SUPREME COURT OF QUEENSLAND

CITATION:	*China First Pty Ltd & Anor v Mount Isa Mines Limited & Ors* [2018] QCA 350
PARTIES:	**CHINA FIRST PTY LTD** ABN 69 135 588 411 (first appellant) **WARATAH COAL PTY LTD** ABN 94 114 165 669 (second appellant) **v** **MOUNT ISA MINES LIMITED** ACN 009 661 447 (first respondent) **QUEENSLAND NICKEL SALES PTY LTD** ACN 009 872 566 (second respondent) **QNI RESOURCES PTY LTD** ACN 054 117 921 (third respondent) **QNI METALS PTY LTD** ACN 066 656 175 (fourth respondent)
FILE NO/S:	Appeal No 7512 of 2018 SC No 4847 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 163 (Brown J)
DELIVERED ON:	14 December 2018
DELIVERED AT:	Brisbane
HEARING DATES:	29 August 2018; 30 August 2018
JUDGES:	Fraser and Gotterson and McMurdo JJA
ORDERS:	**1. Appeal dismissed.** **2. The appellants are to pay the first respondent's costs of and incidental to the appeal on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTION AND PARTIES – PARTIES – OTHER MATTERS – where the appellants sought orders setting aside some of the orders made in a proceeding between the first respondent and the second, third and fourth respondents – where the appellants also sought orders that they be joined

as parties to that proceeding – where the primary judge dismissed the appellants' application for those orders – whether the court had been invited to make, or had proposed to make, orders that would directly affect the rights or liabilities of the appellants – whether the orders ought to have been set aside

China First Pty Ltd & Anor v Mount Isa Mines Ltd & Ors [2018] QSC 163, affirmed
Fletcher & Ors (as liquidators of Octaviar Ltd & Octaviar Administration Pty Ltd) v Anderson & Ors (2014) 292 FLR 269; (2014) 103 ACSR 236; [2014] NSWCA 450, considered
Homestyle Pty Ltd v City of Belmont [1999] WASCA 59, considered
John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1; [2010] HCA 19, applied
Jones v Miami Waterfront Developments Pty Ltd [2012] WASC 483, considered
Lowe v Kladis (2018) 19 BPR 38,599; [2018] NSWCA 130, considered
Pegang Mining Co Ltd v Choong Sam [1969] 2 MLJ 52; [1969] UKPC 16, considered
Re Octaviar Administration Pty Ltd (in liq) (2013) 94 ACSR 612; [2013] NSWSC 786, considered

COUNSEL: E Robinson for the appellants
R Traves QC, with S J Webster, for the first respondent
D B O'Sullivan QC, with J P O'Regan, for the second, third and fourth respondents

SOLICITORS: Robinson Nielsen Legal for the appellants
Allens for the first respondent
Alexander Law for the second, third and fourth respondents

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

[2] **GOTTERSON JA:** This appeal was commenced by a notice of appeal filed in this Court on 13 July 2018.[1] It is against orders[2] made by a judge of the Trial Division on 15 June 2018 in proceeding No 4847 of 2018. Her Honour dismissed with costs an originating application that had been filed by the appellants in this appeal, China First Pty Ltd ("China First") and Waratah Coal Pty Ltd ("Waratah Coal").[3] China First and Waratah Coal had commenced the originating proceeding as first applicant and second applicant respectively.

[3] The entities that were respondents to the originating application are also, in the same order, the respondents to this appeal. They are, respectively, Mount Isa Mines Ltd ("MIM") as first respondent, Queensland Nickel Sales Pty Ltd ("QNS") as

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1 AB1 1-4.
2 AB1 16. The costs of MIM were ordered to be paid by the applicants. The other respondents did not seek costs.
3 AB1 17-18.

second respondent, QNI Resources Pty Ltd ("QNR") as third respondent, and QNI Metals Pty Ltd ("QNM") as fourth respondent.

[4] The relief that had been sought by way of the originating application, and which was refused, concerned a separate proceeding, No 7517 of 2017. That proceeding had been commenced by an originating application filed on 24 July 2017.[4] The applicant was MIM and the respondents were QNS, QNR, and QNM, as first respondent, second respondent and third respondent respectively. I propose to refer to this earlier proceeding as "the MIM proceeding" and to the later proceeding as "the C-W proceeding".

[5] Orders were made in the MIM proceeding by a judge of the Trial Division, who is not the judge who made the orders in the C-W proceeding which are the subject of this appeal. Those orders were made on 20 November 2017[5] on a further amended originating application which had been filed by leave on that date.[6] They also are under appeal.

[6] By their originating application, China First and Waratah Coal, which were neither parties to the MIM proceeding nor formally notified of it, sought orders setting aside paragraphs 1, 4 and 5 of the orders made on 20 November 2017 in that proceeding. They also sought orders that they be joined as fourth respondent and fifth respondent respectively in the MIM proceeding.

The MIM proceeding and the orders made in it at first instance

[7] By its originating application, MIM sought relief in respect of certain equipment on No 2 Wharf at the Port of Townsville. Since 23 December 1992, MIM has held a long-term lease of No 2 Wharf. In August 1994, it granted a licence to Queensland Nickel Pty Ltd ("QNI"), a company to which QNS, QNR and QNM are related. The licence agreement[7] permitted QNI, its servants and its agents to use the licensed area for the purposes of berthing vessels and the unloading or loading of nickel ore and of the refined product from the Yabulu nickel refinery.[8] QNR and QNM own the refinery as joint venturers.

[8] The primary relief sought by MIM was a declaration to the effect that if the respondents did not within 35 days remove the equipment from the wharf, it might lawfully remove it and sell it, and apply the proceeds of sale to defray, first, the costs of removal and sale and, second, its costs of the proceeding, with any surplus to be paid to the respondents. The originating application also sought damages for trespass to land and costs.

[9] The learned primary judge who determined the C-W proceeding at first instance outlined, in her reasons for judgment, the factual circumstances in which the MIM proceeding had arisen as follows:

> "[4] … Under the licence agreement, QNI was granted a licence for non-exclusive access to the berth. QNI had an obligation to

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4 AB2 520-522.
5 AB2 534-535.
6 AB2 531-533.
7 AB2 76-102.
8 Clause 4.1.

pay all harbour dues to the applicant. The refinery was managed by QNI. In 2016, voluntary administrators were appointed to that company and on 22 April 2016, it was placed into liquidation. On 3 March 2016, QNI was replaced as the manager, of the joint venture which owned the refinery, by QNS.

[5] The berth was used to enable unrefined ore to be shipped to it before being transported to the refinery to be processed. According to the applicants, the berth is necessary in order to operate the refinery. They contend that no alternative wharf in Townsville could be used for the purpose of receiving the ore in question. They also contend that there is no alternative port that would be available to it. There is evidence from Mr Wolfe, deposing as to the difficulties of obtaining another berth and about the lack of an alternative port. The evidence does not demonstrate that the refinery could not operate at all if the equipment is removed, but does demonstrate the impediments that will arise if the berth is not available with the equipment to the refinery.

[6] The equipment on the wharf for use in unloading and moving the ore from the ships is owned by one or more of the QNI companies. That equipment includes a crane, ore unloading equipment and conveyers used to transport ore to rail wagons for delivery to the refinery.

[7] It is anticipated that large rail-mounted hoppers and wharf conveyor system may be damaged if removed and it is contended that the equipment would therefore have significantly less value. Mr Wolfe gives evidence in a second affidavit that the rail-mounted hoppers are welded, rather than bolted, and would, in his view, be required to be cut into pieces in order to be transported.

[8] MIM does not accept that the equipment would be of no value or could not be reassembled if removed, and submits that any possibility of damage to the equipment and a reduction in the value of the equipment is only an indirect consequence of the carrying out of the order (made on 20 November 2017 in the MIM proceeding).

[9] The licence agreement was terminated by MIM following the failure to pay harbour dues in late 2015.[9] A notice to remedy breach was issued by MIM on 27 January 2016, relating to the non-payment of $1.2 million in harbour dues. That breach was not remedied and on 14 March 2016, MIM gave notice of the termination of the licence agreement to QNI.

[10] Under the licence agreement QNI had promised it would, at the determination of the licence agreement, peaceably and quietly deliver up to MIM the licensed area. QNI was obliged,

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9 Affidavit of D P Zammit at [4]-[9]; AB2 47-48.

> on termination of the license agreement, to "forthwith" remove all movable improvements. That did not occur."

[10] The orders made in the MIM proceeding on 20 November 2017 included a declaration in these terms:

> "1. The applicant may lawfully cause the equipment set out in Schedule 1 to the Application (the ***Equipment***) to be dismantled, removed from its current location and delivered to the first respondent's premises at 1 Greenvale Street, Yabulu Qld 4818 (the ***Premises***)."

Others orders made include the following:

> "4. The respondents pay the applicant damages of $270,215.
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> 5. Provided the applicant gives the first respondent three clear days' notice in writing of the weekday date or dates on which the Equipment will be delivered to the Premises, the first respondent must accept delivery of the Equipment (whether dismantled or not) at the Premises immediately on the expiry of the notice period, between the hours of 8am and 5pm."

It is this declaration and these orders that China First and Waratah Coal sought by the C-W proceeding to have set aside.

The charges held by China First and Waratah Coal

[11] In an affidavit sworn in the C-W proceeding, Mr C F Palmer, sole director and secretary of both China First and Waratah Coal, stated that on 13 January 2016, China First, QNI, QNM and QNR:

(a) executed a Share Subscription Agreement pursuant to which QNI agreed to purchase two billion shares in China First, and each of QNI, QNM and QNR became jointly and severally liable for "the total purchase price" of $135,000,000; and

(b) entered into an agreement ("China First Charge") pursuant to which QNI, QNM and QNR each granted a fixed and floating charge over all of its property (real and personal, present and future) to secure the payment of monies owed by it from time to time to China First. Such monies included monies owing under the Share Subscription Agreement.[10]

[12] By the same affidavit, Mr Palmer also stated that, on the same date, Waratah Coal, QNI, QNM and QNR:

(a) executed a Security Deed by which Waratah Coal agreed to make certain mining tenements available as security for credit facilities which might be provided to QNI, QNM and QNR, in consideration for which those companies agreed to provide a fixed floating charge in favour of Waratah Coal over their assets and undertakings;

(b) entered into an agreement ("Waratah Coal Charge") pursuant to which QNI, QNM and QNR each granted a fixed floating charge over all of

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10 Affidavit at [12], [13]; AB2 373-374. The China First Charge, which is undated, is at AB2 391-442.

its property (real and personal, present and future) to secure the payment of monies owed by it from time to time to Waratah Coal.[11]

[13] Mr Palmer further stated that both charges were registered on the Personal Property Securities Register on 14 January 2016.[12] In other proceedings, QNI and its liquidators seek to avoid these charges as uncommercial transactions and insolvent transactions. In the present case, their enforceability is assumed.

The issue at first instance in the C-W proceeding

[14] Before the learned primary judge, China First and Waratah Coal contended that they should have been joined as parties in the MIM proceeding.[13] That they were not joined, they submitted, entitled them as of right to have the orders set aside.[14]

[15] Her Honour noted that it was common ground between the parties that, consistently with the decision of the High Court in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*,[15] the test for whether China First and Waratah Coal ought to have been joined turned upon whether, in the MIM proceeding the court had been invited to make, or had proposed to make, orders that would have directly affected the rights or liabilities of either company.[16]

[16] The parties were in dispute as to whether this test had been satisfied in the MIM proceeding. China First and Waratah Coal contended that the orders made on 20 November 2017 directly affected them. The respondents, QNS, QNR and QNM, supported that contention. MIM, however, contended that the orders did not have that effect.

The decision at first instance in the C-W proceeding

[17] China First and Waratah Coal argued before the learned primary judge that they were directly affected by the orders because:

(a) first, they had an interest in the Equipment as chargees and if it was damaged upon removal, the resultant decrease in value of it would immediately have a direct effect on them;

(b) secondly, as chargees, they had security over the entire refinery business and, were they to appoint receivers to the business or exercise a power of sale over it, they would be directly affected by any diminution in the value of the business consequent upon a removal of the Equipment;

(c) thirdly, they had a direct interest in the destination to which the Equipment was to be delivered upon removal and had had no opportunity to make submissions on that.

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11 Ibid at [16], [17]; AB2 374. The Waratah Coal Charge, also undated, is at AB2 456-496.
12 Ibid at [14], [17]; AB2 374.
13 Reasons at [15].
14 Citing *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; [2010] HCA 19 at [137] and *Grovenor v Permanent Trustee Co of New South Wales Ltd* (1966) 40 ALJR 329 at 330.
15 (2010) 241 CLR 1; [2010] HCA 19 per the Court at [131], [132].
16 Reasons at [17], [22].

[18] As to (a), her Honour concluded that the orders did not directly affect the rights and liabilities of China First and Waratah Coal with respect to the Equipment. In arriving at that conclusion, she observed:

> "[39] In the present case, the orders made affect the personal rights of the parties concerned and are not orders *in rem*. That was a matter particularly adverted to by the High Court in *John Alexander*, at [133]. That is, however, not necessarily determinative of whether a party's rights and liabilities are directly affected by the orders made. Nor is it determinative that the applicants are not parties to the licence agreement.
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> [40] I accept that in carrying out the removal of the equipment as permitted by the order [made on 20 November 2017], there is a real possibility that the equipment may be damaged and the value of the equipment may be diminished in the process of the dismantling. I further accept that the ability of the receivers appointed to operate or sell the business may well be diminished by the removal of the equipment, insofar as they would have to find an alternative way to ship the nickel ore to the refinery and that there are difficulties that would have to be overcome in relation to that, including significant time and cost. That could then have a flow-on effect to the value of the security to the applicants.
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> [41] However, while they may be consequences of MIM exercising the rights under the orders, they are indirect and consequential and I do not regard the orders as directly affecting the rights and liabilities of Waratah Coal and China First."

[19] The learned primary judge then gave further reasons for her conclusion. She observed that the orders did not create any new right or declare any proprietary interest in the Equipment or compel any course of conduct. Relevantly, her Honour said:[17]

> "The order that the equipment may be lawfully removed in order for MIM to remedy the trespass to its property is a protective one. That is apparent from cases such as *Aglionby v Cohen*,[18] MIM had a right of removal without the order being made. The order serves a protective purpose…"

[20] The effect that removal might have on the value of the security held by China First and Waratah Coal was properly regarded as indirect or consequential, her Honour said.[19] Insofar as those companies might themselves assert a right to relief against forfeiture of the licence, such a right was unaffected by the orders made.[20]

[21] Her Honour also noted that the rights of China First and Waratah Coal to exercise any rights under their respective charges were not affected by any of the orders. She said:[21]

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17 Ibid at [42].
18 [1955] 1 QB 558 at 562.
19 Reasons at [43].
20 Ibid at [44]-[46].
21 Ibid at [47].

> "… The order provides for the removal of the equipment, not for the taking of possession of the equipment by MIM. The order provides for a point of delivery of the equipment and the party to whom it can be delivered, but it does not determine any entitlement of that party in relation to that equipment as against the applicants. The applicants have not presently sought to exercise any of their proprietary rights in relation to the equipment. The ability of China First and Waratah Coal to claim possession of the equipment or exercise their rights over the equipment is not diminished, even though the commercial value of the security may be reduced as a consequence of the work done to effect the removal of the equipment."

[22] As to (b), the learned primary judge considered that any adverse effect of the order for removal of the Equipment on the commercial value of the refinery was also indirect and consequential.[22] Her Honour distinguished a decision on which China First and Waratah Coal had placed particular reliance, *Homestyle Pty Ltd v City of Belmont*.[23] In that case, a local authority had sought a declaration that a tender lodged by a third party under a tender process was one that it could accept. A Master had refused an application by a competing tenderer to be joined as a party in the proceeding. On appeal, the refusal decision was set aside.[24] The learned primary judge observed that the competing tenderer's right to fairness in the tender process was directly affected by the declaration sought.[25]

[23] The learned primary judge also rejected a submission by China First and Waratah Coal that there was a possibility of inconsistent findings in the event that they pursued relief for forfeiture.[26]

[24] It was in light of the finding that the rights and liabilities of China First and Waratah Coal were not directly affected by the orders that her Honour dismissed the application.[27]

[25] She found it unnecessary to decide an argument advanced by MIM that even if China First and Waratah Coal should have been joined in the MIM proceeding, they would have to establish that a practical injustice had resulted for them in order for the orders made to be set aside. MIM had further argued that the two companies could not do that.[28] Nor was it necessary, her Honour said, for her to consider whether she should have regard to the merits of any argument that they might have raised in the MIM proceeding had they been parties to it.[29]

The ground of appeal

[26] The appellants, China First and Waratah Coal, have one ground of appeal. It is:

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22 Ibid at [48].
23 [1999] WASCA 59.
24 Also set aside was a declaratory order made by a judge at first instance, after the refusal order had been made, but before the appeal was instituted.
25 Reasons at [50], [51].
26 Ibid at [54].
27 Ibid at [56], [59].
28 Ibid at [57].
29 Ibid at [58].

> "The learned primary judge erred in concluding that the Appellants were not directly affected by Orders 1, 4 and 5 made [in the MIM proceeding] on 20 November 2017."

Appellants' submissions

[27] Relying on the High Court decision in *John Alexander*, the appellant submitted that a number of uncontroversial principles provide a context for resolving the issue raised by the appeal. Firstly, where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined.[30]

[28] Secondly, if a court makes an order directly affecting a person who should have been joined as a necessary party, the order is not a nullity. However, generally, that person is entitled as of right to have the order set aside.[31]

[29] The third principle is that it is the responsibility of the plaintiff to ensure that the proceeding is properly constituted by joining all the necessary parties. It is not the responsibility of the non-party to do so, if it even knows that the proceeding is on foot.[32]

[30] The appellants then cited a passage from the judgment of a Full Court of the Federal Court of Australia in *News Ltd & Ors v Australian Rugby Football League & Ors*[33] in which their Honour's said of the "direct effect" test formulated by the Privy Council in *Pegang Mining Co Ltd v Choong Sam*,[34] that it "involves matters of degree, and ultimately judgment, having regard to the practical realities of the case, and the nature and value of the rights and liabilities of the third party which might be directly affected". Drawing upon observations made by Lord Diplock in delivering the opinion of the Privy Council, the appellants further submitted that there are a "great variety" of circumstances where persons may be necessary parties and that a "flexibility of approach" is required to determine whether they are necessary parties.

[31] The appellants place significant reliance upon those observations of the Privy Council and the passage from *News Ltd* to which I have referred. They submitted that it is to be inferred from them that in applying the test, the focus is upon "the practical realities" in a given case.

[32] The appellants then advanced several propositions for assistance in applying the test. They cited other decisions as authority for them.

[33] The first, for which the decision of Edelman J in *Jones v Miami Waterfront Developments Pty Ltd*[35] was cited, is that a non-party may be "directly affected" by relief which is purely declaratory. Secondly, the "direct effect" test may be met even where there are a number of stages between the order and its effect upon a non-party's rights or liabilities. For this, the decision of Young AJ in *Re Octaviar Administration Pty Ltd (in liq)*[36] was cited.

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30 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; [2010] HCA 19 at [131].
31 Ibid at [137].
32 Ibid at [140].
33 (1996) 64 FCR 410 at 525 per Lockhart, von Doussa and Sackville JJ.
34 [1969] 2 MLJ 52 at 56.
35 [2012] WASC 483.
36 (2013) 94 ACSR 612; [2013] NSWSC 786.

[34] The third and fourth propositions, for which *Octaviar* and the decision of the New South Wales Court of Appeal in *Lowe v Kladis*[37] were cited, are that the materiality of the effect of the order on the non-party is a significant factor; and that a right or liability may be directly affected where the order does not affect its existence or scope but affects its utility or value.

[35] Relying on these propositions, the appellant's argued that the removal of the Equipment is the inevitable and intended consequence of the orders made on 20 November 2017. The removal would affect the appellants' rights under clauses 2.4, 5.3(2) and 5.3(3) of their respective charges. Further, the practical reality is that removal of the Equipment will have the result that debts owed to the appellants will no longer be secured by a viable refinery business because the presence of the Equipment at the wharf is essential to it.

[36] The learned primary judge erred, it was submitted, in characterising the effect of the orders made as being only upon the value of the appellant's rights as chargee. The effects identified in the immediately preceding paragraph went beyond value. They ought to have been characterised as directly affecting the appellants' rights.

MIM's submissions

[37] MIM did not take issue with the three principles drawn by the appellants from *John Alexander*.

[38] With regard to the appellants' first proposition, MIM accepted that a declaration that merely confirms an existing right or liability may directly affect a non-party; but submitted that whether it does so or not depends upon the terms of the order made and the particular right or liability involved.

[39] As to the second proposition, MIM also accepted that, in some cases, an order may have a direct effect on a right or liability even though the effect is contingent. The necessity that the order, by its terms, have the requisite effect was emphasised by the High Court in *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (receivers and managers appointed)*.[38]

[40] MIM rejected the appellants' third and fourth propositions insofar as they may assert that a material financial effect alone is sufficient to require joinder of a non-party. Such an assertion is, MIM submitted, unsupported by authority including *Octaviar*[39] on appeal and *Pegang Mining*.

[41] MIM also made submissions with respect to the decisions in *Miami Waterfront*, *Octaviar*, *Lowe* and *Homestyle* for the purpose of analysing the support, if any, that they gave to the appellants' propositions.

[42] It was submitted for MIM that the orders made did not directly affect their rights under the charges. The effect of the orders was correctly characterised by the learned primary judge as an effect upon the commercial value of the Equipment or of the refinery business. Such an effect was indirect and consequential. By contrast

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37 (2018) 19 BPR 38,599; [2018] NSWCA 130.

38 (2011) 244 CLR 1; [2011] HCA 18 at [49].

39 Sub nom *Fletcher & Ors (as liquidators of Octaviar Ltd & Octaviar Administration Pty Ltd) v Anderson & Ors* (2014) 103 ACSR 236; [2014] NSWCA 450.

the orders did not directly affect the appellants' rights or liabilities such as would have required their joinder.

Discussion

[43] The three principles to which the appellants have referred are uncontroversial. I would add that in relation to the first of them, the court in *News Ltd* observed that where, as here, a question of whether a non-party should have been joined arises after final orders have been made, the inquiry as to direct effect is directed to the orders actually made or which, on appeal, it is contended should be made.[40] The parties' submissions on appeal addressed the orders actually made on 20 November 2017.

The adoption and application of the "direct effect" test in Australia

[44] I now turn to the adoption and application of the "direct effect" test in Australia. As noted, the test was formulated in *Pegang Mining*. The reason for the formulation was explained by Lord Diplock in a passage set out in *News Ltd*.[41]

[45] In that passage his Lordship said:[42]

> "The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases.
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> It has been sometimes said as in *Moser v Marsden* [1892] 1 Ch 487 and in *Farbenindustrie AG Agreement* [1944] Ch 41 that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between 'legal' and 'commercial' interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?"

In anticipation of their adoption of the test, their Honours in *News Ltd* added:[43]

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40 *News Ltd* at 525, citing *Associated Grocers Co-op Ltd v Hubbard Properties Pty Ltd* (1986) 42 SASR 321 at 341.

41 Ibid at 524.

42 *Pegang Mining* at 55–56.

43 Ibid at 524.

> "An order which directly affects a third person's rights against or liabilities to a party should not be made unless the person is also joined as a party."

[46] A little later in the reasons, the court in *News Ltd* adopted the test and made the following observations with respect to the application of it:[44]

> "There are some classes of case where the ascertainment of the necessary parties who "ought to have been joined" is not difficult. Where the orders sought establish or recognise a proprietary or security interest in land, chattels or a monetary fund, all persons who have or claim an interest in the subject matter are necessary parties. This is because an order in favour of the claimant will, to a corresponding extent, be detrimental to all others who have or claim an interest. *Grovenor v Permanent Trustee Co of New South Wales Ltd* is an example of this class of case. Where the subject matter of the proceedings is not of this kind, the ascertainment of necessary parties who ought to have been joined may be more difficult.
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> In our opinion, the question should be decided according to the test proposed by Lord Diplock. The test involves matters of degree, and ultimately judgment, having regard to the practical realities of the case, and the nature and value of the rights and liabilities of the third party which might be directly affected. The requirement that a third party's rights against, or liability to, any party to the proceedings be directly affected is an important qualification that recognises that many orders of a court are likely to affect other people to a greater or lesser extent. This is particularly so with remedies in the nature of an injunction: see *Silktone Pty Ltd v Devreal Capital Pty Ltd* (1990) 21 NSWLR 317 at 322 per Kirby P. The requirement of a direct effect on rights or liabilities differentiates the case where a person ought to be joined, from other cases where the effect of the order on non-parties can be characterised as only indirect or consequential."

[47] The passages from the judgment in *News Ltd* which I have set out were referred to with approval by the High Court in *John Alexander*.[45] The court unanimously held that a non-party, Walker Corporation, which claimed an equitable interest in certain land, should have been joined as a party to litigation in circumstances where it could have argued that no constructive trust over the land in favour of a claimant party should be declared because of its equitable interest. More recently, the High Court reaffirmed the "direct effect" test in *Lanepoint*.[46]

[48] The other cases to which the appellants referred illustrate a range of instances in which courts have held that a right or liability was, or might, be directly affected, as would warrant joinder. In *Miami Waterfront*, Edelman J referred to *Pegang Mining* and *News Ltd*.

[49] His Honour explained that in *Pegang Mining*, a non-party, who had contracted with a sub-sublessee of a mining lease for a licence to mine on leased land, was held to

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44 Ibid 524–525.

45 *John Alexander* at [131], footnote 125.

46 Ibid at [49].

be directly affected by litigation over whether there was an entitlement to the sub-sublease. That was because the success or failure of the litigation would affect whether the non-party could exercise separate rights against the sub-sublessee under the licence.[47]

[50] As to *News Ltd*, Edelman J pointed out that players and coaches allied to the Super League should have been joined in litigation, the object of which was to restrain the conduct of a Super League competition. The restraints sought would have directly affected the rights of the players and coaches to choose the employer for whom they worked.[48]

[51] In the case before him, Edelman J refused an application by a director of a company who had been joined as a defendant in a proceeding for a declaration that a receiver and manager had been validly appointed to the company. The director applied to have the proceeding against him dismissed on the footing that he had been improperly or unnecessarily joined as a party. His Honour refused the application. He adopted the reasoning in *News Ltd*. A declaration that the receiver's appointment was valid, his Honour reasoned, meant that the applicant's powers as a director were directly affected, and diminished.[49]

[52] In *Octaviar*, the New South Wales Court of Appeal affirmed the decision of Young JA which, in certain respects, set aside in part an order made in September 2011, pursuant to s 588FF(3)(b) of the *Corporations Act* 2001 (Cth), by a judge at first instance extending the time for the making of any unfair preference application under s 588FD(1) to 3 April 2012, in respect of Octaviar Administration Pty Ltd. The application for an extension of time was made *ex parte* by the liquidators of that company. At that time, the liquidators had intended to take advantage of the extension of time to commence proceedings against the Commissioner of Taxation to recover alleged voidable payments. They subsequently did so in April 2012 by an application made under s 588FF(1) to which the Commissioner was the respondent.

[53] Because that proceeding was bought against the Commissioner, s 588FGA(1) applied. That provision provided that where an order was sought against the Commissioner in respect of a relevant taxation payment, each person who was a director of a company when the payment was made was liable to indemnify the Commissioner in respect of any loss or damage resulting from the order.[50] Any amount so payable to the Commissioner under s 588FGA(2) was a debt due to the Commonwealth.[51]

[54] In March 2013, the Commissioner and two individuals, Mr Anderson and Mr White, who were the only directors of Octaviar Administration at the relevant times, applied to have the order made in September 2011 set aside insofar as it affected the Commissioner and the directors.[52] By that time, the Commissioner had applied for indemnity from the two directors under s 588FGA(2). The order was set aside accordingly. The liquidators appealed to the New South Wales Court of Appeal.

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47 *Miami Waterfront* at [18].
48 Ibid at [21].
49 Ibid at [36].
50 *Corporations Act* 2001 (Cth) s 588FG(2).
51 Ibid s 588FGA(3).
52 Order made 14 June 2013.

[55] On appeal, the court noted that the liquidators did not dispute that the state of their intentions and preparedness as against the Commissioner was such to give rise to a right, interest or expectation in the Commissioner concerning the extension of time application that caused the Commissioner to have a right to be heard on it.[53] The real issue for the court was whether the directors were persons in respect of whom there existed a like right, interest or expectation.[54]

[56] Barrett JA (with whom Beazley P and McColl JA agreed) rejected an argument for the liquidators based on the status of a guarantor. His Honour reasoned that the directors did have a like right, interest or expectation. His Honour said:

> "[95] I say this because the statute does not create primary and secondary liabilities akin to those that arise in a case of principal and surety. There is no concept of being answerable for the debt or default of another on the footing "if he does not pay you, I will". The liability of directors under s 588FGA(2) is a statutory liability that is in no way referable to anything done or not done by the Commissioner or the directors themselves. If "the Court" makes a s 588FF(1) order against the Commissioner in respect of a payment by the company of a kind referred to in s 588FGA(1), the making of that order causes two obligations to arise: first, the Commissioner's obligation to obey the order; and, second, each relevant director's statutory obligation to indemnify the Commissioner under s 588FGA(2). As Warren J pointed out in *Lofthouse*,[55] the bringing of s 588FF proceedings against the Commissioner in respect of a payment of the kind referred to in s 588FGA(1) causes a person who was a director of the company when it made that payment to be immediately subject to a potential liability in the nature of a contingent liability. If and when a s 588FF(1) order is made, that order itself has the immediate and direct effect of subjecting such a director to financial liability; and this is so whether or not the Commissioner has indicated an intention of seeking to recover from the director. The liquidator's application to "the Court" for such an order is an application for an order that, once made, will have that immediate and direct effect upon the director.
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> ...
>
> [98] Given the distinct likelihood that any such s 588FF proceedings would be brought in "the Court" and the statutory liability that would accrue automatically under s 588FGA(2) if such proceedings were successful, the persons who were directors of OA when the payments in question were made (Mr Anderson and Mr White) also had a relevant right, interest, or expectation that would or might be affected by that

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53 *Fletcher & Ors (as liquidators of Octaviar Ltd & Octaviar Administration Pty Ltd) v Anderson & Ors* (2014) 103 ACSR 236; [2014] NSWCA 450 at [92].

54 Ibid at [93].

55 *Lofthouse v Commissioner of Taxation* (2001) 164 FLR 106; [2001] VSC 326.

> extension order. Their identities were known to the liquidators."

In light of this reasoning, his Honour concluded that the order made by Young JA should stand, subject to some refinement which is not relevant for present purposes.[56]

[57] In *Lowe*, orders had been made at first instance requiring certain neighbours to consent to the construction by the respondent of an elevated driveway over several adjacent parallel strips of land, one of which the respondent owned and two others over which he had rights of carriageway. Other neighbours, the owners of No 24, Musgrave Street, had a right of way over the respondent's strip of land. They had not been joined as parties.

[58] On appeal, the orders made at first instance were set aside. The court concluded that the owners of No 24 should have been joined. Sackville JA (with whom Meagher and White JJA agreed) explained the reasons for that conclusion as follows:

> "[76] In my view, the owners of No 24 should have been joined as parties to the Equity Division proceedings. It was not simply a matter for the appellants to decide whether or not they wished to advance arguments based on the adverse impact of the proposed development application on No 24. It was the responsibility of Mr Kladis as the party seeking relief from the Court to join those whose rights were directly affected.
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> [77] The orders sought by Mr Kladis would not of themselves result in works that would impair the rights of carriageway appurtenant to No 24. The lodgement of a development application would only result in work being carried out if the Council, as the consent authority, granted development consent. Even so, the orders made by the primary Judge required the owners of the properties on which the proposed development was to take place to give their consent to the development application. The owners of No 24 could still lodge an objection with the Council to the development application. But the objection would be limited to planning matters that a consent authority can take into account under the *Environmental Planning and Assessment Act* 1979 (NSW). The owners of No 24 could not successfully object to the development application simply on the ground that the proposed works would interfere with their rights of way."

[59] I have already referred to the decision of the Court of Appeal of Western Australia in *Homestyle*. In his reasons, Templeman J (with whom Malcolm CJ and Owen J agreed) described the submissions of the competing tenderer, Homestyle, as unanswerable. His Honour explained why that was so as follows:

> "… The test as propounded by Lord Diplock is whether the rights claimed by the party seeking joinder will be affected by any order

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56 *Fletcher & Ors (as liquidators of Octaviar Ltd & Octaviar Administration Pty Ltd) v Anderson & Ors* (2014) 103 ACSR 236; [2014] NSWCA 450 at [101].

> which *may* be made in the action. And in the present case, one order which *might* have been made was that questions 2.1 and 2.2 be answered in the negative because no contract existed between the City and Link. That being so, I regard as unanswerable Homestyle's submission that it was affected directly by the answer to those questions. Homestyle's submission is strengthened in any event, by the fact that it wished to argue that if there was a contract between the City and Link, that contract was void or voidable because of the City's failure to deal fairly with all tenderers. That issue is raised by question 2.1 in the originating summons. On Homestyle's case, that issue is so intertwined with questions 2.2 and 2.3 that they should not have been separated."

[60] These cases reveal a systematic approach taken by courts to the determination of whether orders made or sought have had, or if made, will have, a direct effect on a legal right or liability. That approach has involved an identification of the specific legal right or liability said to have been affected or liable to be affected, and an assessment of its legal characteristics. Next, the court has inquired into whether the right or liability itself has been affected, or is liable to be affected. Typically, the inquiry has sought to establish whether there is an effect on the existence of the right or liability or on its legal characteristics; or whether there is an effect on the legal environment in which the right might be exercised or the liability discharged, such as would impact upon its exercise or discharge from a legal perspective. An effect of either kind has been regarded by courts as a direct effect on the right or liability for the purposes of the test.

Application of the test in this case

[61] The rights directly affected by the orders made on 20 November 2017 are, it is contended by the appellants, their rights under clauses 2.4, 5.3(2) and 5.3(3) of their respective charges.

[62] As to clause 2.4, the appellants rely on that part of the provision that provides that the Chargor may not, without the prior consent of the Chargee, dispose of, part with possession of, or create or permit to exist an interest in, or otherwise deal with, any of the Charged Property.[57] Clauses 5.3(2) and 5.3(3) provide, respectively, that the Chargor must maintain the Secured Property in a good state of repair and in good working order and condition, and must ensure that no material alteration is made to the Secure Property.[58]

[63] None of these provisions expressly confers a right on the Chargee, as each appellant is. They impose obligations on the Chargor. The orders made on 20 November 2017 do not impact upon the existence of those obligations or their legal characteristics. From a legal perspective, their nature and content are unaffected by the orders.

[64] As well, the orders do not affect the legal environment in a way which impacts upon the enforcement of such obligations by the Chargee against the Chargor. If, with the benefit of Orders 1 and 3, MIM causes the Equipment to be dismantled,

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57 Clause 2.4(1). Although the term "Charged Property" is not defined, I assume for present purposes that it includes the Equipment.

58 The Equipment is "Secured Property" as defined.

removed and delivered to QNS, then such conduct will be that of MIM. The orders do not have the effect of attributing MIM's conduct to the Chargor. For example, the Chargor would not thereby dispose of, part with possession of, or otherwise deal with the Equipment in contravention of clause 2.4.

[65] Furthermore, if the Chargor has failed to discharge obligations under any of these provisions, the orders made do not affect rights conferred by the charge in the event of default or the way in which the Chargee may exercise them or seek enforcement of them by way of curial process.

[66] For these reasons, I conclude that the orders made do not directly affect the Chargor's obligations under clauses 2.4, 5.3(2) and 5.3(3), or the remedial rights that either appellant may have, as Chargee, in the event that there is a failure by the Chargor to perform them. The finding of the learned primary judge to that effect is, in my view, quite correct.

[67] I would accept that dismantlement, removal and delivery of the Equipment, as envisaged by the orders, may affect its physical characteristics in a way which impacts adversely upon the value of the Equipment as measured by the price which might be obtained for it upon enforcement of the security by the Chargee. That, in turn, may have adverse financial consequences for the Chargee in the event that the Chargor is otherwise unable to discharge the secured debt in full.

[68] Such effects are not effects upon the legal characteristics of the Chargee's rights or upon the legal environment in a way which affects the exercise of such rights from a legal perspective. They are not direct effects for the purpose of the test. They are appropriately characterised as consequential effects, which are financial, rather than legal, in nature. As Lord Diplock observed in *Pegang Mining*, such effects have consistently been recognised by courts as an insufficient basis for joinder.

[69] Similarly, any effect that the orders might have on the viability of the refinery business as a security are both indirect and consequential. Her Honour was correct in finding that the effects on the Equipment and on the refinery business relied on by the appellants are not direct effects within the current context.

Disposition

[70] The conclusion I have reached is that the direct test is not satisfied in the case of the appellants. I agree with the conclusion of the learned primary judge in that regard. It follows that the sole ground of appeal cannot succeed. The appeal ought to therefore be dismissed with costs in favour of MIM.

Orders

[71] I would propose the following orders:

1. Appeal dismissed.

2. The appellants are to pay the first respondent's costs of and incidental to the appeal on the standard basis.

[72] **McMURDO JA:** I agree with Gotterson JA.