PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Brisbane City Council v Bowman & Ors and Bowman & Ors v Brisbane City Council* [2015] QPEC 14
PARTIES:	**BRISBANE CITY COUNCIL** **(Applicant)** **v** **JOHN ALEXANDER BOWMAN** **(First Respondent)** **and** **JAB GRAVEL & EARTHWORKS PTY LTD ACN 115 655 840** **(Second Respondent)** **and** **BOWIE'S INDUSTRIES PTY LTD ACN 115 554 240** **(Third Respondent)** **JOHN ALEXANDER BOWMAN** **(First Applicant)** **and** **JAB GRAVEL & EARTHWORKS PTY LTD ACN 115 655 840** **(Second Applicant)** **and** **BOWIE'S INDUSTRIES PTY LTD ACN 115 554 240** **(Third Applicant)** **v** **BRISBANE CITY COUNCIL** **(Respondent)**

FILE NO.S:	1703/13 and 4298/14
DIVISION:	Planning and Environment
PROCEEDING:	Application
ORIGINATING COURT:	Queensland Planning and Environment Court
DELIVERED ON:	16 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	25-26 February 2015
JUDGE:	Searles DCJ
ORDER:	**Both applications are dismissed.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – PROCEDURE – ORDERS – VARYING AND STAYING - EXTENSION OF TIME TO COMPLY – Application to vary orders requiring removal of fill material from land within a certain period – Where period has elapsed – Extension of time for compliance sought – Where history of non-compliance with court orders - Exercise of discretion – Whether new facts arising or discovered after making of orders warrant the court exercising its discretion. PROCEDURE – CONSENT ORDERS – CONTRACTUAL NATURE – Whether consent orders were underpinned by a contract – Principles governing the variation or setting aside of such consent orders – Whether "good reason" has been shown to justify interfering with the parties' contractual rights. *Planning and Environment Court Rules* 2010 (Qld) r 23 *Sustainable Planning Act* 2009 (Qld) ss 601(1)(c), 606(3) *Uniform Civil Procedure Rules* 1999 (Qld) r 895 *Bank of New South Wales v Withers* (1981) 35 ALR 21 *Blundstone v Johnson* [2010] QCA 148 *Bowman v Brown* [2004] QDC 6 *Chavez v Morton Bay Regional Council* [2010] 2 Qd R 299; [2009] QCA 348 *Chavez v Morton Bay Regional Council* [2009] QSC 179 *Collins v Godefrey* (1831) 1 B & Ad 950; 109 ER 1040 *Crymble & Handel v Health Insurance Commission* (Unreported, Supreme Court of New South Wales, Greenwood M, 20 October 1995) *Ernst & Young (a firm) v Butte Mining plc* [1996] 2 All ER

62

Jones v Dunkel (1959) 101 CLR 298

Mentech Resources Pty Ltd v MCG Resources Pty Ltd [2012] QCA 197

Miles v New Zealand Alford Estate Co (1886) 32 Ch D 266

Moga v Australian Associated Motor Insurers Ltd [2008] QCA 79

PQ v Australian Red Cross Society & Ors [1992] 1 VR 19

Paino v Hofbauer (1988) 13 NSWLR 193

Pallante v Stadiums Pty Ltd (No 2) [1976] VR 363

Pownall v Conlan Management Pty Ltd (1995) 12 WAR 370; (1995) 16 ACSR 227

R v Noll [1999] 3 VR 704; VSCA 164

Siebe Gorman Co Ltd v Pneupac Ltd [1982] 1 WLR 185

Singh v Secretary, Department of Family & Community Services [2001] FCA 1281

Venz v Moreton Bay Regional Council [2009] QCA 224

Wentworth v Bullen (1829) 9 B & C 841; 109 ER 313

Wigan v Edwards (1973) 1 ALR 497; (1973) 47 ALJR 586

COUNSEL:

Proceeding 1703/13:
Mr L Godfrey (Solicitor) for the Applicant
Mr C Hughes QC and Ms N Kefford of Counsel for the First, Second and Third Respondents

Proceeding 4298/14:
Mr C Hughes QC and Ms N Kefford of Counsel for the First, Second and Third Respondents
Mr L Godfrey (Solicitor) for the Respondent

SOLICITORS:

Proceeding 1703/13:
Brisbane City Legal Practice for the Applicant
SS Lawyers for the First, Second and Third Respondents

Proceeding 4298/14:
SS Lawyers for the First, Second and Third Applicants
Brisbane City Legal Practice for the Respondent

Contents

Applications

[1] There are two applications before the court. The first was filed on 29 October 2014 in proceeding No. 1703/13, and the second 31 October 2014 in proceeding No. 4298/14. I shall refer to the respondent Bowman interests as Bowman or Mr Bowman, which should be read to include all respondents in appropriate context. In 1703/13, Bowman, relevantly, seeks the following orders:

(a) orders varying the Enforcement Order made by His Honour Judge Robin QC on 16 September 2013 (Enforcement Order) to allow, inter alia, for extension of the period for the removal of fill material from lot 117 on SL9609, lot 33 on SP109619 and lot 35 on SP124014 stipulated in paragraph 17 of the Enforcement Order; or alternatively

(b) an order, pursuant to r 895 of *Uniform Civil Procedure Rules* 1999, that paragraph 17 of the Enforcement Order be stayed and further orders made with respect to completion of the removal of fill material from the premises.

[2] In 4298/14, Bowman seeks the following relevant orders:

(a) orders pursuant to s 601(1)(c) of the *Sustainable Planning Act* 2009 to change an Enforcement Order made by the Planning and Environment Court on 16 September 2013 in proceedings 1703/13 to, inter alia, extend the period for the removal of the fill material from lot 117 on SL9609, lot 33 on SP109619 and lot 35 on SP124014 stipulated in paragraph 17 of the Enforcement Order; and

(b) such other orders as the court deems appropriate.

On the first day of the hearing I ordered that paragraph 17 of the above mentioned 2013 order be stayed pending the determination of these applications.

UCPR r 895

[3] Rule 895 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**) relevantly provides:

> "**Stay of enforcements**
> (1) A court may, on application by a person liable to comply with a non- money order –
> (a) Stay the enforcement of all or part of the order, including because of facts that arise or are discovered after the order was made; and
> (b) Make the orders it considers appropriate.
> (2) …
> (3) …"

SPA s 601(1)(c)

[4] Section 601(1)(c) of the *Sustainable Planning Act* 2009 (Qld) (**SPA**) provides:

> "**Enforcement orders of court**
> **604 – Proceeding for orders**
> (1) A person may bring a proceeding in the court:
> (a) …; or
> (b) …; or
> (c) To cancel or change an enforcement order or enter an enforcement order."

16 September 2013 Contempt and Enforcement Orders

[5] On 16 September 2013, His Honour Judge Robin QC made two orders:

(a) an order finding Bowman guilty of contempt for failure to comply with an earlier order of this court of 10 December 2012 in proceedings 1061/12, recording a conviction against all Bowman respondents and sentencing John Alexander Bowman to imprisonment for four months to be wholly suspended with an operation period of two years;

(b) the Enforcement Order the subject of these applications. Copies of the 2012 and 2013 Enforcement Orders are **Annexures A** and **B** hereto.

[6] Both the 2012 and 2013 Orders were consent orders and Bowman was legally represented on both. They relate to land situated at 79 and 105 Millar Road (also known as Linkfield Road) and 136 Buckle Road, Bald Hills, Brisbane.

Clauses 14 & 17 of 2013 Enforcement Order

[7] Clauses 14 and 17 of the 2013 order provide:

> "14. By October 2013, (Bowman) their heirs and successors in title, their tenants, their servants and agents submit a Rehabilitation Plan ("the Rehabilitation Plan") prepared by a duly qualified expert to Council for assessment and approval by Council for:
>
> A. the removal of introduced fill back to natural ground level or other satisfactory level based on reports by qualified and relevant experts;
>
> B. the removal of introduced fill to the extent that a power screener and concrete crusher is required, provide specific and comprehensive details regarding the method of removal, timing of removal, operation of equipment and other details regarding the screening and/or crushing of material; and
>
> C. rehabilitation of the premises following removal of the fill material.
>
> 17. (Bowman), their heirs and successors in title, their tenants, their servants and agents complete removal of the fill material from the premises in accordance with the Rehabilitation Plan, within twelve (12) months of approval by Council of the Rehabilitation Plan, or such further time as agreed in writing as between the parties with reference to their relevant experts."

Approval of Rehabilitation Plan 23 October 2013

[8] Bowman's Rehabilitation Plan dated 23 October 2013 was prepared by Mr Wayne Moffitt, environmental planner/ecologist, and principal of 28 South Environmental. It was submitted to Council on 4 October 2013 by Bowman's town planner, Mr Craven of Craven Ovenden Town Planning, under cover of a letter of that date. Council's approval was given via letter dated 5 November 2013.[1] The effect of clause 17 of the 2013 Order was that Bowman was to remove all introduced fill material from the subject land on or before 4 November 2014.

Bowman's failure to remove fill by 4 November 2014

[9] Bowman failed to comply with clause 17 of the 2013 Order by clearing the fill by 4 November 2014. Seven days before that deadline expired, Bowman's solicitor

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1 Affidavit of W J Moffitt sworn 29 October 2014, para 3; Exhibit WJN1, p 1.

emailed the Council's solicitor seeking an extension of time of 12 months to comply. No response having been received from Council, Bowman filed the present applications.

[10] Bowman concedes[2] that the evidence supports the finding that only limited removal of fill between 5 November 2013, approval of the Rehabilitation Plan and the commencement of the present proceedings in late October 2014. Bowman did not give evidence, so the court is bereft of any explanation for the failure to comply with the 2013 Order.

History of proceedings against Bowman in relation to the use of the subject land

[11] The evidence establishes the following history of previous proceedings against Bowman in relation to the use of the subject land,[3] namely:

(a) **1988 Magistrates Court prosecution**
Conviction of Mr Bowman on 18 May 1989 following a trial for the offence of carrying out development by using the land for the purpose of filling which was not lawful under the then town plan.[4] Bowman was fined $600, ordered to pay costs of $1,000 and ordered to cease the unlawful use of using the land for the purpose of filling within four months.[5]

(b) **1994 Planning and Environment Court proceedings (22/94)**
On 14 July 1994, private citizen Applicants Hutton and Roberts applied to this court for declarations and orders in relation to Bowman's filling of the land. On 5 August 1994, Bowman, through his counsel, consented to an order that he had placed fill on the land consisting of material other than natural earth, soil and rock free of contaminants in breach of the Town Planning Consent of 18 July 1991 and had also failed to establish and/or maintain appropriate measures to control dust. Bowman was ordered to produce a report to the Court at his expense and to carry out the works recommended in that report within six months of the order.[6]

(c) **2001 Magistrates Court prosecution**
On 26 June 2001, the Council commenced Magistrates Court proceedings against Mr Bowman alleging offences against the

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2 Outline of Submissions on behalf of Bowman, para 91. See also the Affidavits of Council officers R Thorn, sworn 29 January 2015 and Robinson, sworn 17 February 2015 and nearby land owner M E Slattery, sworn 17 February 2015; all filed in action 4298/14 deposing to the lack of activity on the land.

3 Affidavit of R Thorn sworn 18 February 2015.

4 Affidavit of R Thorn sworn 18 February 2015, Exhibit RT/06 p 95.

5 Ibid p 93.

6 Ibid pp 64-68.

Integrated Planning Act 1997 (Qld) (**IPA**) for starting assessable development, being operational work for filling or excavation without a development permit, and for unlawful use of the land between 24 January 2001 and 25 May 2001.[7] Following a two day trial, in which Mr Bowman was again legally represented, he was convicted and fined $15,000 plus costs of $28,340.83.[8] On 18 April 2002, orders were made pursuant to s 4.3.20 of IPA requiring Bowman to cease and not commence Operational Work for filling or excavation and any Extractive Industry and Industry use of the land and requiring him to remove all earth moving machinery from the land within 30 days.[9]

(d) **2002 appeal to District Court**

Bowman appealed that Magistrates Court decision to the District Court. That appeal was allowed in part, with the result that a conviction for one of the charges was set aside, the fine of $15,000 reduced to $10,000, and the costs order reduced from $28,340.83 to $14,120.41. He was ordered to pay half of the respondent counsel's costs of Appeal.[10] As to the unlawful use of the land, His Honour Judge McGill said[11]:

> "An order under s 4.3.20 can be made in respect of any offence under Part 3, and so is available even if the conviction for breach of s 4.3.1 is set aside. The order is essentially directed to the rehabilitation of the land, and to preventing further unlawful use, and is, I consider justified by the circumstances and would have been made even if the Magistrate had properly dismissed the complaint in respect of count 1, and convicted only on counts 2 and 3. I will not interfere with the order which was made under s 4.3.20."

(e) **2012 Planning and Environment Court proceedings**

On 19 March 2012, Council filed an originating application (1061/12) in this court seeking declarations and enforcement orders relating to the alleged unlawful use of the land. As earlier set out, on 10 December 2012 a consent order was made requiring Bowman to cease receiving material onto the land, to cease using it for any purpose that required a development permit (other than a green waste holding station which was temporarily permitted on conditions), and to remove earth moving equipment from the premises and submit a rehabilitation plan for removal of introduced fill to natural ground level or other satisfactory level based on reports by qualified and relevant experts.

Mr Moffitt's Execution Plan 6 February 2015

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7 Ibid pp 87-88.
8 Ibid pp 81-86.
9 Ibid pp 77-80.
10 Ibid p 97. The decision handed down was *Bowman v Brown* [2004] QDC 6.
11 *Bowman v Brown* [2004] QDC 6 at [106].

[12] Before particularising the changes to the 2013 Enforcement Order sought by Bowman, I shall deal with a further plan, an Execution Plan (**EP**)[12] also prepared by Mr Moffitt on behalf of Bowman. Mr Moffitt produced this EP pursuant to another consent order, this time made by the court's ADR registrar Mr Taylor on 4 December 2014.[13] By that order, Council agreed not to oppose a further stay of the operation, at paragraph 17 of the 2013 order to 20 January 2015, on the basis that Bowman provide an Execution Plan by that date. Again, Bowman was legally represented.

[13] The EP was a result of work done on the site by Mr Moffitt and others between 4 December and 15 December 2014.[14] Mr Moffitt reported that the fill material volume was of the order of 193,443m^3, which is not disputed by Mr Gould - an engineer witness for Council. Mr Moffitt expressed the opinion that, with the exception of gross pollutants formed above the soil mostly in the higher levels, the soil was generally of good quality and that he, as an ecologist, was not concerned that the existence on the fill, subject to the removal of those gross pollutants, caused any environmental damage.[15]

[14] Mr Moffitt went on to say that removal of the fill within 12 months as ordered on 16 September 2013 was never realistic or desirable.[16] That conclusion was based on various assumptions. Firstly, that 17,352 truck movements would be involved, operating on 240 days per year, which he calculated would involve 73 truck movements in and out of the site each day - a total of 146. Next, he said that such activity would generate one inbound or outbound movement every 4.5 minutes and could only be sustained if it was a serious commercial operation. Importantly, he said that the existing screening, crushing and loading equipment on site was not capable of such output which would be well beyond Mr Bowman's current level of operation and would require a financial commitment well beyond his capacity. That latter comment as to financial capacity was based on a personal comment by Bowman's solicitor, which is hearsay upon hearsay evidence[17]. I am not prepared to accept evidence as to Bowman's financial capacity on a hearsay basis. That issue

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12 Affidavit of W J Moffitt sworn 11 February 2015, Exhibit WJM3.
13 Registrar Consent Order dated 4 December 2014.
14 Ibid para 1.2.1.
15 Ibid para 1.2.4.
16 Affidavit of W J Moffitt sworn 11 February 2015, Exhibit WJM3, p 11, para 4.2.1.
17 Ibid para 4.1.2(c).

was raised squarely with Bowman's counsel on the second day of the hearing,[18] but Bowman has chosen not to put any such evidence before the court.

[15] On the assumption that the fill would be removed by utilising only Bowman's existing equipment, under then current operational arrangements, Mr Moffitt concluded it would take 36.24 years to remove the fill.[19]

Mr Moffitt's Options

[16] Given the clearly unacceptable timeframe of over 36 years, Mr Moffitt proposed four options:

> **Option A**
> Bowman to provide fill at lower than market rates to attract interest from a commercial scale haulage operator who could be economically engaged to remove relatively large amounts of fill in a relatively short timeframe. If that was achieved, the advantage would be that the fill may be able to be removed within 3 to 5 years, provided the crusher and screener equipment ran at a considerably greater capacity. A disadvantage he saw was having to rely upon others to remove the fill in that those persons couldn't be controlled.
>
> **Option B**
> This option has two alternatives, both of which involve Bowman increasing resources. Employing two additional prime movers, together with existing machinery, would see the fill removed within 12.15 years.[20] The addition of one only prime mover would see it removed in 18.19 years.[21]
>
> Mr Moffitt says the first alternative is not financially viable for Bowman but the second one may be. I repeat it is not for Mr Moffitt to give evidence of Bowman's financial capacity.
>
> **Option C**
> This option involves an initial focus on removal of fill and rehabilitation of Management Units (**MU**) 1, 2 and 3 of the 5 MU's Mr Moffitt delineated the land into. These would be subject to a specific timetable involving a stated number of years (unspecified by Mr Moffitt). As to the balance MU's (4, 5 and 6), they would be the subject of an ultimate timeframe upon further review.
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> **Option D**
> This is Mr Moffitt's preferred option. He says the existing fill does not cause unacceptable offsite impacts in terms of flooding and relies in that regard on the evidence of Bowman's engineer, Mr Giaroli.

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18 T2-2.6.
19 Affidavit of W J Moffitt sworn 11 February 2015, Exhibit WJM3 p 8, para 2.1.12.
20 Ibid p 14, para 4.2.7 – table 2.
21 Ibid p 14, para 4.2.7 - table 3.

Mr Moffitt proposes a partial rehabilitation of the fill to include the removal of the gross or bulk contaminants such as timber, plastics and the like to a level of 6.5m AHD, followed by the spreading of top soil and revegetation of the area (grass seeding) at a time when rainfall events are expected. This, he says, could result in a timely rehabilitation of the land.

As to the recommendation that not all fill would be removed, he observes that the 2012 and 2013 Enforcement Orders never necessitated removal of all introduced fill. I take that observation to refer to paragraph A of the 2012 Order and 14A of the 2013 Order, both of which refer to removal of the introduced fill back to a natural ground level or other satisfactory level or other satisfactory level based on reports by qualified and relevant experts. That observation involves a question of law, namely, the interpretation of the 2013 Order; an observation that is not the province of Mr Moffitt.

Under Option D, the amount of fill to be removed will be reduced from 143,443m^3 to 66,485m^3. It would involve one additional prime mover, as well existing equipment, and would involve the removal of that reduced fill in 6.06 years.[22]

Below is Table 4 from the Execution Plan.

Table 4

No. of Years to Remove Fill under Alternate Operational Arrangement No. 3

Management Unit	Volume of fill (m^3)	Approximate Total Truck Movements Required	Sustainable truck movements/week	Approximate No. of weeks to complete	Approximate No. of years to complete
MU2	9064	907	24	38	0.95
MU3	12793	1280	24	54	1.35
MU4	20908	2091	24	88	2.2
MU5	5390	539	24	25	0.63
MU6	8685	869	24	37	0.93

22 Ibid p 16, para 4.2.15 - table 4. NB: the figure of 66,485m^3 in 4.2.14 differs from the total volume of the fill in the second column of table 4, which is 56,840m^3 - a difference of 9,645m^3.

	Total number of truck movements	**5686**[23]		**Total number of years to complete**	**6.06**

Variation to 2013 Enforcement Order that Bowman seeks

[17] Against the background of the Execution Plan, Bowman seeks to have the 2013 Order varied, proposing four options:[24]

(a) Pursuant to section 606(3) of the Sustainable Planning Act 2009 ('*SPA*') the enforcement order made by the Planning and Environment Court on 16 September 2013 in Application No. 1703 of 2013 ('*2013 Enforcement Order*') be changed as follows:
(a) paragraph 17 thereof be deleted;
(b) in lieu thereof the following paragraph 17 be inserted:

> *"(a) The Respondents, their heirs and successors in title, their tenants, their servants and agents (hereinafter collectively called 'the Respondents') are to remove fill material from the premises generally in accordance with Option D of the Execution Plan prepared by 28 South and dated 6 February 2015 which is exhibited to the Affidavit of Wayne Moffitt filed on 11 February 2015 in Application No. 1703 of 2013 ('Execution Plan').*
> *(b) This order is subject to amendment by the written agreement of the Council or further order of this Court;*
> *(c) This provision does not preclude the Respondents from removing fill from the premises in accordance with Option A of the Execution Plan;*
> *(d) This provision is not intended to preclude the Respondents from the opportunity to re-use the fill on the Site, rather than removing it from the Site, subject to receiving all necessary approvals including:*
>
> > *(i) an approval for extractive industry permitting the opportunity for its re-use as part of rehabilitation of the site, or parts of the site following extraction of resources;*
> > *(ii) any further necessary change to this Enforcement Order to permit use of the fill for rehabilitation of the subject land, after further extractive industry use, rather than removal from the site.*

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23 NB: this figure was erroneously calculated as being 6650: see Affidavit of M Moffitt sworn 11 February 2015, Exhibit WJM3, p 16.

24 Outline of Submissions on Behalf of Bowman, paras 103-104.

(e) This provision prevails to the extent of any inconsistency with any other provision of this Order."

(b) Pursuant to section 606(3) of the Sustainable Planning Act 2009 ('SPA') the enforcement order made by the Planning and Environment Court on 16 September 2013 in Application No. 1703 of 2013 ('2013 Enforcement Order') be changed as follows:
(a) paragraph 17 thereof be deleted;
(b) in lieu thereof the following paragraph 17 be inserted:

"(a) The Respondents, their heirs and successors in title, their tenants, their servants and agents (hereinafter collectively called 'the Respondents') are to remove fill material from those parts of the premises identified as Management Units MU2 and MU3 generally in accordance with Option D of the Execution Plan prepared by 28 South and dated 6 February 2015 which is exhibited to the Affidavit of Wayne Moffitt filed in Application No. 1703 of 2013 on 11 February 2015 ('Execution Plan') and in the timeframes provided for with respect to each of those Management Units in the Execution Plan modified as follows, namely:

(i) with respect to MU2, remove approximately 9,064 cubic metres to reduce the ground level to approximately 6.5m AHD within one year of the date of this Order; and

(ii) with respect to MU3, remove approximately 12,793 cubic metres to reduce the ground level to approximately 6.5m AHD within two years and six months of the date of this Order.

(b) This order is subject to amendment by the written agreement of the Council or further order of this Court;

(c) This provision does not preclude the Respondents from removing fill from the premises in accordance with Option A of the Execution Plan;

(d) This provision is not intended to preclude the Respondents from the opportunity to re-use the fill on the Site, rather than removing it from the Site, subject to receiving all necessary approvals including:

(i) an approval for extractive industry permitting the opportunity for its re-use as part of rehabilitation of the site, or parts of the site following extraction of resources;

(ii) any further necessary change to this Enforcement Order to permit use of the fill for rehabilitation of the subject land, after further extractive industry use, rather than removal from the site;

(e) This provision prevails to the extent of any inconsistency with any other provision of this Order."

(c) Pursuant to section 606(3) of the Sustainable Planning Act 2009 ('*SPA*') the enforcement order made by the Planning and

Environment Court on 16 September 2013 in Application No. 1703 of 2013 ('*2013 Enforcement Order*') be changed as follows:
(a) The words and figures "within twelve (12) months of approval by Council of the Rehabilitation Plan" be deleted;
(b) Instead the following words be inserted "within a period of thirty-six (36) months of the date of this order"; and
(c) The following sentence be inserted:

> *"The Respondents are to provide Council with a progress report each six months with respect to removal of fill and rehabilitation (providing quantification in terms of estimated fill volume removed and estimated current ground levels in relevant parts of the site) to be prepared by Wayne Jeffrey Moffitt or some other suitably qualified independent consultant."*

2. The matter be adjourned for mention to 9.15am on the….. day of……..2015 (being a date approximately seven (7) months from the date of this order).

(d) That the parties' formulate an order based upon my findings.

[18] Focusing on the removal timeline, it can be seen that Bowman's Option A would involve the adoption of Mr Moffitt's Option D, which envisages the reduced fill area of 66,485m^3 being moved in 6.06 years.

[19] Bowman's Option B is the same as Moffitt Option D, except that the timeframe for removal of the 9,064m^3 of fill in MU2 of 38 weeks is to be extended to one year, and in relation to MU3 extended from 54 weeks to two years and six months. Bowman's Option C would involve changing the period of 12 months for the removal of all fill to 36 months, with an obligation on Bowman to provide progress reports to the Council every six months on removal of fill and rehabilitations and for the court to review the progress of the matter in seven months' time.

Evidence of Mr Giaroli

[20] Mr Giaroli, an engineer and managing director of BG Group Engineers, gave evidence for Bowman, having earlier sworn an affidavit.[25] He deposed to being engaged by the second respondent to prepare relevant civil and hydraulic reporting on the subject site since September 2011.[26] As a part of that engagement, he said he had undertaken or supervised work with respect to the land involving erosion and

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25 Affidavit of G E Giaroli sworn 11 February 2015.
26 Ibid para 3.

sentiment control planning, stormwater and management planning, a review of flooding issues and earthworks and management planning.[27]

[21] He deposed to having had numerous discussions with Mr Moffitt during the latter's preparation of his Execution Plan, and confirmed the opinions Mr Moffitt attributed to him in that document are opinions he honestly holds. By reference to his Execution Plan, Mr Moffitt relied on Mr Giaroli in relation to the following matters:

(a) **Paragraph 2.1.5**: He adopted Mr Giaroli's analysis and assumptions of the time required to completely remove all fill.

(b) **Paragraph 2.1.6(c)**: He adopted the opinion of Mr Giaroli, in preference to that of Mr Bowman, as to the weight of the processed soil and concrete rubble to be removed. Mr Bowman had expressed the opinion that the weight was one tonne/m^3 whereas Mr Garoli adopted two tonnes/m^3. From there, Mr Moffitt calculated the capacity of Bowman's Western Star Prime Mover which has a registered capacity of 21 tonnes, at 10m^3.

(c) **Paragraph 2.1.9(b)**: Mr Moffitt adopted Mr Giaroli's number of wet days typically provided for in construction contracts.

(d) **Paragraph 4.2.11**: Mr Moffitt relied on the opinion of Mr Giaroli that the land does not cause unacceptable off site impacts in terms of flooding. In that regard, his report states:[28]

> "On 5 February 2015, I liaised with Giorgio Giaroli (engineer for the Respondents) in this regard, and received the following advice by email: 'my previous reporting on the flooding indicated that there is negligible impact on the flooding of neighbouring properties due to the existence of illegal filling on John's site. Flooding impacts on neighbouring sites will be theoretically improved if soil is removed below the designated flood levels. This means that if a flood occurs at an RL of say 7 metres, then any fill that is removed below the 7 metres level will allow water into that area hence improve the flooding situation for the neighbours. I must stress though, that both my report and the Neilson's report state that the inclusion of the illegal fill on the subject site did not have any measurable impact on flooding in the area.'"

[22] As to the hydraulic consequences of the existing fill on the subject land, Mr Giaroli referred to previous reporting prepared by his office under his supervision, and to reports on neighbouring sites prepared by Neil Collins of BMT WBM, both of which, he said, he had reviewed. Whereas Mr Giaroli deposed that these reports of

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27 Ibid para 4.

28 Affidavit of M J Moffitt sworn 11 February 2015, Exhibit WJM3 p 15, para 4.2.11 (footnote 25).

Mr Collins had modelled the floodplain **with** and **without** the existing fill on the site,[29] he conceded in cross-examination that this was not the case and that, in fact, Mr Collins' reports did not model the floodplain **without** the existing fill on the site.[30] Nevertheless, Mr Giaroli attested to the existence of the present fill having a negligible effect on flooding in the area.[31] He said this on the back of the modelling carved out by, and opinions expressed by, Mr Collins. He then expressed his opinion that none of the options outlined in Mr Moffitt's Execution Plan would involve unacceptable flooding issues.[32]

[23] I have difficulty in accepting Mr Giaroli as a reliable witness for the following reasons. He seemed to find it difficult to give responsive answers to uncomplicated questions. While he eventually would do so, it was only after having been asked the same question on a number of occasions. His responses were all too often plagued with qualifications, clarifications or caveats, despite having given evidence that he had familiarised himself with the relevant reports.[33] He was consistently inconsistent in referring to the specific reports which he said he had reviewed and on which he had sworn his opinions were based.

[24] Initially, he accepted that the 'reports of Mr Collins', to which his affidavit referred, were the reports that would later be tendered as Exhibits 11 and 12.[34] When taken to those reports, he eventually conceded they did not support his affidavit evidence in that they did not model the floodplain **without** the existing fill on site. He then retreated and sought to rely on a report of his from 2011.[35] Then, when pressed on this issue again, he claimed his affidavit was actually referring to the joint experts' report of Mr Collins and a hitherto unmentioned Mr Clark, of which he was neither co-author of nor provider of any input into.[36] This report was prepared for another appeal, not this matter. Similarly, he sought to retreat behind other 'previous reports' of his, not in evidence, when later pressed on his failure to refer to the issue of conveyancing of water in his affidavit.[37]

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29 Affidavit of G E Giaroli sworn 11 February 2015, para 8.
30 T2-58.11-43.
31 Affidavit of G E Giaroli sworn 11 February 2015, paras 6-8.
32 Ibid para 2.
33 T2-73.28-29.
34 T2-48.12-44; T2-55.27-33.
35 T2-57.27-29.
36 T2-59.5-20.
37 T2-62.38-47 – T2-63.1-20.

[25] In short, Mr Giaroli impressed me as an unhelpful witness who raised more questions than he provided answers. It is difficult to afford much weight to his evidence. The risk involved in relying on Mr Giaroli's evidence, which in turn, relies so much on the work of others, is evidenced in the following exchange towards the end of his re-examination by Mr Hughes QC:[38]

> "MR HUGHES: Now, Mr Giaroli, did you independently interrogate that work or that modelling that supported that work to reach your own conclusions? … I reviewed the results of those reports there. Yes.
>
> MR HUGHES: And what was the nature of your review? … They have flood (indistinct) results. They have pictorials as were in – as I – as it's shown in the previous report – the original report which shows that there are no changes to the – no significant changes to the results with and without the Bowman land filling removed.
>
> HIS HONOUR: But did you – the word Mr Hughes used was interrogate. Did you critically analyse? … No"

Objections of Council to Mr Giaroli's evidence

[26] Notwithstanding my attribution of little weight to Mr Giaroli's evidence, it is appropriate to deal with Council's objections to his evidence. I have left until now to address these objections as they will be better understood having dealt with his evidence.

[27] The objections related to Exhibits 9, 11 and 12; documents relied upon by Mr Giaroli. Exhibit 9 is an addendum report, dated 10 September 2014, to his original report of July 2012, prepared for Nielsen Quality Gravels Pty Ltd (**Nielson**), who is another client of his and the owner of adjoining land. That was prepared in relation to an Environmental Protection Order of 9 December 2011 issued by DERM to Nielsen. Council objected on the basis that it was hearsay, because the opinions he expressed in it were essentially an outright adoption of the views of Mr Neil Collins in reports prepared by the latter on behalf of Nielsen.[39]

[28] Exhibit 11 is the Statement of Evidence of Mr Collins (Report in respect of Flooding) prepared for Nielsen in relation to its appeal No. BD3764/10.[40] It concerned land adjacent to, but separate from, the subject land. Exhibit 12 was a

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38 T2.86.15-27.
39 T2-39.21-46 – T2-40.1-7.
40 Exhibit 11.

joint experts report of Mr Collins and Mr Clark in the same Nielsen appeal. I have refereed above to that joint report, into which Mr Giaroli had no input.[41]

[29] To save time at the hearing, I received Exhibits 9, 11 and 12 solely on the basis of the truth of their existence, leaving their final admissibility to this judgment after receiving written submissions from the parties. I turn now to consider those submissions.

[30] Bowman responded to the objection on three bases. The first was that the documents should be admissible on the basis of rule 23 of the *Planning and Environment Court Rules* 2010 (Qld) (**PECR**). The basis argued to support admissibility was that the flooding issue was not seriously in dispute, and to require Mr Collins to be called to attest to his reports would cause 'unnecessary expense, delay or inconvenience'. It was said the existence of Mr Collins' reports, on which Mr Giaroli relied for his own opinions, was a good example of why rule 23 exists. Admitting the reports into evidence, it was said, would prevent wastage of private and public expenditure on formally proving the extent of flooding impacts, which had already been established in other litigation (that is, the Neilsen Appeal) in which the Council was a party.

[31] As a matter of principle, Bowman argued Mr Giaroli was entitled to rely on the hearsay evidence of Mr Collins in forming his own opinions. While there is a general rule that a witness can only give evidence of facts of which s/he has personal knowledge, an exception to this is where an expert gives testimony based on information derived from textbooks or on what s/he has learned from other people.[42] It was submitted that it is usual for expert witnesses to rely on the work of other experts, including reports. Bowman relied on the decision of *R v Noll*,[43] particularly the following comments of Ormiston JA,[44] as authority for the proposition that such evidence is admissible:

> "I have had the benefit of reading the judgment of Callaway J.A. in draft form and agree with him that the application should be dismissed for the reasons he has advanced. The court had the assistance of a very detailed and careful argument from Mr. Gurvich, but the case as conducted at trial raised substantially different issues, as Callaway J.A. has demonstrated. In particular I agree with what is said in his judgment as to the relevance of

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41 Exhibit 12.
42 Citing D M Byrne and J D Heydon, *Cross on Evidence* (Butterworths, 1991) 46 [1255].
43 [1999] 3 VR 704; VSCA 164.
44 Ibid [3].

> confidence limits, an expression succinctly described in *R. v Milat* (1996) 87 A. Crim. R. 446 at 451-2. **As a matter of principle, as exemplified by the authorities, experts can speak of many matters with authority if their training and experience entitle them to do so, notwithstanding that they cannot describe in detail the basis of knowledge in related areas**. Professional people in the guise of experts can no longer be polymaths; they must, in this modern era, rely on others to provide much of their acquired expertise. Their particular talent is that they know where to go to acquire that knowledge in a reliable form." (**Emphasis added**)

Added to this dictum, in support, was commentary to similar effect.[45]

[32] In summary, Bowman argued that Mr Giaroli took into account the work of Mr Collins, who was also a hydraulic expert, and formed his own opinion after utilising his own specialist expertise to review that work.

[33] Finally, Bowman submitted that it was entitled to tender the reports in re-examination of Mr Giaroli on the basis that Council had cross-examined him on those reports. Council's cross-examination about the reports on which Mr Giaroli based his opinion, Bowman says, opened the door for them to be admitted as evidence of the basis of that opinion.

Consideration of objections - Admissibility

[34] I am not satisfied that any of Exhibits 9, 11 or 12 are admissible for the following reasons. However, if I be wrong, I have dealt with Mr Giaroli's evidence in any event.

[35] It is true, as Mr Hughes QC pointed out, that in this jurisdiction hearsay evidence is often allowed. So much is clear from rule 23. However, I am not satisfied that the rule is intended to operate to exempt the impugned exhibits from the operation of the rules against hearsay evidence. Firstly, Bowman's submission that the flooding issue is not seriously in dispute is incorrect. It is very much in dispute and, as I have said, underpins Mr Moffitt's Execution Plan.

[36] Nor do I accept that requiring strict proof of the level of flooding impact, caused by the landfill, would cause unnecessary or unreasonable expense, delay or inconvenience. Just because the matters expressed in the impugned reports were established in the Neilsen proceeding, concerning adjoining land, does not address

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45 Freckleton and Selby, *Expert Evidence – Law, Practice, Procedure and Advocacy* (Lawbook Co, 2009) 112.

the problem. This is not the Neilsen proceeding.[46] Bowman adduced no evidence that it would suffer hardship by having to call Mr Collins as a witness. Nor can it be said that this court may have been caused unnecessary expense, delay or inconvenience, in light of the fact that this matter was set down for three days, and was adjourned only after two.

[37] Given my finding that rule 23(1) does not apply, I turn to consider Bowman's other submissions. It is important to note that it is not disputed by Bowman that the impugned evidence is hearsay. It would be surprising if it did. Mr Giaroli's opinion was that consistent with the view of Mr Collins in the three reports comprising Exhibits 9, 11 and 12, Bowman's landfill would have a negligible impact on flooding in the area. As I have said, Mr Giaroli acknowledged he was not an author of, nor did he in any way contribute to, the two impugned reports constituting Exhibits 11 and 12.[47] In the relevant passages of Exhibit 9, he clearly referred to and relied on the opinions of Mr Collins. So too, did he concede that he merely reviewed the work of Mr Collins; he did not critically analyse it himself before arriving at his opinion.[48]

[38] Rather than disputing its hearsay status, Bowman submitted that Mr Giaroli's opinions fell within a common law exception to the rule against hearsay. Specifically, they fell within a rule concerning expert witnesses relying on the theory of others to formulate their own opinions.

[39] I do not agree this rule applies to the impugned evidence. The exception sought to be invoked applies in relation to experts who are seeking to rely on professional or scientific experience, or on a field of knowledge. It allows the expert witness to draw upon this body of knowledge, such as data or theories in authoritative journals and other publications, to make general conclusions as regards the relevant field of expertise.[49] The evidence which the expert relies upon is admissible as no more than evidence of facts of general application.[50] Thus, the rule is not one that permits the expert to give hearsay evidence on a fact in issue in the case at hand. In short, the

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46 And such evidence is, in any event, plainly inadmissible on the basis that it forms part of the evidence in a separate proceeding. The evidence does not fall within the exception to that rule outlined in *Pallante v Stadiums Pty Ltd (No 2)* [1976] VR 363.

47 T2-59.11-22.

48 T2-86.17-27.

49 See, for example, *PQ v Australian Red Cross Society & Ors* [1992] 1 VR 19 at 34-35.

50 See Ipp J's discussion of the relevant principles in *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370; (1995) 16 ACSR 227 at 231-233.

rule does not allow the personally-formed views of others to replace the expert's own in relation to the proving of facts in issue. Yet, that is exactly what Mr Giaroli sought to do – embark on a wholesale adoption of Mr Collins' reports, without independently undergoing the same processes Mr Collins underwent to produce his opinions. Those reports were not, by any stretch of the imagination, publications providing general expertise in relation to flooding, from which it could be said Mr Giaroli drew to personally conclude as to the likely flood impacts on the subject land.

[40] Despite asserting that it is 'usual … for expert witnesses to rely particularly upon the work of other experts … particularly when those reports are specific to particular issues', Bowman pointed to no authority as such. Obviously, some cases in this jurisdiction proceed on the basis of a witness replying upon the work of others but, when objection is taken to that course, the rules of evidence apply to admissibility as in any other court.

[41] The *Noll* authority relied upon does not assist Bowman. In that case, a biochemist gave DNA profiling evidence in a criminal trial, which led to an accused being convicted of false imprisonment and attempted armed robbery. The biochemist's evidence was that, based on his own testing, certain blood found on a cap matched the blood of the accused. He then went a step further and provided a likelihood of this matching being random, based on a statistical theory well accepted within his profession. Although he could not explain the basis for the theory, because he was not well acquainted with it, or an expert on it, the Victorian Court of Appeal unanimously rejected an application by the accused for leave to appeal against conviction. The application was made on the basis that the biochemist was not entitled to engage in the statistical analyses. Callaway JA (with whom Phillips CJ and Ormiston JA agreed) concluded[51]:

> **The attack on Dr. Gutowski's statistical competence** at the conclusion of the voir dire **did not focus on confidence limits but on his inability to explain the statistical theory underpinning his evidence**. He had said, as he was later to say before the jury, that confidence limits were unnecessary with a database over 200. He was cross-examined as to why, but it was not suggested that he was mistaken. No application was made to adduce further evidence on appeal and it is very unlikely that such an application would have been successful: see Ratten v R. (1974) 131 C.L.R. 510 at 516-20 and Kenny J.A.'s judgment in R. v Challoner (unreported, Court of Appeal, 28

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51 [1999] 3 VR 704 at [23].

> July 1998) and compare R. v Doheny and Adams at 371C. In those circumstances I do not think that we can say that the learned Judge erred in ruling that **Dr. Gutowski could give expert evidence of the kind he did**. (**Emphasis added**)

[42] As can be seen, this case did not concern the application of the exception to the hearsay rule just discussed. Indeed, the word 'hearsay' is not mentioned in the judgment. Rather, it concerned the question whether an expert's testimony was within his competency.

[43] Even if Mr Giaroli's testimony was within his competency, that does not make it admissible; it is still hearsay. And even if it were the case in *Noll* that the hearsay exception did apply, it is clear it would still be distinguishable from the present circumstances. The biochemist there performed the DNA profiling tests himself. He conducted his own analyses from those tests, and formed his own opinions as a result. The first sentence of the quote of Callaway JA above shows that the statistical theory, which would otherwise have been hearsay, underpinned but did not replace those opinions. Here, by contrast, Mr Giaroli sought to do the complete opposite. He relied completely on Mr Collins' modelling of the relevant area, and on Mr Collins' analyses that flowed from that modelling.

[44] I also reject Bowman's submission that the three pieces of evidence are admissible because all three were the subject of Council's cross-examination of Mr Giaroli. In support of this argument, Bowman relied on the following textbook extract[52]:

> The purpose of re-examination is to adduce evidence to explain or qualify matters that have emerged during cross-examination that may cause adverse inferences to be drawn regarding the witness's credit or the examining party's case: see generally *Kosciusko Thredbo Pty Ltd v Milson Projects Pty Ltd* (Unreported, New South Wales Supreme Court, McLelland J, 9 August 1990); *Wentworth v Rogers (No 10)* (1987) 8 NSWLR 398 at 409; *R v Clune (No 1)* [1975] VR 723 at 734. There is a related principle that when a witness has been cross-examined as to **part of a written or oral statement made by him or her**, counsel may prove in re-examination such other parts of the statement as are necessary to explain or qualify it: see Youn (1999, p 282); *Meredith v Innes* (1931) 31 SR (NSW) 103 at 112; *Wentworth v Rogers (No 10)* (1987) 8 NSWLR 398 at 409. (**Emphasis added**)

[45] As the above emphasis shows, the principle sought to be invoked applies only to statements the cross-examined witness made. I am not satisfied the principle could

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52 Freckleton and Selby, *Expert Evidence – Law, Practice, Procedure and Advocacy* (Lawbook Co, 2009) 528.

be invoked to sidestep the rule against hearsay. In relation to Exhibits 11 and 12, being Mr Collins's Statement of Evidence in the Nielsen proceeding and Messrs Collins and Clark's Joint Experts Report (respectively), Mr Giaroli was plainly not a co-author, or in any way a contributor of either of them. Bowman did not contend otherwise. It is true that Exhibit 9 is a report prepared by Mr Giaroli himself but the opinions he expressed therein are, still, plainly hearsay. The appropriate course for Bowman to have followed would have been to have Mr Giaroli carry out the relevant work to enable him to give primary admissible evidence of it.

Council's Expert Mr Gould's Evidence and Review of Moffitt Execution Plan

[46] Mr Gould is an engineer and principal of Everything Infrastructure Group. He provided a report, which provided his review of Mr Moffitt's Execution Plan and his own opinions on the subject, dated 18 February 2015.[53] He accepted Mr Moffitt's measurement of 193,443 m^3 of fill material and that the previous natural ground was at approximately RL5516. He agreed with Mr Moffitt's suggestion in his Option D that 18,050m^3 of the soil could be retained to spread as top soil, leaving approximately 173,501m^3 (193,443m^3 less 18,050m^3) fill to be removed. He further agreed that, apart from the gross pollutants identified by Mr Moffitt, the soil was generally of good quality.[54]

[47] Mr Gould expressed the view that the option of continuing removal of the fill with Bowman's existing equipment at the rate of 12 truck movements per week, or adding a further prime mover to increase to 24 loads per week, or even two additional prime movers to increase that figure to 36 movements per week, all resulted in an exceedingly slow rate of removal of the fill, resulting in unacceptable time durations of 1,446, 723 and 482 weeks respectively.

[48] Approaching the operation on the basis that a commercially-efficient earth moving contractor was engaged, Mr Gould said the removal works could be completed in 8 to 15 weeks and between 21 and 28 weeks, allowing for the time involved in

53 Affidavit of M Gould sworn 18 February 2015, Exhibit MG/02.
54 Ibid para 4.

reaching agreement on price with the contractor and the completion of the top soil and vegetating.[55] In its submissions,[56] Council refers to Mr Gould giving evidence of a maximum of 42 weeks, but no such evidence was given as Mr Gould was not called for cross-examination.

[49] Mr Gould makes the point that the processing of the soil on site would not extend time because the feeder operation, which would separate pollutants from the soil, would keep pace with the rate of loading and removal of the soil material from site. Significantly polluted soil and other pollutants would not be processed but taken to an approved landfill dump. He said the time frames in the Moffitt Execution Plan are not cost-effective for a normal earth moving contractor. Mr Gould tabulated a comparison with the operation of a commercial contractor with that of the Moffitt options A, B and C, which assume a portion of the soil would be left onsite to be used as top soil.[57]

Bowman's bases for variation of the 2013 Enforcement Order

[50] I set out now the grounds Bowman relied upon to justify the making of the variation order sought.

[A] Paragraphs 14A and 17 of the order reflect that on its face, it provided for a determination that not all imported fill was to be removed (14A) and for the timeframe for removal of the fill to be extended (17).[58]

[B] The absence of appropriate information before the court when both the 2012 and 2013 Enforcement Orders were made compared with what is now known namely[59]:

(a) The quantum of fill on the land;

(b) The time period of filling;

(c) The rate at which the fill might now reasonably be removed establishing that it was never a reasonable requirement to complete removal within 12 months.

[C] Whilst the initial application for enforcement orders of 19 March 2012 referred to the filling of the land since 1982, reference to City Plan in the originating application showed that the only alleged unlawful fill relied upon by Council was that undertaken after City Plan came into force in October 2000.[60]

[D] In relation to the 2012 Enforcement Order made by consent on 10 December 2012;

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55 Ibid para 5.
56 Brisbane City Council's Final Submissions, para 73.
57 Affidavit of M Gould sworn 18 February 2015, Exhibit MG/02, p 10, para 5.7.
58 Outline of Submissions on behalf of Bowman, para 3.
59 Ibid para 4.
60 Ibid paras 17 and 18.

(a) The evidence produced by Council and available to the court contains no details with respect to:
  (i) The volume or extent of the alleged unlawful fill;
  (ii) Details with respect to the natural ground level; or
  (iii) The existing ground level;
  (iv) The existing ground levels;
  (v) The relationship between the alleged unlawful fill and the ground level that's natural or existing; and

(b) The court was not informed that the Council had been placing fill on the land between 2006 and 2012.[61]

[E] The 2012 Enforcement Order did not identify the location of the fill to be removed or specify the quantity of fill to be removed and the evidence for the court did allow determination of those issues.[62]

[F] That same evidence included no detail about the location, depth, volume or extent of the fill alleged to have been unlawfully introduced subsequent to the introduction of City Plan and there was no evidence to suggest how the period of nine months was struck as the appropriate timeframe for the removal of the fill.[63]

[G] Notwithstanding the evidentiary shortcomings above outlined the 2012 Enforcement Order contemplated:

(a) That the fill need not be removed back to natural ground level but alternatively to some "other satisfactory level based on reports by qualified and relevant experts";

(b) That the process of removing the fill would involve Bowman using existing machinery for crushing and screening of the fill prior to its removal; and

(c) That the period of nine months for removal of the fill may need to be extended by agreement between the parties.[64]

[H] In relation to application 1703/13 the affidavit material before the court did not contain any details of the quantum of fill Council alleged was required to be removed and the Council did not inform the court that for at least six years from 2006 to 2012 it had placed fill on the land.[65]

[I] The Council's affidavit material was not personally serviced upon Mr Bowman and that which was served on him was not served until one clear day before the contempt hearing on 16 September 2013 in breach of UCPR 926. That is particularly troubling, it is said, because Mr Bowman is illiterate. There is no evidence on the face of the 2013 Enforcement Order or in the reasons of His Honour Judge Robin QC that Council brought this service non-compliance to the attention of the court.[66]

[J] The 2013 Enforcement Order:

(a) Did not identify the location of fill to be removed nor specify the quality of such fill;

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61 Ibid para 21.
62 Ibid para 24.
63 Ibid para 25.
64 Ibid para 26.
65 Ibid para 33.
66 Ibid paras 36-38.

(b) Contemplated that the fill may not need to be removed back to natural ground level, rather than to some 'other satisfactory level based on reports by qualified relevant experts'.[67]

[K] The 2013 Enforcement Order contemplated that the process of removing the fill would involve Bowman using the Chieftan 1700 Power Screen, as well as, potentially, the Terex Pegson XP 4002 concrete crusher (subject to Council's approval) and required the Rehabilitation Plan to detail the intended use of 'a' power screener and concrete crusher.[68]

[L] No evidence was put before the court on 16 September 2013 to support the reason for, or the reasonableness or otherwise of, the 12 month period other than the inference, clear from the order, that the period may well require extension.[69]

[M] The following facts, ascertained after the 16 September 2013 Enforcement Order justify a change of that order:

(a) On 5 November 2013 Council approved the Rehabilitation Plan dated 23 October 2013 which, obviously, was not available at the time of the making of the order;

(b) The 12 month fill removal timeframe in paragraph 17 of the order was imposed when there was no knowledge of the requirements of the Rehabilitation Plan nor the volume of fill to be removed. The latter was still not known as at 5 November 2013;

(c) Mr Moffitt, the author of the Rehabilitation Plan was not asked (necessarily by Bowman) to advise and did not advise on how long it would take to remove all or any of the fill or to achieve rehabilitation of the land in accordance with his Rehabilitation Plan;

(d) The Rehabilitation Plan approved by Council:

(i) Has no quantification of the volume of fill on site above natural ground level;

(ii) No quantification of the volume of fill to be removed;

(iii) No indicative timeframe for the removal of the fill;

(iv) No guidance as to how a removal of imported fill could or should have been achieved within the 12 month period in paragraph 17 of the 2013 Order; and

(v) No suggestion that Bowman was to use machinery other than that referred to in paragraph 13 of the order namely the Chieftan 1700 Power Screen power screener and Terex Pegson XP4002 Concrete Crusher.[70]

[N] When Bowman requested Council to agree to an extension on an interim basis of the 12 month period for removal of the fill the Council did not respond thus making it necessary to seek the present variation of the 2013 Enforcement Order.[71]

[O] On 4 December 2014 Bowman consented to an order of the ADR Registrar whereby he would address the paucity of information previously provided to the court by the Council and to provide a survey plan and documentation at his expense describing:

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67 Ibid para 42.

68 Ibid para 42(c).

69 Ibid para 42.

70 Ibid para 43-48.

71 Ibid paras 49, 50.

(a) Estimated ground level across the land (generally the upper level of the alluvium across the land);
(b) The profile of the fill above that natural land; and
(c) An estimate or estimate of the volume of fill on the land.

[P] That consent did not involve any concession on his part that all fill back to the natural ground level was to be removed as opposed to some "other satisfactory level." The information provided pursuant to that order was obviously not available to the court on the making of the 2013 Enforcement Order.

[Q] The soil in the fill mound is generally of good quality subject to the removal of the gross pollutants (concrete, plastics and timber) and is not causing any environmental damage. Mr Moffitt and Mr Gould agree it is appropriate to retain 18,050m^3 to be respread as processed top soil. Apart from the gross pollutants there is no environmental imperative to remove all of the soil.[72]

[R] The court was not informed of any of the contingencies with respect to removing the fill of which evidence is now available. This includes evidence of delays caused by machinery break down, rain delay, the distance material is required to be carted to a site capable of accepting the material and the number of trucks available.[73]

[S] At the time of the order the Council placed no evidence before the court to demonstrate the retention of the fill on the site was having unacceptable ecological or hydrological effects. Mr Giaroli has deposed to his opinion that there would be no unacceptable flooding issues if the existing fill or any part of it remained on the land.[74]

[T] Evidence now available suggests that some of the filling was lawful and there is no evidence before the court that would enable it ascertain the extent of unlawful fill. This uncertainty supports the fact that Bowman has not contumeliously disregarded the law but rather that he attempted to obtain appropriate permits even if the true extent of the required permits was not appreciated, perhaps, contributed to by his illiteracy.[75]

[U] All of the land surrounding the Site is either the subject of an approval for extractive industry or the subject of an application for such use. Bowman has lodged a development application to extract sand and gravel from the site which application is currently the subject of appeal number 1446/13. Should the appeal be allowed and the application approved it will likely present an opportunity for appropriate re-use of the fill to rehabilitate extraction areas.[76]

[V] Despite the limited progress with removal of fill between the 5 November 2013 (Council approval of Rehabilitation Plan) and the commencement of these proceedings in late October 2014 Bowman has now retained new legal advisors which has resulted in a dramatic increase in his commitment to rehabilitate the site evidenced by the increased rehabilitation activity. Bowman relies on two affidavits of his solicitor, Mr Sciacca, each sworn 22 January 2015 and 11 February 2015 respectively.[77] The first affidavit he exhibits extracts from a hand written diary of Mrs Bowman recording a

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72 Ibid para 59.
73 Ibid para 61.
74 Ibid paras 63-65.
75 Ibid paras 75-77.
76 Ibid paras 86-88.
77 Court documents 30 and 34 (1703/13).

summary of amounts of fill removed from the site on a daily basis. Mr Sciacca deposes to those diaries showing that in December 2014, 1,100m^3 of fill was removed by Bowman, and 250m^3 by others; a total of 1,350m^3.[78] The second affidavit similarly exhibits diary extracts, which Mr Sciacca says show that from 21 January 2015 to 9 February 2015, the Bowman's [sic] removed 60m^3 of fill, and others removed 940m^3; a total of 1,000m^3.[79]

Given Bowman's application for extractive industry approval he now has a genuine incentive to ensure that the recent levels of fill removal activity will continue into the future.[80]

[W] The object of Enforcement Orders is to rehabilitate the land not to punish Bowman and the decision of the court exercising its unfettered discretion is to strike the balance in a way it regards as reasonable having regard to all the evidence. Particularly it would take into account:

(a) The soil is generally of good quality;

(b) It is not causing any environmental harm subject to removal of the gross pollutants;

(c) Both Mr Moffitt and Mr Gould agree 18,050m^3 should be retained to respread as processed top soil;

(d) None of Mr Moffitt's options involve unacceptable flooding issues and if all the existing fill was to remain there would be no unacceptable flooding issues as to the rate of removal appropriate operating hours are between 7.00am to 6.00pm Monday to Friday and 7.00am to 4.00pm Sunday;

(e) Removal within one year is undesirable and in the evidence of Mr Moffitt that would involve a truck entering and leaving the site every 7.5 minutes on the above hours of operation bringing traffic, road and intersection issues and noise and dust emission issues creating unacceptable amenity impacts on residents in the area;

(f) The rain delay factor would impact on the efficiency of any fill removal programs;

(g) Mr Bowman's prime mover which is the primary vehicle for removing the fill has a registered capacity of 21 tonnes. His machinery, whilst theoretically capable of higher output, are such that a long term average throughput of 150m^3 per day is realistic. Machinery breakdowns is also a factor to be considered.[81]

[X] The court would generally prefer the options presented by Mr Moffitt to those of Mr Gould given:

(a) Mr Moffitt's detailed knowledge of the land and familiarity with the quantities and qualities of the fill;

(b) Because his approach is more practical, realistic and reasonable as opposed to Mr Gould's which is purely theoretical subject to unverified assumptions such as:

(i) The practical timing involved in manoeuvring and loading trucks;

(ii) The distance of travel to locations of earth placement given that land owners in nearby properties cannot be forced to accept fill;

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78 Affidavit of S Sciacca sworn 22 January 2015, para 10.

79 Affidavit of S Sciacca sworn 11 February 2015, paras 7-11.

80 Outline of Submissions on behalf of Bowman, paras 91-92.

81 Ibid paras 96-97.

(iii) The number of trucks reasonably available to be utilised and their capacity including the capacity of the loading plants;
(iv) The availability of sites around the North Brisbane Region that would accept large quantities of fill and the ability to match the soil extracted with the receiving site requirements; and
(v) The value of the fill extracted.[82]

[Y] Mr Gould proceeds on the basis that Bowman should engage a commercial earth works contractor or equip themselves as one. The 2013 Enforcement Order always anticipated that the rehabilitation would be undertaken by the Bowmans rather than an commercial contractor and the equipment to be used to screen, crush and transport the fill with that equipment in paragraphs 13, 14B and 18 of the 2000 order (all Bowman equipment).[83]

[Z] Mr Gould provided no evidence of the cost estimate of his options. Mr Giaroli telephoned a commercial contractor who advised a charge of $10 per m^3 for the clean fill and $40 per m^3 for contaminated fill. Those rates across a volume of 193,000m^3 the commercial contractor would cost between $1.9 million and $7.6 million.[84]

[AA] There is no evidence before the court that it would be reasonable to expect Bowman to pay such costs and are disproportionate having a regard to the maximum penalty for an offence of undertaking development without a development permit under s 578 of SPA ($183,150.00). That aside it is not reasonable to make orders requiring Bowman to engage a commercial operator because:

(a) There was no such requirement in either the 2012 or 2013 Enforcement Orders;
(b) The above outlines the paucity of evidence placed before the court when both those orders were made. Had Bowman challenged those orders it now seems apparent that there would have been insufficient evidence to sustain the orders and the terms made;
(c) If Council had contemplated Bowman engaging commercial earth moving contractors it would have needed to stipulate that in clear terms in the orders.

Council's submissions

[51] Council's opening submission is that the failure of Bowman to produce any evidence of their financial position or any evidence to explain the failure to comply with the 2012 and 2013 Orders triggers the operation of the principle of *Jones v Dunkel*,[85] in which his Honour Windeyer J said:[86]

> "The failure to bring before the tribunal some circumstances, document, or witness, when either the party himself or his opponent claims that the facts were thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if

82 Ibid para 98.
83 Ibid para 98.
84 Ibid para 99.
85 (1959) 101 CLR 298.
86 Ibid 320-321.

> brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which made some other hypothesis a more natural than the party's fear of exposure. But the propriety of such an inference in general is not doubted. …
>
> As Wigmore points out (evidence 3rd ed. (1940)) vol. 2, ss 289, 290, pp 171-180) exactly the same principles apply when a party, who is capable of testifying, fails to give evidence as in a case where any other available witness is not called. Unless a party's failure to give evidence be explained, it may lead rationally to an inference that his evidence would not help his case."

[52] Consistent with that principle, Council argues, Bowman has not given evidence on those two issues for fear that had such evidence be given, it would expose facts unfavourable to Bowman, including the minimal attempts to comply with the 2012 and 2013 Orders. It follows, it is said, the court should also infer that Bowman has acted in total disregard of those orders.

[53] Council referred to the evidence of its three officers: Robinson, Thorn and Slattery as to the minimal activity of Bowman in compliance with the orders. As I have already said, there is no dispute as to the lack of work done to comply with the 2013 Order, so there is no need for me to deal further with the evidence of those witnesses. None of them were cross-examined by Bowman and, indeed, no Council witnesses were cross-examined.

[54] As to the evidence of Mr Moffitt and Mr Gould, Council submits the latter would be preferred which would see the fill removed within a maximum of 42 weeks although, as I pointed out earlier, this timeframe was not given in evidence.[87] It says there is nothing, in either the 2012 Order or the 2013 Order, supporting the proposition that the fill was to be removed by Bowman with his own equipment to the exclusion of any commercial operator. Apart from the very long timelines Mr Moffitt envisaged, using only Bowman equipment, Council points to the fact that Mr Moffitt had not made enquiries into the status of development approvals on the property said to be owned by Bowman and where the fill was to be deposited. It is to be recalled that Mr Moffitt envisaged the fill being taken to three properties said to be owned by Bowman, situated (respectively) in Regency Downs, some 92

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87 Judgment at [48].

kilometres from the subject site; Rosewood, 78 kilometres away and Rathdowney, approximately 124 kilometres away.[88]

[55] As to the evidence of Bowman's engineer, Mr Giaroli, Council submits that the court would find that he did not impress as a credible witness and that little weight should be given to his evidence.

Considerations re: exercise of discretion to grant relief sought

[56] The statutory provisions Bowman relied upon for the orders sought, namely r 895 of the UCPR and s 601(1)(c) of the SPA, which were earlier set out, vest broad powers in the court and are similar in nature to other rules and provisions considered by courts when dealing with an application to vary a consent order. For instance, in the first instance decision of *Chavez v Morton Bay Regional Council*,[89] de Jersey CJ (as His Honour then was) said the following when dealing with an application under UCPR r 7, the general provision empowering the court to extend or shorten time periods under the UCPR or a court order:

> "It was common ground that the court has a discretion to extend the relevant time limitation under r 7 or to relieve the plaintiff from the consequences from the order of 2 June under r 668. In *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283, Wilson J referred to the breadth of the discretion under provisions like r 7 as follows:
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> > 'It is a remedial provision which confers on a court a broad power to relieve against injustice. The discretion so conferred is not readily to be limited by judicial fiat. The fact that it manifestly is a power to be exercised with caution and, in the case of conditional orders, with due regard to the public policy centred in the finality of litigation does not warrant an arbitrary limitation of the power itself, not expressed in the words of the rule, so as to deny its capacity to reply to circumstances such as those which are to be found in the present case. It would be wrong to so read the rule as to deny to a court how to prevent injustice in circumstances where the party subject to a conditional order ought to be excused from non-compliance.'
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> The party's approach to the matter on the basis that an extension of time is not unavailable just because of the circumstance that the self-executing order was made by consent. See *Fairmont Suites and*

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88 Affidavit of W J Moffitt sworn 11 February 2015, Exhibit WJM3, p 5, para 2.1.6(d).

89 [2009] QSC 179. This decision was upheld by a unanimous Court of Appeal: [2010] 2 Qd R 299; [2009] QCA 348.

> *Hotels Pty Ltd v Duck Holes Creek Investments Pty Ltd* [2009] QSC 98, paras 9-11.
>
> I accept the submission made by Mr Sullivan, who appeared for the defendant, that matters relevant to the exercise of these discretions are the conduct of the defaulting party and the prosecution of the proceeding generally, the circumstances in which the self-executing order was made, any aspect of prejudice to the innocent party, and the circumstances of non-compliance.
>
> Factors bearing critically on the ultimate exercise of discretion in this situation are the substantial delay in the plaintiff's prosecution of the proceeding, the limited progress which had been made prior to the dismissal of the proceeding; namely, the prompt for the self-executing consent order, the amply warranted application for dismissal for wanted prosecution; and the prejudice which would inevitably be occasioned were the proceeding now to be revived. One should also mention the public policy principle of finality (See *Brisbane South Regional Health Authority v Taylor* at p 552). All of this is in the context of a cause of action which allegedly arose approximately years ago.

The appeal from this decision is dealt with below but, relevantly, it did not interfere with the above statements.

Nature of Consent Orders

[57] Given that all relevant orders were consent orders, it is necessary to consider the nature of such orders. It is accepted that sometimes such orders are not only orders of the court, but may, in appropriate circumstances, also be a contract between the parties to the order.[90] The existence or otherwise of a contract underlying a consent order is one, albeit important, consideration relevant to the exercise of the discretion as to whether or not the consent order should be varied.

[58] The principles relating to the setting aside of consent orders were discussed in the appeal judgment of *Chavez v Moreton Bay Regional Council*.[91] There, the Court of Appeal was asked, amongst other things, to overturn the primary Judge's discretionary refusal to vary a consent order. The appellant was a plaintiff in negligence proceedings which arose out of the respondent Council's issue of a building permit for land the plaintiff was developing. The appellant failed to adhere to one of the conditions for providing security for costs in the time set in a consent

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90 See *Wentworth v Bullen* (1829) 9 B & C 841, 850; 109 ER 313, 316 per Parke J; *Siebe Gorman Co Ltd v Pneupac Ltd* [1982] 1 WLR 185, 189 per Lord Denning MR.

91 [2010] 2 Qd R 299; [2009] QCA 348.

order, which gave the respondent the right to have the claim struck out. The respondent thus had a complete defence to the claim, which was consequently statute-barred. The appellant sought an extension of time to comply under r 7 of the UCPR.

[59] The court dismissed the appeal. Keane JA (with whom Holmes JA and McMeekin J agreed) identified the contractual nature of the consent order, and held that the appellant had failed to demonstrate any circumstances to justify depriving the respondent Council of the benefit of the agreement it and the appellant had freely and voluntarily entered into.[92] His Honour rejected the appellant's claim that he would suffer injustice, in the sense of deprivation of the opportunity to vindicate his damages claim, were the consent order not varied. His Honour identified, as a serious flaw in this argument, that the appellant's loss of opportunity was a result of his own conduct; being his non-compliance with the terms of the consent order.[93] Indeed, his Honour held, the real injustice would have been to the respondent Council, who, at the time of the making of the consent orders "*may not have been at ease with the notion that [the Appellant] was free to seek further extensions of time to progress the action after the time for compliance with the consent order had expired and the Council had become entitled to seek the dismissal of the action.*"[94]

[60] His Honour said[95]:

> "In accordance with the reasons of McHugh JA and Clarke JA in *Piano v Hofbauer* the discretion conferred by r 7 should be exercised in favour of a party in the position of Mr Chavez only in cases where there is good reason for depriving the other party of the benefit of a free and voluntary agreement."

[61] *Paino* concerned a consent order entered into to settle an action for damages for breach of contract. The terms of the order provided that judgment be entered for the plaintiff for $750,000, but its execution be stayed on the basis the defendants pay part of the judgment, namely $530,000 by instalments, in accordance with an agreed timetable. The order provided that the defendants forfeit the benefit of the stay if they failed to pay any of the instalments. They defaulted and applied, successfully at first instance, to have the consent order varied by extending the time for payments in default. On appeal, McHugh JA (with whom Samuels JA and Clarke JA agreed)

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92 Ibid [40].
93 Ibid [29]-[30].
94 Ibid [36].
95 Ibid [39].

overturned the decision extending time for payment. McHugh JA said[96] in relation to the New South Wales *Supreme Court Rules* 1970 Pt 2, r 3 under consideration:

> "…This court must exercise the discretion that conferred by pt 2, r 3.
>
> English courts have gone so far as to say that a court will only interfere with a consent order based on a contract on the grounds that it interferes with any other contract… I am not prepared to adopt the English approach to consent orders based on contracts. The discretion conferred by pt 2, r 3, is not to be equated with the extent of the Court's powers to vary or set aside contracts.
>
> Nevertheless, when a party asks that a consent order based on a contract should be set aside or varied and the underlying contract could not be set aside or varied, the case would need to be exceptional before the court would exercise its discretion in favour of an applicant. Moreover, the failure of the applicant to comply with the terms of the consent order based on a contract could rarely, if ever, be a sufficient ground to vary the order. This is particularly so when the parties have stipulated the time for the performance of the parties' obligations was to be of the essence of the agreement."

[62] Clarke JA said[97]:

> "In my opinion an applicant for relief from the terms of a consent order embodying a compromise agreement is bound, as a general rule, to make out a case for the setting aside of the contract or the granting of relief from the consequences of non-compliance with its terms, in his application for the variation, or setting aside, of the consent orders.
>
> I should not be taken as saying that the court has not power to make an appropriate order in the absence of proof of the circumstances which might entitle a party to relief in respect of his failure strictly to comply with the terms of the contract which was reflected in a court order. I simply suggest that it would be a rare case in which it would be a judicial exercise of the discretion to grant an indulgence the effect of which is to vary an agreement between the parties in *National Benzole CO Ltd v Gooch* (at 1494; 1101) per Diplock LJ."

[63] *Paino* was subsequently applied by the Full Federal Court in *Singh v Secretary, Department of Family & Community Services*.[98] In that case, the appellant agreed to discontinue his proceeding. Minutes of consent orders were filed in the court dismissing his appeal to the Federal Court from the Administrative Appeals tribunal. Within a day or so of the filing of the consent orders, and before their formal entry, the appellant had a change of heart. He told the Registrar he no longer

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96 (1988) 13 NSWLR 193 at 198.
97 Ibid at 200-201.
98 [2001] FCA 1281.

wanted the consent orders to be made but, rather, wanted to proceed with his appeal. The orders were, accordingly, not perfected by the Registrar and the matter referred to the Full Court for determination. He told the court he had agreed to the consent orders at a time when he was suffering from stress and severe depression. The court (Beaumont, Kiefel and Hely JJ) unanimously dismissed the appeal, holding that this did not amount to "an injustice" or "potential for an injustice" that warranted "the exercise of the discretion".[99] Nor had the appellant shown that, in accordance with *Paino*, his case was an exceptional one.[100] For completeness, the court held that there was no basis for interfering with the contract of compromise founding the consent order.

[64] It is important to bear in mind that the applicability of these principles is predicated upon the court first accepting that the consent order is indeed contractual in nature. Courts have long recognised a difference between a consent order "which embodies the terms of a contract between the parties" and one that is merely "based on the parties' willingness to submit to an order on certain terms".[101] The latter is not considered a formal and binding agreement.

[65] An example of the latter is *Blundstone v Johnson*,[102] where the Queensland Court of Appeal dismissed an appeal from the District Court. The primary judge exercised discretion to extend the limitation period to allow the respondent plaintiff to commence a personal injuries action. Before the limitation period expired, the Registrar made consent orders giving the plaintiff leave, pursuant to s 57(2)(b) of the *Motor Accident Insurance Act* 1994 (Qld), to commence proceedings within 60 days of the orders being made. The plaintiff failed to do so, commencing proceedings seven days outside this period as a result of an oversight in his solicitor's office. He then applied to the court for an extension of time to issue proceedings. The plaintiff's application was successful. The insurer appealed. The court (Holmes JA, Chesterman JA and Atkinson J agreeing) upheld the primary Judge's interpretation of the consent order as non-contractual[103]:

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99 Ibid [11]-[12].

100 Ibid [13].

101 See *Siebe Gorman Co Ltd v Pneupac Ltd* [1982] 1 WL 185, 189; *Ernst & Young (a firm) v Butte Mining plc* [1996] 2 All ER 623 at 636, 637; *Venz v Moreton Bay Regional Council* [2009] QCA 224 at [23]; per Muir JA; *Blundstone v Johnson* [2010] QCA 148 at [6]-[14] per Holmes JA.

102 [2010] QCA 148.

103 Ibid [12].

> "One could infer from the terms of the order that the applicants agreed that they would consent to the granting of leave to commence proceedings within 60 days of one of the stipulated events. **Nothing on the order's face, however, indicates an agreement by the applicants not to plead a limitation defence during the specified period**; their inability to do so in that period was simply a practical consequence of the order. And **one cannot infer from the order any agreement on the part of the respondent to do anything**. **There was no undertaking to commence in the 60 day period. Any obligation in that regard was purely statutory not contractual**". (**Emphasis added**)

[66] Holmes JA found that the Applicant Insurer's submissions detailing the terms of the contract it relied upon shifted in the course of argument, first arguing that the plaintiff agreed to commence proceedings within 60 days of the relevant event, but later adding a further term that it, the defendant, would not plead the limitation period if the proceedings were so commenced. In the result, Her Honour did not think an agreement was discernible from the terms of the consent order, which, in contrast, "merely reflected the parties' willingness to submit to an order on certain terms".[104] Her Honour considered this sufficient to dispose of the appeal, although held that even if the consent order reflected an agreement, the plaintiff had in any event performed the obligations under it.[105]

[67] *Chavez* was distinguished in *Mentech Resources Pty Ltd v MCG Resources Pty Ltd*.[106] There, Muir JA allowed an application to vary a consent order, which stipulated a timeframe within which the respondent was required to provide security for costs. The applicant's solicitor was a day late in providing the security resulting from his missing a flight to provide the security. He arrived, cheque in hand, at the Registry only minutes after it had closed for the day. It was held that this was not a case in which the consent order was akin to a contract. Rather, it was one in which there had been no intention for the order to constitute a formal and binding contract. While this finding appears inconsistent with the court's treatment of the consent order as a contract as in *Chavez*, it can still be seen from the following statement by his Honour that, even if a contract had been found, the circumstances justified the exercise of the judicial discretion:.

> "In the circumstances it would not seem to me to be a reasonable exercise of discretion to **deprive the applicant of the ability to**

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104 Citing Atkinson J in *Moga v Australian Associated Motor Insurers Ltd* [2008] QCA 79 at [44].
105 *Blundstone v Johnson* [2010] QCA 148 at [13].
106 [2012] QCA 197.

> **pursue its appeal in consequence of such a minor and accidental default**. The role of the court in these circumstances is not to punish parties for transgressions." (**Emphasis added)**

[68] In summary then, the first issue to be determined in each case is whether the consent order reflects a formal and binding contract between the parties. If so, it is necessary to then consider whether there is good reason justifying the court exercising its discretion in such a way as to deprive a party of the benefit of that agreement freely and voluntarily entered into. I have adopted the expression "good reason", used by the Queensland Court of Appeal in *Chavez*, conscious that McHugh JA in *Paino* and the full Federal Court in *Singh* considered the test was to establish "exceptional circumstances". Importantly, both McHugh JA and Clarke JA in *Paino*, with whom the court in *Chavez* agreed, expressed the opinions that the failure of an applicant to comply with the terms of a consent order based on a contract could rarely, if ever, be sufficient grounds to vary the order. In an application seeking the granting of relief from the consequences of non-compliance with the terms for consent order, the applicant, as a general rule, has to make out a case for the granting of relief from the consequences of non-compliance. That is, where there has been default in compliance with a consent order, the applicant should explain the reasons for that default to the court - which has not happened here. It is no answer for Bowman to say that the issue before the court is the rehabilitation of the land and not his punishment. The issue before the court is whether good reason has been established by Bowman for the exercise of the court's discretion to vary the 2013 consent order. The unexplained failure to comply with that order is an important consideration.

Conclusion re: existence of underlying contract

[69] I am satisfied, on the authority of *Chavez*, that the 2012 and 2013 Consent Orders were both underpinned by a contract between the Council and each of the Bowman interests. Further, Bowman has established no good reason to deprive the Council of the benefit of that contract by the varying of the 2013 Order.

[70] There is no evidence before the court of the terms of the contract except for the terms of the consent order. Common sense dictates that the order followed discussions and eventual agreement between the parties. I infer that the agreement involved the Council agreeing not to prosecute Bowman for the conduct the subject of the order in consideration of Bowman performing the matters agreed to in the

order. This is not a case where Bowman agreed to obey the law that he was duty-bound to do, so as to offend the contractual principle that a promise to perform a public duty is not good consideration.[107] Rather, I see it as a case where Bowman was exposed to prosecution arising from his use of the land, reached agreement with Council, and then agreed to the consent order to avoid further prosecution.

[71] At point of agreement, valuable consideration passed between the parties. The Council was relieved of the burden of preparing prosecution proceedings. It agreed to forbear its right to litigate Bowman's non-compliance with the orders.[108] In consideration of Council forbearing its right to litigate, Bowman agreed to the terms of the order and consented to the making of the order, thus avoiding exposure to prosecution. An obvious benefit passing from, and to, both parties was the considerable costs saved in contesting the prosecution.

[72] But, whether or not a contract did underpin the 2013 Order, it was reasonable for Council to assume that Bowman would not have entered into an agreement to consent to the order unless it was a position to perform.[109] It was not, and is not, for the Council, or indeed the court to go behind the agreement or Bowman's consent to enquire as to his capacity to perform, or to enquire as to the particularised details Bowman now seeks to rely on to vary that Order. It was for Bowman to be satisfied of those matters before reaching agreement with the Council and consenting to the Order.

[73] It is true, as Bowman has submitted, that the level to which the fill was to be removed was, by the Orders, not fixed at ground level if the Rehabilitation Plan evidenced another satisfactory level based on the reports of qualified and relevant experts. As I have set out earlier, Bowman's Rehabilitation Management Plan of 23 October 2013 was submitted to Council by Bowman's town planner Craven Ovenden, under cover of its letter of 4 October 2013.[110] The Plan's author, Mr Moffitt, made it clear[111] he was addressing ecological aspects of the required rehabilitation and that specific detail in relation to the removal of the fill was

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107 *Collins v Godefrey* (1831) 1 B & Ad 950; 109 ER 1040 at 1042 per Lord Tenterden CJ; *Bank of New South Wales v Withers* (1981) 35 ALR 21 at 38; *Crymble & Handel v Health Insurance Commission* (Unreported, Supreme Court of New South Wales, Greenwood M, 20 October 1995).

108 *Wigan v Edwards* (1973) 1 ALR 497; (1973) 47 ALJR 586; *Miles v New Zealand Alford Estate Co* (1886) 32 Ch D 266.

109 *Chavez v Moreton Bay Regional Council* [2010] 2 Qd R 299; [2009] QCA 348 at [36] per Keane JA.

110 Judgment at [8].

111 Affidavit of W J Moffitt sworn 29 October 2014, Exhibit WJM1, p 4.

provided in the covering correspondence from Craven Ovenden of 4 October 2013.[112] That letter referred to reports from experts on air quality, noise and traffic impacts of the removal and screening/crushing operations which would be involved in the removal of the fill. Mr Craven enclosed copies of each of those reports and provided Council with a summary of their recommendations. Nowhere in the Rehabilitation Management Plan, or in any of the experts' reports in support, is there any mention of, much less a recommendation for, the removal of the fill to a level other than the natural ground level in clause 14A of the 2013 Order.

[74] Likewise, in relation to the requirement for removal of fill within 12 months of Council approving the Rehabilitation Plan (5 November 2013), there is no evidence of any extension of time agreed in writing between Council and Bowman as contemplated by the Order. The reality is that the 2013 Order, as with the 2012 Order, was made on the premise of the agreement between Council and Bowman, with the necessary implication that Bowman, having agreed with the Council and consented to the order, had the capacity and willingness to perform. As to removal to any level other than ground level, or if an extension of the 12 month removal period was necessary, it was incumbent upon Bowman to approach the Council with necessary expert opinions seeking the relevant change – if it was wanted. Instead, Bowman chose to ignore both orders and do nothing to fulfil the obligations thereunder until late 2014.

[75] As to the argument that the orders contemplated at all times that the work would be carried out only by existing Bowman equipment, it is rejected. There is nothing in the order or the evidence which founds that assertion. The order is clear. The fill was to be removed. Again, if Bowman was unable to comply with the order, that is a matter which should have been put before Council and the court before agreement was reached and the consent order made.

[76] I accept the submission of Council in relation to the application of *Jones v Dunkel*.[113] The inference that evidence seeking to explain the failure to comply with the 2013 Order would not have been favourable to Bowman, is one I have no hesitation in drawing. Likewise, in relation to the financial position of Bowman, the same applies. The theme underlying Bowman's submissions, as to the use of only

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112 Affidavit of M Gould sworn 18 February 2015, Exhibit MG/02, p 31.

113 (1959) 101 CLR 298.

Bowman machinery and the time periods for removal of the subject fill, clearly evidenced Bowman's reliance upon financial inability to do better by employing further or other machinery to reduce the time involved.

Mr Gould's plan

[77] I am satisfied that Mr Gould's plan is sensible, feasible and realistic in all the circumstances. I prefer his evidence to Mr Giaroli for the reasons I have set out in relation to the latter's evidence.[114]

[78] As to the grounds Bowman relies upon, which have not been addressed by my comments to date, I refer back to those grounds in paragraph 7:

> [H] This relates to the failure of the Council to bring to the notice of the court prior to the 2013 Order that it had itself deposited fill on the land. As Mr Hughes QC for Bowman acknowledged, there is no way any lawful fill could be differentiated from any unlawful fill on the site.[115] That perhaps explains why the consent orders of 2012 (paragraph 13A) and 2013 (paragraph 14A and B) refer to "introduced fill" rather than seeking to identify lawful and unlawful fill. The fact that Council may have deposited on the site, even if capable of being classified unlawful - which it is not - that is not a sufficient reason to vary the 2013 Order.
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> [Q] This relates to Mr Moffitt's report that there is no environmental imperative to remove all the fill. As I have already said I do not accept Mr Giaroli's evidence on the issue of flooding and that issue underpins Mr Moffitt's report. In any event for the reasons above outlined relating to consent orders it is too late now to be seeking to retain the fill.
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> [T] In this ground reference is made as in other places to Mr Bowman's illiteracy. Again, rather than that and its ramifications being deposed to by Mr Bowman, it is done so by his solicitor Mr Sciacca.[116] If this impediment was relevant one would expect direct evidence from Mr Bowman to explain its ramifications and the obstacles it has posed particularly given his consent to the 2012 and 2013 orders and the 2014 order of the ADR Registrar. Absence such evidence, I do not accept his illiteracy impacted on his entering into the agreement with the counsel or consenting to the relevant orders.
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> [U] This deals with the application Bowman has made for approval for the use of land as extractive. Simply saying that, if the appeal from the Council's decision in that application was successful, an opportunity may be available to dump fill, is entirely speculative.

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114 Judgment at [20]-[25].
115 T2-93.16-47.
116 Affidavit of S Sciacca sworn 24 February 2015.

> [Z] This relates to the commercial rates of removal of fill. Mr Giaroli gave hearsay evidence that he had made an enquiry of an unnamed commercial contractor and then gave evidence of the rates quoted for the removal of the fill. There was no evidence as to what information was provided to that contractor concerning the subject fill. As with so much of the evidence of Mr Giaroli it is hearsay and unsatisfactory. Given the importance of the issue of the cost in Bowman's submissions it is hardly an issue which r 23 should be invoked for to relieve Bowman of proving its case properly.

Decision

[79] I am unpersuaded that Bowman has established sufficient grounds for the exercise of the court's discretion to either stay the operation of the 2013 Order beyond the date of delivery of this judgment, or to vary that order as sought. The factors bearing critically on the ultimate exercise of the discretion, to adopt the words of de Jersey CJ in *Chavez* at first instance,[117] are these; in no particular order of weight and having no particular priority over any other:

(a) the failure of Bowman to comply with either of the 2012 or 2013 consent orders;
(b) the failure of Bowman to demonstrate any conscientious effort to comply with the 2013 Order for the removal of the fill until the deadline was almost upon him;
(c) the failure of Bowman to give any explanation to the court as to the reasons for his failure to comply with the 2013 Order, founding the inference that Bowman is content living by his own words and is prepared to ignore court orders where convenient;
(d) the delay in bringing the present application; and
(e) on the assumption, as I have found, that the 2013 Order was underpinned by a contract with the Council – Bowman's failure to establish good reason to deprive the Council of the benefit of that contract.

I make it clear, however, that even if it be the case that no contract underpinned the 2013 Order, I would still exercise my discretion against the granting of the relief sought by Bowman, for the reasons I have outlined.

Order

[80] Both applications are dismissed.

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117 *Chavez v Moreton Bay Regional Council* [2009] QSC 179 at [27].