[2017] QSC 90

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BOND J

No 3202 of 2017

QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)	**Plaintiff**
and	
MINERALOGY PTY LTD	**Defendant**

BRISBANE

3.51 PM, TUESDAY, 9 MAY 2017

JUDGMENT

HIS HONOUR: This proceeding involves a claim for debt by Queensland Nickel Pty Ltd (in liquidation) against Mineralogy Pty Ltd. The amount claimed is some $105 million. Shortly before the expiry of the time permitted for defence, an application was made that the matter be listed on the commercial list and appropriate orders be given. That matter came on before me last week.

On the morning of that hearing, material was filed before me by Mineralogy which suggested that China First Pty Ltd had a fixed and floating charge over assets of Queensland Nickel. The charge was entered into shortly before the administration of Queensland Nickel commenced in January last year. Pursuant to the authority of that charge, China First had appointed Mr Martino as a receiver – or a controller, as it is referred to in the material. That controller had taken steps to deal with the chose in action which is the subject of the debt proceeding commenced by Queensland Nickel against Mineralogy and had, in fact, compromised that proceeding. The terms of the compromise were not placed before me. Rather, secondary evidence was placed before me suggesting there had been a compromise entered into by the receiver purportedly on behalf of Queensland Nickel and that compromise was acceptable to Mineralogy.

It seemed to me that if that proposition was correct, it would amount to a good defence. And so on the directions hearing last week, I listed the matter on the commercial list and made an order that a defence be filed on yesterday the 8th of May. The matter is to come on for a review before me on Thursday of this week.

Yesterday, in addition, I am told, to Mineralogy filing a defence, further steps were taken by Mr Martino, purporting to be the controller of Queensland Nickel. He filed in the Supreme Court a notice that Queensland Nickel was no longer represented by HWL Ebsworth Lawyers and was now acting in person, and a further notice purporting, on behalf of Queensland Nickel, to discontinue the whole of the proceeding against Mineralogy.

Before me today, Queensland Nickel appears by senior counsel instructed by HWL Ebsworth, rejecting the notion that the controller has any authority to act on behalf of Queensland Nickel. Queensland Nickel drew my attention to the fact that I had previously made an order that the winding up of Queensland Nickel continue as a winding up in insolvency. There are a number of consequences of that. Section 474(1) of the *Corporations Act* 2001 (Cth) provides that if a company is being wound up in insolvency in a case in which liquidators are appointed, the liquidator must take into his or her custody or under his or her control all the property which is or appears to be property of the company. The cause of action which is the subject of the proceeding against Mineralogy is contended to be part of the property of Queensland Nickel.

The legal sequelae of that proposition were developed by reference to two cases – *Landmark Corporation Ltd* [1969] NSWR 705 per Street J at 706 and *Krextile Holdings Pty Ltd v Widdows* [1974] VR 689 per Gillard J at 696. The proposition there developed is that any interference with an official liquidator's custody of the

company's property can amount to a contempt. A person purporting to be a validly appointed receiver over such property ought bring an application for leave to embark upon the interference which his appointment is said to authorise. Especially is that so when the liquidators have indicated they have no intention to hand over control of the property to the receiver. In this case, the question of the liquidator's attitude to Mr Martino's contentions was formalised well before the conduct that I have described as occurring yesterday – namely, the purported discontinuance of the proceeding.

It occurred in a letter from HWL Ebsworth to the solicitors for Mr Martino dated 4 May 2017. Essentially, the letter at paragraphs 8 through to 10 developed the propositions that (a) the company was, by order which I made on 27 February 2017, ordered to be wound up in insolvency, (b) where that has occurred, the liquidators have custody and control of the company's property, (c) any entitlement on the part of China First to any property is disputed for the reasons that follow from the foregoing propositions, and further, because Queensland Nickel contended that the charge was liable to be set aside. The reasons why the charge was said to be liable to be set aside are developed in proceeding 6847 of 2016. Amongst other things, the charge is, by virtue of s 588FJ of the *Corporations Act* said to be void as against the liquidators of Queensland Nickel. The letter from HWL Ebsworth also drew Mr Martino's solicitors' attention to the provisions of s 418A of the *Corporations Act*, which permit disputes of this nature to be the subject of declaratory proceedings and a determination by the court.

Presently, Queensland Nickel, at least as represented by HWL Ebsworth and the senior counsel instructed by them, seeks, upon the usual undertaking as to damages, interim injunctions restraining until Thursday afternoon Mr Martino and China First from taking any steps pursuant to the purported appointment on 3 May or the charge, including the following steps: (a) filing any document in proceeding 3202 of 2017, which is the proceeding pursuant to which $105 million is sought from Mineralogy; (b) purporting to dispose or otherwise deal with any property of or held in the name of Queensland Nickel, and (c) executing or entering into any deed agreement or other instrument purporting to bind Queensland Nickel.

The order is sought in aid of a proceeding not yet commenced. The proceeding that will be commenced is a proceeding which, at least, seeks a declaration pursuant to s 418A(2) declaring that the purported appointment was invalid and that Mr Martino has not validly entered into possession the way that he has purported to do. It is also suggested that the final injunctive relief will be sought by those proceedings.

I am satisfied that there is a sufficient case to be argued by reference to the authorities to which my attention has been pointed and to which I have already referred to justify the grant of orders in the forms sought.

Mr Martino and China First were represented before me and in light of the short period of the interim injunction have not opposed the grant of the injunction. Of course, they concede nothing, which I do not criticise at this juncture.

It seems to me in those circumstances that it is appropriate to make an order in the terms sought. Accordingly, I do so in the form of the order provided to me, initialled by me and placed with the papers.

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