

COURT OF APPEAL

PHILIPPIDES JA

**Appeal No 9296 of 2018
SC No 6593 of 2017**

**QNI METALS PTY LTD
ACN 066 656 175**

First Applicant

**QNI RESOURCES PTY LTD
ACN 054 117 921**

Second Applicant

**QUEENSLAND NICKEL SALES PTY LTD
ACN 009 872 566**

Third Applicant

CLIVE FREDERICK PALMER

Fourth Applicant

CLIVE THEODORE MENSINK

Fifth Applicant

IAN MAURICE FERGUSON

Sixth Applicant

**MINERALOGY PTY LTD
ACN 010 582 680**

Seventh Applicant

**PALMER LEISURE AUSTRALIA PTY LTD
ACN 152 386 617**

Eighth Applicant

**PALMER LEISURE COOLUM PTY LTD
ACN 146 828 122**

Ninth Applicant

**FAIRWAY COAL PTY LTD
ACN 127 220 642**

Tenth Applicant

**CART PROVIDER PTY LTD
ACN 119 455 837**

Eleventh Applicant

**COEUR DE LION INVESTMENTS PTY LIMITED
ACN 006 334 872**

Twelfth Applicant

**COEUR DE LION HOLDINGS PTY LTD
ACN 003 209 934**

Thirteenth Applicant

**CLOSERIDGE PTY LTD
ACN 010 560 157**

Fourteenth Applicant

**WARATAH COAL PTY LTD
ACN 114 165 669**

Fifteenth Applicant

**CHINA FIRST PTY LTD
ACN 135 588 411**

Sixteenth Applicant

**COLD MOUNTAIN STUD PTY LTD
ACN 119 455 248**

Seventeenth Applicant

EVGENIA BEDNOVA

Eighteenth Applicant

ALEXANDER GUEORGUIEV SOKOLOV

Nineteenth Applicant

DOMENIC MARTINO

Twentieth Applicant

v

**STEPHEN JAMES PARBERY AND MICHAEL OWEN
IN THEIR CAPACITIES AS LIQUIDATORS OF
QUEENSLAND NICKEL PTY LTD
(CONTROLLER APPOINTED) (IN LIQ)
ACN 009 842 068**

First Respondent

**QUEENSLAND NICKEL PTY LTD
(CONTROLLER APPOINTED) (IN LIQ)
ACN 009 842 068**

Second Respondent

**JOHN RICHARD PARK, KELLY-ANNE
TRENFIELD AND QUENTIN JAMES OLDE AS
LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD
(CONTROLLER APPOINTED) (IN LIQ)
ACN 009 842 068**

Third Respondent

BRISBANE

TUESDAY, 23 OCTOBER 2018

JUDGMENT

PHILIPPIDES JA: This application is brought for stay orders and in the alternative for injunctive relief in relation to orders made on 3 August 2018 by the primary judge, Bond J.

The appeal, in relation to which the application arises, is set down for hearing on the 5th of November 2018; however, the stay application is pursued in the interim.

By way of background, the primary judge made freezing orders in the principal proceeding in respect of certain appellants on 25 May 2018. The matter was listed for case management on the 27th of July 2018. The orders made on that occasion are not the subject of the present application or appeal. The present application is confined to orders made on 3 August 2018, which essentially were case management directions that the trial of the proceeding commence on 29 April 2019, disclosure directions, and directions for the progress of the matter in accordance with standard case management directions.

The applicant contends that, while ordinarily a Court is reluctant to stay proceedings to allow an appeal against an interlocutory matter where the effect of the stay would be to delay the hearing of the proceedings below, in the present situation the circumstances warrant the making of a stay order or, at least, injunctions restraining the progress of the matter below.

The relevant factors to be taken into account in determining a stay application are uncontroversial. One consideration is whether there is a good arguable case on the appeal. In the circumstances of the present case, I do not consider that it can be said that there is a good arguable case on the appeal. The basis of the applicants' contentions are that findings as to credit made in the course of the freezing orders judgment are such that the primary judge could not be considered to be able to bring an impartial mind to bear in making the orders of 3 August 2018.

There is a great difficulty with the argument. It was identified by the primary judge and it is as follows: that there is no logical connection between the contention of apprehended bias and the making of the standard case management orders that were made on 3 August 2018.

It should be said that there is no allegation or contention of actual bias is to be considered in this application. The applicants' counsel seized on the wording in the judgment, and in particular the word "believed", as being of great importance. However, I am unable to see that that is the case. The applicants made no submissions in relation to the nature of the

procedural directions made on 3 August 2018 when invited to do so by Bond J. The directions were of a purely standard procedural nature and no issue of belief or credit of any appellant arose.

There is another difficulty which the applicants face, and that is that, contrary to the argument put forward, it is apparent that the appeal in this matter will not be rendered nugatory if a stay or injunctive relief is not granted. That is because there is presently a review listed for hearing this Friday, 26 October 2018. The case management directions that were made are not set in concrete; they are able to be varied and modified. That is a not-infrequent occurrence in relation to matters listed for review on the commercial list. There will be an opportunity on the 26th for any arguments as to the varying of the directions made on 3 August to be ventilated, and indeed there are matters which the applicants seek to have determined on that date.

There are strong reasons going to the administration of justice which also favour the dismissal of the application. It is important that proceedings are progressed in an orderly and expeditious fashion. This is to the advantage of both parties. If, as the applicants propose, the balance between the competing disadvantages of the parties as to the making of a stay order is struck by allowing the respondent's liberty to continue to comply with the orders of 3 August but dispensating the applicants from compliance, this will result in only one side progressing the matter. That would not be in the interests of justice.

I note the submission made by the applicants concerning the decision in relation to the stay application in the related appeal. I consider that, irrespective of what was said in that application, there remains a fundamental difficulty which the appellants will be required to deal with on the appeal in this matter and which goes both to the heart of the appeal and to the issue of prospects of success of this application. As I have mentioned, that concerns the absence of any logical connection between the apprehended bias arguments arising from credit findings made by the primary judge and the quite distinct matter of the making of

uncontroversial and standard procedural orders. In those circumstances, the application is dismissed.

...

PHILIPPIDES JA: I have heard the parties on the question of costs. The basis on which indemnity costs is ordered is well known. In the present case, as counsel properly conceded, where an unarguable case is ventilated, the lack of merit may be the basis of an award for indemnity costs on the basis that the argument ought never to have been ventilated. In my view, this is such a case. The crux of the matter, as I have mentioned, goes to the lack of connection between the argument of apprehended bias and the submission that the directions of 3 August 2018 are able to be impugned. As I stated, there is no basis demonstrated for such a conclusion being maintainable and that is a significant matter in determining that an order of indemnity costs is warranted.

Now, the order of the Court will be that:

- (1) the application is dismissed; and
- (2) the applicants pay the respondent's costs of and incidental to the application on the indemnity basis.

Is there anything further, gentlemen?

MR BYRNE: No, your Honour.

MR BUTLER: No, your Honour. Your Honour, would it assist if my instructors prepared an order to send to your Associate?

PHILIPPIDES JA: Yes. Yes. And would the – you will obviously show your learned friend the draft.

MR BUTLER: Yes, indeed.

PHILIPPIDES JA: Perhaps if you initial it and have that sent to my Associate.

MR BUTLER: Yes. Of course, your Honour.

PHILPPIDES JA: Thank you. Adjourn the Court.