

# SUPREME COURT OF QUEENSLAND

CITATION: *QNI Metals Pty Ltd & Ors v Parbery & Ors* [2018] QCA 324

PARTIES: **QNI METALS PTY LTD**  
ACN 066 656 175  
(first appellant)  
**QNI RESOURCES PTY LTD**  
ACN 054 117 921  
(second appellant)  
**MINERALOGY PTY LTD**  
ACN 010 582 680  
(third appellant)  
**PALMER LEISURE AUSTRALIA PTY LTD**  
ACN 152 386 617  
(fourth appellant)  
**PALMER LEISURE COOLUM PTY LTD**  
ACN 146 828 122  
(fifth appellant)  
**FAIRWAY COAL PTY LTD**  
ACN 127 220 642  
(sixth appellant)  
**CART PROVIDER PTY LTD**  
ACN 119 455 837  
(seventh appellant)  
**COEUR DE LION INVESTMENTS PTY LIMITED**  
ACN 006 334 872  
(eighth appellant)  
**COEUR DE LION HOLDINGS PTY LTD**  
ACN 003 209 934  
(ninth appellant)  
**CLOSERIDGE PTY LTD**  
ACN 114 165 669  
(tenth appellant)  
**WARATAH COAL PTY LTD**  
ACN 114 165 669  
(eleventh appellant)  
**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)

FILE NO/S: Appeal No 6561 of 2018

SC No 6593 of 2017

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane – [2018] QSC 125 (Bond J)

DELIVERED ON: 20 November 2018

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Gotterson JA

ORDERS: **The appellants are to pay the respondents’ costs of the stay application as follows:**

- 1. For costs incurred up to and including 26 June 2018, on the standard basis.**
- 2. For costs incurred after 26 June 2018, on the indemnity basis.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appellants’ application for a stay of certain orders in a suite of freezing orders was discontinued and dismissed – where an analogous application by a separate appellant had earlier been dismissed – where notification of the discontinuance of the application was very late – whether the appellants should pay the respondents’ costs on the indemnity basis

*Colgate Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225; [1993] FCA 536, cited  
*QNI Metals Pty Ltd & Ors v Parbery & Owen in their Capacities as Liquidators of Queensland Nickel Pty Ltd (Controller Appointed) (In Liq) & Anor* [2018] QCA 139, considered

COUNSEL: S M Iskander (*sol*) for the appellant  
 G Gibson QC, with A Rae, for the respondent

SOLICITORS: Alexander Law for the appellant  
 King & Wood Mallesons for the respondent

- [1] **GOTTERSON JA:** The appellants’ application for a stay of certain orders was discontinued by them and dismissed by consent by order made by me on 7 August 2018. That order made provision for the parties to make short written submissions on costs which they have done.
- [2] It is common ground that the appellants should pay the respondents’ costs of the stay application. However, they are in disagreement as to whether the appellants should do so on an indemnity basis, as the respondents submit; or on the standard basis, as the appellants submit.

- [3] The application was filed by the appellants on 22 June 2018. As an analogous application filed earlier by Mr C F Palmer had sought, this application requested a stay of Orders 16 and 17 in a suite of freezing orders made on 25 May 2018 against which Mr Palmer and the appellants had separately appealed. Orders 16 and 17 required the supply of information as to assets, and their estimated values, of Mr Palmer and the appellants.
- [4] The appellants' stay application was mentioned before me on 26 June 2018 when I heard and determined Mr Palmer's stay application. His application was dismissed with reasons delivered *ex tempore* at the hearing.
- [5] The directions made for the appellants' stay application culminated in a hearing of it to take place before me at 10am on 7 August 2018. That date was chosen because it was within a range of dates for which senior counsel for the appellants would be available, and notwithstanding that senior counsel for the respondents would not be available, with the consequence that other senior counsel would have to be briefed by them.
- [6] It appears that there was compliance with directions as to filing of evidentiary material and exchange of written outlines of argument with respect to the appellants' stay application. Notably, the respondents' written outline of argument was supplied to the appellants' solicitors on 23 July 2018.
- [7] I accept unchallenged evidence in an affidavit sworn by Mr L T Hennessy, solicitor, who acts for the respondents, on 14 August 2018 that by email correspondence received by his firm at 12.47 pm on 6 August 2018, the respondents first received notice that the appellants did not intend to proceed with the stay application. Several minutes later, his firm was copied in on an email sent by the appellants' solicitors to the Court of Appeal Registry advising of the discontinuance of the stay application and attaching a draft order to effectuate a dismissal of it by consent.
- [8] Neither item of correspondence offered a reason or reasons for the discontinuance or why it was not intimated to the respondents' solicitors earlier than it was. No affidavit has been sworn attesting to such a reason or reasons.
- [9] It is well settled that some "special or unusual feature" is required for displacement of the ordinary rule that costs are to be awarded on the standard basis in favour of an award of costs on the indemnity basis.<sup>1</sup>
- [10] In my view, there are special features here that together warrant an award of indemnity costs in respect of costs incurred by the respondents after 26 June 2018. They are as follows.
- [11] Firstly, the appellants ought to have appreciated from the reasons given by me on 26 June 2018 that the grounds that had been advanced by Mr Palmer for a stay of Orders 16 and 17 were without foundation. No other and viable ground or grounds that might have been advanced by the appellants were then or subsequently indicated by them.
- [12] Secondly, the appellants knew from the mention on 26 June 2018 that the respondents were being put to the inconvenience and cost of having to brief substitute senior counsel for the hearing on 7 August 2018.

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<sup>1</sup> *Colgate Palmolive Company v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225 at 230.

- [13] Thirdly, notification of the discontinuance of the application was very late.
- [14] Fourthly, there is an absence of any reason or reasons given for either the discontinuance itself or for the extreme lateness in giving notice of it.
- [15] I note that the appellants suggest in their written submissions on costs that it was when they received and understood the respondents' outline of argument that they realised the vulnerability of their case on the stay application. I treat that suggestion with some reservation given the dismissal of Mr Palmer's analogous application. Moreover, this suggestion does not explain delay beyond 23 July 2018 in notifying the respondents' solicitors of the discontinuance.
- [16] For these reasons, I order that the appellants are to pay the respondents' costs of the stay application as follows:
1. for costs incurred up to and including 26 June 2018, on the standard basis;  
and
  2. for costs incurred after 26 June 2018, on the indemnity basis.