

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B34 of 2020

BETWEEN:

OAKLEY COAL ACTION ALLIANCE INC

Appellant

NEW ACLAND COAL PTY LTD (ACN 081 022 380)

First Respondent

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CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND SCIENCE

Second Respondent

PAUL ANTHONY SMITH, MEMBER OF THE LAND COURT OF QUEENSLAND

Third Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

6 October 2020

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PART 1: PUBLICATION ON THE INTERNET

1. This outline is in a form suitable for publication on the internet.

PART 2: PROPOSITIONS TO BE ADVANCED

Legislative and factual context

2. Where there are objections to applications under the *Mineral Resources Act 1989* (Qld) (**MRA**) and the *Environmental Protection Act 1994* (Qld) (**EPA**), the MRA and the EPA confer jurisdiction on the Land Court, established by the *Land Court Act 2000* (Qld) (**LCA**), to make recommendations to the relevant decision makers about whether the applications should be approved: AS [12].
- 10 3. On 31 May 2017, Member Smith of the Land Court recommended that the applications be refused. However, he found in favour of NAC on most of the issues: AS [13]-[15].
4. NAC sought judicial review. Bowskill J determined that Member Smith had erred in certain respects but held that Member Smith's decision was not affected by apprehended bias. Bowskill J set aside Member Smith's recommendation and remitted the matter to the Land Court for limited further determination, within certain defined parameters: AS [16]-[21].
5. Both parties appealed to the Court of Appeal: AS [22]. Before the appeal hearing, the matter was remitted back to the Land Court, constituted by Kingham P. Kingham P was bound by most of Member Smith's findings. On 7 November 2018, Kingham P recommended that the applications be approved, subject to compliance with certain limited
20 conditions: AS [23]-[25].
6. The appeal and cross-appeal from Bowskill J's decision were heard between 27 February 2019 and 1 March 2019, ie after Kingham P's decision: AS, [27]. The day before the hearing, the Court of Appeal was informed of Kingham P's decision: Reply [2].
7. On 10 September 2019 the Court of Appeal upheld the cross-appeal on the bias issue and rejected the Appellant's appeal on the other issues. It concluded that Bowskill J's orders should be set aside and the matter remitted to the Land Court for a full rehearing.
8. However, following the judgment the parties made further submissions on the appropriate orders consequential on the judgment and the Court of Appeal then concluded that the Bowskill J orders should not be set aside and that there was no utility in a further hearing.

30 Effect of finding of apprehended bias in a court

9. A finding of bias strikes at the validity and acceptability of the trial and its outcome: AS [29], [37]; Reply [5], [10].
 - *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [6]-[7]

- *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, [1]-[3], [116]-[117], [172]

10. If there is a finding of apprehended bias, the judgment should be set aside and a new trial ordered, irrespective of the findings on other issues: AS [38]-[40]; Reply [4]-[5].

- Note analogously *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, [56]
- State and Federal authorities cited at AS [41].

“Utility” in setting aside Bowskill J’s orders

10 11. There was utility in setting aside Bowskill J’s orders and ordering a new hearing: the now “tainted” findings of Member Smith, on most of the issues in play, will be set aside; the applications can be assessed on a lawful basis; and the administration of justice and the integrity of the legal process will be protected: AS [45]-[51]; Reply [6].

12. That is so regardless of whether Kingham P’s recommendations are binding or not. There is nothing in the nature of an administrative decision which requires a conclusion that a power to make a decision, once purportedly exercised, is necessarily spent: Reply [7].

- *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [5]

Kingham P’s recommendations are a nullity

20 13. A denial of procedural fairness – including by reason of bias – will ordinarily involve a failure to comply with a condition of the exercise of decision-making power and thus constitute jurisdictional error: AS [53]. There was jurisdictional error in Member Smith’s decision on the basis of apprehended bias such that it is a nullity.

14. That error infected the decision of Kingham P, which was substantially founded on the decision of Member Smith.

15. The decisions of an inferior court are valid and binding only if made within jurisdiction: AS [52].

- *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435, [27]-[28], [55]
- *State of NSW v Kable* (2013) 252 CLR 118, [56]

16. Because Member Smith’s decision was infected with jurisdictional error and his findings against the Appellant constrained Kingham P, both decisions are invalid: AS [54]-[56].

30 • *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [51], [53]

The arguments of NAC

17. It is circular to argue that the decision of Kingham P is supported by the Remittal Orders, when they are the very orders under appeal.
 18. In any event, the Remittal Orders did not authorise the redetermination of most of the findings of Member Smith; on the contrary, those findings had continuing effect as a past decision of the Land Court: Reply [14].
 19. The Land Court's powers do not derive, in whole or in part, from orders of the Supreme Court. Rather, they derive from the MRA, EPA and LCA. The Supreme Court's orders cannot enlarge the jurisdiction of the Land Court: AS [58]-[63]; Reply [11]-[13].
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- *State of NSW v Kable* (2013) 252 CLR 118, [27], [53], [66]
20. Further, the Court would not lightly infer that any statute would authorize or direct an inferior court to act in a way that results in it denying procedural fairness.
 21. The claimed practical difficulties of a recommendation affected by apprehended bias being a nullity are overstated.
 - *State of NSW v Kable* (2013) 252 CLR 118, [21]-[22]
 22. Insofar as discretion is relevant to the orders sought, claims of eg determinantal reliance on the orders of Kingham P are irrelevant, given NAC sought the very relief it now resists in its Notice of Cross-Appeal and was aware of Kingham P's recommendations prior to the hearing of the appeal: Reply [3].

20 Invalidity of related decisions

23. The appeal should succeed regardless of whether the decisions of Kingham P or the delegate of the Second Respondent should be set aside. For reasons of clarity and legal certainty, however, those decisions should be set aside pursuant to r 658 (when read with rr 5 and 766) of the *Uniform Civil Procedure Rules 1999* (Qld): AS [64]-[69].

Costs

24. If the appeal is allowed, costs of the appeal to this Court should follow the event. As to the proceedings before Bowskill J and the Court of Appeal, the appropriate order is that there be no order for costs: AS [70]-[78]; Reply [17]-[19].