

SECOND SUPPLEMENT

1. **Project 28 Pty Ltd (formerly Narui Gold Coast Pty Ltd) v Barr**

- 1.1 This is a decision of the New South Wales Court of Appeal overturning (in part) the decision of Palmer J at first instance (which case appears as number 23 in the main paper). Ipp JA gave the main judgment, with which Hodgson JA and Campbell AJA agreed.
- 1.2 The judgment at first instance is discussed, or referred to, in the main paper at paragraphs 10.9 (note 57), 13.6 (note 71), 28.14 (note 159) and 28.18 (note 162).

2. **Facts**

- 2.1 In 2002, the Barr interests commenced two proceedings in their name against Narui, referred to as the Lease Proceedings and the House Proceedings, concerning, respectively:
 - (a) whether the termination of a lease of Cudgen Paddock (which included an option to purchase) granted by Narui was valid; and
 - (b) whether Narui should be ordered to specifically perform a sale agreement.
- 2.2 Austcorp is a competitor of Narui and was interested in acquiring Cudgen Paddock for development purposes.
- 2.3 After the Lease Proceedings and the House Proceedings had commenced, Austcorp and the Barr interests entered into:
 - (a) an option deed (dated 19 March 2003), which gave Austcorp an option to purchase Cudgen Paddock and acquire the lease; and
 - (b) a management deed (dated 21 May 2003), which provided for Austcorp to fund, and gave Austcorp complete control over, the Lease Proceedings and applied certain provisions to the House Proceedings.
- 2.4 Austcorp was not entitled to receive a fee or percentage of the recoveries in return for funding. Success in the proceedings would leave Austcorp free to exercise its option and so acquire Cudgen Paddock.

3. **Application for a Stay – Decision at First Instance**

- 3.1 At first instance, Palmer J refused Narui's application for orders dismissing the Lease Proceedings and the House Proceedings and for a stay.

- 3.2 Palmer J held that Austcorp's complete control over the Lease Proceedings did not amount to maintenance and an abuse of process, because Austcorp (before it entered into the option deed) had a "genuine commercial interest" in acquiring Cudgen Paddock and so had a genuine commercial interest in funding the Lease Proceedings. Palmer J relied on *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, discussed in paragraph 36 of the main paper.
- 3.3 Palmer J held that the funding arrangements in respect of the House Proceedings were not an abuse of process or inherently likely to produce an abuse of process.
- 3.4 The case at first instance was decided before the Court of Appeal decided *Fostif* (see Case 1 in the First Supplement).

4. The Appeal

- 4.1 The Court of Appeal refused leave to appeal in the House Proceedings and so concerned itself only with the Lease Proceedings.
- 4.2 Narui submitted Palmer J made two principal errors:
 - (a) in characterizing Austcorp's mere desire to acquire Cudgen Paddock as being a sufficient interest to validate the funding arrangements; and
 - (b) in finding that the absolute control given to Austcorp did not justify a stay.

5. The Relevance of Maintenance and Champerty

- 5.1 Relying on the Court of Appeal decision in *Fostif*, the Court said:

"The Court is not directly concerned with whether the arrangements amount to champerty or maintenance; its inquiry is into whether the arrangements between the parties amount to or may have a material tendency to amount to an abuse of process." [57].

- 5.2 In this respect, the Court found that whether the funding party had a genuine commercial interest in the transactions the subject of the litigation, or whether it had complete control over the litigation, were relevant, but not conclusive factors, in determining whether there was an abuse of process.

6. Was there a Sufficient Interest to Validate the Transaction?

- 6.1 The Court held that the type of interest that would be sufficient to validate the transaction as contemplated by *Trendtex*, would need to be rights based and more than a mere hope. Accordingly, Austcorp's wish to acquire Cudgen Paddock was not sufficient and Palmer J had erred in deciding otherwise.

- 6.2 However, for the purposes of the essential enquiry as to whether there was an abuse of process, the Court said the test was “whether a party has a reasonably arguable case that it has a commercial interest in the subject matter of the litigation (to the extent that such an interest is relevant to the abuse of process issue)”. [52].
- 6.3 The Court found that it was arguable that Austcorp had a genuine commercial interest in the transactions the subject of the litigation because when the Management Deed was entered into (which gave Austcorp control over the Lease Proceedings) it had already entered into the Option Deed, giving it an interest in Cudgen Paddock.
- 6.4 Campbell JA found that “The interest in the subject land found by Palmer J may well be a factor relevant to whether proceedings should be stayed on the grounds of abuse of process” [125] and added “At the least such an interest would negative a relevant, although not determinative, factor that the proceedings were funded by a litigation funder”. [126].
- 6.5 The fact that:
- (a) the result that would flow if the proceedings were to be resolved in favour of the Barr interests would be the acquisition of the Cudgen Paddock by Austcorp (at market value) and if the Barr Interests failed in the Lease Proceedings Austcorp would have no right to Cudgen Paddock; and
 - (b) the Option Deed and the Management Deed (entered into only two months apart) could equally have been contained in one Deed; and
 - (c) the arguable genuine commercial interest arose after the dispute the subject of the proceedings had arisen,

makes it hard to meaningfully distinguish the circumstances in this case, from one where the relevant interest is received under the funding agreement itself (such as a share of the fruits of the action), which interest has been held insufficient to “validate” a funding arrangement. Perhaps the unspoken distinction in the Court’s mind was that Austcorp’s business was not litigation funding.

- 6.6 Even given an arguable interest, the key issue was still whether there had been an abuse of process.

7. Abuse of Process

- 7.1 The Court commented on the circumstances in which an abuse of process might arise where proceedings are funded:

- (a) firstly, by observing that an abuse of process is not restricted to defined and closed categories; and

- (b) secondly, by giving some examples, as follows:
 - (i) where the funder is seeking to use the proceedings otherwise than for the purposes for which they were intended; or
 - (ii) where the funding results in the procedures of the Court being subverted or improperly manipulated or corrupted.

7.2 The Court went on to say that whether or not proceedings should be permanently stayed on grounds of abuse of process is to be determined by taking into account factors including, “the requirements of fairness to the parties, the public interest and the need to maintain public confidence in the administration of justice”. [62].

7.3 The Court confirmed that the standard of proof is high.

7.4 The Court made it clear that the mere fact that Austcorp might gain a commercial advantage by being involved in the litigation did not give rise to an abuse of process.

7.5 As Austcorp’s business was not acquiring claims and prosecuting them, the Court said it was not “trafficking in litigation” and therefore no abuse potentially arose by virtue of the first example above. The issue was whether the arrangements “corrupt or tend to corrupt the process”. [59].

8. The Relevance of Control over the Litigation

8.1 The Court agreed with, and adopted, the remarks of Mason P in *Fostif*, where he said:

- (a) “In my opinion, a conclusion about abuse of process must stem from a finding directed at the actual or likely conduct of the party in whose name the litigation is brought (or its agents)” [at 114] (disagreeing with the “categorical thrust” of the last two sentences of the full Court’s comments at [125] in *Clairs Keeley (a firm) v Treacy* (case number 58 in the main paper); and
- (b) “In my opinion, the Court’s basal inquiry should be whether the role of the particular funder has corrupted or is likely to corrupt the process of the court to a degree that attracts the extraordinary jurisdiction to dismiss or stay permanently for abuse of process”. [132].

8.2 The Court concluded that although the existence of control (by a funder) was a relevant factor in determining whether there was an abuse of process, it did not on its own constitute an abuse.

8.3 The Court pointed to the following examples of situations where the law has accepted control by a non party as being legitimate:

- (a) where an insurer exercises control over litigation taken by an insured; and
- (b) where an assignee conducts legal proceedings in the name of the assignor.

8.4 The law has developed safeguards to protect the interests of the insured, such as:

- (a) imposing a duty on the insured to conduct the proceedings bonafide and in good faith with due regard to the interests of the insured; and
- (b) prescribing duties of solicitors where conflicts of interest might arise.

8.5 The Court said that such rules would be readily adaptable to the circumstances of this case and there would be no reason why they would not apply more generally in cases where litigation is funded by a litigation funder.

9. The Role of the Solicitors

9.1 The Court took comfort from the fact that:

- (a) the solicitors nominated by Austcorp would be subject to the same rules governing solicitors appointed by insurers to act on their behalf when bringing or defending claims in the names of the insureds;
- (b) there was no basis for any suggestion that the solicitors would act improperly. The solicitors could be relied on to douse any temptation of Austcorp or the Barr Interests to act improperly; and
- (c) any attempt by Austcorp to require the Barr Interests to act contrary to Court directions or procedures could result in a finding of contempt of Court.

9.2 In essence, concerns about the potential for a funder's role to corrupt the processes of the Court should be viewed in light of the rules and obligations already in place to protect those processes.

10. Absolute Control and No Liability for Costs

10.1 Austcorp was not contractually bound to indemnify the Barr Interests for any adverse costs orders they may have become liable to pay in the proceedings.

10.2 Under the Supreme Court Rules (1970) (NSW), Austcorp would only be liable for adverse costs if it had committed an abuse of process, which the Court said was a "relatively difficult obstacle". Further, the Court found that the prospects of Narui obtaining an order for security for costs was uncertain.

10.3 The Court concluded that in these circumstances, the absence of a contractual obligation on Austcorp to indemnify for adverse costs was “a paramount consideration in the weighing of the relevant different factors in the present case” [para 120] and that “...without an appropriate indemnity by Austcorp to the Barr Interests for Narui’s costs, there is a material tendency that the processes and procedures of the Court could be “converted into instruments of injustice or unfairness (Walton v Gardiner at 392-393)” [121].

11. Conclusion

11.1 The proceedings were stayed until Austcorp provided the Barr Interests with an indemnity against any costs they might be ordered to pay Narui.

11.2 Perhaps no stay would have been imposed had the case arisen in a jurisdiction where the Court had greater power to award costs against a non party, than is the case in the Supreme Court of New South Wales.

12. Trendlen v Mobil Oil (2)

12.1 This is a decision by McDougall J in the Supreme Court of NSW.

12.2 In the course of his Judgment McDougall J considered whether the proceedings should be struck out or stayed on the basis that:

- (a) the proceedings were tainted by trafficking in litigation, amounting to an abuse of process; or
- (b) the conduct of the funder evidenced an actual abuse of process.

13. Facts

13.1 This case is being funded by the same funder as that involved in Fostif and gave rise to similar issues. The dispute arose in the context of various state Petroleum Acts under which Mobil was required to pay licence fees to the state, which fee was passed on to retailers, including Trendlen.

13.2 The same Court decision rendering the relevant State Tobacco Acts unconstitutional also affected the State petroleum Acts in the same way. Mobil passed on the licence fee to retailers for the first five days of August 1997, but did not pay those fees over to the State. Trendlen sued on its behalf and on behalf of other retailers in various states to recover that part of the price paid to Mobil referable to the unpaid licence fees.

13.3 These proceedings had been held up awaiting the outcome of the Court of Appeal decision in Fostif.

14. Trafficking in Litigation

14.1 Mobil submitted that:

- (a) the judgment of the Court of Appeal in *Fostif* was wrong in its approach to abuse of process and that the approach adopted by Einstein J at first instance was to be preferred;
- (b) the approach taken by Mason P in *Fostif* was too restrictive at least where federal jurisdiction was being exercised; and
- (c) the funder was engaged in “officiously stirring up conflicts” and accordingly it was oppressive for the funder to “seek to engage federal judicial power by stirring up controversy between retailers and Mobil”. [58].

14.2 It was accepted, or the Court found, that:

- (a) when the proceedings were instituted the funder had not spoken to any other retailer than Trendlen and Trendlen was the only retailer who had given instructions to bring a claim;
- (b) the funder admitted that its dominant purpose in initiating the proceedings was profit;
- (c) the funder admitted it was stirring up controversy where none existed and that it was using the Court’s process for that purpose;
- (d) the funder had control over the running of the proceedings;
- (e) the funder was seeking to obtain the names of other retailers so that it could obtain a profit;
- (f) it is unlikely that there would have been any legal controversy apart from the funder’s actions; and
- (g) the funder was not acting altruistically and that it was motivated by desire for profit.

14.4 The Court applied the Court of Appeal’s decision in *Fostif* and found that the facts were insufficient to base a finding that there was an abuse of process by reason of trafficking in litigation.

15 Control

15.1 The Court said that the level of control that the funder had was not in any way improper, relying on the findings by Mason P in *Fostif* at [137] to the effect that:

“A measure of control is essential if the funder is to manage group litigation and also protect its own legitimate interests”.

15.2 Based on *Fostif*, the Court found that the level of control was no more “than is necessary and appropriate to enable Firmstone’s [the funder] ‘to make the forensic decisions necessary to deal with determined and well informed opponents’ ”. [64].

15.3 In spite of the fact that the funder was motivated by a desire for profit, the Court said that the reality was that if the litigation was successful it would also be to the benefit of the plaintiffs. Further, the funder had undertaken to meet the costs incurred and to provide an indemnity for any adverse costs. There was no evidence that the funder lacked capacity to meet these undertakings.

16. Conduct Evidencing Actual Abuse

16.1 The Court approached this issue in light of the findings of the Court of Appeal in *Fostif*, indicating that the starting point is what Mason P said (in *Fostif*) at [114], including the following:

“Indeed, it is not concerned with the arrangements, fiduciary or otherwise, between the plaintiff and the funder except so far as they have corrupted or have a tendency to corrupt the process of the Court in the particular litigation. It is only when they have that quality that the defendant has standing to complain about them...”.

16.2 The Court focused on two aspects of abuse of process:

- (a) the purpose for which proceedings are instituted, on the basis that it may be an abuse of process if proceedings are instituted for a purpose other than that which the Court’s processes are intended to serve; and
- (b) the impact of the proceedings on the defendant, particularly where the proceedings are converted into “instruments of injustice or unfairness”.

16.3 The Court said that “the judgment in *Fostif* clearly establishes that no improper purpose exists simply because the person who is responsible for bringing the proceedings (even though not a party) will stand to make a profit if they succeed”. [Para 75]. As one purpose of the proceedings was to produce a beneficial result for the plaintiffs, there was no abuse of process on the ground of improper purpose.

16.4 In relation to whether the proceedings were oppressive, the Court found:

“Nor do I think that the proceedings are oppressive, so as to amount to abuse of process, simply because of their impact on Mobil. On Trendlen’s case, Mobil has received money to which in justice and equity it is not entitled. The case cannot be dismissed as hopeless; indeed, if the analogy with *Roxburgh* holds up, it is likely to succeed. The proceedings can only be oppressive to Mobil in the sense that any proceedings brought against any wrong-doer, for civil rectification of or recompense for the wrong, are oppressive. I do not think that the law goes so far as to recognize that it is oppressive to call upon a wrong-doer to rectify a wrong. Nor do I think, in the circumstances of this case, that it can be oppressive for Mobil to be called to account for its retention of the money in question”. [76].

16.5 Accordingly, the Court refused to stay or dismiss the proceedings. Further steps in this case will be delayed until the outcome of the application for special leave to appeal (and, if granted, the appeal) to the High Court in Fostif.

Case List

1. Project 28 Pty Ltd (formerly Narui Gold Coast Pty Ltd) v Barr; Project 28 Pty Ltd (formerly Narui Gold Coast Pty Ltd) v Tim Barr Pty Ltd & Ors [2005] NSWCA 240.
2. Trendlen v Mobil Oil [2005] NSWSC 741.