

SUPREME COURT OF QUEENSLAND

CITATION: *Queensland Nickel Pty Ltd v Glencore International AG & Anor* [2017] QSC 57

PARTIES: **QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)**
(applicant)

v

GLENCORE INTERNATIONAL AG
(first respondent)

QUEENSLAND NICKEL SALES PTY LTD
(second respondent)

FILE NO/S: SC No 6216 of 2016

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 19 April 2017

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Bond J

ORDER: **The order of the Court is that the following question which arises in this proceeding be stated and tried:**

“As at the time that Glencore paid the monies into court, which of

(1) Queensland Nickel Pty Ltd;

(2) QNI Metals Pty Ltd and QNI Resources Pty Ltd; or

(3) Queensland Nickel Sales Pty Ltd;

had the legal right to recover from Glencore amounts owing by it under the contract referred to in paragraph 1 of Queensland Nickel’s amended application?”

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – INTERPLEADER – PROCEDURE – GENERALLY – where s 19 of the Civil Proceedings Act 2011 (Qld) empowers the court to order that a question arising in a proceeding be stated and tried – where the first respondent paid monies into court – where the applicant and second respondent each have competing legal and equitable claims to the monies – whether an order should be made that a question as to the legal title to the funds

should be stated and tried

Civil Proceedings Act 2011 (Qld), s 19
Uniform Civil Procedure Rules 1999 (Qld), r 171

Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd (No 3) [2015] QSC 295, cited
Oceltip Pty Ltd v Noble Resources Pte Ltd [2016] QSC 246, cited
QNI Resources Pty Ltd v Park [2016] QSC 222, cited
Queensland Nickel Sales Pty Ltd v Glencore International AG [2016] QSC 269, cited
Reading Australia Pty Ltd v Australian Mutual Provident Society (1999) 217 ALR 495, cited

COUNSEL: A Crowe QC, with C Curtis, for the applicant
 No appearance for the first respondent
 K S Byrne for the second respondent

SOLICITORS: HWL Ebsworth for the applicant
 No appearance for the first respondent
 Alexander Law for the second respondent

- [1] In *Queensland Nickel Sales Pty Ltd v Glencore International AG* [2016] QSC 269 I set out the factual background to this proceeding. I will repeat only part of that background, but the entire background there set out continues to be relevant.
- [2] This proceeding – referred to as the “Glencore interpleader proceeding” – is one of a number of related proceedings being managed by me together on the commercial list.¹
- [3] The current status of this proceeding is:
- (a) On 23 June 2016 Glencore International AG (“Glencore”) commenced the proceeding by originating application. Glencore was conscious that it owed US\$3,759,246.71 to one or other of the old joint venture manager, Queensland Nickel, or, its replacement, Queensland Nickel Sales, and that those two parties were in dispute as to which of them was entitled to that sum.
 - (b) Glencore’s application was an application for relief by way of interpleader. The relief which Glencore sought was an order that it pay the disputed sum into court and ancillary orders aimed at ensuring the disputing claimants could advance no claim against it, but could be left to fight out their entitlement in respect of the monies paid into court. Amongst other things, Glencore applied for “such orders and directions as the Court thinks fit for the determination of all matters in dispute between [Queensland Nickel and Queensland Nickel Sales] in respect of [the amount of US\$3,759,246.71 which Glencore proposed to pay into court].”
 - (c) On 30 June 2016 Queensland Nickel filed an interlocutory application within the Glencore interpleader proceeding, seeking -
 - (i) a declaration that Queensland Nickel was entitled to be paid the amount of US\$3,759,246.71; and

¹ In these reasons I use the terms defined in the glossary adopted in the case management orders made by me. For convenience I set out the glossary in the appendix to these reasons.

- (ii) an order that Glencore pay that amount, or an equivalent amount in Australian currency, to Queensland Nickel.
- (d) On 8 July 2016, Queensland Nickel Sales filed by leave its own interlocutory application within the Glencore interpleader proceeding. It sought orders that Queensland Nickel's interlocutory application within the Glencore interpleader proceeding be stayed as an abuse of process, struck out or dismissed, or struck out pursuant to UCPR r 171.
- (e) On 8 July 2016, the following orders were made by consent of all three parties:
- 1 Pursuant to section 19(1)(c) of the *Civil Proceedings Act 2011* (QLD), [Glencore] pay into the Court the amount of US\$3,759,246.71 (the "Final Amount") claimed against it by each of the Claimants, less the deductions authorised by Order 4.
 - 2 No action be brought against [Glencore] by any of [Queensland Nickel and Queensland Nickel Sales] in respect of the Final Amount.
 - 3 [Glencore] be excused from further appearance in these proceedings.
 - 4 [Glencore's] cost incurred in these proceedings be fixed at AUD 25,000 and be deducted from the Final Amount.
 - 5 The Application of [Queensland Nickel] filed 30 June 2016 and the application of [Queensland Nickel Sales] filed and read by leave 8 July 2016:-
 - (a) be adjourned *sine die*; and
 - (b) be set down, for mention only, before His Honour Justice Bond at 4.30pm on 11 July 2016
 - 6 Costs of [Queensland Nickel] and [Queensland Nickel Sales] be reserved.
- (f) On around 6 December 2016, Glencore paid \$5,028,430.17 into Court.
- (g) My judgment in *Queensland Nickel Sales Pty Ltd v Glencore International AG* [2016] QSC 269 dismissed the application by Queensland Nickel Sales. The application by Queensland Nickel still stands adjourned.
- [4] Queensland Nickel and Queensland Nickel Sales are competing claimants to the monies paid into court by Glencore. The evidence also suggests that Vale Nouvelle Calédonie, a foreign company, may wish to advance a proprietary claim against the monies based on a retention of title clause. Vale entered an appearance on 4 August 2016 and confirmed it claimed a security interest in the funds now paid into court. It did not seek to be joined as a party at that stage but a direction was made that Vale be provided with all documents filed in the proceeding.
- [5] No direction has yet been made that the competing contentions of the parties should be identified by the delivery of pleadings. I do, however, have material before me which at least outlines the cases which Queensland Nickel and Queensland Nickel Sales each advance.
- [6] As to Queensland Nickel, I have the interlocutory application; the submissions filed in support of that application; the supporting affidavit of Ms Trenfield and the parts of the affidavit of Mr Cowling (filed by Glencore) incorporated by reference. Essentially Queensland Nickel contends:
- (a) The Glencore contract was a contract in writing to which Glencore, Queensland Nickel, QNI Metals and QNI Resources were all parties.
 - (b) On the proper construction of the contract, only Queensland Nickel was intended to be legally bound by its terms, despite the fact that QNI Metals and QNI Resources were also parties. Queensland Nickel must have had the legal title to any chose in

action which arose in respect of the contract and, accordingly, has the legal right to be paid the monies in court.

- (c) If Queensland Nickel has any obligations to QNI Metals, QNI Resources or Queensland Nickel Sales in terms of how it must deal with any money received from Glencore, or has any obligation to hold any sums received from Glencore on trust, those are not matters relevant to this proceeding which is solely concerned with which party has a legal right to receive the monies paid into court.
- [7] As to Queensland Nickel Sales, some light is shed on its attitude by material adverted to in the affidavit of Ms Trenfield and Mr Cowling. But I also have an outline of contentions which has been filed by QNI Metals, QNI Resources and Queensland Nickel Sales. The position of Queensland Nickel Sales (relevantly, the procedural position having moved on somewhat since the outline was filed) seems to be:
- (a) There is no dispute as to the existence of the Glencore contract or its terms.
- (b) On the proper construction of the contract, Queensland Nickel entered into the contract as agent for QNI Metals and QNI Resources as disclosed principals. They and not Queensland Nickel must have had the legal title to any chose in action which arose in respect of the contract.
- (c) QNI Metals and QNI Resources assigned the benefit of the Glencore contract to Queensland Nickel Sales and, accordingly, Queensland Nickel Sales has the legal right to be paid the monies in court.
- (d) If, contrary to the foregoing, Queensland Nickel had the legal title to any chose in action which arose in respect of the contract, it held that right as bare trustee for QNI Resources and QNI Metals, and it had no beneficial interest in the chose (or the monies paid into court) and no right of indemnity in relation thereto.
- [8] The question has arisen in case management hearings before me as to the appropriate means of proceeding towards a resolution of the competing claims to the monies presently in court. I required each of the competing claimants to provide me with written submissions on the question and directed that I would resolve the matter on the papers.
- [9] The ultimate position advanced by Queensland Nickel involved the following contentions.
- [10] First, in resolving the question of the competing entitlement to the monies paid by Glencore into court I have the powers conferred on me by s 19 of the *Civil Proceedings Act 2011* (Qld). That section relevantly provides:

19 Interpleader orders

- (1) On an application for relief by way of interpleader, the court may do 1 or more of the following—
- (a) ...
- (b) order a question between the claimants be stated and tried and direct which of the claimants is to be the plaintiff and which the defendant and give any necessary directions for the trial;
- ...
- (e) decide in a summary way a question of law or fact arising on the application;
- (f) make an order it considers appropriate, including an order finally disposing of all issues arising in the proceeding.
- ...

- [11] Second, Queensland Nickel contended I could set down for decision in a summary way its claim for orders in these terms:

1. Pursuant to subsection 19(1)(e) and 19(1)(f) of the *Civil Proceedings Act 2011* (Qld):

- a. A declaration that [Queensland Nickel] is legally entitled to be paid the amount of USD \$3,759,246.71 (or an equivalent amount in Australian currency) owing by [Glencore] under a Contract No 227-09-15539P between [Queensland Nickel] and [Glencore] (as amended) (being the written contract identified at Tab B to the affidavit or [sic] Mr David Cowling filed on 23 June 2016 with variations identified at Tab C to Tab G of the same affidavit); and
- b. An order directing that the funds in the amount of AUD \$5,028,430.17 paid into Court by [Glencore] pursuant to the Order of Douglas J on 8 July 2016 together with any interest accrued thereon be paid out of court to [Queensland Nickel].
- c. Such further or other order dealing with the fund held in court (or any part of it) that to the court seems appropriate.

[12] Third, it contended that taking that course would assist because it would permit me to determine the question of the legal, but not necessarily the beneficial, entitlement to the monies in court. The question could be determined, it contended, without significant evidentiary dispute, requiring only proof of the subject contract and variations, and an affidavit of one of the General Purpose Liquidators, Ms Trenfield. It then submitted:

The affidavit of Ms Trenfield contains evidence which verifies information contained in the Cowling affidavit, in the event that verification of that Glencore contract is necessary (that is, if it is not admitted). The affidavit is otherwise relied on to set out discretionary factors for why a summary determination is appropriate (given section 19 of the Act confers a discretion to make orders). This includes that the moneys in issue are also the subject of a proprietary claim by a third party, Vale Nouvelle Caledonie (“Vale”), based on a “retention of title” clause in a supply agreement under which Queensland Nickel obtained intermediate nickel product (nickel hydroxide cake or “NHC”) used to create the goods which were sold to Glencore. Vale’s claim relates to a “retention of title” clause, including an interest claimed in respect of the proceeds of sale of those goods.

A discretionary reason for the summary determination application to be heard is that Queensland Nickel would (if the summary determination application was determined in its favour), be put in a position to then pursue an appropriate method of resolution of this claim and also for Queensland Nickel to seek directions as a trustee as to the proper use of the funds.

[13] Fourth, however, it embraced as its primary position support for a question formulated by me. I had invited submissions on whether that question should be separately determined. Queensland Nickel submitted stating the question would be an appropriate method of resolution of the issue of which party had the legal entitlement to the funds in issue. The question which I had formulated was in these terms:

“As at the time that Glencore paid the monies into court, which of

- (1) Queensland Nickel Pty Ltd;
- (2) QNI Metals Pty Ltd and QNI Resources Pty Ltd; or
- (3) Queensland Nickel Sales Pty Ltd;

had the legal right to recover from Glencore amounts owing by it under the contract referred to in paragraph 1 of Queensland Nickel’s amended application?”

[14] For its part, Queensland Nickel Sales resisted Queensland Nickel’s primary position. Relevantly it contended:

- (a) A trial was necessary to permit it to advance its contention that Queensland Nickel could only ever hold its entitlement as bare trustee for Queensland Nickel Sales.
- (b) The question of construction of the Glencore contract would be a complex issue requiring consideration of –
 - (i) the capacity in which Queensland Nickel entered into the Glencore contract;
 - (ii) the surrounding circumstances known to the parties at the time of entering into the Glencore contract, including the Joint Venture Agreement and associated agreements and the manner of operation of the refinery; and

- (iii) the effect on Queensland Nickel's rights under the Glencore contract of the fact that QNI Metals and QNI Resources terminated its position as manager under the Joint Venture Agreement.
 - (c) The approach which I should bring to the question of whether to state a separate question was that discussed in *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495, *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd (No 3)* [2015] QSC 295 and *Oceltip Pty Ltd v Noble Resources Pte Ltd* [2016] QSC 246, the ultimate inquiry being whether it is just and convenient to manage the dispute by determining a separate question.
 - (d) Absent pleadings it is difficult to determine whether the proposed question is presently appropriate. There would likely be disputed facts and there might be overlap of evidence between the issues which would arise in the trial of the separate question and the trial of the Queensland Nickel declarations proceeding. I should take a cautious approach and require the parties to file pleadings defining all the issues in dispute.
- [15] It seems to me that the proposition that I should set down for determination the proposed question really involves an exercise of the power which I have under s 19(1)(b) to state a question which arises between the parties. I agree that the considerations which inform the usual exercise of the power under the *Uniform Civil Procedure Rules* to order separate questions should inform the answer to the question whether I exercise the power under s 19(1)(b). I have no doubt that the question I have posed does arise between the claimants. It seems to me that it primarily involves a question of the proper construction of the Glencore contract, although it may also involve the question of the validity of any assignment.
- [16] The merit in determining the question lies primarily in the fact that the answer will dictate the shape of the subsequent contest in relation to what should happen to the monies in court. It would not involve the determination of whether the person identified as having the legal right to recover from Glencore should obtain an order that the monies be paid out to them, or any resolution of the nature of any competing claims to equitable interests in the monies. It would not involve any resolution to the question of whether Vale had any proprietary right to the monies, although it would identify the person against whom Vale might need to assert whatever rights it has and with whom it would have to negotiate.
- [17] If, for example, Queensland Nickel vindicates its contention, then it will know that the monies are to be regarded as an asset in the insolvency of Queensland Nickel. The course which it would eventually seek to persuade the court to take with the monies paid into court would be informed by the choices which the liquidators make in performance of their duties. Queensland Nickel Sales would know that it would have to establish the interests it has asserted if it was ever to dissuade the Court from dealing with the monies otherwise than in accordance with the priorities which would ordinarily apply in a liquidation. Of course, other than mere assertion, I have presently have no evidence before me which suggests there is merit in Queensland Nickel Sales' contention recorded at [7](d) above. I do note, however, that –
- (a) in *QNI Resources Pty Ltd v Park* [2016] QSC 222 I refused QNI Metals, QNI Resources, and Queensland Nickel Sales leave to proceed in a matter in which they sought to advance a similar contention;
 - (b) on an application in the Cessna proceeding heard by me on 20 December 2016, the Palmer parties advanced a similar contention in opposing an application by the General Purpose Liquidators; advanced no substantive evidence to support it beyond the evidence considered on the leave to proceed application and then, belatedly,

conceded the principal dispute: see the discussion in *Re Queensland Nickel Pty Ltd (in liq)* [2017] QSC 56.

- [18] If, on the other hand, Queensland Nickel fails to establish sole legal title to the monies paid into court, then the question whether Queensland Nickel had any right at all to the monies would become much more complex. It would have to plead and prove an indemnity right or other claim to proprietary relief in relation to the asset. Whether it needed to do so against QNI Metals, QNI Resources, or Queensland Nickel Sales would be resolved. Whether it would seek to do so at all might involve an assessment of the merit of the asserted rights of Vale.
- [19] I conclude that there is real merit in seeking to determine the answer to the question I have posed. Despite the submissions of Queensland Nickel Sales, it seems to me that the question is relatively narrow and its resolution will assist the efficient management of the remaining issues in relation to the competing claims against the monies. Queensland Nickel Sales has submitted that there would be admissible extrinsic evidence in relation to the question of construction. I would not attempt to resolve the merits of that submission at this stage, but in my evaluation the extent of such material, if it is admissible, is likely to be much narrower than that posited by Queensland Nickel Sales. I am not persuaded that there is a significant risk of credit findings having to be made at different stages of the proceeding.
- [20] The result is that I order that the following question which arises in this proceeding be stated and tried:
- “As at the time that Glencore paid the monies into court, which of
- (1) Queensland Nickel Pty Ltd;
- (2) QNI Metals Pty Ltd and QNI Resources Pty Ltd; or
- (3) Queensland Nickel Sales Pty Ltd;
- had the legal right to recover from Glencore amounts owing by it under the contract referred to in paragraph 1 of Queensland Nickel’s amended application?”
- [21] I will hear from the parties at the next review hearing on the question of which of the claimants is to be the plaintiff and which the defendant and what directions should be given for the trial of the question.

Appendix

Proceedings

"Glencore interpleader proceeding"	Supreme Court of Queensland proceeding BS6216/16
"Liquidators removal proceeding"	Supreme Court of Queensland proceeding BS6150/16
"Queensland Nickel proceeding"	Supreme Court of Queensland proceeding BS3849/16
"Voidable transactions proceeding"	Supreme Court of Queensland proceeding BS6847/16
"Cessna proceeding"	Supreme Court of Queensland proceeding BS7189/16
"Palmer Cessna proceeding"	Supreme Court of Queensland proceeding BS7778/16
"Public examinations proceeding"	Federal Court of Australia proceeding QUD329/2016
"Liquidators s 459A proceeding"	Supreme Court of Queensland proceeding BS10294/16
Groups of Parties	
"Joint Venture parties"	QNI Resources Pty Ltd & QNI Metals Pty Ltd
"Palmer parties"	QNI Resources Pty Ltd, QNI Metals Pty Ltd, Queensland Nickel Sales Pty Ltd, China First Pty Ltd, Waratah Coal Pty Ltd, Cart Provider Pty Ltd, Mr Clive Palmer
"General Purpose Liquidators"	Mr John Park, Mr Stefan Dopking, Ms Kelly-Anne Trenfield and Mr Quentin Olde in their capacity as liquidators of Queensland Nickel Pty Ltd (in liq)
"Special Purpose Liquidators"	Mr Steven Parbery, Mr Marcus Ayres and Mr Michael Owen in their capacity as special purpose liquidators of Queensland Nickel Pty Ltd (in liq)
Individual parties	
"Queensland Nickel"	Queensland Nickel Pty Ltd (in liq) ACN 009 842 068
"QNI Resources"	QNI Resources. Pty Ltd ACN 054 117 921
"QNI Metals"	QNI Metals Pty Ltd ACN 066 656 175
"Queensland Nickel Sales"	Queensland Nickel Sales Pty Ltd ACN 009 872 566
"China First"	China First Pty Ltd ACN 135 588 411
"Waratah Coal"	Waratah Coal Pty Ltd ACN 114 165 669
"Cart Provider"	Cart Provider Pty Ltd ACN 119 455 837