

# SUPREME COURT OF QUEENSLAND

CITATION: *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 141

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 11 June 2018

TEMPORE ON:

DELIVERED AT: Cairns

HEARING DATE: 11 June 2018

JUDGE: Bond J

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

**(a) The stay of the operation of orders 16 and 17, which was ordered on 25 May 2018, is discharged.**

**(b) Order 16 of the orders made on 25 May 2018 be set aside and in lieu thereof, the following order is inserted:**

16. Subject to order 17, each of the defendants must, within 30 days of 11 June 2018 (the Provision Date) swear an affidavit and serve it on the plaintiffs' solicitors which, to the best of their abilities, sets out (current as at 25 May 2018) all their assets, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of their interest in the assets.

**(c) The costs of the applications heard today be the parties' respective costs in the application for freezing orders brought by the first and second plaintiffs in the consolidated proceeding.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE ORDERS – INHERENT POWER TO AMEND TO GIVE EFFECT TO MEANING AND INTENTION OF COURT – where freezing orders and an ancillary order requiring the provision of asset information in a 7 business day timeframe were made – where in the course of oral argument the Court had indicated that counsel would have an opportunity to be heard on the ancillary order at the time judgment was pronounced – where counsel was not afforded the opportunity before the ancillary order was made but the operation of the ancillary order was stayed pending further hearing – whether at the further hearing the ancillary order should be set aside and an order imposing a different timeframe should be made in its place

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – GENERALLY – OTHER MATTERS – where freezing orders and ancillary orders were made in a proceeding – where an appeal and an application for stay have been filed in the Court of Appeal – whether the ancillary orders should be stayed pending determination by the Court of Appeal

*Parbery & QNI Metals Pty Ltd* [2018] QSC 107, cited

*Parbery v QNI Metals Pty Ltd* [2018] QSC 125, cited

*Tri-Star Petroleum Company v Australian Pacific LNG Pty Limited* [2017] QSC 136, cited

COUNSEL: M Hickey for the plaintiffs  
 K S Bryne for the first defendant, second defendant, and seventh to fifteenth defendants  
 The fourth defendant appeared on his own behalf

SOLICITORS: King & Wood Mallesons for the plaintiffs  
 Alexander Law for the first defendant, second defendant, and seventh to fifteenth defendants  
 The fourth defendant appeared on his own behalf

HIS HONOUR: On 25 May 2018, I granted freezing orders on the application of the first and second plaintiffs in this consolidated proceeding: see *Parbery & QNI Metals Pty Ltd* [2018] QSC 107. Later that day, and with one exception, I refused an application for stay in relation to those orders: see *Parbery v QNI Metals Pty Ltd* [2018] QSC 125. I described the exception on this way:

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.

Orders 16 and 17 were in the following form:

**PROVISION OF INFORMATION**

- 16 Subject to order 17, each of the Defendants must:
- 15 (a) within 7 clear business days of the date of these orders (the Provision Date), to the best of their ability inform the Plaintiffs in writing of all their assets, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of their interest in the assets; and
- 20 (b) by 4.00 pm on 7 clear business days following the Provision Date, swear an affidavit setting out the above information and serve it on the Plaintiffs' solicitors.
- 17 This paragraph applies if:
- 25 (i) any of the Defendants is not a corporation and they wish to object that compliance with order 16 may tend to incriminate them or make them liable to a civil penalty; or
- 30 (ii) any of the Defendants is a corporation and all of the persons who are able to comply with order 16 on its behalf and with whom it has been able to communicate, wish to object that compliance may tend to incriminate them respectively or make them respectively liable to a civil penalty.
- (a) The Defendants must, on or before the Provision Date (or within such further time as the Court may allow), notify the Plaintiffs in writing that they wish to take such objection and identify the extent of the objection.
- 35 (b) If such notice is given, the Defendants need only comply with order 16 to the extent, if any, that it is possible to do so without disclosure of the material in respect of which the objection is taken.

- (c) If such notice is given, the Plaintiff may seek directions as to the filing and service of affidavits setting out such matters as the Defendants wish to place before the Court in support of the objection.

5 The parties have now looked into the question of whether there was merit in the complaint which had been made. The affidavit of Ms Costello sworn today exhibits the relevant part of the transcript of oral submissions which were made on 6 March 2018 by Mr Barlow:

MR BARLOW: ... The only other point I wish to add, your Honour, is as to the form of the orders that were sought.

10 HIS HONOUR: Okay. Hold on.

MR BARLOW: And that's simply that one of the orders that's sought is a requirement to list assets and to do so within seven days.

HIS HONOUR: Yes.

15 MR BARLOW: In our submission, an asset listing order – asset list is unnecessary in the circumstances in this case and, in any event, if they – if your Honour were to make one, your Honour's seen how complicated the assets of – position of all the defendants is, seven days is not enough and at least 30 days should be ordered.

HIS HONOUR: Well, Mr Barlow, if we get there - - -

MR BARLOW: Yes, if we get there. I'm trying to address everything.

20 HIS HONOUR: If we got there, you can – you can pop up and say, “your Honour, can I be heard on the amount of time?” and I'll hear you.

MR BARLOW: Thank you, your Honour.

HIS HONOUR: We may not get there.

MR BARLOW: No, all right. Those are – those are my submissions in that case [indistinct]

25 I did not, before pronouncing my orders on 25 May 2018, give Mr Barlow the opportunity to make the submissions he had sought to make on that aspect of the form of the order. It was later that day and on the basis that I had not done so (but without then being able to identify the requisite part of the transcript), that Mr Barlow sought, and I granted, the stay of the operation orders 16 and 17 that I have recorded above.

30 It seems to me, having reviewed the transcript, that there is merit in the complaint he made. It is common ground that I have jurisdiction to set aside the orders concerned and to make whatever order that I should make consequent upon giving Mr Barlow's clients the opportunity to be heard. It seems to me that that is what I should do. The corporations who were Mr Barlow's clients at the hearing on 6 March 2018 however, are represented before me today by different counsel. That same counsel is also, today, representing all the other corporate defendants.

35 They advance submissions only on the question of the timeframe which should be applicable to the orders and not on the question whether an asset list is unnecessary in the circumstances of the case. No complaint was made as to the form of order 17. The submissions which were put before me on behalf of Mr Barlow's clients were adopted on behalf of the other corporate defendants and also by Mr Palmer who represents himself before me today.

40 They submitted a 30-day timeframe was appropriate. That was not disputed by the plaintiffs. Together, and with one exception, the corporate defendants also submitted, and the plaintiffs did not disagree, that it was generally desirable to have one timeline applicable to all the corporate defendants and that a 30-day timeline commencing today was suitable. They also submitted, and it was accepted by the plaintiffs, that rather than the current two-stage process contemplated by order 16, it

would make more sense if the information was provided, within whatever timeframe was chosen, by affidavit in the first place.

Accordingly, it seems to me that I should at least modify orders 16 and 17 to the extent that I have just mentioned.

5 The exception about which there was dispute was whether special provision should be made in relation to QNI Metals and QNI Resources to accommodate a difficulty identified in Mr Palmer's affidavit read before me today. Paragraphs 11 and 12 of his affidavit were in these terms:

10 11. QNI Metals and QNI Resources have retained Artemis Insolvency to carry out valuation on inventory of Cobalt held in the tailings dam. There approximately 69,000 tonnes of Cobalt metal. The current price of cobalt is approximately US\$84,000/tonne as per the current price published on the London Metals Exchange. Annexed hereto and marked as exhibit **CFP-174** is a copy of the page from the website <https://www.lme.com/en-gb/metals/minor-metals/cobalt/> identifying the value of cobalt.

15 12. The value of the metal contained within the tailings is over \$6.5 billion, however to place an accurate value on the cobalt it requires detailed assessments of the cost of recovery which includes independent of metallurgists, inventory and certification, independent studies, financial modelling and market analysis. We currently have a team of 7 people allocated and will likely expand to 20 people by the end of the month. In my opinion it is anticipated to take approximately 90 days. Until then, I cannot make an estimate as I am not an expert in metallurgy or chemistry which has an influence on Cobalt value.

20 The concern expressed for QNI Metals and QNI Resources was that the terms of order 16 requiring as they do that they must "to the best of their ability, inform the plaintiffs in writing of all their assets giving their value ..." could not adequately be met within a 30-day timeframe. They propose that a different 120-day timeframe apply to them so they could have time value the cobalt inventory concerned. They accepted that an alternative might be to have a carve-out that permitted a different timetable applicable to information as to the cobalt inventory. They were concerned about the risk of non-compliance with the terms of the order, the risk of being accused of contempt, and the desirability of a defendant only being put to the time and cost of swearing one affidavit which did everything requisite to bring about compliance.

25 I think the concern of QNI Metals and QNI Resources about inadvertent non-compliance and potential contempt proceedings is misplaced. All that is required is that the party act, to the best of its ability, to inform the plaintiffs of the information the subject of the order. If the parties' ability to provide some aspect of the information sought is constrained by some consideration which, doing their best, they cannot overcome, then an affidavit which gave the information which could be given at that time (doing their best), and which identified and explained the constraint would likely be compliant. And in the case of any doubt, an application could be advanced pursuant to the liberty to apply, which was reserved by order 30 of the orders made on 25 May 2018, which sought a direction that the affidavit so provided was sufficient compliance with the terms of the order, whether completely or pending further information.

35 So far as the operation of order 16 and 17 on the corporate defendants is concerned, I would make the following orders:

40 (a) The stay of the operation of order 16 and 17, which was ordered on 25 May 45 2018, is discharged.

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(b) Order 16 of the orders made on 25 May 2018 be set aside and in lieu thereof, the following order is inserted:

5           16.       Subject to order 17, each of the defendants must, within 30 days of 11 June 2018 (**the Provision Date**) swear an affidavit and serve it on the plaintiffs' solicitors which, to the best of their abilities, sets out (current as at 25 May 2018) all their assets, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of their interest in the assets.

10       I pause to acknowledge that the corporate defendants also advance a further stay application today in relation to order 16 and 17 but on a different basis. I will address that after I have outlined Mr Palmer's similar application.

I should now turn to address the position of Mr Palmer. He sought to put himself in the same position as Mr Barlow's clients by pointing out that in his written submissions, which were filed on 13 October 2017, he wrote, at paragraph 89:

15           I am aware of the limited time available for this hearing. I will not at this time deal with the content and effect of orders the plaintiffs seek but if his Honour intends to make any order I would seek to make further submissions prior to the making of any orders in respect to each of the orders sought.

20       A party cannot, in this way, unilaterally secure to himself the ability to find out what a Judge's intention is before making submissions as to the "content and effect of orders" sought against the party. Mr Palmer's position is not analogous to that of Mr Barlow. I think I should treat the submissions advanced by Mr Palmer as submissions which are advanced in reliance on the liberty to apply which was reserved by order 30 of the orders made on 25 May 2018.

25       First, Mr Palmer had similar concerns to those advanced on behalf of the joint venturers in relation to being required to provide complete and accurate information as to all his assets, giving their value, location and details, including any mortgages, charges or other encumbrances to which they are subject and the extent of his interest in the assets within even a 30-day timeframe. He deposed as follows:

30           14.       In my personal capacity, I am able to comply with paragraphs 16 and 17 of the Order to the extent so as to disclose unencumbered assets to a cumulative value of \$2 billion, within 14 days from the date of further order to do so.

35           15.       I am able to identify assets to the extent so as to disclose unencumbered assets to a cumulative value of \$2 billion in the short time frame as my assets include some real estate and shares in various corporate entities.

40           16.       However, in relation to assets over and above the cumulative value of \$2 billion, I estimate that it may take between 6 to 9 months for me to provide any reliable list of assets and/or value, given the diversity and geographical spread of the assets in question. I am unsure of the value and location of certain assets and note that some assets are in countries such as China and Tahiti, and others spread across Australia.

            17.       As to those assets I am unable to readily identify the assets or ascribe a reliable value, as they are assets some of which I have acquired over approximately 40 years.

45           18.       Unlike for company assets, I do not maintain an inventory of these assets where they are my personal assets and I do not have ordered records of their value. I have not turned my mind to the monetary value of the assets in this category, nor do I have any understanding of the monetary value of assets. The monetary value of the assets is not important to me and therefore I do not care to turn my mind or incur the expense of valuing these assets in money terms.

50           19.       To give any reliable estimate of the value of those assets, I would need to adopt a procedure similar to that of a company, and prepare a scoping document for an independent valuer in the relevant field and instruct them to formally respond to my

request for a valuation. This would involve retaining a number of consultants in various fields.

Second, he has filed a notice of appeal in respect of the orders I made and also an application to the Court of Appeal seeking that orders 16 and 17 be stayed pending the determination of the appeal. He sought from me a stay of orders 16 and 17 pending the determination of the stay application by the Court of Appeal because he and the corporate defendants would suffer prejudice if they had to comply with orders 16 and 17 before the appeal is determined;

- (a) first, there was the possibility of prejudice to his and their commercial negotiations on various business opportunities if the information became known;
- (b) second, appeal rights in relation to orders 16 and 17 would be rendered nugatory in the event they were forced to apply in two respects:
  - (i) the plaintiffs would obtain information which they would otherwise not be entitled to obtain, which information could not be unlearned; and
  - (ii) he and the corporate defendants would incur costs of compliance with the order which could not be unincurred.

I think the appropriate course is to consider what, if anything, should be done in relation to the operation of order 16 in relation to Mr Palmer apart from the question of the stay and then to address together the question of the stay application brought by Mr Palmer and foreshadowed by the corporate defendants.

As to the form of order 16 in relation to Mr Palmer:

- (a) So far as confidentiality is concerned, there is presently no reason to think that Mr Palmer, and the corporate defendants for that matter, would not be sufficiently protected by the implied obligation to which all parties to litigation are subject. But if there are such concerns, then there is a well-recognised jurisdiction to provide additional protection: as to which see *Tri-Star Petroleum Company v Australian Pacific LNG Pty Limited* [2017] QSC 136 at [55]-[60]. If there is a good case for better protection then an application can be made on appropriate material seeking that better protection.
- (b) So far as the difficulties which Mr Palmer might have in the provision of information within 30 days, the answer is the same as that which applied in respect of the joint venturers.
  - (i) All that is required is that Mr Palmer act to the best of his ability to inform the plaintiffs of the information the subject of the order.
  - (ii) If his ability to provide some aspect of the information sought is constrained by some consideration which, doing his best, he cannot overcome, then an affidavit which gave the information which could be given at that time (doing his best) and which identified and explained the constraint would likely be compliant. The parts of his affidavit, which I quoted, identify an aspect that he could easily provide.
  - (iii) And in the case of any doubt, an application could be advanced pursuant to liberty to apply which sought a direction that the affidavit so provided was sufficient compliance with the terms of the order, whether completely or until further information is provided.

The result is that apart from the question of stay pending the foreshadowed application of the Court of Appeal for stay of orders 16 and 17, the orders I would make are as follows:

- 5 (a) The stay of the operation of orders 16 and 17, which was ordered on 25 May 2018, is discharged.
- (b) Order 16 of the orders made on 25 May 2018 be set aside and in lieu thereof, the following order is inserted:
- 10 16. Subject to order 17, each of the defendants must, within 30 days of 11 June 2018 (**the Provision Date**) swear an affidavit and serve it on the plaintiffs' solicitors which, to the best of their abilities, sets out (current as at 25 May 2018) all their assets, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of their interest in the assets.

I turn now to the question of a stay.

15 Mr Palmer seeks an order that orders 16 and 17 be stayed pending determination by the Court of Appeal of his application that they be stayed pending the determination of the appeal. There is as yet no indication when the stay application might be heard in the Court of Appeal, let alone how long it might take before the appeal itself could be heard. The corporate defendants have instructions to appeal and to bring a similar  
20 application to the Court of Appeal, and it follows, a similar application before me to stay orders 16 and 17. I will treat that application as having been made.

The principles applicable to the exercise of the jurisdiction to order such a stay are not in doubt. I should consider:

- (a) whether there is a good arguable case on the appeal;
- 25 (b) whether the appellant will be disadvantaged if a stay is not granted; and
- (c) whether there is any competing disadvantage to the respondent if the stay is granted which outweighs the disadvantage suffered by the appellant.

30 So far as the first issue is concerned, the question does not require me to form a view on the prospects of success of the appeal. Rather, the principal focus is on whether there is any reason to think that the appeal has been lodged simply to delay execution. In the present case, I would not form that view and no submission that I should have been advanced by the plaintiffs.

The disadvantage to Mr Palmer and the corporate defendants lay in the considerations I have already mentioned, namely

- 35 (a) information would be provided to the applicants to which they would not be entitled if I had not made the order and that could not be undone if it were demonstrated to the Court of Appeal whether on the stay application or the appeal that I should not have made the order; and
- 40 (b) the defendants would have to incur costs of compliance which could not be unincurred.

Counsel for the plaintiffs advance the following submissions opposing the stay.

45 First, I have already determined that a freezing order should be made and that it should not be stayed. The disclosure of information is an integral part of such an order. It should be regarded as a necessary part of furthering the Court's intention to meeting the risk identified in my primary judgment. If the defendants are put in the position of not having to address this part of the order until after the appeal, that would leave a hole in the protection which the plaintiffs had secured for themselves.

Second, so far as costs were concerned, the defendants had the protection of the undertakings upon which the orders were made on 25 March 2018.

5 Third, if necessary, and counsel submitted it was not, any concern about the provision of information to the plaintiffs, which it might turn out on appeal should not have been provided, could be addressed by formulating an order along the lines of a *Fielder Gillespie* order.

10 In my view, and upon reflection, the defendants are adequately protected so far as costs of compliance with the order by the undertakings recorded in the orders I made on 25 March 2018. I am not prepared to countenance any gap in the protection given to the plaintiffs by the orders I have made and, in my view, the disclosure parts of the order were integral parts of the protection which I determined should be afforded the plaintiff. That is also recognised by the fact that the form of order is contained in the *pro-forma* orders contained in Practice Direction 1 of 2007. And in light of the implied obligation to which the applicants would be subject upon receipt of the affidavit required to be provided by compliance with order 16, I do not think it is correct to say that appeal rights would be rendered nugatory. I decline the stay sought by Mr Palmer and by the corporate defendants. In light of the fact that compliance with order 16 is not due for 30 days, that should be sufficient time for an application to be brought on before the Court of Appeal for a stay pending the determination of the appeal.

The orders I make are:

- (a) The stay of the operation of orders 16 and 17, which was ordered on 25 May 2018, is discharged.
- 25 (b) Order 16 of the orders made on 25 May 2018 be set aside and in lieu thereof, the following order is inserted:
- 30 16. Subject to order 17, each of the defendants must, within 30 days of 11 June 2018 (**the Provision Date**) swear an affidavit and serve it on the plaintiffs' solicitors which, to the best of their abilities, sets out (current as at 25 May 2018) all their assets, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of their interest in the assets.
- (c) The costs of the applications heard today be the parties' respective costs in the application for freezing orders brought by the first and second plaintiffs in the consolidated proceeding.

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