

SUPREME COURT OF QUEENSLAND

CITATION: *Re Queensland Nickel Pty Ltd (in liq)* [2017] QSC 56

PARTIES: **QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)**
(first applicant)

JOHN PARK, STEFAN DOPKING, KELLY-ANNE TRENFIELD AND QUENTIN OLDE IN THEIR CAPACITY AS JOINT AND SEVERAL LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)
(second applicants)

FILE NO/S: SC No 7189 of 2016

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 19 April 2017

DELIVERED AT: Brisbane

HEARING DATE: 20 December 2016, 17 March 2017

JUDGE: Bond J

ORDERS: **The orders of the Court are that:**

- 1. Pursuant to s 479(3) of the *Corporations Act 2001* (Cth) it is directed that the General Purpose Liquidators would be justified in paying from bank accounts held by Queensland Nickel the costs in respect of the relief sought in paragraphs 2, 3 and 4 (so far as it relates to paragraphs 2 and 3) of their amended originating application.**
- 2. The interlocutory application filed by Mr Clive Palmer on 19 December 2016 in the Cessna proceeding is dismissed and Mr Palmer must pay the General Purpose Liquidators' costs of and incidental to the interlocutory application on the indemnity basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – POWER TO ORDER – where directions were made setting down a hearing date for an originating application and requiring the filing and serving of material by a group of parties – where one of the parties instead filed an interlocutory application seeking to overturn the directions – where the interlocutory application was dismissed – whether

the circumstances warrant an order for indemnity costs

CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – APPLICATIONS TO COURT FOR DIRECTIONS OR ADVICE – where the liquidators applied for directions under s 479 of the *Corporations Act 2001* (Cth) that they would be justified in paying out of funds in the control or possession of the company their remuneration and the costs of bringing the application – where the opposing parties later consented to the liquidators paying out their remuneration – whether a direction should be made that the liquidators’ costs be paid out of the funds

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – PARTIES AND NON-PARTIES – NON-PARTIES GENERALLY – GENERAL PRINCIPLES – where the liquidators applied for directions in relation to remuneration – where two non-parties were heard in opposition to the application – where the liquidators did not originally seek a costs order against the non-parties – whether a costs order should be made against the non-parties

Corporations Act 2001 (Cth), s 449E, s 479, s 511, s 1318
Trusts Act 1973 (Qld), s 76

LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo [2013] QCA 305, cited

QNI Resources Pty Ltd v Park [2016] QSC 222, cited
Re Rolcross Pty Ltd (in liq) [2012] NSWSC 846, cited

COUNSEL: R M Derrington QC, with C Curtis, for the applicants
N Ferrett for the Palmer parties

SOLICITORS: HWL Ebsworth for the applicants
Alexander Law for the Palmer parties

- [1] In *QNI Resources Pty Ltd v Park* [2016] QSC 222 I rejected an application by QNI Resources,¹ QNI Metals and Queensland Nickel Sales for leave to proceed against Queensland Nickel, which is a company in liquidation.
- [2] My reasons for judgment in *QNI Resources Pty Ltd v Park* set out the factual background which has led to this proceeding and a number of other proceedings being managed by me together on the commercial list. I will not repeat that background.
- [3] In one of those proceedings – known as the “Cessna proceeding” – the General Purpose Liquidators of Queensland Nickel sought the following relief by way of amended originating application:
1. ...
 2. In relation to the remuneration of, and the debts incurred by, the [General Purpose Liquidators] in their former roles as administrators of [Queensland Nickel]:
 - (a) The manner in which, and the extent to which, the [General Purpose Liquidators] may withdraw amounts from funds in the possession or control of, [Queensland Nickel] over

¹ In these reasons I use the terms defined in the glossary which I set out in the appendix to these reasons.

which QNI Resources Pty Ltd, QNI Metals Pty Ltd and Queensland Nickel Sales Pty Ltd assert a beneficial interest (**Company Funds**);

- (b) Whether the [General Purpose Liquidators] would be justified in treating the Company Funds as assets of [Queensland Nickel] for the purpose of indemnifying [Queensland Nickel] for its liabilities to the [General Purpose Liquidators];
3. An order relieving the [General Purpose Liquidators] from liability for any negligence, default, breach of trust or breach of duty relating to the payment by them from the Company Funds in satisfaction of:
- (a) Expenses incurred by the [General Purpose Liquidators] as administrators of [Queensland Nickel]; and
 - (b) Remuneration to which the [General Purpose Liquidators] are entitled under section 449E of the Corporations Act as administrators of [Queensland Nickel];
4. [Queensland Nickel's and the General Purpose Liquidators'] costs of and incidental to this application ... :
- (a) be paid out of the Company Funds;
 - (b) alternatively, be costs in the liquidation of [Queensland Nickel].
- [4] On 14 November 2016, I directed that on 22 November 2016 I would mention the originating application in the Cessna proceeding and a related proceeding for the purposes, amongst others, of making further directions and setting the hearing date in respect of the orders sought by the General Purpose Liquidators in paragraphs 2 and 3 of their amended originating application in the Cessna proceeding.
- [5] On 22 November 2016 at a directions hearing at which the Palmer parties were represented and Mr Palmer personally was present –
- (a) I directed that 20 December 2016 would be the hearing date for the relief in relation to remuneration claimed in paragraphs 2 and 3 of the General Purpose Liquidators' amended originating application in the Cessna proceeding; and
 - (b) the Palmer parties were directed that by 16 December 2016 they were to file and serve any material to be relied on in relation to the General Purpose Liquidators' application for that relief.
- [6] Those directions were also confirmed by formal order signed by me on 9 December 2016.
- [7] The Palmer parties did not comply with the direction I had made that they file and serve any material to be relied on in opposition to the orders sought by the General Purpose Liquidators, so that the hearing could take place on 20 December 2016. Rather, on 19 December 2016 Mr Palmer filed an interlocutory application within the Cessna proceeding which belatedly sought to overturn the orders made on 22 November 2016 and confirmed on 9 December 2016. The interlocutory application sought orders that the proceeding continue as if commenced by claim; that the applicant be joined as a party, and that there be directions for pleadings.²
- [8] That course was opposed by the General Purpose Liquidators and characterized as an attempt to outflank the orders I had previously made. The General Purpose Liquidators contended that the attempt should be rejected, especially as the Palmer parties had not filed

² A separate interlocutory application was filed by QNI Metals, QNI Resources, Cart Provider and Mr Darren Wolfe seeking similar relief. Although it was not entirely clear on the face of the two interlocutory applications it seemed that the one which involved Mr Wolfe as applicant must have been intended to relate to that part of the originating application which was not being heard on 20 December 2016, namely paragraph 1 which related to possession of a Cessna aircraft. That application was not dealt with and the affidavits filed in support of it by Mr Wolfe were not read.

any admissible evidence disputing the facts on which the General Purpose Liquidators relied.

[9] Some other observations should be made concerning the state of the evidence filed by the Palmer parties:

(a) Amongst other things, in *QNI Resources Pty Ltd v Park* I found that –

- (i) the applicants had claimed the unconditional return of all of the joint venture property held by Queensland Nickel, despite the fact that Queensland Nickel had, apparently, and to the knowledge of the joint venturers, properly incurred very significant liabilities and no provision had been made for their discharge;
- (ii) an essential aspect of the applicants' claims was the negation of the propositions that Queensland Nickel had any beneficial interest in the joint venture property or a right of indemnity out of that property in respect of the liabilities incurred by it; and
- (iii) although the applicants' pleaded case did assert that negation, having regard to the evidence before me, the applicants had not persuaded me that there was a solid foundation for the assertion.

(b) At [135] to [140] I held:

[135] Of course this application is not a trial. I make no finding that Queensland Nickel has the rights of indemnity or of lien which I have discussed or that the implications I have discussed must arise in this case. Obviously those implications would not arise if the proper analysis of the mutual rights and obligations which existed between the Joint Venturers and the General Manager of their Joint Venture did not involve the apparent affront to justice identified at [130] above. That might occur if the events which actually happened had occurred in such a way as justified the conclusions that Queensland Nickel had no beneficial interest in the Joint Venture Property and no right of indemnity out of that property in respect of very substantial liabilities incurred by it. The applicants' proposed statement of claim asserts these conclusions, but the problem for the applicants is that mere assertion of conclusions does not establish a serious question to be tried that as to the truth of the assertion.

[136] In my view the negation of the existence of Queensland Nickel's entitlement to an indemnity of such a nature as would also confer proprietary or beneficial rights in the Joint Venture Property is an essential aspect of the applicants' claims against Queensland Nickel. The applicants' case as currently framed asserts conclusions which suit their case but does not establish a solid foundation for them. In a technical pleading sense, the pleading is flawed because of failure to plead the material facts which justify the pleaded conclusions. However, although that failure is significant, the point is more fundamental, especially in light of the evidence I have received. Absent a solid foundation for the pleaded negations, there can be no solid foundation to (and no point in the Court embarking on a consideration of) the applicants' claims for relief against Queensland Nickel.

[137] I have mentioned the specific questions which I caused my associate to raise with the parties. During argument at the second hearing I specifically asked Senior Counsel for the applicants this question during argument at the second hearing:

Bearing in mind the matters referred to, the evidence that they are not at arms' length, the provisions of the agreement, the pleaded case, why wouldn't I assume that the way in which the business was conducted must have been satisfactory to the JVOC and therefore to the joint venturers, and if that was so, how is it arguable that the joint venturers wouldn't be contractually liable for their respective proportions of the liabilities incurred by Queensland Nickel or at least a significant part of them, example, in relation to employees, at least?

[138] I received no answer, other than a change of subject to focus on a trustee's right of indemnity.

[139] And so far as a trustee's right of indemnity was concerned, the closest I got to an answer was the acknowledgment that if there was a specific item of Joint Venture Property of which Queensland Nickel held legal title (e.g. a truck or a garden fork), and specific expenses were

incurred in respect of that truck or garden fork, then there would be a trustee's right of indemnity in respect of those expenses and in respect of that truck or garden fork. But, so the argument went, it would be wrong to regard there as being any more general right of indemnity over all the Joint Venture Property. I was left in the dark as to why that might be so, and why that proposition could be arguable in light of the evidence to which I have referred and the specific appropriation of all Joint Venture Property to the management and control by Queensland Nickel for the use by Queensland Nickel solely for "the purpose and duration of the Joint Venture".

[140] If there is some analysis of fact or law capable of persuading a Court that there is a serious question to be tried as to the non-existence of Queensland Nickel's entitlement to right of indemnity of such a nature as would also confer proprietary or beneficial rights in the Joint Venture Property, the applicants have not presented it.

- (c) The only evidence relied on by the Palmer parties (both in support of the interlocutory application and, when, as will appear, that failed, to resist the orders sought by the General Purpose Liquidators) was contained in 2 affidavits affirmed by Mr Palmer.
- (d) The Palmer parties had to be taken to have been familiar with my judgment in *QNI Resources Pty Ltd v Park*. Indeed Mr Palmer exhibited the judgment; the notice of appeal filed by the losing applicants; and even the written submissions in support of the notice of appeal.
- (e) Yet despite that, the Palmer parties had not adduced any admissible evidence of events which had actually happened during the operation of the joint venture in support of the contention which they had made in the proceeding under appeal and which they still advanced on the current application, namely that any monies held by Queensland Nickel were held by it as bare trustee for QNI Resources and QNI Metals; that Queensland Nickel had no beneficial interest in the monies and no right of indemnity in respect of the monies. Nor was there any explanation for the absence of such evidence. There was, for example, no contention by the Palmer parties' that they needed further time to obtain such evidence.

[10] I was not persuaded that I should alter the orders that I had previously made concerning the hearing on 20 December 2016, and refused the orders which had been sought by the interlocutory application.³ I did not then dispose of the question of costs of the interlocutory application, but there is no reason why costs should not follow the event. As will appear, a question arises as to whether I should order costs to be paid on an indemnity basis. I will come back to that.

[11] After having lost the interlocutory application, no application for adjournment was made by the Palmer parties. Accordingly, on 20 December 2016 I proceeded to hear argument on the question whether I should make the orders which had been sought by the General Purpose Liquidators. They had formulated the relief which they sought in draft orders which they provided to me as follows:

1. Pursuant to sections 511 and 479(3) of the Corporations Act 2001 (Cth)⁴ it is directed that [the General Purpose Liquidators] would be justified in paying the amount of \$3,173,551.70 from bank accounts held by [Queensland Nickel] in payment of the remuneration payable to [the General Purpose Liquidators] pursuant to section 449E of the *Corporations Act 2001* (Cth) together with the costs in respect of the relief sought in paragraphs 2, 3 and 4 of the Amended Originating Application.
2. Pursuant to section 1318 of the *Corporations Act 2001* (Cth) and section 76 of the *Trusts Act 1973* (Qld), [the General Purpose Liquidators] are relieved from any negligence, default, breach of trust

³ See transcript 20 December 2016 at 1-19.

⁴ Because the winding up was commenced prior to 1 March 2017, the recent repeal of these two sections does not affect this proceeding: see *Insolvency Law Reform Act 2016* (Cth) sch 2 ss 120 and 151.

or breach of duty relating to the payment of amounts towards their remuneration fixed pursuant to section 449E of the Corporations Act 2001 (Cth) prior to the date of this order.

- [12] The application for that relief was fully argued before me on that day.
- [13] Amongst other things, the General Purpose Liquidators contended (and the evidence adduced by them supported) that I should make the following conclusions:
- (a) As administrators they had carried on the business formerly conducted by Queensland Nickel at the Yabulu refinery. That business involved the purchasing of ore products for production, the use of Queensland Nickel's funds to meet expenses or incurring liability for those costs, bearing the cost of freighting goods to and from the refinery, meeting the operating costs of production including all employee costs, arranging sales of finished products and paying costs associated with sales.
 - (b) During the administration period Queensland Nickel generated revenue totalling \$57 million and paid debts totalling \$60.1 million. The work of the administrators included terminating the employment of almost all employees on 11 March 2016, after the General Purpose Liquidators were notified that Queensland Nickel's appointment as "General Manager" of the Queensland Nickel Joint Venture was terminated.
 - (c) There was no evidentiary support for a contention that any part of the business which the General Purpose Liquidators carried on as administrators was not business of the Joint Venture which would attract a right of indemnity out of the Joint Venture assets.
 - (d) There was an absence of any evidence filed by the Palmer Parties seeking to support its arguments that monies were held by Queensland Nickel as bare trustee for QNI Resources and QNI Metals; that Queensland Nickel had no beneficial interest in the monies and no right of indemnity in respect of the monies. Mere assertion of the conclusion without evidence to support it did not amount to a reason why relief should be denied. On the evidence before me there seemed to be no reason why the liquidators should not use the property held by Queensland Nickel to discharge the liabilities of the administration, including the amounts owing to the administrators by way of remuneration.
 - (e) In any event the persons asserted to have the beneficial interest (namely QNI Resources and QNI Metals) had in separate instruments entered into at the time of the appointment of administrators, promised to pay the administrators' remuneration.
 - (f) There was undisputed evidence before me which verified that that the remuneration relevant to the administration was approved:
 - (i) by a committee of creditors in respect of the period 18 January 2016 to 27 March 2016, in an amount of \$2,973,771.50 (ex GST); and
 - (ii) at a full meeting of the creditors of Queensland Nickel in respect of the period 28 March 2016 to 22 April 2016, in an amount not exceeding \$1.1 million (the actual fees and expenses incurred were \$911,275.50 ex GST).
- [14] The General Purpose Liquidators contended I had jurisdiction to make directions of the nature sought. Further, they submitted that the directions which they sought did not involve any determination of substantive rights over trust property, and would not determine any right on the part of any claims by beneficiaries over funds held by Queensland Nickel, such as a right to recover those funds. The question, they contended, was solely whether the General Purpose Liquidators would be personally liable for any breach of duty in the liquidation if they conducted themselves as proposed.

[15] At the hearing, and in a revised submission submitted shortly after it, the Palmer parties opposed the making of a direction pursuant to s 479(3)⁵ essentially in reliance on these contentions:

- (a) Queensland Nickel's position as General Manager of the Queensland Nickel Joint Venture was terminated on 3 March 2016 and upon termination, Queensland Nickel became obliged to transfer assets as directed by the beneficiaries (and without any right of indemnity).
- (b) If, contrary to the previous proposition, a right of indemnity existed, the right could not be regarded as applying in respect of the generality of joint venture assets. Rather -
 - (i) I should conclude that there was must have been a separate and distinct trust established each time Queensland Nickel acquired legal title to an item of joint venture property, the trust property of which was the particular item of property.
 - (ii) Queensland Nickel would have a right of indemnity in respect of the expenses incurred in respect of that particular item of property, but no wider right.
 - (iii) Because of the existence of numerous separate individual trusts, if the General Purpose Liquidators were to establish a right of indemnity, it would be necessary for them to identify the expenses incurred directly in respect of the particular assets concerned.
 - (iv) The weakness in the case of the General Purpose Liquidators was the absence of evidence demonstrating why it was that the remuneration which they sought was related to the particular fund they were seeking access to.
- (c) There was no prejudice caused to the General Purpose Liquidators by refusing the relief sought because they could always make a demand on the instruments which contained the personal promises to pay their remuneration which were entered into at the time of their appointment.

[16] Since the hearing concluded the following events have occurred.

[17] First, by letter dated 24 February 2017, the solicitor for the Palmer parties wrote to the solicitors for the General Purpose Liquidators in these terms:

I refer to your earlier correspondence and we are instructed to inform your firm and clients as a sign of good faith, our clients QNI Resources Pty Ltd and QNI Metals Pty Ltd consent to your clients paying themselves \$3,173, 551.70 representing fees of the administration from the bank account of Queensland Nickel Pty Ltd (In Liquidation) and from money beneficially owned by our clients. Without admission to the correctness of the amount, clients need further time to consider the appropriateness of it.

[18] Second, at a review on 17 March 2017 the General Purpose Liquidators brought an application for leave to rely on that letter as evidence in their application. That course was not opposed. They still contended I should make the following orders:

1. Pursuant to s 479(3) of the Corporations Act 2001 (Cth) it is directed that [the General Purpose Liquidators] would be justified in paying the amount of \$3,173,551.70 from bank accounts held by [Queensland Nickel] in payment of the remuneration payable to [the General Purpose Liquidators] pursuant to section 449E of the Corporations Act 2001 (Cth) together with the costs in respect of the relief sought in paragraphs 2, 3 and 4 of the Amended Originating Application.
2. Pursuant to section 1318 of the Corporations Act 2001 (Cth) and section 76 of the Trusts Act 1973 (Qld), [the General Purpose Liquidators] are relieved from any negligence, default, breach of trust

⁵ Because, for reasons which will appear, it subsequently becomes unnecessary to consider the question of relief otherwise than under s 479, I will refer to arguments relevant only to the s 479 relief.

or breach of duty relating to the payment of amounts towards their remuneration fixed pursuant to section 449E of the Corporations Act 2001 (Cth) prior to the date of this order.

3. The interlocutory application filed by [QNI Metals], [QNI Resources], [Cart Provider] and Mr Daren Wolfe on 16 December 2016 (“the Interlocutory Application”) is dismissed.⁶
4. [QNI Metals], [QNI Resources], [Cart Provider] and Mr Daren Wolfe are to pay [Queensland Nickel’s and the General Purpose Liquidators’] costs of and incidental to the Interlocutory Application.

[19] Third, at that review I was not satisfied that I had received sufficiently considered submissions addressing the impact which the new evidence had on the orders which should be made in response to the General Purpose Liquidators application. I directed the delivery of submissions (first by the Palmer parties and then by the General Purpose Liquidators) addressing that topic.

[20] Fourth, in their further written submissions the Palmer parties:

- (a) acknowledged the letter dated 24 February 2017;
- (b) submitted the four orders sought by the General Purpose Liquidators should not be made because:
 - (i) there was no utility in giving a direction that the General Purpose Liquidators were justified in paying \$3,173,551.70 from the funds which QNI Resources and QNI Metals had asserted beneficial ownership, because there was no controversy between the parties that the General Purpose Liquidators were permitted to apply those funds to the \$3,173,551.70 for the remuneration;
 - (ii) the claim for a direction under s 479(3) in relation to the costs in respect of the relief sought in paragraphs 2, 3 and 4 of the amended originating application was misconceived and the costs of the application should be dealt with in the usual way;
 - (iii) relief under s 1318 of the *Corporations Act 2001 (Cth)* and s 76 of the *Trusts Act 1973 (Qld)* was either unnecessary or misconceived;
- (c) submitted that paragraphs 2 and 3 of the amended originating application should be dismissed;
- (d) submitted that the interlocutory application should be dismissed;
- (e) submitted, as to costs, that:

“[16] The costs of both applications should be in the proceeding. The General Purpose Liquidators have abandoned or significantly narrowed the relief sought at a late stage. It could not be said that they have enjoyed success on the application.

[17] The General Purpose Liquidators’ costs should be costs in the liquidation.”

[21] Fifth, in their further written submissions the General Purpose Liquidators:

- (a) pointed out that the Palmer parties had by the letter and their further written submissions informed me that there was no potential dispute or controversy in Queensland Nickel applying the funds it holds to discharge the costs of the administration;
- (b) submitted that, in that event, the General Purpose Liquidators no longer sought the directions sought in paragraphs 1 and 2 of the draft order tendered on 20 December 2016 (which are quoted at [11] above);

⁶ It is evident that the reference in proposed orders 3 and 4 to this and not Mr Palmer’s interlocutory application was an error: see footnote 2. As will appear, ultimately the General Purpose Liquidators seek orders only in relation to the interlocutory application filed by Mr Palmer.

- (c) maintained the application so far as it related to the use of Queensland Nickel's funds to satisfy the costs of the application;
- (d) also sought an order for payment of the costs of the application heard on 20 December 2016 and the costs of the interlocutory application filed by Mr Palmer on 19 December 2016 on the indemnity basis.

[22] Ultimately, the General Purpose Liquidators submitted I should make the following orders:

1. Pursuant to section 479(3) of the Corporations Act 2001 (Cth) it is directed that [the General Purpose Liquidators] would be justified in paying from bank accounts held by [Queensland Nickel] the costs in respect of the relief sought in paragraphs 2, 3 and 4 of the Amended Originating Application.
2. [not used]
3. The interlocutory application filed by Mr Clive Palmer on 16 December 2016 ("the Interlocutory Application") is dismissed.
4. Mr Clive Palmer is to pay [the General Purpose Liquidators'] costs of and incidental to the Interlocutory Application on the indemnity basis.
5. QNI Resources Pty Ltd and QNI Metals Pty Ltd are to pay [Queensland Nickel's and the General Purpose Liquidators'] costs of and incidental to the proceeding, in relation to the relief sought in paragraphs 2, 3 and 4 of the Amended Originating Application on the indemnity basis.

[23] I will address the issues which remain in contest under separate headings.

The interlocutory application filed by Mr Palmer

[24] I dismissed the interlocutory application during the hearing on 20 December 2016. An order should formally be made dismissing the application.

[25] As I have said, costs should follow the event. The question is whether there should be an indemnity costs order.

[26] The principles governing applications for indemnity costs orders are not in dispute. In *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo* [2013] QCA 305 at [21] – [22], the Court of Appeal stated (footnotes inserted):

[21] The applicable principles for the awarding of indemnity costs were usefully summarised by Sheppard J in *Colgate-Palmolive Company v Cussons Pty Ltd*, [[1993] FCA 536; (1993) 46 FCR 225 at 232-234.] However, those principles operate as a guide to the exercise of the relevant discretion. They do not define all of the circumstances in which the discretion is to be exercised and do not limit the width of that discretion. [*Ingot Capital Investment & Ors v Macquarie Equity Capital Markets & Ors (No 7)* [2008] NSWSC 199 at [26].] Further, the categories in which the discretion to award indemnity costs may be exercised are not closed. [*Di Carlo v Dubois & Ors* [2002] QCA 225 at [37].]

[22] Whilst the awarding of costs on an indemnity basis will always ultimately depend upon the exercise of a discretion in the particular circumstances of each individual case, the justification for an award of indemnity costs continues to require some special or unusual feature of the particular case. As was observed by Basten JA in *Chaina v Alvaro Homes Pty Ltd*, [[2008] NSWCA 353 at [113].] the general rule remains that costs should be assessed on a party and party basis, and the standard to be applied in awarding indemnity costs ought not "be allowed to diminish to the extent that an unsuccessful party will be at risk of an order for costs assessed on an indemnity basis, absent some blameworthy conduct on its part".

[27] I do not think that the subsequent decision by the Palmer parties to consent to payment out of funds which had been the subject of contest is relevant to the costs order which should be made in relation to the interlocutory application.

[28] However, I do agree with the submission advanced by the General Purpose Liquidators at the time, namely that the application was an attempt to outflank the orders I had previously made. More importantly, unless it had been supported by evidence of the nature of that referred to in [8] and [9](e) above (or even material which pointed to the existence of the evidence, and which suggested that more time was required to collect the evidence so that

it would be unfair to proceed on 20 December 2016), it was doomed to fail. Because it was not, it was an application which ought never have been made.

- [29] Those circumstances warrant the making of an indemnity costs order in respect of the interlocutory application filed by Mr Palmer.

Should there be a direction pursuant to s 479(3) concerning costs?

- [30] The amended originating application sought an order that the General Purpose Liquidators' costs of bringing the application for directions in relation to their remuneration be paid out of "Company Funds", namely the funds in Queensland Nickel's possession or control over which QNI Resources, QNI Metals and Queensland Nickel Sales had asserted a beneficial interest.
- [31] The specific orders sought from me on 20 December 2016 included directions pursuant to s 479(3) that the General Purpose Liquidators would be justified in paying from bank accounts held by Queensland Nickel, both –
- (a) the \$3,173,551.70 claimed for remuneration; and
 - (b) the costs of bringing the application for the directions.
- [32] The bringing of the application for directions had been rendered necessary by the fact that the Palmer parties had resolutely opposed the course which the General Purpose Liquidators had proposed. The Palmer parties continued that opposition at the hearing before me.
- [33] It was not until their solicitors' letter dated 24 February 2017 and their subsequent written submissions, that the Palmer parties abandoned that opposition (at least in relation to the payment of the \$3,173,551.70) after the application had been argued. They have not sought to adduce any evidence which explains their change of position.
- [34] Whilst I accept (as have the General Purpose Liquidators) that the change of position rendered unnecessary the making of any s 479(3) direction in relation to the \$3,173,551.70 claimed for remuneration, the same cannot be said of the question of the costs of having had to pursue the application.
- [35] The only argument which the Palmer parties have advanced against the making of such an order is that it is "misconceived". I reject that argument. In *Re Rolcross Pty Ltd (in liq)* [2012] NSWSC 846, at issue was whether a liquidator should receive directions in relation to recouping costs out of trust assets when it was apparent that the costs were all associated with the operation of the trust. The Court considered it was appropriate both to make a direction that remuneration be paid out of the trust assets and to order that the costs of the proceeding seeking the direction be paid out of the trust assets. *Re Rolcross* is an example of the appropriateness of making an order such as that which is presently sought by the General Purpose Liquidators. For the following reasons, I think a similar order is appropriate in the circumstances of this case:
- (a) Prior to the concession, the argument which had been advanced as the reason why a s 479(3) direction should not be made was that summarized at [15] above.
 - (b) There was no compelling evidentiary support for those arguments. Rather the Palmer parties' case had the gaps to which I have referred at [9] above. Further, I do not accept the suggestion that no prejudice could attend requiring the General Purpose Liquidators to face the uncertain prospect of attempting to enforce the instruments entered into at the time of their appointment.

- (c) The concession revealed by the Palmer parties' solicitors' letter dated 24 February 2017 and their subsequent written submissions was inconsistent with the argument which had been advanced before the concession.
- (d) I would not make the findings necessary to accept the Palmer parties' argument as advanced before the concession.
- (e) The General Purpose Liquidators' argument – for which there was evidentiary support – should be accepted. Although, the concession having subsequently been made, no direction is now necessary in relation to the remuneration itself, the concession did not extend to costs and that order was still opposed. That point is not moot. Justice requires that it be resolved in favour of the General Purpose Liquidators.

What if any costs order should be made against QNI Resources and QNI Metals?

- [36] QNI Resources and QNI Metals were not formally parties to the amended originating application. However they had been heard (because they fell within the umbrella of the Palmer parties) to oppose the order.
- [37] The jurisdiction which the General Purpose Liquidators seek to have me exercise is the jurisdiction to make an order for costs against a non-party.
- [38] However, it seems to me that it is inappropriate to entertain that application.
- [39] First, I note that the relief which they sought in the amended originating application was an order that the costs be paid out of the "Company Funds", or, alternatively that the costs be the liquidators' costs in the liquidation. The General Purpose Liquidators had not sought a costs order against QNI Resources or QNI Metals personally. Nor did they seek one either on 20 December 2016 or even on the occasion of the review on 17 March 2017. It does not seem to be to be appropriate to permit such an application to be advanced in the way they have sought to do.
- [40] Second, I have acceded to their application for an order that they would be justified in paying from bank accounts held by Queensland Nickel the costs in respect of the relief sought in paragraphs 2, 3 and 4 of the amended originating application. No explanation has been advanced as to why I should, cumulative to such an order, also make an order against QNI Resources and QNI Metals personally.
- [41] In light of the fact that I do not propose to make an order for costs against QNI Resources and QNI Metals personally, it is unnecessary to consider the submission that the order should require costs to be paid on the indemnity basis.

Conclusion

- [42] The orders which I make are as follows:
 - (a) Pursuant to s 479(3) of the *Corporations Act* 2001 (Cth) it is directed that the General Purpose Liquidators would be justified in paying from bank accounts held by Queensland Nickel the costs in respect of the relief sought in paragraphs 2, 3 and 4 (so far as it relates to paragraphs 2 and 3) of their amended originating application.
 - (b) The interlocutory application filed by Mr Clive Palmer on 19 December 2016 in the Cessna proceeding is dismissed and Mr Palmer must pay the General Purpose Liquidators' costs of and incidental to the interlocutory application on the indemnity basis.

Appendix	
Proceedings	
"Glencore interpleader proceeding"	Supreme Court of Queensland proceeding BS6216/16
"Liquidators removal proceeding"	Supreme Court of Queensland proceeding BS6150/16
"Queensland Nickel proceeding"	Supreme Court of Queensland proceeding BS3849/16
"Voidable transactions proceeding"	Supreme Court of Queensland proceeding BS6847/16
"Cessna proceeding"	Supreme Court of Queensland proceeding BS7189/16
"Palmer Cessna proceeding"	Supreme Court of Queensland proceeding BS7778/16
"Public examinations proceeding"	Federal Court of Australia proceeding QUD329/2016
"Liquidators s 459A proceeding"	Supreme Court of Queensland proceeding BS10294/16
Groups of Parties	
"Joint Venture parties"	QNI Resources Pty Ltd & QNI Metals Pty Ltd
"Palmer parties"	QNI Resources Pty Ltd, QNI Metals Pty Ltd, Queensland Nickel Sales Pty Ltd, China First Pty Ltd, Waratah Coal Pty Ltd, Cart Provider Pty Ltd, Mr Clive Palmer
"General Purpose Liquidators"	Mr John Park, Mr Stefan Dopking, Ms Kelly-Anne Trenfield and Mr Quentin Olde in their capacity as liquidators of Queensland Nickel Pty Ltd (in liq)
"Special Purpose Liquidators"	Mr Steven Parbery, Mr Marcus Ayres and Mr Michael Owen in their capacity as special purpose liquidators of Queensland Nickel Pty Ltd (in liq)
Individual parties	
"Queensland Nickel"	Queensland Nickel Pty Ltd (in liq) ACN 009 842 068
"QNI Resources"	QNI Resources Pty Ltd ACN 054 117 921
"QNI Metals"	QNI Metals Pty Ltd ACN 066 656 175
"Queensland Nickel Sales"	Queensland Nickel Sales Pty Ltd ACN 009 872 566
"China First"	China First Pty Ltd ACN 135 588 411
"Waratah Coal"	Waratah Coal Pty Ltd ACN 114 165 669
"Cart Provider"	Cart Provider Pty Ltd ACN 119 455 837