SUPREME COURT OF QUEENSLAND

CITATION:	*Swan v Santos GLNG Pty Ltd & Ors* [2019] QCA 6
PARTIES:	**STEVEN JOHN SWAN** (applicant) **v** **SANTOS GLNG PTY LTD** ACN 131 271 648 (first respondent) **PAPL (DOWNSTREAM) PTY LTD** ACN 147 649 205 (second respondent) **TOTAL GLNG AUSTRALIA** ARBN 146 680 524 (third respondent) **THE CHIEF EXECUTIVE ADMINISTERING THE ENVIRONMENTAL PROTECTION ACT 1994** (fourth respondent)
FILE NO/S:	Appeal No 2779 of 2017 Appeal No 4367 of 2017 DC No 80 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Applications – Civil
ORIGINATING COURT:	District Court at Maroochydore – [2017] QPEC 2; [2017] QPEC 17 (Robertson DCJ)
DELIVERED ON:	1 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	24 November 2017
JUDGES:	Fraser and McMurdo JJA and Henry J
ORDERS:	**In CA 2779/17** **1. Refuse the application for leave to appeal, with costs.** **In CA 4367/17** **1. Grant the application for leave to appeal.** **2. Allow the appeal with costs.** **3. Set aside the costs order made in the Planning & Environment Court on 24 March 2017, and instead order that the applicant pay the costs incurred by the respondents after 16 June 2016.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – ENVIRONMENTAL LAW – where part of the respondent's [Santos'] gas pipeline

was built on the applicant's properties – where Environmental Authorities were granted to Santos – where the applicant filed an originating application applying for declarations under s 505 of the *Environmental Protection Act* 1994 (Qld) that Santos was in breach of various conditions of the Environmental Authorities – where the applicant sought the appointment of an independent expert to report to the court on the extent of the breaches and the rehabilitations required – where the primary judge found that the orders sought at trial were beyond power – where Santos' expert believed that all recommended rehabilitation had been undertaken except those obligations that required ongoing maintenance – where Santos undertook to continue that ongoing maintenance

ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS – COSTS – GENERALLY – where the applicant was wholly unsuccessful in the proceeding below – where the primary judge ordered the applicant to pay the respondents' costs of the proceedings on the standard basis or as agreed – where s 457(1) of the *Sustainable Planning Act* 2009 (Qld) provides that the costs of the proceeding are in the discretion of the Planning and Environment Court – where it was accepted that the general rule that costs follow the event did not apply and instead the non-exhaustive list of considerations in s 457(2) should be considered – where the primary judge observed that the court never ruled against the no case submission – where the court did in fact rule against the no case submission – where the primary judge considered the factor in s 457(2)(d) of whether a party commenced or participated in the proceeding without reasonable prospects of success in light of this error – whether the primary judge erred in ordering the applicant to pay the respondents' costs of the proceeding on the standard basis

Environmental Protection Act 1994 (Qld), s 505
Sustainable Planning Act 2009 (Qld), s 457(1), s 457(2)

Cox v Brisbane City Council (No 2) [2014] QPELR 92; [2013] QPEC 78, approved

COUNSEL: K Barlow QC, with T Jackson, for the applicant
J M Horton QC, with D M Favell and A Hellewell, for the respondents

SOLICITORS: P&E Law for the applicant
Carter Newell for the respondent

[1] **FRASER JA:** The applicant seeks leave to appeal from two decisions of the Planning and Environment Court:

(a) A decision after a trial dismissing his application for an injunction under s 505 of the *Environmental Protection Act* 1994 (Qld) ("EPA") against three companies collectively described in these reasons as "Santos"; and

(b) The trial judge's subsequent order that the applicant pay Santos' costs of the proceedings.

[2] The grounds of the proposed appeals to this Court are confined to error in law.[1] I will first discuss the application for leave to appeal against the substantive judgment.

Background

[3] Santos built a 420 kilometre gas pipeline between the Surat and Bowen Basins and Curtis Island near Gladstone. Environmental Authorities ("EA") were granted to Santos in November 2011 and March 2015 approving the construction of the pipeline under a petroleum licence ("PPL 166") subject to numerous conditions. The relevant conditions are identical or materially identical, so it is necessary to refer only to terms of the EA granted in 2015. The pipeline was designed, supplied, constructed and commissioned by Santos' contractor Saipem Australia Pty Ltd ("Saipem"). The applicant owns two properties near Moura known as Inala (Lot 12) and Mulawa (Lot 3), as well as other properties nearby. He uses the properties for grazing beef cattle and operating a cattle stud. Part of the pipeline was built on the applicant's properties. By deeds dated 21 June 2011,[2] the applicant's father (who then owned the properties) covenanted to grant easements over both properties to Santos to allow for the construction and maintenance of the pipeline (the right of way, "RoW").[3] The RoW is 30 metres wide together with an adjacent "Working Space" ten metres wide.[4]

[4] Construction of the Pipeline over Inala and Mulawa commenced in March or April 2013[5] and was completed by 8 September 2014 at the latest.[6] The applicant alleged that during the work there were contraventions of conditions of the EA, many of which were not rectified despite his complaints to Saipem and Santos.

[5] Section 430 of the EPA applies to a person who is the holder of an EA or to a person who is acting under an EA. It is an offence for a person to contravene a condition of an EA: s 430(3). The holder of an EA (in this case, Santos) must ensure that everybody acting under it complies with its conditions: s 431(1). If "another person" (that is, someone other than the holder – in this case, Saipem) acting under an EA commits an offence against s 430, the holder commits the offence of failing to ensure the other person complies with the conditions: s 431(2). Section 431(4) provides that it is a defence for the holder to prove that the holder issued appropriate instructions and used all reasonable precautions to ensure compliance with the conditions, and the offence was committed without the holder's knowledge, and the holder could not by the exercise of reasonable diligence have stopped the commission of the offence.

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1 *Sustainable Planning Act* 2009 (Qld) s 498(1)(a).

2 Deeds of Option for Easement with the attached easement documents over Inala (Ex SJS-1 at 23-82) and Mulawa (Ex SJS-1 at 83-144).

3 Reasons [17], [18].

4 Reasons [18].

5 Reasons [13].

6 Reasons [102].

[6] Section 505(1) of the EPA provides that proceedings may be brought in the Planning and Environment Court for an order to remedy or restrain an offence against the Act, or a threatened or anticipated offence against the Act, by (amongst others) a person whose interests are affected by the subject matter of the proceeding. The applicant is such a person in relation to the alleged contraventions of the conditions of the EAs. Section 505(5) empowers the Court to make orders it considers appropriate to remedy or restrain an offence if the court is satisfied that an offence against the Act has been committed or will be committed unless restrained.

[7] In May 2015, the applicant filed an originating application in the Planning and Environment Court applying for declarations under s 505 of the EPA that Santos was in breach of various conditions of the 2015 EA over Inala and it was anticipated that Santos would further breach those conditions, an order under s 505 that Santos cease work until measures could be put in place to ensure future compliance with the EA, and further orders under s 505 to which I will refer. In an amended originating application filed in August 2015 the claim was extended to Mulawa.

[8] The parties obtained expert reports. The reports and other evidence identify locations on Inala and Mulawa by reference to "Kilometre Point" or "KP" numbers. The length of the RoW over Inala and Mulawa is about nine kilometres. Farm Plans for those properties[7] assign KP numbers to points on the RoW representing distances from the western point of the pipeline. KP240 is west of the western boundary of Inala, KP241-243 are within Inala, KP244-248 are within Mulawa, and KP249 is north-east of the eastern boundary of Mulawa.

[9] The applicant's solicitors retained an expert, Mr Dudgeon, to undertake a preliminary review of the Pipeline through Inala and Mulawa. Dudgeon drove the length of the RoW through those properties, concentrating on some of the applicant's areas of concern, and prepared a report dated 18 August 2015.[8] Dudgeon's August 2015 report discusses five areas. The discussion may be briefly summarised as follows:

(a) Area 1, around KP241: the applicant stated that the pipe trenches were backfilled with sodic subsoil clay from a dam. Dudgeon noted hard setting surface crusts which are characteristics of subsurface sodic soils, not evident in other local areas, and unexpected in the top soil horizon. The crusts can inhibit seed germination and crop growth, increase surface runoff and erosion, and decrease water infiltration rates.

(b) Areas 2 and 3, east of KP242 and west and east of KP243 on Inala, an area known as Red Hill South: this area has the highest quality Red Earth soils on the farm. The applicant had concerns that lower quality sodic soils and rock from other areas had been mixed in, modifying the soil profile and land capacity. Dudgeon observed that a pit dug within the RoW had a shallow Red Earth A horizon less than 250 mm, overlaying a rocky sodic heavy clay layer B horizon, whereas the soil profile outside the RoW had deeper clay loams to one metre plus.

(c) Area 4, West of KP244 on Mulawa: the applicant stated that subsoils and rock from other areas were backfilled in the pipeline trench for about 300 metres from the road east along the RoW. Two soil inspection pits were dug

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7 Exhibits 7 and 8.

8 AB 752.

and Dudgeon made an observation to the same effect as that concerning areas 2 and 3. He also observed a large blue rock in the pit in the RoW, which was inconsistent with the soil profile.

(d) Area 5, East of KP244: two soil inspection pits were dug and Dudgeon made observations to similar effect to those in Areas 2 and 3.

[10] Under the heading "Other Issues", Dudgeon observed that there was subsidence every 250 m with an average depth of 0.5 m, there was "swell" or overburden in some locations, there were more weeds in the RoW compared with the remainder of the land, and there was a marked visual difference between plants in the RoW and the remainder of the farm.

[11] Dudgeon concluded that there was observed evidence of:

- "subsidence (refer EA condition H6 and H9);
- the surface not being returned to a condition that serves the preconstruction use (refer EA condition H4, H5, H6, H8, H9, and D11);
- pipeline trenches have not been rehabilitated (refer EA condition H3 and H4);
- soil horizons that are inconsistent with those nearby (refer EA condition H5 and H8 and H9);
- profiles at levels inconsistent with surrounding soils (refer EA H6 and H9);
- profiles inconsistent with surrounding land features (refer EA condition H6 and H9);
- top horizons of soil profile not reinstated (refer EA condition H5 and H8);
- the land not being reinstated to the pre-disturbance soil suitability class (refer EA condition D11 and H9); and
- change in pasture including weed infestation (refer EA condition D39, H3 and H4)."

[12] Dudgeon recommended that a revised rehabilitation plan should be produced from a detailed survey of: the soil profile and condition within the RoW compared with native adjacent soils profiles and classifications; weeds; rehabilitation species compared with the current farming pastures species; and subsidence. He recommended that the survey and consequential remediation be undertaken under the supervision of an environmental consultant or consultants selected by the Court.

[13] Santos' solicitor engaged an expert, Mr Sutherland, to prepare a preliminary report. Sutherland inspected the RoW on 1 October 2015 in the presence of a representative from Dudgeon's company. The applicant was present during part of that inspection and expressed some of his concerns. Sutherland's October 2015 report assessed soils and vegetation cover at 12 locations in six transects along the pipeline. At each transect there was one sampling point within the RoW and another sampling point in an undisturbed area outside the RoW. The selection of the transects was largely informed by areas identified in Dudgeon's August 2015 report. Sutherland's conclusions may be summarised as follows:[9]

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9 Sutherland October 2015 report at [5.3] (AB 1968- 970); Reasons [59]-[62].

(a) There was little overall difference in ground cover between the RoW and the undisturbed areas but there were areas of bare soil surface and minor erosion in the RoW.

(b) There was an observable difference in vegetation composition within a 10 metre radius at transects 3 and 4, particularly undesirable weeds in the RoW adjacent to transect 4. There was a general trend towards taller vegetation within the undisturbed areas compared with the RoW.

(c) Surface coarse fragments were found only at transect 1 within the RoW. Soil texture as between the RoW and undisturbed areas differed markedly only at transects 2 and 3. Soil structure was reasonably consistent except at transects 2 and 4. Coarse fragments were present in higher proportions within the RoW at transects 1 and 2 compared with the undisturbed areas, the fragments being likely to reflect at least in part blast product.

(d) Soil profile had not been reinstated to its pre-disturbance condition within the RoW soils at transects 1, 2, 4 and 5. Soil moisture was predominantly higher in the undisturbed areas except at transects 2 and 4.

(e) Areas of subsidence were evident throughout the RoW relative to the land surfaces on either side. Introduced weed species were prevalent in areas along the RoW, especially in lower lying portions of Mulawa near transect 4, indicating at least in part deficient weed management practices by the contractor and poor pasture re-establishment.

[14] In relation to issues raised in the August 2015 Dudgeon report about EA conditions, Sutherland's discussion may be briefly summarised as follows:

- Multiple areas of subsidence, exposed subsoils and poor soil structure likely to have resulted from disturbance noted along the RoW indicated that some parts of it had not been restored to a "land use condition that serves the pre-construction use", but the restoration of large parts of the RoW did meet the required condition (Condition D11(b)).
- There were significant differences in soil horizons between the RoW and undisturbed areas in transects 1, 2, 4 and 5, including evidence of mixed soil and different soil texture and/or structure (EA conditions H5, H8 and H9).
- There were introduced weeds in the RoW adjacent to transect 4 and in other areas where soil disturbances had occurred (EA condition 39).
- There were examples of subsidence along the RoW (EA condition H6).
- Parts of the RoW required rectification with regard to soils, land surface and weed management.
- Sutherland's understanding was that the Land Rehabilitation Reinstatement Management Plan prepared by Saipem was implemented and rehabilitation works were carried out as soon as practicable within the three month time period following backfilling of the trench. Further rehabilitation within the RoW was needed but the rehabilitation plan was implemented over significant portions of the RoW (EA conditions H3 and H4).

[15] Sutherland made recommendations about the appropriate assessment and rehabilitation of the soil and pasture in the RoW which differed from Dudgeon's recommendations. Sutherland's recommended forms of rehabilitation varied according to a characterisation of the RoW disturbance as "major" (disturbance across the entire width of the RoW, irrespective of its length along the RoW), "medium" (the

area of disturbance being greater than 150 m^2 but less than the RoW width), and "minor" (the RoW disturbance being less than 150 m^2). Sutherland produced a table which summarised what he described as a "simple three-step process of assessment, rehabilitation and monitoring to ensure the rehabilitation has succeeded" and observed that the process was "based on the well-established grassland management strategy of replacement, renovation or retention".[10]

[16] The applicant swore a lengthy affidavit on 24 August 2015 in which he made numerous contentions about matters concerning the construction of the pipelines and failures to rehabilitate the RoW, and about the absence of meaningful or effective action in response to complaints he had made to Saipem and Santos. The applicant's partner, Ms Hotz, swore an affidavit on 24 August 2015 which supported many of the applicant's contentions and referred to other matters.

[17] An employee of Santos, Mr Brier, swore affidavits on 29 September 2015[11] and 12 November 2015.[12] In the first affidavit, Brier referred to Dudgeon's August 2015 report and the affidavits of the applicant and Ms Hotz. Brier disputed some of the applicant's contentions and acknowledged the accuracy of others. In the second affidavit, which Brier deposed he was authorised to swear on behalf of Santos, he deposed that: Santos was willing to undertake all of the rehabilitation works recommended in Sutherland's October 2015 report; because of the current proceeding and a stated wish by the applicant that his land not be entered by Santos' contractors, those contractors were not able to carry out the works similar to those recommended by Sutherland which otherwise would have been carried out by mid-September 2015; and by using contractors other than Saipem, with whom the applicant had indicated he was dissatisfied, Brier anticipated that subject to the availability of those contractors the work should be able to start within two weeks of Santos being given permission to enter the applicant's land.

[18] At a review hearing before the trial judge on 12 November 2015, which was about seven months before the trial commenced in June 2016, Santos proposed interlocutory orders which would require it to carry out the rehabilitation work recommended by Sutherland by the end of January 2016. The applicant opposed those orders, contending that those works were insufficiently defined and additional work was required to rehabilitate the applicant's land. After hearing argument on 12 November 2015, the trial judge ordered that Santos carry out forthwith the works recommended in Sutherland's October 2015 report and complete such works by the end of January 2016,[13] with both parties having liberty to apply upon 48 hours notice.

[19] Subsequently Sutherland swore an affidavit on 21 January 2016, in which he deposed that, based upon photographs taken by colleagues on 18 and 19 January 2016 and discussions with them, he believed that his recommendations, except those which would involve ongoing watering, monitoring and repair, had been properly undertaken to a satisfactory standard. In an affidavit sworn on 8 April 2016 he referred to an inspection of the applicant's property. He observed that the state of the property had generally improved since his visit on 1-2 October 2015,

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10 Sutherland October 2015 report, s 8 pp 25-26 (AB 1978).
11 AB 1401.
12 AB 1461.
13 The form of the order in the Appeal Book (AB 2582) refers to January 2015 but that is obviously incorrect.

there were limited areas suffering from subsidence, and there had been a reasonable strike rate (germination of seed) and grass cover. He recommended the application of additional gypsum to a relatively small area in which further erosion had become evident. He referred to an area of subsidence repair where there had been very little strike, which he stated was most likely due to cattle trampling on the soil in wet conditions, and recommended that the area be left without cattle, harrowed and reseeded as soil moisture conditions allowed. Sutherland confirmed that the recommendations in his 30 October 2015 report had been implemented by Santos to the extent possible and stated that the results had to an extent been curtailed by the lack of recent rain, the presence of cattle on the property, and some further subsidence. He made recommendations about ongoing remediation. For Santos, Brier swore affidavits on 20 January and 12 April 2016 to the effect that Santos had completed the works recommended by Sutherland other than the recommended ongoing work and activity, and Santos would carry out the ongoing work and activity, consult with Sutherland, and comply with its obligations under the EAs.[14]

[20] Dudgeon assessed the rehabilitation and soil condition at the properties in a report dated 20 April 2016 with reference to investigations undertaken in late February of that year. He concluded that, despite the recent rehabilitation work, areas of the properties had not yet been appropriately rehabilitated; there was evidence of "the surface not being returned to its pre-disturbance condition that serves the pre-construction use (refer EA condition H4, H5, H6, H8, H9 and D11); soil horizons that are inconsistent with those nearby (refer EA condition H5 and H9); the land not being reinstated to the pre-disturbance soil suitability class (refer EA condition D11 and H9)". Dudgeon recommended:

> "A detailed site survey should be undertaken to assess soil profile conditions within the RoW. This should be compared to native adjacent soil profiles and classifications and undertaken at a maximum scale of 1:10000 … from this survey a revised rehabilitation plan for the properties of Inala and Mulawa should be produced and implemented. It is recommended that all survey and consequent remediation be undertaken by an independent environmental consultant/s selected by the Court and remediation subject to supervision by that expert. This recommendation for independent detailed surveys is made to ensure that the extent and level of the impact is fully identified so as to provide enough details to enable an accurate revised rehabilitation plan. Without that plan it is not possible to determine resources required and the level of rehabilitation achievable (i.e. potential to return the land to the pre-disturbed land condition)."

[21] In an affidavit sworn on 12 May 2016, Dudgeon referred to his inspection on 29 January 2016 along the entire length of the RoW and made various criticisms of the nature and effectiveness of rehabilitation work done by Santos in purported compliance with Sutherland's recommendations, as a result of which Dudgeon had prepared his 20 April 2016 report.

[22] Pursuant to directions made in May 2016, Dudgeon and Sutherland met and prepared a joint expert report in which various points were agreed, including that

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14 AB 1466-1467 and 1507-1509.

"[n]o soil rehabilitation exercise will result in a replica of the undisturbed soil profile",[15] "[t]he success of the rehabilitation is measured by ground cover, area of subsidence and pasture availability",[16] and "[t]he monitoring and ongoing repair provisions detailed in the [Sutherland] report should continue as prescribed".[17]

[23] Affidavits and oral evidence at the subsequent trial by the applicant, Ms Hotz, and Mr Hotz (an employee of the applicant) suggested that Saipem had committed numerous breaches of the EAs, some of which had enduring and substantial significance for the applicant's use of his properties, Santos did not prevent or promptly remediate the breaches upon becoming aware of them (in some cases by virtue of the applicant's complaints), and there were significant deficiencies in the rehabilitation work recommended by Sutherland and in the work actually carried out by Santos.

[24] A great deal of evidence and argument at the trial was directed to the question whether the applicant had proved to the required standard that Santos had contravened conditions of the EAs. The trial judge concluded that the applicant had not fulfilled that onus.

[25] Much attention at the trial was also directed to a conflict in the expert's opinions about the appropriate method of rehabilitation. The parties' final positions at the trial reflected that conflict: on the basis of Dudgeon's expert evidence that Santos' rehabilitation work had not been as successful as he had initially thought[18] and it was necessary to conduct scientific testing of soil samples along the whole of the RoW, the applicant contended that much more investigation needed to be done to establish the extent of the environmental harm along the RoW; whereas Santos contended that the work it undertook under Sutherland's supervision since 12 November 2015 had essentially provided what the applicant sought in orders (2) and (3),[19] and Sutherland's opinion was that the measures he recommended, and which Santos had adopted, would (after at least two seasons) result in the land use condition of the RoW being returned to a condition that served the pre-construction use.[20]

[26] The trial judge held that:

(a) Sutherland's evidence about the appropriate remedial measures for the alleged contraventions should be preferred to Dudgeon's evidence.[21]

(b) There was reasonable ground cover recovery along the RoW; it had deteriorated to some extent by the time of the June 2016 hearing, but that might have been contributed to by weather conditions, as well as by cattle being allowed to move across the rehabilitated area during the rehabilitation process.[22] (The trial judge found that the applicant had incorrectly proceeded upon the footing that it was Santos', rather than the applicant's, legal responsibility to fence the RoW.[23])

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15 Joint expert report 6 June 2016 at [24].
16 Joint expert report 6 June 2016 at [35].
17 Joint expert report 6 June 2016 at [36].
18 Reasons [89].
19 Reasons [38].
20 Reasons [89], [144]-[145], [158].
21 Reasons [82]-[95], [158].
22 Reasons [143].
23 Reasons [94]-[95], [99], [113]-[118].

(c) Once Santos was permitted to enter the properties after the 12 November 2015 order, it had "demonstrated good faith in engaging Sutherland and accepting all the recommendations, many of which are ongoing".[24] After making similar findings specifically in relation to Santos' conduct in implementing particular aspects of the rehabilitation measures recommended by Sutherland,[25] the trial judge concluded that "Santos' actions since 30 October 2015 when it obtained Sutherland's first report, has shown good faith and a willingness to comply with its legal obligations".[26]

[27] In the amended originating application upon which the applicant went to trial, the applicant sought four orders under section 505. Order (1) is that Santos cause all works on the applicant's land to cease until measures have been put in place to secure compliance with the EAs for PPL166. That order lacked utility, Santos having earlier completed the pipeline construction, and it was not pursued in final submissions at the trial. The remaining orders are:

(a) Order (2) – that Santos "cause an independent investigation to be undertaken at their cost, by an expert appointed by the Court, to identify all respects in which the [EAs for PPL 166] have been contravened on the Applicant's Land and the measures to be taken to remedy those contraventions".

(b) Order (3) – that Santos "cause the contraventions to be remedied by the measures identified by the independent investigation".

(c) Order (4) – "Such further or other orders as to the Court may seem just to remedy the contraventions" of the EAs for PPL166 on the Applicant's Land.

[28] The trial judge declined to grant any of the orders sought by the applicant, essentially upon three main grounds:

(a) Orders (2), (3) and (4) (under which, in final submissions at the trial, the applicant sought an order appointing an independent expert to determine the "spatial extent" of contraventions and the required remediation works[27]) lack sufficient certainty and are beyond the jurisdiction of the Planning and Environment Court because they impermissibly seek to have the Court concede jurisdiction to a lay person (an expert) to identify offences and measures to remedy the alleged offence.[28]

(b) Orders (2), (3) and (4) should be refused in the exercise of the discretion because those orders required court supervision, which although appropriate for some litigation, was not appropriate "in the circumstances here where on all the evidence before me, I am satisfied that Swan will only ever be satisfied if an independent expert is controlled by him, inevitably leading to difficulties (again) about access, and returns to the court to resolve disputes about the way in which the orders are to be implemented",[29] and for other reasons.[30]

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24 Reasons [159].
25 Reasons [159] (last sentence), [162], [167], [169], [172], [173].
26 Reasons [197].
27 Under order (4) the applicant also sought an order requiring Santos to complete fencing of the RoW to secure the re-establishment of pasture, but the applicant does not challenge the trial judge's finding that the applicant was legally responsible for this fencing.
28 Reasons [132]-[135].
29 Reasons [135].
30 Reasons [190]-[208].

(c) The applicant had not established any of the alleged offences under s 430 or s 431 of the EPA.[31]

The application for leave to appeal

[29] The applicant contends that each of those grounds for the decision involves an error of law. His draft notice of appeal seeks the following orders:

> "(2) That the First, Second and Third Respondents are enjoined to remove any temporary access tracks remaining on the right of way area save and except any such tracks which are presently required for rehabilitation purposes or for the purposes of maintaining, inspecting, testing and/or repairing the pipeline in the right of way area;
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> (3) That the First, Second and Third Respondents replace topsoil and return the surface of the right of way area to a condition that serves the preconstruction use and implement and maintain land management and erosion control measures in respect of the right of way area;
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> (4) That the First, Second and Third Respondents implement the *GLNG Gas Transmission Pipeline Landscape Rehabilitation Management Plan* approved June 2011 in respect of the right of way area;
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> (5) That the First, Second and Third Respondents rehabilitate the area of the backfilled pipeline trenches in the area of the right of way, including to ensure a stable landform, the avoidance of subsidence and erosion gullies in the life of the operational pipeline ~~and profiling of the backfilled areas to a level consistent with the surrounding soils~~;[32]
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> (6) That, in carrying out the measures required by orders 2, 3, 4 and 5, above, the First, Second and Third Respondents have regard to the report of Mr. Neil Sutherland dated 30 October 2015; the affidavit of Mr. Sutherland sworn on 8 April 2016; and Mr. Sutherland's evidence contained in the Joint Experts' Report and in Mr. Sutherland's oral testimony."

[30] Santos contended in its first outline of submissions,[33] that those orders should not be made for many reasons: relief of that kind was not sought at the trial, the proposed orders are uncertain (because, for example, in carrying out each of orders (2) – (5) Santos is to "have regard" to Sutherland's evidence, there is no identification of what access tracks "are presently required for access and rehabilitation purposes", and there is no identification of what topsoil ought to be removed and in what locations), Sutherland did not recommend that the work described in the orders should be done, and the trial judge accepted Sutherland's evidence that the only

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31 Reasons [137]-[176] and, in relation to s 431(4) as a "defence", [183]-[189].

32 The applicant abandoned pursuit of the struck through words for the expressed reason that the effect of Sutherland's evidence, as accepted by the trial judge, is that work to achieve compliance with condition AH(5) to the extent that soil profiles are made consistent with those of nearby areas was not recommended.

33 Outline of submissions on behalf of Santos filed 4 September 2017 at [1(a)], [13].

additional remedial work that was required involved ongoing watering, monitoring and repair.

[31] In an outline of argument in reply, the applicant made concessions that are important for the disposition of his application for leave to appeal. The applicant:

(a) accepted the correctness of Santos' argument that mandatory injunctions must state exactly what is required to be done;[34]

(b) disclaimed any challenge to "Sutherland's prescriptions for remediation" and sought orders on appeal only for the implementation of those recommendations made by Sutherland which had not been completely fulfilled by the time of the trial and which (the applicant contended, but Santos denied) were found to be necessary for Santos to comply with its legal obligations;[35] and

(c) annexed to the outline of argument a draft order which was submitted to be the "type" of order that would be appropriate, and argued that the matter might be remitted to the Planning and Environment Court for that Court to settle the final terms of the order after hearing argument.[36]

[32] That draft order seeks the following substantive orders to give effect to Sutherland's expert opinion about the appropriate method of rehabilitation:

> "(3) That the First, Second and Third Respondents, within two weeks of the date of these orders, retain Mr. Neil Sutherland, or a soils remediation expert with comparable skills to Mr. Sutherland who is acceptable to the Applicant;
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> (4) That the First, Second and Third Respondents cause Mr. Sutherland, or the other soils remediation expert, to carry out further remediation works on the Applicant's right of way area so as to return the surface of the right of way area to a condition that serves the preconstruction use, namely, grazing of cattle, by:
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> (a) Achieving a 75% ground cover of the sward of grasses in the designated seed mix;
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> (b) Providing ongoing weed management;
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> (c) Where necessary, supplementing the seed bank;
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> (d) Taking steps to remedy any bare areas;
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> (e) Ensuring that surface soils are regenerated into topsoil;
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> (f) Repairing, reinstating, compacting, treating with gypsum and grassing contour banks that have been damaged as part of the reinstatement rehabilitation works carried out to date;

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34 Santos cited *Morris v Redland Bricks Ltd* [1970] AC 652 at 666 and *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 259-260.

35 Amended outline of argument in reply at [8], [11]-[22].

36 Amended outline of argument in reply at [39].

(g) Repairing areas of further subsidence as become evident;

(h) Removing any temporary access tracks remaining on the right of way area save and except any such tracks which are presently required for rehabilitation purposes;

(i) Provide ongoing monthly monitoring of the sward of grasses in the designated seed mix until they achieve the 75% ground cover;

(j) Preparing fenced off sites both in the Right-of-Way and analogue sites outside of it for the purpose of ongoing monitoring.

(5) That, in the event that 75% groundcover of the sward of grasses in the designated seed mix is not achieved by the end of November 2017, the First Second and Third Respondents cause Mr. Sutherland, or the other soils remediation expert, to provide a report to the Planning and Environment Court by 31 December 2017 which reassesses the steps necessary to be taken to achieve that outcome as at the date of the report;

(6) That, in any event, upon completion of the remediation works, the First, Second and Third Respondents cause Mr. Sutherland, or the other soils remediation expert, to provide a report to that effect to the Planning and Environment Court within 31 days of such completion;

…

(8) That the matter be remitted to the Planning and Environment Court;

(9) That the parties have liberty to apply to the Planning and Environment Court."

[33] Santos argues that leave to appeal should be refused for three reasons:

(a) The only substantive relief sought at trial was that a technical expert be appointed to identify what contraventions had occurred and what should be done to remedy them, and the trial judge correctly held that the claimed relief should not be granted.

(b) The relief claimed by the applicant in the proposed appeal was not sought in the Planning and Environment Court, raises fresh factual issues, and is uncertain.

(c) The effect of the evidence of Santos' agricultural expert, Mr Sutherland, was that there was nothing to which injunctive orders might usefully be directed and the applicant now accepts his evidence, thereby reversing its opposition to it at the trial.

[34] In relation to the third ground of the trial judge's decision, Santos submits that leave should be refused because it succeeded in the Planning and Environment Court on the statutory defence in s 431(4) and the draft notice of appeal does not seek to challenge that defence. In response to this argument, the applicant applied for leave to amend the draft notice of appeal by adding a new ground 4A, which contends that the

Planning and Environment Court erred in law in finding that Santos had established a defence under s 431(4) and, in the alternative, that in any event Santos breached the EAs by failing to rectify the actions of Saipem once Santos had become aware of them.

[35] Santos also submits that if leave to appeal is granted the appeal should be dismissed, substantially for the same reasons submitted to justify the rejection of leave and because the trial judge did not err in law in finding that the applicant had not established the alleged offences or in finding that Santos had established the statutory defence.

The first main ground for the decision: the orders sought at trial are beyond power

[36] The applicant's draft notice of appeal does not contain any ground that challenges the first main ground for the trial judge's decision. However in a supplementary submission dated 29 November 2017 the applicant sought to rely upon a new ground of appeal which challenges that ground for the decision:

> "That the trial judge erred in law:
>
> (a) in concluding at [132] of his reasons for judgment that orders 2 and 3 sought in the Amended Originating Application sought to have the Court concede its jurisdiction to a lay person in the respects identified by his Honour;
>
> (b) in concluding at [135] of his reasons for judgment that orders 2, 3 and 4 sought in the Amended Originating Application lacked sufficient certainty and that court supervision was not appropriate in the circumstances described by his Honour;[37] and
>
> (c) in concluding consequently that the application did not succeed because the relief sought was either beyond the Court's jurisdiction or uncertain;
>
> in that his Honour
>
> (d) failed to take into account:
>
> (i) the orders that the applicant in fact sought at trial;
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> (ii) the applicant's explanation of the intent of the orders sought;
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> (iii) the applicant's submission as to the Court's jurisdiction, and the appropriateness of the orders sought (as explained and sought at trial); and
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> (iv) the manner by which the applicant submitted the proceeding ought continue and orders ought be made if the Court found that the respondents had breached s 430 or 431 and therefore the Court's discretion under s 505 of the *Environment Protection Act* 1994 had arisen;

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37 The reference to court supervision not being appropriate concerns the applicant's challenge to the second main ground for the decision.

(e) consequently denied the applicant procedural fairness in not considering the case put to the Court by the applicant."

[37] The denial of procedural fairness contended for in (e) depends upon acceptance of the contention that the trial judge erred in the way described in (d). Appropriately, the parties' arguments focussed upon the alleged failure to take into account submissions made by the applicant's counsel of the kind described in (d).

[38] The applicant relied upon s 505(5) of the EPA as the source of power to make the orders it sought at the trial:

"**505 Restraint of contraventions of Act etc.**

(5) If the Court is satisfied–

(a) an offence against this Act has been committed (whether or not it has been prosecuted); or

(b) an offence against this Act will be committed unless restrained;

the Court may make the orders it considers appropriate to remedy or restrain the offence."

[39] The applicant does not now argue that s 505 empowered the trial judge upon the conclusion of the trial to make orders (2) and (3). Rather, the applicant's argument involves two related contentions: the trial judge should have construed the claimed relief as though it contemplated a delay between the making of orders (2) and (3) and the applicant foreshadowed seeking orders that materially differed from orders (2) and (3) after the trial judge had made findings upon the alleged contraventions.

[40] The applicant submits that having regard to the nature of the litigation and his counsel's final submissions, orders (2) and (3) should have been understood by the trial judge as orders appointing an independent expert to report about what had been done, whether in the expert's opinion what had been done complied with the requirements of the EA, and, if not, what measures were required to obtain compliance, after which the Court would use the report to assist it in making findings and orders about what had been done and what remedy was appropriate.[38] The applicant submits that the orders it sought were to the same effect as orders that had been made in the Land and Environment Court of New South Wales, which provided for a "stepped" approach, including for further investigations and the preparation of an action plan followed by a court determination of the appropriate remedial orders.[39]

[41] The applicant also submits that the fact that such relief was not claimed in its originating application did not prevent the Planning & Environment Court from

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38 Applicant's supplementary submission 29 November 2017 at [2]; Transcript 24 November 2017 at T1-39.

39 Applicant's amended outline of argument in reply 1 September 2017 at 40-46, citing *Great Lakes Council v Lani* (2007) 158 LGERA 1, *Director-General, Department of the Environment, Climate Change and Water (No 1) v Venn* (2011) 210 LGERA 300. *Director-General, Department of Environment, Climate Change and Water (No 2) v Venn* [2011] NSWLEC 232, and the paper delivered by Preston, Chief Judge of the Land and Environment Court of New South Wales, *Injunctions in Planning and Environmental Cases*, Australasian Conference of Planning and Environment Courts and Tribunals, 30 August 2012.

being empowered to grant it.[40] He submits that s 441 of the *Sustainable Planning Act* 2009 empowered the trial judge to grant that relief.[41] Santos submits in response that such relief would not have been appropriate because it would have been inconsistent with the way in which the applicant had litigated the case by seeking to prove the alleged contraventions and their spatial extent, so that the trial judge's discretion not to grant such relief did not miscarry.[42] Santos submits that the only basis upon which relief of the character now described by the applicant might have been granted was by the appointment of a referee, no such relief was sought, and it would have been inappropriate to grant it.

[42] The only question raised by the proposed new ground of appeal is whether the trial judge erred in law by failing to take into account the matters in (d) of the proposed new ground of appeal. But to put that question into context it is necessary first to focus upon orders (2) and (3) in the applicant's amended originating application. Those orders are not open to the construction for which the applicant contends. They unambiguously require (order (2)) a person appointed by the court to identify both any contraventions and the appropriate remedy for those contraventions identified by that person and (order (3)) the implementation of that remedy. Orders (2) and (3) do not refer at all to an expert report of the kind now described by the applicant, to any period of delay between order (2) and order (3) (or between the two tasks required of the appointee by order (2)), or to a post-trial hearing and further judicial decision about the alleged contraventions and their appropriate remedy. In any event, the amended originating application would naturally be understood as seeking that both orders be made at the same time upon the trial judge giving the judgment after the trial unless the applicant gave notice that different orders were sought.

[43] In opening the case at trial the applicant's counsel described the principal relief he sought as "an investigation at GLNG's cost and implementation of the recommendations of that investigation".[43] That did not flag orders that differed from orders (2) and (3), and the applicant's counsel's following submission, that "the order that we seek is actually one that involves an ascertaining by somebody completely independent … and then a requirement that those works be undertaken",[44] is consistent with orders (2) and (3).

[44] During a no case submission on the fourth day of the six day trial, Santos foreshadowed its argument ultimately accepted by the trial judge that orders (2) and (3) were beyond power.[45] In oral argument the point was forcefully made that the relief sought "an injunction that someone else do the court's job".[46] The applicant's counsel's response was that order (2) might be amended by replacing "all respects in which" with "the extent to which".[47] Despite the submission made for Santos and the trial judge's indication that the foreshadowed modification would not make

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40 See *Warwick v Tankey* [2004] QSC 274 at [19]; *Coppo v Banalasta Oil Plantation Ltd* [2005] QCA 96.

41 That section empowered the Planning & Environment Court to "make an order, give leave or do anything else it is authorised to do on the terms the court considers appropriate". The applicant's submissions did not elaborate upon the contention that this was a relevant source of power.

42 See *Mark Bain Constructions Pty Ltd v Avis* [2012] QCA 100 at [108], [119].

43 Transcript 13 June 2016 at T1-5.

44 Transcript 13 June 2016 at T1-40. Emphasis added.

45 No Case Submission 16 June 2016 at [9].

46 Transcript 16 June 2016 at T3-92 l 28.

47 Transcript 16 June 2016 at T4-15 l 40.

any difference,[48] the applicant did not seek to amend the claimed relief or foreshadow different orders that would omit the problematic requirements for an expert to identify the contraventions and the appropriate remedy. The applicant's counsel did not foreshadow that the orders might provide for an expert report or post-trial hearing and decision about the contraventions and appropriate remedy. To the contrary, the applicant's counsel submitted that the powers conferred upon the court were extremely broad and if the court found a contravention, the court "would appoint an expert to identify the extent of the contravention … and the remedy".[49] In that context, the applicant's counsel's submission that if the court was satisfied that there had been an offence there might be a further hearing at which the trial judge might craft the appropriate remedial orders[50] did not flag any departure from the substance of orders (2) and (3), especially where the applicant's counsel persisted in seeking the appointment of an individual to determine how to remedy any offence[51] and submitted in terms that "it's quite an appropriate use of the power under this section to appoint somebody to determine what it is that out [sic: ought] to be done to remedy that offence".[52]

[45] Primacy should be given to the closing submissions for the applicant as representing his final position about the relief he sought. In considering what those submissions conveyed, it would be wrong to start with an assumption that the applicant wanted to obtain relief of the kind which he now describes; such relief would have the potential to prolong the litigation and make it more expensive, by imposing upon the expert a requirement to report that person's opinions both about the contraventions (or their "spatial extent") and about the appropriate rehabilitation, by the necessity for a hearing in which the parties might make competing submissions about the decisions the trial judge should make about those matters, by such a decision being reserved, and by disputes requiring judicial resolution about matters of detail during the work. Nor should weight be given to the hindsight that the trial judge has since ruled that the claimed relief was inconsistent with s 505 of the EPA. It is necessary to consider what was in fact conveyed by the applicant's counsel's submissions in the context in which they were made, which includes the orders sought in the amended originating application.

[46] The applicant's counsel delivered written submissions towards the end of the trial[53] and elaborated upon them in his final address.[54] Early in the written submissions it was explained that orders (2) and (3) were sought on instructions: the applicant was "dissatisfied with the way in which the RoW has been left" and "wants orders that will secure the reinstatement and rehabilitation contemplated by the conditions of the environmental authorities under independent supervision and control".[55]

[47] Importantly, paragraph 301 of the written submissions anticipated findings of contraventions and, as had been foreshadowed during the no case submission, sought orders for the appointment of an independent expert "to determine the spatial extent of those contraventions and the measures that should be adopted to remedy

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48 Transcript 16 June 2016 at T4-16 l 24.
49 Transcript 16 June 2016 at T4-16 l 30, T4-18 ll 42-44.
50 Transcript 16 June 2016 at T4-20 ll 17-20, T4-26 ll 1-5.
51 Transcript 16 June 2016 at T4-20 ll 25-30, T4-26 ll 10-17.
52 Transcript 16 June 2016 at T4-26 ll 15-17.
53 Applicant's outline 17 August 2016.
54 Transcript 18 August 2016.
55 Applicant's outline 17 August 2016 at [14].

those matters and to contemporaneously secure the establishment of the specified pasture [within the RoW]". That maintained the claim for the problematic aspects of orders (2) and (3). And in oral submissions the applicant's counsel again argued that it "would be appropriate – middle of paragraph 301 [of the final written submissions] – to appoint an independent expert at GLNG's [Santos'] cost to determine the spatial extent of those contraventions and the measures that should be adopted to remedy those matters". The applicant's counsel also submitted that it was not necessary to amend orders (2) and (3), because of the claim for further or other orders (order (4)) and the nature of the relief sought in the written submission but he indicated a preparedness to amend "in terms of paragraph 301".

[48] The applicant's written submissions also argued that the orders should be framed after delivery of the reasons containing findings of contraventions, but at the same time he made it clear that the claimed orders were to secure compliance with the measures identified by the independent expert.[56] And the applicant's counsel subsequently explained the purpose of deferring the framing of relief in a way that was also consistent with the applicant continuing to insist upon the appointment of an expert to determine at least the "spatial extent" of contraventions and the appropriate remedy; the relief should be drafted to **exclude** matters the trial judge found did not amount to an offence[57] and "for there to be precision the relief for which we contend is the appropriate relief, that is, let's wait until we understand what findings your Honour has made about fences and then make orders that an appropriately qualified person identify what needs to be done to cure it".[58] At no stage did counsel suggest that the purpose of suggesting that the framing of orders be deferred was that, depending upon the trial judge's findings, the applicant might wish to claim "stepped" relief of the kind now described.

[49] Accordingly, as the trial judge mentioned, the orders claimed by the applicant had subtly shifted[59] from orders (2) and (3). The applicant now sought under order (4) the appointment of an independent expert to determine both the "spatial extent" of any contraventions identified by the trial judge and the appropriate remedy for those contravention. The "spatial extent" of a contravention is one aspect of the contravention which would inform the Court's decision about the appropriate remedial order under s 505(5), yet under the modified orders it is the expert who determines both the extent of the contraventions and the appropriate remedy for them. For present purposes there is no material distinction between orders (2) and (3) in the amended originating application and the proposed modified order under order (4). Each such order is beyond the power conferred by s 505(5) of the EPA.

[50] In these circumstances, the fact that the trial judge did not adopt the applicant's submission that the framing of the orders might be deferred for consideration after the publication of reasons does not mean that the trial judge did not consider that submission.

[51] My conclusion is that the trial judge did not make the errors of law for which the applicant contends. I would accept Santos' argument that leave to appeal should be refused on the ground that the only substantive relief sought at trial was that a technical expert be appointed both to identify, or at least define the extent of, what

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56 Applicant's outline 17 August 2016 at [297]-[299], [302].
57 See Transcript 18 August 2016 at T6-91 ll 33-34.
58 Transcript 18 August 2016 at T6-99 ll 12-18.
59 Reasons [133]-[134].

contraventions had occurred and what should be done to remedy any such contraventions so identified or defined, and the trial judge correctly held that such relief should not be granted.

The second main ground for the decision: refusal of orders in the exercise of the Court's discretion under s 505(5) of the EPA.

[52] Section 505(5) confers upon the Planning & Environment Court a broad discretionary power to make the orders it considers appropriate to remedy or restrain an offence which the court is satisfied has been committed or will be committed unless restrained. Sections 505(7) and (8) provide that the Court's power to make an order to ((7)) stop an activity or ((8)) do anything may be exercised whether or not –

(a) it appears to the Court the person against whom the order is made intends to ((7)) engage, or to continue to engage, in the activity or ((8)) fail, or to continue to fail, to do the thing; or

(b) the person has previously ((7)) engaged in an activity of that kind or ((8)) failed to do a thing of that kind; or

(c) there is a danger of substantial damage to the environment if the person ((7)) engages, or continues to engage, in the activity or ((8)) fails, or continues to fail, to do the thing.

[53] The trial judge decided that even if the applicant established the alleged offences, it was not appropriate to exercise the discretion to grant relief under s 505(5) of the EPA. It is convenient here to refer to some relevant findings by the trial judge. The trial judge: referred to the applicant's ultimate position that, on the basis of Dudgeon's evidence, much more investigation needed to be done to establish the extent of the environmental harm along the RoW and to Santos' argument that its work after 12 November 2015 under Sutherland's supervision essentially provided what the applicant sought in orders (2) and (3);[60] discussed expert evidence obtained by the parties by the time of the 12 November 2015 review; referred to his preliminary observations at that review that the applicant had no faith in Santos' ability to rehabilitate the applicant's land unless forced to do so by strict orders and Santos had complained that the applicant had been obstructive and non-compliant in allowing Santos to enter the applicant's land to carry out its legal obligations; and concluded that some of those preliminary observations were borne out upon an assessment of the whole of the evidence.[61]

[54] The trial judge went on to discuss expert and other evidence about the rehabilitation work done by Santos under Sutherland's supervision and aspects of the evidence relating to the alleged contraventions of the EAs. In the course of that discussion, the trial judge found that, at a time before the commencement of litigation, the applicant "was completely disenchanted with Saipem, and had adopted an attitude that any rectification work would be controlled by him at Santos' expense" and had "made it very clear that access to his property by Santos or Saipem would not be allowed unless on terms agreed by him". The trial judge concluded that, "since the

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60 Reasons [38].

61 Reasons [68].

commencement of these proceedings, [the applicant] has been obstructive and unreasonable in the face of attempts by Santos' lawyers to address his concerns".[62]

[55] The trial judge referred to the applicant's criticism of Santos for not properly fencing the RoW to protect the rehabilitation works undertaken under Sutherland's direction, which the applicant's counsel had described as being "a simple, and obvious, land management measure … to secure the areas to be remediated to facilitate successful remediation".[63] After referring to the provisions of a deed (the "Inala deed') which provided that the ownership and responsibility for maintenance of the relevant fencing would pass to the owner on the completion of the construction of the pipeline, the trial judge found that the applicant had incorrectly been adamant that completion of construction had not occurred in order to avoid his obligations under that provision of the deed.[64]

[56] The trial judge went on to observe that the relief sought by the applicant lacked sufficient certainty and "also calls for court supervision, which may be appropriate for some species of litigation but not in the circumstances here where on all the evidence before me, I am satisfied that Swan will only ever be satisfied if an independent expert is controlled by him, inevitably leading to difficulties (again) about access, and returns to the court to resolve disputes about the way in which the orders are to be implemented".[65] The trial judge concluded that section of his reasons by stating that he intended to proceed to determine the application on its merits in case he was wrong in the conclusions he had set out.[66] After giving extensive reasons for his conclusion that the applicant had not established the offences under ss 430 and 431 of the EPA which he alleged,[67] the trial judge identified various matters which would have been relevant to the exercise to the discretion to grant relief under s 505(5) of the EPA if the applicant had instead established the alleged offences.

[57] That exercise of discretion is challenged in (b) of the proposed new ground of appeal set out in [36] of these reasons and in grounds 6 – 10 of the draft notice of appeal. The applicant's argument upon the proposed new ground focused upon the legal error asserted in (a) rather than upon the exercise of discretion the subject of (b). If, contrary to my view, the applicant's argument under (a) were correct, the orders sought by the applicant might have complicated and prolonged the parties' disputes (see [44] of these reasons), thereby adding weight to the trial judge's exercise of discretion not to grant the relief. It is necessary then to focus upon appeal grounds 6-10.

Appeal grounds 1 – 6: failure to find contraventions.

[58] Appeal ground 6 contends that in the premises of the preceding paragraphs, the Planning and Environment Court committed an error of law in failing to find that the discretion bestowed upon the Planning and Environment Court by s 505(5) of the EPA to make orders requiring the First, Second and Third Respondents to remedy or restrain offences against s 430 EPA had arisen in the proceeding. Appeal

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62 Reasons [111].
63 Reasons [113].
64 Reasons [118].
65 Reasons [135].
66 Reasons [136].
67 Reasons [137]-[189].

ground 5 contends that in the premises of grounds 1 – 4 the Planning and Environment Court erred in law by failing to find that Santos had committed offences against s 430(3) by contravening conditions of the EAs.

[59] Accordingly, the particular errors for which the applicant contends in this respect are to be found in appeal grounds 1 – 4. Those grounds assert that the Planning and Environment Court erred in law in failing to find specified contraventions of conditions of the EAs. Those contraventions are described as alleged failures:

(1) to remove access tracks from the right of way area being access tracks not presently required for rehabilitation purposes or for the purposes of maintaining, inspecting, testing and/or repairing the pipeline in the right of way area;

(2) during the period from September 2014 to September 2015, to replace topsoil; return the surface of the right of way area to a condition that serves the preconstruction use; and implement and maintain land management and erosion control measures;

(3) during the period from September 2014 to September 2015, to take steps to implement the *GLNG Gas Transmission Pipeline Rehabilitation Management Plan* approved in June 2011 in respect of the right of way area;

(4) during the backfilling of pipeline trenches or at any other time, to replace soils so that the soil horizons are consistent with the soil horizons of the immediately surrounding areas and, during the period from September 2014 to September 2015, failing to take steps to rehabilitate the area of the backfilled pipeline trenches in the area of the right of way, including to ensure a stable landform, the avoidance of subsidence and erosion gullies in the life of the operational pipeline and profiling the area of the trenches to a level consistent with the surrounding soils.

[60] The effect of appeal grounds 1 – 6 is that the trial judge erred in law by failing to take into account in the exercise of the discretion under s 505(5) of the EPA that Santos had committed four of the offences alleged against it. The applicant argued that the trial judge's exercise of the discretion was irremediably affected by his conclusion that no such offence had been committed and by the suggested errors which led to that conclusion. In oral argument, it was also submitted for the applicant that even if there were no offences committed by Santos, s 505 empowered the making of orders against Santos to remedy offences committed by Saipem.[68] That argument appears not to have been put to or addressed by the trial judge. For that reason, in addition to the following reason, it is not necessary to consider it in this application.

[61] It will be evident from the reasons already given that in holding that the discretion should be exercised against granting the claimed relief the trial judge assumed in the applicant's favour, contrary to findings which the trial judge went on to make, that the applicant established the offences he alleged.

Appeal grounds 7 – 10: the Planning and Environment Court took irrelevant considerations into account.

[62] Grounds 7 – 10 challenge the exercise of the discretion to withhold relief under s 505(5). In the way in which this part of the application was argued, it is governed by the

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68 Transcript 24 November 2017 at T1-45.

well-known principles applicable in an appeal against the exercise of statutory discretion:

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge had reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."[69]

[63] The question for the appellate court is not whether it thinks the exercise of the discretion was correct. The applicant does not contend that the case is one in which the trial judge's exercise of discretion was "unreasonable or plainly unjust", so as to justify an inference that there had been a failure properly to exercise the statutory discretion. The effect of these grounds of appeal is only that the trial judge took into account matters which were not relevant to the exercise of the discretion.

Appeal ground 7: that the Planning and Environment Court committed an error of law, when considering a notional exercise of discretion pursuant to s. 505(5) EPA, by placing weight on a partial refusal of access to the right of way areas by the Appellant, between 18 September and 12 November 2015, in circumstances where, from September, 2014, the First, Second and Third Respondents had signaled a complete rejection of, and refusal to comply with, its obligations pursuant to the conditions of the environment authorities referred to in grounds 1 to 4, above, and only desisted from that rejection and refusal after the proceeding, below, had been commenced and the Appellant had served the First, Second and Third Respondents with the report of Mr. Dudgeon in that proceeding.

[64] Ground 7 is based upon the following passage in the trial judge's reasons:

> "[191] Santos' position is that in 2015 Swan unreasonably denied access to its contractors to effect rehabilitation and address a lot of the issues raised in the OA, until forced to do so as consequence of the November 2015 court order. On 18 September 2015, Mr Manning wrote to Carter Newell (Santos' solicitors) as a result of his client being told that 'work crews' were moving along the pipeline 'to conduct rehabilitation works'.
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> [192] By then Swan was disenchanted with Santos as well as Saipem. That letter sought to place conditions on any entry in accordance with Exhibit 10 which is Swan's Position Statement prepared consequent upon an order of this court

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69 *House v The King* (1936) 55 CLR 499 at 504-505 (Dixon, Evatt and McTiernan JJ).

made on 11 June 2015. The statement provided very prescriptive conditions for entry and undertaking remedial works, including condition 12:

'**12. Powers of O2 Environment + Engineering**

The powers of O2 Environmental + Engineering will be:

12.1. To monitor and inspect all aspects of the Remedial Works, other works and access.

12.2. To require Santos to stand down such workers who have shown a continuing lawful disregard for the EA, Easement Terms and Deed.

12.3. To require work to cease on site where there is not an insubstantial non-compliance with the EA, Easement Terms and Deed.'

[193] Not surprisingly, Santos would not accept such a condition. It is common ground that in June 2015, Swan denied access to Ausecology, described in Exhibit 18 as a third party monitoring rehabilitation works undertaken by Santos' contractor along the pipeline. By then Dudgeon, a principal of O2 Environment + Engineering, had been notified as an expert on behalf of Swan.

[194] At the review on 12 November 2015, Swan argued strongly for a highly proscriptive order which I did not accept for reasons published that day. It was not until the order was made on that day that Santos had the ability to progress its obligation under the EAs and the Deeds relating to Swan's land.

[195] Both experts inferentially acknowledged the need to implement rehabilitation programs sooner rather than later after such major disturbance, and this need was frustrated by Swan's entrenched position. It is a factor that is relevant to the exercise of the discretion."

[65] The applicant argued that the trial judge wrongly took into account that at the review on 12 November 2015 the applicant sought a highly prescriptive order which was not accepted. In fact, the trial judge found that the applicant unreasonably denied access to Santos' contractors to rehabilitate the properties, thereby frustrating Santos in fulfilling the need to implement rehabilitation sooner rather than later. This finding supported the trial judge's conclusion that the applicant would only ever be satisfied if an independent expert was controlled by him, which would lead to further difficulties about access and return to the Court to resolve disputed issues. That was a relevant consideration which the trial judge could take into account in the exercise of the discretion to refuse relief.

[66] The applicant argued that the applicant's lack of cooperation was "of little weight", having regard to Santos' failure to address the concerns of which the applicant had complained, and Santos had acknowledged as valid, as early as July 2014, and where Santos took no action to address those concerns until after the applicant

commenced proceedings in May 2015.[70] That argument implicitly acknowledges that the factor the trial judge took into account was a relevant consideration, even if its weight was limited.

[67] In the same paragraph of the outline the applicant argued that his concerns were very understandable in the light of the history and the applicant did not refuse access absolutely but instead sought to impose conditions to ensure the work was appropriately directed to rehabilitation. That is not a basis for impugning the trial judge's relevant finding that the applicant would only ever be satisfied if an independent expert were controlled by him, which inevitably would lead to further difficulties about access.

Appeal ground 8: that the Planning and Environment Court committed an error of law, when considering a notional exercise of discretion pursuant to s. 505(5) EPA, by placing weight on actions by the First, Second and Third Respondents to engage Mr. Sutherland to carry out work in partial performance of their obligations to rehabilitate the right of way areas in circumstances where such work was carried out pursuant to a court order and after a long period of rejecting, and refusing to carry out, those obligations.

[68] The finding described in appeal ground 8 is one aspect of the trial judge's findings that: Sutherland's rehabilitation work conducted at Santos' cost had to a significant extent provided the relief sought in orders (2) and (3), Santos accepted that the obligation was ongoing and Sutherland would have no further part to play unless the applicant agreed, and Santos' actions since it obtained Sutherland's first report on 30 October 2015 had showed Santos' good faith and willingness to comply with its legal obligations.[71] This was also reflected in the trial judge's finding concerning a condition of the EAs that the holder must implement a specified Rehabilitation Plan; the trial judge found that, subject to the applicant's consent, Santos seemed committed to following Sutherland's recommendation to comply with the Plan.[72] Those findings are plainly relevant to the exercise of the discretion whether or not to make an order under s 505(5). Contrary to the applicant's argument upon this point,[73] the circumstance that s 505(8) of the EPA allows for injunctive relief whether or not the Court finds that the respondent intends in the future to breach its obligations does not render this consideration irrelevant to the exercise of the discretion.

[69] The applicant also referred to the extent of the remediation work, or possible remediation work depending upon the final assessment of the rehabilitation process requiring stated percentages of productive grasses, and the long periods of time during which Santos failed to fulfil its obligations to rehabilitate the land despite many requests by the applicant and until after the commencement of proceedings and submitted that, the appropriate exercise of discretion was to order the continuation and completion of the work recommended by Sutherland.[74] Those arguments do not deny the relevance to the exercise of the discretion of the trial

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70 Appellant's outline of argument 22 June 2017, as amended and filed on 18 September 2017 at [173]; Transcript 24 November 2017 at T1-46.

71 Reasons [196], [197].

72 Reasons [159].

73 Applicant's amended outline of argument [177].

74 Amended outline of argument in reply 1 September 2017 at [13]-[22]; Transcript 24 November 2017 at T1-48.

judge's findings about Santos' commitment to complete the same work of rehabilitation which the applicant now contends should be enforced by court order.

Appeal ground 9: that the Planning and Environment Court committed an error of law, when considering a notional exercise of discretion pursuant to s. 505(5) EPA, by placing weight on actions by the Appellant in the course of an unrelated dispute about a stockpile of soil by the First, Second and Third Respondents on the Appellant's land.

[70] Appeal ground 9 concerns the conduct of the applicant in the course of a dispute with Santos about a stockpile of soil on Inala resulting from the construction of the "Meridian Interconnector" adjacent to the intersection of the RoW and a road, which connected the pipeline over the applicant's land to other pipelines. The trial judge observed that this only had "some relevance" to the subject proceedings[75] but accepted Santos' submission that the communications between the applicant and Santos upon this issue were relevant to the exercise of the discretion to grant relief.

[71] At the trial the applicant insisted that he wanted the stockpile removed from his land. The following summary of the evidence was adopted by the trial judge:

> "a. Santos wanted, on 11 June 2015, to remove the soil from Swan's property;
>
> b. Swan (on 12 June 2015) advised that he was not willing to have the material removed, unless Santos paid $9.00 per cubic meter for it to be stored on his property (provided it was clean-fill);
>
> c. On 17 June 2015, Swan advised that any removal of soil from his land would be treated as conversion of his property and that he would take steps to protect his interests;
>
> d. On 17 June 2015, Swan advised that he had denied Ausecology (a contractor engaged by Santos to undertake rehabilitation works) access to his property. Swan said that this was because legal proceedings were on foot;
>
> e. On 17 June 2015, Santos again sought confirmation as to what Swan wanted done with the soil (which Santos had found was clean-fill);
>
> f. On 18 June 2015, Santos was told by Swan's solicitors that 'the excavated material is to remain on our client's property and is to remain in the area of the Meridian Interconnect works';
>
> g. On or about 1 July 2015, the independent supervisor identified and approved a site for the removal of the stockpile because Santos could not leave it in the working area and still undertake construction works;
>
> h. On or about 1 July 2015, Swan complained to the police about the removal of soil from his land. Santos therefore instructed its contractor to not remove the soil;

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75 Reasons [19].

i. On 1 July 2015, Swan's solicitors advised Santos' solicitor that ‘your client does not have a clear right to remove excavated material from our client's property and your client is constrained to do those works within the area identified within the agreement reached and no other area. In the event that your client considers the area is not sufficient that is a matter that your client ought to have addressed at the time of entering into the agreement that was reached’;

j. On 2 July 2015, Santos confirmed its intention to store the soil offsite so as not to hinder the workspace. Santos advised that it would return the soil as soon as possible;

k. On 2 July 2015, Swan's solicitor advised that if Santos proceeded to remove the excavated material 'we will refer the matter to the constabulary';

l. On 29 July 2015, Santos asked Swan to explain why he had contacted the police;

m. On 3 September 2015, Santos advised that it would shortly be in a position to return the soil to Swan's property. Santos also asked Swan whether he would like the soil placed elsewhere (instead of the working area) or disposed of altogether;

n. On 11 September 2015, Santos (having received no response to its letter of 3 September 2015) advised that unless it received response from Swan by 5.00pm on 18 September 2015, the stockpile soil would be returned to its original stockpile location. It later returned the soil.”[76]

[72] The trial judge considered that that those events gave considerable insight into the difficulty Santos had in dealing with the applicant and that the dispute about the soil was unnecessary and resulted only from the applicant’s “stubbornness and inability to work through matters constructively and simply”.[77] The applicant’s attitude to that issue was found to be consistent with his approach generally to issues including access for rehabilitation purposes, particularly after the commencement of the proceedings; that attitude was perhaps understandable but the trial judge concluded that it was unhelpful to the reasonable resolution of the problem.[78] Those findings also supplied support for the trial judge’s conclusion that the applicant would only ever be satisfied if an independent expert were controlled by him, which would inevitably lead to further difficulties about access and returns to the Court to resolve disputed questions about implementation of any orders. Accordingly they were relevant to the exercise of the discretion whether to grant relief of the kind claimed by the applicant.

[73] The applicant argues that the trial judge erred in relying upon the dispute because the dispute occurred after the applicant had commenced proceedings and long after the applicant had yet again made Santos aware of the need for rehabilitation, the dispute did not prevent Santos from undertaking rehabilitation work, the trial

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76 Reasons [202].
77 Reasons [203].
78 Reasons [204].

judge's findings indicate that there were issues properly in dispute about the soil, and the trial judge found that the applicant's attitude was understandable given the history of his treatment by Saipem.[79] Those arguments raised relevant considerations but they did not deny the relevance of the considerations taken into account by the trial judge.

Appeal ground 10: that the Planning and Environment Court committed an error of law, when considering a notional exercise of discretion pursuant to s. 505(5) EPA, by placing weight on sums of money paid by the First, Second and Third Respondents to the Appellant in respect of matters unrelated to the issues in the proceeding, below.

[74] Appeal ground 10 concerns findings relating to compensation paid by Santos to the applicant under a settlement, which included a payment for the settlement of unrelated litigation about the Meridian Interconnector as well as for option fees, compensation in advance, fencing, and the repair of a dam. The applicant argued that the payment was irrelevant because it concerned a dispute that was unrelated to the subject proceeding.

[75] In the applicant's amended originating application, the applicant contended that a condition of the EAs was likely to have been contravened in relation to the construction of the Meridian Interconnector[80] and the applicant adduced the settlement deed as evidence in his case.[81] In evidence to which the trial judge referred, the applicant appeared to accept that, although he was only legally entitled to approximately $700 as compensation for access to about 3,000 square metres of land required for the construction of the connector, under the settlement Santos paid him $187,830 on that account together with $147,042 which was not related to any identified head of compensation, and Santos also agreed to pay an independent expert to supervise its works on the land.[82] After referring to the settlement arrangements and the amount of approximately $700,[83] the trial judge observed that "when one has regard to those documents and [the applicant's] evidence concerning this issue, this amount is a relevant factor in the exercise of the discretion", that the expert referred to in the deed was appointed, and it was not suggested that Santos did not comply with its obligations relating to this land.[84]

[76] The effect of the findings is that, shortly after the applicant commenced the proceedings and in order to resolve a dispute with the applicant, Santos assumed and thereafter complied with a variety of obligations to the applicant, including obligations to pay a substantial amount of money to which the applicant otherwise had no apparent entitlement and to appoint an independent person to supervise Santos' works. That could reasonably be regarded as supplying additional support for the trial judge's confidence that Santos would fulfil its commitment to continue to rehabilitate the applicant's land to the extent required by Sutherland. The fact that the settlement was of an unrelated dispute may have affected the weight that

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79 Applicant's amended outline of argument 18 September 2017, at [179]-[185].

80 Amended originating application, Grounds, at [10(i)(iv)], [10(j)], [15], [16], [32] ("soils excavated for the Meridian Interconnector have been intermingled … [and] intermingled with road base … [and] the intermingled soils are unsuitable for use to reinstate the pre-disturbed soil suitability class and if used would modify the soil profile and would be likely to subside").

81 Reasons [207].

82 Transcript 14 June 2016 at T2-27.

83 Reasons [207].

84 Reasons [208].

might be attributed to this consideration, but it did not render it entirely irrelevant in the exercise of the discretion to refuse relief.

Disposition and order

[77] The applicant has not demonstrated that there is any error of law in either of the first and second main grounds for the trial judge's decision, each of which is of itself a sufficient reason for refusing leave to appeal. For that reason, and because the proposed appeal involves a substantial departure from the way in which the applicant litigated the case in the Planning & Environment Court, it is unnecessary to consider the merits of the third main ground for the trial judge's decision.

[78] In relation to the last point, the applicant argued that the relief sought in the appeal (see [32] of these reasons) is within the relief sought in the amending originating application and consistent with the case at trial, even though the relief is "adjusted for a finding of fact which is not being appealed".[85] Order (4) is expressed in such broad terms as to be capable of comprehending the relief now claimed, and many other forms of relief. But at the trial the applicant articulated the nature of the orders he sought in terms that excluded relief of the kind now sought. The relief the applicant sought throughout, including in final submissions, was based upon the trial judge accepting Dudgeon's evidence about the appropriate remediation, which substantially differed from the remediation recommended by Sutherland; and the applicant sought only the appointment of an expert to define contraventions, or their extent, and to determine the appropriate remedy. Having lost his challenge to Sutherland's evidence about how the land should be remediated and the argument about whether the orders he claimed could or should be granted - which formed a central plank of the applicant's case at trial – the applicant now seeks leave to appeal from the decision that Santos did not commit the alleged offences merely so that he can construct a very different form of relief on appeal. I would not grant leave to appeal for that purpose.

[79] In CA 2779/17, I would refuse the application for leave to appeal, with costs.

Proposed costs appeal

[80] The trial judge ordered the applicant to pay Santos' costs of the proceedings in the Planning & Environment Court to be assessed on the standard basis or as agreed. The applicant seeks leave to appeal from that order.

[81] The first ground of the proposed costs appeal is that the cost order should be reconsidered in light of the result of the application for leave to appeal against the substantive judgment. That ground is unnecessary and need not be considered.

[82] It is not in issue that the costs of the proceeding were governed by s 457 of the *Sustainable Planning Act* 2009 (Qld).[86] Section 457(1) provided that the costs of a proceeding are in the discretion of the Planning and Environment Court. That is subject to various qualifications in following subsections. In this case it is only some paragraphs of s 457(2) that are submitted to be relevant.

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85 Amended outline of argument in reply 1 September 2017 at [9].

86 The then current form of s 457 was introduced by the *Sustainable Planning and Other Legislation Amendment Act (No 2)* 2012 (Qld), which commenced on 22 November 2012. The *Local Government Electoral (Transparency and Accountability in Local Government) and Other Legislation Amendment Act* 2017 (Qld) replaced s 457(1) with a provision that, subject to some exceptions, "each party to a proceeding must bear the party's own costs for the proceeding". That provision commenced on 19 May 2017, after this matter was determined.

[83] In *Cox v Brisbane City Council (No 2)*[87] Rackemann DCJ held that the discretion s 457(1) conferred was "an open one" which, unlike the general rule in other courts dealing with ordinary civil litigation, was not to be approached on the basis that there is a presumption that costs follow the event; the generally expressed discretion was to be exercised judicially with regard to the non-exhaustive list of considerations s 457(2) and the relevant circumstances of the particular case. The trial judge applied those principles and neither party puts them in issue in this application.

[84] Before the trial judge, Santos relied upon the following parts of s 457(2):

> "**457 Costs**
>
> (2) In making an order for costs, the court may have regard to any of the following matters–
>
> (a) the relative success of the parties in the proceeding;
>
> …
>
> (c) whether a party commenced or participated in the proceeding for an improper purpose;
>
> (d) whether a party commenced or participated in the proceeding without reasonable prospects of success;
>
> …
>
> (i) whether a party has acted unreasonably in the conduct of the proceeding, including, for example–
>
> (i) by not giving another party reasonable notice of the party's intention to apply for an adjournment of the proceeding; or
>
> (ii) by causing an adjournment of the proceeding because of the conduct of the party;
>
> …
>
> (l) whether a party has incurred costs because another party has defaulted in the court's procedural requirements;"

[85] The trial judge's costs decision was mainly based upon his conclusion that paragraphs (a) and (d) were relevant considerations.

[86] With reference to paragraph (a), the trial judge observed that the applicant was wholly unsuccessful in his serious allegations that Santos has breached conditions of the EAs, and that resulted from a construction of the conditions of the EAs and a conclusion that the applicant had not satisfied the onus of proving the alleged breaches, rather than from credibility findings. That is not contentious.

[87] With reference to paragraph (d), the trial judge observed that the applicant resisted attempts by Santos and the court to properly particularise his case under s 505(5) of the EPA. In this respect, the trial judge noted that: on 22 April 2016 Santos' application to strike out the proceeding on the basis that it disclosed no properly identified cause of action was heard but adjourned to the trial for the evidence to be

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87 [2014] QPELR 92 at [2]; see also *LMRM Pty Ltd v Brisbane City Council* (2017) 222 LGERA 99 at [2], in which Rackemann DCJ made similar observations.

tested; on 8 May 2016 the trial judge ordered the applicant to deliver to Santos a list of issues contended to be actionable under s 505 and still affecting his land; the list delivered on 31 May 2016 did not identify the section or sections relied upon by the applicant as amounting to an offence under the Act; although the trial judge made that clear to counsel for the applicant on the fifth day of the trial (17 June 2016), it was not until the applicant's outline was delivered on 17 August 2016 that a real attempt was made to particularise the offences by reference to ss 430 or 431 of the EPA. The trial judge stated that his reasons for dismissing the applicant's application "establish that Mr Swan never did properly particularise his case;[88] the principal orders sought in 2 and 3 of his AOA impermissibly sought to have the court concede jurisdiction to a lay person".[89] The applicant persisted with the trial even after Sutherland had undertaken the works subsequent to the 12 November 2015 order. Taking the evidence to the highest, it did not establish any breach of the EAs, and the combination of those matters meant that the applicant never did have any reasonable prospects of succeeding in the proceeding.

[88] In the course of rejecting the applicant's arguments to the contrary, the trial judge observed:

> "The court never did rule against the no case submission as [the applicant] suggests. It was deferred and put off to the trial which, by then, was less than seven weeks away."[90]

[89] The second and third grounds of the proposed costs appeal contend that the trial judge misdirected himself that he had not ruled against Santos' no case submission and Santos did not insist upon a ruling on its no case submission, and that the trial judge confused the no case submission with the earlier application to strike out the amended originating application. Santos argues that the trial judge's reference to the no case submission was intended as a reference to the strike out application, which the trial judge had mentioned in a preceding paragraph of his reasons. This was submitted to be a slip of no consequence. The applicant also submitted that an application to strike out and a no case submission were closely related concepts.

[90] An obstacle to acceptance of Santos' argument is that the applicant did in fact submit that the court had ruled against Santos' no case submission.[91] It is uncontroversial that the submission was correct; the trial judge rejected the no case submission made by Santos on the fourth day of the trial.[92] As the applicant argued, the trial judge must have inadvertently confused the no case submission with an earlier application by Santos to strike out the applicant's originating application, which was adjourned to the trial.

[91] The finding that the no case submission had not been rejected was material for the trial judge's exercise of the costs discretion, notwithstanding that, as Santos argues, the trial judge relied upon other considerations as support for the costs order. The no case submission was primarily based upon Santos' argument that the relief claim by the applicant should not be given because it was beyond power. The trial judge's rejection of the no case submission is not readily reconcilable with a conclusion that

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88 [2017] QPEC 17 at [10]. The trial judge cited Reasons [135].
89 [2017] QPEC 17 at [10]. The trial judge cited Reasons [132].
90 [2017] QPEC 17 at [11].
91 That submission was made in the Applicant's outline of submissions on costs 16 February 2017 at [39].
92 Transcript 16 June 2016 at T4-27 l 43.

the claimed relief was so obviously unavailable as to justify a finding that the proceeding lacked reasonable prospects of success. And the fact that Santos acquiesced in the adjournment to the trial of its application to strike out the proceedings also tends against a view that the flaws found in the applicant's claim after a trial should have been apparent to him from the outset.

[92] It follows that the trial judge's exercise of discretion miscarried: see [62] of these reasons. The error was an error of law, if only because it was inconsistent with the only evidence and submissions. I would grant leave to appeal because of the nature of the error. It follows that the discretion should be re-exercised afresh.

[93] The applicant's outline of offences of 3 August 2016[93] appears on its face to supply a generally reasonable level of particularity of the alleged offences, although in some respects it may have been inadequate; in any case, as the applicant points out, although the trial judge referred to a failure by the applicant to provide proper particulars, the trial judge did accept that in the applicant's outline delivered on 17 August 2016 the applicant had made a real attempt to particularise the offences by reference to the relevant provisions of the EPA.[94] The applicant's case was explained in great detail in that outline. It is not immediately obvious that the delay in supplying that level of particularity resulted in any significant prejudice to Santos at the trial. Furthermore, the applicant was acquitted of any procedural defaults.

[94] The applicant also argues that notwithstanding the trial judge's conclusion that the applicant continued with the proceeding in the face of insurmountable legal obstacles, the trial judge did accept that even Sutherland found inadequacies in the RoW.[95] The trial judge's characterisation of the inadequacies as falling outside the requirements of the conditions of the EAs is submitted to involve mixed questions of fact and law which required the application of technical legislation (including the EAs) to technical factual scenarios. The applicant also submits that Dudgeon's evidence supported his arguments that the rehabilitation done under Sutherland's supervision had been inadequate. Reference even to the relatively brief summary of evidence in [3]-[25] of these reasons suggests that there is substance in these arguments. Overall my strong impression is that the applicant did have a reasonably arguable case about the alleged contraventions, or at least those of them which were argued in this application.

[95] Santos argues that the legal obstacles identified by the trial judge concerned the absence of power to grant orders (2) and (3) and the uncertainty of the relief described in order (4), "such further or other orders as the court may seem just to remedy the contraventions". That argument is weakened by the refusal of the no case submission. Although I agree with the trial judge's conclusion that orders (2) and (3), and the modified version of them sought under order (4), were beyond power, in my respectful opinion it does not follow that there was anything unreasonable about the applicant's pursuit of the litigation. If his arguments about the construction of the conditions of the EAs had been accepted and the trial judge had been more impressed with Dudgeon's evidence, the trial judge might have

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93 AB 2510.

94 This is one of the arguments advanced in support of ground 4 of the proposed costs appeal, which contends that the trial judge misdirected himself in concluding that the applicant continued with his application in the face of insurmountable legal obstacles. In view of my acceptance of grounds 2 and 3, it is not necessary for me to separately consider any other ground.

95 [2017] QPEC 17 at [11].

acceded to the applicant's request to make findings before framing the final relief. Although I have concluded that the trial judge did not err in law in failing to adopt that approach, it would have been open to him to do so.

[96] In addition to the relevant consideration that Santos was wholly successful in the proceeding, the relevant matters under s 457(2) are that neither party commenced or participated in the proceeding for an improper purpose or without reasonable prospects of success, acted unreasonably in the conduct of the proceeding, or incurred costs because the other party had defaulted in the Court's procedural requirements. Other relevant considerations are that the decision to reject the applicant's claim in the exercise of a discretion was not readily predictable, there was no suggestion that Dudgeon, whose evidence supplied substantial support for important aspects of the applicant's case, was not a reputable expert in the field, the first reports of both experts appeared to supply support (albeit in varying degrees) for the applicant's concerns about Santos' compliance with the conditions of the EAs, substantial progress in rehabilitation of the land appears to have occurred only after the applicant issued proceedings against Santos, and Dudgeon's evidence supplied some support for the applicant's concern about the adequacy of the ongoing rehabilitation.

[97] In deciding upon the appropriate order, I would take into account the matters already mentioned, including the result of the litigation, and also that Santos identified the defects in the relief sought by the applicant in very clear language on the fourth day of the trial (16 June 2016). Notwithstanding the refusal of the no case submission, it is a relevant consideration that the applicant thereafter persisted in claiming only orders (2) and (3), or the modified form of those orders. Even so, and bearing in mind that the familiar approach in much litigation that costs ordinarily follow the event does not apply in this case, I am not persuaded that the applicant should be ordered to pay all of Santos' costs of the proceedings at first instance. In my view the appropriate order is that the applicant pay the costs incurred by Santos after 16 June 2016.

Disposition and order

[98] In CA4367/17, I would grant the application for leave to appeal and allow the appeal with costs, set aside the costs order made in the Planning & Environment Court on 24 March 2017, and instead order that the applicant pay the costs incurred by the respondents after 16 June 2016.

[99] **McMURDO JA:** I agree with Fraser JA.

[100] **HENRY J:** I have read the reasons of Fraser JA. I agree with those reasons and the orders proposed.