SUPREME COURT OF QUEENSLAND

CITATION: *Palmer v Parbery & Ors; QNI Metals Pty Ltd & Ors v Parbery & Anor* [2019] QCA 27

PARTIES: **In Appeal No 6047 of 2018:**

CLIVE FREDERICK PALMER
(appellant)
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)
QUEESLAND 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/appellant)
QNI RESOURCES PTY LTD
ACN 054 117 921
(second applicant/appellant)
MINERALOGY PTY LTD
ACN 010 582 680
(third applicant/appellant)
PALMER LEISURE AUSTRALIA PTY LTD
ACN 152 386 617
(fourth applicant/appellant)
PALMER LEISURE COOLUM PTY LTD
ACN 146 828 122
(fifth applicant/appellant)
FAIRWAY COAL PTY LTD
ACN 127 220 642
(sixth applicant/appellant)
CART PROVIDER PTY LTD
ACN 119 455 837
(seventh applicant/appellant)
COEUR DE LION INVESTMENTS PTY LIMITED
ACN 006 334 872
(eighth applicant/appellant)
COEUR DE LION HOLDINGS PTY LTD
ACN 003 209 934
(ninth applicant/appellant)

CLOSERIDGE PTY LTD
ACN 010 560 157
(tenth applicant/appellant)
WARATAH COAL PTY LTD
ACN 114 165 669
(eleventh applicant/appellant)
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
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ACN 009 842 068
(second respondent)

FILE NO/S:	Appeal No 6047 of 2018 Appeal No 6561 of 2018 SC No 6593 of 2017 SC No 3849 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 107 (Bond J)
DELIVERED ON:	22 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	20 September 2018
JUDGES:	Fraser and Gotterson and McMurdo JJA
ORDERS:	**In Appeal No 6561 of 2018:** **Appeal dismissed with costs.** **In Appeal No 6047 of 2018:** **1. Application filed on 24 July 2018 dismissed with costs.** **2. Appeal dismissed with costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DETENTION, INSPECTION AND PRESERVATION – FREEZING ORDERS – where company in liquidation – where liquidators commenced proceedings against former directors and certain companies within the corporate group – where liquidators were successful in an application for freezing orders and ancillary orders – where the primary judge found that there was a good arguable case that Mr Palmer was a shadow director – where

the primary judge found that there was a good arguable case that Mr Palmer breached company statutory and general law duties – whether the primary judge erred in finding that there was a good arguable case – whether a good arguable case requires a finding of fact on the balance of probabilities

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DETENTION, INSPECTION AND PRESERVATION – FREEZING ORDERS – where company in liquidation – where liquidators commenced proceedings against former directors and certain companies within the corporate group – where liquidators were successful in an application for freezing orders and ancillary orders – where the primary judge found that there was a good arguable case that certain transactions involving the company in liquidation could be set aside as uncommercial and insolvent transactions – where the primary judge found that there was a good arguable case that the appointment and subsequent decisions of a controller of the company in liquidation were invalid – whether the primary judge erred in finding that there was the requisite danger that a judgment would be unsatisfied because assets would be dissipated – whether an applicant seeking a freezing order must prove that the purpose of a likely disposition is to put the other party's assets beyond the applicant's reach – whether an inference of a risk of dissipation should be determined by the standard of a prudent, sensible commercial person – whether the evaluation of the existence of the risk of dissipation should be conducted in a manner analogous to the approach taken in applications for interlocutory injunctions

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DETENTION, INSPECTION AND PRESERVATION – FREEZING ORDERS – where company in liquidation – where liquidators commenced proceedings against former directors and certain companies within the corporate group – where liquidators were successful in an application for freezing orders and ancillary orders – whether the primary judge erred in finding that it was in the interests of justice that a freezing order be made – whether the primary judge properly considered the appellants' evidence of reputational damage that would be caused by the making of a freezing order – whether a freezing order should not have been made because the assets frozen were more than twice the value of impugned payments and outstanding liabilities

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DETENTION, INSPECTION AND PRESERVATION – FREEZING ORDERS – where company in liquidation – where liquidators commenced proceedings against former directors and certain companies within the corporate group – where liquidators were

successful in an application for freezing orders and ancillary orders – where the primary judge set aside and then replaced certain orders because a party was not given a proper opportunity to make submissions about them – whether the primary judge failed to give adequate reasons – whether the primary judge's amendment to a freezing order and accompanying reasons for that amendment cured the failure to provide reasons for certain orders in the original freezing order – whether the primary judge failed to provide adequate reasons by not stating whether the freezing order was made pursuant to the Court's inherent jurisdiction or the powers conferred by the *Uniform Civil Procedure Rules*

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE – where Mr Palmer filed an application to adduce further evidence as to his financial position – where Mr Palmer was self-represented – where Mr Palmer's companies were represented and shared his personal interest on most issues – where the evidence was extensive and no reason was provided as to why it was not tendered in the primary proceeding – whether the Court should receive the further evidence

COURTS AND JUDGES – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – GENERALLY – where the primary judge raised a matter of concern about Mr Palmer's testimony in the absence of Mr Palmer – where the primary judge provided Mr Palmer an opportunity to, in effect, re-examine himself – where the primary judge refused an application to adduce further evidence – where the primary judge disclosed a conversation that concerned a communication between another judge of the Supreme Court and a judge of the Federal Court – where the primary judge granted an adjournment – where the primary judge made unqualified findings of fact – whether the circumstances indicated actual or apparent bias affecting the disposition of the applications for freezing orders – whether the primary judge ought to have recused himself for denying a party procedural fairness

Uniform Civil Procedure Rules 1999 (Qld), r 260A, r 260D, r 766

Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd (2011) 81 NSWLR 47; [2011] NSWCA 109, applied
Hawkins v Pender Bros Pty Ltd [1990] 1 Qd R 135; [1989] QSCFC 41, followed
Holyoake v Candy [2017] 3 WLR 1131; [2017] EWCA Civ 92, explained
Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH [1984] 1 All ER 398, considered
Riley McKay Pty Ltd v McKay [1982] 1 NSWLR 264, considered

Third Chandris Shipping Corporation v Unimarine SA [1979] QB 645, explained
TTMI Ltd of England v ASM Shipping Ltd of India [2006] 1 Lloyd's Rep 401; [2005] EWHC 2666 (Comm), considered

COUNSEL: No appearance for the appellant in Appeal No 6047 of 2018
D F Jackson QC, with T R March, for the applicants/appellants in Appeal No 6561 of 2018
T Sullivan QC, with M Hickey, for the respondents

SOLICITORS: No appearance for the appellant in Appeal No 6047 of 2018
Alexander Law for the applicants/appellants in Appeal No 6561 of 2018
King & Wood Mallesons for the respondents

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

[2] **GOTTERSON JA:** I agree with the orders proposed by McMurdo JA and with the reasons given by his Honour.

[3] **McMURDO JA:** These appeals seek to overturn freezing orders made against the appellants who are some of the defendants in a proceeding brought by the respondents in the Trial Division ("the Judgment").[1] Their claims arise from the liquidation of the respondent company ("Queensland Nickel"). The other respondents to the appeal, Mr Parbery and Mr Owen, are special purpose liquidators of that company.

[4] Queensland Nickel was the manager of a nickel mining and refining joint venture of which two of the appellants, QNI Resources Pty Ltd ("QNI Resources") and QNI Metals Pty Ltd ("QNI Metals"), were the joint venturers. The joint venture was governed by the terms of a deed executed in 1992 (the "Joint Venture Agreement"), which provided for the appointment of Queensland Nickel as the manager on terms that included a covenant by it not to carry on or be interested in any other business, activity or operation. In 1995, QNI Resources and QNI Metals became the joint venturers, holding shares of 80 per cent and 20 per cent respectively. In about 2009, entities controlled by the appellant Mr Palmer acquired a 100 per cent interest in the joint venturers, which in turn own all of the shares in Queensland Nickel.

[5] In March 2016, the joint venturers terminated the appointment of Queensland Nickel. By that stage, it was in voluntary administration, and on 22 April 2016 it became subject to a creditors' voluntary winding up. Its administrators became its liquidators, who were described in the Judgment as the general purpose liquidators.[2] On 18 May 2016, the Federal Court appointed Mr Parbery, Mr Owen and another[3] as special purpose liquidators of the company.

[6] The respondents' proceeding was commenced in June 2017, after which the case was consolidated with other proceedings, with the result that the general purpose liquidators were added as plaintiffs.

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1 *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 107.
2 Judgment at [3].
3 Who has since resigned.

[7] The defendants in the proceeding are Mr Palmer, along with two other individuals who are Mr Mensink and Mr Ferguson, and 19 companies including QNI Metals and QNI Resources. The freezing orders were sought and obtained against Mr Palmer, QNI Metals, QNI Resources and nine other companies. Mr Palmer is a director and the ultimate beneficial owner of those 11 companies. In the appeals, the companies are legally represented, but Mr Palmer is not.

[8] The purpose of a freezing order, according to r 260A of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"), is the prevention of the "frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied." Rule 260D provides for the making of a freezing order[4] against a judgment debtor, a prospective judgment debtor or a third party. A prospective judgment debtor is (relevantly here) a party against whom the applicant for the freezing order has a good arguable case. By r 260D(3), a freezing order may be made against a prospective judgment debtor if the court is satisfied, having regard to all the circumstances, that there is a danger that a prospective judgment will be wholly or partly unsatisfied because the debtor might abscond or because the assets of the debtor might be removed from Australia or a place inside or outside Australia or disposed of, dealt with or diminished in value.

[9] As the primary judge identified, there were relevantly three questions to be considered as against each of the appellants, namely whether there was a good arguable case against that party, whether there was the requisite danger that a judgment would be unsatisfied because the assets of that party would be dissipated and whether it was in the interests of justice that a freezing order be made.

[10] The corporate appellants concede, as they did before the primary judge, that there is a good arguable case against each of them. They dispute that the requisite danger was established by the evidence and contend that there were errors by the judge both in the definition of this question and in the consideration of the evidence which might be relevant to its answer. Further, they argue that the primary judge erred in assessing whether the interests of justice favoured the orders which were made, in that he did not exercise the high degree of caution necessary in the making of a freezing order and failed to take into account the evidence of prejudice to the appellants.

[11] Mr Palmer's challenges to the orders made against him are more extensive. He disputes, as he did before the primary judge, that there is a good arguable case against him. Like the corporate appellants, he argues that there was no demonstrated danger that a prospective judgment against him would be unsatisfied and contends that the orders against him were not in the interests of justice. Further, he argues that the primary judge failed to give adequate reasons, wrongly refused to admit evidence which Mr Palmer sought to tender, and granted to the respondents an adjournment of the hearing of the application at a time when the respondents were unable to prove what was necessary in their application. And by extensive written submissions, Mr Palmer argues that the primary judge ought to have recused himself for apparent bias and for denying Mr Palmer procedural fairness in certain respects.

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4 And/or ancillary order as defined in r 260B.

The role of Queensland Nickel

[12] I have referred to the Joint Venture Agreement, but the relationship between Queensland Nickel and the joint venturers was also governed by an Administration Agreement. This agreement required Queensland Nickel to provide certain services, which included managing the debtors of the joint venturers from the sale of nickel products, such as by collecting payment of those debts. This agreement provided that all costs, liabilities and expenses incurred by Queensland Nickel in the performance of its obligations under the agreement would be paid or reimbursed by the joint venturers in the proportions of their respective interests and would be deemed to be Joint Venture Expenses under the Joint Venture Agreement. This provision enabled Queensland Nickel to make "calls" on the joint venturers to meet expenses of that kind and obliged the joint venturers to contribute their share of the funds once a call was made. The Joint Venture Agreement required Queensland Nickel to deposit such monies to a bank account in the name of Queensland Nickel with the money in the account belonging to the joint venturers and being applied to meet joint venture expenses "to the intent that calls made … be reduced to the maximum extent possible."

[13] As already noted, from about 2009, Mr Palmer held a 100 per cent interest in the two joint venturers which in turn owned Queensland Nickel. He was a director of the joint venturers for periods in 2013, 2014 and 2015 and he was a director of Queensland Nickel during the following periods:

(a) 31 July 2009 to 30 January 2013;

(b) 17 April 2013 to 5 April 2014;

(c) 22 January 2015 to 16 February 2015; and

(d) 8 February 2017 to 4 May 2017.[5]

[14] The evidence featured something which was described as the "green notebook" and which emerged during the liquidators' public examinations of Mr Palmer in 2016. It contained handwritten entries made by Mr Palmer over a period from August 2009 to May 2016, apparently recording resolutions at meetings of what was called the joint venture owners committee ("JVOC"). The Joint Venture Agreement provided that Queensland Nickel was subject to the directions of the JVOC which was to determine policies and strategies for the conduct of the joint venture. It is Mr Palmer's case that it was in his capacity as the validly appointed chair of the JVOC, rather than as a director of Queensland Nickel, that he gave directions to that company.

[15] The liquidators' case is that Mr Palmer's actions were those of a director of Queensland Nickel as defined in s 9 of the *Corporations Act* 2001 (Cth) (the "CA"). The liquidators' case is that, even during the periods when Mr Palmer was not appointed to the position of a director, he was a director because he was acting in the position of a director or because the appointed directors were accustomed to act in accordance with his instructions or wishes.

[16] The primary judge observed that the green notebook contained records made by Mr Palmer of occasions when, at purported meetings of the JVOC, Mr Palmer, as the only person present, was said to have agreed with himself, acting in separate

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5 Judgment at [101].

capacities.[6] His Honour set out extensive extracts from the notebook, which included what was recorded as an agreement between the joint venturers and Queensland Nickel on 5 April 2012, by which the joint venturers might agree to extend the purposes of the joint venture. The notebook contained what purported to be an agreement, signed in three places by Mr Palmer for respectively the joint venturers and Queensland Nickel, to extend the purposes of the joint venture to include the following:

- to make loans and receive loans to and from Palmer companies;
- to forgive loans;
- to invest in Palmer companies or projects as the joint venturers proposed;
- to support Mr Palmer and his activities as he might direct or require from time to time;
- to provide guarantees and/or security for or to Palmer companies;
- to make political donations as directed by Mr Palmer;
- to direct Queensland Nickel to do all things necessary to support any activity of the Palmer companies;
- to second staff and provide support for all Palmer companies from the joint venture;
- to give support and assistance to the Palmer companies; and
- to do any matter or thing requested or required by Mr Palmer to assist the Palmer Companies or any other party as Mr Palmer might direct.

[17] The primary judge, about this suggested agreement to vary the scope of the joint venture, observed that:[7]

> "Putting to one side the question whether that could have been a proper exercise of power by Mr Palmer in each of those capacities, I agree with the plaintiffs' submission that the amendments sought to enable Mr Palmer, with no oversight at all, to require Queensland Nickel to transfer Joint Venture Property (including monies held in Queensland Nickel's bank accounts) to almost any recipient on his whim. And, importantly, that was so regardless of whether or not he was formally appointed as a director of Queensland Nickel at the time."

[18] The primary judge said that there were "good reasons to doubt the reliability of the green notebook as a contemporaneously-created record of the matters with which it purports to deal."[8] His Honour listed those reasons which included the inherent unlikelihood that an experienced businessman and company director, on "matters of such moment … would have thought it appropriate to keep records and agreements written in pencil on a notebook", and the fact that, as Mr Palmer had conceded in the liquidators' examination, he had not disclosed to anyone (except possibly to

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6 Judgment at [108].
7 Judgment at [113].
8 Judgment at [119].

Mr Mensink, another director of Queensland Nickel and the joint venturers for various periods) either the existence of the notebook or the amendments to the Joint Venture Agreement which were purportedly recorded in it.

[19] According to evidence from Mr Parbery, Queensland Nickel's only role was acting as general manager for the joint venture and it did not carry on a separate business in its own capacity. Its employees were engaged solely for the purpose of operating and managing the joint venture property which primarily consisted of the nickel refinery.[9] Mr Parbery's evidence was that Queensland Nickel had bank accounts in its own name into which it deposited the proceeds of sale of the refinery's product and from which it discharged liabilities and his investigations did not reveal the existence of a bank account of either joint venturer into which receipts were deposited or from which joint venture expenses were paid.[10]

[20] Mr Parbery's evidence was that at no time from 2009 did Queensland Nickel employ the mechanisms available to it under the Joint Venture Agreement to make calls upon the joint venturers before it incurred liabilities. Instead, to the extent that it discharged its liabilities, it did so from the proceeds of sale of the product of the refinery. The primary judge said that this evidence was corroborated by evidence given by Mr Mensink (in another hearing) as well as by an affidavit by a Mr Wolfe who was Queensland Nickel's chief financial officer.[11]

Payments by Queensland Nickel

[21] As the primary judge detailed, in the four year period from 30 June 2011 Queensland Nickel made payments or transfers totalling more than $200 million to Mr Palmer, his associates or entities controlled by him.[12]

[22] Mr Parbery's evidence was that, based on the investigations by him and his staff of the books and records of Queensland Nickel, the payments and transfers did not appear to have been made for the purpose of the joint venture.[13] The primary judge detailed these payments and transfers in a table extending over several pages of the Judgment, in which he set out the relevant date or period of the transaction, the amount involved and the relevant circumstances.[14] The table explains the basis for the particular monetary limits in the orders made against most of the appellants.

[23] The appellants Palmer Leisure Coolum Pty Ltd, Coeur de Lion Investments Pty Ltd and Coeur de Lion Holdings Pty Ltd were ordered not to remove from Australia or in any way to dispose of, deal with or diminish the value of any of their assets in Australia up to an aggregate unencumbered value of $67,039,694.27, until judgment or further order. That amount is referrable to the groups of payments shown in the table as payments made by Queensland Nickel for the benefit of the business known as the Palmer Coolum Resort.

[24] A restraint in the same terms was imposed upon Mineralogy Pty Ltd ("Mineralogy"), in the amount of $14,458,217.94, which counsel for the corporate appellants explained was referrable to payments made to that company between

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9 Judgment at [123].
10 Judgment at [125].
11 Judgment at [127].
12 Judgment at [135].
13 Judgment at [136].
14 Judgment at [134].

June 2014 and January 2016, broadly for the benefit of Mineralogy's mining tenements.

[25] A restraint was imposed in identical terms against Palmer Leisure Australia Pty Ltd in the amount of $375,000, which was a payment made to it in February 2015 at the request of Mr Palmer.

[26] The restraint imposed in the same terms upon Fairway Coal Pty Ltd was in the amount of $9,163,066.73, which was the aggregate of amounts paid to that company between June 2011 and September 2012 and (as to $401,231) on 30 June 2015 to meet expenses of what was called the Styx Basin Joint Venture.

[27] The same restraint imposed upon Cart Provider Pty Ltd, in the amount of $324,999.68, was the amount of a payment made by Queensland Nickel on behalf of that company for the purchase by it of golf carts for its business in May 2015.

[28] The restraint upon Closeridge Pty Ltd, in the amount of $77,800, represented a payment to a car dealer for the price of a car purchased either for Mr Palmer or that company in March 2015.

[29] For Waratah Coal Pty Ltd, the restraint in an amount of $2 million was the aggregate of two payments which Queensland Nickel made in September and November 2012 to that company at the direction of Mr Palmer.

[30] The amounts in the orders made against the joint venturers and Mr Palmer require a more detailed explanation. The amount in the case of QNI Metals was $49,993,120.74 and the amount for QNI Resources was $199,972,482.97, which are their proportions of the aggregate of essentially three amounts. The first of them is an amount of $40 million which was paid in August 2011 by Queensland Nickel to Palmer Leisure Australia on behalf of the joint venturers as the purchase price of shares in the latter company which the joint venturers had acquired. The second was an amount of $74,031,845.17, being unpaid liabilities of Queensland Nickel for employee entitlements such as unpaid wages, annual leave, payment in lieu of notice, redundancy payments and long service leave. The third was an amount of $135,933,758.54, being the total of claims by identified third party creditors of Queensland Nickel (the largest of which was Aurizon in an amount of approximately $88 million). The respondents' claims in relation to those second and third components are on the basis that the joint venturers are obliged to indemnify Queensland Nickel against expenses and liabilities from the management of the joint venture on their behalf. The first component, like the claims against other corporate appellants, is claimed on the basis that these were either monies lent to those companies which have not been repaid, or monies paid to or for the benefit of them and recoverable on a restitutionary basis.

[31] As already noted, the corporate appellants concede, as they did before the primary judge, that there is a good arguable case against them in these amounts.

[32] That leaves the order made against Mr Palmer, in which he was restrained in relevantly identical terms and where the amount is $204,943,664.39. That amount was derived as follows. The total of the transactions and payments in the table is an amount of $207,016,881.99. That included an amount against Mineralogy of $16,425,535.54. But, as noted above, the restraint imposed upon that company was in the amount of $14,458,217.94. Counsel for the corporate appellants identified

that difference and said that the Court need not be concerned with the reason for it. Similarly, the restraints imposed upon Palmer Leisure Coolum Pty Ltd, Coeur de Lion Investments Pty Ltd and Coeur de Lion Holdings Pty Ltd were about $100,000 less than the total of the amounts shown against them in the table. Those differences were applied to reduce the total shown in the table to the amount of the restraint in the order against Mr Palmer.

[33] Some of the payments in the table were made to Mr Palmer directly. But the amount in the freezing order against Mr Palmer, whilst including those payments, was the total of all of the payments which the respondents say was wrongly paid by the company. Their case is that Mr Palmer, as an appointed or shadow director was in breach of his statutory and general law duties by causing those payments to be made.

Mr Palmer's influence over Queensland Nickel

[34] The primary judge found that there was a good arguable case that during the periods when Mr Palmer was not formally appointed as a director of Queensland Nickel, he was a director as defined in the CA because the appointed directors were accustomed to act in accordance with his instructions or wishes.[15] Mr Palmer challenges that finding.

[35] The primary judge referred to the testimony of Mr Mensink, who was a director of Queensland Nickel for periods in 2012, 2013, 2014 and 2015 and was the sole director of the company by the beginning of 2016, as well as the sole director of QNI Resources and QNI Metals. Before another judge on an interlocutory application, Mr Mensink had testified that Queensland Nickel acted in accordance with Mr Palmer's directions, even when he was not formally appointed as a director.[16] The primary judge also referred to the testimony of Mr Wolfe (when he had been examined by the liquidators) that, throughout 2015, Mr Palmer commonly gave instructions to him about the operations of Queensland Nickel and maintained a tight control on his approval of expenditure by the company, retaining to Mr Palmer the ability to approve new contracts entered into by it.[17]

[36] The primary judge said that the evidence of Mr Parbery about Mr Palmer's position as an authorised signatory for Queensland Nickel and of particular conduct and correspondence of Mr Palmer indicated "the requisite degree of control". His Honour referred also to the facts of Mr Palmer's ownership of the joint venturers and (through them) Queensland Nickel. Further, his Honour notes that there was evidence which suggested that Mr Palmer regarded the assets of private companies owned directly or indirectly by him as sufficiently within his control to be broadly his with which to deal.[18]

[37] Against that substantial body of evidence, there had to be considered Mr Palmer's case, which was that his influence over Queensland Nickel came from the exercise of his powers in his capacity as the chair of the JVOC, so that his instructions

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15 Judgment at [106].
16 Judgment at [103].
17 Judgment at [103].
18 Judgment at [104].

provided to Queensland Nickel were instructions on behalf of the joint venturers in the exercise of their contractual rights.[19]

[38] Mr Palmer's case relied upon observations by Hodgson JA in *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd*,[20] when considering whether the influence of a mortgagee on the directors of a mortgagee company was such as to have made the mortgagee a shadow director. Hodgson JA there said that where a mortgagee, acting in its own interest, exercised an influence on directors with the support of contractual rights in its mortgage documents, that would not generally constitute the mortgagee a shadow director because it would remain for the directors to make their own decision as to whether the company should act in accordance with the instructions of the mortgagee. Justice Hodgson said that the position would be different "if it appeared that, at least for some decisions, the directors were treating the mortgagee's instructions or wishes as themselves being a sufficient reason so to act."[21] Referring to that observation by Hodgson JA, the primary judge here said that the evidence supported the conclusion that there was a good arguable case that the directors of Queensland Nickel treated Mr Palmer's instructions or wishes in that way.[22]

[39] Having stated those conclusions, the primary judge then turned to the subject of the green notebook, where, as I have discussed, his Honour explained his doubts about the reliability of the notebook as a "contemporaneously-created record of the matters with which it purports to deal."[23] Evidently, the notebook was not critical to his finding about Mr Palmer's influence over Queensland Nickel.

[40] In my view, no error is demonstrated in the conclusion of the primary judge that there was a good arguable case that Mr Palmer was a shadow director (when not an appointed director) at all relevant times. His Honour did not need to find that, more probably than not, Mr Palmer was a shadow director. The evidence of Mr Mensink and Mr Wolfe considered with the background of Mr Palmer's ownership of Queensland Nickel and the facts and circumstances of the impugned payments from its funds amply supported the finding that there was a good arguable case in this respect.

[41] Mr Palmer's explanation, that he was acting as the chair of the JVOC, was not compelling at least because the various payments and transfers upon which the respondent's claims are based were made to parties and for purposes with no apparent connection with the joint venture. Some of those transactions post-dated 5 April 2012 when, according to what was purportedly recorded by Mr Palmer in the green notebook, he agreed with himself to expand the purposes of the joint venture. But the primary judge was not obliged to find whether there was a valid change to the terms of the joint venture in that way. As his Honour explained, there were several reasons to doubt whether that had occurred. If it had not occurred, then it would be impossible to characterise the decisions by Mr Palmer to effect these transactions as made in his capacity as chair of the JVOC. If there had been such a change to the terms and scope of the joint venture, there is no apparent error in the primary judge's observation that the effect of the change was to enable Mr Palmer, with no oversight at all, to require Queensland Nickel to transfer any joint venture

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19 Judgment at [105].
20 (2011) 81 NSWLR 47 at 51; [2011] NSWCA 109 at [9]-[10].
21 Ibid at [10].
22 Judgment at [106].
23 Judgment at [119].

property "to almost any recipient on his whim",[24] in which there would have been little room for any independent decision making by the appointed directors.

A good arguable case against Mr Palmer

[42] The respondents' case is that, as a director of Queensland Nickel, Mr Palmer owed to the company statutory and general law duties to ensure that the property of Queensland Nickel was used only for the purposes of the joint venture and not for the benefit of Mr Palmer or other entities which he controlled. The payments totalling more than $200 million are alleged in each case to be the result of a breach by Mr Palmer of these duties and to have resulted in a loss to Queensland Nickel because the amount has not been repaid.

[43] Mr Palmer's argument is that in no case was the payment or transfer an application of the funds or property of Queensland Nickel; rather, it was an application of funds that belonged to the joint venturers about which they have made no complaint. According to the written submissions for Mr Palmer, as the funds were owned by the joint venturers, any claims in respect of them by Queensland Nickel "are capable of being summarily dismissed and do not disclose a good arguable case."[25] Mr Palmer says Queensland Nickel could have no claim against any of the appellants because it did not own the money which it paid away.

[44] His argument emphasises the evidence of the audited financial statements of the joint venturers. There were no separate financial statements for Queensland Nickel itself, but Mr Palmer argues that by reference to the accounts for the consolidated group (which included the joint venturers and Queensland Nickel) and to the financial statements for the joint venturers, it can be seen that Queensland Nickel had no assets of its own.

[45] In discussing the terms of the Joint Venture Agreement, the primary judge observed that the effect of the provisions dealing with the "call process" (by which Queensland Nickel was able to call upon the joint venturers to provide funds) was that monies so provided to Queensland Nickel would be placed in its bank account, to be held on trust by it. More generally, his Honour accepted that Queensland Nickel was a trustee of any funds in its hands so that those monies the subject of the transactions, totalling more than $200 million, were trust monies. But those circumstances do not preclude the recovery by Queensland Nickel of money from a person to whom or for whose benefit a payment was made on the recovery from Mr Palmer of the amount of the payment as compensation for his breach of a director's duty. As a trustee, Queensland Nickel would have its own interest in the money distinct from that of the joint venturers because of its right to use trust funds to discharge liabilities it incurred as a trustee.[26]

[46] Mr Palmer's argument refers to s 1305 of the CA, which provides that a book kept by a body corporate under a requirement of the CA is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded within it. But if the effect of the accounts was, as Mr Palmer argues, that they stated or recorded that Queensland Nickel had no assets, that evidence was to be considered against the other evidence.

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24 Judgment at [113].

25 Outline of submissions for Mr Palmer, para 28.

26 *Octavo Investments Pty Ltd v Knight* [1979] HCA 61 at [13]-[16]; (1979) 144 CLR 360 at 367-368.

[47] In my view, the primary judge was correct to find that what was paid was an asset of Queensland Nickel, albeit an asset which was subject to a trust. And there was a good arguable case that the payments were made in breach of the trust. Further, as the primary judge discussed, when making payments, at least arguably the interests of creditors of Queensland Nickel had to be considered because the company was "of doubtful solvency" with the potential for the transactions to cause prejudice to creditors or a group of creditors.[27]

[48] An argument which was made by Mr Palmer to the primary judge was that these payments by Queensland Nickel were something in the nature of dividends being paid to the joint venturers from the profits of the joint venture. It was then said that the strategy was to have these payments made, at least in some cases, as apparent loans, which would later be forgiven, although they were really distributions of profits of the joint venture because this would have tax advantages. The primary judge was unpersuaded by that argument and concluded that it did not explain away the case presented by the plaintiffs, in the sense of reducing that case to something below a good arguable case.[28] That explanation is not the subject of an argument in Mr Palmer's submissions in this Court and it need not be considered.

[49] Overall, Mr Palmer's submissions demonstrate no error by the primary judge in the consideration of whether there was a good arguable case against him to the extent of the amount of the restraint imposed in his case.

Was there a risk of the relevant kind?

[50] By r 260A and r 260D(3) UCPR, a freezing order may be made if there is a demonstrated danger that a prospective judgment will be wholly or partly unsatisfied because the debtor might abscond or (relevantly here) because the assets of the debtor might be removed, disposed of, dealt with or diminished in value.

[51] The corporate appellants argue that the primary judge misstated, and misapplied, the correct test. It is submitted that the test has these characteristics:

(a) what must be demonstrated is a danger, or a real risk, that a prospective judgment will be wholly or partly unsatisfied because assets might be dissipated; and it is not enough for a plaintiff to simply assert a risk;

(b) it must be a likelihood of danger which in the circumstances justifies the freezing order; and

(c) that likelihood must be demonstrated on "solid" evidence.[29]

[52] None of that is controversial, but something should be said about the third of them, which comes from the statement of Mustill J (as he then was) in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH*, as follows: [30]

> "It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of

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27 *Bell Group (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 at [6065] and [9743] and on appeal: *Westpac Banking Corporation v Bell Group (in liq) (No 3)* (2012) 44 WAR 1 per Lee AJA at [767], [849] and [920] and Drummond AJA at [2046].

28 Judgment at [140]-[151].

29 Appellants' amended outline of argument, para 27.

30 [1984] 1 All ER 398 at 406.

> direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there."

[53] The primary judge discussed the test to be applied with extensive reference to the authorities at [27] through [39] of the Judgment. In particular, he referred to *Patterson v BTR Engineering (Aust) Ltd*, where Gleeson CJ said:[31]

> "The remedy is discretionary, but it has been held that, in addition to any other considerations that may be relevant in the circumstances of a particular case, as a general rule a plaintiff will need to establish, first, a prima facie cause of action against the defendant, and secondly, a danger that, by reason of the defendant's absconding, or of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with in some fashion, the plaintiff, if he succeeds, will not be able to have his judgment satisfied.
>
> …
>
> It is not difficult to imagine situations in which justice and equity would require the granting of an injunction to prevent dissipation of assets pending the hearing of an action even though the risk of such dissipation may be assessed as being somewhat less probable than not."

[54] At [32] of the Judgment, the primary judge recorded a submission for the defendants that what had to be proved was according to what was said in the English Court of Appeal in *Candy v Holyoake*, as follows:[32]

> "There must be a real risk, judged objectively, that a future judgment would not be met because of *unjustifiable* dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief."
>
> (Emphasis added.)

[55] Referring to that statement, the primary judge considered that the use of the word "unjustifiable" would invite an enquiry into a defendant's purpose or motivation in dealing with its assets, and that the weight of authority in Australia supported the view that a plaintiff seeking a freezing order does not have to show that the purpose of the defendant's conduct is to prevent recovery of the amount of any judgment.[33] But in my respectful view, this was not the sense in which the word "unjustifiable" was used in the above passage. Lady Justice Gloster there cited *Gee on Commercial Injunctions* (6th Edition) at 12 [12-032], and a reference to that text and the cases cited under the heading "Unjustifiable Disposals" shows what Gloster LJ

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31 (1989) 18 NSWLR 319 at 321- 322, 325.
32 [2017] 3 WLR 1131 at [34] per Gloster LJ.
33 Judgment at [34].

meant by the expression. Not every disposition of a defendant's property might be unjustifiable so that the payment of ordinary trading debts, which might affect ultimately the recovery of the plaintiff's judgment, would not be an unjustifiable disposal in this sense. But that is not to say that an applicant must prove that the purpose of a likely disposition is to put the defendant's assets beyond the plaintiff's reach. In one of the authorities cited in the text, *TTMI Ltd of England v ASM Shipping Ltd of India*, the point was described as follows:[34]

> "[25] The purpose of the Mareva jurisdiction is sometimes referred to as the prevention of the "dissipation of assets". Without explanation that phrase is, itself, obscure. As Colman J stated in *Gangway Ltd v Caledonian Park Investments (Jersey) Ltd* (2001) 2 Lloyd's Rep 715 the underlying purpose of the jurisdiction is not to provide a claimant with security for its claim but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business so as to make itself judgment proof with the result that any judgment or award in favour of the claimant goes unsatisfied. The purpose is not to provide security for the claimant in respect of his claim. *It is well established that it is not necessary to establish that the defendant is likely to act with the object of putting his assets beyond reach.* What has to be shown is that there is, absent an injunction, "a real risk that a judgment or award in favour of the plaintiffs would go unsatisfied": *The "Niedersachsen"* [1983] 2 Lloyd's Rep 600. That formulation cannot, however, be regarded as a complete statement of the law. A defendant may be likely to make perfectly normal dispositions, such as the payment of ordinary trading debts, the effect of which may be that, when any award is made, it is, in whole or in part unsatisfied when, absent those payments, it might have been satisfied or satisfied to a greater extent. Something more than a real risk that the judgment will go unsatisfied is required."
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> (Emphasis added.)

[56] To the same effect, the New South Wales Court of Appeal (Street CJ, Hope JA and Rogers AJA) said in *Riley McKay Pty Ltd v McKay*:[35]

> "[T]he jurisdiction to grant the [Mareva] injunction is not to be exercised simply to preclude a debtor from dealing with his assets, and in particular to prevent him from using them to pay his debts in the ordinary course of business. It is directed to dispositions which do not fall within this category and which are intended to frustrate, or have the necessary effect of frustrating, the plaintiff in his attempt to seek through the court a remedy for the obligation to which he claims the defendant is subject."[36]

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34 [2006] 1 Lloyds Rep 401 at 406 at [25].

35 [1982] 1 NSWLR 264 at 276.

36 See also *Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liquidation)* [2018] WASCA 174 at [55]; (2018) 53 WAR 201 at 213-214.

[57] As I will discuss, there were transactions, or attempted transactions, in the present case which were extraordinary by any measure and which met, or would have met, the description of an unjustifiable disposal or dissipation of an asset in this sense.

[58] At [39] of the Judgment, the primary judge said that:

> "[T]here must be facts from which a prudent, sensible commercial person could properly infer the existence of the relevant risk of frustration"

for which his Honour cited *Third Chandris Shipping Corporation v Unimarine SA* ("*Third Chandris*"),[37] adding that the relevant statement in that case had been approved by the Full Court of the Federal Court in *Hua Wang Bank Berhad v Deputy Commissioner of Taxation*,[38] and by the New South Wales Court of Appeal in *Severstal Export GmbH v Bhushan Steel Ltd*.[39]

[59] The submissions for Mr Palmer criticise the use of the standard of a "prudent, sensible commercial person". It is said that instead the primary judge should have applied "an objective standard" to assess whether there was a risk of the relevant kind. In my view, the submission misunderstands what was said by Lawton LJ in *Third Chandris*.

[60] Lord Justice Lawton discussed the way in which judges may draw inferences about the relevant risk and likened the process to that followed by "honest commercial men [who] have to learn to spot those who are likely to be defaulters." His Lordship said:[40]

> "What [commercial men] have to do is to find out all they can about the party with whom they are dealing, including origins, business domicile, length of time in business, assets and the like; and they will probably be wary of the appearances of wealth which are not backed up by known assets. In my judgment the Commercial Court should approve applications for Mareva injunctions in the same way."

[61] The effect of these passages from *Third Chandris* is not that there are distinct degrees of risk, one which a court would recognise and another which would be recognised by prudent, sensible commercial people. Rather, it is that a court assesses the risk by a pragmatic view of the facts and circumstances in a commercial context. In my opinion, that is what the primary judge did in this case.

[62] The corporate appellants make a different criticism of that passage of the Judgment. They argue that, throughout the Judgment, the primary judge reasoned by reference not to what the prudent, sensible commercial person *would* infer, but by reference to what that person *might* infer. It is true there were statements to that effect: for example at [262] of the Judgment. Nevertheless, the primary judge ultimately concluded that there was a real risk of Mr Palmer entering into colourable transactions, which, when discovered, would operate to inhibit or to frustrate the enforcement or execution processes.[41] His Honour said that "[t]he relevant aspects of Mr Palmer's

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37 [1979] QB 645 at 671 per Lawton LJ.
38 [2010] FCAFC 140 at [21]-[23].
39 (2013) 84 NSWLR 141, 156-157; [2013] NSWCA 102 at [59].
40 [1979] 1 QB 645, 671-672.
41 Judgment at [266].

previous conduct which justify this conclusion have either been proved before me in this application, or to the extent that the facts or their proper characterization are disputed, my qualitative evaluation of the evidence as a whole supports the conclusion I have expressed."

The Waratah Coal and China First transactions

[63] In my view, the appellants have not demonstrated a misunderstanding by the primary judge as to the risk of dissipation which the plaintiffs had to demonstrate. The question then is whether his Honour misapplied the test. To consider that issue, it is necessary to go to the evidence of what the primary judge described as the Waratah Coal transaction, the China First transaction and the Martino appointment and Martino settlement deeds.

[64] In early 2016, Queensland Nickel engaged PwC to advise about restructuring options in circumstances which included demands being made by Aurizon for security for an amount exceeding $80 million owed to it by the company. Aurizon told PwC that the required security (or further security) had to be provided by a source outside the group of companies of which Queensland Nickel was a member, and that it could not be tied to the sale of the coal assets. Aurizon also told PwC that, if satisfactory security was not provided, it would deny Queensland Nickel access to the rail lines which were necessary for the refinery's operation, of which the likely consequence would be that Queensland Nickel would be forced into voluntary administration. PwC reported that Aurizon was adamant that there was no scope for further negotiations: security satisfactory to Aurizon had to be provided. The primary judge said that there was a good arguable case that it must have been obvious to Queensland Nickel that it was indeed necessary to provide Aurizon with security of the kind which it had stipulated.[42]

[65] PwC advised that there had to be urgent consideration by Queensland Nickel of what security might be offered. PwC further advised that, from its discussions with potential financiers, there was a "genuine interest in proceeding to the next stage of due diligence", but that it was necessary that Queensland Nickel remain out of voluntary administration whilst the due diligence proceeded.

[66] It was in these circumstances that, on 13 January 2016, the China First transaction and the Waratah Coal transaction were effected.

[67] Waratah Coal Pty Ltd owned two exploration permits for coal ("EPCs") in the Galilee Basin. Mineralogy was the ultimate holding company of Waratah Coal and Mr Palmer was the beneficial owner of all the issued shares in Mineralogy.[43] China First Pty Ltd ("China First") and Waratah Coal were parties to a Mining Right Agreement dated 8 July 2009, by which China First had the right to mine the coal within the area of the EPCs, conditional upon Waratah Coal being granted a right to do so under the *Mineral Resources Act* 1989 (Qld). The agreement could be terminated by Waratah Coal if China First did not commence development operations within seven years of the date of the agreement. Consequently, as at January 2016, China First's rights under the agreement were susceptible to a termination by Waratah Coal if it did not commence development operations by July 2016.

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42 Judgment at [172].

43 Sixth affidavit of Mr Palmer, paras 2-5.

[68] In January 2016, a consultant, BDO Corporate Finance (Qld) Limited ("BDO"), provided a report about the likely quantities of coal which could be extracted from the area of the EPCs, the total cost of the mining project and the forecast return. In a letter to Waratah Coal dated 8 January 2016, BDO provided an "indication of thermal coal resources values on a non-reliance basis", in which it calculated an indicative value in a range of $51.6 million to $246.8 million. BDO wrote another letter on the same date to Waratah Coal, with another valuation upon different bases, showing an indicative value for the same resources of $198.2 million.

[69] The Waratah Coal transaction was the subject of three documents: an agreement between Queensland Nickel, the joint venturers and Waratah Coal, a so called "Security Deed" between the same parties, and a document executed by Queensland Nickel granting a fixed and floating charge over its assets to Waratah Coal.

[70] The agreement recited that Queensland Nickel had been asked by Aurizon, as well as by certain banks, to provide security and that Waratah Coal had agreed to provide certain mining tenements to any party nominated by Queensland Nickel as security for any of its borrowings or transactions. The consideration for that promise by Waratah Coal was the "Release", which was defined to mean "all loan forgiveness made by Queensland Nickel and/or any of the QN Parties to the Palmer Parties or any of them up to the date of execution of this Agreement". The "QN Parties" were defined to mean Queensland Nickel and the joint venturers. The "Palmer Parties" were defined to mean all companies or entities which had ever been ultimately owned by Mr Palmer.

[71] By another term of that agreement, each of the QN Parties indemnified Waratah Coal and the Palmer Parties against all claims, proceedings, expenses, costs, damages, losses, and other liabilities of any kind incurred in connection with (amongst other things) any breach by any of the QN Parties of the agreement. On the face of the document, the "Release" by the QN Parties took effect immediately, so that, at least to the extent that the payments which had been made by Queensland Nickel to Mr Palmer or his entities could be characterised as loans, those debts were immediately extinguished.

[72] The second of the documents in the Waratah Coal transaction, the so called "Security Deed", contained similar recitals to those in the agreement. The deed required Waratah Coal to provide the two EPCs as security for credit or facilities provided to the QN Group, in return for which Queensland Nickel and the joint venturers were each to grant a fixed and floating charge in favour of Waratah Coal.

[73] The third of those documents was the charge instrument, in the terms of a fixed and floating charge granted by Queensland Nickel and the joint venturers to Waratah Coal to secure amounts for which those companies, jointly and severally described as "the Chargor", might become liable under the Security Deed, with a liability capped at USD$100 million "together with interest and costs". It provided that on the occurrence of an "Insolvency Event", a term defined to include the appointment of an administrator, the charge would become a fixed charge and any secured money would become immediately payable at the chargee's option.

[74] As the primary judge observed,[44] at this time an Insolvency Event was imminent because, absent some agreement being reached with Aurizon, an administrator

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44 Judgment at [181].

would be appointed immediately, so that the whole of the property of Queensland Nickel and the joint venturers would become subject to this fixed charge, whilst any loan by any of them to the Palmer Parties would have been forgiven.

[75] The China First transaction was the subject of two documents, both again dated 13 January 2016. One was a so called Share Subscription Agreement made between Queensland Nickel, the joint venturers and China First, by which Queensland Nickel agreed to be issued shares in China First for a total of $135 million, payable in two instalments on 31 December 2017 and 31 December 2018. The other document was an agreement between the same parties by which China First was granted a charge for amounts due and owing under the Share Subscription Agreement. The charge was in similar terms to that in favour of Waratah Coal: on the occurrence of an "Insolvency Event" (which included the appointment of an administrator) the charge would become a fixed charge and, at the chargee's option, the secured money would become immediately payable and the charge immediately enforceable.

[76] On 18 January 2016, Queensland Nickel was placed into voluntary administration. It was by that day that Queensland Nickel had to comply with default notices issued by Aurizon if it was to avoid a suspension of Aurizon's services.

[77] In the following weeks, the administrators issued calls under the Joint Venture Agreement, calling upon the joint venturers to pay monies totalling more than $206 million. After the first of those notices was sent on 24 February 2016 (requiring payment of $16,441,186 on or before 4 March 2016), Mr Mensink wrote on behalf of the joint venturers to the administrators saying that this expenditure had not been approved by the joint venturers and therefore there was no liability on their part to pay it. On the same day, the JVOC met and resolved to remove Queensland Nickel as manager for the Joint Venture and to appoint in its place another Palmer company, Queensland Nickel Sales Pty Ltd ("Queensland Nickel Sales"). Then, on 22 March 2016, QNI Resources and QNI Metals lodged proofs of debt with the administrators, respectively claiming $246,433,255 and $61,608,313.80, apparently on the basis that Queensland Nickel had wrongly incurred debts on their behalf.

[78] A week later, on 29 March 2016, Queensland Nickel Sales and the joint venturers together wrote to the administrators, claiming (amongst other things) that China First had a good claim for $135 million (under the Shared Subscription Agreement) against Queensland Nickel.

[79] On 5 July 2016, Queensland Nickel and its general purpose liquidators commenced a proceeding against China First, Waratah Coal and the joint venturers seeking relief under s 588FF of the CA upon the bases that the Waratah Coal and China First transactions were uncommercial transactions and insolvent transactions,[45] or that the charges in favour of those companies were void under s 588FJ because they created circulating security interests during the six months ending on the relation-back day.

[80] The primary judge was of the view that there was a good arguable case that the Waratah Coal and China First transactions and the charges could be set aside on those bases. His reasons for that opinion, insofar as they were alleged to have been uncommercial and insolvent transactions, were as follows. There was a good arguable case that Queensland Nickel was insolvent from 9 October 2015 up to and including

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45 Within ss 588FB and 588FC of the CA.

the date of the appointment of the administrators. There was a good arguable case that at the time of these transactions, if Queensland Nickel was to remain out of voluntary administration, it had to reach an accommodation with Aurizon before 18 January 2016 which met Aurizon's requirements for securing past and future debt, and Aurizon had said that the security had to be property which was unencumbered, provided by entities external to the Queensland Nickel Group, easy to realise and not tied to any potential sale of coal assets. The primary judge said that, although these two transactions had been expressed to be made for the purpose of placing Queensland Nickel in a position to secure further external borrowing, the transactions did not meet the requirements of Aurizon.[46] That being so, an "Insolvency Event" was inevitable, thereby accelerating Queensland Nickel's obligations to pay monies to Waratah Coal and China First and crystallizing the charges in their favour. Moreover, the primary judge noted, the Waratah Coal agreement provided for the release, with immediate effect, of loans made by Queensland Nickel. And under the China First transaction, the amount to be paid for the shares in China First could not be explained, in a manner consistent with the BDO valuations. Whilst not expressing a concluded opinion, the primary judge said that his view was that there was a strong case for setting aside the transactions.

The Martino appointment and Settlement Deed

[81] Part of the background to the events involving Mr Martino was a proceeding in the Trial Division which had been brought by Queensland Nickel, at the instance of the general purpose liquidators, against Mineralogy Pty Ltd on 29 March 2017. By that proceeding, Queensland Nickel claimed an amount in excess of $105 million, part of which consisted of unpaid loans made by Queensland Nickel to the company.

[82] The primary judge found that Mr Martino was a financial advisor with whom Mr Palmer had done business on several occasions prior to May 2017. And he had been a director of China First for a short time in 2011 and 2012.[47]

[83] On 3 May 2017, Mr Palmer's assistant emailed to Mr Martino a deed signed on that date by Mr Palmer on behalf of China First, which purported to record the appointment of Mr Martino, as an agent of China First, to be the controller of Queensland Nickel. The deed referred to Mr Martino as a registered liquidator, which was incorrect, and a corrected version of the deed was signed on behalf of China First and emailed to Mr Martino early on the afternoon of the same day. Just over an hour later, the document was signed by Mr Martino and emailed back to Mr Palmer.[48]

[84] Less than another hour later, Mr Palmer's assistant sent to Mr Martino a document in the form of a deed between China First and Queensland Nickel which was described as a "Deed of Settlement, Claims, Release, Discharge, Indemnity and Confidentiality". It had been signed on behalf of China First by Mr Palmer. The primary judge recorded that it was just seven minutes later that Mr Martino's assistant emailed a scan of the document, signed by him, to Mr Palmer's assistant, with copies sent to Mr Palmer and his lawyer. The primary judge referred to this document as the "first version of the Martino settlement deed".[49]

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46 Judgment at [205].
47 Judgment at [214].
48 Judgment at [215].
49 Judgment at [217].

[85] By this deed, it was accepted that a debt of $135 million was due and payable by Queensland Nickel to China First and it was agreed that the debt would be reduced to $125 million, in consideration of Queensland Nickel agreeing to discontinue the Mineralogy proceeding and not to make future claims against the company. It was further agreed that upon that proceeding being discontinued, China First and Queensland Nickel would release each other from all claims concerning the Mineralogy proceeding and Queensland Nickel would release all directors and related parties of China First.

[86] On the following day, 4 May 2017, what was described by the primary judge as the "second version of the Martino settlement deed" was sent by Mr Palmer's assistant to Mr Martino, with a request that it be signed and sent back "as soon as you can". The parties to this document were China First, Queensland Nickel and Mineralogy. It had been signed on behalf of China First and Mineralogy by Mr Palmer. Mr Martino signed it and returned it by email that evening. This second version was different in that Mineralogy had been added as a party and had become subject to the mutual releases and discharges, but otherwise its terms corresponded with the first version. Mineralogy provided no apparent consideration for the release of the claims against it.[50]

[87] Purportedly on behalf of Queensland Nickel, but without reference to its liquidators, Mr Martino took steps to discontinue the Mineralogy proceeding. On 9 May 2017, interim orders were made restraining China First and Mr Martino from taking any steps under the China First charge and the Martino appointment, including the filing of any documents in court proceedings on behalf of Queensland Nickel.[51] Interlocutory injunctions to the same effect were issued on 18 May 2017.[52]

[88] In the hearing of the application for the freezing orders, there was evidence from Mr Martino that, on the morning of 3 May 2017, Mr Palmer telephoned him and asked if he, on behalf of Queensland Nickel, was prepared to settle the Mineralogy proceeding. His evidence was that he told Mr Palmer that he was prepared to consider the matter and that Mr Palmer should send the proposal to him. He said, as did Mr Palmer in his evidence, that this was the first time that the two had discussed the settlement of the Mineralogy proceeding. His evidence was that he then gave consideration to the question, on the basis of what he knew from discussions with Mr Palmer about the claims which were made as well as from "reading newspapers" and a knowledge of events which he "had about the Group and the audited accounts of the various entities."[53] He formed the view that the claims made against Mineralogy were baseless and, therefore, that Queensland Nickel would be better off by signing the settlement deed because its debt to China First would be reduced by $10 million. He said he acted quickly because he was concerned that the offer by China First was so beneficial to Queensland Nickel that it might be withdrawn before he had accepted it. His explanation for the second version of the Martino settlement deed was that he was told that the first version was invalid because Mineralogy had not been made a party to it.

[89] Mr Palmer's evidence was that he formed the view that it was in the interests of China First that it should act on its security instruments and seek to obtain control over the shares which it had issued to Queensland Nickel. Upon the basis of legal advice, he believed that China First was permitted to appoint a controller over the

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50 Judgment at [219].
51 *Queensland Nickel Pty Ltd (in liq) v Mineralogy Pty Ltd* [2017] QSC 90.
52 *Queensland Nickel Pty Ltd (in liq) v Mineralogy Pty Ltd* [2017] QSC 95.
53 Judgment at [227](k).

assets of Queensland Nickel. He considered the appointment of other insolvency practitioners but decided to appoint Mr Martino, having discussed the appointment with him.[54]

[90] The primary judge concluded that the plaintiffs had a good arguable case to impugn the conduct of Mr Martino and to obtain final relief which included declarations under s 418A of the CA that the Martino appointment was invalid and that he did not validly assume control over Queensland Nickel's property, and a declaration that the Martino settlement deed and documents by which Mr Martino had purported to take steps to discontinue the Mineralogy proceeding were not legally effective to bind Queensland Nickel and to discontinue the proceeding.[55] The primary judge gave the following reasons for those conclusions.

[91] First, Mr Martino acted as if the Mineralogy proceeding had no merit, but apparently without obtaining or reading the documents by which the proceeding was commenced, making any inquiries of the liquidators or their lawyers who had been acting for them in relation to the claim, conducting his own diligent investigations into the merits of the claim or obtaining his own legal advice on the question.[56]

[92] Secondly, Mr Martino executed the (second) deed, which recorded that there was debt owed by Queensland Nickel to China First which was immediately due and payable, without making inquiries of the liquidators or their lawyers, conducting his own investigations into that question, or obtaining legal advice upon it.[57]

[93] Thirdly, Mr Martino had purportedly acted upon a view of the merits of the settlement although he had had only seven minutes in which to consider the settlement deed and he had not made inquiries of the liquidators or their lawyers about whether a reduction in a debt said to be owed to China First had any value. The same applied to the second version of the Martino settlement deed.[58]

[94] Lastly, Mr Martino acted on the basis of information provided to him from parties whose interests were opposed to those of Queensland Nickel.[59]

[95] The primary judge said that "Mr Martino's acts and omissions give rise to the inference that Mr Martino did not act in good faith and that he wilfully or recklessly acted to sacrifice the interests of Queensland Nickel."[60] His Honour described the evidence of Mr Martino and Mr Palmer as "apparently implausible."[61] Overall, his Honour said that it sufficed to say that the plaintiffs' case passed the threshold of being a good arguable case and that it was a strong case.[62]

[96] The judge observed that in this context "the law requires solid evidence justifying the assessment of the requisite risk …" and that the "[m]ere assertion of concern or speculation about a person's character would not be sufficient."[63] But, in this case, his Honour said there was more than mere assertion or speculation: there were

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54 Judgment at [228](c).
55 Judgment at [229], [237].
56 Judgment at [230]-[232].
57 Judgment at [233].
58 Judgment at [232].
59 Judgment at [234].
60 Judgment at [235].
61 Judgment at [236](a).
62 Judgment at [236](h).
63 Judgment at [264].

particular aspects of Mr Palmer's conduct which supported "the conclusion that there is a real risk of Mr Palmer entering into colourable transactions which, when discovered, would operate to inhibit or to frustrate enforcement or execution processes."[64] His Honour added that the inability of the plaintiffs to identify particular transactions which might be entered into was not fatal to their application because of the "ingenuity of schemes which a potential judgment debtor might devise …"[65].

[97] The primary judge then discussed the influence of Mr Palmer upon the defendants against whom a freezing order was sought, saying that Mr Palmer regarded himself as the person who could make decisions on their behalf, including decisions in relation to the principal proceeding.[66] In that respect, his Honour referred to an earlier passage in the Judgment in which he had noted that, in the course of the hearing, Mr Palmer had made it clear that his intention, and "his instruction to the corporate defendants",[67] was to assert the validity of the China First and Waratah Coal security transactions and to rely on the Martino appointment and deed of settlement to contend that he and his various companies had a complete defence to the claims advanced against them.[68] The primary judge said that Mr Palmer's "ownership position and his directorships support the argument that he has both *de facto* and *de jure* control over the companies and their assets [which were] effectively assets which he owns and the protection of their wealth is the protection of his wealth."[69]

[98] The primary judge then turned to the Martino appointment and the Martino settlement deeds, saying that Mr Palmer's involvement in them was a matter for grave concern, in which "Mr Palmer had, and acted on, a positive intention to frustrate the possibility of any judgment against himself, Mineralogy and any of the other natural and corporate defendants within the ambit of the releases contained in the Martino settlement deeds and that he had, and acted on, a willingness to do so by illegitimate means."[70]

[99] His Honour said that "those considerations alone" (Mr Palmer's influence over the other defendants and his involvement in the Martino appointment and settlement deeds) were "sufficient to justify a conclusion that the plaintiffs have demonstrated the existence of the requisite risk …"[71].

[100] The judge then discussed the submissions for the plaintiffs that the existence of that risk was further supported by the evidence of the Waratah Coal transaction and the China First transaction, by the way in which the joint venturers had responded to Queensland Nickel's demands (through the administrators) that it be indemnified for liabilities which it had incurred on their behalf and by the green notebook.[72]

[101] His Honour said that the Waratah Coal and China First transactions supported his conclusion as to the existence of the risk.[73] As to the second of those matters, his Honour said that although the evidence itself would not provide "a secure basis

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64 Judgment at [266].
65 Ibid.
66 Judgment at [268].
67 Ibid.
68 Judgment at [238].
69 Judgment at [268].
70 Judgment at [269].
71 Judgment at [270].
72 Judgment at [271].
73 Judgment at [272].

from which to draw the inference of the existence of the relevant risk", the fact of Mr Palmer's support for the conduct of the joint venturers in refusing to indemnify Queensland Nickel was relevant to the existence of the risk.[74] As to the evidence of the green notebook, the judge said that this was "less easily employed by the plaintiffs", noting that no submission had been made that Mr Palmer fabricated the notebook.[75]

[102] The primary judge then discussed four other matters upon which the plaintiffs relied for the existence of the relevant risk. The first of those was what was said to have been a demonstrated preparedness by Mr Palmer by his testimony in another matters to "mislead lawful inquiry into his conduct".[76] As to that, his Honour was not persuaded that it was appropriate in an interlocutory application of this kind to make such a finding, especially when the evidence in question had taken place before another judicial officer and his Honour had only the transcript of that evidence.[77]

[103] Another of those matters was evidence of what were said to have been "inadequately explained transfers of significant sums of money overseas" which were made in November 2012.[78] They were in large sums,[79] but his Honour did not accept that they supported the plaintiffs' case on this issue, other than by demonstrating, if evidence was required for this point, that cash could be quickly disposed of in a way which might frustrate the enforcement of a judgment.[80]

[104] Another of those matters was the evidence of financial support which had been given to Mr Mensink, it was said by the plaintiffs, to assist him to avoid compliance by him with orders of the Federal Court. As to that point, his Honour was not persuaded that he should reject Mr Palmer's explanation that the money paid to Mr Mensink was part of his "normal entitlements" in his work for the Palmer group of companies and "an existing arrangement that once [Mr Mensink] retired he was entitled to draw his salary for a 3 year period."[81]

[105] The last of these matters upon which the plaintiffs relied was the evidence of three property dealings by Mr Palmer, one of which involved a property at Sovereign Island. At a public examination by the liquidators on 16 September 2016, Mr Palmer said that this property had been sold to Mr Martino five or six years earlier. On the day after that evidence was given, Mr Palmer transferred the property to a company called Sovereign Paradise Pty Limited, as trustee for what was called the Paradise Point Trust, for a consideration of $1.75 million. According to Mr Palmer he had agreed with Mr Martino that Mr Martino would be the beneficial owner of the property and that the legal title would be transferred to him when Mr Martino's entitlement to fees for his services as an advisor to Mr Palmer's group of companies reached the amount of $1.75 million. As it happened, Mr Palmer said, Mr Martino's entitlement to that amount was reached just before Mr Palmer's public examination. The transferee was related to Mr Martino. The primary judge said that Mr Palmer's justification for the transaction was "imprecise" and that the fact and timing of the transfer might be thought to be

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74 Judgment at [273].
75 Judgment at [274].
76 Judgment at [275](a).
77 Judgment at [276](d).
78 Judgment at [275](c).
79 Totalling USD39 million and AUD4.5 million.
80 Judgment at [278].
81 Judgment at [279].

"surprising and not in the ordinary course of business."[82] Although it was a small transaction relative to the scale of Mr Palmer's holdings, the primary judge accepted that it provided some support for the conclusion which he had reached as to the existence of the relevant risk.[83] Notably, there was no finding that the property had been transferred at an undervalue.

[106] The second property transaction was a sale of the building called Mineralogy House. As the registered proprietor of this property, Mr Palmer transferred it in June 2017 for a consideration of $25.3 million. Mr Palmer's evidence was that he did so because he was offered what he regarded as a good price and the primary judge accepted that explanation.[84] But his Honour said that of greater concern was the evidence of the disposition of the proceeds of sale.[85]

[107] After some of the proceeds were used to retire debt and pay certain corporate expenses, $500,000 was paid to Mr Palmer's wife on 1 August 2017, $100,000 to his brother-in-law a few days later, and $4 million was transferred to Mr Palmer's wife on 22 August 2017.[86] Mr Palmer's evidence was that Mrs Palmer was entitled to half of the proceeds of sale upon the basis, he said, that she owned half of the building. At a later point in his evidence, Mr Palmer said, in effect, that the payments were justified upon the basis that this was simply a gift by one spouse to another. The judge's view was that this added further weight to the evidence of the existence of the relevant risk.[87]

[108] The third of the properties was at the Gold Coast and called the Avica Resort. It is sufficient to note that the primary judge found no support for the applications in the evidence about this property.[88]

[109] The primary judge then discussed a number of arguments advanced by the appellants as to the absence of a relevant risk. The first was based upon Mr Palmer's sworn evidence that he had no intention to frustrate any potential judgment and, indeed, that it was his intention that he would ensure that he and his companies discharged their lawful obligations pursuant to any orders. In that respect, Mr Palmer referred to the fact that, on 9 October 2017, Mineralogy became the subject of a judgment requiring the payment of more than USD$17 million[89] and duly paid that sum.[90] The primary judge said that this evidence did not provide a good reason not to assess the relevant risk as his Honour did.[91]

[110] It was submitted to the primary judge that there was no risk of any adverse dealing with the assets of the refinery without the co-operation of the two sets of liquidators.[92] It was submitted that the rights in the property of the joint venture

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82 Judgment at [277](d)(v).
83 Judgment at [277].
84 Judgment at [277](e)(iii).
85 Judgment at [277](e)(iv).
86 Judgment at [277](e)(vii).
87 Judgment at [277](e)(ix).
88 Judgment at [277](f).
89 *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [2017] QSC 219. An appeal against that judgment was dismissed by this Court on 31 July 2018 – see *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [2018] QCA 174 and an application for special leave to appeal to the High Court against that judgment was dismissed on 5 December 2018: see *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [2018] HCASL 385.
90 The sum was paid on 20 November 2017: see Judgment at [281].
91 Judgment at [281].
92 Judgment at [282].

which were claimed on behalf of Queensland Nickel, taken together with the security interests held by China First and Waratah Coal (which were registered on the Personal Property Securities Register), would have the practical effect of preventing a sale of the refinery or its use as security for borrowings without the co-operation of the liquidators.[93] In the view of the primary judge, this argument had a logical flaw: if there was no practical possibility of a disposition of joint venture property, the judge asked, why would the joint venturers or Mr Palmer not undertake that they would not deal with the assets?[94] His Honour accepted that the notoriety of this proceeding would deter a bona fide purchaser from acquiring the joint venture property, but said that the risk of dealings was not confined to a purchase of that kind.[95] The judge rejected a related submission that there would be no prospect that Mr Palmer would see fit to do something which would discredit him prior to the resolution of the proceeding because there was a risk that something might be done which would not come to light until then.[96]

[111] The defendants relied upon evidence of the financial position of Mineralogy, as it was after a judgment had been delivered in its favour in the Supreme Court of Western Australian on 24 November 2017 which upheld a claim by that company to receive payment of hundreds of millions of dollars in royalties over the life of an iron ore mine.[97] There was evidence that in January 2018, Mineralogy received USD278 million as an initial payment of those royalties. At the time of his Judgment, his Honour noted, an appeal had been lodged in that matter but not argued. He said that, if the judgment stood, Mineralogy's capacity to meet a judgment in favour of the plaintiffs was strong but the risk came from concerns about what Mr Palmer might cause to be done by Mineralogy to protect its wealth. He said that the demonstration of Mineralogy's wealth was not a "weighty negation of the existence of the relevant risk."[98]

[112] It was submitted to the primary judge that there was no relevant risk in relation to Mineralogy because in Western Australia there is a statutory constraint on the company assigning, charging or dealing with its mining tenements.[99] His Honour said that this did not eliminate the risk because, absent a freezing order, there would be nothing preventing Mineralogy from seeking an approval from the relevant minister for such a dealing and, in any case, there was no statutory or contractual restraint against Mineralogy assigning or charging its right to receive the royalties.[100]

[113] Next, there was a submission, attributed to Mr Palmer and "many of the corporate defendants", that the value of Mr Palmer's assets and those of his companies was such as to suggest that there was no real risk of dealings with assets in a way which would affect the enforcement of a judgment.[101] The primary judge said that he did not find this argument to be "compelling" for the following reasons.[102] The first was that, although he had information about the value of the assets of the corporate

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93 Judgment at [282](a).
94 Judgment at [282](b).
95 Judgment at [282](c).
96 Judgment at [282](d).
97 *Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16]* [2017] WASC 340.
98 Judgment at [283].
99 Judgment at [284](c).
100 Judgment at [284].
101 Judgment at [285].
102 Ibid.

defendants, his Honour did not have information as to the amounts of their liabilities and, therefore, of their net assets, with the exceptions of the joint venturers and Mineralogy. As to Mineralogy and the joint venturers, the Court had been provided with financial statements and "a great deal of confidential information about the value of the Refinery".[103] He noted that there was conflicting opinion evidence as to their value and said that his judgment was not the occasion to make finding resolving that conflict of opinion.[104] Nevertheless, his Honour's "qualitative evaluation of the competing merits of the two opinion favoured that of the plaintiffs".[105] The judge said that, although he had evidence of Mr Palmer's rough estimate of his net worth, no detail had been given by Mr Palmer as to how the figure had been reached.[106]

[114] There was a submission on behalf of many of the corporate defendants that the evidence did not demonstrate a particular intention by them to deal with their assets at all, a submission which is repeated by the corporate appellants in this Court. The judge's response to that argument was to say that existence of the risk could be inferred from "an assessment of the risk of how Mr Palmer would conduct himself", the relevant risk being what Mr Palmer might cause to be done by those defendants to protect his wealth, of which their wealth formed a part.[107]

[115] Lastly, the judge referred to a submission by Mr Palmer that the application for the freezing orders was made for a collateral purpose and was an abuse of process.[108] His Honour rejected the submission saying that, as he had earlier explained in the Judgment, there was a proper basis to conclude that there existed a real risk of the requisite nature.

The appellants' arguments as to the existence of a risk

[116] In discussing the principles to be applied, the primary judge discussed what should be the approach to the evaluation of the evidence where there were contested questions of fact. His Honour said that, as the application was for alternative forms of interlocutory orders,[109] the determination of the application would not finally dispose of the rights of the parties so that he would not be making findings of fact as would be made at a trial. Rather, his Honour said, his task was to make a "qualitative evaluation" of the evidence in the sense described as McDougall J in *Skyworks NSW Pty Ltd v 32 Drummoyne Road* as follows:[110]

> "The Court is required to undertake a qualitative evaluation of all the evidence that is available, to see if there is a sufficiently serious risk of frustration to justify the making of a freezing order. Further, the two considerations [namely, (1) whether there is a good arguable case and (2) whether there is a real risk of judgment frustration] should be analysed together (as each may impact on the

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103 Judgment at [285](b).
104 Judgment at [285](b)(iii).
105 Ibid.
106 Judgment at [285](c).
107 Judgment at [286].
108 Judgment at [287].
109 Citing *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 403-404 [51], in which the plurality agreed with the Court of Appeal of New South Wales in *Frigo v Culhaci* (Unreported; 17 July 1998) (Mason P, Sheller JA, Sheppard AJA).
110 [2017] NSWSC 343 at [24].

> other), and with an appreciation of both the underlying purpose of the rule and the relative risks of granting or withholding relief – the customary discretionary calculus."

The judge said that it followed that an application such as this was not, in general, an occasion to determine contested questions of fact and conflicts in affidavit evidence. Instead "the approach which should be taken … is analogous to the approach to be taken in applications for interlocutory injunctions."[111] His Honour adopted these observations by Mahoney JA (with whom Glass and Samuels JJA agreed) in *Shercliff v Engadine Acceptance Corporation Pty Ltd*:[112]

> "But there are limitations upon the extent to which a judge is to take into account such evidence as the defendant may tender upon an interlocutory application. It is not his function to conduct a preliminary trial of the action, nor is it, in general, to resolve the conflict between the parties' evidence, and grant or refuse the application upon the basis of such findings. Where there is conflict of evidence, the use which may be made of the defendant's evidence in determining whether the plaintiff has made out a prima facie case is a limited one. For example, the plaintiff's evidence, considered alone, may be such a prima facie case as would be acceptable if submitted to a jury in a trial. But, when considered in the light of the defendant's evidence, it may be explained away so as no longer to be such. Or the defendant's evidence, when juxtaposed to that of the plaintiff may show that there is in reality no such case, no real question between the parties, appropriate to warrant preserving the status quo until the hearing."

[117] The appellants argue that this approach was erroneous because it was inapt to the determination of the question of whether there was a real risk of dissipation. The corporate appellants accept that the approach may have been apt to apply to the assessment of evidence relevant to the question of whether there was a good arguable case. But it is said that this approach to the evidence on the question of whether there was a real risk of dissipation would tend to shift the onus of proof to the defendants.

[118] In my view, the argument cannot be accepted. Notably, the primary judge began this section of the Judgment with a statement that his task was to have regard to all of the evidence before him "and to form a view on whether the plaintiffs have sufficiently discharged their burden on the matters requisite to the making of [the] orders sought …"[113].

[119] The determination of whether there exists a sufficiently serious risk of the dissipation of assets involves the evaluation of future possibilities, rather than the ascertainment of historical facts.[114] The risk of dissipation might justify an order although the probability of the risk eventuating is less than 50 per cent.[115] But, as the risk of dissipation must be a real and not merely a theoretical one, it must have

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111 Judgment at [73].

112 [1978] 1 NSWLR 729 at 734, as the primary judge had done in *SDW2 Pty Ltd v JLF Corporation Pty Ltd* [2017] QSC 1 at [56].

113 Judgment at [71].

114 cf *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 [1] per Brennan and Dawson JJ.

115 *Patterson v BTR Engineering (Aust) Ltd & Ors* (1989) 18 NSWLR 319 at 325.

an evidentiary basis. Where a fact is alleged by the plaintiff in support of its case about the risk, but there is contrary evidence from the defendant, must the fact be proved to the court's satisfaction as if the application for the freezing order was the trial of the case? In my view, a plaintiff need not do so. A freezing order is interlocutory in nature; it does not involve a final determination of the parties' positions. Usually it is made in circumstances of urgency in which the court is unable to conduct an extensive and conclusive factual inquiry in a way which is fair to both parties. Where the factual basis for the plaintiff's case about the risk of dissipation is disputed, the risk will commonly have to be evaluated with the recognition that the factual basis for it is in doubt. Nevertheless, the possibility of the plaintiff's evidence being correct, considered with other facts and circumstances, might mean that there is a sufficiently serious risk of the frustration of the satisfaction of a judgment as to justify the making of a freezing order. In my opinion, the observations in *Shercliff*, as to the limitations upon the extent to which evidence contradicting the plaintiff's case will be considered, are apt to an application of the present kind.

[120] A further submission for the corporate appellants is that the primary judge reasoned that there was a risk of dissipation by reference of the plaintiffs' case for final relief, although that case did not involve allegations of serious dishonesty or otherwise indicate that there was a real risk of dissipation. The submission acknowledges that, where the underlying claim involves a prima facie case that the defendant has been dishonest, that factor may be sufficient to raise an inference that there is a risk of dissipation.[116]

[121] It may be accepted that some of the underlying claims do not require the proof of dishonesty on the part of the defendant. For example, the claims against the corporate appellants for the restitution of monies paid to them or on their behalf, or lent to them, would be recoverable without the proof of some dishonesty on their part. However, it is unnecessary for a plaintiff seeking a freezing order to have an underlying cause of action with an element of dishonesty. The question is whether it is proved that there is a risk of the dissipation of assets which justifies the order which is sought and that risk may be proved by other conduct and circumstances.

[122] The primary judge was satisfied that there was a sufficient risk from the circumstances of Mr Palmer's relationship with the corporate defendants, together with his own conduct in relation to the Martino appointment and Martino settlement deeds. He was fortified in that view, amongst other things, by Mr Palmer's conduct in the Waratah Coal and China First transactions. In my view, it was open to his Honour to find that there was the requisite risk from those facts and circumstances. In particular, the sequence and timing of the events involving Mr Martino provided a strong indication of conduct which was intended to defeat the plaintiffs' claims against Mineralogy in the present proceeding and Mr Palmer's participation in the events involving Mr Martino gave the judge good cause for concern that Mr Palmer would take other steps to defeat the successful recovery of monies sought from a defendant in this proceeding.

[123] As I have discussed, there was other evidence which, whilst not determinative of the question, fortified the primary judge's view about the risk of dissipation.[117] It is

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116 *Patterson v BTR Engineering (Aust) Ltd & Ors* (1989) 18 NSWLR 319 at 321-322 (Gleeson CJ) and 326 (Meagher JA).

117 See above at [63]-[115].

submitted that this evidence was not in the nature of evidence of a risk of dissipation and nor did it rise to the level of "solid" evidence of that risk. In my view, it was open to the primary judge to find some support for the existence of the risk from that other evidence. But, as he made it clear, this was not critical to his decision.

[124] As the corporate appellants submit, the plaintiffs had to establish that there existed a risk of a dissipation of assets on the part of *each* defendant against whom a freezing order was sought. They submit that the plaintiffs did not discharge this onus because it was insufficient to point to a risk that Mr Palmer would seek to frustrate or inhibit the Court's process. What was necessary, it is argued, was that there be evidence, defendant by defendant, of the nature and extent of that defendant's assets in comparison with the claim against it, together with any other facts or circumstances going to the likelihood that the particular defendant would seek to default on an adverse judgment.

[125] The primary judge rejected that argument as follows:[118]

> "The response to that argument is that I think a prudent, sensible commercial person would regard it to be legitimate to draw inferences about the risk of how the corporate defendants would conduct themselves, by reference to an assessment of the risk of how Mr Palmer would conduct himself. And the risk being addressed is what Mr Palmer might cause to be done by those defendants, to protect his wealth, of which their wealth must form a part."

And, as already noted,[119] the primary judge said that he was untroubled by the failure of the plaintiffs to identify particular transactions which might be entered into because of "the ingenuity of schemes which a potential judgment debtor might devise."

[126] For the most part, the primary judge had to assess the risk of dissipation by a defendant without the benefit of evidence of that defendant's financial position. His Honour said that although he had some information about the value of assets of the corporate defendants (other than the joint venturers and Mineralogy) he did not have information as to their net assets. He had relatively more information about the joint venturers and Mineralogy. Clearly, the primary judge did not attempt to assess the risk about a certain defendant by an analysis of its own financial circumstances. His Honour's reasoning was that it was unnecessary to discern a particular means by which the assets of a defendant might be dissipated because the risk might exist without specific potential dealings being able to be identified. What mattered, in his Honour's view, was Mr Palmer's ownership and control of the companies and Mr Palmer's propensity to use that control in order to cause assets to be dissipated. In my view, there was no error.

[127] The corporate appellants argue that the primary judge made a number of findings that were unreasonable or unjust, in the sense of *House v The King*.[120] The first of them was in respect of the green notebook. As I have discussed,[121] his Honour said that there were good reasons to doubt the reliability of this notebook, which the

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118 Judgment at [286].
119 Judgment at [266].
120 (1936) 55 CLR 499.
121 See above at [96].

corporate appellants say was unfair because there was no suggestion of fabrication which was squarely put to Mr Palmer in cross-examination.[122] In my view, there was no unfairness, this being an interlocutory application in which it was appropriate for the judge to approach the evidence in the way discussed above at [116]. Further, his Honour's doubt in this respect did not matter for his assessment of whether there was a good arguable case for final relief or whether there was a sufficient risk of dissipation.

[128] A similar point is made by the appellants about Mr Martino's conduct, where the primary judge found that Mr Martino's evidence was implausible although Mr Martino had not been called for cross-examination. Again however, this was not a trial and the primary judge did not have to make a final determination about the truth of Mr Martino's evidence. It was open to his Honour to assess Mr Martino's evidence as unlikely to be true, without seeing that evidence tested by cross-examination.

[129] A similar complaint is made by the appellants about the primary judge's assessment of the evidence of Mr Palmer's involvement in the Martino appointment. Mr Palmer deposed that he had sought, obtained, and acted on legal advice in making the appointment. The primary judge noted that the "manner in which the lawyer was briefed and the assumptions and instructions on which he was asked to act were not contained in the material" and further noted that, although the lawyer had given "multiple affidavits on other aspects of the application, the lawyer concerned did not address those questions or address the advice which he is said to have given."[123] Absent that detail, his Honour said, he was not "presently prepared to accept the proposition at face value."[124]

[130] His Honour was not bound to accept Mr Palmer's evidence, even where it was not specifically challenged in cross-examination. And his Honour did not so much reject Mr Palmer's evidence that he had sought, obtained, and acted on legal advice; rather his Honour was not prepared to act upon the premise that the lawyer had been fully briefed. That reservation was not unfair in the context of an interlocutory application.

[131] Another complaint by the appellants is that it was not put to either Mr Martino or Mr Palmer that Mr Martino was acting merely as Mr Palmer's cipher. The plaintiffs submitted to the primary judge that he should find that the Martino appointment and the Martino settlement deed were "all part of a concocted charade, which attempted to give the appearance of independence to a scheme over which Mr Palmer retained control."[125] His Honour declined to make such a finding of fact because he said that it was not the occasion for making anything other than a qualitative evaluation of the current state of the evidence. But again, on his Honour's approach to the evidence, it was open to him to regard the evidence of Mr Martino as apparently implausible,[126] without the cross-examination which the appellants suggest was necessary.

[132] It is submitted that it was unreasonable for the primary judge to conclude that the China First transaction supported the existence of the relevant risk, having regard to

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122 Except in relation to one page.
123 Judgment at [236](f).
124 Ibid.
125 Judgment at [236](g).
126 Judgment at [236](a).

what the primary judge discussed as a "substantial body of evidence which suggests that there was a series of good faith attempts made by Mr Palmer, and other directors and executives of Queensland Nickel and the Joint Venturers to obtain funding to overcome Queensland Nickel's cash flow problems."[127] But his Honour did not accept that the Waratah Coal transaction or the China First transaction could be characterised as a part of those attempts.[128] Having regard to the terms and circumstances of them, it was open to his Honour to find that the evidence about them supported a good arguable case for final relief and the existence of a sufficient risk of dissipation of assets.

[133] It is submitted for the corporate appellants that evidence adduced by the defendants "was not given due weight". Notably, none of this evidence is said to have been overlooked by the primary judge. The evidence which is the subject of this submission was:

(a) Mr Palmer's evidence that he had no intention to frustrate any potential judgment and his evidence of the payment by Mineralogy of a judgment debt of approximately USD17 million in October 2017;

(b) evidence of the nature of the assets of the refinery and the difficulties involved in their dissipation; and

(c) evidence of Mineralogy's right to receive hundreds of millions of dollars in royalties from its iron ore mine and its receipt of approximately USD278 million as an initial payment.

[134] However, it was not incumbent upon the primary judge to act upon this evidence and to reject the plaintiffs' case that there was the necessary risk of dissipation. Again, the judge had to consider the potential for a means of dissipation to be devised which could not be identified at this stage.

Was it in the interest of justice that the freezing orders be made?

[135] In relation to this third question, the primary judge considered several factors, namely:

(a) the prejudice which might be caused by failing to make the orders sought;

(b) whether there had been inordinate delay by the plaintiffs in making the application;

(c) the absence of a specific undertaking by the plaintiffs to ensure that the proceeding was prosecuted with due expedition;

(d) the availability of alternative proceedings or remedies; and

(e) the impact of the orders upon the defendants and innocent third parties.

[136] The corporate appellants complain overall that the primary judge failed to properly take into account the defendants' evidence of prejudice, including the reputational stigma which would be caused. But this evidence was not overlooked by the primary judge, and the submission goes no further than a complaint that it was given insufficient weight. The judge considered the effect upon the defendants' commercial reputations, but was unpersuaded that "further reputational damage would be caused by the making of the orders sought [which was] additional to the reputational damage which must already have been caused by the insolvency of Queensland

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127 Judgment at [212].

128 Ibid.

Nickel and associated termination of employees".[129] Further, the primary judge considered that "[t]he evidence of the suggested damage to the businesses conducted by the defendants was similarly unpersuasive, either of its nature (which was either speculative, expressed at a high level of generality, or in argumentative or inflammatory terms), or because it turned on choices which Mr Palmer said he would make if orders were made against him and the defendants (e.g. not to proceed with the itself speculative possibility of his re-opening the Refinery)."[130] In my view, those circumstances were open to his Honour.

[137] It is submitted that the orders which were made were outside the range of those which could justifiably have been made in the circumstances, an argument which characterises the orders as freezing "in total more than twice the impugned payments and more than twice the outstanding liabilities to third party creditors". It is said that this reveals an error in the exercise of the discretion. The primary judge received a similar submission, which was that he should limit the operation of orders made against all defendants by stating that the orders would not operate to prevent the removal of an aggregate of $219,050,352 measured by reference to the aggregate of the unencumbered value of assets within Australia.[131] In rejecting that argument, the judge accepted the argument in response for the plaintiffs, namely that orders in the terms which were made were justified to ensure that an eventual judgment would not be frustrated, bearing in mind that ultimately the assets of a defendant could not be ordered to be available to satisfy a judgment against another defendant in recognition of "the separate cases against the defendants."[132] In my view, there was no error in that reasoning.

[138] I have considered then each of the grounds of appeal by the corporate appellants and concluded that none of the grounds is established. Mr Palmer adopted the submissions for the corporate appellants. But it remains to consider further grounds of appeal and arguments raised by him.

Mr Palmer's further arguments

A failure to give reasons?

[139] Mr Palmer argues that the primary judge failed to provide reasons, or adequate reasons, in the Judgment. His argument has two limbs. First, he says that no reasons were given by the primary judge for the ancillary orders for the disclosure of Mr Palmer's assets. Second, he argues that the primary judge was required to, but did not, state the basis upon which the freezing orders were made, that is to say whether they were made pursuant to the inherent jurisdiction of the Court or the powers conferred by the UCPR.

[140] The orders which were made upon pronouncement of the Judgment (on 25 May 2018) required, by Order 16, that within seven clear business days, each defendant inform the plaintiffs of all of that defendant's assets, giving their value, location, and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of that defendant's interest in each asset. The same order required each defendant, within a further seven days, to provide an affidavit

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129 Judgment at [308].
130 Ibid.
131 Judgment at [317].
132 Judgment at [317](b).

verifying that information. Order 17 qualified that obligation of disclosure so that it would not compromise the privileges against self-incrimination and exposure to a civil penalty.

[141] As soon as the Judgment was delivered, the defendants applied for all of the orders to be stayed. Later on the same day, his Honour refused that application but with one exception.[133] The exception was for Orders 16 and 17, the operation of which was stayed by consent until further order because of a complaint by counsel for some of the defendants that he had not been given a proper opportunity to make submissions about them.

[142] By a further judgment delivered on 11 June 2018 ("June 2018 Judgment"), his Honour acknowledged that there was merit in counsel's complaint. For that reason, his Honour set aside Order 16 as made on 25 May 2018. But as he noted, the corporate defendants did not oppose a similar order being substituted for it and made submissions only about the timeframe for the disclosure to be made. His Honour accepted that the order to be substituted, as against the corporate defendants, should provide for disclosure, together with the verifying affidavit, within 30 days.[134]

[143] In the June 2018 Judgment, the primary judge then set out Mr Palmer's arguments advancing why such an order, in identical terms to that to be made against the corporate defendants, ought not to be made against him. It is unnecessary to set out here the effect of those arguments or the judge's reasons for rejecting and for substituting the same order in Mr Palmer's case. The point is that reasons were then given and Mr Palmer's submissions in this Court do not claim that they were inadequate.

[144] Mr Palmer says that the publication of those reasons in the June 2018 Judgment did not cure the error in the judge's failure to give reasons for Order 16 in the Judgment. That cannot be accepted because the relevant order was that made on 11 June 2018. Order 17 is that which was originally made, but that is simply in terms which qualify the obligation to make disclosure. The order for disclosure was explained by the reasons given by the judge in the June 2018 Judgment.

[145] Mr Palmer's second argument is that the primary judge did not state the legal basis for the orders which were made because his Honour ought to have said whether the orders were made pursuant to the inherent jurisdiction of the court or pursuant to the powers contained in the relevant provisions of the UCPR. Mr Palmer's written submission is that, in consequence, Mr Palmer is unable to understand the reasoning process of the primary judge.

[146] It is submitted that there are differences between the two legal bases which were recognised, implicitly and explicitly, in the Judgment, but that his Honour did not identify the basis which he employed. As to those differences, it is submitted that "the inherent jurisdiction as explicated by the learned Primary Judge permits a more generous, and less specific test for a freezing order (than that under the UCPR)."

[147] The relevant ground of appeal is that the primary judge did not provide adequate reasons, by not stating the basis upon which the orders were made. The ground here

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133 *Parbery v QNI Metals Pty Ltd* [2018] QSC 125.

134 There was a further argument for the joint venturers based upon some evidence of a particular difficulty in providing information as to the value of their assets within a 30 day timeframe, which the primary judge rejected: *Parbery v QNI Metals Pty Ltd* [2018] QSC 141.

is not that the judge was wrong to have considered that, in this case, it did not matter whether the orders were made pursuant to the inherent jurisdiction or pursuant to the power under the UCPR.

[148] At [16] to [21] of the Judgment, his Honour described the Court's inherent power to make orders of this kind, citing (amongst other cases) *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*.[135] At [45] to [49], his Honour summarised the matters to be proved to justify an exercise of the inherent jurisdiction to make a freezing order, namely a good arguable case, a real risk of steps being taken which would have the effect of frustrating the prospective processes of execution and enforcement of a judgment in the plaintiff's favour, and that the interests of justice favoured the exercise of the power having regard to the need to exercise a high degree of caution and give proper consideration to the impact upon persons affected by the order.

[149] At [50] to [63], the primary judge discussed the relevant provisions of the UCPR, noting that they follow the uniform model rules throughout the various States and Territories and in New Zealand. His Honour discussed the terms of r 260A and r 260D and compared them with the content of the Court's powers under the inherent jurisdiction. As to r 260A, he said that it provided for "one overall question … namely is a freezing order necessary for the purpose of preventing frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied."[136] His Honour said that, in seeking to answer that question, the Court should address those three matters to be proved under the inherent jurisdiction. He added that r 260A did not "suggest any departure from the inherent jurisdiction's focus on the effect rather than the purpose of the defendant's conduct, occurring or apprehended."[137]

[150] As to r 260D, the primary judge said:

> "[63] What then of r 260D? I make the following observations:
>
> (a) Rule 260D confers on the Court a power to make freezing orders and ancillary orders which is specifically constrained.
>
> (b) Putting to one side orders sought in aid of judgments from other courts, or against third parties, the constraints are (1) the applicant has the good arguable case referred to in r 260D(2), and (2) the court is satisfied, having regard to all the circumstances, of the matters referred to in r 260D(3). Those matters cover the same ground as the first two considerations which are relevant in the exercise of the inherent jurisdiction. No mention is made of the third (interests of justice) consideration, but it could hardly be thought that the discretion conferred by the rule was intended to be exercised without having regard to that subject matter.

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135 (2015) 258 CLR 1 at [43], [46], [64]-[67], [77].
136 Judgment at [62].
137 Ibid.

> (c) It is notable that r 260D(3)(b) is also not worded in a way which would suggest any departure from the inherent jurisdiction's focus on the effect rather than the purpose of the defendant's conduct, occurring or apprehended."

[151] Consequently, his Honour did explain his reasoning as to the basis for these orders. In his view, there was no material difference between the requirements for an order made under the inherent jurisdiction and one made under the specific rules. There is no evident error in that analysis. But all that matters for this ground of appeal is that his Honour did reveal his reasoning and Mr Palmer's argument to the contrary must be rejected.

Mr Palmer's arguments about the risk of dissipation

[152] Grounds 2(e), (f), (g), (h), (o), (q), (u), and (v) of Mr Palmer's appeal largely raise arguments which have been already discussed. But two points within Mr Palmer's written submissions for those grounds require further consideration.

[153] The first is a submission that the judge failed to give effect to the established constraint in the exercise of this jurisdiction that it should not be used to give plaintiffs security for the satisfaction of their judgments. His written submissions set out some passages from the cross-examination of Mr Parbery, both by senior counsel appearing for some of the corporate defendants and by Mr Palmer personally, in which there were attempts to have Mr Parbery say that the liquidators were seeking security for the satisfaction of prospective judgments. The passages do not record any concession by Mr Parbery to that effect. And in any event, his Honour was not mistaken as to the proper purpose to be served by the orders which were sought.

[154] The second point sought to be made in this part of Mr Palmer's written submissions is that the primary judge failed to distinguish between the distinct questions of whether there was a good arguable case and whether there was a demonstrated risk, with the consequence that his Honour did not assess whether Mr Palmer's evidence which sought to explain the impugned conduct, was assessed "objectively as to whether it established [Mr Palmer's] character was deserving of the conclusion of there being a presently existing danger to the Court's processes." That argument cannot be accepted; Mr Palmer's conduct and his purported explanations for it were relevant to an assessment of the existence of a risk, upon a "qualitative evaluation" of the whole of the evidence, as I have discussed.

Mr Palmer's arguments on the third question

[155] Grounds 2(i), (j), (l), (p) (r), (s), and (t) relate to the third question, namely whether it was in the interests of justice that freezing orders be made in Mr Palmer's case. Again, much of what is contained in Mr Palmer's written submissions has already been discussed but something should be said about some of the submissions in this respect.

[156] Grounds 2(i) and (j) complain that the primary judge failed to act upon evidence which established that Mr Palmer's substantial net worth was many times the amount of the claim or claims against him and that, in all the circumstances, "it would simply not be worth [Mr Palmer's] while to default on an adverse

judgment."[138] The evidence before the primary judge as to Mr Palmer's net worth was discussed by his Honour as follows:[139]

> "(c) Confidential exhibit 3 was Mr Palmer's rough estimate of his net worth. The amount was an amount which would have given some weight to the submission. But there was no detail given by Mr Palmer as to how the figure was reached. I do not know, for example, the extent to which the estimate may be informed by treating assessments of the value of mining tenements in the same way as Mr Palmer was prepared to treat the BDO "valuation" of China First's coal project. Nor do I have any information as to the extent of his personal liabilities. Nor do I have any information, for example, as to the whether he is likely to experience any cash flow pressures either now or in the future. I am not prepared to reach the conclusion which I am invited to reach by the defendants, based on Mr Palmer's rough estimate of his net worth."

[157] According to Mr Palmer's submissions, the primary judge ought to have given more weight to that exhibit. The difficulty is that the submission was not developed by reference to the content of the exhibit itself and there is no demonstrated error in the passage from the Judgment which I have set out. Further, as I have said earlier, there was no error in the judge's reasoning at [285](d) that Mr Palmer's conduct as an indicator of the relevant risk could not be discounted simply on the basis that Mr Palmer was so wealthy that there was no risk.

[158] Mr Palmer filed an application in this Court[140] to adduce further evidence as to his financial position. That was supported by an affidavit affirmed by him on 11 July 2018. There was no written response to that application, but, at the hearing in this Court, counsel for the respondents submitted that this Court should not receive the further evidence because none of the well-established bases for the reception of fresh or new evidence was addressed, let alone established, by Mr Palmer.

[159] Rule 766(1)(c) UCPR provides that this Court may, on special grounds, receive further evidence as to questions of fact. Rule 766(2) provides that, for that sub-rule, further evidence may be given without special leave, unless the appeal is from a final judgment, and in any case as to matters that have happened after the date of the decision under appeal. This was not a final judgment, so that further evidence may be allowed without special leave or special grounds. But as Thomas J (as he then was) said in *Hawkins v Pender Bros Pty Ltd*,[141] the power of this Court to receive further evidence upon questions of fact is discretionary, whether or not it is a case that additionally requires "special leave" or "special grounds", and appeal courts "use their discretion rigidly to control the matters upon which further evidence may be received" because it is in the interests of justice that there be an end to litigation. Mr Palmer's submissions do not explain why this more detailed evidence as to his financial position was not tendered during the hearing of these applications. Although Mr Palmer was without legal representation, he is not the usual litigant in that

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138 Outline of submissions para 43 citing *Third Chandris* at 654-655 and *GE Capital Australia v Davis* [2001] NSWSC 933 at [7].

139 Judgment [285].

140 On 24 July 2018.

141 [1990] 1 Qd R 135 at 137.

position: not only has he the means to afford his own lawyers but his companies are very ably represented, and on this and most issues, they have the same interest. And by this application, he seeks to have this Court consider extensive further evidence, in the form of an affidavit by him, without his presence at the hearing. This is after some nine days of hearing before the primary judge, during which Mr Palmer should have adduced this evidence. I would refuse this application to have it received in this Court.

[160] Ground 2(l) claims that the long period of time required for the resolution of the application for freezing orders was "prejudicially long and ought to have counted against the grant of the freezing orders." It must be said that the length of hearing was exceptionally long for an application of this kind. But the applications were strenuously defended and, having regard to the scope of the respondents' claims and the amounts involved, this is not a case where a freezing application could have been determined "in hours, not days" as Mr Palmer seems to suggest. Most importantly, Mr Palmer does not explain how the time taken for the resolution of the application was *prejudicially* long, so that it should matter as he suggests.

[161] By ground 2(s), Mr Palmer contends that the effect of the orders was to propose "an excessive negative pledge" against him because of the limitations which it imposed by limiting his allowable living expenses to "ordinary" expenses and his legal expenses to those which are "reasonable". Mr Palmer says that he ought to be able to pay any expenses. But the constraints in this respect were not unusual and they reveal no error by the primary judge.

Refusal of an application to re-open

[162] Ground 2(k) of Mr Palmer's appeal says that the primary judge erred in dismissing what is said to have been his application, filed on 28 September 2017, for leave to adduce further evidence which was probative on both the second and third questions and which would not have resulted in any material prejudice to the plaintiffs.

[163] It is necessary to set out the course of the application before the primary judge. An application for an interim freezing order was filed on 23 August 2017 which, on that date, was dismissed upon undertakings being given by some of the defendants and with a timetable set for evidence and further submissions for an interlocutory application to be heard on 14 and 15 September 2017. The application was then heard over those two days, which were occupied with oral evidence leaving the final submissions of the parties to be presented on another day. No party then sought to adduce further evidence. Mr Palmer was extensively cross-examined during that two day hearing, at the end of which the Court accepted further undertakings from the parties and the application was adjourned to 17 October for oral submissions. The parties also agreed on a timetable for the filing of further written submissions to address the evidence which had apparently closed.

[164] On 29 September 2017, an application was made for leave to adduce further evidence by a solicitor appearing for the joint venturers, Queensland Nickel Sales and China First, but filed on behalf of all defendants. After hearing argument, the primary judge dismissed the application by an ex tempore judgment.

[165] The application for the freezing orders resumed on 17 October 2017, when Mr Palmer made a recusal application and applied for an adjournment. The primary judge refused both applications by an ex tempore judgment (the "Recusal

Judgment").[142] The hearing proceeded but was not finalised on 19 October 2017, when the application was adjourned to 30 October 2017 for what was expected to be the final day of the hearing.

[166] On 12 October 2017, Mr Palmer filed a notice of appeal against the judgment which refused leave to adduce further evidence. The corporate defendants also filed their own appeal against that judgment.

[167] On 24 November 2017, judgment was given in the Supreme Court of Western Australia in favour of Mineralogy which I have discussed at [111]. With the consent of the plaintiffs, Mr Palmer, the joint venturers and Mineralogy were given leave to re-open to adduce evidence of that judgment and directions were given for further submissions and a final hearing date on 6 March 2018, which proved to be the final day of hearing. By then the appeals against the judgment of 29 September 2017 had been dismissed by consent, with the appellants ordered to pay the costs.

[168] As the primary judge recorded at [14] of the Judgment, by 6 March 2018 he had received over 13,000 pages of evidentiary material and without the assistance of an index.

[169] It is against that history that Mr Palmer again challenges the decision of 29 September 2017 to refuse leave to re-open. There was no renewed application to re-open by Mr Palmer or another defendant at any time during the further days of hearing, save for the evidence about the judgment in Western Australia. On that history alone, Mr Palmer should not be permitted now to challenge the judgment of 29 September 2017.

[170] But further, Mr Palmer's submissions do not descend to any analysis of the apparently careful reasons for judgment which were then given.[143] There is no discernible error in that judgment. The primary judge there noted that the overriding consideration was whether it was in the interests of justice to permit the defendants to re-open. In his view, the parties had been given ample opportunity to present their evidence. Further, his Honour considered the content of the proposed further evidence, particularly the proposed affidavits of Mr Palmer which had been filed on 22 and 25 September 2017. The judge said that none of the proposed further affidavits, including those two of Mr Palmer, were read on the application for leave to re-open, but instead he was acting upon the description of their contents in submissions for the defendant. The first of those affidavits, according to Mr Palmer's submissions to the judge, identified "his commitment to Queensland and Australia and … his role in federal politics and his achievements therein". The solicitor appearing for other defendants said, by a written submission, that Mr Palmer's first affidavit:

> "Seeks to identify Mr Palmer's ties to Queensland and Australia. The affidavit is intended to highlight achievements in the Australian Federal Parliament and exhibits his book which illustrates those achievements."

[171] The primary judge said this about Mr Palmer's first affidavit:

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142 *Parbery v QNI Metals Pty Ltd* [2017] QSC 231.

143 Mr Palmer's extensive written submissions refer to the Judgment, but do not identify it in the appeal record where it appears in book 2, volume 27 at 11971-11980.

> "A more inauspicious basis upon which to bring an application for further evidence could hardly be imagined. The notion that it might be necessary to let evidence in, exhibiting a book bearing the description that has been put before me, is hard to take seriously. I reject the application."

[172] Mr Palmer described his second proposed affidavit as one which was relevant because it was evidence of what had occurred during his cross-examination. It did not relate to any of the questions which were ultimately to be determined in the application for freezing orders. His Honour noted a submission by the solicitor for the other defendants that this affidavit of Mr Palmer also contained evidence described as follows:

> "The affidavit of Mr Clive Palmer filed on 25th of September 2017 seeks to highlight and clarify certain evidence that was brought up during the last hearing. It further evidences this with certain evidence such as PwC's involvement in pre-administration advices and action that was sought to be taken.
>
> The affidavit of Clive Palmer further provides evidence in relation to events during the administration and the frustrations that had occurred in attempting to maintain the operation of the refinery. The reason that this material has been sought to be submitted was a result of the evidence which was led during the hearing and the Palmer parties saw fit that the entire set of facts should be presented rather than piecemeal as may have been portrayed and led under cross-examination."

[173] The primary judge said that this submission did not persuade him that there was any particular further evidence from Mr Palmer which should be admitted. Mr Palmer now says that, although his and the other affidavits containing the further evidence were not read on the application to re-open, the judge should have considered that evidence in full rather than relying upon summaries of their contents which were given by Mr Palmer and the solicitor who was making the application. The written submissions for Mr Palmer claim that in this context, as a self-represented litigant, Mr Palmer should have been given some leeway and assistance from the Court in the identification of any issues of dispute. That same submission was made in written submissions to the primary judge on the application for leave to re-open. His Honour rejected the argument in terms with which I agree:[144]

> "I should also say that some aspects of what Mr Palmer has placed in his written submissions before me ask me to treat him as though he was an ordinary litigant in person outnumbered by senior counsel, well resourced, on the other side of the record. I cannot accept the proposition. Material adduced by Mr Palmer before me reveals that, by his own description, he is a man of considerable wealth. Companies that he owns have been able to retain senior counsel and solicitors. If he chooses to represent himself, that is because it suits his purposes to represent himself to give himself a personal voice in these proceedings. It is appropriate to give litigants in person some differential treatment in Courts to ensure that the proceedings are

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144 *Parbery & Ors v QNI Metals Pty Ltd & Ors* (Unreported; 29 September 2017) (Bond J).

> fair. Even if a litigant with resources chooses not to be represented, I think it is still appropriate to give such a litigant some leeway, and I have sought on occasion to do that with Mr Palmer, given an inevitable lack of familiarity with court processes that a litigant in person has. But I am not prepared to accept the notion that in this litigation I should assess Mr Palmer's position as though he were unrepresented with no access to legal advice."

[174] Although it is asserted in Mr Palmer's written submissions in this Court that the proposed further evidence would have affected the outcome of the application for freezing orders, the submissions do not attempt to make good that assertion by reference to the detail of the evidence and the relevant parts of the Judgment.

[175] For these reasons Ground 2(k) must be rejected.

Alleged bias

[176] Ground 2(m) is that the primary judge erred in not recusing himself before making the freezing orders.

[177] As already noted, Mr Palmer's application for recusal was dismissed on 17 October 2017. Mr Palmer appealed against that decision but, on 22 February 2018, by consent, the appeal was dismissed and he was ordered to pay the respondents' costs of it.

[178] Mr Palmer's present arguments about recusal go well beyond matters which he agitated on 17 October 2017. But to the extent that he still relies on those matters, some discussion of them is necessary.

[179] In the Recusal Judgment, the primary judge identified three groups of factual circumstances upon which Mr Palmer then relied, the first of which involved something that had happened when Mr Palmer was being cross-examined by counsel for the plaintiffs on 14 September 2017. The primary judge had interrupted the cross-examination saying that there was something which he wished to raise with those at the bar table but in the absence of Mr Palmer. Mr Palmer then left the court room before his Honour said that he had the impression that Mr Palmer's testimony was to the effect that the joint venturers were saying to the administrators/liquidators that the joint venturers were seeking an accounting of what Queensland Nickel had spent so that they might reimburse the company. The judge said that this evidence seemed to be inconsistent with the contentions by the joint venturers and Queensland Nickel Sales in an earlier proceeding, in which those three companies had sought leave to proceed against Queensland Nickel for declarations that it had no right or interest in the joint venture property and that it was obliged to transfer it to Queensland Nickel Sales. In that earlier proceeding, those companies also sought a further declaration that call notices issued by Queensland Nickel to the joint venturers were not validly issued in accordance with the Joint Venture Agreement. In that matter, leave to proceed was refused by a judgment delivered on 29 September 2016 (the "2016 Judgment").[145]

[180] What was concerning the judge was an apparent tension between Mr Palmer's testimony and the position of those three companies in that earlier proceeding. The

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145 *QNI Resources Pty Ltd & Ors v Park & Ors* [2016] QSC 222.

judge said that he did not wish to ventilate this concern in the presence of Mr Palmer whilst he was still under cross-examination. He said he would leave it to those at the bar table to raise it as they saw fit. Mr Palmer then returned to the witness box.

[181] After some further evidence from him, other evidence was interposed and Mr Palmer's cross-examination resumed on the following morning. Before that occurred, again in the absence of Mr Palmer, the judge said that he proposed that at the end of Mr Palmer's cross-examination, he would give Mr Palmer an opportunity to read the relevant passages of the transcript of the previous day so that he could, in effect, re-examine himself on the matter which the judge had raised. Counsel for some of the corporate defendants asked to re-examine Mr Palmer on that matter, to which the judge agreed. Mr Palmer returned and the judge then informed him of what had occurred.

[182] Contrary to Mr Palmer's argument, those events did not reveal any basis for an argument of actual or apprehended bias. The judge was endeavouring to avoid any interference in the cross examination of Mr Palmer whilst giving him an opportunity to address the subject in what would amount to re-examination.

[183] The second of the circumstances relied upon for the recusal application was the judge's dismissal of the application to adduce further evidence which occurred on 29 September 2017. My discussion of that subject should make it clear that it provided no basis for an argument of actual or apprehended bias.

[184] The third matter relied upon by Mr Palmer was what he contended had been improper communications between judges of the Trial Division of this Court, the Federal Court and the Supreme Court of Western Australia about Mr Palmer's litigation in those various courts. It seems that, in August 2017,[146] in Mineralogy's proceeding in the Western Australian Supreme Court, Chaney J informed counsel that there had been some communication between him and judges of courts, including the Trial Division of this Court, about Mr Palmer's litigation but that the communications had gone no further than identifying some overlap between proceedings which might be relevant for their case management. A year later, in another proceeding in the Trial Division which was being heard by Jackson J, a solicitor for Mineralogy applied for that judge to recuse himself by reason of those communications to which Chaney J had referred. Justice Jackson then disclosed certain communications which included email correspondence involving also the Federal Court.

[185] Then at a review of another matter, before the primary judge in this case, which took place on 7 September 2017, his Honour said that he could recall something being said by Jackson J to him about the communications between the courts, but that in his mind, the matter was "shelved to wait to see if anything came of it, and nothing ever did." The relevant part of the transcript of that review and the exchange between his Honour and Mr Palmer which then took place on this subject (which is set out in the Recusal Judgment) indicates that Mr Palmer was then content with his Honour's disclosure. Yet in the recusal application, Mr Palmer asserted that his Honour had been a party to "secret communications" which

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146 Incorrectly recorded as August 2019 in the Recusal Judgment.

provided a basis for at least an apprehension of bias. Unsurprisingly, his Honour rejected that contention.

[186] The Recusal Judgment also records that Mr Palmer complained that, on 15 September 2017, after the judge had raised with him the subject of the tension between Mr Palmer's testimony and the 2016 Judgment, the judge did not specifically inform Mr Palmer that he might wish to seek an adjournment to consider the position. In the Recusal Judgment, his Honour rejected that he had been obliged to do so or that his not doing so indicated any bias.

[187] It is unsurprising then that Mr Palmer later agreed to his appeal against the Recusal Judgment being dismissed with costs: it was without merit.

[188] On 23 August 2017, initially the date for the hearing of the application for freezing orders, counsel for the plaintiffs applied for an adjournment which was then granted. This is the subject of a ground of appeal, namely Ground 2(n), which asserts that the judge erred in adjourning the application because he ought to have construed the request of an adjournment as a concession that the plaintiffs could not discharge their onus of proof. But Mr Palmer also relies upon the granting of the adjournment as evidence of bias. None of these complaints can be accepted.

[189] The circumstances on that day were recorded in the judgment of 29 September 2017. The parties had each been "a little late" in complying with the timetable which the Court had fixed ahead of the hearing. The judge recorded that the defendants' material had been required on 18 August, with any evidence and submissions in reply by the plaintiffs by 22 August, and that the material which had been belatedly provided by the defendants was extensive. According to the respondents' outline in this Court (which is not relevantly contradicted by Mr Palmer's submissions), there were some 19 affidavits amounting to 3,682 pages in the defendant's material, all of which was served on the plaintiffs on 22 August. As the respondents submit, the granting of an adjournment in those circumstances was unremarkable and it provides no basis, as an indication of bias or otherwise, for challenging the Judgment.

[190] Remarkably, the written submissions from Mr Palmer make extensive reference to the Judgment itself as evidence of a pre-judgment against the defendants on several issues. At paragraph 81 of Mr Palmer's outline of submissions, it is said that the primary judge in the Judgment "appears to have arrived at views still the subject of the proceedings", so that a "fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide", citing *Ebner v Official Trustee*.[147] But the present question is not whether there might be that apprehension if the primary judge were to try the principal proceeding. And as it happens, his Honour has recused himself from hearing the trial,[148] because of his concern about an apprehended bias as a result of conclusions he expressed in the Judgment that Mr Palmer's evidence on an important issue was implausible. Instead, the present question is whether the Judgment provides any basis for an apprehension of bias in the determination of the application for freezing orders. Much of what appears in Mr Palmer's written submissions might appear to be an intended rehearsal of the argument which his Honour accepted (in part) in that recent judgment.

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147 (2000) 205 CLR 337 at 344 [6].

148 *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 213.

[191] Mr Palmer also misstates the effect of much of the Judgment, in seeking to draw from it some basis for apprehended bias. He claims that the primary judge disregarded the defendants' evidence, which cannot be accepted: see in particular the judge's explanation of his "qualitative evaluation" of all of the evidence.

[192] Mr Palmer complains that in many places in the Judgment his Honour expressed what appeared to be final conclusions, which he says ought not to have then reached in an interlocutory judgment and which for that reason indicate his Honour's bias. It is unnecessary to go to each sentence of the Judgment which is the subject of this argument. It is sufficient to say two things. The first is that in very many cases, the statement was not in the terms of a final conclusion as Mr Palmer suggests. The second is that an unqualified finding (such as that, at the time of the Waratah Coal transaction, an insolvency event was likely in the immediate future, absent reaching an accommodation with Aurizon[149]) did not indicate any actual or apparent bias *affecting the disposition of the applications for freezing orders*.

[193] In his supplementary written submissions,[150] Mr Palmer again suggests that there was an apprehended bias from the Judgment by comments or findings made which were adverse to him. Again, they are submissions which would be relevant if this Court was concerned with whether the primary judge should hear the trial of the principal proceeding. But in these supplementary submissions, Mr Palmer also raises another suggested basis for an apprehension of bias, which is that a pre-judgment of the application for freezing orders, or some of the issues within that application, is evident upon a close examination of the 2016 Judgment. Mr Palmer did not appear at the hearing in this Court, but the Court agreed to receive yet further submissions from him, described as "speaking notes" and running to 33 pages, and it is within that document that his argument based upon the 2016 Judgment is developed.

[194] At some length, Mr Palmer accuses the primary judge of actual bias in the hearing from which there was the 2016 Judgment, before appearing to say that this bias in 2016 must have infected the judge's consideration of the applications for freezing orders. And a related but distinct submission appears to be that by deciding the critical issue within the 2016 Judgment, namely whether the joint venturers and Queensland Nickel Sales had an arguable case against Queensland Nickel that it could not look to the joint venture property for indemnity or reimbursement, his Honour had pre-judged that issue when it arose in the applications for freezing orders.

[195] The 2016 Judgment came from what it described as two hearings. In the first hearing, conducted on 4 August 2016, counsel for Queensland Nickel ultimately conceded the existence of a serious question to be tried (that it was obliged to hand over to the joint venturers the joint venture property) but maintained that the Court should not grant leave to proceed except upon conditions which entitled Queensland Nickel to be funded for the costs of the litigation.[151] But his Honour told the parties that he required further submissions on the question of whether the applicants had a serious question to be tried. That was not inappropriate on the judge's part because there was a discretionary power to be exercised by him which could affect other interests in the winding up of Queensland Nickel. Having asked for further

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149 Judgment [181].
150 Filed 22 August 2018.
151 2016 Judgment at [122].

submissions, his Honour set the matter down for further hearing on 24 August 2016. At that second hearing, Queensland Nickel withdrew its concession as to the existence of a serious question to be tried. The applicants then made an application for an adjournment to permit them to adduce further evidence but that application was refused. The judge then heard argument on the question and gave a reserved judgment in the following month.

[196] In the 2016 Judgment, the judge held that the joint venturers and Queensland Nickel Sales had no serious case to be tried because, on the material then before him, Queensland Nickel had either a trustee's right to indemnity in respect of trust liabilities, secured by an equitable charge or lien over the joint venture property, or otherwise had a right of indemnity for joint venture expenses properly incurred, to be secured by an equitable lien over the joint venture property regardless of the intent of the parties. This was on the basis of legal principles which the judge had earlier discussed.[152] Consequently the application for leave to proceed under s 500(2) of the CA was refused.

[197] The applicants appealed against that judgment and their appeal was dismissed on 8 August 2017.[153] One of the arguments rejected by this Court was the challenge to his Honour's conclusion that there was no serious case to be tried, on the evidence before him, which negated the entitlement of Queensland Nickel to be indemnified against its liabilities, and reimbursed for its expenses, from the joint venture assets. In that appeal, there was no challenge to the correctness of the legal principles which had informed the conclusions of the primary judge; rather, the argument was that the judge's conclusions ought not to have been reached in the absence of final factual findings.[154] This Court held that the appellant companies had done no more than "hypothesise circumstances which might affect the right of indemnity and resultant charge or lien in various ways", and that "his Honour ought to have taken the approach that some or all of the circumstances might exist and that, in combination, they might wholly negative any right to indemnity."[155] It was held that such circumstances ought to have been pleaded, and ought to have been the subject of evidence. Consequently, it was held, it was appropriate for his Honour to have concluded that the appellants lacked any reasonable prospect of establishing an unconditional entitlement to the joint venture property as they had claimed.[156]

[198] It may be noted that there was no argument by the joint venturers and Queensland Nickel Sales, either prior to the 2016 Judgment or in their appeal against it, that there was any actual or apprehended bias on the part of the judge. I have considered Mr Palmer's extensive submissions within his "speaking notes", but I am of the view that there is no basis for concluding that there was actual or apprehended bias by the judge in his consideration of the matter which was the subject of the 2016 Judgment. The correctness of his opinion on the critical issue in that judgment was unanimously upheld by this Court. The circumstance that it was his Honour who raised that issue for submissions (or further submissions) does not suggest any bias.

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152 Ibid at [130]-[132].
153 *QNI Resources Pty Ltd & Ors v Queensland Nickel Pty Ltd (in liq)* [2017] QCA 167.
154 Ibid [53].
155 Ibid [55].
156 Ibid at [58].

[199] In the (present) Judgment, his Honour set out the critical passages from the 2016 Judgment,[157] explaining their relevance in terms which made it clear that his mind was not closed on the question of whether Queensland Nickel had a right of indemnity or reimbursement, and that what had to be decided was whether, on the evidence before him in 2018, Queensland Nickel had a good arguable case and an existence of such rights in relation to expenses and liabilities properly incurred by it on behalf of the joint venturers.[158] As I have said, there had been no challenge to the legal principles applied by his Honour in the appeal against the 2016 Judgment. And there was no evidence which, it is suggested, should have affected the view in the 2016 Judgment as upheld in this Court. There was no apparent bias from the reasoning in the 2016 Judgment, in his Honour's consideration of the question of whether, on the evidence led in the present matter, Queensland Nickel had a good arguable case for the existence of such rights over the joint venture property.

[200] It should be noted that, when Mr Palmer made his recusal application in October 2017, he did not rely on these present arguments about the 2016 Judgment.

[201] Finally, Mr Palmer suggests that there is an indication of pre-judgment by the repetition in [99] of the Judgment of what was written in [22] of the 2016 Judgment, namely that:

> "Since at least 2009, the relationship between the Joint Venturers inter se and between them and Queensland Nickel, has not been an arm's length relationship."

Mr Palmer does not explain how that statement could have been controversial. As the judge explained in each judgment, from about 2009, entities controlled by Mr Palmer held a 100 per cent interest in the joint venturers, which in turn owned Queensland Nickel.

Conclusion and orders

[202] No ground in these appeals is established and there was no error affecting the exercise of the discretion to make these orders.

[203] I would order as follows:

1. In CA 6561/18, the appeal be dismissed with costs; and

2. In CA 6047/18, the application filed on 24 July 2018 be dismissed with costs and the appeal be dismissed with costs.

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157 Judgment [132].

158 Judgment [133](d).