

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Bond v Chief Executive, Department of Environment and Science* [2021] QPEC 14

PARTIES: Peter Bond
(applicant)
v
Chief Executive, Department of Environment and Science
(respondent)

FILE NO: 3131/2019

DIVISION: Planning and Environment Court of Queensland, Brisbane

PROCEEDING: Hearing of an application

ORIGINATING COURT: Planning and Environment Court of Queensland, Brisbane

DELIVERED ON: 15 March 2021

DELIVERED AT: Brisbane

HEARING DATE: 5 March 2021

JUDGE: Muir DCJ

ORDER: **The application for a stay filed 30 August 2019 is dismissed**

CATCHWORDS: ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS – PROCEDURE - where the applicant is subject to an Environmental Protection Order as a “related person” under s363AD of the *Environmental Protection Act* (1994) – where the order required the applicant to lodge a bank Guarantee of \$5,500,000 to secure compliance and to carry out specific rehabilitation works – where the operational period of the order has expired – where the rehabilitation works required by the order have been carried out pursuant to a Direction Notice issued to the Department of Natural Resources Mines and Energy

APPLICATION FOR STAY – where the applicant seeks a stay pursuant to s539B(2) of the *Environmental Protection Act* (1994) of the Environmental Protection Order to which he is subject– where the applicant submits that the stay is necessary to secure the effectiveness of an appeal to this court in relation to the making of the Environmental Protection Order – where a stay has been refused on two earlier occasions – whether “significant” new facts and circumstances have arisen which justify the further application for a stay being made – whether the interests of justice warrant a further hearing of the application – whether it is necessary on the facts to consider competing discretionary factors – whether the application amounts to an abuse of process

LEGISLATION: *Environmental Protection Act 1994 (Qld)*, sections 535, 539B, 358, 363AD, 363AG

CASES: *Alexander & Ors v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685

Bajramovic v Calubaquib (2015) 71 MVR 15

Bond-v-Chief Executive, Department of Environment and Heritage Protection [2018] QPEC 15

Bond-v-Chief Executive, Department of Environmental and Heritage Protection (No. 2) [2018] QPEC 31

Bond-v-Chief Executive, Department of Environment and Science [2019] QCA 137

Cougar Energy Limited v Debbie Best, Chief Executive Under the Environmental Protection Act 1994 2012 [QPELR] 370

Liu-v-The Age Company Limited (2016)] 92 NSWLR 679

Rozenblit v Vainer (2018) 262 CLR 478

Tomlinson v Ramsay Food Processing Pty Ltd (2015) 256 CLR 507

Young-v-Roads and Maritime Services (No. 2) [2018] NSWCA 106

COUNSEL: Mr D Gore QC for the applicant

Mr J Horton QC with Ms E Hoiberg for the respondent

SOLICITORS: Australian Business Lawyers and Advisers for the applicant
Herbert Smith Freehills for the respondent

The application

- [1] The **applicant** Mr Peter Bond, applies pursuant to s 539B(2) of the *Environmental Protection Act 1994 (Qld)* (the **Act**), for an order staying the Environmental Protection Order (the **EPO**) issued to him by the Department of Environment and Heritage Protection (now the **respondent**) on 25 May 2016. Such an order is said to be necessary to secure the effectiveness of an appeal (to this court) of an internal review decision refusing to set aside the EPO and is only sought until the appeal is determined.
- [2] The respondent submitted that it was against the interests of justice and an abuse of process to entertain the application, and otherwise opposed the order being made.
- [3] For the reasons discussed below, I am satisfied that the interests of justice warrant the application being heard and determined. I am not satisfied that the application is an abuse of process. But nor am I satisfied that an order for a stay is necessary to secure the effectiveness of the appeal.

The applicable facts

- [4] The applicable facts are not in dispute and can be summarised as follows.

The issuing of the EPO

- [5] For some period prior to 2016, **Linc** Energy Limited carried out underground gasification activities on land in the Chinchilla region of Queensland. Linc held two environmental authorities for the site which required it to rehabilitate any land significantly disturbed by these activities.
- [6] A liquidator was appointed to Linc on 23 May 2016. Two days later, on 25 May 2016, the respondent issued an EPO to the applicant as a “related person” under ss 358 and 363AD of the Act.¹ Relevantly, the EPO required the applicant to:
- (a) provide a bank guarantee to the value of \$5.5m to the Department to secure compliance with the EPO by 25 August 2016 (**Condition B23**);²
 - (b) submit a report to the Department regarding works to be undertaken to achieve the overall objectives of the EPO (by 26 September 2016, (**Condition B4**);

¹ Under s 358 of the Act an EPO may be issued (among other things) to secure compliance with the general environmental duty or a condition of an environmental authority. The EPO was issued to the applicant as a related person under s 363AD of the Act because he was the chairman, managing director and the holder of considerable shares in the company at the relevant time.

² Department is defined in the EPO as the Chief Executive of the Department of Environment and Heritage and Protection. Under B23 the guarantee was to be lodged in person with, or sent to, the Director Petroleum and Gas, Department of Environment and Heritage and Protection.

- (c) by 1 November 2019:
- (i) rehabilitate the infrastructure described as ‘Dam 1,’ ‘Dam 2,’ ‘Dam 3,’ ‘the encapsulate area previously known as Dam 5,’ ‘the area known as “land farm”’, and ‘the area known as “old Tank Farm”’, in accordance with the rehabilitation conditions of Linc’s environmental authority; and
 - (ii) clean the infrastructure known as ‘Dam 6’ and ‘All Tanks within the new Tank Farm’, (**Conditions B1, B2 and B3**);
- (d) undertake annual dam inspections of Dam 6, and of Dam 1 until such time as it meets the rehabilitation requirement specified in the EPO (**Conditions B9 and B10**);
- (e) undertake ground water seepage monitoring at a frequency not exceeding 3 months (**Condition B11**); and
- (f) submit reports that demonstrate compliance with the rehabilitation requirements within 60 days of Condition B1 being completed, and 30 days of Condition B2 being completed (**Conditions B19 and B21**).

Court proceedings arising from the issuing of the EPO

- [7] After unsuccessfully seeking to have the EPO set aside on an internal review, the applicant appealed the decision refusing to set aside the EPO on 4 August 2016 (the **EPO Appeal**).
- [8] The applicant then filed an application in a pending proceeding in the EPO Appeal seeking the separate determination of a preliminary point. On 12 August 2016, an order by consent was made by this court, staying the EPO until final determination of the preliminary point, (including by way of appeal). The stay of the EPO ceased to have effect on 13 December 2017 after an application for special leave in relation to the preliminary point was refused by the High Court.
- [9] On 7 September 2016 and 11 November 2016, the applicant was charged with five offences of wilfully and unlawfully causing serious environmental harm in his capacity as an executive officer of Linc. On 5 March 2020, the applicant was committed to stand trial for these offences. That trial is listed to commence in the Brisbane District Court in August 2021.
- [10] On 22 December 2017 the applicant filed an application in the EPO Appeal seeking a stay of that appeal pending the finalisation of the criminal charges laid against him and a further stay of the EPO pending finalisation of the EPO Appeal.
- [11] On 29 March 2018 Jones DCJ refused both of these applications but deferred the making of final orders until impending verdicts in criminal proceedings against Linc following a trial in the District Court at Brisbane were delivered : see *Bond-v-Chief*

Executive, Department of Environment and Heritage Protection [2018] QPEC 15 (**Bond No. 1**).

- [12] Those verdicts were delivered on 9 April 2018, with Linc being convicted of five counts of committing serious environmental harm.
- [13] On 30 May 2018 the applicant filed another application seeking a stay of the EPO Appeal and of the EPO. On 12 June 2018, Jones DCJ again refused both applications: see *Bond-v-Chief Executive, Department of Environmental and Heritage Protection (No. 2)* [2018] QPEC 31 (**Bond No. 2**).
- [14] On 15 June 2018 Jones DCJ made orders formally dismissing the applications filed on 22 December 2017 and 30 May 2018.
- [15] On 23 July 2018 the applicant applied to the Court of Appeal for leave to appeal against the decision in Bond No.2 and the orders of 15 June 2018.
- [16] On 12 December 2018 a complaint was laid against the applicant for two charges of wilfully contravening the EPO as a result of his failure to comply with Conditions B23 (providing a bank guarantee by 25 August 2016) and Condition B4 (submitting a report to the Department by 26 September 2016). The evidence from the solicitor for the respondent [as at 11 October 2019] was that her instructions were that “the Department is content to continue to adjourn that matter until the present proceeding in which the Applicant appeals the EPO is determined by this Court.”³
- [17] On 16 July 2019 the Court of Appeal delivered judgment staying the EPO Appeal pending final resolution of the criminal prosecution against the applicant but refusing the applicant’s appeal against this court’s decision not to grant a stay of the EPO.⁴
- [18] On 30 August 2019 the applicant filed the current application.

Compliance with the EPO

- [19] The applicant has not complied with any of the conditions of the EPO within the time required or at all.
- [20] On 17 May 2019 the respondent issued a Direction Notice to the Department of Natural Resources Mines and Energy (DNRME) to carry out the works required under the EPO in place of the applicant.⁵ DNRME completed some of the work in December 2019 and the rest in February and March 2020.

³ Affidavit of M A Simpson (tab 5 of Exhibit 1)

⁴ See *Bond-v-Chief Executive, Department of Environment and Science* [2019] QCA 137.

⁵ Section s 363AG of the Act allows an “authorised person” to take the action specified in an EPO issued to a related person if the related person fails to comply with the EPO.

Relevant legal principles

- [21] Section 539B(2) of the Act provides that: “The Court may grant a stay of a decision appealed against to secure the effectiveness of the appeal.”⁶ The applicant bears the onus of demonstrating that a proper basis for an order for a stay exists.⁷
- [22] It follows that the express statutory power to order a stay in a case such as the present, only arises when this Court is satisfied that such an order is necessary to “secure the effectiveness of the appeal”. But the exercise of the power in such a circumstance is a discretionary one, so the common law principles relevant to the exercise of the discretion on stay applications are relevant.⁸
- [23] These discretionary factors may vary depending on the circumstances of the case.⁹ The discretionary factors raised by the parties in this case included issues of financial prejudice to the applicant if he was made to pay the security amount before the EPO Appeal,¹⁰ the delay by the applicant in progressing the appeal¹¹ and the overriding safeguard of the administration of and the interests of justice.¹²
- [24] With the above facts and principles in mind, I now turn to consider and analyse the respective arguments of the parties in this case.

Analysis

Do the interests of justice warrant a further hearing of the application?

- [25] This is the third contested attempt by the applicant to stay the EPO. Ordinarily a litigant who is dissatisfied with an interlocutory order is not automatically entitled to have a second contested run at the target. But a further interlocutory application may be entertained if it is in the interests of justice to do so.¹³

⁶ At the time of the issuing of the EPO, the power to appeal was found in 535(1). Senior counsel for both parties both submitted and I accept, that the version of the Act in force when the EPO was issued was the version current as at 27 April 2016 but the relevant version of the Act for the purpose of this application is the one as it currently stands [as at 4 December 2020]. Regardless, there was no substantive change to the relevant provisions at the time of the Bond No. 1 and Bond No. 2 decisions apart from the numbering of the section.

⁷ See *Alexander & Ors v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 694 [F].

⁸ In *Cougar Energy Limited v Debbie Best, Chief Executive Under the Environmental Protection Act 1994* 2012 [QPELR] 370 at 373 [20] Jones DCJ referred to the general principles associated with the granting of a stay to be applicable but later at [22] his Honour referred to the “competing considerations” which in my view can be read as referring to the discretionary factors.

⁹ Ibid at 374 [22]

¹⁰ Given what is set out in paragraph 38 (a) of these Reasons this is not now an issue.

¹¹ In my view, the delay has been adequately explained by the death of the applicant’s former solicitor and issues with the availability of counsel and listings. No real delay can be attributable to the applicant himself.

¹² With reference to *Rozenblit v Vainer* (2018) 262 CLR 478 at 501 [76] (per Gordon and Edelman JJ).

¹³ See *Young-v-Roads and Maritime Services (No. 2)* [2018] NSWCA 106 at 72. See also the observations of Justice of Appeal, McColl in *Liu-v-The Age Company Limited* (2016) 92 NSWLR 679at [199] (Beazley P at [13] and Ward JA at [292]).

- [26] The applicant submitted that the stay of the EPO Appeal by the Court of Appeal (pending the final resolution of the criminal prosecution of the applicant), together with DNRME having completed the work required to be performed by the applicant under the EPO (at the direction of the respondent), are “significant” new facts and circumstances which justify a further application for a stay being made.
- [27] I accept as a matter of principle “it may well be an abuse of process for a party who has been unsuccessful in obtaining interlocutory relief to relitigate the very same question.”¹⁴ But I reject the respondent’s submission that the interests of justice do not warrant the applicant relitigating a stay of the EPO, or that his conduct in doing so is an abuse of process in this case. I am not satisfied this case falls within any of the categories discussed by the High Court in *Tomlinson v Ramsay Food Processing Pty Ltd.*¹⁵
- [28] The facts and circumstances identified in paragraph 26 above did not exist when the decisions in Bond No. 1 and Bond No. 2 were made. Whilst the application is seeking the same order as was previously sought, it is premised on different facts. So, in that sense, it is a re-litigation on different facts. In these circumstances there is a justifiable basis for bringing the application. I am satisfied therefore that the interests of justice warrant a further consideration and determination of the current application for a stay.
- [29] But, for the reasons below, I am not persuaded that these facts and circumstances are as “significant” as is contended for by the applicant or more crucially that these new facts and circumstances form a proper basis for a stay to now be ordered.

Would a stay secure the effectiveness of the appeal?

The respective positions

- [30] As outlined above, the EPO Appeal seeks an order that the decision to issue the EPO be set aside.
- [31] The applicant submitted that if the EPO is not stayed, and the applicant is compelled to comply with the requirements of the EPO, the EPO Appeal is “tantamount to a futility.”¹⁶
- [32] The respondent opposed the application and submitted that a stay of the EPO is unnecessary to secure the effectiveness of the EPO appeal because the time for compliance with the primary obligations in the EPO has now passed. In other words “the purpose to be achieved under s 539B(2) by the granting of a stay will not be met.”¹⁷ Senior Counsel for the applicant pointed to this opposition as lending force

¹⁴ *Bajramovic v Calubaquib* (2015) 71 MVR 15 at 25 [40].

¹⁵ (2015) 256 CLR 507 at [25] (French CJ, Bell, Gageler and Keane J).

¹⁶ *Ibid* at [8].

¹⁷ Respondent’s outline of submissions at [27].

to the applicant's concern that the respondent was going to take steps to enforce the EPO prior to the EPO Appeal being determined thus undermining the effectiveness of that appeal.

Analysis

- [33] The reasoning said to underpin the applicant's submission that without a stay the EPO Appeal may not be effective, is that the applicant "seeks relief which would have the consequence that he should never have been subjected to the requirements of the EPO, and should not now (i.e. following a successful appeal) be required to comply with those requirements."¹⁸ During oral argument, Senior Counsel for the applicant explained this submission as follows:¹⁹

"It brings the status of the stay into line with the facts. It ensures that there can be no suggestions that, until the EPO appeal is determined, that Mr Bond is obliged to do anything under the EPO. It brings it into line with the facts. The time for compliance with the three conditions has passed. The works have, essentially, been done. The need for the bank guarantee has disappeared and, as I've said more than once, that should mean that the department's focus is first – ignoring the criminal proceedings that are to be heard later this year – is first on the EPO appeal. And – and if that is unsuccessful by Mr Bond, then they would turn their attention to – to prosecution for non-compliance with the EPO. But there's nothing that they should be doing about the EPO before then, and that's the utility in engaging the stay."

- [34] In developing this argument Senior Counsel for the applicant aptly referred to the "unhappy history" between the parties and identified the applicant's concern to affirm that the respondent could not act on the EPO, so that he "can now sleep at night."
- [35] I reject the applicant's submission that an order for a stay is necessary to secure the effectiveness of the EPO Appeal for two main reasons.
- [36] First: The applicant's concern that the respondent could potentially act in relation to the EPO other than to potentially enforce the bank guarantee or to pursue the complaint against the applicant for breaching the EPO, is baseless. It was uncontroversial and as discussed in paragraphs 6, 19 and 20 above, the date for compliance with the obligations under the EPO has well passed and all of the work required to be completed by the applicant under the EPO has now been completed by someone other than the applicant.
- [37] Secondly, the applicant's two real concerns, which underpinned the basis of the current application, were that:

¹⁸ Applicant's outline of submission at [8].

¹⁹ T1-8135 to 45

- (a) the applicant could be required to comply with the obligation to provide a bank guarantee despite the obligation having a due date of 25 August 2016; and
- (b) the complaint against him might be resurrected prior to the EPO Appeal.

[38] But these concerns were both put to rest during the hearing before me, by Senior Counsel for the respondent stating in open court:

- (a) in relation to the concern identified in 37(a), words to the effect that no steps to enforce the bank guarantee will be taken until after the determination of the EPO Appeal.²⁰
- (b) in relation to the concern identified in 37(b), that the respondent would not proceed with the complaint in the Magistrate's Court until the EPO Appeal was determined.²¹

[39] It follows and I find that the applicant has not satisfied me that a stay is necessary to secure the EPO Appeal. It is therefore unnecessary to consider and analyse any competing discretionary factors.

Orders

[40] The application for a stay filed 30 August 2019 is dismissed.

[41] I will hear from the parties (if necessary) as to any consequential orders.

²⁰ T1-29 14 to 45; T1-30 11.

²¹ T1-25 111-13.