

SUPREME COURT OF QUEENSLAND

CITATION: *Cart Provider Pty Ltd & Ors v Park & Ors* [2016] QSC 277

PARTIES: **CART PROVIDER PTY LTD**
(first applicant)

CHINA FIRST PTY LTD
(second applicant)

WARATAH COAL PTY LTD
(third applicant)

CLIVE FREDERICK PALMER
(fourth applicant)

QNI RESOURCES PTY LTD
(fifth applicant)

QNI METALS PTY LTD
(sixth applicant)

v

JOHN PARK
(first respondent)

STEFAN DOPKING
(second respondent)

KELLY-ANNE TRENFIELD
(third respondent)

QUENTIN OLDE
(fourth respondent)

QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)
(fifth respondent)

FILE NO/S: SC No 6150 of 2016

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 22 November 2016, *ex tempore*

DELIVERED AT: Brisbane

HEARING DATE: 22 November 2016

JUDGE: Bond J

ORDER: **The direction of the Court is that after 22 November 2016 all applicants in this proceeding are to be represented by the same solicitors and counsel.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PARTIES AND REPRESENTATION – LEGAL REPRESENTATION –

SEPARATE LEGAL REPRESENTATION – where co-applicants are related entities – where the co-applicants were previously represented by the same solicitors – where the fourth applicant gave notice to the respondents that he was now acting in person – where the fourth applicant submits that separate representation is necessary to manage the possibility of conflict between his interests and the interests of the other applicants – whether there is any basis to conclude that the interests of justice are served by permitting the separate representation sought by the fourth applicant

Blatch v Australian Solar Information Pty Ltd (unreported, No. 59 of 1986, 25 July 1986), cited

Goold and Porter Pty Ltd v Housing Commission [1974] VR 102, cited

MDA National Limited v Medical Defence Australia Limited [2014] FCA 954, cited

COUNSEL: N H Ferrett for the first, second, third, fifth and sixth applicants
The fourth applicant appeared on his own behalf
A B Crowe QC, with C G Curtis, for the respondents

SOLICITORS: Kilmurray Legal for the first, second, third, fifth and sixth applicants
The fourth applicant appeared on his own behalf
HWL Ebsworth for the respondents

- [1] As presently constituted, there are six co-applicants in proceeding 6150 of 2016, which I shall refer to as the Liquidators removal proceeding, namely:
- (a) Cart Provider Pty Ltd;
 - (b) China First Pty Ltd;
 - (c) Waratah Coal Pty Ltd;
 - (d) Mr Clive Palmer;
 - (e) QNI Resources Pty Ltd; and
 - (f) QNI Metals Pty Ltd.
- [2] There are five respondents, namely:
- (a) the four natural persons who are the general purpose liquidators of the fifth respondent, Queensland Nickel Pty Ltd, a company in liquidation, and
 - (b) Queensland Nickel.
- [3] The first, second, third, fifth and sixth applicant companies are part of a group of companies which, in the management of a number of related proceedings on the Commercial List, are identified in case management orders that I make as “the Palmer parties”. They are so referred to because of their relationship to Mr Palmer.
- [4] It was common ground before me that:
- (a) Mr Palmer is the ultimate owner of Cart Provider, China First and Waratah Coal;
 - (b) companies controlled by Mr Palmer have a 100% interest in QNI Resources and QNI Metals;

- (c) QNI Resources and QNI Metals own the fifth respondent, as to 80 per cent and 20 per cent, respectively; and
 - (d) Mr Palmer has, from time to time, been a director of the five corporate applicants.
- [5] The issues which arise in the Liquidators removal proceeding are articulated in the following pleadings:
- (a) amended points of claim, delivered 18 August, filed 24 August 2016;
 - (b) amended points of defence, filed 25 August 2016; and
 - (c) reply to amended points of defence, filed 5 September 2016.
- [6] The amended points of claim and the reply were filed at a time when all six applicants were represented by the same solicitors, and the pleadings were each settled by the same two counsel.
- [7] By the points of claim, the six co-applicants assert an entitlement to orders in these terms:
- In all the circumstances,
- (a) each of the First to Fourth Respondents:
 - (i) Is a person whose interests conflict with the interests of Queensland Nickel;
 - (ii) Is a person whose interests conflict with his or her duty to Queensland Nickel;
 - (iii) Is a person whose duty to QNI Resources and QNI Metals conflicts with his or her duty to Queensland Nickel and/or the interests of Queensland Nickel;
 - (iv) Is not a person who is independent or who can be seen to be independent of Queensland Nickel;
 - (b) the removal of each of the First to Fourth Respondents is justified for the better conduct of the winding up and the general advantage of those interested in the winding-up.
- [8] By notice filed 5 October 2016, the fourth applicant, Mr Clive Palmer, gave notice to the respondents that he was no longer represented by the solicitors on the record for all the applicants, and was now acting in person.
- [9] Objection to that course was first taken by the provision of written submissions by the respondents in relation to a directions hearing that took place on 14 November 2016. Between 5 October and 14 November, Mr Palmer has asserted from the bar table that he has incurred separate expense by directly briefing a barrister for advice, and by spending time and effort, himself, in researching matters relating to the Liquidators removal proceeding. The respondents are content for me to accept the truth of that assertion.
- [10] The respondents now apply for a direction in this proceeding that all the applicants be represented by the same solicitors and counsel.
- [11] Mr Palmer appeared for himself to oppose the application. The attitude of the other five applicants in the Liquidators removal proceeding was also to oppose the application.
- [12] It is appropriate to identify the circumstances in which Mr Palmer became a party to this proceeding, because he was not an applicant from its inception.
- [13] The applicants at the commencement of this proceeding were the first three applicants that I have named.
- [14] The question of additional applicants being added as co-applicants arose at a directions hearing which took place on 11 August 2016. At that time, senior counsel for the present respondents had challenged the status of the first three applicants as creditors, and contended that there should be a preliminary determination of the question of their standing to advance the relief which they had sought by the points of claim which they had filed.

- [15] Senior counsel for the first three applicants had submitted that there was no utility in taking that course, because questions of standing could be resolved by the joinder as applicants of Mr Palmer, QNI Resources and QNI Metals.
- [16] Amongst other things, on 11 August 2016, I ordered that by 18 August 2016 the Palmer parties in the Liquidators removal proceeding file and serve any amended points of claim, including joinder of QNI Metals, QNI Resources and/or Mr Palmer, and I set a timetable for remaining steps in the proceeding.
- [17] It was in compliance with that order that amended points of claim joining Mr Clive Palmer, QNI Resources and QNI Metals as the fourth to sixth applicants occurred. Thereafter, the proceeding has been conducted on the basis that they have been joined. I note that the order I made on 11 August did not formally join Mr Palmer as the fourth respondent, the order that I made being formulated in a way which left that as a question for decision. In light of the way in which the proceeding has been conducted since the order was made, it was common ground that I should treat that as an irregularity and regard Mr Palmer as having been properly joined since the amended points of claim were delivered.
- [18] There is a rule of practice that co-plaintiffs be jointly represented by solicitor and counsel, unless the Court orders otherwise: see *MDA National Limited v Medical Defence Australia Limited* [2014] FCA 954 per Yates J commencing at [55]. His Honour examined a long line of authorities which justified the proposition on which the respondents rely.
- [19] The matter was put rather more strongly by Norris J in *Goold and Porter Pty Ltd v Housing Commission* [1974] VR 102, which is one of the cases to which Yates J referred. Norris J observed (citations omitted):
- There seems to be a long line of authority to the effect that plaintiffs, where there is more than one plaintiff in an action, must appear by the same counsel. The cases seem very largely to be equity cases, but the matter is stated categorically in the authorities ...
- In *Lewis v Daily Telegraph* there is a dictum of Russell, LJ, which does indicate his Lordship's view that where there are a number of plaintiffs in an action, whether that action is a consolidated action or not, there is a discretion to allow separate representation to the plaintiffs. But that appears, on a review of the authorities by counsel, to be the only reference to the possibility in an action of this kind, which is not a consolidated action, of plaintiffs appearing by separate counsel. The condition of the plaintiffs so doing is stated to be to avoid injustice, and his Lordship indicates that it must be rare.
- [20] I note that *Lewis v Daily Telegraph (No 2)* was cited with approval by Master Weld in *Blatch v Australian Solar Information Pty Ltd* (unreported, No. 59 of 1986, 25 July 1986).
- [21] The observation of Russell LJ, to which Norris J referred, was his Lordship's statement that:
- Prima facie, co-plaintiffs, whether in one original action or in an action consisting of consolidated actions, must be jointly represented by solicitor and counsel. In a proper case, an order may be made authorising severance in point of representation, but this must be, I think, rare, and should only be done to avoid injustice.
- [22] The proposition, contended by the respondents before me, which underlies the approach taken by the authorities, is that if a number of people get together and have sufficient commonality of interest to advance the same claims for relief based on the same contentions, without something more they should not be allowed to have more than one person advancing that argument. Unfairness to their opponent would result if the opponent had to meet more than one representative advancing the same case.
- [23] It seems to me that the approach to the question of separate representation by co-applicants advancing the same case which is articulated by Russell LJ is the correct one.
- [24] Putting the question of onus to one side, the critical question before me today is whether I should conclude that the interests of justice require me to make an order such as that sought

by the present respondents, or to authorise the separate representation for which Mr Palmer and his co-applicants contend.

- [25] The reasons which Mr Palmer advanced for contending that he should have separate representation were founded on the possibility that a conflict might arise between he and his corporate co-applicants. He accepts that all of the corporate co-applicants, one way or the other, are ultimately owned by him, but he points out, correctly, in my view, that ownership is a question distinct from the course which might be taken by the executive management or, indeed, the board of a corporate party.
- [26] He submits that, especially in circumstances where the liquidators for Queensland Nickel have foreshadowed contentions that various transactions should be regarded as voidable as against the liquidators, it is possible, as the various disputes unfold in the related cases that I am presently managing, that conflict could arise between his interests and the interests of the other applicants.
- [27] He says that it is because of the possibility of that conflict that he has formed the view that his interests might not be able to be adequately represented by the representation of his co-applicants. He also points to the delay between 5 October and 14 November as a reason for me not to be interested to accede in the application advanced by the present respondents.
- [28] In my view, the question of conflict to which Mr Palmer adverts is presently speculative. I think the question of conflict, which is relevant, is conflict that might affect the prosecution of the issues that arise in this case. In light of the current state of pleadings and the relationship between the co-applicants, there is presently no basis to conclude that the interests of justice are served by permitting the separate representation sought by Mr Palmer. I say separate representation, because I put to one side the question of whether the separate representation is by him personally, or by other lawyers engaged by him. It seems to me that that is the appropriate course, from the point of view of analysis.
- [29] In my view, if Mr Palmer wishes to continue in this proceeding as a co-applicant, he must accept the same representation as his other co-applicants. If evidence ever demonstrates a real conflict between the co-applicants capable of affecting the adequacy of representation on their respective behalves of the case that they have all joined, so far, to present, then I can address that at the time it arises. Presently, no such evidence exists, and the conflict strikes me as speculative.
- [30] Accordingly, I accede to the application advanced by the respondents, and direct that all of the co-applicants be represented by the same solicitors and counsel.