**[2017] QSC 216**

**SUPREME COURT**

**APPLEGARTH J**

**SC No 6002 of 2017**

**NEW ACLAND COAL PTY LTD**

**v**

**SMITH (MEMBER OF THE LAND COURT OF QUEENSLAND)**

**BRISBANE**

**FRIDAY, 23 JUNE 2017**

HIS HONOUR: The applicant ("NAC"), has applied for mining leases and an amendment to an existing environmental authority for a proposed further stage of the New Acland Coal mine. Part of the process involves the making of objections by interested parties, and there is a process whereby objections in different statutory contexts are the subject of consideration by the Land Court. After considering those matters, under the relevant legislation – including the Mineral Resources Act 1989 (Qld) ("MRA") - the Land Court makes a recommendation. The recommendation must consist of a recommendation that the mining lease application be granted or rejected, in whole or in part, and it may include a recommendation that the mining lease be granted subject to appropriate conditions.

There is a parallel regulatory regime under the Environmental Protection Act 1994 (Qld), which involves an Administering Authority. The relevant Minister has a role to play in terms of the Administering Authority making a decision under the relevant provisions.

I emphasise that the Land Court, in these statutory contexts, makes recommendations as distinct from binding decisions. Its recommendation is in the form of an objection decision and that decision is then given to the Minister. There is a process whereby the relevant Minister must give advice to the Administering Authority within 10 business days of being given a copy of the objection decision or some longer period if the Minister and the Administering Authority agree to a longer period. Under the MRA, it is the Minister who has to make a decision based upon, amongst other things, the recommendation of the Land Court.

In this matter, the Land Court made recommendations against the granting of two applications for mining leases and against an application for an amendment to an existing environmental authority. NAC commenced proceedings for judicial review of the Land Court decision. Today, it seeks an order pursuant to section 29 of the Judicial Review Act 1991 (Qld) suspending that decision. Originally, it sought a wider form of order which would have had the effect of restraining the Ministers from making certain decisions. However, the order which it seeks is that the operation of the decision of the first respondent, who constituted the Land Court, and any subsequent decisions of that respondent, including orders as to costs following the decision, be suspended until the final determination of these proceedings. The relevant Minister and authorities, who are represented but not parties to these proceedings, accept that an order suspending the decision until the final determination of these proceedings would result in decisions not being made by the Minister.

An application of this kind for a stay or a suspension involves the application of well-settled principles, analogous to those applied in granting or refusing interlocutory injunctions. However, the public law context is important.

It is appropriate to consider an application of this kind on the dual but related basis of whether there is a prima facie case, in the sense discussed in the authorities, that the application will succeed and, if so, where the balance of convenience lies.

Sometimes the expression is used that the applicant must first establish that there is a serious question to be tried, but that is a somewhat ambiguous phrase which in some contexts means something which is barely arguable. Ultimately, in an application of this kind, the court has to consider both prospects of success and the potential for irreparable harm and, more broadly, the balance of convenience. Ultimately, the issue is whether the applicant has demonstrated sufficient prospects of success to warrant an order staying a decision so as to avoid irreparable harm and to serve the interests of justice.

In this matter, the newly added second respondent argues that the applicant has failed to establish these things. It submits that NAC's case is a very weak one and likely to be dismissed because, in essence, it is a challenge to the merits of the decision in a thinly veiled form of a judicial review case. Nonetheless, given the volume of material and the complexity of some of the arguments, the second respondent, Oakey Coal Action Alliance ("OCAA"), concedes that I should proceed on the basis that the application is not without merit. So there is a concession: it accepts that there is a serious question to be tried.

Emphasis is placed by OCAA on the argument that NAC is not likely to suffer injury if the judicial review application proceeds without an order for a stay and the applications under the MRA and the EPA are allowed to continue to final determination. OCAA further argues that the balance of convenience favours this course rather than restraining the Minister and the Chief Executive from carrying out the statutory functions assigned to them. OCAA emphasises that neither the Minister nor the Chief Executive are bound by the Land Court's recommendations and they will give those recommendations the weight that they deserve.

As against that, NAC submits that this is a case in which the balance of convenience favours the granting of a stay because of what is said to be significant prejudice that will be suffered if no stay is ordered, whereas it is submitted that there is no real prejudice suffered by any other party by the granting of the stay. Particular reliance is placed by NAC upon the concern that, unless the court suspends the Land Court's decision, a later decision by the Minister or the administering authority to reject one or both of the applications may not be open to effective challenge even if the Land Court's decision is later found to be in error in these proceedings. It is submitted that, unless the order is suspended, the decision will have relevant legal effect until such time as it is set aside. Further, it is argued that if the ultimate applications are refused, it will have to start the entire application process again.

Particular reliance is placed by NAC upon the consequence of a rejection of the grant of the mining leases or the environmental authority application and that, unless these orders are granted, there is a risk that the mine will close. That was a matter that was addressed in the decision of the Land Court and is the subject of some further evidence by Mr Boyd, who is the Chief Operating Officer of New Hope Corporation Limited. He explains the employment position at the mine and the threat of unemployment if the life of the mine is unable to be extended beyond the period for which it has current reserves. I am not quite sure of what that period is. However, I take account of what is said about the consequences of the mining lease application or the EA amendment application not being granted.

As to the concern that, unless the Land Court's decision is stayed, the later decisions of the Minister or the Chief Executive may not be open to effective challenge, I am not persuaded that that is obvious or necessarily so. OCAA has accepted that, if the decision of the Land Court is not suspended, and prior to the final determination of the proceedings the MRA Minister and/or the Administering Authority in reliance, in part, on the Land Court decision refuse the relevant applications, and if the Land Court decision is subsequently set aside or quashed in the Supreme Court proceedings, then OCAA will not oppose the making of further or consequential orders setting aside the decisions of the MRA Minister and the Administering Authority. It seems to me that concession goes a long way to addressing the concern of NAC that later decisions may not be open to effective challenge, even if the Land Court decision is later found to be in legal error.

The relevant statutory context has been outlined in the parties' submissions and I will not delay to outline it. The Land Court's decision is in the form of a recommendation. The ultimate decision makers are not bound to accept the recommendations of the Land Court and, in the case of the Mineral Resources Act, whilst the Minister must consider the Land Court recommendation under section 271B, the Minister must also consider the matters mentioned in section 269(4), which are the very matters which the Land Court, in making a recommendation, must take into account and consider. The statutory scheme does not easily fit into more familiar statutory contexts whereby a decision maker makes a decision that, as it were, is binding. Nonetheless, decisions in the form of recommendations do have consequences, and in some situations such as this are amenable to judicial review because the making of such a recommendation is a precondition to the further exercise of official power.

Also, it would be idle to imagine that a Minister or the Administering Authority would place little or no reliance upon the recommendation of the Land Court. The statute, as I have noted, requires the Minister to consider the Land Court recommendation. One would expect the Minister to accord such a decision the respect which it deserves. Nonetheless, in this statutory process, the Land Court recommendation and the process by which it was reached, can be the subject of persuasive, compelling and highly critical analysis by those who would wish to oppose it and other groups and individuals, including the Minister's trusted advisers, who can be assumed to be well acquainted with the present dispute.

Although the making of the Land Court recommendation is an important and legally indispensable part of the process, this is not a statutory context in which the recommendation forces the hand of the Minister. Rather, it is a recommendation, and the Minister must separately consider all of the matters required to be considered by law. Still, I proceed on the basis that the Land Court recommendation has the potential to be influential on the Minister's decision and the decision of the Administering Authority. That influence will be reduced if NAC or anyone else can place before the Minister and the Minister's advisers' arguments as to why the recommendation is effected by legal error, factual error or is unpersuasive on the merits.

In circumstances in which I proceed on the basis that the application for judicial review does raise questions to be tried, I turn to the balance of convenience. The exercise of the power to grant a stay or to suspend an administrative decision of the present kind - like the power to grant an interlocutory injunction - is designed to minimise irreparable harm until at least the parties' rights and interests can be determined more fully at a final hearing. In deciding where the balance of convenience lies, a court has to consider competing rights and interests and also has to consider the interests of affected third parties and broader interests concerning the public interest, including the proper administration of the law.

Here, one has a detailed scheme which ultimately places the Minister, or the Administering Authority, in the final position as a decision maker. That approval process has been a protracted one. I am told the proceedings in the Land Court itself occupied almost 100 sitting days, during which there were almost 2,000 exhibits with tens of thousands of pages and well in excess of 2,000 pages of submissions. There was said to be 28 experts and 38 lay witnesses, and the size of the Land Court's decision itself is a testament to the scale of the hearing and the time which it must have taken to hear and determine it.

There is - both in respect of the interests of NAC and the interests of OCAA and land owners - concerns about uncertainty. On the one hand, NAC has hanging over it the prospect of refusal of the applications and the significant consequences that will affect it and its workforce if new mining leases are not granted and existing reserves exhausted. That position places it and its workforce and the community which supports the continuation of mining in a state of uncertainty. Equally, the parties who oppose the granting of the applications give evidence that they are affected by significant uncertainty. The President of OCAA has outlined the distress which is caused to persons in the vicinity and how the

application for judicial review and the application to stay the Land Court decisions are affecting the business planning of local farmers.

Whether one turns to the uncertainty besetting NAC or the uncertainty besetting local land owners, it would seem to be important to all concerned - in their personal interests and their economic interests - that they obtain a decision whether to grant or not grant the relevant applications as soon as reasonably possible. Such a decision should not be a legally flawed one. However, it would seem to be consistent with the scheme of public administration that such a decision should be as timely as possible.

I have already mentioned the potential prejudice to NAC if there is ultimately an adverse decision refusing the relevant applications, particularly a decision which is based, in part, upon a Land Court decision which NAC submits is legally flawed. It remains important, though, to emphasise that the relevant decision, whether it be to grant NAC the applications which it hopes to be granted or refuse those applications, or grant them on conditions which NAC is unable to accept, ultimately is the decision of the Minister. I consider that the position then is different to one in which one is concerned with a party or a decision maker whose decision affects legal rights and makes determination of rights, subject to appeal or judicial review. Nonetheless, the decision of the Land Court has legal consequences and I do not make light of it.

If there is no stay, and NAC can obtain the decisions which it seeks, then its position will be resolved in its favour. Its interest is in not having the prospect of obtaining such a favourable decision burdened by an unsupportive Land Court recommendation which, it argues, is vulnerable to legal challenge. Whilst I place real significance upon the detriment which it may suffer by being burdened by unsupportive recommendations by the Land Court, NAC is not powerless in seeking to minimise that detriment. It can, through appropriate channels, persuade the Ministers and persons who would advise the Ministers of the merits of its case and the merits of its arguments before the Land Court, and even the arguments which it advances here concerning alleged flaws in the Land Court's decision. NAC has an expectation that the Minister will not simply adopt the recommendations of the Land Court. In fact, it would be a legal error for the Minister to do so in circumstances in which the Minister, under section 271, must separately consider matters stated in the Act.

I am not persuaded that declining to grant a stay will lead to irreparable harm being suffered by NAC. If, on the other hand, a stay of suspension is ordered, then the Ministers will, as it were, stay their hand - there will be no decision by the Minister or the Administrative Authority and uncertainty will beset all the parties with a prolongation of the process. One cannot say how long it will take for the judicial review matter to be readied, heard and determined. I have to consider and balance a number of matters. One is that the recommendation is simply part of a process which is concerned with a full consideration of the merits informed by the Land Court's recommendations but also informed by criticisms of the substance of that decision and the process by which that decision was reached.

I have to consider that there is an important public interest in decisions of Ministers and the Approving Authority not being made on the basis of decisions or recommendations which are legally flawed. Also, I have to weigh in the balance the public interest in decision-making processes of the kind created by statute not being unduly delayed with every step in a process being treated as if the decision is merely provisional and somehow ineffective until it has been the subject of judicial review.

I am only able to give a rather cursory consideration to the grounds for judicial review. In argument, I remarked that I was not much persuaded that there was a basis for denial of natural justice on the grounds that the member of the Land Court did not afford witnesses an opportunity to address the bases of an assessment of their credit. I would be surprised if that was a legal requirement in a case in which witnesses might understand their credit to be an issue. In any event, that is only one of many grounds of review.

Reference was made to some apprehension of bias. However, I did not understand that there was any point raised during the course of the hearing about that. There certainly was not, as I understand, any application to the member to disqualify himself or to seek some orders from this court to stop the matter proceeding. So that would seem to give rise to issues concerning a waiver. There are, however - and these are helpfully summarised in paragraphs 23.2 to 23.7 of NAC's submissions – a variety of grounds concerning alleged errors of law committed by the Land Court.

The proposition that such alleged errors may be said to be thinly veiled attempts at merit review is not a matter which I can pass any judgment upon. It seems to be always possible to characterise what are proper grounds for judicial review as being merit based. The final ground of review that the exercise of power is so unreasonable that no reasonable person could have so exercised it, or that the exercise involved irrational reasoning and/or conclusions, is a notoriously difficult ground to succeed upon in any administrative law context. Ultimately, then - and on the very provisional basis upon which I proceed - I cannot say that the grounds for judicial review are weak, but nor can I say are they strong.

I have to consider the private interests of the parties. NAC has an obvious interest in enhancing its prospects of obtaining approval and, in that context, of not being jeopardised by a recommendation which may subsequently be shown to have been legally flawed. OCAA and those who it represents, also have important private interests in, as it were, taking advantage of recommendations which favour its position and seeking early resolution of the matter.

I will not take the time to read in any detail the evidence of Ms Plant, who is a farmer, and Mr Ashman, who is also a farmer, about the consequences of this Supreme Court proceeding and how they and others have been subjected to uncertainty and how, following the decision of the Land Court, they had hoped for a relatively quick and final decision and how the present judicial review proceeding and the application for a stay has affected them. I take into account what is said about the prolonged uncertainty in relation to proposed stage 3 mine

and the stresses which it has had upon individuals and the effect which it has had upon their existing businesses and the proposals to expand their businesses.

Ultimately, it seems to me that I have to balance a number of matters and consider where justice is best served. It seems to me that, if the process continues, then there is the potential for relatively early resolution, which, if it is in NAC's favour, will give it and its workforce the certainty that it seeks. If, on the other hand, the process continues without an order for suspension and the applications are refused, then, subject to the outcome of this judicial review proceeding and further or consequential orders that might be made, then NAC will also have the certainty of knowing that its applications have been refused and the reasons they were refused and it can consider whether it makes further applications.

As I noted, the Oakey Coal Action Alliance accepts that, if the decision of the Land Court is not suspended and, prior to the final determination of the proceedings, the MRA Minister and/or the Administering Authority in reliance, in part, on the Land Court decision refuse the relevant applications, and if the Land Court decision is subsequently set aside or quashed by this court, then the OCAA will not oppose the making of further or consequential orders setting aside the decisions of the MRA Minister and/or the administering authority. It seems to me that that position reduces what might otherwise have been a significant point of prejudice to NAC.

Ultimately, I have to balance, on one side, the interest of NAC and the public interest that decisions, including non-binding recommendatory decisions which form part of a process, are made according to law. Against that, I have to balance the interest of land owners and the broader public interest that decisions, including non-binding recommendatory decisions, are not suspended or treated as somehow provisional because they are open to arguable challenge on administrative law grounds.

I am not satisfied that irreparable harm will be caused to NAC or third parties if a suspension or stay is not ordered. It seems to me that the alleged flaws in the process and the substantive arguments against the Land Court's decision are able to be addressed as part of the statutory process by which the Minister and the Administering Authority have to consider the merits of the matter. I recognise that NAC may be disadvantaged to some extent by the fact that the Minister may be influenced by a decision which is later shown to be invalidated on administrative law grounds. However, that disadvantage can be reduced by the making of submissions to the Ministers. I do not consider that any disadvantage will be irreparable because, as acknowledged, if the Land Court decision is flawed, then any decisions taken in reliance upon it will be liable to be set aside. At some point, it will be necessary to consider, if that course occurs, whether the relevant decision makers are joined as parties so that such further or consequential orders can be made.

I take into account the fact that suspending the Land Court decision will not allow the process to continue and, as it were, the final decisions will not be able to be made for a substantial amount of time, causing uncertainty to many individuals and businesses, including NAC and the persons who support the OCAA.

Ultimately, I am not persuaded that NAC will suffer irreparable prejudice unless I grant an order suspending the decision. I conclude that the prospects of it succeeding on its substantive application for judicial review have not been shown to be sufficiently strong as to justify suspension of the decision. Having regard to the potential for irreparable harm and the interests of the parties and third parties, in circumstances where the prospects of success cannot be said to be strong, I do not consider that the balance of convenience favours the granting of the stay that is sought.

As I said, the relevant Minister and the Administering Authority are on notice that, if NAC is subject to certain decisions which are adverse to it, then it reserves its right to challenge those decisions and, in the event it succeeds in the current judicial review proceeding, to have those decisions set aside. In all the circumstances, I decline the application to suspend the decision of the Land Court.

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The second order will be the costs of and incidental to the application be costs in the proceedings.