[2023] QCA 13

COURT OF APPEAL

BOND JA

Appeal No 1332 of 2023
SC No 13947 of 2018

QNI RESOURCES PTY LTD **ACN 054 117 921**	**First Applicant**
QNI METALS PTY LTD **ACN 066 656 175**	**Second Applicant**
v	
VANNIN CAPITAL OPERATIONS LIMITED **Company Number C74594**	**First Respondent**
PALMER AVIATION PTY LTD (in liquidation) **ACN 158 870 789**	**Second Respondent**
QUEENSLAND NICKEL PTY LTD (in liquidation) **ACN 009 842 068**	**Third Respondent**

BRISBANE

FRIDAY, 10 FEBRUARY 2023

JUDGMENT

BOND JA: These reasons assume familiarity with the judgment and orders made by Justice Burns on 13 January 2023 and 1 February 2023 and with his Honour's reasons expressed in *Vannin Capital Operations Limited v QNI Resources Pty Ltd* [2023] QSC 1. For present

purposes, the critical orders were those which required the first, second and third defendants to pay to the plaintiff jointly and separately the sum of US$30,835,112.14.

The first and second defendants in the proceeding before Justice Burns have filed a notice of appeal which seeks to set aside the orders made by his Honour, including the orders requiring payment of the US dollar money sum. As appellants, they now seek a stay of the payment orders made by his Honour. The application is opposed by the first respondent to the appeal, who was the plaintiff below and the beneficiary of the payment orders made by his Honour. I have made an order excusing the second and third respondents to the appeal from participating in this application.

The law relating to such applications for stay has been adequately developed in written submissions which I have received from each side. It is not necessary to essay an exhaustive summary of the law, not least because I do not apprehend there to be much difference between the parties. But also because, as I will shortly elaborate, the issues between the parties on the stay have narrowed substantially. Nevertheless, for the resolution of the issues as narrowed, senior counsel for the first respondent submitted, and I accept, that it is still necessary to keep three propositions in mind as helpfully identified in the head note to the Court of Appeal decision of *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453, namely:

(a) "…it would not be appropriate to grant a stay unless a sufficient basis was shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and a successful party in litigation was entitled to the fruits of its judgment."

(b) "That the fundamental justification for staying judicial orders pending appeal was to ensure that the orders which might ultimately be made were fully effective."

(c) "That it was an important consideration that the courts should impede the enforcement of their orders only so far as was necessary to ensure that the orders which might ultimately be made could be given effect without leaving a residue of injustice."

The nature of the issues which remain can best be identified by contrasting the terms of the orders which each party proposes.

The appellants propose a stay of the payment orders made by his Honour upon their offering the usual undertaking as to damages, and also upon their offering undertakings:

"(a) to pay the Australian dollar equivalent at the prevailing exchange rate on the date the payment is made of the judgment sum of US$30,835,112.14 ordered to be paid by them to the first respondent pursuant to the order of Justice Burns on 1 February 2023 in BS13947 of '18 into the Court within seven days to be held until the appeal in respect of the judgment is heard and determined on a final basis or further order of the Court.

(b) to prosecute the appeal expeditiously, and;

(c) if the appeal is discontinued by them or dismissed by the Court of Appeal, they will pay the first respondent the difference of

(i) the amount of interest in the judgment funds calculated in accordance with section 59 of the *Civil Proceedings Act 2011* Queensland, from the date of the date of the judgment until the date the appeal is discontinued or is dismissed; and

(ii) the amount of interest actually accrued on the judgment funds from the date of the judgment until the date the appeal is discontinued or dismissed."

For its part, the first respondent proposes an order in these terms:

"Upon the first respondent and Vannin Capital Investments (Australia) Pty Ltd (**VCIA**) undertaking that VCIA will hold all monies recovered from the First Appellant, Second Appellant, Second Respondent and Third Respondent, pursuant to the orders of Justice Burns on 1 February 2023 in BS 13947/18 (the **Judgment**), in an interest bearing account maintained in Australia, in the name of VCIA, at a bank regulated by the Australian Prudential Regulation Authrotiy under the *Banking Act 1959* (Cth) (the **Judgment Funds**), and the First Respondent and VCIA will not make any withdrawal (except from their solicitors' trust account to the said interest bearing account) transfer or other payment out of the Judgment Funds or deal with or encumber any amounts comprising the Judgment Funds or any amounts comprising the interest accrued on the Judgment Funds, until:

(a) the appeal pursuant to the notice of appeal filed 3 February 2023 in respect of the Judgment to the Queensland Court of Appeal by the First and Second Appellants (the **Appeal**) is discontinued by the appellants; or

(b) the Appeal is dismissed by the Queensland Court of Appeal; or

(c) if either event in paragraph (a) or (b) does not occur, further order of the court;

AND UPON the First and Second Appellants undertaking to prosecute the Appeal in respect of the Judgment expeditiously;

AND UPON the First and Second Appellants undertaking that if the Appeal is discontinued by the Appellants or dismissed by the Queensland Court of Appeal, to pay to the First Respondent the difference between:

(a) the amount of interest on the Judgment Funds calculated in accordance with section 59 of the *Civil Proceedings Act 2011* (Qld) from the date of the Judgment until the date the Appeal is discontinued or is dismissed; and

(b) the amount of interest actually accrued on the Judgment Funds from the date of the Judgment until the date the Appeal is discontinued or dismissed.

THE COURT ORDERS THAT:

1. The First and Second Appellants' application filed on 8 February 2023 is dismissed.

2. The First and Second Appellants are to pay the First Respondent's costs of the application on a full indemnity basis."

Senior counsel for the appellants confirmed his instructions to offer the undertakings to which I have referred on behalf of the appellants. Senior counsel for the first respondent confirmed his instructions to offer the undertakings referred to in the draft order on behalf of the parties the draft order identifies as offering undertakings, other than those undertakings recorded as undertakings by the appellants.

Before me, the appellant's argument was that the order proposed by the first respondent did not offer complete protection against their appeal rights being rendered nugatory, because the terms so proposed still left the appellants exposed to any potential insolvency of VCIA and to potential difficulties obtained in obtaining payment out of the monies held in the account.

The first respondent's response was effectively to submit that that argument did not proceed from the right starting point. The basis for the stay was said to be a concern that any moneys paid to the first respondent will be paid away and not recovered in the event of the appeal being successful. He submitted and I accept that the right starting point is an appreciation of the principles to which I have referred, deriving from *Cook's Construction*.

He submitted that having regard to those principles, the first respondent's proposal provided sufficient protection to address the risk of which the appellants had complained. He suggested and I accept that the material revealed no risk of insolvency on the part of VCIA. Indeed, the affidavit deposed to by its Australian-based director, Mr McDonald, demonstrated VCIA's solvent position.

Against the background of having pointed out that the first respondent's proposal adequately addressed risk, senior counsel for the first respondent submitted, and I accept, that while the payment into Court proposal of the appellants would also address the risks with which the appellants were concerned, it carried with it the detriment to the first respondent that it would

deny the first respondent the benefit of the US dollar currency judgment which it had obtained, and would expose it both to exchange rate risks and to potential complications in obtaining payout in the event of success, at least in a manner that might address any exchange rate risks that had come to pass. The first respondent was unwilling to accept those risks. It wanted to have the benefit of its US currency judgment and payment in that currency.

In my view, given that the first respondent's proposal satisfactorily addresses any concern that any payments made to the first respondent would be paid away and not recovered in the event of the appeal being successful, there is no demonstrated reason to deny the first respondent the benefit of securing in its favour payment in the US dollar sum, nor is there any reason to impose on the first respondent the risks to which I have earlier referred.

I make an order in terms of exhibit 2, save in relation to proposed order number 2, I will hear the parties on the question of costs.

…

BOND JA: The first respondent has succeeded in resisting the application advanced by the appellants. Ordinarily, that might suggest that costs should follow the event. The first respondent, however, submits that it should have an order for indemnity costs in its favour. The appellants resist that and suggest that the costs of this application should be costs in the Court of Appeal proceeding or, at worst, an order for costs on a standard basis should be made against them.

The application must be considered against the remarks that I made about the competing positions that were proposed, but also, importantly, against an understanding of the relevant chronology of events.

The trial in this proceeding took place initially between 27 and 30 April 2021, and there was a litany of further submissions being received over the months thereafter.

At some stage during December 2022, the possibility of a judgment going against the defendants was examined and the question of whether there should be a stay in that event was canvassed in correspondence between the parties. No resolution was obtained.

On 13 January 2023, Burns J published reasons to the parties and invited submissions from them on the final orders that should be made.

Those orders were made on 1 February 2023 at 2.15. An hour or so prior to that time, the present first respondent had, by its solicitors, written to the present appellant's solicitors, exposing their willingness to offer undertakings concerning the fruits of any judgment in their favour in terms which relevantly are indistinguishable from those recorded in the orders that I have made today.

That proved not immediately acceptable, and a stay application was advanced before Justice Burns on the afternoon of 1 February 2023. His Honour made interim orders, which will expire some time today.

The present application, that is, the application for stay in the Court of Appeal, was filed on 7 February 2023, arrangements about the possibility of having it listed today, being raised with the Court of Appeal a day or so earlier.

By letter of 6 February 2023, the solicitors for the present first respondent wrote to the solicitors for the present appellants, repeating essentially the offer made in their letter of 1 February 2023.

There had been no engagement with that offer. There was no engagement with the repetition of the offer in the letter of 6 February 2023. There was no explanation in the evidence as to why that was so.

Rather, the first what one might loosely refer to as response was by letter sent yesterday. The solicitors for the appellants advanced the proposal that the resolution of the stay application could be dealt with by their undertaking to pay the US dollar sum into Court. Inquiries were made by the solicitors for the first respondent, which established that the Court was not administratively willing to accept payment in a US dollar sum, and the results of that inquiry were communicated to the appellants.

Late yesterday, the appellants amended their proposal so that it was a proposal to pay the

Australian dollar equivalent of the US dollar judgment sum into Court.

It is notable and seems to me an obvious failure to comply with the duties imposed on all parties in rule 5 of the *Uniform Civil Procedure Rules* that there was no engagement by the appellants with the proposals put in the letters of 1st and 6th February. And there was no basis, as I have recorded in my judgment, in the evidence to suggest that there were (a) any concerns at all and (b) any reasonable concerns with that proposal. Indeed, the first time any concerns were expressed in relation to that proposal was during oral argument advanced on behalf of the appellants by senior counsel today. The appellants' departure from their obligations is notable and to be regretted. The question is whether it is such as warrants an indemnity costs order.

If the appellants had advanced in response to the letters of 1 and 6 February 2023 from the first respondent that they rejected the adequacy of the first respondent's proposal and insisted that the better resolution was a form of undertaking by them to pay an Australian dollar sum into Court, then the outcome of today would simply be that they had advanced the proposition and had lost. It would follow that costs should follow that event. The basis for indemnity costs would only be if the advancing of that proposition was an argument that was so inadequate as to attract the principles discussed in very many authorities, not least of which is the old authority of *Colgate Palmolive*.

That is not what they did, though. The argument is a weak one. The argument opposing the proposal put by the first respondent did not identify any reasonable basis to resist it. I think the weakness of the argument allied with the unreasonable conduct that preceded the filing of the stay application in this Court is sufficient to warrant an indemnity costs order. I do not think that making any order that makes costs not determined today is appropriate. Accordingly, I am persuaded by the first respondent that the costs order should be on an indemnity basis.

I make a cost order in the terms identified in paragraph 2 of the proposed order which is exhibit 2 in the proceeding.

…

BOND JA: The result is that the orders I am prepared to make are in terms of the draft order, which is exhibit 2. So in order to formalise an order in accordance with what I pronounced orally, I make an order in terms of the draft signed by me and it goes with the papers. Thank you, counsel. Adjourn the Court.