

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BOND J

No 6150 of 2016

RE: QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)

No 10294 of 2016

RE: QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)

BRISBANE

2.28 PM, WEDNESDAY, 22 FEBRUARY 2017

JUDGMENT

HIS HONOUR: Proceeding 6150/16 (“the liquidators removal proceeding”) and proceeding 10294/16 (“the liquidators s 459A proceeding”) are proceedings which have been placed on the commercial list and which are being case managed by me together with a number of other proceedings.

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All the proceedings being managed by me relate in, one way or the other, to the joint venture which Queensland Nickel Pty Ltd had conducted on behalf of QNI Resources Pty Ltd and QNI Metals Pty Ltd and to the liquidation of Queensland Nickel Pty Ltd.

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I will seek, so far as possible, to use the terms which have been defined in the glossary of terms which has appeared in the case management orders I have been making over time.

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Some of the factual background and the steps which have occurred which resulted in Queensland Nickel being placed into administration and then into liquidation are discussed in my judgement in *QNI Resources Pty Ltd & Ors v Park & Ors* [2016] QSC 222, in the proceeding referred to as the Queensland Nickel declarations proceeding.

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The liquidators removal proceeding commenced by originating application in June 2016. The issues which arise in the proceeding have been identified in points of claim, points of defence and a reply which have been delivered and amended. Directions have been made requiring the parties to file and serve the evidence and the written submissions on which they rely in the proceeding. I have dealt with disclosure disputes in relation to the proceeding.

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The trial dates were set on 29 September 2016 by order on that date which provided that the hearing dates of 27 February 2017 to 3 March 2017 were set for:

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Hearing of the Liquidators Removal proceeding and any application for leave under section 532 of the Corporations Act 2001 (Cth) and any application under section 459A of the Corporations Act 2001 (Cth).

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Those hearing dates, for those purposes, have been confirmed in a number of other case management orders which I have made since that time using the same language: see orders made on 14 November 2016, 22 November 2016, 9 December 2016 and as late as 13 February 2017.

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The term “liquidators removal proceeding” was defined in a glossary in the order of 29 September 2016 to refer to proceeding 6150/16. In that proceeding, the applicants contend that -

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- a) each of the present general purpose liquidators of Queensland Nickel
 - (i) is a person whose interests conflict with the interest of Queensland Nickel;
 - (ii) is a person whose interests conflict with his or her duty to Queensland Nickel;

- (iii) is a person whose duty to QNI Resources and to QNI Metals conflicts with his or her duty to Queensland Nickel and/or the interests of Queensland Nickel;
 - (iv) is not a person who is independent or who can be seen to be independent of Queensland Nickel;
- 5 b) the removal of each of the general purpose liquidators is justified for the better conduct of the winding up and general advantage of those interested in the winding up.

10 The applicants in the liquidators removal proceeding seek an order that the general purpose liquidators be removed as liquidators and replaced with someone else.

15 The reference in the order of 29 September 2016 to: “any application for leave under section 532 of the Corporations Act 2001 (Cth)” was a reference to the contention which had been advanced in the general purpose liquidators’ amended points of defence, at [61] and [67], that leave should be granted to the general purpose liquidators *nunc pro tunc* under s 532 to permit the appointment of the general purpose liquidators as liquidators of Queensland Nickel because even though the general purpose liquidators admit that they were accreditors of QNI Resources and

20 that it was a company related to Queensland Nickel -

- (i) any amounts QNI Metals Pty Ltd or QNI Metals Pty Ltd are liable to pay to the [general purpose liquidators] are also liabilities of Queensland Nickel and Queensland Nickel has a common interest in the discharge of the amount;
- 25 (ii) the nature and effect of the Security Documents, which gave rise to any creditor relationship between the [general purpose liquidators] and QNI Resources, was disclosed to the creditors of Queensland Nickel at about 29 January 2016;
- (iii) the nature and effect of the Security Documents was set out in section 4.2 of the Report to Creditors dated 11 April 2016 under section 439A of the Act;
- 30 (iv) the creditors of Queensland Nickel, at a meeting of creditors of 22 April 2016, resolved to appoint the [general purpose liquidators] as liquidators of Queensland Nickel; and
- (v) the Committee of Inspection in relation to Queensland Nickel resolved to
- 35 oppose the removal of the [general purpose liquidators] as liquidators on 7 July 2016.

40 I quoted there from [61(d)] of the amended points of defence. The applicants in the proceeding opposed such leave being given on grounds pleaded in their then reply at [31] and [32].

I observe there has been no relevant change to those aspects of the pleadings since the order of 29 September 2016.

45 The only other matter to mention is that the general purpose liquidators did not leave the application under section 532 to the informality of the assertions to which I have referred in the defence. Rather, on 30 September 2016, the day after the making of the order, they filed a separate application within the liquidators removal proceeding, which notified that they were applying to the Court for the following orders:

An order pursuant to section 532(2) of the Corporations Act 2001 (Cth), granting leave nunc pro tunc to the [general purpose liquidators] to seek to be appointed and act as liquidators of [Queensland Nickel Pty Ltd] having regard to:

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a) any liabilities of QNI Resources Pty Ltd and QNI Metals Pty Ltd towards the [general purpose liquidators] personally as at, and after, 22 April 2016; and

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b) the following instruments executed by QNI Resources Pty Ltd and QNI Metals Pty Ltd:

(i) a deed titled "Deed of Guarantee and Indemnity" executed on or about 16 January 2016;

(ii) a deed titled "General Security Agreement - All Property" executed on or about 16 January 2016;

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(iii) a deed poll titled "Power of Attorney and Undertaking" executed by QNI Metals Pty Ltd on or about 18 January 2016;

(iv) a deed poll titled "Power of Attorney and Undertaking" executed by QNI Resources Pty Ltd on or about 18 January 2016; and

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(v) a deed titled "Priority Deed" executed on or about 16 January 2016.

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The application, on its face, notified that it would be heard on 27 February 2017 consistent with the order I had made on 29 September. Thereafter when in case management orders I confirmed the hearing dates in the language which I have earlier quoted, the reference to the application under section 532 must be taken to be a reference to this application.

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The reference in the order of 29 September 2016 and subsequent case management orders to the liquidators s 459A proceeding, was initially a reference to the intention of the liquidators flagged orally to me in a directions hearing to bring an application pursuant to that section to convert the existing creditors voluntary liquidation of Queensland Nickel Pty Ltd into a winding up in insolvency. The benefit which the general purpose liquidators saw in making that change was that it would empower them to attack the validity of certain charges under s 588FJ of the Act.

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The general purpose liquidators had not at the time of the order of 29 September 2016 commenced such a proceeding but had sought to persuade me to list it separately and earlier than when I propose to list the liquidators removal proceeding for hearing. I was persuaded by senior counsel on behalf of the Palmer parties that I should not do that but that I should list it to be heard at the same time as the liquidators removal application and the s 532 application. I did that.

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Subsequently, on 7 October 2016, the general purpose liquidators filed an originating application commencing a proceeding seeking the flagged order under s 459A, namely, proceeding 10294/16. Subsequent case management orders use the term "Liquidators s 459A proceeding" when confirming the hearing dates in the terms I have already quoted.

It follows that before the events to which I'll shortly turn, the parties were under no illusions but that -

- 5 a) the dates 27 February 2017 to 3 March 2017 had been originally set by order on 29 September 2016 and confirmed multiple times thereafter.
- b) during those hearing dates, I would hear three applications:
- 10 (i) the originating application by the applicants in the liquidators removal proceedings for the relief they sought by originating application;
- (ii) the application filed by the general purpose liquidators for leave under s 532 of the *Corporations Act 2001* (Cth) which had been filed as an interlocutory application within the liquidators removal proceeding; and
- 15 (iii) the originating application filed by the general purpose liquidators for an order under section 459A.

So far as the former two applications were concerned, as I have said, the issues had been the subject of pleadings delivered in the liquidators removal proceeding. Directions had been made in relation to the evidence which would be relied on. The parties must be taken to have been ready for trial because the trial dates were confirmed without objection in a directions hearing on 8 February 2017 in respect of which I made formal orders on 13 February 2017.

The evidence before me today records the following events.

25 First, on Sunday 19 February 2017, by email, sent at approximately 4.12 pm, the solicitors for the applicants in the liquidators removal proceeding made an offer in these terms:

30 *Our clients have decided to withdraw the Liquidator Removal Proceedings as a sign of good faith and to pay your clients taxed costs. I would suggest we approach the court with consent orders tomorrow considering the impending trial dates. Please find draft consent orders if your client agrees please execute and return.*

35 The draft consent orders referred to was a consent order providing as follows:

By consent, the order of the court is that:

1) *The proceeding be discontinued.*

40 2) *The Applicants pay the costs of the proceeding of the First to Fourth Respondents on the standard basis.*

Second, the solicitors for the general purpose liquidators responded by email on Monday 20 February 2017 at about 6.47 am in these terms:

45 *Thankyou for your email received at 4.14 pm yesterday.*

I confirm that the general purpose liquidators accept your clients offer and will agree to the terms of the proposed order discontinuing the proceedings with costs to be paid on the standard basis.

5 *I anticipate that it will be necessary to inform his Honour's Associate in the first instance of the proposed orders and await his Honour's direction. A consent order (Form 59A) will not be able to be filed as the matter is being case managed.*

10 It may be observed that although the response purported to accept the offer and stated that the general purpose liquidators would agree to an order in the terms proposed, the response

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- a) did not unconditionally accept the offer;
 - b) did not execute and return the draft consent orders as requested; and
 - c) rejected the proposition that such orders could be made by consent orders and suggested that it would be necessary to obtain my direction because a consent order could not be filed.

Third, the next step was that the applicant's solicitors approached my Associate by email copied to the parties in these terms:

20 *We refer to the above proceeding and to the trial due to commence on 27 February 2017.*

The Applicants wish to discontinue the proceeding.

25 *The Applicants have sought the Respondent's consent to the discontinuance. The request was made yesterday and we have received confirmation of their acceptance.*

30 *Please find attached a proposed draft order.*

Given the urgency and proximity to trial, we respectfully request that the matter immediately be listed before Justice Bond to allow an application for leave to discontinue to be made and heard.

35 *The solicitors for the other parties are copied to this communication.*

40 That communication led to the two proceedings being listed for an urgent hearing before me this morning (using the terms of the applicant's email to my Associate "to allow an application for leave to discontinue to be made and heard").

The following parties appeared before me this morning:

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- a) the applicants in the liquidators removal proceedings;
 - b) the general purpose liquidators; and
 - c) Queensland Nickel Pty Ltd (In Liquidation) represented by senior counsel instructed the by special purpose liquidators.

The latter appearance was solely in case it was necessary to press an application for costs. I had, by order on 13 February 2017, ordered that Queensland Nickel Pty Ltd

(In Liquidation) be removed as a party to the proceeding and that the question of costs be dealt with by written submissions and determined by me on the papers. Senior counsel for Queensland Nickel Pty Ltd (In Liquidation) has provided those submissions and briefly addressed them. Counsel for the applicants in the liquidators removal proceeding is not ready to respond. The order I make in that regard is as follows:

I vacate order 2(b) made on 13 February and direct that –

- 10 (a) the applicants provide, by 4 pm on 23 February 2017, responsive written submissions on the costs order limited to no more than four pages; and
 (b) I will determine the costs order on the papers.

15 Both the active parties before me in relation to the liquidators removal proceeding agreed that UCPR rule 304 should be taken to apply at the proceeding. The general purpose liquidators submitted, and I accept, that the *Corporations Rules* rules apply to the proceeding which is an application under s 503 of the *Corporations Act 2001* (Cth). The *Corporations Rules* do not provide for any process of discontinuance and as such, rule 304 may be applied as a rule which is relevant and not inconsistent with the *Corporations Rules*.

Rules 304 is in these terms:

- 25 304 Discontinuance by plaintiff or applicant
 (1) A plaintiff or applicant may discontinue a proceeding or withdraw part of it before being served with—
 (a) for a proceeding started by claim—the first defence of any defendant; or
 (b) for a proceeding started by application—the first affidavit in reply from a respondent.
 (2) However, after being served with the first defence or first affidavit in reply, a plaintiff or applicant may discontinue a proceeding or withdraw part of it only with the court’s leave or the consent of the other parties.
 (3) Also, if there is more than 1 plaintiff or applicant, or a counterclaim against a plaintiff, a plaintiff or applicant may only discontinue with the court’s leave or the consent of the other parties.
 (4) A plaintiff may discontinue against one or more defendants without discontinuing against other defendants.
 (5) An applicant may discontinue against one or more respondents without discontinuing against other respondents.

Notably, the UCPR provides a form of discontinuance in Form 27. That form is a document which makes provision for the other party to a proceeding to consent to discontinuance. There is no suggestion that any such document has been filed let alone filed with the executed consent of the respondent general purpose liquidators.

The applicants, before me, resiled from the position advanced by their solicitors in the communication to my Associate which was copied to the other parties, namely,

that this was an application for leave to discontinue. The applicants submitted that the liquidators removal proceeding had been discontinued and that the hearing dates of 27 February 2017 to 3 March 2017 should be vacated. They submitted that the liquidators s 459A application should be adjourned for directions.

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The general purpose liquidators, on the other hand, submitted that –

- 10 a) the applicant should have leave to discontinue but only subject to the condition that costs be paid as proposed and that the general purpose liquidators be permitted to continue their application for a cost order under s 532; and
- b) the liquidators s 459A application should be heard in accordance with orders previously made.

15 I will consider, first, the question whether leave was required.

The submission was made that rule 304(2) applied and in terms, contemplated two possibilities, namely, discontinuance with leave or discontinuance with the consent of the other party. That much may be accepted. Then the submission was that the applicants already had the requisite consent of the respondent, that submission having been made by the interpretation placed on the solicitor's email sent last Monday morning to which I have referred. It was contended that email proved the appropriate consent.

25 I reject that argument.

I doubt that the reference in rule 304, to discontinuing with consent, refers to anything other than filing in a Form 27 with the actual signed consent of the other party but assuming without deciding, that consent may be proved otherwise than by filing a Form 27 containing that consent, I think the argument fails on the evidence. The consent sought was consent in the form of execution of a proposed order and return of that executed order. That did not happen. Rather, the response from the general purpose liquidators' solicitors was that what the applicants sought to have done could not be achieved by consent order and that the Court's direction was necessary. That proposition was accepted by the applicants' solicitors as the terms of the email to my Associate demonstrate. I do not think that the applicants had the consent contemplated by rule 304(2).

40 It follows that I treat this application as an application for leave pursuant to section 304(2).

45 It is obvious that I have the power to grant leave. No one contends that I do not. It is also obvious that leave may be granted subject to conditions. That much is clear in rule 310(1) which contemplates conditions. In any event, no one contends that I do not.

The applicants submitted (footnote omitted):

12. There is no proceeding presently before the Court with respect to section 532 of the Corporations Act.

13. The GPLs did not file a counterclaim in the Liquidator Removal Proceeding.

5 14. The GPLs should be required to file a claim and statement of claim articulating the basis on which they say:

- (a) Leave is required;
- (b) Leave should be granted.

10 15. Once the claim and statement of claim has been filed, the defendants to the proceeding can file a defence. The matter can then be programmed to a hearing in the usual way.

15 16. The absence of a properly articulated claim highlights why the s532 Application should not proceed without pleadings.

17. The defences to be raised to such a proceeding may not necessarily mirror those in the points of reply to the Liquidator Removal Proceeding.

20 18. It is inappropriate and unacceptable for the GPLs to purport to convert paragraphs from their points of defence in the Liquidator Removal Proceeding and an interlocutory application to an originating application and seek to have that originating application heard on an expedited basis on 27 February 2017.

25 19. It is prejudicial for the proposed respondents to that originating application to be denied the opportunity to put on a proper defence, evidence and submissions before a trial of issues raised by the GPLs concerning section 532 of the *Corporations Act* (Cth).

30 As to these submissions:

35 First, the claimed relief was both pleaded and identified in a separate interlocutory application. There has been no complaint about this, and much opportunity to do so if there had been any merit. If the applicants do not wish to press their case to have the general purpose liquidators removed, that is a matter for them. They cannot prevent the general purpose liquidators from pressing their case for a s 532 order merely by giving up on their own application. That sort of procedural stratagem is not to be countenanced.

40 Second, the proposition that there needs to be a claim and statement of claim and further pleadings in relation to the general purpose liquidators' application for an order under s 532 which "might not mirror those in the reply" cannot be maintained in light of the procedural history which I have recited. The parties must be taken to be ready for next week's trial. The general purpose liquidators have put on evidence
45 addressing the relief which they seek under s 532. I reject the notion that there is any prejudice to the applicants in dealing with the application next week. Certainly, apart from bare assertion, none is proven.

Third, the public interest in matters of this nature being heard and determined on the dates which have been set down is a compelling one. That consideration applies in all cases. And in this case in particular, one of the parties wants to keep the dates which have already been allocated and no good reason has been demonstrated to me why they should not.

The bottom line is that I do not see any reason why I should not grant leave to the applicants to withdraw their application for orders removing the general purpose liquidators as liquidators but I reject the proposition that, in the circumstances, the general purpose liquidators should be prevented from continuing their application for relief under s 532. The application for an order s section 532 will proceed as presently scheduled.

I turn to the question whether I should vacate the existing hearing date for the liquidators s 459A application. I observe:

- a) The application seems to be made on behalf of the parties who are the applicants in the liquidators removal proceeding. However, they have not filed any application nor have they filed any supporting affidavits in relation to the application.
- b) Nevertheless, they now contend that I should change the date for hearing of the s 459A application and program it to take place on the same date as the voidable transaction proceeding. That proceeding does not presently have a date for hearing. Rather, dates have been set for lay and expert opinion evidence to be filed.
- c) Even if, contrary to the case management history which I have recited earlier, the question of the date for hearing of the liquidators s 459A proceeding had not already been set, given the fact that the point of the proceeding was to empower the liquidators to advance an argument in the voidable transaction proceeding which they might they not otherwise be able to advance, it escapes me why it would not be sensible to have an answer to that question before hearing the voidable transaction proceeding. I reject the logic of the argument in terms of case management.
- d) But the most significant point against the notion is that the question of the date for the hearing is not at large. It has been set and confirmed by a number of orders made, by me, since September last year. No good reason to change the program which is in place has been advanced. I observe:
 - (i) The date was originally delayed until the hearing of the liquidators removal application at the instance of the Palmer parties. It is hardly persuasive, having got what they wanted months ago, for them to be heard now on the eve of trial to contend that the hearing should be further postponed.
 - (ii) It is said that there might be creditors who wish to be heard in relation to the s 459A application. There is no evidence as to who they might be or what their submissions might be. Mr Palmer, personally, was mentioned but he is an applicant to the liquidators removal proceeding. In any event, he has had ample opportunity at quite a number of directions hearings to seek whatever directions might be

appropriate to respond to his concerns and has not done so. I do not find this to be a reason to change the trial dates.

(iii) The applicants contend that a problem exists because of the absence of evidence concerning the general body of creditors' attitude to the litigation. If that is a problem, it is a problem for the applicants for the s 459A order. It is not a reason to adjourn the hearing.

e) I reject the application informally made to vacate the hearing dates in relation to the liquidators s 459A proceeding.

10 I order as follows:

(1) Subject to the conditions set out in order 2, I grant the applicants in the liquidators removal proceeding leave to withdraw their application for an order that the general purpose liquidators be removed as liquidators of Queensland Nickel Pty Ltd (In Liquidation) and I vacate the hearing dates in relation to that application.

(2) The conditions are as follows:

a. The applicants must pay the general purpose liquidators' costs of and incidental to the application for an order that the general purpose liquidators be removed as liquidators of Queensland Nickel Pty Ltd (In Liquidation);

b. The general purpose liquidators' application for an order under s 532 of the *Corporations Act 2001* (Cth) as identified in their amended points of defence and in the interlocutory application filed 30 September 2016 in the liquidators removal proceeding will continue.

c. The pleadings delivered in the liquidators removal proceeding and directions made in relation to evidence at the trial will apply *mutatis mutandis* to that application;

(3) I dismiss the application to vacate the hearing dates in relation to application for an order under s 532 and the liquidators s 459A proceeding.

I will hear the parties as to costs of the hearing today.

...

HIS HONOUR: ... As between the general purpose liquidators and the applicants in the liquidators removal proceeding, I order that the applicants in the liquidators removal proceeding are to pay the costs of the general purpose liquidators of the hearing today, to be assessed on the standard basis.

...

HIS HONOUR: ... I direct that the applicants in the liquidators removal proceeding identify which, if any, of the deponents in affidavits filed by the general purpose liquidators are required for cross-examination at next week's hearing, and they do so by 4:00 pm on 23 February 2017.
