# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Bond v Chief Executive, Department of Environment and Science* [2019] QCA 137 |
| PARTIES: | **PETER BOND**<br>(applicant)<br>**v**<br>**CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND SCIENCE**<br>(respondent) |
| FILE NO/S: | Appeal No 7811 of 2018<br>P & E Appeal No 3070 of 2016 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Planning and Environment Appeal |
| ORIGINATING COURT: | District Court at Brisbane – [2018] QPEC 15 (Jones DCJ) |
| DELIVERED ON: | 16 July 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 20 November 2018 |
| JUDGES: | Fraser and Philippides JJA and Crow J |
| ORDERS: | **1. Grant leave to appeal against the orders made on 15 June 2018 in so far as those orders dismissed the applicant's application for an order that his appeal in the Planning and Environment Court be stayed pending the final resolution of the criminal prosecution involving the appellant (Court Reference Numbers MAG-00208544/16(1) and MAG-00255740/16(4)).**<br>**2. Allow the appeal, set aside those orders to the extent described in paragraph 1 of these orders, and order instead that until further order made in the Planning and Environment Court the appellant's appeal in that Court be stayed pending the final resolution of that criminal prosecution.**<br>**3. The application for leave to appeal is otherwise dismissed.**<br>**4. The parties have leave to make submissions on costs within 14 days of the date on which these reasons for judgment are published and otherwise in accordance with paragraph 52 of Practice Direction No. 3 of 2013.** |
| CATCHWORDS: | ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – |

QUEENSLAND – PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS – PROCEDURE – where the applicant was issued with an environmental protection order as a related person of Linc Energy Limited – where the operation of the decision to issue the environmental protection order was stayed pending the final determination, by appeal or otherwise, of specified preliminary matters concerning the order – where the applicant was subsequently charged with five counts of wilfully and unlawfully causing serious environmental harm in connection with the activities of Linc Energy Limited– where the preliminary matters were determined adversely to the applicant, and the applicant in turn applied to stay the operation of the decision to issue the environmental protection order pending the final resolution of the criminal prosecution – whether the decision to refuse the stay was infected with legal error – whether substantial injustice would arise unless leave to appeal was granted – whether the environmental protection order should be stayed pending the final resolution of the criminal prosecution

ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS – PROCEDURE – where the applicant was issued with an environmental protection order as a related person of Linc Energy Limited – where the operation of the decision to issue the environmental protection order was stayed pending the final determination, by appeal or otherwise, of specified preliminary matters concerning the order – where the preliminary matters were determined adversely to the applicant, and the applicant in turn applied to stay the operation of the decision to issue the environmental protection order pending the final resolution of his substantive appeal against the order – whether the decision to refuse the stay was infected with legal error – whether substantial injustice would arise unless leave to appeal was granted – whether the environmental protection order should be stayed pending the final resolution of the applicant's substantive appeal against that order

ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS – PROCEDURE – where the applicant was issued with an environmental protection order as a related person of Linc Energy Limited – where the operation of the decision to issue the environmental protection order was stayed pending the final determination, by appeal or otherwise, of specified preliminary matters concerning the order – where the

preliminary matters were determined adversely to the applicant, and the applicant applied to have a further matter heard and determined separately from his substantive appeal against the environmental protection order – whether the decision refusing to allow a further matter to be heard and determined separately from the substantive appeal was infected with legal error – whether substantial injustice would arise unless leave to appeal was granted – whether the specified further matter should be heard and determined separately from the substantive appeal against the environmental protection order

*Environmental Protection Act* 1994 (Qld)
*Evidence Act* 1977 (Qld), s 79
*Planning and Environment Court Act* 2016 (Qld), s 63
*Uniform Civil Procedure Rules* 1999 (Qld), r 761

*Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46; [2015] HCA 5, applied
*Jesasu Pty Ltd v Minister for Mineral Resources* (1987) 11 NSWLR 110, cited
*Network Ten Pty Ltd v Rowe* [2006] NSWCA 4, applied
*Paringa Mining & Exploration Co plc v North Flinders Mines Ltd* (1988) 165 CLR 452; [1988] HCA 53, cited
*Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 240 FCR 276; [1999] FCA 718, considered

COUNSEL: D R Gore QC, with B Rix, for the applicant
J Horton QC, with E Hoiberg, for the respondent

SOLICITORS: Thomson Geer for the applicant
Herbert Smith Freehills for the respondent

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

(a) for a stay of the applicant's appeal in that Court against a decision to issue an Environmental Protection Order ("EPO") to him pending the final resolution of a criminal prosecution of the applicant;

(b) for an order pursuant to s 535 of the *Environmental Protection Act* 1994 (Qld) ("EPA") staying the decision to issue the EPO pending the final resolution of the applicant's appeal against EPO in the Planning and Environment Court; and

(c) for an order that one of the grounds of the applicant's appeal to the Planning and Environment Court be heard and determined separately from and before the hearing and determination of the other grounds of that appeal.

[2] The grounds of the proposed appeal from the decision of the Planning and Environment Court are confined to error or mistake in law or jurisdictional error: *Planning and Environment Court Act* 2016 (Qld), s 63. The grounds of appeal contend for errors in law. The respondent contends that leave to appeal should be refused because the applicant has not satisfied the conditions usually required for leave to appeal from an interlocutory decision on a matter of practice and procedure; that

there be both an arguable error of principle and that substantial injustice would result if the Court did not intervene.[1]

[3] The applicant acknowledges that each of the challenged decisions involved an exercise of discretion. The applicant contends that each exercise of discretion was infected by an error of a kind which justifies appellate correction[2] and amounts to a legal error which may found an appeal by leave under s 63 of the *Planning and Environment Court Act*.[3] The applicant accepts that, because each of the challenged decisions is interlocutory in nature, leave is unlikely to be granted unless the Court considers a substantial injustice otherwise would result. As the applicant argues, leave is more readily granted if, as the applicant submits is so in this case, the interlocutory decision determines a substantive right rather than merely a point of practice or procedure.[4]

**The EPO**

[4] On 25 May 2016 an EPO was issued to the applicant by a person described as a delegate of the respondent Chief Executive. The EPO commences by giving notice to the applicant under the EPA that the EPO is issued to the applicant as a related person of Linc Energy ("Linc") by the administering authority, the Chief Executive of the Department of Environment and Heritage Protection ("Department"). The EPO then refers to described land near Chinchilla in relation to which Linc held a mineral development licence and a petroleum facility licence. The EPO requires the applicant to take actions which may be summarised as follows:

(a) By 25 August 2016 deliver to the address of the Department a bank guarantee to a value of $5.5 million to secure compliance with the EPO.

(b) By 26 September 2016 submit to the Department a report by a suitably qualified person or persons detailing work to be undertaken to achieve rehabilitation and infrastructure cleaning work described in the EPO.

(c) By 1 November 2019, carry out described rehabilitation and infrastructure cleaning work.

[5] EPOs are created and regulated by provisions in Part 5 of Chapter 7 of the EPA. In Division 1 of Part 5: s 358 identifies the circumstances in which the administering authority may issue an EPO; s 359 obliges the administering authority to consider the "standard criteria" before deciding to issue an EPO; s 360 specifies the necessary form and content of an EPO; and s 361 makes it an offence for the recipient of an EPO to contravene or wilfully contravene it.

[6] Section 358 empowers the administering authority to issue an EPO to a person in circumstances described in the following paragraphs (a) – (f). Paragraph (f) refers to the circumstances stated in Division 2 of Part 5, in which s 363AD empowers the administering authority to issue an EPO "to a related person of a high risk company, whether or not an [EPO] is being issued, or has been issued, to the high risk company." The term "high risk company" is defined to mean a company that is (or

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1 *Just GI Pty Ltd & Ors v Pig Improvement Company Australia Pty Ltd* [2001] QCA 48 at [14]; *MGM Containers Pty Ltd v Wockner* [2006] QCA 502 at [29].

2 See *House v The King* (1936) 55 CLR 499.

3 See *Wyatt v Albert Shire Council* [1987] 1 Qd R 486 at 487.

4 See *Sharpe v WH Bailey & Sons Pty Ltd* (2014) 317 ALR 738 at 746 [39] and *Driesen v Gold Coast City Council* [2015] QCA 85 at [19].

is an associated entity of a company that is) an externally-administered body corporate within a meaning given by the *Corporations Act* 2001 (Cth), s 9.

[7] The EPO alleges that Linc is a high risk company because on 15 April 2006 Linc was placed in voluntary administration and on 23 May 2006 Linc's creditors resolved that it be wound up. The expression "related person" is defined in s 363AB. The definition comprehends (s 363AB(1)(d)) a case in which the administering authority decided the person has a "relevant connection" with the company. Under s 363AB(2), the administering authority may make such a decision if satisfied of either one of two matters. The EPO alleges satisfaction with s 363AB(2)(b), that "the person is or has been at any time during the previous 2 years, in a positon to influence the company's conduct in relation to the way in which, or extent to which, the company complies with its obligations under the Act."

[8] Section 363AB(4) sets out various matters the administering authority may consider in deciding for s 363AB(2) whether a person has a relevant connection with a company. The EPO alleges that the applicant was in a position to influence Linc's conduct in the way described because: the applicant was the Chief Executive Officer and the Managing Director of Linc from 2004 until 1 October 2014 and the Executive Chairman of the Board of Linc from 1 October 2014 to 11 December 2015; and as the Chief Executive Officer and Managing Director the applicant was responsible for managing the day-to-day operations of Linc, including all decisions that involved operations in the ordinary course of business, and was responsible to the Board for the overall development of strategy, management and performance of Linc. The EPO also alleges the following matters as being relevant in this determination: for the financial years ending 30 June 2014 and 2015 respectively the applicant received as remuneration amounts exceeding SGD $2 million; the applicant was described in Linc's annual reports for those years as being "pivotal" to Linc's success and having "personally seen the Company evolve from a small… business to an ASX 200 company"; and the applicant appeared to have adopted the role of informal spokesperson for the company even after his resignation from the Board in December 2015.

[9] Section 363ABA provides that in deciding whether to issue an EPO to a related person of a company under (relevantly) s 363AD the administering authority:

> "(a) must have regard to any relevant guidelines in force under section 548A; and
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> (b) may consider whether the related person took all reasonable steps, having regard to the extent to which the person was in a position to influence the company's conduct, to ensure the company –
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> (i) complied with its obligations under this Act; and
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> (ii) made adequate provision to fund the rehabilitation and restoration of the land because of environmental harm from a relevant activity carried out by the company."

[10] Paragraph (a) is not said to be relevant here. The EPO states that the Department considered s 363AB(2)(b) and concluded that: as the Chief Executive Officer and Managing Director, the applicant held the most senior operational position within

Linc for ten years until his resignation on 1 October 2014; the Department considers that steps need to be taken to rehabilitate or restore the land on which Linc carried out its underground gasification activities; and the Department was not satisfied that the applicant took all reasonable steps to ensure Linc complied with its obligations under the Act and made adequate provision to fund the rehabilitation and restoration of the land. The EPO sets out in some detail the manner in which the Department considers that action was required to rehabilitate or restore land because of environmental harm from a relevant activity from contaminants on the land on which Linc carried out a relevant activity, comply with the general environmental duty,[5] and secure compliance with identified conditions of the environmental authorities for Linc's mineral development licence and petroleum facility licence.

**The applicant's appeal against the EPO and the stay applications**

[11] On 4 August 2016, after the Department was deemed to have affirmed the decision to issue the EPO following the institution of an internal review of the decision by the applicant, the applicant filed a Notice of Appeal in the Planning and Environment Court against the decision to issue the EPO and applied for a stay of the EPO pending the final resolution of the appeal. On 12 August 2016 that Court instead ordered by consent that until further order the operation of the decision to issue the EPO be stayed pending the final determination (whether by appeal or otherwise) of one of the many issues raised in the notice of appeal. That issue was ordered to be determined as a preliminary point.

[12] The preliminary point was heard and determined adversely to the applicant on 30 August 2016. This Court subsequently granted the applicant leave to appeal from that decision but dismissed the appeal. On 13 December 2017 the High Court dismissed an application brought by the applicant for special leave to appeal against this Court's decision. In consequence, the order of 12 August 2016 staying the operation of the decision to issue the EPO ceased to have effect on 13 December 2017.

[13] After the Planning and Environment Court had determined the preliminary point adversely to the applicant but before the resolution of the subsequent appeal against that determination, on 13 September 2016 a criminal complaint was brought against the applicant in the Magistrates Court at Dalby charging three counts of failing to ensure that Linc did not wilfully and unlawfully cause serious environmental harm. A further criminal complaint against the applicant charging an additional two counts of the same offence was brought on 11 November 2016.

[14] On 22 December 2017, the applicant filed an application in the Planning and Environment Court for an order granting a stay of the decision to issue the EPO pending the final resolution by that Court of the applicant's appeal and an order that the appeal be stayed pending the final resolution of a criminal proceeding against the applicant. On 29 March 2018, after an earlier hearing of the applications, the primary judge published reasons ("the March Reasons") which include conclusions that, if the applicant were committed for trial on all or some of the charges criminal proceedings could potentially take many months, if not years,[6] and that, as matters

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5 Section 319(1) of the EPA defines "general environmental duty" as, in substance, the requirement that a person who carries out an activity that causes or is likely to cause environmental harm to take all reasonable and practicable measures to prevent or minimise the harm.

6 March Reasons at [9].

stood at that time, the balance of justice favoured the refusal of a further stay of the operation of the EPO or a stay of the applicant's appeal pending the final resolution of the criminal proceeding against the applicant. The primary judge considered that any injustice or prejudice the applicant might suffer by the refusal of his applications was outweighed by the prejudice likely to be caused to the respondent and the public by further uncertain but lengthy delay.[7] The primary judge did not then make orders reflecting those conclusions but instead adjourned the proceeding to a date to be fixed following the verdicts of the jury in the criminal proceeding against Linc, which the primary judge considered might have a bearing upon the appropriate orders.[8]

[15] On 9 April 2018 Linc (which was then in liquidation) was convicted after a trial of five counts of wilfully and unlawfully causing serious environmental harm between 1 July 2007 and 29 February 2012. The particulars of the charges allege that the conduct involved the operation of gasifiers in a way that caused environmental harm by (Count 1) "creating and/or enhancing pathways such that the land form could not effectively contain UCG [Underground Coal Gasification] products", or (Counts 3 – 5) contamination of the land form causing one or all of an increase in explosive risks in disturbing the land form, toxicity risks in disturbing the land form, and an aquifer being unsuitable for stock watering without an ongoing monitoring program confirming its suitability for that use.[9]

[16] The conviction of Linc was significant for the criminal proceedings against the applicant. Under s 493(2) and (3) of the EPA evidence that a corporation committed the relevant offence is evidence that the executive officers committed an offence of "failing to ensure that the corporation complies with this Act", but s 493(4) provides a defence if the executive officer proves that the officer took all reasonable steps to ensure the corporation complied with the provision or that the officer was not in a position to influence the conduct of the corporation in relation to the offence.[10]

[17] The applicant's appeal in the Planning and Environment Court was mentioned before the primary judge on 11 May 2018. The applicant then foreshadowed amendments to the notice of appeal which, he submitted, potentially had implications for the applications for the stays. The primary judge ordered the applicant to serve a proposed amended notice of appeal within 14 days. That occurred. After a further mention of the appeal before the primary judge the applicant filed an application for orders granting leave to amend the notice of appeal, staying the decision to issue the EPO pending the final resolution of the appeal by the Planning and Environment Court, and staying the appeal pending the final resolution of the criminal proceedings against the applicant. The application also sought an order allowing the appeal and setting aside the decision to issue the EPO on what was described as a "limited basis", that in issuing the EPO the respondent had not demonstrated that it considered the mandatory requirements in s 359 of the EPA. At the hearing the applicant sought an order for the determination of that issue as a preliminary point prior to the final determination of the appeal.

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7 March Reasons at [57].
8 March Reasons at [58].
9 Indictment against Linc and particulars, DocB of Ex. MAS-01 to the affidavit of M Simpson of 16 February 2018.
10 March Reasons at [25] – [26].

[18] On 12 June 2018 the primary judge published reasons ("the June Reasons"). On 15 June 2018 the primary judge ordered that the applicant's application filed on 22 December 2017 be dismissed, the applicant have leave to file an amended notice of appeal, and the applicant's application filed on 30 May 2018 otherwise be dismissed. It is those orders which are sought to be challenged in the proposed appeal to this Court. The draft notice of appeal also seeks an order setting aside what are said to be orders made on 12 June 2018 - apparently a reference to what is described as an "order" in the coversheet of the June Reasons - but no such orders were made on that date.[11]

**Stay of the EPO pending the appeal against it in the Planning and Environment Court**

***The primary judge's reasons***

[19] For the following reasons the primary judge concluded that the balance of justice favoured refusal of the application for a stay of the EPO pending the appeal against the decision to issue it.

[20] In the March Reasons the primary judge found that the applicant's obligation to satisfy the first two requirements of the EPO crystallised on 13 December 2017 when the High Court refused special leave to appeal from the decision of this Court affirming the Planning and Environment Court's rejection of the preliminary point argued by the applicant. The primary judge accepted that, because of the magnitude of the sum payable pursuant to the first requirement of the EPO, the obligation to pay that sum would not have to be met until a reasonable time after the refusal of the special leave application. That the primary judge concluded that a reasonable time had passed in that respect is implicit in the primary judge's conclusion that the date for compliance with the first two requirements in the EPO had "already passed" and in those respects the application for a stay in effect sought "an excusal of lack of performance from the date of the determination of the preliminary matters" or "immunity from sanction for his non-compliance".[12] In relation to the third requirement of the EPO, that by 1 November 2019 the applicant carry out described rehabilitation and infrastructure cleaning work, the primary judge observed that it was not suggested that at the time of the hearing the applicant was obliged to carry out the specified works or take any steps in that regard, the obligation did not arise until some time in the future, in all likelihood the appeal could be disposed of before the obligation crystallised, and if the appeal was substantially unsuccessful the Planning and Environment Court would have power to extend the time for compliance under s 539(1)(b) of the EPA.

[21] The primary judge referred to the provision in s 535(1) of the EPA that the Planning and Environment Court "may grant a stay of a decision to secure the effectiveness of the appeal" and to the articulation of the principles concerning an application for a stay pending appeal in *Jesasu Pty Ltd v Minister for Mineral Resources*,[13] *Paringa Mining & Exploration Co plc v North Flinders Mines Ltd*,[14] and *Network Ten Pty Ltd v Rowe.*[15] The primary judge applied the principles distilled in Meagher,

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11 See the June Reasons at [41] and the Order made on 15 June 2018.
12 March Reasons at [47]; this was affirmed in the June Reasons at [12].
13 (1987) 11 NSWLR 110.
14 (1988) 165 CLR 452.
15 [2006] NSWCA 4.

Gummow and Lehane's *Equity – Doctrines and Remedies*[16] subject to the qualification in paragraph (vi) expressed by Santow JA in *Network Ten Pty Ltd v Rowe*:[17]

> "(i) There is a right of appeal which has been exercised;
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> (ii) On appeal no greater right is asserted than is necessary to preserve the status quo pending the outcome of the appeal;
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> (iii) The appeal seems to raise an arguable point;
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> (iv) No special prejudice to the respondent is alleged;
>
> (v) The court can dispose of the appeal promptly; and
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> (vi) Failure to give relief may involve serious and arguably irreversible damage to the appellant and loss of valuable rights".[18]

[22] The effect of the primary judge's reasons is that (ii) is not satisfied in relation to the first two requirements of the EPO because the status quo upon the expiration of a reasonable time after the High Court's refusal of special leave was that the applicant's obligation to fulfil those requirements had crystallised. In relation to (iii), the primary judge concluded that the grounds of appeal remaining after the rejection of the applicant's preliminary point should not be characterised as frivolous or otherwise doomed to fail, but if Linc were found guilty of the criminal charges the applicant's prospects of prosecuting a successful appeal might be further weakened at least in relation to the applicant's appeal ground 27. (Paragraph 27 in the notice of appeal contends that the grounds identified by the EPO were erroneous because Linc complied with its general environmental duty and conditions of the environmental authorities referred to in the EPO.) As to (iv), the primary judge noted that the respondent did not point to direct prejudice to it if a stay were granted. In particular, there was no suggestion of ongoing environmental harm being caused. The primary judge accepted, however, that there was a significant public interest, which could be prejudiced by delay, in having the land rehabilitated by the applicant as quickly as practicable or in having sufficient funds available for that purpose if the applicant did not carry out the rehabilitation.

[23] As to (v), upon the assumption that the appeal should be stayed pending the final determination of criminal proceedings the primary judge concluded that it could not sensibly be said that the appeal could be disposed of promptly; the primary judge observed that "it could take months if not years with the potential for appeals in the criminal process and then, following the hearing of the applicant's appeal to this court, the potential for further appeals."[19] It is implicit in the primary judge's conclusion in the June Reasons that the appeal could be prosecuted and determined well before the commencement of any criminal trial against the applicant[20] that the appeal could be disposed of promptly if the appeal were not stayed pending the final determination of a criminal proceedings.

[24] As to (vi), the applicant's solicitor, Mr Marshall, gave hearsay evidence in an affidavit that the cost per year to the applicant of supplying the guarantee required by the EPO would be: $187,500 (if the applicant provided cash as security for the

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16 Meagher, Gummow and Lehane's Equity Doctrines and Remedies (5th Edition, 2015).

17 Neither party challenged the appropriateness of these principles in the context of an appeal under s 536 of the EPA.

18 [2006] NSWCA 4 at [10] – [11].

19 March Reasons at [47].

20 June Reasons at [30].

guarantee); $463,650 (if the applicant supplied real property as security for the guarantee); or $723,250 (if the applicant provided the bank guarantee under an unsecured arrangement with a second tier lender). The primary judge accepted that having to provide a bank guarantee of $5.5 million might cause serious and irreversible financial damage to the applicant. The primary judge considered that the circumstance that the obligation to supply the bank guarantee lay with the applicant should be seen in the context that the applicant made a "tactical decision" to agree to consent orders for a stay pending the determination of the preliminary point, rather than pursuing his original application for a stay "pending the final resolution of this appeal",[21] the applicant sought to resile from that tactical decision in circumstances where he had obtained the benefit of the stay for in excess of 18 months, and the present proceeding was for a fresh or new stay based on materially different grounds which, if granted, inevitably would lead to further delay in the finalisation of the appeal and, if the appeal failed, in satisfaction of the requirements of the EPO.

[25] As to the application of (vi) to the third requirement of the EPO, the primary judge's reasons convey that the failure to grant the stay would not involve serious or irreversible damage to the applicant in that respect because the obligation to fulfil that requirement would not arise until some time in the future.

**Consideration**

[26] Section B of the applicant's draft amended notice of appeal contends that the primary judge made the specific errors in refusing to stay the EPO which are set out in the following headings.

**B(a) In taking into account, as a matter adverse to the applicant, that what was being sought were "fresh stays"**

**B(d) In viewing the 2016 consent order of Rackemann DCJ as being "*a tactical decision that the applicant now seeks to resile from*"**

**B(ee) In deciding that the applicant's consent to the order granting the stay in August 2016 was a tactical decision, in treating the time that had lapsed before the primary judge made his decision as relevant delay, and in acting on the mistaken assumption that the applicant was not required to begin carrying out rehabilitation works under condition B3 until 1 November 2019**

[27] Ground B(a) cites the primary judge's statements (in the March Reasons) that "the applicant elected not to seek a stay pending the outcome of his appeal to this court, but instead until the finalisation of the preliminary matters … the present proceeding is for fresh or new stays based on materially different grounds which, if granted, will inevitably lead to further delay in the finalisation of the proceedings and, in the event that the appeal was unsuccessful, the satisfaction of the requirements of the EPO"[22] and (in the June Reasons) "what was in reality being sought were fresh stays rather than the renewal or continuation of existing stays."[23]

[28] Those statements are accurate. The primary judge did not find that the applicant was not entitled to apply for a fresh stay but merely that the applicant should be required to establish afresh that the new stay he then sought should be granted. The

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21 March Reasons at [54], quoting from the application for a stay.
22 March Reasons at [55].
23 June Reasons at [8].

applicant applied for a stay of the EPO pending the final resolution of his appeal but compromised that application by consenting to an order for a stay of the EPO pending the finalisation of a preliminary point. The stay having expired on 13 December 2017 upon the refusal of the special leave application, in March 2018 it was accurate for the primary judge to describe the proceeding as being for a fresh or new stay.

[29] The applicant submits that a materially different ground for the new stay was found in the criminal charges brought against the applicant on 13 September 2016 and 11 November 2016, after the adverse decision in the Planning and Environment Court on 30 August 2016 and that it was unnecessary for the applicant to seek a further stay of the EPO until after the final determination of the preliminary points. He also submits that the primary judge's reference to the applicant's consent to the order granting the stay in August 2016 as a "tactical decision" was an error of law because there was no evidence to that effect.

[30] It must have been apparent to the applicant when he consented to the stay in August 2016, instead of pursuing his original application that the stay of the EPO would expire if and when the preliminary point was determined against him. In that context the applicant's argument does not explain why in August 2016 he ceased to pursue his original application for a stay of the EPO pending determination of the appeal only to renew it in December 2017. The delay in the prosecution of the appeal occasioned by the applicant's unsuccessful pursuit of a preliminary point was plainly a relevant consideration in considering whether a further stay of the EPO should be granted. The criminal charges against the applicant brought in September and November 2016 justified the applicant in applying for a stay of his appeal pending determination of the criminal prosecution. In the different context of the application for a stay of the EPO pending the appeal, the bringing of those charges is not a basis for finding any error in the primary judge's remark that the applicant sought to resile from an earlier tactical decision to pursue a stay only until the resolution of the preliminary point. As the respondent submitted, that remark was consistent with the applicant's own argument that a stay in terms of the consent order "would have been sufficient if the [a]pplicant was successful in its application with respect to the preliminary points … and … the [r]espondent was willing to agree to a stay in the terms contemplated by that order."[24]

**B(b) In taking the view that what was involved was not a case of preserving the status quo pending the outcome of related proceedings**

**B(c) In regarding the grant of a stay as involving an immunity from sanction for non-compliance with conditions B4 and B23 of the EPO**

[31] The applicant argued that the proposed stay would preserve the status quo, because the status quo was that the applicant had not been required to comply and in fact had not complied with the first two requirements of the EPO. It is common ground that the applicant did not comply but otherwise the argument is incorrect. There being no stay of any requirement of the EPO between the refusal of the special leave application on 13 December 2017 and the hearing of the application for a fresh stay on 2 March 2018, a fresh stay thereafter would change the status quo by bringing to an end the applicant's unqualified obligation to comply with the EPO in the future. The applicant's further argument that the primary judge incorrectly described the

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24 Applicant's outline of submissions lodged 29 October 2018, paragraph 14.

proposed stay as involving immunity from sanction for the applicant's past non-compliance with the EPO conditions does not meet the substance of the point made by the primary judge. The primary judge did not err by taking into account the fact that as a result of the applicant's consent to an order staying the EPO pending determination of the preliminary point instead of pending determination of his appeal, the first two requirements of the EPO had been in force for a substantial period before the hearing of the application for a fresh stay in March 2018.

**B(e) In taking into account the potential for further appeals to the Court of Appeal (despite the limitations in s 535(3) of the [EPA], which limits the period of a stay to the time when the Planning and Environment Court decides the appeal, and rule 761(2) of the UCPR, which denies power to grant a stay for an application for leave to appeal)**

[32] Section 535(3) of the EPA provides that the period of a stay (a stay of a decision appealed against to secure the effectiveness of the appeal, under s 535(1)) must not extend past the time when the Court decides the appeal. Rule 761(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) confers upon this Court, a judge of appeal, or the court that made the order appealed from, power to order a stay of the enforcement of all or part of a decision subject to an appeal.

[33] The application for a stay of the decision to issue the EPO sought such a stay pending the final resolution of the applicant's appeal by the Planning and Environment Court. If, as the applicant contends, the primary judge took into account the potential for delay in the determination of further appeals following the decision of the Planning and Environment Court upon the applicant's appeal, that would have been an error, but in the passage in which the criticised statement was made the primary judge was considering only whether or not the appeal to the Planning and Environment Court could be disposed of promptly if that appeal were stayed pending the final determination of the criminal proceeding against the applicant. The applicant's draft amended notice of appeal does not contend for error in the primary judge's assessment that it could take months, if not years, for the criminal process, including any appeals from any convictions, to be determined. The primary judge appropriately took that into account in exercising the discretion. Excluding any prospect of a further stay being granted in the event of an appeal from a decision of the Planning and Environment Court adverse to the applicant, on any view the applicant's appeal would be very seriously delayed. The suggested error is immaterial.

[34] The applicant argued that the primary judge erred by taking into account the period of time that the applicant's appeal had been on foot before the March hearing and in using the word "delay" which, the applicant submitted, carried a pejorative overtone. The primary judge did not use the word "delay" pejoratively. There was no suggestion of any conduct on the part of the applicant that caused delay in the prosecution by him of the preliminary point, in the Planning and Environment Court and in the subsequent appeal and application for special leave to appeal. But that does not deny that substantial additional delay to the operation of the EPO was sought by the applicant in the context that the final determination of his appeal had been delayed for a very lengthy period of time whilst he elected to pursue a preliminary point through the courts. As already indicated, that was relevant in a case in which the applicant sought a fresh stay on different grounds after the original stay had ceased to operate.

[35] The applicant also argued that in the June Reasons the primary judge wrongly considered that the applicant was not required to "begin" carrying out rehabilitation works until 1 November 2019, that being the date by which the rehabilitation works must be completed. As the respondent submitted, it is apparent that the primary judge appreciated the correct position. In the March Reasons the primary judge twice referred to the requirement of the EPO that the applicant carry out the specified rehabilitation works by 1 November 2019[25] and towards the beginning of the June Reasons the primary judge correctly stated that the EPO required the applicant "to carry out" the rehabilitation work "by 1 November 2019".[26] Furthermore, the applicant did not adduce evidence that the time required for completion of the work was such as to make it reasonable for a stay to be granted so far in advance of the required completion date, and the primary judge recorded that, if necessary, this matter could be re-visited on another occasion if that were appropriate.[27] The word "begin" in the ex tempore reasons was a slip of no consequence.

**B(f) When dealing with s 79 of the *Evidence Act* 1977, in failing to take into account that a conviction of the applicant of charges in the criminal proceedings (if they were heard first) would be directly relevant to the applicant's reliance upon s 363ABA(b) and s 493(4) of the [EPA] in the appeal (if it were heard second)**

[36] Ground B(f) cites paragraph 51 of the March Reasons. The only reference in that paragraph to s 79 of the *Evidence Act* 1977 (Qld) is the primary judge's statement:

> "While not expressing a final view on the matter, in the event of guilty verdicts against the company, the operation of s 79 of the *Evidence Act* 1977 may well be a matter of consequence."

[37] It is difficult to see how this could form a basis of challenge to the primary judge's exercise of discretion in the June Reasons to refuse a stay of the EPO pending determination of the applicant's appeal against the decision to issue it. Ground B(f) is not in terms directed to such a challenge. The applicant's amended outline of argument[28] and its oral argument[29] upon this point instead concern only the challenge to the primary judge's refusal to stay the civil proceedings pending the determination of the criminal proceedings against the applicant. Those arguments should be rejected for the reasons given in relation to the identically worded ground C(a).

**B(g) In taking into account, in the absence of any relevant evidence relating to other aspects of the applicant's case, or any material consideration of them, that the preliminary points determined on 30 August 2016 were "*probably the strongest or most potentially determinative matters*"**

[38] Senior counsel for the applicant argued before the primary judge "that the nature of the preliminary points that were determined … were such that, if the appellant had been successful with the arguments, they would have disposed of the appeal,

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25 March Reasons at [3], [45].
26 June Reasons at [4].
27 June Reasons at [11].
28 Applicant's amended outline of argument, paragraph 20 – 26, particularly 23.
29 Transcript 20 November 2018 at 1 – 7 ll 26 – 28, in particular, referring to paragraph 23 of the outline.

because the effect of the arguments was that the EPO was invalid and would need to be re-issued".[30] Subsequently he returned to the same point:

> "… [The preliminary points determined against the applicant] were more than just preliminary points. They had the capacity, if decided in the appellant's favour, of disposing of the entire appeal in the appellant's favour. So it was understandable that the order made by Justice (sic) Rackemann would be framed in those terms, because it was on the cards on any view of things, that a favourable determination of those points would finally dispose of the appeal".[31]

[39] The primary judge introduced that statement with the words "according to Mr Gore [the applicant's senior counsel]", immediately after making the remark quoted in this ground of appeal. That remark reflected the applicant's own arguments and the facts that the applicant had earlier promoted the preliminary determination only of those points and consented to a stay of the EPO until the determination only of them. The primary judge in any event found that the applicant's appeal raised arguable points. In these circumstances the primary judge's remark about the previous preliminary point does not amount to a material error justifying appellate interference in the primary judge's discretionary decision.

**B(h) In concluding that there was "*prejudice likely to be caused to the respondent*", despite accepting that it was "*true that the respondent did not point to any direct prejudice*"**

[40] Ground B(h) quotes from part of March Reasons concerning prejudice to the respondent if a stay of the EPO was not granted. The applicant's argument is that the primary judge did not identify any separate prejudice to the respondent, the "public interest element" described by primary judge as "significant" should be balanced against the lack of evidence of a risk of further environmental harm, and the respondent had assured the primary judge that the disposal of the proceeding was not urgent. The last point is irrelevant because the proceeding said not to be urgent was the application for a stay, not the appeal.

[41] The primary judge's relevant conclusion upon this topic was that there was a significant public interest in the land being rehabilitated by the applicant as quickly as practicable or in there being sufficient funds made available for the rehabilitation of the land if the applicant did not cause it to be done. The applicant's argument does not supply a basis for finding that there was any error in that conclusion. The primary judge did not err by taking into account the public interest he described. The applicant does not contend for any such error, nor is there any basis for assuming that the primary judge did not take into account that there was no evidence of a risk of further environmental harm or some other prejudice.

**B(i) In taking into account that the Planning and Environment Court might extend the time for compliance, even if the applicant's appeal failed, pursuant to s 539(1)(b) of the [EPA], in circumstances where that was speculative, and failed to take into account that the period that had been allowed under the EPO must have been regarded as the appropriate period by the respondent**

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30 Transcript 2 March 2018 at 1-5 ll 41 – 45.

31 March Reasons, paragraph [52], quoting from Transcript 2 March 2018 at 1-32.

[42] The error contended for in ground B(i) concerns the third requirement of the EPO, that the applicant carry out certain work by 1 November 2019. The primary judge observed that if the applicant's appeal failed, the Planning and Environment Court had the power to extend the time for compliance with that obligation under s 539(1)(b) of the EPA. The applicant does not contend that the observation was incorrect. That such a power might be exercised in the postulated situation if that were found to be appropriate was not an irrelevant consideration. That is so whether or not (as the applicant contends) the respondent considered at the time of issue of the EPO that it allowed an appropriate period for compliance by the respondent.

**B(j) In misunderstanding the respondent's concession about what was the orthodox and appropriate approach to adopt in the applicant's circumstances**

[43] In a passage of the March Reasons the primary judge referred to the possible impact of the result of the criminal proceedings concerning Linc. The primary judge observed that if at the adjourned hearing fresh stays in some form were granted pending the determination of the appeal, then his Honour "would envision the making of further orders and directions designed at having the appeal heard at the earliest practicable date." The primary judge added that counsel for the respondent considered that the adoption of such a course, subject to conditions, would be "orthodox" and an "appropriate approach".[32]

[44] The applicant argued that the primary judge had misunderstood what it was that the respondent acknowledged to be orthodox and appropriate. The applicant also referred to the discussion about this and other aspects of the March Reasons at the hearing after the verdicts had been taken in the criminal proceedings against Linc, in which there appears to have been some confusion about the intended effect of the respondent's acknowledgement.[33]

[45] Upon no reasonable view of the arguments before the primary judge did the respondent concede that any stay sought by the applicant should be granted. The reference by the respondent's senior counsel to what was orthodox and appropriate concerned orders and directions that might be made if, contrary to its argument, some such stay were granted. The meaning of the primary judge's observation in its context was that if fresh stays in some form were granted pending the determination of the applicant's appeal to the Planning and Environment Court, further orders and directions would be made with a view to having that appeal heard at the earliest practicable date. Given that the primary judge ultimately did not grant any stay pending the determination of the appeal, the debate about the intended meaning of the argument for the respondent need not be considered further.

**Conclusion**

[46] The applicant has not established any of the specific errors for which he contended in the primary judge's decision to refuse to stay the EPO pending the final resolution of the appeal.

**The application for a stay pending the final determination of the criminal proceeding**

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32 March Reasons at [58], referring to Transcript 2 March 2018 at 1-29.

33 Transcript 11 May 2018 at 1-3 to 1-5.

[47] It is important for the resolution of the applicant's challenge to the refusal of a stay of his appeal pending determination of the criminal proceedings against him to bear in mind that the applicant's evidence and arguments upon this issue differed very markedly as between the hearing preceding the March Reasons and the hearing preceding the June Reasons.

**The March Reasons**

[48] At the hearing preceding the March Reasons:

(a) The focus of the applicant's argument for a stay pending final determination of the criminal proceeding was upon a potential overlap between the criminal prosecution against him and the so called "merits point" in paragraph 27 of the notice of appeal (that Linc had complied with its general environmental duty and conditions of the Environmental Authorities). The applicant did not then make submissions about the potential operation of the defence in s 493(4) of the EPA that the executive officer proves that the officer took all reasonable steps to ensure the preparation complied with the provisions or that the officer was not in a position to influence the conduct of the corporations.

(b) The applicant relied upon an affidavit sworn by his solicitor in February 2018 which did not suggest an overlap between issues in his appeal and the defence under s 493(4). The affidavit instead suggested as the overlap between the civil proceedings and the prosecution of the applicant for failing to ensure that Linc did not wilfully and unlawfully cause serious environmental harm that the determination of the applicant's defence would "be contingent on a finding to the effect that such harm was caused (as if no harm occurred, Mr Bond cannot be guilty of failing to prevent such harm)."[34]

(c) There was no evidence that the applicant might give evidence in his appeal or in the criminal proceedings.

[49] In the March Reasons, the primary judge gave reasons to the following effect in addition to the reasons summarised earlier. The applicant conceded that the suggested "factual overlap" and "real risk of prejudice" if the applicant's appeal to the Planning and Environment Court proceeded before the trial of criminal proceedings arose only in respect of "the merits point" and only that point could give rise to any real risk of prejudice.[35] The applicant submitted that "there is inevitable overlap between those charges [against the applicant] and the … assertion in paragraph 27 that the company complied with its general environmental duty."[36] The charges against Linc and the charges against the applicant were concerned with the operation of the same gasifiers and the cause of the serious environmental harm alleged against the applicant was to the same effect as the criminal charges concerning Linc. While there was clearly a high degree of overlap in the nature of the offences there was nonetheless a material difference; the proceedings against Linc were concerned with its conduct, the focus in the Linc trial being on the actions and/or inaction of the company and the consequences thereof, whereas the focus of the allegations against the applicant was that he failed to ensure that Linc

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34 Affidavit of M Marshall sworn 7 February 2018, paragraph 49.2.
35 March Reasons at [12], referring to Transcript 2 March 2018 at 1-7 ll 20-46, 1-25 ll 7-46.
36 March Reasons at [14], quoting from T 1-7 ll 20-30.

did not conduct its operation in the alleged reckless or grossly negligent way.[37] The applicant's submissions were to the effect that the alleged substantial overlap between the cases concerned the gasification process causing environmental harm.[38]

[50] The applicant argued that "to make good his allegation in paragraph 27, he will be required, presumably, to give evidence from his perspective as to how the gasification process was carried out and that will, necessarily, involve overlap with the evidence that's relevant to the criminal proceedings",[39] the "heart at both cases is whether the site is contaminated; if so, to what extent, whether that contamination was lawful or unlawful; and the extent to which Bond is personally responsible", and that to progress the appeal the applicant would have to (1) advance evidence relating to the state of the site, (2) advance evidence about his involvement, and (3) advance arguments about the lawfulness of activities on the site, and the first two of those would risk him effectively admitting in the civil case important ingredients of the criminal case and would reveal his arguments about lawfulness, prejudicing his defence in a criminal case.[40]

[51] The primary judge observed that not guilty verdicts in the Linc trial could have serious ramifications for the civil and criminal proceedings involving the applicant.[41] Guilty verdicts against Linc might have serious ramifications because of s 493 of the EPA.

[52] The primary judge reasoned that, in the absence of evidence, it should not be inferred that the applicant would necessarily be required to give evidence in the civil appeal about the condition of the site or the gasification process, and it was relevant also that there was hearsay evidence by the applicant's solicitor that the applicant did not possess the necessary technical skills, qualifications or expertise upon those topics.[42] Submissions were not made to the primary judge about the operation of s 493 of the EPA,[43] and having regard to paragraph 27 of the notice of appeal and the areas of concern identified for the applicant, "it is difficult to discern any appreciable risk of the applicant having to give evidence that might have relevance to the defences provided for, and if there were any risk, the risk would be small"; evidence about the question whether the applicant was an executive officer in a position to influence the conduct of the corporation in relation to the offence for the purposes of s 493(4) of the EPA would be "largely, if not entirely, irrelevant to the substance of a pleading in paragraph 27, which is concerned with what the company did and did not do and the consequences thereof."[44] After discussing authorities concerning applications to stay civil proceedings because of pending or possible criminal proceedings, the primary judge distinguished the decision in *Commissioner of the Australian Federal Police v Zhao*[45] upon the basis that, whilst there was a significant overlap between the applicant's appeal and the criminal proceedings, there was "no significant factual overlap".[46]

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37 March Reasons at [15] – [18].
38 March Reasons at [18].
39 March Reasons at [18].
40 March Reasons at [19].
41 March Reasons at [24] – [25].
42 March Reasons at [29] – [30].
43 March Reasons at [27].
44 March Reasons at [31].
45 (2015) 255 CLR 46.
46 March Reasons at [38].

[53] The primary judge considered that there was considerable force in the submission for the respondent that there was a public interest in having the appeal determined rather than being left to languish potentially for years.[47] Whilst there was a small risk that the applicant would suffer some prejudice in prosecuting his appeal before the criminal proceedings, that was outweighed by the prejudice to the respondent and the public interest in having the appeal determined; and the respondent would be prejudiced in that it was entitled to have proceedings bought against it and litigated in a timely way except where delay was warranted.[48] There was a small risk that the applicant would suffer some prejudice in being required to prosecute his appeal before the criminal proceedings against him were concluded, but that risk was outweighed by the prejudice to the respondent and the public interest against the appeal being left unresolved for an uncertain but lengthy period to allow the appeal "to languish for a further indefinite period of time would tend to erode public confidence in the administration of justice"[49] and there was a "strong public interest" in the determination in a timely fashion of a matter involving significant environmental issues.[50]

**The June Reasons**

[54] At the hearing preceding the June Reasons the same solicitor filed a further affidavit and an amended notice of appeal was produced. In an affidavit sworn on 24 May 2018, the solicitor for the applicant summarised the provisions of EPA concerning defences open to a person charged with an offence under s 493(2), expressed opinions about assertions and implied assertions made in the EPO, referred to disputes about those assertions in the amended notice of appeal, and deposed:

> "All of these matters are likely to be live issues in the Prosecution Proceeding against Mr Bond. It is anticipated that Mr Bond will give evidence in both proceedings … [g]iven the stage in the Prosecution Proceeding Mr Bond, as the defendant is not required to make the Prosecution aware of the defences that he intends to run, nor is he required to do so before the defence case opens … [t]he statutory defences … are also relevant to this proceeding … should Mr Bond establish any of the above mentioned defences it would mean that there was no basis on which the respondent could have issued the EPO."[51]

[55] The amendments to the notice of appeal accurately stated (paragraph 28F) that s 363ABA(b) of the EPA provides that in deciding whether to issue an EPO to a related person of the company under s 363AD of EPA the administering authority "may consider" whether the related person took all reasonable steps to ensure the company complied with its obligations under the EPA and made adequate provision to fund the rehabilitation and restoration of the land because of environmental harm from a relevant activity carried out by the company. The amendments contended both that (paragraph 28G(a)) the respondent "failed to properly consider" the matters in s 363ABA(b) of the EPA and by "failing to take into account relevant considerations the respondent erred in law and the decision to issue the EPO was

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47 March Reasons at [40].
48 March Reasons at [40] – [41].
49 The primary judge referred to *White v ASIC & Ors* [2013] QCA 357 at [33].
50 March Reasons at [41].
51 Affidavit of M Marshall sworn 24 May 2018, paragraphs 25 – 28, 30.

unlawful" and that (paragraph 28G(b)) in deciding the appeal the Planning and Environment Court should consider those matters.

[56] The primary judge concluded that the result of the applicant's appeal would be unlikely to have any effect upon the criminal proceedings, the result of the criminal proceedings need not necessarily be determinative of the result of the appeal and in that context, although convictions against Linc might be admissible under s 79 of the *Evidence Act* in the civil proceedings, that would not be the case in respect of the criminal proceedings against the applicant.[52] The primary judge was not convinced that there was a substantial overlap in terms of the facts and issues in the civil proceedings and the criminal proceedings. The overlap was only between the new contentions in paragraphs 28F and 28G of the amended notice of appeal and the defences that the officer took all reasonable steps to ensure the corporation complied with the provision (s 493(4)(a)) and the officer was not in a position to influence the conduct of the corporation in relation to the offence (s 493(4)(b)).[53] The primary judge acknowledged that a defence might exist but was not convinced that the applicant himself would be required to give evidence about the statutory defences other than in relation to the defences under s 493(4).

[57] The primary judge considered that the risk was a direct consequence of the applicant's conduct in raising these matters for the first time in an amended notice of appeal nearly two years after the filing of the original notice, in circumstances in which the applicant knew or should have known the relevant facts and circumstances at the time the original notice of appeal was filed and where no reasonable explanation was given for the delay; that was of particular significance given the public interest in having the proceedings determined in an appropriate way.[54] It was also relevant that the applicant could elect in the appeal not to answer any questions that might tend to incriminate him; although that might impact upon his prospects on that particular element in the appeal, that would be a consequence primarily of the applicant's own action or inaction and the other grounds still could be relied upon.[55] The primary judge observed that steps could be taken to alleviate any concern the applicant would be required to give evidence (including by statements or otherwise) that would disclose any potential defence or require him to give potentially prejudicial evidence.[56]

[58] The primary judge referred to observations in the March Reasons that the task was to balance justice between the parties taking into account relevant factors, the balance favoured refusal of a stay where the injustice or prejudice the applicant might suffer in having to prosecute his appeal was outweighed by the prejudice likely to be caused to the respondent and the public by further uncertain but lengthy delay.[57] The primary judge rejected arguments that the criminal proceedings were well advanced and that refusal of a stay might result in the criminal proceedings and the civil proceedings occurring at or about the same time.[58]

**Consideration**

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52 June Reasons at [28].
53 June Reasons at [31] – [32], [34].
54 June Reasons at [32] – [38].
55 June Reasons at [39].
56 June Reasons at [39].
57 June Reasons at [39], referring to the March Reasons at [57].
58 June Reasons at [40].

[59] Section C of the applicant's draft amended notice of appeal contends that the primary judge made the specific errors in refusing to stay the appeal which are set out in the following headings.

**C(d) In suggesting that it was part of the applicant's case that the hearing of the appeal before the criminal proceedings may expose the applicant to the potential of having to reveal arguments on matters of law**

[60] The applicant contended that the primary judge misunderstood the applicant's contentions upon this topic in thinking that the applicant contended that he was exposed to the potential to having to reveal arguments on matters of law. The primary judge addressed that topic in two short paragraphs, observing that an argument presented by the applicant that in the appeal the applicant would have to "advance arguments about the lawfulness of activities on the site" obviously would involve matters of fact and law, that the potential for an accused being required to reveal arguments of law might not give rise to the same level of concern arising out of the prejudicial effect of being required to reveal matters of fact, but the circumstance that a party might be required in civil proceedings to alert the prosecution to potential legal arguments, defences, and other tactical considerations still would constitute a potential for prejudice to be brought into account in the balancing exercise.[59] If, as is implicit in this ground of appeal, it was not part of the applicant's case for a stay of the appeal that the hearing of that appeal before the criminal proceedings might prejudice the applicant by requiring the applicant to reveal arguments about matters of law, it was an error for the primary judge to take prejudice of that kind into account. But if there was any such error it did not operate to the disadvantage of the applicant. The suggested error is therefore immaterial.

**C(e) In misunderstanding the respondent's concession about what was the orthodox and appropriate approach to adopt in the applicant's circumstances**

[61] Ground C(e) fails for the reasons given in relation to the identically worded ground B(j).

**C(a) When dealing with s 79 of the *Evidence Act* 1977, in failing to take into account that a conviction of the applicant of charges in the criminal proceedings (if they were heard first) would be directly relevant to the applicant's reliance upon s 363ABA(b) and s 493(4) of the [EPA] in the present proceedings (if it were heard second)**

[62] The applicant argued that:

(a) in the criminal proceedings against the applicant the prosecutor would contend that the conviction of Linc was evidence that the applicant committed the offence of failing to ensure that Linc complied with the EPA (see s 493(3)) and the onus was upon the applicant to prove that he took all reasonable steps to comply with the Act or that he was not in a position to influence Linc's conduct (see s 493(4));

(b) if the applicant were convicted of the charges against him the respondent would contend in the civil appeal that the convictions would be admissible

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[59] March Reasons at [20] – [21], citing *Re AWB Ltd (No 1)* (2008) 21 VR 252 and *White v ASIC & Ors* [2013] QCA 357 at [22] – [23].

under s 79 of the *Evidence Act* and the onus would be upon the applicant to prove the contrary (*Evidence Act*, s 79(3));

(c) if the criminal proceedings against the applicant were determined first and a conviction obtained (as had occurred in the criminal proceeding against Linc), those convictions would be relevant to paragraphs 27, 28F and 28G of the amended notice of appeal, they might impact upon whether the appeal was heard, and if it were the convictions would shorten the length of the hearing;

(d) if the civil appeal were heard and determined before the related criminal proceedings against the applicant, the result of that appeal would have no material impact upon the criminal proceedings but the applicant's entitlement to claim privilege would affect the efficiency of the hearing in the civil appeal and prejudice the applicant's prospects of success in the appeal.

[63] That argument extended beyond the terms of ground C(a). The respondent submitted that the applicant's argument within this ground was to the effect that the appeal should have been stayed because a conviction of the applicant would shorten the length of the hearing of the appeal. That was submitted to be unpersuasive because it was not addressed to any risk of prejudice in the conduct of the applicant's criminal defence, which was what the applicant was required to show in order to obtain a stay.

[64] Ground C(a) fails for the more fundamental point also argued by the respondent that the primary judge did take into account the matter expressed in that ground. The primary judge observed of it that "[it] may well be so in the event that the [a]pplicant is found guilty … of the charges",[60] that the outcome of the criminal proceedings were not necessarily determinative of the outcome of the appeal, and that the two matters were separate "save for the evidentiary matters to which I have referred."[61]

**C(b) In failing to take into account, or to appreciate, the substantial overlap between the charges against the applicant in the criminal proceedings, and the applicant's reliance upon s 363ABA(b) and s 493(4) of the [EPA] in the appeal**

**C(c) In failing to take into account the true impact on the due administration of justice of the applicant's entitlement to claim privilege against self-incrimination if the appeal were heard before the criminal proceedings**

[65] In relation to ground C(b), the primary judge accepted that the issues raised by paragraphs 28F and 28G of the amended notice of appeal overlapped with the issues in the criminal proceeding against the applicant and that the applicant would be required to give evidence about those defences, but was not particularly convinced by the applicant's argument that this was a substantial overlap. Ground C(c) cites a paragraph of the March Reasons in which the primary judge observed that there was a risk that the applicant would not be able to successfully prosecute his appeal because of claims of privilege and it was a matter for the applicant to decide whether or not to claim privilege against self-incrimination as an objection to answering questions, and a paragraph of the June Reasons in which the primary judge stated that "the risk of self-incrimination was dealt with in some detail and

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60 June Reasons at [28].

61 June Reasons at [28] – [29].

decided against the [a]pplicant in my previous reasons".[62] The applicant also relied upon the primary judge's statement about the exercise by the applicant of an election not to answer incriminating questions in the appeal that it "may very well have an impact on his prospects in respect of that particular element of his appeal but that is a consequence primarily of his own action or inaction";[63] that was submitted to reveal an error because the authorities demonstrated a trend that a person in the applicant's position should not be put to such material prejudice.

[66] The applicant argued that his situation was similar to that of the second respondent in *Commissioner of the Australian Federal Police v Zhao*, in which the High Court observed:

> "42 The risk of prejudice to the second respondent if a stay is not granted in the forfeiture proceedings and the exclusion proceedings is plain. It is not necessary for the second respondent to say any more than he did on the application for a stay in order to identify that risk, given that the offences and the circumstances relevant to both proceedings are substantially identical.
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> 43 The Commissioner contends, as the primary judge had held, that it was necessary that the second respondent state the specific matters of prejudice before a stay could be contemplated. However, to require the second respondent to do so would be to make the risk of prejudice a reality by requiring him to reveal information about his defence, the very situation which an order for a stay seeks to avoid. Similarly, the Commissioner's contention that the court should defer making an order for a stay until the parties have exchanged their evidence is beside the point.
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> …
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> 47 The prospect that civil proceedings may prejudice a criminal trial and that such prejudice may require a stay of the civil proceedings is hardly novel. In some jurisdictions, procedures are provided for making an application for a stay in such circumstances. The risk of prejudice in a case such as this is real. The second respondent can point to a risk of prejudice; the Commissioner cannot.
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> …
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> 50 The interests of justice are not served by requiring the second respondent to defend the forfeiture proceedings or pursue the exclusion proceedings before his criminal proceedings are finalised, especially since the Commissioner will suffer no relevant prejudice from a delay in the continuation of the forfeiture proceedings."[64]

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62 June Reasons at [36].

63 June Reasons at [39].

64 (2015) 255 CLR 46 at 59 – 61. Citations omitted.

[67] The primary judge plainly was familiar with the principles expressed in *Zhao*. His Honour quoted extensively from that decision and discussed other cases.[65] The applicant did not seek to identify any error in that aspect of the primary judge's analysis. In my respectful opinion, however, in the application of the relevant principles the primary judge understated the degree and significance of the overlap between the criminal proceedings against the applicant and the applicant's civil proceedings.

[68] In the March Reasons the primary judge did not err in a way that would justify appellate interference in holding that although there was "a clear and significant overlap of facts, matters and circumstances in the respect of criminal proceedings" the issues were not identical or near identical to those likely to arise in the criminal prosecution and there was in reality no significant factual overlap.[66] But the applicant's subsequent amendment by leave of the notice of appeal together with the additional evidence upon which the applicant relied at the June hearing changed the case very markedly. The potential defences in the criminal proceeding under s 493(4) very closely mirrored issues under paragraph 28G of the amended notice of appeal and there was then evidence that it was anticipated that the applicant would give evidence related to those issues in both proceedings. That overlapping of issues was both substantial and significant for the administration of justice notwithstanding that other issues in the appeal had no counterpart in the criminal proceeding.

[69] The respondent argued that paragraph 28G did not address the circumstance that the appeal against the EPO was an appeal "by way of rehearing, unaffected by the administrating authority's decision" under s 536(2) of the EPA and that the Planning and Environment Court was authorised by s 539(1)(c) to "set aside the decision appealed against and make a decision in substitution for the decision set aside." The result was submitted to be that the alleged error in the decision to issue the EPO was immaterial and in any event amenable to correction in the appeal in the Planning and Environment Court. In that respect, however, 28G(b) of the notice of appeal contends that "in deciding this appeal this Honourable Court should consider the matters set out in s 363ABA(b) [EPA]", it is to be expected that the applicant could give evidence upon that issue, and that evidence seems likely also to be relevant to his defence of the prosecution against him.

[70] The respondent argued that it was apparent on the face of the EPO that the relevant considerations were taken into account and that paragraph 28G was weak for the absence of particulars raising a positive case, because the word "may" conferred a discretion, and because of the unknown content of the word "properly" in the expression "failed to properly consider"; but the primary judge did not accept that the ground was of insufficient strength to justify refusing leave to amend to add it and the respondent did not seek to challenge that decision. Upon the face of that ground, issues in the criminal proceeding very substantially overlap both with the issue in 28G(a) that the respondent failed to properly consider the matters in s 363ABA(b) and with the issue raised by paragraph 28G(b) that the Planning and Environment Court should consider the same matters in deciding the appeal. The respondent may have a good argument that the first point should fail because those matters were considered by the decision maker. If so, as the applicant submitted,

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65 March Reasons at [32] – [37].

66 March Reasons at [38].

the applicant could seek to rely upon that fact in a submission that it should be considered by the Planning and Environment Court in the rehearing.

[71] The respondent also argued that the evidence of Mr Marshall failed to identify a "specific" prejudice which might justify staying the appeal pending determination of the criminal proceeding. As the applicant submitted, the totality of that evidence was not significantly less specific than the evidence considered by the High Court in *Zhao*. It was submitted for the respondent that the evidence needed more specifically to be directed to, for example, the question whether or not the applicant was in a position to influence the corporation, so as to relate it to the statutory defence. Such a requirement would itself risk prejudicing the applicant in the criminal prosecution, at least by alerting the prosecution to a train of enquiry concerning the manner in which the applicant would defend the prosecution and perhaps in other ways.

[72] Nor was any delay by the applicant very significant in this context. The applicant's delay in finalising the grounds of his appeal was a relevant factor in refusing to stay the EPO pending that appeal but it was not significant for a decision whether to stay the appeal pending determination of the criminal proceedings. At the time when the criminal proceedings were brought against the applicant his appeal was already not being progressed other than by the pursuit of the preliminary point which did not overlap with any issue in the prosecution of the applicant. In those circumstances it was not obviously unreasonable for the applicant to defer applying for a stay of the appeal pending finalisation of the criminal proceeding until after the determination of a point which, if decided in his favour, would obviate any need to make such an application. After the final determination of the preliminary point by the High Court's refusal of special leave on 13 December 2017 the applicant promptly applied on 22 December 2017 for a stay of his appeal pending final resolution of the criminal proceedings. It is not suggested that the applicant delayed in his prosecution of that application. The fact that the applicant did not plead the ground of appeal in paragraph 28G of the amended notice of appeal until after the hearing in March 2018 may have delayed the determination of his application to stay the appeal pending resolution of the criminal proceedings, but only for a relatively short period.

[73] As was observed by the High Court in *Zhao* in a passage quoted by the primary judge,[67] the question in each case is whether "the interests of justice require such an order."[68] In the June Reasons,[69] the primary judge adopted an earlier observation[70] that the task for the Court was "one of balancing justice between the parties, taking into account all relevant factors" and that "[w]hatever injustice or prejudice the applicant might suffer in having to prosecute his appeal is outweighed by the prejudice likely to be caused to the respondent and the public by further uncertain but lengthy delay." It is correct, as the primary judge considered, that the stay would result in further and very significant delay in the determination of the appeal, but that delay lacks substantial significance for present purposes in circumstances in which the EPO is not stayed. The public interest in prompt completion of the specified rehabilitation works and in the lodgement of a guarantee to secure compliance by the applicant with his obligations under the EPO was already secured

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67 March Reasons at [35].
68 (2015) 255 CLR 46 at 58 [36].
69 June Reasons at [39].
70 March Reasons at [57].

against the applicant, so far as that was practicable under the statutory provisions, by the refusal of a further stay of the EPO. It follows that any prejudice to the respondent and the public was not significant in comparison with the prejudice risked by the applicant if his appeal were not stayed. The prompt prosecution of the forfeiture proceedings in *Zhao* attracted a public interest but French CJ, Hayne, Kiefel, Bell and Keane JJ observed in that respect that it "could hardly be said, from any point of view, that they are more important than criminal proceedings and should be given priority."[71] The same might be said of the applicant's appeal in circumstances in which the EPO is not stayed pending determination of that appeal.

[74] In these circumstances the applicant should not be forced to make the invidious choice between giving evidence in support of a ground of his appeal and risking prejudice by self-incrimination in the prosecution against him or not giving such evidence and incurring the risk of prejudice in his appeal.

[75] Grounds C(b) and C(c) are established, leave to appeal should be granted, the appeal should be allowed, and upon the exercise of the discretion afresh the applicant's appeal in the Planning and Environment Court against the decision to issue the EPO should be stayed. It is appropriate to make such a stay subject to further order made in the Planning and Environment Court, not only because such an order is interlocutory in nature and may be amended or terminated if circumstances change, but also because an issue was raised but not decided in the Planning and Environment Court about the appropriate terms and duration of any stay.

**Application for the separate determination of a new preliminary point**

[76] Paragraphs 28A and 28B of the notice of appeal in the Planning and Environment Court, as amended by the leave granted by the primary judge in June 2018, refer to ss 358, 359, and 363AD of the EPA. Paragraph 28C states that the EPO asserts that five requirements which are mandatory for an EPO are met but the EPO does not include a reference to the mandatory requirement in s 359 to consider the standard criteria. Paragraph 28D states that the EPO asserts that the respondent also considered s 363ABA(b) of the EPA, which is not a mandatory requirement. The point apparently sought to be made in these grounds of appeal is then expressed in para 28E:

> "Any failure, by the [r]espondent, to consider the standard criteria prior to issuing the EPO is an error of law, making the decision to issue the EPO unlawful."

[77] The primary judge refused the applicant's application for the separate determination of that "mandatory requirement" point. The applicant's grounds of appeal from that decision are that (ground E(a)) the primary judge erred in law by failing to take into account the prospect that the preliminary point could dispose of the entire appeal and (ground E(b)) it raised matters of substance.

[78] The primary judge accepted arguments for the respondent about the weakness of the case made in the amendments, including the "mandatory requirements point", and observed that the applicant made no attempt to explain why that point was not

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71 (2015) 255 CLR 46 at 59 [39].

raised earlier.[72] Despite those reservations the primary judge granted leave to file the amended notice of appeal. In refusing to order a separate determination of the mandatory requirements point, the primary judge took into account the applicant's delay in relying upon that point as a ground of appeal in circumstances in which it was capable of being known to the applicant with reasonable enquiry at the time the original notice of appeal was filed, that it could take months for the point to be finally determined, that the point did not strike the primary judge as being sufficiently strong to warrant yet another determination of a preliminary point, and the point could sensibly be disposed of on the merits together with the balance of the appeal in circumstances in which the whole appeal was to be prosecuted expeditiously as contemplated by r 5 of the *Uniform Civil Procedure Rules*.[73]

[79] The applicant argued that the determination of the mandatory requirements point as a preliminary point, if determined in favour of the applicant, would result in a declaration of invalidity of the EPO. That would save the time and cost of a full hearing on the merits. The applicant relied upon a judicial statement that questions which 'can be conveniently decided summarily ordinarily should be so decided.'[74] The effect of the primary judge's reasons is that it was not convenient to order the separate determination of a preliminary point in the particular circumstances of this case. The circumstance that if the point were decided one way it would determine the issue in the appeal did not oblige the primary judge to set the point down for a preliminary determination. No basis appears for thinking that the primary judge did not take into account the possibility that the determination of the preliminary point would have such an effect.

[80] The applicant also submitted that the primary judge erred by relying upon an impression that the mandatory requirements point was not particularly strong, because that was not a relevant consideration in a decision whether or not to order a preliminary hearing. For that proposition, the applicant cited *Reading Australia Pty Ltd v Australian Mutual Provident Society*.[75] In that case Branson J referred to principles governing the circumstances in which an order will be made under Order 29 Rule 2 of the Federal Court Rules for the separate determination of a question. Branson J did not indicate that the principles her Honour stated were comprehensive or that the apparent absence of strength in a party's case upon a proposed separate question might not be a relevant consideration in determining whether it was just and convenient for the order to be made. In this case the absence of strength in the mandatory requirements point is apparent upon the face of the amended notice of appeal itself. As was frankly acknowledged by senior counsel for the applicant at the hearing, the material available to the applicant was insufficient to justify a positive assertion that the standard criteria were not considered.

[81] The applicant has not established either of the claimed errors in the primary judge's discretionary decision to refuse to order the separate determination of the new preliminary point.

**Proposed Orders**

[82] The following orders are appropriate:

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72 June Reasons at [15], [17].
73 June Reasons at [18] – [19].
74 *Re Multiplex Constructions Pty Ltd* [1999] 1 Qd R 287 at 288.
75 (1999) 240 FCR 276 at 279 – 280.

1. Grant leave to appeal against the orders made on 15 June 2018 in so far as those orders dismissed the applicant's application for an order that his appeal in the Planning and Environment Court be stayed pending the final resolution of the criminal prosecution involving the appellant (Court Reference Numbers MAG-00208544/16(1) and MAG-00255740/16(4)).

2. Allow the appeal, set aside those orders to the extent described in paragraph 1 of these orders, and order instead that until further order made in the Planning and Environment Court the appellant's appeal in that Court be stayed pending the final resolution of that criminal prosecution.

3. The application for leave to appeal is otherwise dismissed.

4. The parties have leave to make submissions on costs within 14 days of the date on which these reasons for judgment are published and otherwise in accordance with paragraph 52 of Practice Direction No. 3 of 2013.

[83] **PHILIPPIDES JA:** I agree.

[84] **CROW J:** I have had the benefit of reading the reasons of Fraser JA. I agree with those reasons and the orders proposed by his Honour.