SUPREME COURT OF QUEENSLAND

CITATION:	*China First Pty Ltd & Anor v Mount Isa Mines Ltd & Ors* [2018] QSC 163
PARTIES:	**CHINA FIRST PTY LTD** (first applicant) and **WARATAH COAL PTY LTD** (second applicant) **v** **MOUNT ISA MINES LTD** (first respondent) and **QUEENSLAND NICKEL SALES PTY LTD** (second respondent) and **QNI RESOURCES PTY LTD** (third respondent) and **QNI METALS PTY LTD** (fourth respondent)
FILE NO/S:	BS No 4847 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 June 2018 (*delivered ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	14 June 2018
JUDGE:	Brown J
ORDER:	**The order of the Court is that:** **1. The application is dismissed.** **2. The applicants pay the costs of the application of the**

first respondent.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – where the applicants apply to set aside final orders in a proceeding between the first respondent and the second to fourth respondents – where the applicants seek orders that they be joined as parties to that proceeding – whether the final orders directly affected the rights or liabilities of the applicants – whether the applicants are necessary parties – whether the final orders should be set aside

ASIC v Lanepoint Enterprises Pty Ltd (2011) 244 CLR 1
Aglionby v Cohen [1955] 1 QB 558
Homestyle Pty Ltd v City of Belmont [1999] WASCA 59
IAI Australia II Pty Ltd v Connemara Holdings [2011] WASC 340
John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1
Merit Protection Commissioner v Nonnenmacher (1999) 86 FCR 112
News Limited v Australian Rugby Football League Limited (1996) 64 FCR 410
Pegang Mining Co Ltd v Choong Sam [1969] 2 MLJ 52

COUNSEL: E Robinson for the applicants
R N Traves QC with S J Webster for the first respondent
J O'Regan for the second to fourth respondents

SOLICITORS: Robinson Nielsen for the applicants
Allens for the first respondent
Alexander Law for the second to fourth respondents

[1] On 20 November 2017, Justice Atkinson made a declaration and orders which the applicants, China First Pty Ltd ABN 69 135 588 411 (**China First**) and Waratah Coal Pty Ltd ABN 94 114 165 669 (**Waratah Coal**), now, by this application, seek to set aside. Those orders included:

(1) That the applicant may lawfully cause the equipment set out in Schedule 1 to the application to be dismantled, removed from its current location and delivered to the first respondent's premises at 1 Greenvale Street, Yabulu, Queensland, 4818 (**the Premises**).

(2) That the respondents pay the applicant damages of $270,215.00

(3) That provided the applicant gives the first respondent three clear days' notice in writing of the weekday date or dates on which the equipment will be delivered to the Premises, the first respondent must accept delivery of the equipment, whether dismantled or not, at the Premises immediately on the expiry of the notice period, between the hours of 8.00am and 5.00pm.

[2] In proceedings 7515 of 2017, in which her Honour's orders were made, the second, third and fourth respondents to this application were the respondents to the application brought by Mount Isa Mines Limited ACN 009 661 447 (**MIM**), which is the first respondent in these proceedings. The second, third and fourth respondents support the present application. The applicants in the present case were not parties to proceedings 7515 of 2017. They claim they were necessary parties and that the consequence of them not having been joined by the first respondent is that the orders made by her Honour, which are the subject of their application, should be set aside.

[3] The outcome of this application is said to potentially affect an application for appeal from Justice Atkinson's orders, which has been set down for hearing on 3 August 2018. I have therefore expedited the delivery of this decision. I will set out the background leading to her Honour's judgment briefly.

[4] MIM has a long-term lease of Wharf Number 2 at the Port of Queensland in Townsville, which expires in 2024. In 1994, MIM granted a licence to Queensland Nickel Pty Ltd (**QNI**), to use the berth for the loading and unloading of nickel, ore and refined nickel from vessels. Under the licence agreement, QNI was granted a licence for non-exclusive access to the berth. QNI had an obligation to pay all harbour dues to the applicant. The refinery was managed by QNI. In 2016, voluntary administrators were appointed to that company and on 22 April 2016, it was placed into liquidation. On 3 March 2016, QNI was replaced as the manager, of the joint venture which owned the refinery, by Queensland Nickel Sales.

[5] The berth was used to enable unrefined ore to be shipped to it before being transported to the refinery to be processed. According to the applicants, the berth is necessary in order to operate the refinery. It contends that no alternative wharf in Townsville could be used for the purpose of receiving the ore in question. It also contends that there is no alternative port that would be available to it. There is evidence from Mr Wolfe, deposing as to the difficulties of obtaining another berth and about the lack of an alternative port. The evidence does not demonstrate that the refinery could not operate at all if the equipment is removed, but does demonstrate the impediments that will arise if the berth is not available with the equipment to the refinery.

[6] The equipment on the wharf for use in unloading and moving the ore from the ships is owned by one or more of the QNI companies. That equipment

includes a crane, ore unloading equipment and conveyers used to transport ore to rail wagons for delivery to the refinery.

[7] It is anticipated that large rail-mounted hoppers and wharf conveyor system may be damaged if removed and it is contended that the equipment would therefore have significantly less value. Mr Wolfe gives evidence in a second affidavit that the rail-mounted hoppers are welded, rather than bolted, and would, in his view, be required to be cut into pieces in order to be transported.

[8] MIM does not accept that the equipment would be of no value or could not be reassembled if removed, and submits that any possibility of damage to the equipment and a reduction in the value of the equipment is only an indirect consequence of the carrying out of the order of Justice Atkinson.

[9] The licence agreement was terminated by MIM following the failure to pay harbour dues in late 2015.[1] A notice to remedy breach was issued by MIM on 27 January 2016, relating to the non-payment of $1.2 million in harbour dues. That breach was not remedied and on 14 March 2016, MIM gave notice of the termination of the licence agreement to QNI.

[10] Under the licence agreement QNI had promised it would, at the determination of the licence agreement, peaceably and quietly deliver up to MIM the licensed area. QNI was obliged, on termination of the licensed agreement, to "forthwith" remove all movable improvements. That did not occur.

[11] At the hearing before Justice Atkinson, neither QNI, nor its external controllers, contested the validity of the termination of the licence agreement. The general purpose liquidators stated that they were content to abide by the decision of the Court. The applicants and the second to the fourth respondents do not accept that the termination was necessarily lawful. While it was a finding by her Honour, it was not the subject of an order.

[12] There was an issue raised by MIM as to whether the applicants were seeking to examine the effect of a finding, rather than the orders made by her Honour in this application. The applicants clarified that not to be the case, but contended it is relevant to the "practical reality", to which I will return.

[13] China First has a registered charge over all of the property of QNI, QNI Resources (**QNR**) and QNI Metals (**QNM**) (QNI Resources and QNI Metals are the joint venturers who own the refinery). The charges are to secure the payment of monies said to be owed to China First by those companies from time to time. That includes a liability to pay some $135 million pursuant to a share subscription agreement, of which $67.5 million fell due in December 2017 and $67.5 million will fall due at the end of this year, namely, 2018.

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[1] Affidavit of Zammit at [4] to [9].

[14] Waratah Coal has a registered charge over all of the property of QNI, QNM and QNR, to secure monies owing from time to time. There are unresolved challenges in other proceedings to the charges in favour of China First and Waratah Coal. For the purposes of this application, however, I assume that the charges are valid and that there is a fixed charge in relation to the equipment and that any chose in action under the licence agreement may fall within the scope of either charge.

[15] China First and Waratah Coal contend that they should have been joined to the proceedings 7515 of 2017, in which the orders of Justice Atkinson were made, because they were directly affected by the proposed orders. MIM contends that the orders made by Justice Atkinson did not directly affect the rights or liabilities of the applicants.

[16] Where the question arises as to whether a party was a necessary party after final orders have been made in a proceedings, the enquiry must be directed to the orders actually made. It is the effect of the orders upon the rights and liabilities of that known party that must be determined.

[17] There was no dispute as to the test to be applied in determining whether parties' rights are directly affected by orders, such that they should be joined insofar as both parties referred to the High Court decision of *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*.[2]

[18] There is, however, a point of contention between the parties as to what is required to be shown to establish that a party's rights or liabilities may be directly affected by the orders in order to characterise the effects as being sufficient to regard the non-party's rights and liabilities as being directly affected.

[19] In particular, the applicants submit that the reference to direct effect is in some ways a misnomer and that the satisfaction of the test does not require a direct legal effect if, as in this case, it significantly reduces the value of the secured property.

[20] There was also a dispute between the parties as to whether the Court should look to whether there has actually been a denial of natural justice, even if the Court accepts that a party's rights are directly affected, before setting the orders aside.

[21] The applicants contend that if they establish that they should have been joined, then they were entitled, as of right, to have the orders set aside and it is not a matter for this Court to examine the merits of any argument that they may

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[2] (2010) 241 CLR 1.

raise, or whether there has, in fact, been a denial of natural justice by their non-joinder.

[22] The High Court in *John Alexander's Clubs Pty Ltd v White City Tennis Clubs Ltd* accepted the submission that where a court is invited to make or proposes to make orders directly affecting the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined. In particular, reference was made to the passage of the Full Federal Court in *News Limited v Australian Rugby Football League Limited*, that:[3]

> "Where the orders sought establish or recognise a proprietary or security interest in land, chattels or a monetary fund, all persons who have or claim an interest in the subject matter are necessary parties. This is because an order in favour of the claimant will, to a corresponding extent, be detrimental to all others who have or claim an interest."

[23] The judgment of Lord Diplock, who delivered the opinion of the Judicial Committee of the Privy Council in *Pegang Mining Co Ltd v Choong Sam*,[4] was referred to by the Full Federal Court in *News Limited* at 524 and is regarded as the principal authority in establishing the direct effect test in relation to the question of determining whether a party was a necessary party and should have been joined.

[24] The applicants particularly highlight that in formulating the test, Lord Diplock stated that the dichotomy between legal and commercial interests was not a helpful one. On that basis, the applicant submits that a commercial interest alone may be sufficiently affected to render a non-party affected and therefore a necessary party. That does not however necessarily follow.

[25] In that regard MIM submits that there is no case where a commercial interest alone has been held to be sufficient. That is consistent with the High Court statement in *ASIC v Lanepoint Enterprises Pty Ltd* at [49].[5]

[26] At page 525 of *News Limited,* the Full Federal Court went on to state:

> "In our opinion, the question should be decided according to the test proposed by Lord Diplock. The test involves matters of degree, and ultimately judgment, having regard to the practical realities of the case, and the nature and value of the rights and liabilities of the third party which might be directly affected. The requirement that a third party's rights against, or liability to, any party to the

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[3] (1996) 64 FCR 410 at 524-525.

[4] [1969] 2 MLJ 52.

[5] (2011) 244 CLR 1.

> proceedings be directly affected is an important qualification that recognises that many orders of a court are likely to affect other people to a greater or lesser extent… The requirement of a direct effect on rights or liabilities differentiates the case where a person ought to be joined, from other cases where the effect of the order on non-parties can be characterised as only indirect or consequential."

[27] The applicants emphasise the reference by the Full Federal Court to the practical realities of the case and the nature and value of the rights and liabilities of the third party as matters to which the court has regard in determining the question of whether a party is a necessary party. They contend that one must have regard to the materiality of the effect and that one is not just looking at a direct effect per se.

[28] The proper test has been set out by the High Court in *John Alexander*, namely, whether the non-party's rights and liabilities are directly affected by the orders sought or made, where the party wasn't joined. The practical reality of the case and the nature and value of the rights of a non-party which may be directly affected are matters to which the Court must have regard in determining whether those rights are directly affected but those matters are not a substitute test. That is supported by the reference at the end of the paragraph in *News Limited* that:

> "The requirement of a direct effect on rights or liabilities differentiates the case where a person ought to be joined, from other cases where the effect of the order on non-parties can be characterised as only indirect or consequential."

[29] In *News Limited* the Court found that the rights of players and coaches who were not joined to the proceedings were directly affected by the orders, as they were affected in relation to their right to payment and their right to choose their employer.

[30] China First and Waratah Coal contended that they were directly affected by Justice Atkinson's orders because:

(a) first, the equipment which was the subject of the orders was equipment in which the applicants have an interest as chargees and that equipment, if damaged upon removal, will significantly decrease in value and that immediately has a direct effect on the applicants because the applicants had a charge over the equipment; and,

(b) secondly, as China First and Waratah Coal have security over the entire refinery business, any operation of the business which may be conducted through receivers appointed by China First and Waratah Coal, or any proposed sale that may be carried out by them, would be significantly

affected by the removal of the equipment, and the removal of the equipment would directly affect the value of the charge;

(c) thirdly, the applicant has had no opportunity, as it should have, given its interest in relation to the equipment, to make submissions as to where the equipment should be delivered, which is addressed in paragraph 5 of the orders.

[31] The applicants contend that once the equipment is removed and the constructed structures dismantled, China First and Waratah Coal will no longer have security over a viable refinery business either to sell or operate themselves. It will effectively destroy the business and destroy the value of the applicants' security.

[32] This is because the unrefined nickel ore needs to be unloaded for use at the refinery and the evidence from Mr Wolfe is that he has been told that the port is operating at full capacity, so alternative berths are unlikely to be available. He further states that given there is a dispute between QNR and the Port of Townsville, that may mean that the Port is unlikely to be prepared to lease the respondents a berth. Further, Mr Wolfe addresses the difficulties of going to an alternative port, which would require expenditure of time and cost.

[33] The applicants also contend that the size of the indebtedness to them needs to be considered, as well as the significant effect on the value on the security in looking at the practical realities of the case, having regard to the nature and value of the rights of the applicants.

[34] MIM, however, contends that the declaration in paragraph 1 of her Honour's orders does not create or confer any new rights, nor declare any proprietary interest, nor compel a course of conduct which affects non-parties. It contends that while the declaration protects MIM from a subsequent claim brought by the QN companies for trespass, MIM could have disassembled, removed and returned the equipment without first seeking the declaration. The declaration does not of itself alter the extent of China First's or Waratah Coal's equitable interest in or rights over the equipment. MIM therefore contends that, to the extent that the order may have an effect on the value of the equipment, the effect is only an indirect or consequential effect.

[35] Further, MIM submits that the chargee's interests in the equipment and the value of its rights have always been affected by the fact that the equipment is on land which QNI was permitted to access under a licence for a fixed term only. Thus the dismantling of the equipment in 2018, rather than 2024, cannot be characterised as having a direct effect on the chargee's rights. The applicants point out that those rights under the licence agreement, however, were to continue for a considerably longer period.

[36] The applicants submit that order 5 of her Honour's orders which relate to equipment being delivered to the premises of QNS to QNS was a matter which China First and Waratah Coal should have had the opportunity to make submissions about, as to where the equipment should have been delivered. MIM submits that the fact that QNS is obliged to receive the equipment does not compel MIM to deliver the equipment to a particular location, such that, if the applicants wish to take possession of the equipment, there is nothing in the order which prevents them from doing so. I consider that is correct.

[37] Further, MIM contends that the focus on "practical realities" relating to the value of the refinery business and right to seek relief against forfeiture are consequential and indirect effects of a variety of circumstances on the value of the applicants' security, not a direct effect of the orders of Justice Atkinson on the applicants' rights. In particular to the extent that China First and Waratah Coal assert that they could seek relief from forfeiture, MIM submits that if they have standing to do so, they can still seek such relief.

[38] I was referred to a number of cases by both parties considering whether a non-party's rights were affected by orders made, such that they should have been joined. While that review was helpful, every case turns on its own facts and no case is on all fours with the present case.

[39] In the present case, the orders made affect the personal rights of the parties concerned and are not orders *in rem*. That was a matter particularly averted to by the High Court in *John Alexander*, at [133]. That is, however, not necessarily determinative of whether a party's rights and liabilities are directly affected by the orders made. Nor is it determinative that the applicants are not parties to the licence agreement.

[40] I accept that in carrying out the removal of the equipment as permitted by the order of Justice Atkinson, there is a real possibility that the equipment may be damaged and the value of the equipment may be diminished in the process of the dismantling. I further accept that the ability of the receivers appointed to operate or sell the business may well be diminished by the removal of the equipment, insofar as they would have to find an alternative way to ship the nickel ore to the refinery and that there are difficulties that would have to be overcome in relation to that, including significant time and cost. That could then have a flow-on effect to the value of the security to the applicants.

[41] However, while they may be consequences of MIM exercising the rights under the orders, they are indirect and consequential and I do not regard the orders as directly affecting the rights and liabilities of Waratah Coal and China First.

[42] The order that the equipment may be lawfully removed in order for MIM to remedy the trespass to its property is a protective one. That is apparent from

cases such as *Aglionby v Cohen*,[6] MIM had a right of removal without the order being made. The order serves a protective purpose. The declaration did not create any new right, nor declare any proprietary interest, nor compel any course of conduct. Further, the right to have equipment on the wharf was always a limited one, albeit expected to be of a longer duration. The equipment was always liable to be removed upon expiry of the licence.

[43] The effect on the value of the security under the charge of Waratah Coal or China First by the removal of the equipment may be a consequence of the giving effect to the orders of Justice Atkinson, but again, that can only be regarded as an indirect effect or a consequential effect. The rights and liabilities of the applicants are not directly affected by the orders.

[44] If relief from forfeiture is available to the applicants in relation to the licence agreement, the right to seek such relief remains available and, again, is unaffected by the orders of Justice Atkinson. It is, as was submitted by the first respondent, a remedy and not a defence to the orders that were sought before Justice Atkinson. The seeking of relief from forfeiture is consequential upon the termination of the contract.

[45] To the extent that the applicants' suggest that they may challenge the termination by the first respondent of the licence agreement, the question of termination was only a finding made by her Honour and was not the subject of an order per se. It is unclear to me how the applicants could challenge the termination of the contract, not being parties to that contract, however, I do not need to consider that further.

[46] Further, any effect of delay by the applicants seeking to dispute the termination in separate proceedings, vis-à-vis the equipment and the operation of the refinery business, are not matters which can be said to be directly affected by the orders made.

[47] The rights of the applicants to exercise any of their rights under the charge in relation to the equipment are not affected by the orders of Justice Atkinson. The order provides for the removal of the equipment, not for the taking of possession of the equipment by MIM. The order provides for a point of delivery of the equipment and the party to whom it can be delivered, but it does not determine any entitlement of that party in relation to that equipment as against the applicants. The applicants have not presently sought to exercise any of their proprietary rights in relation to the equipment. The ability of China First and Waratah Coal to claim possession of the equipment or exercise their rights over the equipment is not diminished, even though the commercial value of the security may be reduced as a consequence of the work done to effect the removal of the equipment.

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[6] [1955] 1 QB 558 at 562

[48] The effect of the removal of the equipment on the operation of the refinery business may again affect the commercial value of the security, but that is an indirect and consequential effect of the orders. A loss of commercial opportunity without more is insufficient to satisfy the direct effect test. The potential effect on the business operations or potential sale is not, on the facts of this case, such that one can conclude that the orders made directly affect the rights and liabilities of the applicants.

[49] The applicants particularly relied on the case of *Homestyle Pty Ltd v City of Belmont*[7] as supporting the fact that the effect on the value of the security in this case is sufficient for the Court to find that the orders have a direct effect on the applicants' rights and liabilities which arise as a result of their charge.

[50] While the non-party, Homestyle, was found to be a party who was directly affected by the orders made in those proceedings when it had only provided a tender for a contract, the case must be seen in the context of the decision. The contract was to be awarded to another party. The loss of the tender was a loss of opportunity for Homestyle in terms of being able to gain the contract; however, that was in the context of Homestyle having the benefit of a contractual scheme involving public authorities and where it could challenge any contract and contend it was void or voidable because the principal had acted unfairly in the tendering process. In that regard there was an acceptance that Homestyle had a right to fair dealing in the tender process.[8]

[51] The applicants' counsel submitted that the case was an example of where the effect was indirect, given it was a loss of opportunity to gain a tender, and it was enough that the impact was that the non-party only would have a one-in-four chance of obtaining the contract made, for the court to conclude it satisfied the direct effect test. It is true that the party, Homestyle, could, at best, only have had the opportunity to win the contract. However, the right of the non-party to a fair tendering process was directly affected by the declarations that had been made and Homestyle had lost an opportunity if the tender process was not carried out as required. The context of the contractual framework in relation to the tender and the reference to the loss of opportunity were clearly relevant to the determination of the court that the rights of the non-party were directly affected by the declaration sought.

[52] The case of *Merit Protection Commissioner v Nonnenmacher*[9] is of little assistance, as in that case the party was a necessary party because she would lose the benefit of the promotion if the decision was set aside.

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[7] [1999] WASCA 59.

[8] At [21] and [35].

[9] (1999) 86 FCR 112.

[53] The case of *IAI Australia II Pty Ltd v Connemara Holdings*,[10] is referred to in the applicants' submissions, was a case where the court's conclusion relied on the reasoning of Justice Beech at [9]:

> "Where orders sought by a plaintiff establish or recognise a proprietary interest in land, chattels or a monetary fund, all persons who have or claim an interest in the subject matter are necessary parties. That is because an order in favour of the claimant will, to a corresponding extent, be detrimental to others who claim an interest…"

His Honour considered by analogy that reasoning applied in that case.

[54] The applicant submits that its ability to pursue relief from forfeiture could raise the possibility of inconsistent findings being made by the Court. However, there is no potential inconsistency that would arise in terms of the applicant seeking relief from forfeiture and her Honour's orders. The grant of relief from forfeiture may permit the applicants to restrain the removal of the equipment, but that would not be inconsistent with the orders that were originally made by Justice Atkinson. Similarly, the relief from forfeiture is consequential upon the termination.

[55] That is not to suggest that the fact that a non-party can bring separate proceedings to enforce a right is sufficient to overcome their non-joinder if they are a party who should have been joined, nor that they have to establish that they could have advanced arguments that could have changed the result. However, I do not have to consider that matter further, given that I have reached the view that the applicants are not necessary parties, as I am not satisfied that their rights and liabilities are directly affected by the orders made.

[56] I do not find that the practical realities of the case, having regard to the nature and values of the applicants' rights, are such that the applicants are directly affected by the orders made by Atkinson J. Any effect on the nature and value of those rights or liabilities are indirect and a consequence of those orders.

[57] Given the conclusion that I have reached, that China First and Waratah Coal's rights and liabilities are not directly affected by the orders made by Justice Atkinson, which are the subject of this application, it is unnecessary for me to consider whether the Court has a discretion or should make an enquiry as to whether there has been a denial of natural justice before setting aside any order.

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[10] [2011] WASC 340.

[58] Further, it is not necessary for me to consider whether the Court should have regard to the merits of any argument which the applicants may have raised in the context of the proceedings before Justice Atkinson.

[59] I therefore dismiss the application.

[60] Upon hearing further submissions from the parties, I order that costs follow the event and that the applicants pay the costs of the application of the first respondent, noting that the second to fourth respondents do not seek costs.