[2017] QSC 95

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BOND J

No 4720 of 2017

QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION) and ANOTHER	**Applicants**
and	
DOMENIC MARTINO and OTHERS	**Respondents**

BRISBANE

2.32 PM, THURSDAY, 18 MAY 2017

JUDGMENT

HIS HONOUR: By order made 11 May 2017, I granted an interlocutory injunction on the application of Queensland Nickel Pty Ltd (in liquidation) (**Queensland Nickel**) and its four general purpose liquidators. Upon Queensland Nickel giving the usual undertaking as to damages, I ordered, until 5 pm on Thursday 25 May 2017 or earlier order, the first respondent (**Mr Martino**) to be restrained from taking any steps pursuant to his purported appointment on 3rd May as agent and controller of Queensland Nickel, including, without limitation, certain particular steps identified on the face of the order. And, as against the second respondent, China First Pty Ltd (**China First**), I ordered that it be restrained from taking any step pursuant to the charge granted to it by Queensland Nickel on 13 January 2016, including, without limitation, certain steps which I specified.

The application today was to extend the interlocutory injunction against both respondents until the date of the trial of this proceeding.

The nature of this proceeding is identified in an originating application filed 11 May 2017. The applicants seek, first, an order, pursuant to s 418A of the *Corporations Act*, that China First's purported appointment of Mr Martino as agent and controller of Queensland Nickel's property was not valid and that he did not, as he had purported to do on about 3rd May, validly enter into possession or assume control of Queensland Nickel's property under the terms of a security interest in that property. Second, the applicants seek a declaration that particular documents were not legally effective to bind the first applicant. The first was a compromise said to have been entered into on 4th May 2017 between Queensland Nickel and Mineralogy Pty Ltd (**Mineralogy**) in relation to Queensland Nickel's suit against Mineralogy claiming some $105 million. The second was a notice by which Mr Martino purported to bring about the situation that the general purpose liquidators and their instructing solicitors no longer controlled the conduct of Queensland Nickel's suit against Mineralogy. And the third document was a notice of discontinuance of that suit, which Mr Martino had purported to sign on behalf of Queensland Nickel. That notice was also signed by Mineralogy, the third respondent. There were other declarations sought by the originating application, which also sought permanent injunctions similar to those sought in the interlocutory injunction that I have described.

The events which preceded the grant of the injunction may briefly be summarised. Queensland Nickel had, in a different proceeding, sued Mineralogy, claiming, on various bases, $105 million. Solicitors instructed by the general purpose liquidators acted on behalf of Queensland Nickel. China First, on 3rd May 2017, purported to appoint Mr Martino as an agent and controller to property of Queensland Nickel. That step was said to have validly taken place pursuant to a charge granted to China First by Queensland Nickel dated 13 January 2016. It was in pursuance of that appointment that Mr Martino took steps purporting to bind Queensland Nickel to a compromise of its claim against Mineralogy. That occurred on 4 May 2017, which was the day before the proceeding was to be reviewed by me on 5 May 2017 and only a few days before the time that Mineralogy's defence was due, which was 8 May 2017.

China First and Mineralogy are both companies controlled by Mr Clive Palmer. Queensland Nickel describe what occurred as one party controlled by Mr Palmer (namely China First through its agent, Mr Martino, who China First had purportedly appointed as controller of Queensland Nickel) purporting to compromise Queensland Nickel's $105 million claim against another company controlled by Mr Palmer (namely Mineralogy) without reference to the court-appointed liquidators of Queensland Nickel. That description is accurate.

More detail has since emerged about the nature of that compromise. The terms of the settlement deed, purportedly entered into by Mr Martino on behalf of Queensland Nickel and Mr Palmer on behalf of Mineralogy, are before me. The critical parts are accurately summarised as follows:

(a) Mineralogy provided no monetary consideration for the release of the $105 million claim against it.

(b) By clause 8, China First agreed to reduce a debt purportedly payable by Queensland Nickel to it from $135 million to $125 million.

(c) By clause 11, the parties to the deed entered into broad releases and discharges in the following terms:

> Upon this deed being duly executed, [Queensland Nickel], [China First] and [Mineralogy] mutually release and discharge each other from all claims, actions, suits, causes of action, demands, complaints, damages and costs which each may have had, have now or may have in the future, concerning the proceeding and the carriage of the proceeding, but for the execution of this deed. Furthermore, the consideration of the matters set out herein [Queensland Nickel] releases all directors and related parties of [Mineralogy] and [China First], as defined under the *Corporations Act 2001* (of [China First]) from all claims, actions, suits, causes of actions, demands, complaints, damages and costs that have accrued to the date hereof.

(d) Those releases purported to capture present and future claims as between Queensland Nickel, China First and Mineralogy and all claims which Queensland Nickel might have against all directors and related parties of Mineralogy and China First. Indeed, when one has regard to the definitions provided in clause 6, the releases may have extended more broadly to encompass all officers, employees, agents and related bodies corporate of the party being released.

(e) By clause 12, Queensland Nickel also agreed to indemnify China First and Mineralogy for any breach of the deed, but did not obtain any equivalent indemnity in return.

The compromise seems to have been entered into on 4 May 2017. The compromise deed was sent to Mr Martino at 12.39pm on that day and returned later that evening. I am invited by the applicants to infer that that is an extraordinary proposition. The notion that it is an extraordinary proposition derives from the fact that the breadth of the release takes place in the context of a wider array of litigation, many of the proceedings encompassed by which are proceedings which I am managing on the

commercial list. I am invited to look askance at the notion that Mr Martino could, within the short time in which he had obtained the deed, have formed a considered view as to the merits of all the claims that he was releasing. I am invited to form the view that he did this without that consideration and in concert with and at the behest of Mr Palmer.

It was in the context of those events having occurred, but, of course, my not being apprised of the terms of the settlement, that the interlocutory injunction first came before me. On 9 May 2017, I granted an interim injunction, and it was on 11 May 2017 that I granted the interlocutory injunction.

The question before me today is whether I should extend the interlocutory injunction until trial or discharge it. I have received arguments from senior counsel on behalf of Queensland Nickel and the general purpose liquidators supporting my extending the interlocutory injunction and argument by counsel on behalf of Mr Martino and China First opposing that course and contending for discharge.

It was common ground between the parties that the approach I should take to the grant of an interlocutory injunction – and, accordingly, the approach I should take to the question whether I should extend the injunction I have already granted – was that summarised by me in *Stacks Managed Investments Ltd v Tolteca Pty Ltd* [2015] QSC 234 at pp 5 to 7. The principles are well-known, and it is not necessary to expand upon them here.

Queensland Nickel and the general purpose liquidators contended that the following propositions encompassed questions on which they showed a sufficient likelihood of success to justify the preservation of the status quo pending the trial of the originating application to which I have referred:

(a) first, the contention that Mr Martino's appointment was invalid and his acts legally ineffective to bind Queensland Nickel;

(b) second, that Mr Martino's conduct in interfering with the general purpose liquidators' control of Queensland Nickel's property without first obtaining the leave of the Court constituted a contempt which the Court has power to restrain and that the contempt was a contempt which China First and Mr Martino plainly threatened to continue. I observe, parenthetically, that I am persuaded of the existence of that threat by correspondence sent by solicitors on behalf of Mr Martino and China First dated 8 May 2017 and not since withdrawn. That correspondence stated:

> …The controller has enforced the security over the assets of [Queensland Nickel] subject to the charge and intends to continue to do so. If it is helpful the controller is happy to meet with your client to discuss the orderly sale of the assets and the return of funds to the Chargee as well as the liquidation of [Queensland Nickel]. Our client, the Controller of [Queensland Nickel] will continue to exercise its rights under the charge.

(c) third, the proposition that the conduct of China First and Mr Martino, if otherwise effective, constituted a breach of the equitable obligation to act in good faith for the purposes of obtaining repayment and not to sacrifice the

chargor's (namely Queensland Nickel's in this context) interests and, further, was such as to warrant setting aside the dealings with the related party.

(d) fourth, that there was a serious question to be tried as to whether Mr Martino's conduct warranted an order under s 434A of the *Corporations Act*, that section being the section dealing with misconduct.

It seems to me that I am able to resolve this application without embarking upon a consideration whether the conduct of China First and Mr Martino constitutes a breach of equitable obligations or warranted setting aside the dealings, or whether Mr Martino's conduct warrants a misconduct finding. I will turn to consider the other aspects of the arguments said to warrant the conclusion that there is a serious question to be tried.

The first and easiest to deal with is the argument that persons in the position of Mr Martino and China First may engage in contempt if they interfere with court-appointed liquidators' control of an insolvent company's property without first obtaining the leave of the Court.

The applicants contend that there is substantial authority to the effect that that is so, and cite *Re Landmark Corporation Ltd (in liq)* [1968] 1 NSWR 705 at 706, *Krextile Holdings Pty Ltd v Widows* [1974] VR 689 at 696, *South Australian Asset Management Corporation v Sheahan* (1995) 17 ACSR 569 at 576 and *ASIC v Landy DFK Securities Ltd* (2002) 123 FCR 548 at [24] to [28].

The nature of the proposition appears best in the last-mentioned citation, and I quote it below:

> [24] In *Owen v Homan* (1853) 4 H of L Cases 995 ("*Owen v Homan*") at 1032 the Lord Chancellor observed that where a court appoints a receiver to take possession of property the court is taking possession of the property "by its officer". In *Commissioner for Corporate Affairs v Harvey* [1980] VicRp 64; [1980] VR 669 at 695-696 Marks J explained the role of a liquidator appointed by the court in a compulsory winding up as a representative of the court whose decisions are made under the authority of the court. A similar position has been stated to exist in respect of a trustee in bankruptcy appointed by the court: see *Ex parte James; re Condon* (1874) LR 9 Ch App 609 at 614.
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> [25] In *Re Henry Pound, Son, & Hutchins* (1889) 42 Ch. D 402 ("*Henry Pound*") at 420, Cotton L.J. observed that where a court appoints receivers or liquidators as officers of the court and they are in possession of property in that capacity:
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> > "...a person having a right to a property which is in the possession of an officer of the Court, cannot, if he could otherwise take possession, take possession without leave of the Court so as to dispossess the officer of the Court who is in possession."
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> [26] Cotton L.J. explained at 420 that interference with the possession of the court appointed officer would be a contempt of court unless prior leave is sought from the court to exercise rights which a third party has in respect of the property. At 422 Fry LJ stated:
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> > "Now, where property is in possession of an officer of the Court, and there are legal or equitable rights in that property not vested in the parties to the action or the persons who are before the Court, which legal or equitable rights are not the subject of the administration then going on, then the Court requires that the person who

> claims to enforce those rights shall apply for leave to enforce them. The right may be a right to take possession, or a right to bring an action, or a right to do various other things; but the Court requires an application to be made to it."

[27] In *Krextile Holdings Pty Ltd v Widdows; Re Brush Fabrics Pty Ltd* [1974] VicRp 83; [1974] VR 689 at 696. Gillard J stated:

> "Pursuant to s. 233, the liquidator after the order for winding up, is entitled to custody or control of the company's property, and it would be a contempt of court for anyone to attempt to interfere with his possession of the company's property: see *Re Henry Pound, Son & Hutchins* (1889), 42 Ch. D. 402, at pp. 420-2; *Re Northern Garage, Ltd.,* [1946] 1 All E.R. 566, at p. 569."

[28] Of course, where the Court appointed liquidator or receiver does not dispute the right to possession of a third party, such as a secured creditor, the third party may take possession of the property without seeking leave of the Court: see *Re Landmark Corporation Ltd (In Liq) and the Companies Act* [1968] 1 NSWLR 705 at 706 and *SA Asset Management Corp v Sheahan* [1995] SASC 5182; (1995) 17 ACSR 569 at 576. The present case, however, is one in which Lifetime, although claiming to be entitled to possession of the property, is aware that that claimed entitlement is disputed by the applicants.

I note also that in *Ford, Austin and Ramsay's Principles of Corporations Law*, paragraph 25.220, the learned authors state:

> If in a winding up ordered by the court the liquidator is unwilling to hand over the security, the receiver may, in order to avoid being in contempt of court (*Re Landmark Corp Ltd (in liq)* [1968] 1 NSWR 705 ; (1968) 88 WN (Pt 1) (NSW) 195), have to seek leave of the court to take possession of the assets out of the control of the liquidator: *SA Asset Management Corp v Sheahan* (1995) 65 SASR 59; 17 ACSR 569; 13 ACLC 1138.

I note further that the authority of *Re Landmark Corporation* is referred to in *McPherson's Law of Company Liquidation* at paragraph 7.1810.

The authority certainly seems to support the propositions advanced by the applicants. I hasten to add that the evidence reveals that China First, at least, must have been under no illusion but that the general purpose liquidators challenged the validity of the security upon which it sought to rely.

For their part, China First and Mr Martino advanced the submission, in effect, that ss 471B and 471C of the *Corporations Act* together entirely regulate the circumstances in which a secured creditor might be obliged to seek leave. And, because those sections do not oblige a secured creditor to seek the leave of the Court to enforce its security, the propositions advanced in the authorities to which I have referred are erroneous. China First and Mr Martino contend that the decision of Street J in *Re Landmark Corporation* had been superseded by the introduction of s 471C under the *Corporate Law Reform Act* 1992 (Cth), which implemented the recommendations of the Harmer Report, and that the other cases relied upon make no reference to section 471C and simply cite the earlier authority.

They also place reliance on the Queensland Court of Appeal decision in *MSI (Holdings) Pty Ltd (in liq) v Mainstreet International Group Limited* [2013] 2 Qd R 253 at [17] to [27]. Of course, in that authority, the security on which a secured creditor was acting was not challenged by the liquidators. It seems to me that *MSI*

(Holdings) Pty Ltd (in liq) v Mainstreet International Group Limited has nothing whatsoever to do with the present circumstances.

For their part, the applicants contend that s 471C does not affect or modify the requirement for leave to interfere with the position or control of liquidators in case of disputed appointments. I completely agree. Sections 471B and 471C are dealing with valid securities. They simply do not touch upon the question whether the propositions advanced in the authorities to which I have referred is still good.

Indeed, the notion that the operation of the statute and the case law concerning the ability of a secured creditor to act upon its securities, notwithstanding the stay that the law would otherwise impose, may have escaped the notice of Street J is simply not arguable. At the time Street J decided *Re Landmark Corporation*, the statutory equivalent of the combined effect of the present section 471B and C was to be found in s 263 of the *Companies Act* 1961 and also in the combined operation of s 291(2) of that Act read with s 60 of the *Bankruptcy Act* 1924. Those sections provided as follows:

> *Companies Act* 1961 s 263
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> (1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of a creditor's voluntary winding up shall be void.
>
> (2) After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.
>
> (3) The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer forthwith or within such time as the Court directs to the liquidator any money, property or books and papers in his hands to which the company is *prima facie* entitled.
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> *Companies Act* 1961 s 291
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> (2) Subject to section two hundred and ninety-two, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force the time being under the law of the Commonwealth relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.
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> *Bankruptcy Act* 1924 s 60
>
> (1) Upon sequestration the property of the bankrupt shall vest in the official receiver named in the order, and shall be divisible among the creditors of the bankrupt in accordance with the provisions of this Act.
>
> (2) After sequestration, except as directed by this Act, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, or shall commence or take any fresh step in any action or other legal proceeding, unless with, the leave of the Court and on such terms as the Court imposes.

> (3) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security.

Counsel on behalf of China First and Mr Martino contended that s 291(2) was not to be read in that way, as it dealt with a different subject. I disagree. The wording operates in the way contended for by the applicants, and I note, in this regard, that a similar view seems to have been taken by the majority in *Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd* [2015] WASCA 95 at [208] and [209] (footnotes omitted):

> [208] Similarly, whilst s 471A of the Act provides for the suspension of powers of the officers of the company during a winding up, and s 471B, in effect, suspends proceedings or an enforcement process against the company or in relation to its property whilst the company is being wound up in insolvency, s 471C of the Act provides:
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> > Nothing in section 471A or 471B affects a secured creditor's right to realise or otherwise deal with the security.
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> 209 The predecessors of s 471C included s 291(2) of the *Companies Act 1961* (WA). In *Re Asiatic Electric Co Pty Ltd (in liq)*, Street J observed in relation to the *Companies Act 1961*:
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> > The secured creditor has property rights, in the form of his security, that exist outside and above the winding up. The fact of his security and its property content, unless challengeable on some particular ground available in the winding up, is unaffected by the making of a winding up order. The secured creditor has his property rights under his security.

Indeed, it was not just the statutory regime that operated in that way and with which Street J must have been familiar. The notion that a secured creditor long stood outside the statutory insolvency regime had been in place at the least since *In re David Lloyd and Co* (1877) 6 Ch D 339 at 344. When one construes the observations by Street J in *Re Landmark Corporation* against that background, one appreciates that the rationale for the proposition which he advanced still exists.

It seems to me to be plain beyond argument that, in the circumstances which faced Mr Martino and China First, the appropriate course, if they wanted to embark upon the course they in fact embarked upon, was to approach the Court seeking leave. Of course, the present circumstance is whether there is a serious question that their conduct constituted contempt. I do not make the finding that it did constitute contempt because that course has not been urged upon me. Certainly, I find that there is a serious question to be tried that their conduct should be so regarded.

Two other propositions, each seeking to support the notion that there was a serious question to be tried concerning the validity of Mr Martino's appointment, have been advanced by the applicants, which I should touch upon.

A priority deed was entered into shortly before the appointment on 18 January 2016 of the present general purpose liquidators as administrators of Queensland Nickel. The priority deed was entered into between the four of them as natural persons and the following companies: Waratah Coal Pty Ltd, China First, QNI Metals Pty Ltd, QNI Resources Pty Ltd and Queensland Nickel. Amongst other things, the priority

deed secured for the persons who became appointed as administrators of Queensland Nickel a degree of priority.

Amongst other things, there were two obligations which would, if the priority deed presently continues in force, have constrained China First against taking the steps that it in fact took. The first was clause 3.1, which, if I ignore the definitions contained within the deed, obliged China First not to enforce or attempt to enforce or exercise or attempt to exercise any power under its security, including the appointment of a controller, without the prior written consent of the natural persons who are presently the general purpose liquidators. The evidence reveals that China First did not have their prior written consent. There is also clause 5.2, which, in the context, operated as a statement that China First was not entitled to make a claim or exercise a right, power or remedy against Queensland Nickel. On its face, those terms, if the deed is still in force, would amount to at least a serious question to be tried that China First was obliged not to do that which it did.

China First's answer is that it has terminated the contract constituted by the priority deed consequent upon a breach of either an essential or intermediate term. Certainly, China First has purported to terminate the deed. That has not been accepted by those who are now the general purpose liquidators. Whether there is anything in this argument turns on whether some part of the deed should be construed as a promise by the general purpose liquidators not subsequent to the entering into of the deed to take any step to seek to have the security declared voidable. Of course, the general purpose liquidators have commenced a proceeding in which they seek to do just that. They also seek to contend that China First's security is void as against the liquidators by virtue of s 588FJ(2).

It does not assist, I think, to consider this argument in any detail. It does not seem to me that I can form the view that China First's contention is so plainly right as to defuse completely, or at least to the extent necessary to remove it from consideration as a sufficient basis for injunction, the argument that the present applicants rely upon.

That brings me to the third contender for the serious question to be tried, and that is the contention that, pursuant to s 588FJ, the China First charge is void against the general purpose liquidators. Again, the operation of that section, and whether China First can establish either that one of the subparagraphs of s 588FJ(2) or applies or the company was solvent at the relevant time, seem to me to be matters that, obviously, need to be dealt with at a trial. I note the applicants seek to have that occur pursuant to the litigation which I referred to as the voidable transaction litigation.

On any of the three grounds I have mentioned, it seems to me that there is a strong case as to the existence of a serious question to be tried.

Then, the question arises as to the balance of convenience. The argument advanced by Mr Martino and China First is that they accept that a question for me is whether the liquidators will suffer irreparable harm by the threatened conduct of China First and Mr Martino or whether damages are an adequate remedy. They contend that I should form the view that damages are an adequate remedy. The applicants contend

the contrary.

I should mention that no one contests the notion that it is relevant, in assessing the proposition as to whether damages might be an adequate remedy, whether the person against whom damages might be recoverable would be in a financial position to pay them. There is no evidence before me as to whether Mr Martino and China First should be so regarded.

The notion that damages might be an adequate remedy, in a context where Mr Martino has already purported to interfere with the liquidation pursuant to which Queensland Nickel seeks to recover $105 million and threatens to be capable and legally entitled to do so in respect of any other asset apparently owned by Queensland Nickel or any other enforcement litigation that it might be proceeding with, seems to me to be ridiculous.

Queensland Nickel is being wound up in insolvency. The general purpose liquidators are officers of the Court embarking upon a number of processes by which they seek to recover the assets of Queensland Nickel. The evidence before me reveals that, apart from the claim against Mineralogy, there are claims against other related parties other than Mineralogy in amounts totalling $91 million. There are numerous other proceedings already on foot.

I accept the submission advanced by Queensland Nickel and the general purpose liquidators that, absent the interlocutory injunction, the risk of prejudice to the orderly conduct of liquidation and the efficient administration of justice is very real. It seems to me that damages are not an adequate remedy. There is a public interest in officers of the Court being permitted to perform their duty without interference from a person purporting to act under a charge the validity of which is and has been, before they purported to act, the subject of serious dispute. If any action is to be taken by such a person, then they should act in the way that authority has long provided for.

The result is that I will grant the application to extend the interlocutory injunction until trial or other earlier order. I will hear the parties on the question of costs.

...

HIS HONOUR: The course of events that has led up to this hearing and the order I made in relation to the further extension of the interlocutory injunction was such that the hearing today could easily have been avoided had the respondents Mr Martino and China First not determined to proceed to resist the extension of the interlocutory injunction by advancing arguments that I have formed the view should never have been run.

Costs on interlocutory injunctions are often reserved because the Court often can make only a tentative assessment of the merits of the arguments that were sought to

be advanced in the claim for final relief. Costs were reserved when I made the order that the interlocutory injunction extend until 25 May.

The question today was whether it should be further extended. In my view, properly advised, the respondents should not have advanced the arguments that they did advance today. It seems to me that that falls within one of the grounds in Sheppard J's well-known decision of *Colgate-Palmolive*, namely proceeding in a high-handed way or proceeding by advancing arguments that should never have been advanced. It seems to me that the present circumstances warrant an order granting costs on an indemnity basis.

I make an order in terms of the draft provided to me, signed by me and placed with the papers.

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