relation to a company "subject to this Law". Additionally, s. 160 of the Law states that the object of ss 161 and 162 is, inter alia, to abolish the doctrine of ultra vires.

The question arises whether the requirement that s. 161 be read subject to the Law diminishes the capacity of a no-liability company because the Law provides that a no-liability company may only be incorported for "mining purposes".

Conversely, could it be argued that, because:

(a) the memorandum of association of Newco allows the holding of shares in Subsidiary and the grant of a guarantee to Financier; and

(b) Newco's certificate of incorporation would, as against third parties, be conclusive of the fact that pre-incorporation requirements have been met,

17. Ibid. at 112.
18. (1846) 10 Beav. 1; 50 E.R. 481.
19. 50 E.R. 486.

therefore those activities are not impeachable in any way on the ground that they are not "mining purposes"?

Common sense suggests that the answer to that question must be yes. Closer analysis confirms this, but not because of the conclusiveness of the certificate of incorporation.

In respect of the latter Ryan J. quotes[20] from Lawton L.J.'s judgment in *R. v. Registrar of Companies; Ex parte Central Bank of India*[21] where Lawton L.J. says:

> "Counsel for the registrar invited our attention to the words of exclusion used in s. 98(2), viz that 'the certificate shall be conclusive evidence that the requirements of this Part of this Act as to registration have been complied with. They are words excluding the admission of evidence, not words excluding the jurisdiction of the court to grant judicial review."[22]

It is submitted that s. 122 of the Law is to similar effect.

Accordingly, Newco's certificate of incorporation precludes third parties from alleging, as a matter of evidence, non-compliance with incorporation requirements.

However, the issue here is whether, as a matter of law, a no-liability company is precluded from engaging in other than "mining purposes" and whether s. 161 of the Law should be read in that light. If the Law does so preclude a no-liability company, then it would not be necessary to lead any evidence regarding incorporation requirements to prove breach. This is because it would not be incorporation that was being questioned, but capacity.

Ryan J. speaks of the "facility" of no-liability status.[23] It is submitted that that is the key to the interpretation of s. 161 and other relevant provisions of the Law in this respect.

Section 115, as read with the definitions of "mining company" and "mining purposes", merely provides that a company is not entitled to the "facility" of no-liability status if its memorandum contains objects other than "mining purposes".

There is no prohibition in the Law on a no-liability company undertaking purposes other than mining purposes. Its doing so is not rendered illegal.

Accordingly, a contract made for a non-mining purpose would not be a contract deliberately made to do a prohibited act and would not be unenforceable on that account.[24]

Nor, it is submitted, could a subsequent change in a company's memorandum of association to remove non-mining purposes itself have any effect on a contract already entered into by the company.

20. (1991) 9 A.C.L.C. 1,152.
21. [1986] 1 All E.R. 105.
22. Ibid. at 117.
23. (1991) 9 A.C.L.C. 1,150.
24. See generally *Chitty on Contracts* (26th edn, 1989), para. 1242ff.

Such a change would merely bring the constitution of the company into line with what is ordinarily required before the facility of no-liability status is granted. It would have nothing to say about the capacity of the company to enter into a particular contract at the time it did so, nor could it vitiate a contract enforceable against the company immediately prior to the change. In order to have such an effect, there would have to be something akin to frustration by reason of supervening impossibility of performance. It is submitted that would clearly not be the case.

It follows that the provision in s. 161(2)(a) that s. 161 is subject to the Law does not place no-liability companies in any different position from companies generally in relation to abolition of the ultra vires doctrine.

This is subject to one caveat. The capacity given to a company in s. 161 is irrespective of any statement of objects in the memorandum (s. 161(2)(c)). However, there remains the subsidiary question of improper purpose.

Professor Ford refers to what he describes as the "embarrassment" which can be caused by a statement of objects in a memorandum.[25] He says that if an outsider dealing with the company has seen the objects clause in the memorandum, it might put that outsider on notice that the company's constitution is not being complied with by officers of the company or that they are using their powers for an improper purpose. He suggests that in such an event if the outsider is held to have knowledge of that breach of duty, then the relevant transaction will be voidable at the company's option.

There are a number of aspects to this proposition.

First, if the no-liability company has been incorporated with power under its memorandum to undertake certain non-mining purposes, then the fact that it should not have been granted no-liability status whilst it had those objects will not render its undertaking those improper.

This is not because its certificate of incorporation conclusively establishes against third parties compliance with incorporation requirements. Rather, it is because the company is still acting within its constitution. The purpose is therefore a proper one. The only impropriety in this case is the impropriety of the Commission in registering a company as a no-liability company when its constitution allowed it to undertake non-mining purposes.

So, in our example, the guarantee given by Newco to Financier would, it is submitted, not be rendered unenforceable on this account.

What if a no-liability company's memorandum only allows mining purposes and directors are therefore necessarily engaged in an improper purpose if they purport to enter into a transaction on behalf of the company for a non-mining purpose? Would an outsider dealing with the company be held in that event to have notice of that improper purpose because the Law provides that a no-liability company may only be engaged on mining purposes?

25. H. A. J. Ford and R. P. Austin, *Ford's Principles of Corporations Law* (6th edn, 1992), p. 97.

It is submitted that the fact that the Law provides that no-liability companies may only have as objects "mining purposes" will not be determinative of this issue.

The principles to be applied are those referred to in s. 164 of the Law.

Pursuant to s. 164(1) a person having dealings with a company is entitled, subject to s. 164(4), to make those assumptions referred to in s. 164(3). Section 164(3)(a) refers to the assumption that, at all relevant times, the company's constitution has been complied with. Section 164(4) sets out the circumstances in which such an assumption cannot be relied on. These are where the relevant person has actual knowledge of the matter or where the person's connection or relationship with the company is such that he or she ought to know of that matter.

Thus, the question of whether a company may avoid a contract with an outsider on the basis of notice of improper purpose will depend on whether there is actual knowledge of improper purpose on the part of the outsider, or whether there is such a relationship between the two parties that there should be actual knowledge.

The fact that legislation would suggest that the company is unlikely to have complied with its constitution, since generally the constitution of a no-liability company would not allow non-mining purposes, would not, it is submitted, be sufficient knowledge to preclude the s. 164(4) assumption.

Nicholson J. in *Lyford v. Media Portfolio Ltd*[26] referring to the predecessor of s. 164(4)(b), says that it:

> "refers to knowledge a person ought to have by reason of his connection or relationship with the company and not to knowledge which he ought to have because something in the particular transaction would put a reasonable person on enquiry."[27]

WINDING UP

Ryan J. in the *SIB Resources* case indicated that if the Company did not amend its memorandum to exclude non-mining purposes, it would be liable to be wound up on the application of the Commission or the Attorney-General.[28]

His Honour refers to ss 460 and 461 of the Law.[29]

Section 460 does not apply to a company that is a going concern since it relates to insolvency.

Section 461 is more relevant because it refers to the general grounds upon which a company may be wound up by the court.

26. (1989) 7 A.C.L.C. 271.
27. Ibid. at 281.
28. In fact the Company did amend its memorandum, so the issue never arose.
29. (1991) 9 A.C.L.C. 1,156.

Relevantly s. 461 provides as follows:

"The Court may order the winding up of a company if:

. . .

(f) affairs of the company are being conducted in a manner which is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole;

(g) an act or omission, or a proposed act or omission, by or on behalf of a company, or a resolution, or a proposed resolution of a class of members of the company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole;

(h) the Commission has stated in a report prepared under Division 1 of Part 3 of the ASC Law that, in its opinion:

. . .

(ii) it is in the interests of the public, of the members, or of the creditors, that the company should be wound up;

. . .

(k) the Court is of the opinion that it is just and equitable that the company be wound up."

So far as the Commission or the Attorney-General is concerned, it is suggested that only ss 461(h) and (k) could be relevant.

Section 461(h)(ii) refers to a report prepared by the Commission under Div. 1 of Pt 3 of the "ASC Law" (which is the *Australian Securities Commission Act 1989*—see s. 1B of that Act).

Accordingly, s. 461(h)(ii) does not seem particularly apposite to the present case. Division 1 of Pt 3 of the ASC Law deals with investigations undertaken by the Commission where it has reason to suspect, inter alia, the contravention of a national scheme law (which by virtue of s. 5 of the ASC Law includes the Law).

In the *SIB Resources* case there had been a breach of the Law, but that breach was by the Commission in registering a company as a no-liability company when it was not entitled to be registered as such.

It would seem to be more than a quantum leap in legal reasoning to suggest that the Commission could institute an investigation under Pt 3 of Div. 1 of the ASC Law simply because the Commission had improperly registered a no-liability company. The second element of s. 461(h)(ii) requiring that it be in the interests of the public or members or creditors of the company that the company be wound up would not be so difficult since the Commission could argue that it is in the interests of the public that no-liability companies should only pursue mining purposes.

The most likely head under which the Commission would presumably proceed is the just and equitable ground in s. 461(k). Indeed the cases to which Ryan J. refers in *SIB Resources* case discuss winding up in circumstances where that would be "just and equitable".

Does the Commission have standing, however?

Section 462 is conclusive as to standing (s. 462(5)). Section 462(2)(e) states that the Commission is entitled to wind up a company pursuant to s. 464 or s. 453. Section 464 relates to an investigation under Div. 1 of Pt 3 of the ASC Law. Section 453 deals with winding up of a company under official management.

Certainly in the circumstances of the *SIB Resources* case, therefore, it would appear that the Commission would not have had standing to bring a winding up application. There was no investigation on foot nor was the Company under official management.

Even if the Commission did have standing, it is submitted that it would not be entitled to rely on the "just and equitable" ground because it would not have come to the court with clean hands.[30]

Section 462 makes no reference to the Attorney-General having standing to wind up companies. Accordingly, it is suggested that the Attorney-General is not entitled to apply for an order to wind up a company (s. 462(5)).

Therefore, it is submitted, neither the Commission nor the Attorney-General had power in the *SIB Resources* case to apply for the winding up of the Company.

PREROGATIVE WRIT

Any comprehensive discussion of judicial review is beyond the scope of this paper. However, given the submissions made on winding up, the availability of judicial review as an alternative remedy is simply raised.

It is submitted that the Commission is susceptible to judicial review at common law and by a State Supreme Court under the *Administrative Decisions (Judicial Review) Act* (1977).[31]

The appropriate remedy would be certiorari,[32] the effect of which is generally to quash the decision ab initio.[33]

The difficulty with this remedy is that Ryan J. in the *SIB Resources* case held that there should be no retrospective destruction of the corporate existence of the company.[34]

Further, the court might exercise its discretion to grant the remedy against the Commission because it, as the applicant, was partly responsible for the mistake.[35]

30. *Ebrahimi v. Westbourne Galleries Ltd* [1972] 2 All E.R. 492 at 507; *Australian Corporations and Securities Law Reporter* (Looseleaf Service, CCH), para. 142-200; Ford and Austin, op. cit., p. 626.
31. M. Aronson and N. Franklin, *Review of Administrative Action* (1987), p. 4; *Broken Hill Propriety Co. Ltd v. National Companies and Securities Commission* (1986) 67 A.L.R. 545.
32. Ibid. at 550.
33. Ibid. at 544.
34. (1991) 9 A.C.L.C. 1,156.
35. *Minister for Aboriginal Affairs v. Peko Wallsend Ltd* (1986) 66 A.L.R. 299.

Save for the matter of discretion, there would not appear to be any impediment, however, to certiorari proceedings being brought by the Attorney-General.[36]

CONCLUSION

Many of the issues raised in this paper have not yet been adjudicated upon. The writer understands that they are matters about which the Commission is concerned. Certainly, in Western Australia, there has been considerable interest shown by the Commission in no-liability companies and whether those companies are engaged solely on mining purposes. It is further understood that the Commission proposes very shortly to release its own views on the question of what constitutes mining purposes and on the position of no-liability companies generally.[37] That will presumably make the Commission's views clear. It might be some time, however, before the precise legal position of no-liability companies is settled by the courts. Certainly, the *SIB Resources* case would not appear to finally settle that matter.

36. For a general discussion on discretion see *Halsbury's Laws of England* (4th edn, 1989), Vol. 1(1), para. 108.
37. The primary concern of the Commission appears to be change of status following the cases of *Re Bamboo Gold Mines Ltd* (1987) 5 A.C.L.C. 631, *Re Insight Mining Pty Ltd* (1987) 5 A.C.L.C. 518 and *Windsor v. National Mutual Life Association of Australasia Ltd* (1992) 10 A.C.L.C. 509. However, the Commission's concern is apparently wider than that. In any event, change of status may be relevant in an *SIB Resources* type of case given Ryan J.'s suggestion at 1,156 that the Company's alternative to amendment of its memorandum was conversion to a company limited by shares as allowed by s. 167(1)(b) of the Law.