[2018] QCA 139

COURT OF APPEAL

GOTTERSON JA

Appeal No 6047 of 2018
Appeal No 6561 of 2018
SC No 6593 of 2017

In Appeal No 6047 of 2018:

CLIVE FREDERICK PALMER	**Applicant**
v	
STEPHEN JAMES PARBERY AND MICHAEL OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (CONTROLLER APPOINTED) (IN LIQ) ACN 009 842 068	**First Respondent**
QUEENSLAND NICKEL PTY LTD (CONTROLLER APPOINTED) (IN LIQ) ACN 009 842 068	**Second Respondent**

In Appeal No 6561 of 2018:

QNI METALS PTY LTD ACN 066 656 175	**First Applicant**
QNI RESOURCES PTY LTD ACN 054 117 921	**Second Applicant**
MINERALOGY PTY LTD ACN 010 582 680	**Third Applicant**
PALMER LEISURE AUSTRALIA PTY LTD ACN 152 386 617	**Fourth Applicant**
PALMER LEISURE COOLUM PTY LTD ACN 146 828 122	**Fifth Applicant**

FAIRWAY COAL PTY LTD **ACN 127 220 642**	**Sixth Applicant**
CART PROVIDER PTY LTD **ACN 119 455 837**	**Seventh Applicant**
COEUR DE LION INVESTMENTS PTY LIMITED **ACN 006 334 872**	**Eighth Applicant**
COEUR DE LION HOLDINGS PTY LTD **ACN 003 209 934**	**Ninth Applicant**
CLOSERIDGE PTY LTD **ACN 114 165 669**	**Tenth Applicant**
WARATAH COAL PTY LTD **ACN 114 165 669**	**Eleventh Applicant**
v	
STEPHEN JAMES PARBERRY AND MICHAEL OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (CONTROLLER APPOINTED) (IN LIQ) **ACN 009 842 068**	**First Respondent**
QUEENSLAND NICKEL PTY LTD (CONTROLLER APPOINTED) (IN LIQ) **ACN 009 842 068**	**Second Respondent**

BRISBANE

TUESDAY, 26 JUNE 2018

JUDGMENT

GOTTERSON JA: On the 25th of May 2018, a Judge of the trial division made a series of freezing orders against Mr Clive Palmer and other defendants. The freezing order against him prohibits him from removing from Australia or otherwise disposing of, dealing with or diminishing the value of his assets in Australia up to the unencumbered value of AUD$204,943,664.39. At the same time, other orders were made for the provision of

information. They are orders 16 and 17, as substituted by order of his Honour made on the 11th of June 2018. Order 16 now provides as follows:

> "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."

Order 16 must therefore be complied with by the 11th of July 2018. Order 17, the terms of which I need not set out, provides mechanisms for protection of the defendants against self-incrimination or exposure to civil penalties in complying with order 16. Mr Palmer filed an appeal to this Court against all orders on the 7th of June 2018. Then, on the 8th of June, he filed an application for an order pursuant to r 761 of the *Uniform Civil Procedure Rules* 1999 or within the Court's inherent jurisdiction that orders 16 and 17 be stayed pending the determination of this appeal. I note that an amended notice of appeal was filed on the 22nd of June 2018.

In support of this application, Mr Palmer relies on his affidavit sworn on the 17th of June 2018 and amended by his further affidavit sworn on the 19th of June 2018. He also relies on an affidavit of Mr C M Mashayanyika sworn in the primary proceeding on the 15th of June 2018. No affidavit material has been filed by the respondents to this application. In his primary affidavit, Mr Palmer swears to his preparedness to file and serve by the 11th of July 2018 an affidavit deposing to: (a) his assets up to an unencumbered value of AUD$2 billion, and (b) his liabilities, which he estimates do not exceed AUD$2 million. He says that the assets to which he can depose would include the following, then under the heading Mineralogy Pty Ltd he continues:

> "(a) I am the beneficial shareholder of all the issued shares in Mineralogy … The asset is my shareholding in Mineralogy Pty Ltd.
>
> (b) Mineralogy has substantial sums in the order of AUD$360,306,744 in cash at bank and Australian equivalents, which are located in Australia."

I interpolate that this is broadly supported by Mr Mashayanyika's affidavit. He continues:

> "(c) Further, Mineralogy holds a royalty stream which has been independently valued at between AUD$1,402,300,000 and AUD$1,498,800,000."

This valuation is verified by a report of BDO Queensland Proprietary Limited, exhibited to an affidavit of Mr S D Burkett, a partner of that company, sworn in the primary proceeding which, in turn, is an exhibit to Mr Palmer's affidavit. Next, under the heading QNI Resources Proprietary Limited and QNI Metals Proprietary Limited, Mr Palmer swears that he is the beneficial shareholder of all the issued shares in their respective holding companies. His asset, he says, is his shareholding in the holding companies. He demonstrates that QNI Resources and QNI Metals are the owners of the Yabulu refinery land and the refinery. He exhibits an affidavit of a corporate adviser who values those assets at approximately AUD$790 million. Referring to just these assets, Mr Palmer gives a preliminary estimate of the value of his 100 per cent beneficial interest in Mineralogy of $2 billion, and of his shareholding in the holding companies of QNI Resources and QNI Metals of $500 million. These assets, Mr Palmer notes, exceed the maximum possible judgment against him in the primary proceeding of $209 million.

He reasonably readily identifies unencumbered assets with a cumulative value of $2 billion, including the shareholdings to which I have referred, some real estate and some other shares. He maintains that to provide a reliable list of assets above the cumulative value of the $2 billion, including personal assets, would take between six and nine months given their diversity and geographical spread. He does not maintain an inventory for these assets and he would need to instruct an independent valuer to value them in order to comply with order 16.

There are two other matters raised in Mr Palmer's affidavit. The first is his concern that compliance with order 16 could disclose information to third parties with whom he is negotiating a number of commercially sensitive substantial projects. The prejudicial disclosure would be of his ownership and the value of certain assets. The second matter is that an asset that he maintains has a very significant value is cobalt in a tailings dam. The value of it is dependent on the price of cobalt and recovery costs. It would take, he estimates,

90 days to obtain an independent detailed assessment of the recovery costs from metallurgists or chemists.

I now turn to consider factors which are relevant to whether a stay should be granted. There are numerous grounds of appeal. I am unable at this distance to reliably assess whether any of them has substantial prospects of success. Nevertheless, I am satisfied that the appeal has not been lodged merely to delay, nor is it suggested by the respondents to this application that it has been. Next, as Justice Keane observed in *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453, the fundamental justification for delaying the enforcement by a stay is to ensure that orders which might be made are fully effective.

Thus, a relevant consideration is whether the applicant for a stay would be prejudiced irretrievably if the stay were not granted and the appeal ultimately upheld. Would Mr Palmer be prejudiced irretrievably if orders 16 and 17 are not stayed and he wins the appeal? I am quite unpersuaded that he would be. Orders 16 and 17 are auxiliary in nature. They require information to be furnished on oath to the respondents. Rights with respect to any aspect of Mr Palmer's property are unaffected by that. If the appeal succeeds and the freezing orders against him are discharged, he will not have been irremediably harmed by having supplied the information. Certainly, his evidential material does not demonstrate any harm of that kind.

Mr Palmer does, however, point to a risk of prejudice in that any affidavit he makes in compliance with order 16 might, once filed in the Court, be accessed by a search by third parties with whom he is presently negotiating. I note, and as has been pointed out to me this morning, that, in fact, order 16 does not require the filing of the affidavit. It goes without saying, I think, that the respondents, once served with the affidavit, understand that they are not to disclose its contents directly or indirectly to such third parties, nor are they to use it other than for the purposes of the proceedings. At this point, I see no need for a further regime in relation to the information in their hands.

The asset that Mr Palmer has identified as difficult for him to attribute any meaningful value to within the time allowed by the order is the cobalt in the tailings dam. That difficulty can be accommodated by staying the order insofar as it might require him to state a value for that

asset. As to the other assets, the prejudice raised is more at a level of inconvenience rather than actual prejudice. It is, I think, important to bear in mind that order 16 does not require Mr Palmer to vouch that the list of his assets is conclusively comprehensive or that the valuations ascribed to them are independently verified as accurate. What he must do is produce a list of assets and their values to the best of his ability. If he has difficulty in doing that by the 11th of July, it will be open to him to seek a variation of the order to accommodate that specific difficulty.

On the other side of the coin, is the stay sought likely to disadvantage the respondents? At a general level, to stay the orders would, I accept, deprive them of the benefit of disclosure of Mr Palmer's assets and consequently prejudice their ability to monitor or safeguard compliance with the orders. It is axiomatic that auxiliary orders designed to facilitate the effectiveness of freezing orders ought not themselves be frozen without good cause. That remains so even when a timetable has been set for a relatively prompt hearing of the appeal against the freezing orders.

It is in anticipation of these prejudices for the respondents that Mr Palmer has proposed the affidavit to which I have referred. He submits that were he to make it, it would disclose sufficient unencumbered assets of his as would exceed the maximum judgment against him by many times. This is opposed by the respondents who note that an offer to disclose assets is not the same as actual disclosure but, more importantly, they say it is not clear the extent to which the assets to which Mr Palmer refers in his affidavit are subject to liabilities or encumbrances. That, indeed, is so.

To my mind, there are additional difficulties with the proposal. The assets to which he refers are shareholdings in Mineralogy and the holding companies of QNI Resources and QNI Metals; however, he describes himself as the beneficial shareholder of these shares. That attribution is apt to describe a shareholding structure in which there are layers of share ownership between Mr Palmer and those companies, leaving open the possibility that intermediate layer shareholders have secured or encumbered, in one way or another, the shares they hold. Accordingly, I am unable to accept that the proposal is a satisfactory alternative means of performing order 16.

Overall, I am unpersuaded that the stay sought should be granted. I do, however, consider that the application ought not be refused outright. I would make the order with respect to cobalt that I have indicated. In these circumstances, the costs of the application should be reserved to the Court that determines the appeal. I therefore order:

1. Orders 16 and 17 be stayed until the determination of this appeal insofar as they require the appellant, Clive Frederick Palmer, to state a value for cobalt in the tailings dam.

2. The application filed on the 8th of June 2018 is otherwise refused.

3. The costs of that application are reserved.