

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BOND J

No 6150 of 2016

RE: QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)

BRISBANE

10.11 AM, MONDAY, 27 FEBRUARY 2017

JUDGMENT

HIS HONOUR: This proceeding was dealt with by me by judgment last week. Some part of the background to what has happened in the proceeding appears on the face of that judgment.

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Today was the first day of the hearing of the application by the General Purpose Liquidators in the liquidators removal proceeding for an order *nunc pro tunc* pursuant to section 532 of the *Corporations Act 2001* (Cth), and also an application referred to as the liquidators s 459A proceeding.

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At the outset of the hearing today, an application has been made by the first to sixth applicants, which I will refer to as the Palmer Parties, in the liquidators removal proceeding to be removed as parties to the proceeding. The application seeks such an order and an order that there be no order as to costs of the application.

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The application is not opposed by the General Purpose Liquidators. I am informed that if the application is granted, the first to sixth applicants intend to absent themselves from any further participation in this proceeding of which it is plain they all have notice. I am informed by their counsel that they do not appear in the liquidators s 459A proceeding.

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In those circumstances, I order as follows:

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(1) The first to sixth applicants be removed as parties to proceeding 6150/16, pursuant to rule 69(1)(a) of the *Uniform Civil Procedure Rules 1999* (Qld).

(2) There be no order as to costs of this application.

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HIS HONOUR: In proceeding 6150/16, the respondent General Purpose Liquidators had in their pleadings indicated that they sought an order pursuant to s 532(2) of the *Corporations Act 2001* (Cth). The order was sought *nunc pro tunc*, and the effect of the order they sought was that they have leave to act as liquidators of Queensland Nickel Pty Ltd (in liquidation).

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The background facts have been identified by me in a number of judgments in this proceeding, and I will not repeat them.

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Six parties, who had alleged that they were creditors, and two of them contributories, of Queensland Nickel Pty Ltd (in liquidation) had, by their pleadings, indicated an intention to oppose the grant of any such order. As my judgment earlier today recorded, at the commencement of the hearing of the General Purpose Liquidators' application, they sought an order that they be removed as parties, indicating that if they were removed, they no longer sought to be heard in relation to the application, of which, as I mentioned this morning, they had had notice.

It follows that the hearing of the application before me is not opposed by any person. Its nature is such that I am persuaded it would be an appropriate exercise of discretion to make the order sought.

5 Section 532(2) relevantly states:

(2) *Subject to this section, a person must not, except with the leave of the Court, seek to be appointed, or act, as liquidator of a company:*

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(b) if the person is, otherwise than in his or her capacity as liquidator, a creditor of the company or of a related body corporate in an amount exceeding \$5,000 ...

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The provision applies in the present circumstances, because prior to their appointment as administrators, the persons who are the General Purpose Liquidators had entered into a number of security instruments. The security instruments relevantly contained promises to pay by two companies who are related companies of Queensland Nickel Pty Ltd, namely, QNI Metals Pty Ltd and QNI Resources Pty Ltd.

25 The material before me satisfies me that consequent upon steps taken as administrators, the General Purpose Liquidators were creditors of those companies in an amount exceeding \$5000.

30 It follows that s 532(2) provided that the General Purpose Liquidators should have sought to be appointed or as liquidators of Queensland Nickel Pty Ltd without seeking the leave of the Court. They should have - conscious of the security instruments which had been entered into - approached the Court before appointment, seeking leave pursuant to s 532. They did not do that.

35 Nevertheless, an order may be made *nunc pro tunc* under s 532(2): see *Re Performance Finance Ltd* [2004] WASC 80 and *In the matter of Jick Holdings* [2009] NSWSC 574.

40 The nature of the discretion that is to be exercised when a Court is approached for leave under s 532(2), was summarised by French J, as the former Chief Justice of Australia then was, in *Mallesons Stephen Jaques v Mistral Mines NL* [1993] FCA 338.

45 In the circumstances of this case, it is appropriate to make the order sought for a number of reasons.

First, I am persuaded that the failure to seek the leave was a consequence of an innocent error.

Second, the General Purpose Liquidators have pointed out that even in the absence of any other security which an administrator might get to protect any liability imposed for the debts of a company, the Act confers a right of priority and a security interest by way of lien over the company's assets. The obtaining of the additional security represented by the security instruments is really to the benefit of persons from whom one could imagine complaint being advanced.

But third, in respect of those persons, there has been disclosure by the General Purpose Liquidators of the nature of the instruments into which parties had entered in the following way:

(a) The declaration of independence, relevant relationships and indemnities filed pursuant to s 436DA was published by the General Purpose Liquidators before the first meeting of creditors on 29 January 2016, which was about three months prior to their appointment as liquidators on 22 April. That declaration identified the nature of the indemnities that they had obtained.

(b) After review by ASIC, a revised version of the declaration was given to creditors and made available on a website for the creditors on 29 January 2016.

(c) The securities were also described in a report to creditors published prior to the second meeting, pursuant to s 439A of the Act, on 11 April 2016.

Fourth, I note also that it is significant in exercising my discretion that, before events which took place last week, the first to sixth applicants in this proceeding had been pursuing an application to have the General Purpose Liquidators removed as liquidators and replaced by somebody else, essentially, on the same grounds of conflict as those which are relevant to s 532. A committee of creditors had passed a resolution opposing the removal of the liquidators.

These factors alone would be powerful considerations in favour of the exercise of discretion as has been sought by the General Purpose Liquidators. However, I think the point is rendered beyond any reasonable argument by the fact that by order of Justice Dowsett, Special Purpose Liquidators have been appointed to Queensland Nickel Pty Ltd (in liquidation), and the breadth of the tasks allocated to the Special Purpose Liquidators is identified in a schedule to his Honour's order. I accept the submissions advanced on behalf of the General Purpose Liquidators before me that if there had been a conflict between the interests and duties of the General Purpose Liquidators about which I might be concerned, it has been eliminated by the appointment of the Special Purpose Liquidators. They have not been given the carriage of all claims against the relevant debtors, QNI Resources Pty Ltd and QNI Metals Pty Ltd.

A further compelling consideration in support of the application is the need to allow the General Purpose Liquidators to continue to act, thereby avoiding disruption to Queensland Nickel's orderly liquidation. I am satisfied that were I to refuse the application and take any steps presently to cause the General Purpose Liquidators not to be authorised to continue, that has the potential to interfere with the orderly continuation of the liquidation.

For all these reasons, I am satisfied that it is appropriate to make the order that has been sought, and I make an order in terms of the draft which the General Purpose Liquidators have provided to me.

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10 HIS HONOUR: Queensland Nickel Pty Ltd is being wound up pursuant to a creditor's voluntary winding up. It is presently not being wound up in insolvency. However, the evidence before me demonstrates that the company became insolvent no later than November 2015, and it was certainly insolvent by 18 January 2016, when administrators were appointed.

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The General Purpose Liquidators seek to have me make an order, pursuant to s 459A of the *Corporations Act* 2001 (Cth) that the company be wound up in insolvency.

20 The principal motivation for seeking that order is to enable the liquidators to seek to set aside a bundle of security transactions entered into by Queensland Nickel with, amongst other things, the companies, China First Pty Ltd and Waratah Coal Pty Ltd, on 13 January 2016, only a few days before the commencement of the administration of Queensland Nickel.

25 The evidence demonstrates that China First and Waratah Coal intend to seek to enforce those securities and have lodged proofs of debt in the liquidation for a total amount of \$235 million, which, if the security documents are not set aside, would be regarded as secured debts.

30 There is an advantage in the liquidation to an order under s 588FJ being able to be made. It can only be made in circumstances where a company is being wound up in insolvency. It provides that "Circulating security interests" to which the section applies, are void except under particular conditions set out in s 588FJ(2). A forensic advantage to the liquidators is that proof of insolvency is not an element, but, instead,
35 something that might be relevant to a defence under s 588FJ(3).

A similar application was made in *CBA Corporate Services (NSW) Pty Ltd v Walker & Ors* (2013) 95 ACSR 135. The Full Court of the Federal Court of Australia dismissed an appeal from an exercise of discretion by a primary Judge who made a s 459A order, that Judge taking into account as a relevant consideration – indeed, a compelling consideration – the prospect that liquidators might make an application under s 588FJ.

45 I propose to follow the approach taken by the Full Court in *CBA Corporate Services*. It seems to me that the arguments in support of the order are compelling. The company is plainly insolvent. There are two creditors who intend to rely on security instruments, and the liquidators seek the advantage to which I have earlier adverted. Those considerations, I think, are very persuasive in the exercise in my discretion under s 459A. Accordingly, I propose to make the orders sought.

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A draft order has been provided to me. Amongst other things, that order seeks an order pursuant to s 467(3), of the *Corporations Act 2001* (Cth) that the requirements of ss 465A and 470 be dispensed with. Section 465A requires that a person who applies for a company to be wound up must lodge a notice in a prescribed form, serve it within a particular time period on the company and cause a notice setting out prescribed information to be published in a prescribed manner. Section 470 requires material to be lodged with ASIC. These provisions, which, for present purposes, may be described as notification and publication provisions, are said by the applicants before me to be unnecessary in the present circumstances, because the company has already been placed into liquidation. The company has been notified and knows about it, because it has both General Purpose Liquidators and Special Purpose Liquidators who know of the intended process.

The two creditors, China First and Waratah Coal, certainly know about the application, because up until I made an order removing them as parties to an application I dealt with earlier today which I had in case management ordered be heard at the same time as the present application, they were, in fact, represented by counsel before me. I have no doubt at all that they know of the application, both from the function of participating in case management hearings before me and being here actually before me this morning.

The material before me demonstrates that late last week, the Committee of Inspection of Queensland Nickel Pty Ltd (in liquidation) was notified of this application. No response has yet been received, but I infer that given the time frame, if the committee were concerned with the order sought being made, they would have had ample opportunity, at least, to communicate that concern.

ASIC has been served with material, and, I am informed by Senior Counsel on behalf of the General Purpose Liquidators, has communicated to his instructing solicitors, that if the Special Purpose Liquidators support the making of the order that has been sought by the General Purpose Liquidators, then ASIC would not oppose the application. Senior Counsel for the Special Purpose Liquidators has confirmed his clients' support for the making of the s 459A application.

The only persons who might possibly not know about the nature of this application are the public more generally and individual creditors not actually represented by the Committee of Inspection. I do not think, in the present circumstances, that is a reason not to make the order dispensing with the publication and notification requirements, and I propose to make that order.

One complication exists because this company already has General Purpose Liquidators, appointed pursuant to a creditor's voluntary winding up, as I have mentioned, and Special Purpose Liquidators appointed pursuant to order made by Justice Dowsett in the Federal Court dated 18 May 2016. It is necessary, accordingly, to make orders to ensure the continuation of the regime presently in place, notwithstanding that the winding up is being converted to a winding up in insolvency.

A form of order has been placed before me, which, in my judgment, achieves that outcome.

I will make the following amendments to the draft order provided to me. In paragraph 3 in the first line, I will delete the words “the liquidators” and insert “the general purpose liquidators and the special purpose liquidators.” In paragraph 4 in the first line, I will make the same change. I will add a new order 6 to this effect. “In this order, general purpose liquidators and special purpose liquidators have the same meaning as in the order of Bond J dated 13 February 2017.” With those amendments, I will make an order in terms of the draft, initialled by me and placed with the papers.

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HIS HONOUR: In paragraph 5, I will delete the phrase, “the applicants”, where it twice appears and insert, “the general purpose liquidators and the special purpose liquidators.” ...

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