

# SUPREME COURT OF QUEENSLAND

CITATION: *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 125

PARTIES: **STEPHEN JAMES PARBERY AND MICHAEL ANDREW OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ)**

ACN 009 842 068  
(first plaintiffs)

**QUEENSLAND NICKEL PTY LTD (IN LIQ)**

ACN 009 842 068  
(second plaintiff)

**JOHN RICHARD PARK, KELLY-ANNE LAVINA TRENFIELD & QUENTIN JAMES OLDE AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)**

ACN 009 842 068  
(third plaintiffs)

v

**QNI METALS PTY LTD**

ACN 066 656 175  
(first defendant)

**QNI RESOURCES PTY LTD**

ACN 054 117 921  
(second defendant)

**QUEENSLAND NICKEL SALES PTY LTD**

ACN 009 872 566  
(third defendant)

**CLIVE FREDERICK PALMER**

(fourth defendant)

**CLIVE THEODORE MENSINK**

(fifth defendant)

**IAN MAURICE FERGUSON**

(sixth defendant)

**MINERALOGY PTY LTD**

ACN 010 582 680  
(seventh defendant)

**PALMER LEISURE AUSTRALIA PTY LTD**

ACN 152 386 617  
(eighth defendant)

**PALMER LEISURE COOLUM PTY LTD**

ACN 146 828 122  
(ninth defendant)

**FAIRWAY COAL PTY LTD**

ACN 127 220 642

(tenth defendant)

**CART PROVIDER PTY LTD**

ACN 119 455 837

(eleventh defendant)

**COEUR DE LION INVESTMENTS PTY LTD**

ACN 006 334 872

(twelfth defendant)

**COEUR DE LION HOLDINGS PTY LTD**

ACN 003 209 934

(thirteenth defendant)

**CLOSERIDGE PTY LTD**

ACN 010 560 157

(fourteenth defendant)

**WARATAH COAL PTY LTD**

ACN 114 165 669

(fifteenth defendant)

**CHINA FIRST PTY LTD**

ACN 135 588 411

(sixteenth defendant)

**COLD MOUNTAIN STUD PTY LTD**

ACN 119 455 248

(seventeenth defendant)

**EVGENIA BEDNOVA**

(eighteenth defendant)

**ALEXANDER GUEORGUIEV SOKOLOV**

(nineteenth defendant)

**ZHENGHONG ZHANG**

(twentieth defendant)

**SCI LE COEUR DE L'OCEAN**

(twenty-first defendant)

**DOMENIC MARTINO**

(twenty-second defendant)

**MARCUS WILLIAM AYRES**

(first defendant added by counterclaim)

**STEFAN DOPKING**

(second defendant added by counterclaim)

FILE NO/S: SC No 6593 of 2017

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED EX 25 May 2018

TEMPORE ON:

DELIVERED AT: Brisbane

HEARING DATE: 25 May 2018

JUDGE: Bond J

ORDER: **The application is dismissed.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – GENERALLY – where judgment delivered on an interlocutory application in a proceeding – where judgment imposed freezing orders on certain defendants in the proceeding – where defendants applied for a 21-day interim stay of the orders to provide time to consider the reasons for judgment pending a full application for a stay pending appeal – whether the undertakings offered by the defendants constituted a sufficient change in circumstances – whether the calculus of the interests of justice has changed following the delivery of judgment – whether the interests of justice justify an interim stay

COUNSEL: T Sullivan QC for the plaintiffs

K A Barlow QC for the eighth to fourteenth defendants

D O’Sullivan QC for the first, second, fourth, seventh, fifteenth and sixteenth defendants

SOLICITORS: King & Wood Mallesons for the plaintiffs

Robinson Neilson for the eighth to fourteenth defendants

Alexander Law for the first, second, fourth, seventh, fifteenth and sixteenth defendants

HIS HONOUR: I published a judgment today, making orders in effect granting freezing orders on the application of the plaintiffs in this consolidated proceeding. In referring to “plaintiffs”, I intend to use that term in the same way as it is defined in the reasons for that judgment.

The operation of that part of the orders which I made today, which required the provision of information within a timeframe, namely orders 16 and 17, was by consent stayed until further order, because senior counsel for some of the defendants submitted that he had not been accorded a proper opportunity to make submissions on that question. The stay of that aspect of the orders will give the parties an opportunity to look into that question.

A more complicated issue concerns an application for an interim stay of the operation of the remaining parts of the order.

Immediately after I published my reasons for judgment this afternoon, submissions were made by senior counsel on behalf of the defendants that I should stay the operation of the order – at that stage, the differential treatment in respect of orders 16 and 17 had not been identified, but that does not matter – for a period of 21 days to

give the defendants an opportunity to consider my reasons and to argue a full application for stay pending appeal.

5 After a brief adjournment, which permitted the defendants to obtain instructions from Mr Palmer, it was proposed by senior counsel that the interim 21-day stay would be sought on certain offered undertakings.

The principal elements of the proposal senior counsel put were as follows:

- 10 (a) The undertakings recorded on items 1 and 2 of annexure C to my published reasons for judgment, given on behalf of QNI Metals, QNI Resources, Waratah Coal and China First, would continue up until 4 June 2018.
- 15 (b) Mineralogy would undertake that it would pay the sum of \$200 million into a joint bank account in the name of both the solicitors for the plaintiffs and Mineralogy, to be invested as agreed in writing or as directed, such payment to be made by 4 June 2018, and the funds including accretions to be held in the account pending the application for stay pending appeal, and if that application was successful pending the appeal.
- (c) If the application for stay pending appeal by me was rejected, then the monies would be paid back out to Mineralogy.
- 20 (d) Whilst held in the account proposed, the funds would be available to satisfy judgment against any of the defendants against whom orders were made, consequent upon my judgment.

25 However, no sooner were those undertakings offered than senior counsel was provided with changed instructions from Mr Palmer and the offer was withdrawn. The explanation made was that Mr Palmer, after having given the instructions, decided that he should get accounting advice, and, until he obtained that accounting advice, decided to withdraw the offer and to provide new instructions to senior counsel accordingly. The result was that the proposed undertakings were withdrawn.

30 Thus the application before me is an oral application that I should make an order staying the operation of the orders I have made (apart from orders 16 and 17, which will be dealt with in a different way as I have already indicated) for 21 days from today upon the undertakings recorded in items 1 and 2 of annexure C to my reasons for judgment.

35 Unsurprisingly, given the fact that my reasons for judgment extend over some 103 pages, the applicants have not this afternoon had an opportunity to examine my reasons to identify arguable error. Part of their reasons for seeking a 21-day interim stay is to permit them to do so. They contend that I should form the view that the interests of justice favours the stay on the undertakings offered because:

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- (a) The stay sought is relatively short.
- (b) I should form the view that the potential prejudice to the successful plaintiffs is low.
- 45 (c) The undertakings that they had offered had, in fact, proved a sufficient basis to preserve the status quo during the course of the application up until today, the course of the application being that which is described in paragraph 11 of the reasons for judgment, and they submitted there is no reason to think that anything has changed which would make the undertakings any less sufficient.

In particular, they point to the absence of any changed circumstance as a reason to form that view.

- 5 (d) Finally, they contend that I should assess the risk of the defendants, and in particular Mr Palmer, doing anything adverse to be insufficiently high to warrant not granting the stay. When I say “adverse”, I mean adverse to the protection in respect of which the successful plaintiffs are legitimately interested.

10 Senior counsel for the successful plaintiffs contends that, now that there has been a judgment, the calculus of the interests of justice has altered from that which applied before I had published my reasons. He points out that I had made an order affecting Mr Palmer, and without offering anything in return to safeguard the plaintiffs against the risk which I have obviously thought warranted an order, the effect of the application is Mr Palmer simply asking to be excused from the operation of the order for a 21-day period.

15 I think that submission is correct.

20 My orders reflect my having formed the view that there was sufficient risk to warrant the making of the orders, notwithstanding the impact that the making of the orders might have on the defendants. That creates legal rights and advantages for the plaintiffs who have succeeded in front of me. It seems to me it would be unfair to the plaintiffs who have obtained that advantage to deprive them of the protection which I had concluded was warranted, for any period at all, without there being a changed circumstance. The most obvious changed circumstance which might persuade a judge in my position to alter the immediate operation of the orders would be something which offered an analogous protection.

25 If the initial proposed undertakings had not been withdrawn, then an issue would have been whether the protection offered by those undertakings was sufficient, but at least that would have been something which I could balance in the scales to consider whether it was inappropriate to deprive the plaintiffs of the fruits of their success.

30 I hasten to add that this is not a case where appeal rights would be rendered nugatory by the refusal of a stay.

35 Logically, the changed calculus is such that if my assessment of risk is right, then the risk would be increased by a respondent knowing that I had actually formed the views I have.

40 I am not persuaded, given the nature of the proposed undertakings, that the interests of justice support the making of the stay that has been sought of me. I dismiss the application.