SUPREME COURT OF QUEENSLAND

CITATION:	*New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc* [2020] QSC 212
PARTIES:	**NEW ACLAND COAL PTY LTD** **(ACN 081 022 380)** (applicant) **v** **OAKEY COAL ACTION ALLIANCE INC** **(IA 39819)** (respondent)
FILE NO:	BS No 5646 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	22 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2020 and 26 May 2020 Written submissions filed on 3, 9, and 10 June 2020 Application determined without further oral hearing
JUDGE:	Davis J
ORDERS:	**1. The application to wind up the respondent is adjourned to a date to be fixed after determination by the High Court of Australia of the appeal against the orders of the Court of Appeal made in *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 238.** **2. Each party shall have liberty to apply.** **3. Costs reserved.**
CATCHWORDS:	ASSOCIATIONS AND CLUBS – INCORPORATED ASSOCIATIONS – OTHER MATTERS – where the respondent is an incorporated association – where the applicant applies to wind up the respondent on the basis that it is insolvent – whether the respondent should be wound up CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – where the applicant applies to wind up the respondent, which is an incorporated association, on the basis that it is insolvent – where the debt which gives standing to the applicant to make the application is a costs order made in

litigation between the parties – where the respondent has appealed the judgment in that litigation to the High Court and special leave to appeal was given on 5 June 2020 – where the respondent submits that the application should be stayed or adjourned until after the hearing of the appeal to the High Court – where there is no dispute that the applicant is a creditor of the respondent for a substantial amount – where there is no real dispute that the respondent is insolvent – whether the refusal of a stay of the application would be likely to result in a substantial injustice to the respondent

Associations Incorporation Act 1981, s 90
Environmental Protection Act 1994
High Court Rules 2004 (Cth), r 59.01, r 59.03, r 59.04
Mineral Resources Act 1989
State Development and Public Works Organisation Act 1971
Uniform Civil Procedure Rules 1999
Water Act 2000

Brinds Ltd & Ors v Offshore Oil NL & Ors (No 2) (1986) VR 635, followed
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337, cited
Emanuele v Australian Securities Commission (1997) 188 CLR 114, cited
IOC Australia Pty Ltd v Mobile Oil Australia Ltd (1975) 49 ALJR 176, considered
New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No 4) [2017] QLC 24, cited
New Acland Coal Pty Ltd v Ashman & Ors (No 7) [2018] QLC 41, cited
New Acland Coal Pty Ltd v Smith & Ors [2018] QSC 88, cited
New Acland Coal Pty Ltd v Smith & Ors (No 2) [2018] QSC 119, cited
Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors [2019] QCA 184, cited
Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors [2019] QCA 238, cited
Tait v The Queen (1962) 108 CLR 620, considered

COUNSEL: D Clothier QC and CA Wilkins for the applicant
D Topp and C McGrath for the respondent

SOLICITORS: Clayton Utz for the applicant
Environmental Defenders Office Ltd for the respondent

[1] The applicant applies to wind up the respondent,[1] which is an incorporated association,[2] on the basis that it is insolvent. The debt which gives standing to the applicant to make the application is a costs order made in litigation between the parties. The respondent has appealed the judgment in that litigation[3] to the High Court of Australia and special leave to appeal was given on 5 June 2020.

[2] The respondent submits that the winding up application ought to be stayed or adjourned until after the hearing of the appeal to the High Court.

History

[3] The applicant is a company whose business is mining for coal. It operates an open cut mine in the eastern Darling Downs near Oakey. It plans to expand the mine. That raises various considerations under Queensland legislation.[4] In particular, in order to conduct its expanded operation, the applicant requires two mining leases pursuant to the *Mineral Resources Act* 1989 and an amendment of an existing environmental authority to cover the expanded activities.[5]

[4] On 9 March 2012, the respondent was incorporated as an association pursuant to the provisions of the *Associations Incorporation Act* 1981 (AIA). The respondent was incorporated for the purposes of opposing the applicant's development of the mine on environmental grounds. The principal activity of the respondent is expressed to be:

> "Ensure protection of good agricultural land."[6]

[5] The respondent objected to the applicant's applications for mining leases and amendment to the existing environmental authority. The objections came before the Land Court which, on 31 May 2017, recommended that the applications be refused.[7]

[6] Judicial review of the decision of the Land Court was sought by the applicant. Bowskill J heard the application in March 2018. It is unnecessary to conduct a detailed analysis of the issues before her Honour or to analyse her Honour's reasons for judgment. For present purposes, there were two relevant issues. The first was whether there was a perception of bias against the applicant of the member of the Land Court who heard the case.[8] The second was whether the impact of the mining operations on groundwater supplies was a matter within the jurisdiction of the Land Court to consider.

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1 Throughout these reasons I refer to Oakey Coal Action Alliance Inc as "the respondent" and New Acland Coal Pty Ltd as "the applicant" regardless of their party status in the various proceedings.

2 Pursuant to the *Associations Incorporation Act* 1981.

3 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184 and *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 238.

4 Including the *Mineral Resources Act* 1989, the *Environmental Protection Act* 1994, the *Water Act* 2000, and the *State Development and Public Works Organisation Act* 1971.

5 *Environmental Protection Act* 1994.

6 Exhibit BSC-1 to the Affidavit of Brett Stuart Cook, CFI 2 in 2930/20, p 2.

7 *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No 4)* [2017] QLC 24.

8 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, considered in the judgment in *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 at [103] and following.

[7] On 2 May 2018, her Honour set aside various decisions of the Land Court and then called for further submissions as to what final orders ought to be made.[9] Importantly, her Honour found that:

1. the groundwater issue was not one for consideration by the Land Court; and
2. apprehended bias was established but the applicant had waived its right to complain.[10]

[8] After receiving further submissions, her Honour remitted the matter back to the Land Court to determine the case consistently with her judgment but with two important directions:

1. the further hearing of the application be conducted before a different member; and
2. the findings and conclusions reached at the first hearing would bind the court on the second hearing except in relation to the matters of "groundwater, intergenerational equity (as it relates to groundwater) and noise".[11]

[9] The respondent appealed to the Court of Appeal on the groundwater issue. The applicant filed a cross-appeal on the ground that her Honour should have found that the Land Court's decision was affected by apprehended bias.

[10] On 10 September 2019, the Court of Appeal delivered reasons and proposed orders:

1. setting aside the orders of Bowskill J directing that the Land Court be bound by the factual conclusions made at the first hearing on matters other than groundwater and noise;[12]
2. ordering the present respondent to pay the applicant's costs of the appeal; and
3. referring the matter back to the Land Court for a complete rehearing.[13]

[11] It is unnecessary to descend into a detailed analysis of the Court of Appeal's reasons. It will suffice to say that the court upheld the decision of Bowskill J on the groundwater issue but found that once her Honour found apprehended bias it was an error to have the member conducting the second hearing in the Land Court bound by the factual findings of the member who was affected by apprehended bias.

[12] However, in October 2018, Kingham P had reheard the applications in the Land Court in accordance with the judgment of Bowskill J. The applicant was successful before Kingham P and the orders which were made led to the grant of an environmental authority.[14]

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9 *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88.

10 *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 at [182] – [188] and *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184 at [53].

11 *New Acland Coal Pty Ltd v Smith & Ors (No 2)* [2018] QSC 119, order number 5.

12 And to exclude those issues from consideration, her Honour having held them to be irrelevant, *New Acland Coal Pty Ltd v Smith & Ors (No 2)* [2018] QSC 119 at [38].

13 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184 at [117].

14 *New Acland Coal Pty Ltd v Ashman & Ors (No 7)* [2018] QLC 41.

[13] The applicant argued in the Court of Appeal that as the rehearing had now occurred and been determined in the Land Court, and the environmental authority had been issued, there was no utility in setting aside the directions given by Bowskill J as to how the second hearing should be conducted. The respondent submitted that the Court of Appeal ought to set aside both the decision of Kingham P and the environmental authority.

[14] The final orders of the Court of Appeal were to this effect:

1. The respondent's appeal was dismissed.[15]
2. The applicant's cross-appeal was allowed.[16]
3. There was a declaration "that in making the recommendations in *New Acland Coal Pty Ltd v Ashman & Ors, and Chief Executive, Department of Environment and Heritage Protection (No 4)*, the [Land Court member] failed to observe the requirements of procedural fairness".
4. It was ordered that the respondent pay the applicant's costs of the appeal, cross-appeal and the proceedings before Bowskill J.[17]

[15] The applicant then set about recovering the costs and the respondent made an application for special leave to appeal to the High Court.

[16] The applicant delivered a costs statement pursuant to the *Uniform Civil Procedure Rules* 1999 (UCPR) and the respondent lodged a notice of objection. There was an amount of $81,026.58 representing the total of the costs items to which objection was not taken. The respondent objected to the remainder of the costs statement.

[17] On 13 March 2020, the applicant filed an originating application being court file number 2930 of 2020 seeking the winding up of the respondent pursuant to s 90(1) of the AIA. That application came before me on 31 March 2020.

[18] By s 90 of the AIA, this court may wind up an incorporated association which is "unable to pay its debts".[18] The applicant accepted that it would only have standing to seek a winding up order if it was a creditor.

[19] The respondent raised two arguments in resistance to the application namely:

1. By force of the provisions of the UCPR, the respondent submitted that the applicant was not a creditor for that sum claimed by way of costs to which there was no objection. It was submitted that upon a proper construction of the relevant provisions of the UCPR, the applicant was only a creditor of the respondent once the costs assessment process was finalised.
2. The applicant had not shown the respondent to be insolvent.

[20] I heard full argument and reserved judgment.

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15 The challenge to the groundwater findings.
16 The allegation of perceived bias.
17 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 238.
18 Section 90(1)(c).

[21] While judgment was reserved, the applicant achieved a final assessment of its costs in the sum of $736,823.41.

[22] The applicant caused application 2930 of 2020 to be listed for further hearing before me on 26 May 2020.

[23] On that day, the applicant submitted that the finalisation of the costs assessment drastically improved its prospects of achieving a winding up of the respondent. Firstly, the applicant was now most definitely a creditor of the respondent. Secondly, in assessing the insolvency or otherwise of the respondent, the evidence now was that there was a debt of $736,823.41 instead of $81,026.58. The applicant submitted that it ought to file a new application for winding up and sought leave to do so in order to avoid the suggestion that the filing of the second application, while the first was still on foot, was an abuse of process. By this stage, the High Court had set the hearing date for the respondent's special leave application as 5 June 2020.

[24] During argument, I made some comments and the parties then agreed on consent orders, which I made, as follows:

> "**BY CONSENT, THE ORDER OF THE COURT IS THAT:**
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> 1. The applicant is given leave to file and serve a second originating application for the winding up of the respondent (the Second Application).
> 2. The originating application filed 13 March 2020 (the First Application) is dismissed.
> 3. The costs of the First Application are reserved for determination in the Second Application.
> 4. The material and arguments on the First Application shall be deemed to be read and made in the Second Application.
> 5. Any further material of the applicant, together with the applicant's further written submissions, be filed and served by 4:00 pm on Monday, 1 June 2020.
> 6. Any further material of the respondent, together with the respondent's further written submissions, be filed and served by 4:00 pm on Monday, 8 June 2020.
> 7. The applicant file and serve any written submissions in reply by 4:00 pm on Wednesday, 10 June 2020.
> 8. Costs of today are reserved for determination in the Second Application."

[25] A second application for winding up, being court number 5646 of 2020 was filed on 26 May 2020. That is the application presently before me.

[26] The application for special leave duly came before the High Court. The grounds of appeal for which special leave was sought were:

"**Grounds**

1. The Court of Appeal erred in concluding that, although the findings of the Third Respondent were affected by apprehended bias:

   a. there was no utility in setting aside orders 4-8[19] made by Bowskill J in the Supreme Court on 28 May 2018;

   b. it was not open to it to interfere with the orders made in the Land Court by Kingham P on 7 November 2018, which were binding upon the parties;

   c. it should not remit the matter to the Land Court for a further hearing that was unaffected by the findings of the Third Respondent."

[27] The special leave questions were:

"1. Having found that a decision of an inferior court is affected by a reasonable apprehension of bias, is it open to a court on review of that decision to refuse to set it aside and order a new trial either: at all; in the absence of exceptional circumstances; or on the basis of a lack of 'utility' in doing so?

2. Can an order of a superior court requiring an inferior court to proceed in a particular way augment the jurisdiction of the inferior court such as to make valid a decision of the inferior court that would, absent such validation, be a nullity?"

[28] Bell and Gageler JJ heard the application for special leave.[20] After hearing firstly from the applicant,[21] the court called on the respondent's counsel to address the proposed third ground which concerns costs. That exchange was as follows:

"BELL J: Mr Kirk, I think we only need to hear you on the last issue raised by Mr Clothier, which is your proposed ground 3.

MR KIRK:· Your Honours, can I just say a couple of things briefly about that. First, we conceded in our special leave application that that does not raise a special leave point itself - - -

BELL J: Yes.

MR KIRK: - - - so we have not sought to say anything of significance about it in our written submissions. But that being said, it is integrally related in the ordinary incidental way to the conduct of the litigation below. Your Honours may recall that the original order on costs made by Justice Bowskill was that there be no order as to costs, and that was then overturned by the Court of Appeal in the subsequent orders. Because we are seeking to overturn those

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19 The directions about the rehearing by the Land Court.

20 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2020] HCA Trans 73 (5 June 2020).

21 New Acland Coal Pty Ltd, the respondent to the special leave application.

orders, the effect would be to seek to restore it. I am not sure exactly what was put below - - -

GAGELER J: Mr Kirk, if you lose on grounds 1 and 2, do you seek independently to pursue ground 3, that is the question?

MR KIRK: No. Sorry, no, we do not.

GAGELER J: We do not need ground· 3 - - -

BELL J: We do not need it.

GAGELER J: I mean, costs are not normally something that are independently addressed and - - -

MR KIRK: That is probably right - sorry your Honour.

GAGELER J: The last thing we would want to do is to turn this appeal into an appeal about costs.

BELL J: I think, Mr Kirk, you accept that you do not need ground 3.

MR KIRK: I think that is right. Can I just raise one other practical point, your Honour, because there is a little bit of background here which I perhaps need to mention anyway. New Acland has applied to wind up my client based on the costs orders made below and I understand there is proceedings in the Queensland Supreme Court, I think it is, which are currently, in effect, awaiting this determination.

Now, no doubt New Acland will be sensible and not seek to pursue that application in light of the grant of special leave because that would bring to an end potentially my client's existence.[22] Consistently with *Tait's Case*, a rather more dramatic example, but that would be a very large question.

So, I do not want to make a stay application now but I did just want to clearly put or raise the issue that in relation to this costs issue it would be inappropriate, in our respectful submission, for New Acland to seek to use any orders made below to wrap up the existence of my client and thus bring this matter to an end. That being said, I do not understand what your Honours have raised with me to mean that issues of costs cannot be argued incidentally in terms of the orders - - -

BELL J: Well, issues of costs will depend upon the outcome of the appeal in the ordinary way.

MR KIRK: Yes, indeed. If it please the Court."

[29] A grant of special leave was made in these terms:

"BELL J: There will be a grant of special leave in this matter. That grant is confined to grounds 1 and 2 in the application."

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22 An erroneous assumption.

The position of the respective parties

[30] The applicant presses for a winding up order to be made. It made very detailed written submissions pursuant to my order of 26 May 2020. It submits that there are seven reasons why the winding up order should be made now:

1. There is no dispute that the applicant is a creditor of the respondent for a substantial sum.

2. There is no dispute that the respondent is insolvent.

3. The applicant is prima facie entitled to a winding up order.

4. There is no realistic prospect of the respondent disturbing the Court of Appeal's costs order in the High Court.

5. There are discretionary considerations favouring the refusal of the respondent's application for a stay or adjournment.

6. The winding up of the respondent does not affect the authority of the High Court to hear the appeal nor render the appeal nugatory.

7. To the extent that the respondent points to the existence of a right for the applicant to apply for security for costs and the fact that the applicant has foreshadowed such an application, are irrelevant considerations on the present application.

[31] The respondent submits that:

1. The application is based upon the costs order made by the Court of Appeal, consequent upon its determination of the appeal. The Court of Appeal's orders are now under appeal.[23]

2. The making of a stay or the granting of an adjournment is necessary to preserve the authority of the High Court to hear the appeal.

3. The High Court on the special leave application left open a challenge to the costs order.

4. The appropriate remedy to the applicant is to apply to the High Court for an order that security for costs be given.

[32] The respondent does not submit that the applicant has failed to prove that it is a creditor of the respondent, nor does it submit that it is solvent.

[33] It is convenient to consider the applicant's submissions.

There is no dispute that the applicant is a creditor of the respondent for a substantial amount

[34] The applicant is correct about this. The applicant is a creditor in an amount of $736,823.41 and the appeal does not operate as a stay upon recovery.

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[23] And the costs orders of the Court of Appeal may be disturbed.

There is no dispute that the respondent is insolvent

[35] On the hearing of 31 March 2020, the applicant relied on evidence that searches had failed to identify any substantial assets of the respondent. The respondent has not adduced any evidence suggesting to the contrary. There is little, if any, evidence as to what debts are owing by the respondent but I conclude that it is not currently in a position to pay the costs assessment.

The applicant is prima facie entitled to a winding up order

[36] The applicant relies upon the statement of Gibbs J (as his Honour then was) in *IOC Australia Pty Ltd v Mobile Oil Australia Ltd*[24] where his Honour said:

> "The authorities show that as a general rule a creditor who cannot obtain payment is, as between himself and the company that owes the debt, entitled to a winding-up order as a matter of right: *In re K L Tractors Ltd* [1954] VLR 505 at pp.511-512; *Re Leonard Spencer Pty Ltd* [1963] Qd R 230 at pp.232-233; *Halsbury* 4th ed, vol 7, par 1033."[25]

[37] His Honour's reference to the "general rule" recognises the existence of a discretion which is also recognised in s 90 of the AIA. There have been many cases where a stay of a winding up application has been granted.[26] I accept that as a general proposition, in the absence of good discretionary grounds to the contrary, an applicant for winding up who has proved its debt and has proved insolvency ought to achieve a winding up order. However, as observed by the New South Wales Court of Appeal, the discretion can be exercised in favour of granting a stay "where the refusal of a stay would be likely to work a substantial injustice".[27]

[38] There is no evidence that the controllers of the respondent are dissipating assets of the respondent. The evidence is that the respondent has no assets. There is no suggestion that a delay in the winding up will reduce any dividend ultimately paid to creditors.

[39] Public interest considerations that insolvent companies should not be allowed to continue to trade may arise.[28] In my view, that does not arise here. The respondent is not a trading corporation. There is no suggestion of it incurring debts. It exists for a limited purpose. In pursuing its objectives, it has caused the applicant to incur legal costs and that is a consideration, but there are no broader public interest issues favouring making a winding up order now.

There is no realistic prospect of disturbing the Court of Appeal's costs order in the High Court

[40] The applicant's submission is that it won the judicial review before Bowskill J and it won in the Court of Appeal. The present arguments are only about consequential

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24 (1975) 49 ALJR 176.
25 At 427.
26 See McPherson & Keay, *The Law of Company Liquidation*, 4th ed, Thomson Reuters 2018, 3-026 to 3-121.
27 *Brinds Ltd & Ors v Offshore Oil NL & Ors (No 2)* (1986) VR 635.
28 *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 155.

orders and the outcome of the appeal to the High Court will not result in different costs orders.

[41] The applicant got itself into a difficult position at the appeal. Before Bowskill J, the applicant had advocated that Member Smith's decision was affected by apprehended bias. However, there were findings of Member Smith that it wanted to maintain. Bowskill J's orders had expressly preserved those findings. On appeal, the applicant pressed the bias issue as an alternative to its primary position, namely that the respondent's appeal ought to be dismissed. Therefore, the applicant's position was that if the respondent was successful in its appeal, the applicant's cross-appeal relying on bias would be pressed leading to the setting aside both of the orders of Bowskill J and the orders of Member Smith.

[42] The inappropriateness of taking such a course was explained by Sofronoff P in these terms:

> "[55] Acland filed a cross-appeal and also a notice of contention. At the hearing of the appeal, Acland abandoned its notice of contention and it also abandoned all but the first two paragraphs of its grounds of cross-appeal. Those paragraphs are as follows:
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> > '2. In the event that the appellant's grounds of appeal are upheld and the first respondent's notice of contention is dismissed, the first respondent relies on the grounds set out below.
> >
> > 3. The learned primary judge erred in concluding that the decision by the third respondent was not made in circumstances where there was apprehended bias:
> >
> > (a) by concluding that, by failing to take any action immediately following the 2 February 2017 hearing, the first respondent may be taken to have waived any objection to the third respondent continuing to hear and determine the matters;
> >
> > (b) by failing to conclude that a fair minded lay observer might reasonably apprehend from the third respondent's reasons delivered on 31 May 2017 that the third respondent might then still be affected by the personal offence, feelings and views formed at the 2 February 2017 hearing; and
> >
> > (c) by failing to conclude that the third respondent's reasons delivered on 31 May 2017 indicated an effective revival on the part of the third respondent of the personal offence, feelings and views formed at the 2 February 2017 hearing.'

[56] As appears from the first of the paragraphs quoted above, Acland did not wish to raise apprehended bias as a ground of cross-appeal unless the Court proposes to allow the appellant's appeal. By adopting this course, Acland, as the respondent in this appeal, wishes to retain the benefit of the orders made by Bowskill J. If it makes out a case of apprehended bias, then it will lose that benefit. Consequently, it wishes to argue that her Honour's reasons for her orders were sound and that the appeal should be dismissed. The appellant does not challenge her Honour's conclusion about bias otherwise the orders her Honour made, which preserve some of the Member's findings while remitting the case as a whole, could not stand. It is only if it fails to uphold the orders that it wishes to change its position and argue instead that one of her Honour's reasons, to do with apprehended bias, is wrong.

[57] Allegations of bias, whether actual or ostensible, constitute a challenge to the very validity of a judicial decision. Such allegations involve an assertion that the administration of justice has failed.

[58] At least in the field of civil litigation, the primacy of private interests means that a party is usually at liberty to forego taking a point about bias at its sole discretion. However, that is not to say that a party may refrain from any election and yet retain a right to complain later. The interests of the other party and, in some cases, the interests of the due administration of justice have resulted in principles that govern how an affected party can proceed. One instance in which a party will be taken, in general, to have elected to abandon a right to claim bias is when the party takes steps that are consistent only with the continuation of the hearing or with maintaining the validity of a judgment. Such steps are inconsistent with an assertion of invalidity on the ground of bias and are, therefore, indicative of an election to abandon the right to complain.

[59] In a case like the present, the respondent's opposition to the appellant's attack upon the orders that are the subject of its appeal, and its submissions to the effect that the reasons of the trial judge that support those orders is inconsistent with a contention that the reasons are unsound in relation to bias and with seeking an order that the orders of her Honour should all be set aside. If the respondent were to seek to maintain its opposition to the appeal, it must be taken to have abandoned its right to maintain a cross-appeal on the ground that Bowskill J should have found that the Member's decisions were affected by a reasonable apprehension of bias.

[60] This conclusion can be explained simply on the basis of the principles concerning election between inconsistent rights. However, there is, in addition, a reason for this conclusion having to do with the due administration of justice.

> [61] In *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* Kirby and Crennan JJ said that claims of actual bias or apprehended bias strike at the validity and acceptability of a trial and its outcome. For that reason, when such questions are raised on appeal they should be dealt with before other substantive issues are decided. Their Honours said that a party making such an allegation should be put to an election on the basis that, if the allegation is made out, a retrial will be ordered irrespective of possible findings on other issues. The strictly legal correctness of the decision cannot justify or excuse a decision that is affected by bias.
>
> [62] If a party is not permitted to postpone until after judgment an application that a judge disqualify himself or herself, in order first to determine whether the judgment is favourable, we do not see how a party to an appeal can do so by asking an appellate court to postpone its consideration of a claim of actual or ostensible bias until it is known whether the result of the appeal on other grounds is favourable.
>
> [63] Mr Clothier QC, who appeared for Acland, submitted that if the Court were to rule that his client was not able to keep its cross-appeal in reserve in the way that it wished, Acland would then wish to amend its notice of cross-appeal by deleting paragraph 2, which rendered the cross-appeal contingent upon the appellant's appeal and would rely upon the ground of apprehended bias immediately. We do not understand that the appellant opposed that course. It follows that the Court should first consider whether Acland succeeds on its cross-appeal." (footnotes omitted)

[43] Ironically, it is the respondent, who was successful in the Land Court and who tried to hold that decision before Bowskill J, who now wishes to see the decision fall in *toto*, because, presumably, it sees that as the only way it can now mount an attack on the subsequent decision of Kingham P.

[44] If the High Court allows the respondent's appeal, then the result will be that the judgment of Member Smith falls completely, the decision of Kingham P may also fall and the respondent will be able to re-agitate its objection to the applicant's applications in the Land Court. While that result is a far cry from the position the respondent took on the judicial review, it sees that as a more favourable position than its position after the determination of the judicial review or after the appeal.

[45] Given the tortuous path of the litigation and the wide discretion in relation to costs, I am not prepared to find that there is no reasonable prospect of the High Court disturbing the costs orders.

Discretionary considerations favouring the refusal of the respondent's application for a stay or adjournment

[46] The applicant points to a number of features:

1. Despite the fact that the Court of Appeal's decision was handed down on 1 November 2019, there has been no prior application for a stay.
2. The respondent effectively shields from liability its members that have a common interest in opposing the expansion of the applicant's coal mine.
3. No evidence was led as to the financial capability of the members to pay the costs order.
4. The respondent has not consented to the release of security in the sum of $40,000 held by the Court of Appeal.
5. The debt under the costs order is substantial.
6. There are further costs which have not yet been assessed.

[47] These are valid discretionary considerations in favour of making the winding up order.

An order for the winding up of the respondent does not affect the authority of the High Court nor will it render the appeal nugatory

[48] The respondent relies upon the decision of the High Court in *Tait v R*[29] where the court granted a stay of execution of the order appealed. That case involved an order staying the execution of an appellant who had been sentenced to death for murder. The death of the litigant would bring the proceedings to a halt. *Tait* is far removed from the present circumstances.

[49] There are two aspects to the consideration of the impact of a winding up order upon the appeal.

[50] The first is the legal impact. I accept the applicant's submissions that the legal personality of the corporation subsists until the winding up is completed and the court orders its deregistration. The authority of the High Court to hear the appeal will not be affected by the making of the winding up order. The liquidator may prosecute the appeal.

[51] The second consideration is as to the practical impact of the winding up upon the appeal. The respondent's financial benefit from the success of the appeal will be limited. The most that can be achieved commercially by a liquidator considering prosecuting the appeal is the remittal of the application back to the Land Court to be heard *de novo* and the release of the respondent from the costs orders. Yet the real interest of the respondent's members is to vindicate the case against allowing the grant of the mining tenements.

[52] I draw the inference that it is unlikely in those circumstances that the liquidator would prosecute the appeal at least without indemnity for his legal costs and perhaps upon other conditions.

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29 (1962) 108 CLR 620 at 624.

[53] I draw the inference that the winding up of the respondent will impact adversely upon the prospects of the appeal being prosecuted and determined with the result that, in practical terms, the respondent will lose the chance it now has to prevent the grant of the mining tenements.

The applicant's foreshadowed application for security for costs of the appeal in the High Court is irrelevant to whether the winding up application should be stayed or adjourned

[54] I reject this submission and deal with it more fully below.

Consideration and disposal

[55] The respondent owes a substantial debt to the applicant and appears to be insolvent. There are undoubtedly discretionary considerations which favour the making of a winding up order now.[30]

[56] However, for the reasons I have already explained,[31] the only relevant interests are those of the applicant and respondent. There are no public interest considerations such as arise where an insolvent trading company continues to conduct business.

[57] The respondent's interest is in prosecuting its appeal. For the reasons already explained, the making of a winding up order will practically frustrate the appeal.

[58] As already observed,[32] there is no evidence that a delay in making a winding up order will reduce any dividend from the winding up. The real interest of the applicant is to avoid incurring ongoing costs defending an appeal against the respondent who is likely to be unable to meet a costs order in the event that the appeal is dismissed.

[59] The High Court may order security for costs to be provided.[33]

[60] Whether security for costs ought to be ordered is a matter concerning the management of the appeal, a proceeding presently before the High Court. It is therefore a matter for consideration by that court should the applicant choose to make an application.

[61] Notwithstanding the discretionary factors which might favour the making of a winding up order now, I can see that the respondent's interests may be prejudiced irreparably if there is no adjournment. On the other hand, the applicant will suffer little in the way of prejudice. It has an available remedy to address the prejudice, namely by making an application for security for costs of the appeal. I consider it appropriate to adjourn the application to a date to be fixed after determination of the appeal to the High Court.

[62] Circumstances may change, making it appropriate to proceed with the application notwithstanding that the appeal has not been determined. A failure by the respondent to provide any security ordered may be such a circumstance, although

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30 See paragraphs [46] and [47] of these reasons.
31 See paragraph [39] of these reasons.
32 See paragraph [38] of these reasons.
33 *High Court Rules* 2004 (Cth), r 59.01.

the consequences for the High Court appeal of a failure to provide security is also a matter for the High Court.[34] It is appropriate to order that the parties have liberty to apply.

[63] It is appropriate that the costs of the application be reserved.

Orders

[64] I make the following orders:

1. The application to wind up the respondent is adjourned to a date to be fixed after determination by the High Court of Australia of the appeal against the orders of the Court of Appeal made in *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 238.

2. Each party shall have liberty to apply.

3. Costs reserved.

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34 *High Court Rules* 2004 (Cth), rr 59.03 and 59.04.