Federal Court of Australia

Mensink v Registrar of the Federal Court of Australia [2022] FCAFC 102

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| Appeal from: | *Registrar of the Federal Court of Australia v Mensink* [2021] FCA 1152 |
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| File number(s): | QUD 53 of 2021  QUD 361 of 2021 |
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| Judgment of: | **BROMWICH, LEE AND THAWLEY JJ** |
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| Date of judgment: | 9 June 2022 |
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| Catchwords: | **CONTEMPT OF COURT** – where Registrar appointed by primary judge to continue conduct of contempt charges originally brought by special purpose liquidator after settlement of principle claim – whether a denial of procedural fairness because of an asserted lack of opportunity to be heard – whether there was power to appoint the Registrar to continue the proceeding – whether rr 42.11 and 42.16 of the *Federal Court Rules 2011* (Cth) set out an exhaustive list of procedures for contempt proceedings – whether the Registrar was competent to continue the proceeding – whether settlement merged contempt proceeding and could not be continued– where suppression orders made in related matter with no fixed end date |
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| Legislation: | *Corporations Act 2011* (Cth) ss 596A, 596B, 596D and 597(9)  *Federal Court of Australia Act 1976* (Cth) ss 23, 24(1C), 51(1), 59(1)  *Federal Court Rules 2011* (Cth) rr 1.04, 1.32, 1.34, 1.35, 1.37, 26.12, 42.11, 42.16 |
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| Cases cited: | *Clayton v Bant* [2020] HCA 44; 95 ALJR 34  *Jackson v Goldsmith* (1950) 81 CLR 446 at 466  *Kazal v Thunder Studios Inc (California)* [2017] FCAFC 111; 256 FCR 90  *Mensink v Parbery* [2018] FCAFC 101; 264 FCR 265  *NHB Enterprises Pty Ltd v Corry (No 8)* [2022] NSWSC 97  *Parbery (Liquidator), in the matter of Queensland Nickel Pty Ltd (in liquidation) (No 2)* [2022] FCA 101  *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; 147 CLR 589  *Ramsay v Pigram* (1968) 118 CLR 271  *Registrar of the Federal Court of Australia v Mensink* [2021] FCA 1152  *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1  *Tomlinson v Ramsay Food Processing Pty Ltd* [2015] HCA 28; 256 CLR 501  *Witham v Holloway* (1995) 183 CLR 525 at 530–534  *Zavarco PLC v Nasir* [2021] EWCA Civ 1217; [2022] Ch 105 |
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| Date of last submissions: | 14 May 2022 |
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| Date of hearing: | 11 – 12 May 2022 |
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| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

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|  | | QUD 53 of 2021  QUD 361 of 2021 |
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| BETWEEN: | CLIVE THEODORE MENSINK  Appellant | |
| AND: | REGISTRAR OF THE FEDERAL COURT OF AUSTRALIA  Respondent | |

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| order made by: | BROMWICH, LEE AND THAWLEY JJ |
| DATE OF ORDER: | 9 june 2022 |

THE COURT ORDERS THAT:

1. The application for an extension of time and leave to appeal in QUD 53 of 2021 be refused as to ground 1, and be granted as to ground 2.
2. The draft notice of appeal in QUD 53 of 2021 contained within the appeal book be treated as a notice of appeal as to ground 2.
3. The appeal in QUD 53 of 2021 be dismissed.
4. The appeal in QUD 361 of 2021 be dismissed.
5. The appellant pay the respondent’s costs of the application for an extension of time and leave to appeal, and the appeals, as assessed or agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. Clive Theodore Mensink brings two appeal proceedings against orders made by two judges of the Federal Court of Australia, concerning a contempt of court proceeding brought against him by special purpose liquidators (**SPL**s) of the company for which he was the sole director at the time it went into voluntary administration in January 2016, **Queensland Nickel** Pty Ltd. It is alleged that Mr Mensink committed two contempts of court by reason of his failure to comply with a summons to appear at an examination under the *Corporations Act 2011* (Cth) on two separate occasions in February and March 2017.
2. The first appeal proceeding (QUD 53 of 2021) concerns an order made on 5 August 2020 by Reeves J that the Registrar take over the contempt proceedings. This followed the settlement of a proceeding brought by the SPLs in the Queensland Supreme Court to which Mr Mensink was a party and the corresponding lack of intention on the part of the SPLs to take any further steps in the contempt proceeding. Mr Mensink contends that the deed of settlement had the collateral effect of bringing the contempt proceeding to an end and otherwise precluding that, or any other, contempt proceeding being maintained or brought against him. He requires an extension of time and leave to appeal from that order on either of the two grounds advanced. In case it could be argued that leave was not required, we deal with this appeal proceeding upon the alternative basis of there being no such requirement.
3. The second appeal proceeding (QUD 361 of 2021) concerns the dismissal, on 24 September 2021, of an amended interlocutory application for summary judgment. It was common ground that leave to appeal was not required by reason of s 24(1C)(b) of the *Federal Court of Australia Act 1976* (Cth) (***Act***), which dispenses with the need for leave to appeal from an interlocutory judgment of a single judge in original jurisdiction in a proceeding relating to contempt of court.

## Chronology of key events

1. On 18 January 2016 Queensland Nickel was placed into voluntary administration. The sole director at that time was Mr Mensink. On 22 April 2016, creditors resolved that Queensland Nickel be wound up. The voluntary administrators subsequently became general purpose liquidators.
2. On 18 May 2016, Messrs Parbery, Ayres and Owen were appointed by Dowsett J as special purpose liquidators (**SPL**s) on the application of the Commonwealth of Australia to investigate certain dealings or transactions of Queensland Nickel concerning the entitlements of former employees.
3. On about 6 June 2016, Mr Mensink left Australia. He has not returned in the six years since then.
4. On 28 July 2016, the SPLs filed an originating application in this Court under provisions of Part 9 of the *Corporations Act* dealing with examinations and the production of documents, specifically ss 596A, 596B, 596D and 597(9). That application (QUD 580 of 2016) sought orders summoning five individuals for examination and to produce documents, including Mr Mensink, as well as orders for summoning or otherwise producing documents by other individuals and entities. The summons for Mr Mensink was sought to be made returnable on 19 August 2016 at which time the documents were to be produced, and the summons was then to be adjourned to a date to be fixed for the examination to take place.
5. On 3 August 2016, as sought by the SPLs’ originating application, a summons was issued for the examination of Mr Mensink and for the production of documents by him, with a return date of 19 August 2016. On 15 August 2016, that summons was adjourned to 30 August 2016. On 15 December 2016, the summons was amended and the return date adjourned to 22 February 2017, with orders for substituted service also being made designed to bring the summons to the attention of Mr Mensink. Mr Mensink did not attend the examination on 22 February 2017.
6. On 27 February 2017, Dowsett J ordered Mr Mensink to appear before a Deputy Registrar on 27 March 2017 for the purpose of his examination. On 27 March 2017, Mr Mensink did not appear in accordance with the 27 February 2017 orders. Justice Dowsett made further orders that a warrant be issued for the arrest of Mr Mensink to bring him to court for the purposes of his examination.
7. On 28 March 2017, the SPLs filed an interlocutory application seeking that Mr Mensink be punished for contempt. On that day, Justice Dowsett signed a statement of charge for two charges of contempt of court, relating to Mr Mensink’s failure to attend for examination in accordance with the summons on 22 February 2017 and on 27 March 2017 (**contempt proceeding**), and made an order that a warrant issue for his arrest.
8. On 29 March 2017, the arrest warrants for the examination and for the contempt charges were issued.
9. On 28 June 2018, an appeal brought by Mr Mensink challenging the validity of the orders by which the two arrest warrants were issued was dismissed: *Mensink v Parbery* [2018] FCAFC 101; 264 FCR 265.
10. On 3 August 2019, the SPLs, Mr Mensink and others entered into a settlement deed principally addressed to resolving proceedings brought in the Supreme Court of Queensland by the SPLs. Mr Mensink was also a party to those proceedings. The settlement deed was approved by Justice Greenwood at a duty hearing on 5 August 2019 in matter QUD 473 of 2019, but as is addressed below, reasons were not published until 14 February 2022.
11. At the hearing of these appeal proceedings the argument advanced on behalf of Mr Mensink was that the settlement deed in terms, by its extended operation, settled the entirety of the proceedings brought by the SPLs without any further step needing to be taken in this Court. Accordingly, he contends that the deed of its own force settled and concluded the contempt proceeding brought against him by the SPLs. We return to that argument below.
12. On 11 September 2019 the summons addressed to Mr Mensink requiring him to attend for examination was discharged by a Registrar.
13. On 20 September 2019, eight notices of discontinuance were filed in QUD 580 of 2016 in relation to eight bills of costs, including three involving Mr Mensink. Each was dated 12 September 2019, signed by the solicitors for the SPLs and signed by Mr Sameh Iskander, in his capacity as the solicitor for Mr Mensink or for another examinee. Although not in the appeal books, reference was made to these notices of discontinuance in the course of legal argument on the second day of the appeal hearing. No other notice of discontinuance has been filed.
14. On 5 June 2020, Mr Mensink filed an interlocutory application in QUD 580 of 2016, seeking to have the orders made by Dowsett J on 27 February 2017 and the two warrants discharged but not addressing the underlying contempt proceeding. On 23 July 2020, a case management hearing took place before Reeves J, at which his Honour indicated that he would not deal with the issue concerning the contempt of court warrant until Mr Mensink’s approach to the underlying contempt proceeding itself was made clear.
15. On 5 August 2020, at a further case management hearing for the 5 June 2020 interlocutory application, the SPLs indicated that they would not be taking further steps in the contempt proceeding. After Reeves J referred to the need for there to be a contradictor in relation to the contempt proceeding, his Honour ordered that “The Registrar of the Federal Court of Australia take over the prosecution of the statement of charge of contempt dated 28 March 2017”. His Honour also made procedural orders directed to the contempt prosecution, including provision for written submissions to be made by Mr Mensink after his counsel requested that he be able to be heard in relation to that order. Appeal proceeding QUD 53 of 2021 seeks an extension of time and leave to an appeal from that order, with the Registrar of the Federal Court of Australia as respondent.
16. On 29 October 2020, Mr Mensink filed an amended interlocutory application seeking to have the contempt charge as prosecuted by the Registrar summarily dismissed upon the ground of there being no case to answer, and to have the two arrest warrants discharged. On 22 January 2021, Reeves J made orders for the hearing of the contempt charges and to hear the application to have the warrants discharged. On 22 February 2021, Mr Mensink filed an application for an extension of time in which to bring an appeal from those orders and a draft notice of appeal (QUD 52 of 2021). That appeal proceeding was discontinued by a notice dated 17 February 2022 being filed on 18 February 2022.
17. On 29 April 2021, Mr Mensink filed a further interlocutory application seeking orders to permanently enjoin the Registrar from continuing the contempt proceeding, and in the alternative, that the statement of charge be discontinued and the two warrants be discharged. On 10 June 2021, that application was replaced by an amended interlocutory application seeking summary judgment on the statement of charge for contempt upon the ground that the settlement deed had the effect of releasing or discharging the statement of charge and that judgment should therefore be given in his favour. He also sought the discharge of the two arrest warrants.
18. The amended interlocutory application filed on 10 June 2021 was heard by Rangiah J on 10 September 2021, and dismissed on 24 September 2021: *Registrar of the Federal Court of Australia v Mensink* [2021] FCA 1152. Appeal proceeding QUD 361 of 2021 is an appeal from that dismissal.

## The grounds or proposed grounds of appeal

1. Mr Mensink appeals, or seeks to appeal, from:
2. the order made by Reeves J on 5 August 2020, that “The Registrar of the Federal Court of Australia take over the prosecution of the statement of charge of contempt dated 28 March 2017”, pressing the following two grounds contained in a draft notice of appeal dated 1 March 2021 in appeal proceeding QUD 53 of 2021 (for which appeal an application for an extension of time was filed on 22 February 2021):

[1] The learned primary Judge erred in making the orders of 5 August 2020 **(Orders)** in that the Appellant was not provided any or any reasonable opportunity to present his case in respect of the Orders and the learned primary Judge did not provide him procedural fairness.

[2] The learned primary Judge proceeded on an incorrect principle because there is no power to order that a Registrar 'take over' a contempt proceeding and/or the circumstances in which a Registrar may conduct a proceeding for contempt are exhaustively provided for in rule 42.16 and the learned primary Judge did not proceed under that rule.

1. the judgment of Rangiah J dismissing his amended interlocutory application seeking summary judgment, relying upon the following grounds in appeal proceeding QUD 361 of 2021 filed on 22 October 2021:

[1] The learned primary Judge erred at [50] in holding that it was open to Reeves J to take a ‘hybrid’ of the procedures envisaged under rr42.11 and 42.16 of the *Federal Court Rules 2011* (Cth) to order the Registrar to ‘take over the prosecution of the statement of charge of contempt dated 28 March 2017’, as the *Federal Court Rules 2011* (Cth) confers no such power.

[2] Having correctly held that:

a. the contempt proceeding brought by the SPL was capable of being compromised by the parties to it (namely, the SPL and Mr Mensink) (at [58]); and

b. the Settlement Deed compromised the contempt proceeding brought by the SPL (at [57]),

the learned primary Judge erred in not holding that the necessary legal consequence was that the right of, or cause of action claimed by, the SPL, merged in the Settlement Deed and no longer had an independent existence and no other proceedings could thereafter be maintained or ‘taken over’ on the same, now spent, cause of action by the Registrar.

[3] The learned primary judge erred at [53](a) in finding that the appellant abandoned the argument that the Settlement Deed was a complete bar to the prosecution of the statement of charge and contempt proceeding.

[4] The learned primary Judge erred at [66] to [71] in finding that it was competent for the Registrar to ‘take over’ the contempt proceeding on the grounds that a ‘purpose’ remained in the prosecution of the proceeding, namely to vindicate the public interest.

1. The primary material that was initially before this Court on appeal in relation to the settlement approval in proceeding QUD 473 of 2019 was confined to the following:
2. In the appeal book Part C, orders made by Greenwood J as duty judge on 5 August 2019, with separate reasons, that:
   1. the settlement approval application be made in closed court;
   2. the supporting affidavit and submissions (**settlement approval documents**) be placed in a sealed envelope and not made available for inspection or be filed electronically; and
   3. the reasons for judgment not be published until the earlier of judgment or discontinuance of the proceeding in the Supreme Court of Queensland: *Parbery (Liquidator), in the matter of Queensland Nickel Pty Ltd (in liquidation)* [2019] FCA 1219.

Those orders had the practical and legal effect of suppressing, until earlier this year, any details of the settlement that had been reached and the approval of that settlement that had been sought and granted.

1. In the joint list and bundle of authorities, the judgment published on 14 February 2022 by Greenwood J containing the text of the orders made on 5 August 2019 approving the settlement and his Honours reasons: *Parbery (Liquidator), in the matter of Queensland Nickel Pty Ltd (in liquidation) (No 2)* [2022] FCA 101 (**settlement** **approval judgment**). The settlement approval judgment was delivered after judgment had been given in the Supreme Court of Queensland in the balance of the proceeding in that Court, and an appeal to the Queensland Court of Appeal had been dismissed.
2. The above sequence of events in relation to the settlement approval had the unfortunate result that neither the settlement approval judgment, nor the material upon which it was based, was before either Reeves J or Rangiah J. It may have been that parts of that material were appropriate candidates for a suppression order, but the course which was adopted had the result that consideration was not apparently given to the requirements of the *Act*, in particular, ss 37AE, 37AF, 37AG and 37AJ.
3. A submission was made on behalf of Mr Mensink that the correctness of the discretionary decision to order the Registrar to take over the contempt proceeding was that “the settlement deed could not be entered into without the sanction of a judge of this Court” and that “the knowledge that it was proposed to dispose of the contempt proceedings, along with all of the other proceedings, was a matter that was before Greenwood J when he determined whether to sanction the settlement”. It was further submitted that [38], [40] and [45] of his Honour’s reasons in the settlement approval judgment (apparently prepared over two years later) meant that “when his Honour is considering the settlement deed … he’s to be taken to be alive to the fact that it was dealing with the contempt proceedings”.
4. In light of these submissions, and having regard to Greenwood J having made no reference in his judgment to the contempt proceeding, this Court was concerned as to whether or not his Honour was expressly made aware of the contempt proceeding in granting settlement approval. As a result, copies of the settlement approval documents were obtained without objection by the parties and following a variation to the orders made by Greenwood J on 5 August 2019, those orders being ones which had the effect of suppressing the whole of the material referred to earlier without in fact amounting to a suppression order made in accordance with the requirements of the *Act*. Those documents were obtained on the morning of the second listed day of the appeal hearing, which had otherwise adjourned indefinitely after the conclusion of submissions the day before. The settlement approval documents were subsequently furnished to the parties, and the matters relisted the same afternoon, for the purpose of hearing submissions from the parties as to the scope of the settlement and the scope of Greenwood J’s settlement approval. We comment further upon the effective suppression order that was sought and made by his Honour below at [76]-[80].
5. The settlement approval documents were received without objection as part of the material before the Court on these appeals. It is clear from those documents that Greenwood J was not told that the proposed settlement either did, or may have had, any impact on the contempt proceeding. There is nothing to indicate that his Honour was otherwise aware of this suggestion given that there is no reference to it in the reasons published by his Honour.
6. Mr Mensink’s case on appeal, as it was before Rangiah J, is that properly read and understood the settlement deed extended to the contempt proceeding and that accordingly it concluded that proceeding. He further submits that Greenwood J is taken to have approved the settlement according to its full effect, irrespective of whether this aspect was raised or was otherwise evident when his Honour granted that approval.

## Ground 1, QUD 53 of 2021: Denial of procedural fairness

1. Mr Mensink seeks leave to rely upon a ground of appeal that the primary judge erred in making the order on 5 August 2020 that “The Registrar of the Federal Court of Australia take over the prosecution of the statement of charge of contempt dated 28 March 2017”, because he asserts that he was denied procedural fairness by reason of the order being made without giving him an opportunity to be heard.
2. The primary judge was confronted with the SPLs no longer wishing to continue the contempt proceeding as a consequence of the settlement of the proceedings in the Queensland Supreme Court out of which the deed arose, and the consequent practical end of any utility of the proceeding brought by the SPLs for examinations and the production of documents out of which the contempt proceeding arose. The relief sought from Reeves J of setting aside the orders made by Dowsett J on 27 February 2017 concerning the examination order and examination warrant did not in terms address the statement of charge. Reeves J asked the parties who had prepared the statement of charge, and his Honour was informed it had been prepared by the SPLs. Counsel for Mr Mensink then put to his Honour that “the more important question is whether the contempt warrant ought to be allowed to stand so that it can be executed, a charge laid and a hearing held”, and asked to make written submissions on the point.
3. The primary judge was legitimately concerned that there should be a contradictor as to the future course of the contempt proceeding. On 5 August 2020, his Honour ordered the Registrar to take over that proceeding for that purpose, and in line with the suggestion from Mr Mensink’s counsel, made procedural orders for submissions, being “By close of business on 21 August 2020, Clive Mensink file an outline of submissions addressing the form of prosecution, limited to five pages”. This necessarily enabled any submission to be made that the order be revoked or that the contempt proceeding otherwise not continue.
4. Mr Mensink filed submissions on 21 August 2020. Relevantly to the order currently under appeal and reproduced at [29] above, the submissions furnished included the following:

**Present Application**

27. The Registrar has been appointed to appear as contradictor to this application.

28. The applicant is able to bring this application notwithstanding that the warrant has not been executed pursuant to Rule 1.40 *Mulhern v Morgan* [2017] FCA 1183.

29. The Court has power to:

a. Make an order under rl.40 FCR prohibiting prosecution on the grounds that it has no reasonable prospect of success under r 26.0l(l)(a) *Mulhern v Morgan* [2017] FCA 1183 at 11.

b. Set aside an order that the Registrar prosecute for contempt of court, again on the basis that there is no reasonable prospect that he will be able to prove beyond reasonable doubt the allegation of contempt *Bob Jane Corporation Pty Ltd v CAN* [sic] *149 801 141 Pty Ltd* [2017] FCA 899.

30. This is particularly so here where there is no evidence of knowledge and therefore no reasonable prospects of success.

31. Whilst the Court has power to punish for contempt and to appoint the Registrar to prosecute, the Court is charged with the function of “superintending the administration of justice” *Hinch v Attorney General (Viet)* [1987] HCA 56.

32. As such, if the Court were to order the Registrar to prosecute this matter it would do so in circumstances where there is insufficient evidence (if any) to prove beyond reasonable doubt that there was a contempt of court. It is submitted therefore that it is not in the interests of justice to prosecute in these circumstances.

33. It is not irrelevant that in the present circumstances the parties seeking the warrants in the first instance are not pursuing the prosecution.

34. In the circumstances therefore, it is submitted that it is not in the interests of justice for the Registrar to be appointed to do so.

**Form of prosecution**

35. Should the Court decide the prosecution is to be continued, the applicant seeks orders that he appear before the court by video link for the hearing of the prosecution.

36. Directions for the provision of a formal charge document and any evidence to be relied upon, including any proofs of witnesses, be served upon the applicant's legal representatives within a reasonable time.

37. The filing of any further affidavit material ought also be given a timeframe.

1. Reeves J acknowledged that the submissions had been made by Mr Mensink at the next case management hearing, and even went so far as to point out that “they seemed to go a lot further than the form of the prosecution”. It is clear that Reeves J had regard to these submissions but did not vacate the impugned order. It is therefore clear that Mr Mensink had the opportunity to be heard, and in fact was heard, about the order for the Registrar to take over the proceeding. This ground of appeal must therefore be rejected. For completeness, it should be noted that subsequent orders were made to the 5 August 2019 procedural orders, by consent, allowing further time for the Registrar to comply with the due date for submissions under those orders. A further set of consent orders were made on 24 September 2020 that Mr Mensink was to file and serve an application for orders that he appear by video link during the hearing of the prosecution, as foreshadowed earlier in his submissions reproduced in the preceding paragraph.
2. We note that, even if submissions had not ultimately been made about the impugned order, the presence of procedural orders allowing for those submissions to be made would also have been sufficient to show that there was no genuine denial of an opportunity to be heard, and certainly no element of the necessary practical injustice for there to be a denial of procedural fairness: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 per Gleeson CJ at [37]. While the situation of making the impugned order first and then providing for, receiving and considering submissions as to whether it should be maintained was unusual, that arose from the circumstances of the primary judge otherwise being deprived of the benefit of assistance from a contradictor.
3. In all of the circumstances, there was never any serious possibility of it being demonstrated that there was any denial of procedural fairness in the necessary sense of practical injustice, nor in sustaining any argument as to injustice (let alone substantial injustice) in refusing leave in those circumstances. Leave to appeal upon that ground must therefore be refused.
4. Alternatively, if the proper construction of s 24(1C) of the *Act* means that no leave is required, we would treat the draft notice of appeal as though it was a filed notice of appeal and conclude that this ground must fail.

## Ground 2, QUD 53 of 2021: Error in determining there was power for the Registrar to take over the contempt proceeding

## Ground 1, QUD 361 of 2021: Error in concluding that it was open to take a hybrid of the procedures envisaged by rr 42.11 and 42.16 of the *Rules*

1. Proposed ground 2 in appeal QUD 53 of 2021 depends upon either an assertion that the primary judge relied upon an incorrect principle because, it is said, there is no power to order that a Registrar take over a contempt proceeding, and/or an assertion that the circumstances in which a Registrar may conduct such proceedings are exhaustively provided for by r 42.16. Because the underlying proposition is of some importance we would grant leave to rely upon this ground if that is required.
2. Ground 1 in appeal QUD 361 of 2021 depends upon the rules for contempt proceedings in rr 42.11 and 42.16 being read as being proscriptive as to the way in which contempt proceedings in this Court must be commenced and continued. As with ground 2 in appeal QUD 53 of 2021, the substance of this ground concerns an asserted absence of power to make the impugned order.
3. While the *Act* does not in terms deal with the discontinuance of proceedings, s 59(1) provides:

The Judges of the Court or a majority of them may make Rules of Court, not inconsistent with this Act, making provision for or in relation to the practice and procedure to be followed in the Court (including the practice and procedure to be followed in Registries of the Court) and for or in relation to all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Court.

1. Plainly enough, the means by which a proceeding in this Court can be brought to an end without a hearing and adjudication is a matter of practice and procedure and thus able to be addressed by any Rules of Court made in accordance with s 59(1).
2. The *Federal Court* ***Rules*** *2011 (Cth)* arethe current iteration of the Rules of Court contemplated by s 59(1) of the *Act*, and apply to all proceedings started in the Court on or after 1 August 2011: r 1.04. The *Rules* are amended by the Judges of the Court from time to time.
3. Division 26.2 of the *Rules* deals with the ending of proceedings early, including withdrawal and discontinuance of first instance proceedings, with Division 36.6 dealing with ending appeals and cross-appeals.
4. Rule 26.12 provides that a party may discontinue a proceeding, or any part of a proceeding, by filing a notice of discontinuance in the following circumstances: without leave or consent before the return date of an originating application or before pleadings have closed for a proceeding continuing on pleadings; with the opposing parties consent prior to judgment; or, with the leave of the Court. Thus, a proceeding remains on foot until one of those steps has been taken.
5. The first of those options of filing a notice of discontinuance without leave or consent was not applicable. The contempt proceeding was not brought by an originating application, although it was brought within a proceeding commenced by an originating application, being the SPLs ex parte proceeding seeking the issue of summons for, inter alia, examination summonses to issue. In any event, the summons addressed to Mr Mensink was issued after the first return date of that originating application. That leaves the filing of a notice of dismissal by consent, or by the leave of the Court.
6. While notices of discontinuance were filed for three bills of costs concerning Mr Mensink, at no time has any notice of discontinuance been filed in relation to the contempt proceeding, let alone one with consent or by leave, and certainly not before the order made by Reeves J that the contempt proceeding be taken over by the Registrar. For so long as that order stands, consent to discontinuance on the part of the Registrar is unlikely to be forthcoming. The grant of leave to discontinue is not presently likely either. Accordingly, the argument that there was nothing for the Registrar to take over must fail.
7. The remaining arguments by Mr Mensink on these grounds, based on the power of the Court to order the Registrar to take over the contempt proceeding, turn upon a misunderstanding of the nature of the *Rules*, the statutory context in which they are made, their terms, their ordinary operation and the freedom given to a judge to depart from them. The starting point is the wide powers bestowed upon judges of this Court by s 23 of the *Act*. Section 23 gives the Court (and thus a judge) power in relation to matters within jurisdiction to make orders as thought to be appropriate. No point has been raised as to jurisdiction, nor could there be in the present circumstances. It is in the context of that wide power to make any appropriate order within jurisdiction that s 59(1) of *Act*, reproduced above, and the *Rules* themselves, must be considered.
8. As s 51(1) of the *Act* and the terms of the *Rules* themselves make clear, the *Rules* are, and are required to be, directed to necessary and convenient practice and procedure, including incidental matters. While the *Rules* provide a convenient template for the generally predictable exercise of power bestowed by the *Act* or by any other statutory or implied source, including the ordinary requirements imposed upon litigants, they do not limit such powers. They are not any kind of straitjacket on the way in which a judge conducts proceedings, subject to questions of procedural fairness in departing from the *Rules* without notice or a chance to be heard. In any appropriate case, with no particular threshold or pre-condition, they may be departed from as the circumstances dictate. Put another way, the *Rules* are the servant of the Court and its judges, assisted by its registrars, not the master of how proceedings are to be conducted, including as to what may be required of litigants and registrars.
9. All of the above characterisations are amply reflected in a number of rules which expressly describe the exercise of overarching powers which have the effect that express rules on any topic, while ordinarily required to be complied with by litigants, are neither rigid, limited or necessarily prescriptive if a judge chooses to depart from them in any way that is considered to be in in the interests of justice. In particular:
10. “The Court may make any order that the Court considers appropriate in the interests of justice”: r 1.32;
11. “The Court may dispense with compliance with any of these Rules, either before or after the occasion for compliance arises”: r 1.34;
12. “The Court may make an order that is inconsistent with these Rules and in that event the order will prevail”: r 1.35;
13. “The Court may direct a Registrar to do, or not to do, an act or thing”: r 1.37.
14. In light of the foregoing, it is simply not tenable to suggest that any of the *Rules*, let alone those containing procedural requirements imposed upon litigants and not upon judges, especially in relation to contempt proceedings as provided by rr 42.11 and 42.16, could possibly stand in the way of the impugned order being made as a question of power.
15. It follows that the remaining ground appeal in QUD 53 of 2021 must fail and that appeal must be dismissed, and ground 1 in appeal QUD 361 of 2021 must fail.

## Ground 2, QUD 361 of 2021: Error in not determining that the contempt proceeding “merged” in the settlement deed and therefore could not be continued by the Registrar

1. Mr Mensink submitted, and his argument necessarily depends upon the proposition, that the contempt proceeding merged in the settlement deed in the same way that a cause of action merges in a judgment given on that cause of action. This argument is made despite there having been no judgment beyond settlement approval (which did not refer to the contempt proceeding) and no notice of discontinuance filed to bring the contempt proceeding to an end. No authority was advanced to support such a proposition. It cannot be accepted on first principles.
2. Where an applicant succeeds in an action, his or her cause of action is said to “merge” in the judgment with the result that the cause of action no longer has an existence independently of the judgment: see *Tomlinson v Ramsay Food Processing Pty Ltd* [2015] HCA 28; 256 CLR 501 per curium at [20]-[27], see also *Clayton v Bant* [2020] HCA 44; 95 ALJR 34 per Kiefel CJ, Bell and Gageler JJ at [26] and [28] and *Ramsay v Pigram* (1968) 118 CLR 271 per Barwick CJ at 276, quoted with approval in *Kuligowski v Metrobus* [2004] HCA 34; 220 CLR 363 per curium at [40]. A consequence of the operation of the doctrine is that the person cannot bring a second proceeding on the cause of action. The merger is often said to give rise to a cause of action estoppel, although it might be more accurate to view this as a rule based on the principle of finality of litigation rather than as a species of estoppel: *Jackson v Goldsmith* (1950) 81 CLR 446 at 466; *Port of Melbourne Authority v* ***Anshun*** *Pty Ltd* [1981] HCA 45; 147 CLR 589 at 597. The doctrine of merger does not apply to agreements. It may be doubted that the doctrine even applies to the obtaining of declaratory relief or that such relief might give rise to any cause of action estoppel: *Zavarco PLC v Nasir* [2021] EWCA Civ 1217; [2022] Ch 105 at [37]-[41].
3. The doctrine of merger does not apply where there is no judicial determination and cannot therefore apply in respect of a cause of action the subject of a proceedings which has been discontinued. Indeed, r 26.14 specifically preserves the right to bring a proceeding again after filing a notice of discontinuance, subject to any limitation imposed by the general law, such as *Anshun* estoppel.
4. The settlement deed, even if it did extend beyond the private interests of the SPLs in bringing the contempt proceeding and encompassed any separate public interest in vindicating the authority of the Court, and even if it was capable of leading to a binding decision of the Court, never reached that point. There was not, and could not be, any merger or associated estoppel based upon nothing more than a settlement reflected in the settlement deed, and the approval of that settlement by Greenwood J. No doubt, as between the SPLs and Mr Mensink, their respective rights and obligations were affected by their settlement, but that did not operate to extinguish the contempt proceeding, or the underlying “cause of action” for contempt. The “cause of action” did not merge in the deed of settlement. It follows that ground 2 in QUD 361 of 2021 must fail.
5. Even if the above conclusion as to there being no merger is erroneous, it was for Mr Mensink to persuade this Court that the terms of the settlement deed not only clearly applied to the contempt proceeding, but was not confined to the SPLs’ capacity to bring and maintain such a proceeding and extended also to the vindication of a public right via the Registrar either taking over the contempt proceeding, or separately commencing a fresh contempt proceeding. The argument advanced in support of that proposition, principally in Mr Mensink’s written submissions, as elaborated upon at the appeal hearing, can be summarised as follows, accompanied by acceptance or consideration of each.
6. First, Mr Mensink asserts that cl 4.1 of the settlement deed, under the subheading “Releases” specified that subject to payment, Queensland Nickel and other related entities would be released from the SPLs claims. That argument may be accepted.
7. Secondly, Mr Mensink relies upon the primary judge considering that the following definitions applied to cl 4.1:
8. the term “claim” in the deed meant, relevantly, “any proceeding in a Court… of any kind or type whatsoever and which arise out of or in relation to the QN Proceedings”; and
9. the “QN Proceedings” meant proceedings BS6593/17 in the Supreme Court of Queensland;
10. while the contempt proceeding was brought within a different Federal Court proceeding, it did arise out of or in relation to the QN Proceedings.

That argument may be accepted upon the assumption that the examinations were sought in aid of the Queensland Supreme Court proceeding.

1. Thirdly, Mr Mensink relies upon the primary judge accepting that the settlement deed compromised the contempt proceeding brought by the SPLs. That argument may be accepted for present purposes, noting that this addresses only the scope of the agreement between the parties to the settlement deed, not the need to give binding effect to it.
2. Fourth, Mr Mensink asserts that once the primary judge reached the conclusion that the contempt proceeding was compromised, the proceeding merged in the settlement deed and no proceeding could be maintained or taken over after that point. He therefore argues that the primary judge erred in determining the contempt proceeding was ongoing because it had not been discontinued or dismissed. Those arguments are necessarily rejected by reason of the conclusions reached about merger not having taken place and the contempt proceeding therefore not having concluded, but will be accepted for the purpose of considering the remaining aspects of Mr Mensink’s argument.
3. Fifth, Mr Mensink asserts that the primary judge further erred in relying upon concurrent public and private “interests” in contempt proceedings as displacing the conclusion that the settlement deed had brought the proceeding or prosecution to a close. He submits that even where a true dichotomy between public and private interests in a matter may not exist, determination of a proceeding either by trial or compromise disposes of both of those interests, and in this case the SPLs were seeking to vindicate both their private interests and the Court’s public interest, being appointed at the Court’s imprimatur.
4. Even accepting for present purposes the proposition that approval of a settlement, without more, was capable of bring the contempt proceeding to an end, these related arguments cannot otherwise be accepted. They entail acceptance that a contempt proceeding brought in vindication of a private interest wholly addresses all public interests to the point of settlement of the former precluding continuation to vindicate separate considerations informing the latter. That is not so, even if the sharp distinction between public interests and private interests is no longer maintained following *Witham v Holloway* (1995) 183 CLR 525 at 530–534; see also the discussion on this topic in ***Kazal*** *v Thunder Studios Inc (California)* [2017] FCAFC 111; 256 FCR 90 at [20]–[27]. See also *NHB Enterprises Pty Ltd v Corry (No 8)* [2022] NSWSC 97 per Bell P (as the Chief Justice then was) at [26]-[28].
5. A settlement addressing the private interest in bringing a proceeding and thereby the interest in maintaining a collateral contempt proceeding does not necessarily subsume all and any public interests in such a prosecution. Plainly in this case, there remained an important and independent public interest to be vindicated, having much wider application than the private interests of the SPLs confined to the proceeding they had brought. Resolution of a contempt proceeding brought to vindicate a private interest cannot preclude continuation to vindicate a continuing public interest.
6. Sixth, Mr Mensink contends that by appointing the SPLs, the Court did not “do nothing” in the conduct of the matter, and authorised the SPLs to settle it on terms as sanctioned by the Court. He therefore submits that once the Court is seized of the matter, and acts upon its own authority, it is still with “due regard” to the “wishes and feelings of the person who has brought the matter before it”, and therefore the Court needed to have regard to the SPLs’ resolution of the proceedings. That may be correct as far as it goes, and the resolution of the public interest dispute is undoubtedly an important consideration, but it does not address the question of whether there remains any public interest of sufficient importance to justify its vindication by continuing the contempt proceeding. As the Full Court pointed out in *Kazal* at [97], contempt proceedings are to be viewed as essential in facilitating courts being able to function properly, including being, and being seen to be, making orders that will ordinarily be obeyed, such that individual contempt cases have an importance transcending the resolution of the individual substantive case from which it arose by supporting and enhancing the integrity of judicial proceedings.
7. We also note that in oral submissions following the distribution of the primary materials relating to the settlement approval before Greenwood J, counsel for Mr Mensink also sought to argue that cl 4.7 of the deed under the subheading “Mensink Warrant”, which stated that “the SPL must immediately apply for the discharge of summons”, would have indicated to the primary judge that the intended scope of the settlement was plainly directed at releases and that a judge reading the deed must have realised that it was directed at more than simply the settlement of a debt claim. The primary judge also considered that this context was relevant, as set out at [57] of the primary judgment. That is plainly relevant, but it is not determinative. In this case, defiance of the Court’s authority, and the ongoing public interest in maintaining practical and effective compulsion to attend examinations under the *Corporations Act,* were both important considerations and bases for continuing the contempt proceeding.
8. In essence, Mr Mensink argues that the private interests of the SPLs as reflected in the settlement deed were to be preferred over the Court’s ability to vindicate its authority, or that the SPLs interests displaced the Court’s interest in the proceeding completely. The primary judge referred to multiple authorities which demonstrated the innate public interest in punishing civil contempt, whereby the public and private interests in such an action cannot sensibly be separated. Mr Mensink has not attempted to displace that line of authority. To the contrary, a concession to that effect was made by Mr Mensink at first instance, where it was accepted that “all [that] the [SPLs] compromised under the settlement deed was the [SPLs’] own right to pursue the claim of contempt … [and did not] compromise the right of the Court to order the prosecution of a proceeding for the same alleged contempt”. Even under the primary judge’s reading of the settlement deed, allowing the context of the clauses relating explicitly to the warrant for the examination to extend to the release cl 4.1, this could never have precluded the Court from moving on its own right to pursue such an action.
9. With this in mind, Mr Mensink’s argument on this ground amounts to a complaint that instead of the Registrar bringing a new proceeding for contempt of Court, which Mr Mensink concedes would have been open to the Registrar, this was instead done using the existing proceeding. As the discussion of the breadth of the powers of the Court under the *Rules* detailed above makes clear, there was no lack of power to do so.
10. The Registrar, while accepting the primary judge’s judgment on the effect of the settlement deed, submits that the deed did not and could not compromise the power of the Court to vindicate its own authority, and that there was an ongoing proceeding which could be continued or “taken over”. That argument must be accepted. None of the preceding arguments on this topic advanced by Mr Mensink should prevail, including those assuming merger in the appellant’s favour.
11. If the merger argument advanced by Mr Mensink is correct after all, that does not and cannot preclude the commencement of a fresh contempt proceeding by the Registrar.
12. Although it does not need to be finally decided in light of the conclusion we have reached on merger, it seems likely that there would have been nothing to prevent Reeves J ordering, in place of the order that the Registrar take over the existing contempt proceeding, that the Registrar commence a fresh contempt proceeding, and in aid of that, ordering that the prior statement of charge be treated as constituting that fresh proceeding.
13. Ground 2 in QUD 361 of 2021 is without merit and must be rejected.

## Ground 3 QUD 361 of 2021: Error in finding that the argument that the settlement deed was a complete bar to the continued contempt proceeding had been abandoned

1. In light of the conclusion reached about ground 2 in QUD 361 of 2021, ground 3 does not require in-depth consideration. First, even if this argument was not abandoned before the primary judge, which seems doubtful, this argument cannot not succeed because the settlement deed, without more, and perhaps even with a notice of discontinuance, was never a complete bar to the contempt proceeding continuing by the Registrar. In any event, it is not appropriate to contemplate upholding a ground of appeal when it entails acceptance of a false premise. It follows Ground 3 in appeal QUD 361 of 2021 must fail.

## Ground 4, QUD 361 of 2021: Error in finding that the Registrar was competent to take over the contempt proceeding in order to vindicate the public interest

1. This ground is not directed to the existence of a power to make the impugned order directed to the Registrar to take over the contempt proceeding, but rather to the asserted erroneous basis for upholding its exercise. In substance, Mr Mensink suggests that once the private interests between the SPLs, himself, and the other parties to the settlement deed had been resolved by its execution, there was no residual public interest left to be vindicated. Mr Mensink relies upon curial comments to that effect.
2. This cannot be accepted as having any universal, let alone binding, application. That is especially so in circumstances in which the contempt charge concerns alleged defiance of an order of the Court by a summons to attend for an examination specifically provided for by statute on two separate occasions: see [59]-[61] above. It is an outcome having wide application to all similar proposed examinations.
3. The SPLs no longer had an interest in prosecuting the contempt proceeding once the part of the principal proceeding in the Queensland Supreme Court involving them had resolved. When that occurred, it was plainly appropriate and in the interests of justice to make an order to ensure that the contempt proceeding could continue given the broader implications. There was no error on the part of the primary judge in his Honour’s reasoning and conclusions on this topic.
4. Ground 4 in appeal QUD 361 of 2021 must fail.

## The suppression of evidence adduced and submissions relied upon

1. The orders made by the Court on 5 August 2019, at a duty hearing, provide a stark example of the need to ensure that suppression orders, or orders having the practical effect of suppression orders, in relation to evidence adduced and other material furnished in Court by which orders are obtained, including in closed Court, and the reasons for such orders, be made under and in compliance with the requirements of Div 2 of Pt VAA of the *Act*, which sets out express limits on:
2. the power to make any suppression order: s 37AF;
3. the grounds for making such an order: s 37AG; and
4. their duration: s 37AJ.
5. The only relevant ground for making a suppression order under Div 2 of Pt VAA in QUD 473 of 2019 was that the order was considered “necessary to prevent prejudice to the proper administration of justice”, although, contrary to the dictates of the *Act*, that ground was not set out in the order that was made: see s 37AF(1)(a) and s 37AF(2).
6. As explained above, the settlement deed in this case was approved by a judge of the Court at a duty hearing on 5 August 2019, but reasons were not delivered nor provided until 30 months later in the settlement approval judgment. As is recorded in that judgment at [1], the sole remaining special purpose liquidator sought orders that reasons explaining the basis for the making of the settlement approval not be published until proceedings in the Supreme Court had been heard and determined. The basis of this request was that much of the information relied upon on the settlement approval application was commercially sensitive, and its disclosure may have had an impact upon the conduct and determination of issues in the Supreme Court proceedings. In the settlement approval judgment at [8] to [11], the following is recorded:

As earlier mentioned, the Court also ordered on 5 August 2019 that Mr Parbery’s affidavit of 5 August 2019 and the written outline of submissions of counsel not be made available for inspection and not be filed electronically. The Court also ordered that until the delivery of judgment or the filing of a notice of discontinuance in [the] Supreme Court proceeding…or further order (whichever is the earlier), the Court’s reasons for judgment in the present proceeding not be published. The orders and judgment of the Supreme Court in the proceeding described at [4] of these reasons was the subject of appeal to the Court of Appeal. Judgment on appeal was delivered on 25 June 2021: *Queensland Nickel Pty Ltd (in liq) v QNI Metal Ltd & Ors* [2021] QCA 138 (“Appeal Decision”). The appeal was allowed and judgment was entered for QNI and the General Purpose Liquidators against Mineralogy Pty Ltd in an amount of $102,884,346.26 concerning payments out of QNI’s “bank account to or for the benefit of Mineralogy”: Appeal Decision [5].

…

**Because judgment on the trial of the action before the Supreme Court has now been delivered and published, publication of short reasons explanatory of the making of the orders on 5 August 2019 cannot affect the conduct and determination of any questions of fact or law in those proceedings.**

Accordingly, it is appropriate to now give short reasons for the making of the orders in this Court on 5 August 2019 rather than defer doing so any further until any date after the hearing of the special leave application or, for that matter, the determination of the appeal should leave be granted.

(Emphasis added)

1. The problem is that when the matter came before Rangiah J in September 2021, it was unclear the actual basis upon which the settlement approval had been given. Judgment in the Supreme Court proceedings was given on 3 June 2020 (*Parbery v QNI Metals Pty Ltd* [2020] QSC 143) and the appeal was dismissed on 25 June 2021. Although reasons for the settlement approval were subsequently published, given the terms of the effective suppression order (initially proposed by the special purpose liquidator), even after the first day of this appeal the continued suppression of evidence had the consequence of allowing Mr Mensink to advance an untenable submission that the judge approving the settlement deed *must* have been aware that the settlement compromised the claims of contempt.
2. The suppression order sought by the special purpose liquidator should have been calibrated to ensure that reasons were provided at the time of settlement approval (or shortly thereafter) and a copy of the judgment not be published until the delivery of judgment in the Supreme Court proceeding (except to the special purpose liquidator). The duration of the suppression order should have been no later than the period necessary, that is, until completion of the Supreme Court proceeding (which turned out to be June 2020). If this had been the case, the parties, Rangiah J and the Full Court would have obtained a copy of the reasons and the precise material relied upon in order to obtain settlement approval at the outset. This would have prevented submissions ever having being put to this Court based on what turned out to be an entirely false premise.

## Conclusion

1. As all four grounds of appeal have failed, appeal QUD 361 of 2021 must be dismissed with costs. As already noted, leave to rely upon ground 1 in appeal QUD 53 of 2021 is refused and ground 2 must fail. As the remaining grounds were abandoned, that appeal must be dismissed with costs.

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| I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Bromwich, Lee and Thawley. |

Associate:

Dated: 9 June 2022