SUPREME COURT OF QUEENSLAND

CITATION:	*Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 238
PARTIES:	**OAKEY COAL ACTION ALLIANCE INC** **(appellant/cross-respondent)** **v** **NEW ACLAND COAL PTY LTD** **ACN 081 022 380** (first respondent/cross-appellant) **CHIEF EXECUTIVE DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION** (second respondent) **PAUL ANTHONY SMITH, MEMBER OF THE LAND COURT OF QUEENSLAND** (third respondent)
FILE NO/S:	Appeal No 5751 of 2018 SC No 6002 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 88; [2018] QSC 119 (Bowskill J)
DELIVERED ON:	Date of Reasons: 10 September 2019 Date of Orders: 1 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Sofronoff P and Philippides JA and Burns J
ORDERS:	**1. The appeal is dismissed.** **2. The cross-appeal is allowed.** **3. Declare that in making the recommendations in *New Acland Coal Pty Ltd v Ashman & Ors and the Chief Executive, Department of Environment and Heritage Protection (No. 4)*, the third respondent failed to observe the requirements of procedural fairness.** **4. The appellant shall pay the first respondent's costs of:** **(a) the appeal and the cross-appeal;** **(b) the proceedings before Bowskill J.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – where the Land Court recommended

the refusal of applications for mining leases and an amendment to an environmental authority to expand a mine owned by Acland – where Acland applied for judicial review of the Land Court's recommendation on various grounds including apprehended bias of the Member and jurisdictional error concerning consideration of groundwater – where the learned primary judge held that the Land Court did not have jurisdiction to consider the impacts upon groundwater – where the learned primary judge concluded that there were reasonable grounds upon which to apprehend bias but Acland had waived its right to complain – where Oakey appealed, among other things, the learned primary judge's finding in respect of the Land Court's jurisdiction to consider groundwater impacts – where Acland cross-appealed the learned primary judge's finding in respect of apprehended bias – where the Court of Appeal delivered reasons for judgment on 10 September 2019 – where the Court found that the learned primary judge erred in failing to conclude that a fair minded lay observer would reasonably apprehended bias from the Member's reasons – where the Court, at the invitation of the parties, considered and upheld the learned primary's judges finding that the Land Court did not have jurisdiction to consider the impacts upon groundwater – where the Court invited the parties to make submissions as to the appropriate form of the orders – where the matter had since been remitted to and determined by the Land Court according to the orders made by the learned primary judge – where the environmental authority had been granted as a result of the Land Court's rehearing – whether the Court of Appeal should make orders setting aside all of the learned primary judge's orders, the subsequent Land Court decision and the grant of the environmental authority – whether the Court of Appeal should make a declaration that the initial Land Court decision was affected by apprehended bias – whether the Court of Appeal should interfere with subsequent decisions of the Land Court and Department in respect of the matter

COUNSEL: S Holt QC, with C McGrath, for the appellant/cross-respondent
D G Gore QC, with D Clothier QC and N Andreatidis QC, for the first respondent/cross-appellant

SOLICITORS: Environmental Defenders Office Queensland for the appellant/cross-respondent
Clayton Utz for the first respondent/cross-appellant

[1] **THE COURT:** On 10 September 2019 the court published its reasons in this appeal and proposed a form of orders for the parties to consider. The parties have now filed written submissions about the form of orders that the court should make.

[2] The first respondent, New Acland Coal Pty Ltd ("Acland"), is a mining company that applied for new mining tenements, as well as amendments to certain other statutory instruments, to augment its existing rights. The appellant was one of a number of objectors to the grant of those new tenements. The questions involved in the objections to Acland's applications came before the Land Court and, in the result, the Member hearing the dispute recommended against granting the applications. Acland sought judicial review of the Member's decision in the Supreme Court. Ultimately, that proceeding came to depend upon three issues. The first concerned the scope of the jurisdiction of the Land Court and, in particular, whether it was open for it to consider issues arising from the possible effects of mining upon groundwater in the area. That was a question of statutory construction. The second issue was whether the Member's reasons for his decisions were adequate. Inadequacy of reasons constitutes an error of law. The third issue was whether there were reasonable grounds to apprehend that the Member was biased.

[3] Success on any of these grounds would have entitled Acland to an order setting aside the Member's decisions and, ordinarily, an order for a retrial of Acland's applications. Acland succeeded on the first two of these grounds and failed on the third ground.

[4] Bowskill J set aside the Member's decisions and referred the case to the Land Court to be determined. Having regard to the dispute as it had been crystallised by then, her Honour remitted the case to the Land Court subject to certain qualifications. First, by order 5, her Honour directed that issues concerning groundwater, as well as issues about intergenerational equity affected by groundwater, were not to be the subject of the new hearing. Second, her Honour excluded issues about noise from consideration subject to a minor qualification addressed by her in order 7(b). Third, her Honour directed that other findings made by the Member would bind the parties. The effect of this was to limit the issues at the rehearing.

[5] The appellant, Oakey Coal Action Alliance Inc ("Oakey"), was dissatisfied with her Honour's interpretation of the *Mineral Resources Act* 1989 (Qld) concerning the scope of the jurisdiction of the Land Court to consider groundwater and with her Honour's conclusion that the Member's reasons were inadequate. It appealed to this court. Success on both grounds would have resulted in restoration of the Member's orders. Acland resisted the appeal but also filed a cross-appeal against Bowskill J's orders on the ground that her Honour should have found that the Member's decision had been affected by apprehended bias. Success on that ground would have entitled Acland to maintain Bowskill J's order setting aside the Member's decisions and would have entitled Acland to an order that the whole matter be heard again fully by a differently constituted Land Court. It could also have formed a basis for maintaining the existing orders; but that would have meant raising the ground by way of notice of contention rather than by way of cross-appeal.

[6] Neither party complained in this court about the form of her Honour's orders in the circumstances of the findings she had made and the conclusions to which she had come. Obviously, the orders were practical having regard to the outcome of the case. Relevantly for present purposes, Oakey did not appeal against the form of orders themselves but was concerned only with the substantive issues of law that constituted its grounds of appeal.

[7] At the hearing of the appeal Acland submitted that its cross-appeal should only be determined if Oakey succeeded in persuading the court that the Member had been right to consider groundwater as part of his inquiry.

[8] The court declined to permit this course, taking the view that Acland's cross-appeal, if sustained, affected the integrity of the Member's decision and that Acland could not appeal on a contingent basis. The nature of this controversy has been dealt with in the reasons of Sofronoff P in the appeal and need not now be discussed further.

[9] Acland acceded to its cross-appeal being determined first and, in the result, the court decided to uphold Acland's cross-appeal. However, at the invitation of the parties the court also determined the point of law raised by Oakey about the scope of the jurisdiction of the Land Court. The court has concluded that the conclusion of Bowskill J had been right. It follows that Oakey's appeal should be dismissed and Acland's cross-appeal should be allowed. There is no dispute about this. The parties disagree about the fate of Bowskill J's other orders.

[10] In accordance with those orders the case came back before the Land Court for reconsideration. That court was obliged by the terms of those orders, and because its jurisdiction had been validly invoked, to proceed to determine the dispute. Oakey applied for the hearing to be adjourned to await the determination of the appeal. Acland opposed that application. The adjournment was refused by President Kingham. Oakey did not apply to this court for a stay of the proceedings in the Land Court pending appeal. In due course, the Land Court heard and determined the remitted matter and, on 7 November 2018, the President of the Land Court made final orders in favour of Acland. Since those orders were made, and as a consequence of them, a delegate of the Chief Executive of the Department of Environment and Science made a grant of an Environmental Authority.

[11] The appeal in this court was heard over three days in February and March 2019 and the court's reasons were published on 10 September 2019. As the reasons for judgment show, Acland established that the Member's decisions were affected by a reasonable apprehension of bias and Acland also sustained the view of the legislation accepted by Bowskill J.

[12] Oakey submits that the appropriate orders now are orders that would have the effect of setting aside all of the orders that Bowskill J made on 28 May 2018. It also submits that this court should also set aside the orders made by the President of the Land Court on the remitted hearing. It further submits that the subsequent grant of an Environmental Authority should be set aside.

[13] Acland submits that, apart from allowing the cross-appeal and dismissing the appeal, the court should simply declare that the Member's decisions had been affected by apprehended bias and should make costs order in Acland's favour.

[14] Acland's submissions should be accepted.

[15] Had Oakey prevailed in its argument about the construction of the *Mineral Resources Act* and had it succeeded in resisting Acland's cross-appeal, the consequence would have been that Bowskill J's orders setting aside the Member's decisions and remitting the matter for rehearing could not stand. However, Oakey's appeal has failed and the cross-appeal has succeeded. The effect of allowing the cross-appeal and dismissing the appeal is to confirm the correctness of Bowskill J's

order to set aside the Member's orders. That would have left for consideration the fate of orders for a rehearing.

[16] As has been said, although Oakey applied in the Land Court for the rehearing to be adjourned, that application was refused. Oakey did not apply to the Court of Appeal for a stay of the orders made by Bowskill J. As a result, orders 4, 5, 6, 7 and 8 have been performed.

[17] Those orders having been spent, there would be no utility in setting them aside. Nor is it open for this court in this appeal to interfere with the orders made by President Kingham in determining the dispute between the parties. Those are valid orders of the Land Court and, subject to being set aside on appeal, they bind the parties. There has been no such appeal.

[18] In summary, setting aside the orders for rehearing would accomplish nothing and it is not open in this proceeding to interfere with the final orders made by President Kingham or with the decision of the delegate.

[19] As a result, the orders should be those proposed by Acland, namely:

1. The appeal is dismissed.

2. The cross-appeal is allowed.

3. Declare that in making the recommendations in *New Acland Coal Pty Ltd v Ashman & Ors and the Chief Executive, Department of Environment and Heritage Protection (No. 4*), the third respondent failed to observe the requirements of procedural fairness.

4. The appellant shall pay the first respondent's costs of:

   (a) the appeal and the cross-appeal;

   (b) the proceedings before Bowskill J.