SUPREME COURT OF QUEENSLAND

CITATION:	*Arcturus Downs Limited v Peta Stilgoe (Member of the Land Court of Queensland) & Ors* [2019] QSC 84
PARTIES:	**ARCTURUS DOWNS LIMITED** ACN 010 937 112 (applicant) **v** **PETA STILGOE (MEMBER OF THE LAND COURT OF QUEENSLAND)** (first respondent) **SPRINGSURE CREEK COAL PTY LIMITED** ACN 119 713 601 (second respondent) **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND SCIENCE** (third respondent)
FILE NO/S:	BS No 6 of 2018
DIVISION:	Trial
PROCEEDING:	Application for a Statutory Order of Review
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	2 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 December 2018
JUDGE:	Lyons SJA
ORDER:	**The Amended Application is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – where the applicant objected to the grant of mining leases and environmental authorities – where the Land Court dismissed an application by the applicant to dismiss the second respondent's application for mining leases and environmental authorities – where the Land court recommended that mining leases be granted over application area – where the Land Court recommended to the administering authority that the environmental authority be issued – where the Land Court recommended the issue of EA 1613 – where the applicant seeks a statutory order of review of those decisions – whether the decisions of the Land Court involved errors of law – whether the decision of the Land Court had jurisdiction to make the environmental decision – whether the making of the environmental authority was an improper exercise of the Land

Court's power – whether a breach of natural justice has occurred

Environmental Protection Act 1994 (Qld)
Strategic Cropping Land Act 2011 (Qld)
Mineral Resources Act 1989 (Qld)
Mining Act 1978 (WA)
Judicial Review Act 1991 (Qld)

Chase Oyster Bar v Hamo Industries [2010] NSWCA 190
David Grant and Company Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265
Fernando ats Minister for Immigration and Multicultural Affairs [2000] FCA 324
Forrest and Forrest Pty Ltd v Wilson (2017) 346 ALR 1
Grant Samuel Corporate Finance Pty Ltd v Fletcher; *J P Morgan Chase Bank, National Association v Fletcher* (2015) 254 CLR 477
Hunter Resources Limited v Melville [1988] 164 CLR 234
Minister for Immigration and Border Protection v Singh (2014) 231 FCR 437
Minister for Immigration and Border Protection v Stretton (2016) 237 FCR 1
Minister for Immigration and Border Protection v SZVFW (2017) FCAFC 33
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332
New Acland Coal Pty Ltd v Smith [2018] QSC 88
Project Blue Sky Inc v Australian Broadcasting Authority (1988) 194 CLR 355
Springsure Creek Coal Pty Ltd v Arcturus Downs Limited & anor (No. 2) [2018] QLC 8
Springsure Creek Coal Pty Ltd v Arcturus Downs Limited & Anor (No 3) [2018] QLC 20
Wall v Windridge [1999] 1 Qd R 329

COUNSEL:	D A Skennar QC for the Applicant S A McLeod QC for the Second Respondent E J Longbottom for the Third Respondent
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This application

[1] Arcturus Downs Limited (Arcturus) owns a property near Emerald which it uses for dry land cropping as well as breeding and fattening cattle.

[2] Springsure Creek Coal Pty Ltd (Springsure Creek) made mining lease applications and submitted draft environmental authorities over that property. The first mining lease application in 2012 related to the development of a longwall thermal coal mine over part of Arcturus Downs and the second in 2013 related to the construction of a haul road and associated infrastructure to link the coal mine to a rail load-out facility.

[3] The Department of Environment and Heritage Protection, as it then was, issued complementary draft environmental authorities on 21 February 2014 and 23 June 2014.

[4] Arcturus objected to the draft environmental authorities issued by the Chief Executive, who is the third respondent under the *Environmental Protection Act* 1994 (EP Act).

[5] The hearing of the applications for the mining leases and objections as well as the objections to the application for environmental authority were initially heard before the Land Court by the first respondent in January and March of 2018 with an initial decision handed down on 12 April 2018 and a final decision on 2 July of 2018.

[6] The Land Court dismissed Arcturus' application and recommended that the environmental authority be issued in terms of the draft environmental authorities, one of which had been amended by the Land Court, and further amended by the final decision (the EA Decision). The environmental authorities the subject of the EA Decision were subsequently granted by a delegate of the third respondent.

[7] Arcturus now seeks a statutory order of review of those decisions of the first respondent.

Short History of the proceedings before the Land Court

[8] Springsure Creek was the applicant for mining leases MLA 70486, MLA 70501 and MLA 70502 and the environmental authorities EPML00961613 (EA 1613) and EPML01584713 (EA 4713) for the mining activities to be carried out by it. Mining lease application 70501 is not relevant to this application. Arcturus objected to the grant of the mining leases and the environmental authorities and was therefore the objector in the proceedings in the Land Court. The objections hearing was held on 22 – 25 January 2018 and 26 March 2018.

[9] Arcturus argued that in relation to EA 1613 the application for the environmental authority was not in accordance with the Act because it concerned only the proposed mining activity and not the other aspects of the project which included a train load out and infrastructure corridor. Arcturus argued that those three components were interdependent as one component could not operate without the others and they would all operate under one management. Arcturus argued therefore that pursuant to s 149 of the Act a mining project means all mining activities carried out or proposed to be carried out as a single operation and accordingly the application should have covered all aspects of the mining project.

[10] On 12 April 2018 the Land Court delivered a decision[1] in which it:

1. Dismissed a General Application filed by Arcturus on 6 March 2018 to dismiss Springsure Creek's applications for the mining leases and the environmental authorities;

[1] *Springsure Creek Coal Pty Ltd v Arcturus Downs Limited & Anor (No 2)* [2018] QLC 8.

2. Recommended that mining leases application MLA 70486 and MLA 70502 be granted over the application area, for the term and purpose sought by Springsure Creek;

3. Recommended pursuant to section 222(1) of the *Environmental Protection Act* 1994 (EPA), to the Administering Authority for the EPA that subject to the recommendations as set out in paragraphs 3(b) and 3(c) of the decision dated 12 April 2018, the environmental authority be issued in terms of the draft environmental authorities with respect to EA 1613 and EA 4713;

4. Recommended that the draft environmental authority conditions relating to the standard of rehabilitation of Strategic Cropping Land be amended to provide clarity about the standard of rehabilitation contemplated, in consultation with the Department of Environment and Heritage Protection and requested varied conditions be provided by the statutory party by 4 May 2018, with an opportunity for Springsure Creek and Arcturus to provide submissions about the varied conditions by 18 May 2018.

[11] The Land Court handed down its final decision in relation to the conditions of the draft environmental authority on 2 July 2018.[2] The final decision recommended the issue of EA 1613 as further amended pursuant to Annexure 1 of that decision.

[12] Arcturus now seeks a statutory order of review of those two decisions of the Land Court. The environmental authority applications related to two of the mining lease applications. The first, as I have indicated was an application to develop a longwall thermal coal mine (MLA 70486) over part of Arcturus' property, and the second was for a haul road and associated infrastructure to link the coal mine to a load-out rail facility on the Bauhinia rail line (MLA 70502).

[13] The recommendation by the Land Court to grant mining leases 70486 and 70502 is not challenged but rather the recommendation that the environmental authorities be issued in the terms of the draft environmental authorities is challenged by the application for judicial review. The environmental authorities were subsequently granted by a delegate of the third respondent.

[14] An Amended Application for a Statutory Order of Review was filed by leave on the day of hearing in the following terms;

1. The decisions of the Land Court involved errors of law and Arcturus is aggrieved by the initial decision and the final decision because they relate to and affect land owned by Arcturus and it was an objector in the proceeding, the subject of the decisions. In the Amended Application for a Statutory Order of Review (AASOR) Arcturus relies on the following grounds:

   (a) The Land Court decision involved errors of law in that the Land Court erred in recommending that mining lease applications MLA 70486 and MLA 70502 be granted and there was no basis to recommend that the environmental authorities EPML 00961613 and EPML 01584713 be granted. (Ground 2 AASOR);

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[2] *Springsure Creek Coal Pty Ltd v Arcturus Downs Limited & Anor (No 3)* [2018] QLC 20.

(b) The Land Court decision involved errors of law:

- in concluding that the effect of non-compliance with s 155 of the EPA did not result in invalidity.

- in relying on the criteria identified in s 113 of the EPA which was not in force until 31 March 2013, to determine that the proposed mine was not one project.

- having determined that the standard of rehabilitation could not be determined by reference to the conditions identified in the draft environmental authorities the Land Court ought to have refused to issue the draft environmental authorities.

- in relying on the Protocol to request amendments to the draft environmental authority EPML 00961613 when it came into effect after the conclusion of the hearing.

- in finding that the *Strategic Cropping Land Act* 2011 (SCL Act) only applies to a granted EA and not a draft EA and the failure to comply with s 93 rendered the draft EA invalid.

- in failing to find that it was impossible to rehabilitate Arcturus land as required by s 290 of the SCL Act.

(Ground 4 AASOR);

(c) The Land Court did not have jurisdiction to make the environmental decision and/or the decision was not authorised under the EPA. (Ground 5 AASOR);

(d) The Land Court did not have any evidence before it to justify the making of the environmental decision in that it was permitted to make the decision only if a single application had been made and there was no evidence from which the Land Court could be satisfied that Springsure Creek had made a single application for all mining activities that formed the project. (Ground 6 AASOR);

(e) The making of the Environmental Authority decision by the Land Court was an improper exercise of the power conferred by the EPA in that it was a decision that was so unreasonable that no reasonable person could have made it as it failed to conclude that it was impossible to rehabilitate the land to its former condition as required by s 290 of the *Strategic Cropping Land Act* 2011 (SCL Act). (Ground 7 AASOR);

(f) A breach of natural justice occurred in relation to the amendment decision and the final decision in that the Land Court denied Arcturus the opportunity to test the proposed amendments (Ground 8 AASOR).

[15] The way in which the application was argued at the hearing in both the oral argument and the written submissions took a different form to those set out in the Amended Application. I shall address the arguments raised by the applicant in the way in which they were approached at the hearing whilst endeavouring to cover the grounds raised in the AASOR

many of which overlap. Ground 1 of the original application was not pursued in the same format at the hearing.

[16] Whilst the applicant seeks an extension of time for the filing of the application, I consider that as the final decision was not made until 2 July 2018, the application for judicial review was in fact filed within time. In any event, I would have granted the extension of time. I also note that neither the second or third respondent considered that the application was filed out of time.

[17] In accordance with the usual practice the first respondent took no part in these proceedings. I also note the limited role that the third respondent, as the statutory party and administering authority under the EP Act, took in the Land Court and in these proceedings.

Statutory Framework

[18] The object of the EP Act is "to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (ecologically sustainable development)".[3] It is necessary to consider the legislative framework and in particular Chapter 5 of the EP Act which outlines the process for the issuing of environmental authorities for a "mining activity". That process includes assessing an environmental authority application in relation to a mining lease, the issuing of draft environmental authorities and the referral of objections to the Land Court.

[19] The application in relation to MLA 70486 was made on 18 October 2012 (EA 1613) and the application in relation to MLA 70502 was made on 24 May 2013 (EA 4713).

[20] As each of the environmental authority applications in contention here were made on different dates, there are minor differences in Chapter 5 as to how it applied to each of the environmental authority applications as in the period between those two applications, amendments were made in relation to Chapter 5.

[21] At the time EA 1613 was made, s 222(1) provided as follows in relation to objections decisions;

> "**222 Nature of objections decision**
>
> (1) The objections decision for the application must be a recommendation to the Minister that –
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> (a) the application be granted on the basis of the draft environmental authority for the application; or
>
> (b) the application be granted, but on stated conditions that are different to the conditions in the draft; or
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> (c) the application be refused."

[22] Section 223 of the EP Act provided that in making the objections decision the Land Court was required to consider a number of matters including: the application documents for the application; any relevant regulatory requirement; the standard criteria; a wild river

[3] *Environmental Protection Act* 1994 (Qld) s 3.

declaration if the application relates to mining activities in a wild river area; each current objection; any suitability report obtained for the application and the status of any application under the *Mineral Resources Act* 1989 (Qld) (MR Act) for each relevant mining tenement.

[23] The Minister is then required by s 225(1) of the EP Act to determine whether to grant the application on the basis of the draft environmental authority or on different stated conditions or to refuse the application. The Minister must, before making the decision, consider *inter alia* the objections decision (s 225(3)(a)) but is not bound to impose on the environmental authority a condition recommended under the objections decision pursuant to s 225(4).

[24] At the time the later EA 4713 was made, s 190(1) provided as follows:

> "**190 Nature of objections decision**
>
> (1) The objections decision for the application must be a recommendation to the administering authority that –
>
> (a) if a draft environmental authority was given for the application –
>
> (i) the application be approved on the basis of the draft environmental authority for the application; or
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> (ii) the application be approved, but on the stated conditions that are different to the conditions in the draft environmental authority; or
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> (iii) the application be refused."

[25] Section 191 of the EP Act then provided that the Land Court in making an objections decision must consider: the application, any response given for an information request; any standard conditions for the relevant activity or authority; any draft environmental authority for the application; any objection notice for the application; any relevant regulatory requirement; the standard criteria and the status of any application under the MR Act for each relevant mining tenure.

[26] The administering authority is then required by ss 194(1)(a) and 194(2)(a) of the EP Act to decide that the environmental authority application be approved on the basis of the draft environmental authority or on different stated conditions or that the application be refused. In making the decision the administering authority must have regard to, amongst other matters, the objections decision and the draft environmental authority (s 194(4)).

[27] I accept that the making of the EA Decision is properly characterised as an exercise of the administrative function of the Land Court, being "an administrative step consequent upon a statutorily prescribed inquiry" conducted by the Land Court. I am satisfied therefore that the EA Decision is a decision to which the *Judicial Review Act* 1991 (Qld) (JR Act) applies and that the JR Act provides the only available avenue of review. In this regard I note the decision of Bowskill J in *New Acland Coal Pty Ltd v Smith*[4] as follows:

> "[6] There is no dispute that the decision of the first respondent is a decision to which the JR Act applies. Judicial review is the only available avenue for review of

[4] [2018] QSC 88 at [6].

> a decision of this kind, as it has been characterised as an exercise of the Land Court's administrative, rather than judicial function. The making of a recommendation under s 269 of the MRA has been described as "an administrative step consequent upon a statutorily prescribed inquiry conducted by the learned Land Court member", and not a decision in relation to a proceeding in the Land Court, from which an appeal lies to the Land Appeal Court. The same reasoning logically applies to the making of a recommendation under s 190 of the EPA."

[28] Turning to the specific grounds of review which were pursued.

Grounds of review

Grounds 2, 4, 5, 6 and 7 of the AASOR which relate to Section 155 of the EPA

[29] Arcturus submitted that notwithstanding a finding by the member that MLA 70486 contemplated a transport corridor and the other supporting infrastructure and that such a plan involved MLA 70502 as well, she nonetheless concluded that EA 1613 was not invalid because;

- Section 155 was permissive and not directive;
- The EP Act was silent as to the consequences of non-compliance;
- The object of the Act is to protect the environment while allowing for development
- There are numerous opportunities within the EPA regime to impose conditions given the mining registrar could impose conditions, the Court could impose conditions and the administering authority retained a discretion to refuse or allow the EA;
- Section 156(4) permitted amendment or replacement of the authority;
- Section 93 of the *Strategic Cropping Land Act* 2011 (SCL Act) states an EA cannot be issued until the SCL protection decision can be made.
- The mining project did not satisfy the requirements of s 113 of the EP Act.

[30] Arcturus argued that the Land Court erred in construing s 155 as not requiring a single environmental application for the activities to be carried out by Springsure Creek in its "mining project" and says that the interpretation of the Land Court was an error of law and an improper exercise of power, as it was so unreasonable that no person could have arrived at it. In addition, it is argued that there was no evidence to justify the decision and as it was not a single application the Land Court did not have jurisdiction.

[31] Section 155 of the EP Act at the time of EA 1613 was lodged on 18 October 2012 provided that the section applied to a person who may apply for an environmental authority (mining activities) for mining activities proposed to be carried out as a mining project. It also provided that the person may only make a single application for one environmental authority (mining activities) for all mining activities that form the mining project as follows;

"155 Single application required for mining project

(1) This section applies to a person who may apply for an environmental authority (mining activities) for mining activities proposed to be carried out as a mining project.
(2) The person may only make a single application for 1 environmental authority (mining activities) for all mining activities that form the project.
(3) The application must—
    (a) comply with subdivision 1; and
    (b) state—
        (i) each type of environmental authority (mining activities) applied for; and
        (ii) whether each stated type is proposed to be a standard or non-standard environmental authority (mining activities).
(4) If any relevant mining tenement for the application is a mining claim or mining lease, part 6, divisions 6 to 8 must be complied with for the whole application.
(5) If the administering authority grants the application, it may issue—
    (a) 1 environmental authority (mining activities) for all the activities (a ***project authority***); or
    (b) 2 or more environmental authorities (mining activities) for the activities.
(6) A project authority must—
    (a) state each type of environmental authority (mining activities) that forms the project authority; and
    (b) identify the conditions applying to each type.
(7) For applying parts 7 to 13 to a project authority, each type of environmental authority (mining activities) that forms the project authority is taken to be an environmental authority (mining activities) of that type."

[32] "Mining activity" was then defined in s 147 and included activities mentioned in subsection 2 that were authorised to take place under the *Mineral Resources Act* on land "to which a mining tenement relates" or "land authorised under that Act for access" to such land and included activities such as "prospecting, exploring or mining under the *Mineral Resources Act* or another Act relating to mining". It also included processing a mineral as well as any activity which was directly associated with such an activity which may cause environmental harm.

[33] A "mining project" was then defined in s 149 to mean:

> "All mining activities carried out, or proposed to be carried out under 1 or more mining tenements in any combination, as a single integrated operation".

[34] At the time the application for EA 1613 was made the phrase "single integrated operation" was not defined in the EP Act for the purposes of s 149 but, as Counsel for Springsure Creek noted, it was defined for the purposes of s 73 (which related to Registration) which specified in s 73F(3) that environmentally relevant activities are carried out as single integrated operation if the following components were present;

- activities that were carried out under the day to day management of a single responsible person such as a site or operations manager; and

- the activities were operationally interrelated; and

- the integrated operation leads to a lower risk of environmental harm; and
- the activities are or will be carried out at 2 or more places at about the same time and the places where they are carried are separated by distances short enough to make feasible the integrated day to day management of activities.

[35] I accept the argument by Arcturus that s 73F relates to a completely different role of the administering authority but I consider that it does indeed provide some guidance as to how that phrase should be interpreted with respect to s 155.

[36] Significantly, the Land Court member correctly noted the question for her to determine was whether Springsure Creek should have made only one application for environmental authorities. The decision stated that the description for the mining lease 70486 included a reference to the infrastructure and the haul road to the rail line. There was no factual dispute therefore that the project was for both a mine and the supporting infrastructure and that Springsure Creek had in fact made two applications for environmental authorities and not one. The Land Court member held that the requirement in s 155 was mandatory and in failing to make one application Springsure Creek did not comply with the EP Act.[5] The next question was whether that failure resulted in invalidity.

[37] As the Member noted, the EP Act did not impose any consequence for such a failure and the question for the Member was therefore whether there was a legislative intent to invalidate a breach of that requirement. In this regard, the member referred to the High Court decision in *Project Blue Sky Inc v Australian Broadcasting Authority*,[6] which held that "an act done in breach of a condition regulating the exercise of a statutory power will not necessarily make the act invalid. Whether the act done is invalid depends on whether there is a legislative purpose to invalidate it." In considering that issue the Member referred to the fact that there were numerous opportunities within the EP regime to impose conditions including recommendations by the Land Court and the mining registrar. The Member also noted that the administering authority retains a discretion to refuse or allow the issuing of the EA and then made reference to s 156(4) which provided that nothing in the section prevented the holder from applying to amend or replace the authority. Accordingly, the Member considered that once an EA issues "it is not necessarily set in stone".[7]

[38] The Member then concluded that non-compliance with s 155 did not result in invalidity as follows:

> "[43] These provisions indicate that the legislative purpose of the EP Act is to enable the DEHP to respond to environmental issues as they arise. Although the intention is that all issues relevant to mining should be the subject of only one application, the regime has a flexibility that suggests non-compliance would not render an application void if the mischief can be otherwise addressed. I agree with Springsure Creek that, given the statutory regime that exists under the EP Act, there is no legislative purpose in finding that non-compliance with s 155 results in invalidity."

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[5] *Springsure Creek Coal Pty Ltd v Arcturus Downs Limited & Anor (No 2)* [2018] QLC 8 at [30]-[33].
[6] (1988) 194 CLR 355 at [91].
[7] *Springsure Creek Coal Pty Ltd v Arcturus Downs Limited & Anor (No 2)* [2018] QLC 8 at [42].

[39] Counsel for Arcturus argued that as s 155 provides that the applicant "may only make" a single application for one environmental authority (mining activities) for all mining activities that form a project, the term *may only* is directive. Reference was made to the decision of *David Grant and Company Pty Ltd v Westpac Banking Corporation* where the court held:[8]

> "The force of the term may only "is to define the jurisdiction of the court by imposing a requirement as to time as an essential condition of the new right conferred by Section 459G. An integer or element of the right created by Section 459G is its exercise by application made within the time specified. To adapt what was said by Isaacs J in *R v McNeil*, it is a condition of the gift in subs (1) of s459G that subs (2) be observed and, unless this is so, the gift can never take effect. The same is true of subs (3)."

[40] Reference was also made to the decision of *Grant Samuel Corporate Finance Pty Ltd v Fletcher*; *J P Morgan Chase Bank, National Association v Fletcher*,[9] where the term "may only" was considered by the High Court in the context of voidable transactions under the Corporations Act and whether a time period under that Act could be varied by a provision under State legislation.

> "Section 588FF(3) provides that an application under s 588FF(1) "may only be made" within the periods set out in pars (a) and (b) of s 588FF(3). The phrase "may only be made" should be read with both paragraphs. So understood, the term "may only" has the effect of defining the jurisdiction of the court by imposing a requirement as to time as an essential condition of the right conferred by s 588FF(1) to bring proceedings for orders with respect to voidable transactions. An element of that right is that it must be exercised within the time specified. This is what is conveyed by *Gordon v Tolcher*."

[41] Counsel for Arcturus also relied on *Project Blue Sky Inc v Australian Broadcasting Authority*[10] to argue that the requirement for a single application was a mandatory condition as follows:

> "[92] Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory. In *Pearse v Morrice*, Taunton J said "a clause is directory where the provisions contain mere matter of direction and nothing more". In *R v Loxdale*, Lord Mansfield CJ said "[t]here is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory". As a result, if the statutory condition is regarded as directory, an act done in breach of it does not result in invalidity. However,

[8] (1995) 184 CLR 265 at 276-277.
[9] (2015) 254 CLR 477 at [22].
[10] (1998) 194 CLR 355.

> statements can be found in the cases to support the proposition that, even if the condition is classified as directory, invalidity will result from non-compliance unless there has been "substantial compliance" with the provisions governing the exercise of the power. But it is impossible to reconcile these statements with the many cases which have held an act valid where there has been no substantial compliance with the provision authorising the act in question. Indeed in many of these cases, substantial compliance was not an issue simply because, as Dawson J pointed out in *Hunter Resources Ltd v Melville* when discussing the statutory provision in that case:
>
> > "Substantial compliance with the relevant statutory requirement was not possible. Either there was compliance or there was not."
>
> …"

[42] Reliance was also placed on the decision in *Chase Oyster Bar v Hamo Industries*[11] where Spigelman CJ held that the words in question there had a mandatory import:[12]

> "The element under consideration in the present case – "cannot be made unless" – has a similar mandatory import. To adapt the words of Gummow J in *David Grant v Westpac* at 277:
>
> > "... it is impossible to identify the function or utility of the words – "cannot be made" – if (they do) not mean what (they) say."

[43] Accordingly, on the basis of those decisions, Counsel for Arcturus argued that the term "may only" is an essential condition and that the language of the provision is intractable. Counsel argued that there is nothing in the structure of the EP Act as it was at the time EA 1613 was granted to suggest that it was possible to make more than one application for an environmental authority for all mining activities that formed the project proposed by Springsure Creek. Furthermore, Counsel argued that to look at the change to the legislation in 2013 to conclude that it was possible to make more than one application in 2012 was to look at the issue with the benefit of hindsight.

[44] Counsel for Arcturus therefore argued that at the date the application for EA 1613 was made, Springsure Creek had to comply with s 155 which was a necessary statutory requirement for the environmental authority. Counsel argued that the structure of the EP Act at the time was to ensure that the environment was adequately protected from all aspects of the mining operation which is apparent from the objects of the Act. Accordingly, requiring a single application for a mining project was consistent with the objects and purposes of the Act as there were obvious reasons why all components to a mining project needed to be considered at one time, particularly as a larger and more intense project might dictate additional environmental conditions to achieve an integrated management program consistent with ecologically sustainable development.

[45] Accordingly, it was argued that the words "may only" create a statutory prerequisite for the application and the effect of failure to comply with the statutory prerequisite was invalidity. As the decisions in *Hunter Resources Limited v Melville*[13] and *Fernando ats*

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[11] [2010] NSWCA 190.
[12] At [41].
[13] [1988] 164 CLR 234.

Minister for Immigration and Multicultural Affairs[14] establish because there were mandatory obligations in relation to the applications, strict compliance was necessary and EA 1613 is invalid.

Should the declaration be made and should the decision of the Land Court be set aside?

[46] Grounds 2, 4, 5, 6 and 7 of Arcturus' Amended Application for Judicial Review all relate to Arcturus' contention that EA 1613 was invalid because it did not cover the activities which were the subject of two mining lease applications namely MLA 70486 and MLA 70502 and the finding by the Land Court Member that Springsure did not have to make a single environmental authority application. The second environmental application EA 4713 which was lodged by Springsure on 24 May 2013 does not relate to land owned by Arcturus and Arcturus cannot therefore be aggrieved by the Land Court recommendation to grant that environmental authority. Rather, Arcturus' argument as I understand it is that as there was non-compliance with s 155 in respect of the first application, that failure has resulted in invalidity in the environmental application and that invalidity has affected the subsequent applications and makes them similarly invalid. Accordingly, all of these grounds essentially relate to s 155 and whether the requirements of that section were directory and not simply permissive.

[47] The basis upon which the Member came to her decision in relation to s 155 have been outlined above as have Arcturus' arguments as to why the decision should be set aside. Having considered the authorities relied on by Arcturus to argue that the requirements of s 155 were mandatory it is apparent that those decisions are only illustrative of the specific meaning of those phrases or words within the context of the actual legislation which is relevant to each decision. In this regard, I note that the decisions *David Grant and Co v Westpac* and *Grant Samuel Corporate Finance* involved the *Corporations Act* 2001. The first decision related to the regime set out in that legislation with respect to statutory demands where the company involved did not file an application to set aside the statutory demand within the strict time frames provided for by that Act. Similarly, the decision in *Grant Samuel* involved an application by a liquidator for extension of time within which to bring proceedings to set aside voidable transactions.

[48] It is also clear that *Chase Oyster Bar v Hamo* involved a decision where an application for an adjudication decision pursuant to the NSW *Building and Construction Industry Security of Payment Act* 1999 was made outside the time period provided for in s 17(2)(a) of the Act in circumstances where the adjudicator had incorrectly concluded on the facts that the notice had been made in time. It was in that context that the Court of Appeal held that as the application had not been made in accordance with the Act in the 20 business day period required, the determination of the adjudicator in the absence of a valid application was invalid. In my view, therefore, those decisions are of limited assistance in determining the legislative intention in the EP Act.

[49] It is necessary for me therefore to consider the regime established in the EP Act itself and to examine the words used in the context of the legislation as a whole. As I have already noted, s 3 states that the object of the Act is to protect the environment of Queensland while allowing for development which is ecologically sustainable development. Chapter 5 of the Act then sets out the process for assessing an environmental authority application

[14] [2000] FCA 324.

in relation to mining leases which includes issuing draft environmental authorities and the referral of objections to the Land Court.

[50] In this regard, Counsel for Arcturus argued that s 156 of the EP Act should not have been relied upon by the Member as s 156 permits amendment or replacement after the EA has been granted and can have no effect on the mandatory requirement of s 155 given the necessity for a single application, which is a requirement which must be satisfied before the grant of the EA. Furthermore, it is argued that reference to s 93 of the *Strategic Cropping Land Act* was also not relevant.

[51] In both the written submissions and oral argument, Counsel for Arcturus placed most weight on the unreasonableness ground of review and argued that no reasonable decision maker could have come to the decision which was made. There can be no doubt that the authorities clearly establish that the unreasonableness ground of judicial review necessarily involves a stringent test and is notoriously difficult to establish. It is not simply made out because a court disagrees with a decision made by the decision maker or the weight given to a particular matter in the making of the decision. The court's task on review is to examine the reasoning of the decision under review and to determine whether it was a decision that could be justified even though reasonable minds could differ. Such a review does not sanction a review on the merits and the question is whether the decision was so unreasonable that it lacked an evidence and intelligible justification.

[52] In *Minister for Immigration and Border Protection v SZVFW,*[15] Griffiths, Kerr and Farrell JJ observed that there were some general principles which could be extracted from the three leading decisions of *Minister for Immigration and Border Protection v Singh,*[16] *Minister for Immigration and Border Protection v Stretton*[17] and *Minister for Immigration and Citizenship v Li* as follows:[18]

- there is a legal presumption that a statutory discretionary power must be exercised reasonably in the legal sense of that word;
- nevertheless, there is an area within which a decision-maker has a genuinely free discretion, which area is bounded by the standard of legal reasonableness;
- the standard of legal reasonableness does not involve a court substituting its view as to how a discretion should be exercised for that of a decision-maker;
- the legal standard of reasonableness is not limited to what is in effect an irrational, if not bizarre, decision and an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified;
- in determining whether in a particular case a statutory discretion has been exercised unreasonably in the legal sense, close attention must be given to the scope and purpose of the statutory provision which confers the discretion and other related provisions;

[15] (2017) FCAFC 33 at [38].
[16] (2014) 231 FCR 437.
[17] (2016) 237 FCR 1.
[18] (2013) 249 CLR 332.

- legal unreasonableness "is invariably fact dependent" and requires a careful evaluation of the evidence. The outcome of any particular case raising unreasonableness will depend upon an application of the relevant principles to the relevant circumstances, rather than by way of an analysis of factual similarities or differences between individual cases;
- the concept of legal unreasonableness can be "outcome focused", such as where there is no evident and intelligible justification for a decision or, alternatively, it can reflect the characterisation of an underlying jurisdictional error;
- where reasons are provided, they will be the focal point for an assessment as to whether the decision is unreasonable in the legal sense and it would be a rare case to find that the exercise of a discretionary power is legally unreasonable where the reasons demonstrated a justification.

[53] As the authorities make clear, in determining whether in a particular case a discretion has been exercised unreasonably, attention must be given to the purpose of the statutory provisions and to the Act as a whole. An essential finding of the member was that the EP Act had some flexibility and that once an environmental authority is issued, it was not necessarily set in stone. When one considers the Act as a whole it is apparent that there was indeed such flexibility as is evidenced in ss 156(4), 207 and 225. Significantly s 156 (4) allows the holder of an environmental authority to apply to "amend or replace" the authority. Whilst Arcturus contends that the legislative scheme is inconsistent with the flexibility referred to by the Land Court, I do accept that submission given a consideration of the sections outlined above. Furthermore, as Counsel for Springsure Creek contends, the mining registrar retained a discretion to allow or refuse the application and indeed the Minister, pursuant to s 225, also had a discretion to allow or refuse the application to issue the EA.

[54] Counsel for the third respondent also referred me to s 238 of the EP Act which relates to the general provisions which apply in relation to applications for amendment of an environmental authority. In particular, I note that s 238(6) refers to an amendment application which allows an application to address "changes in activities". Those provisions do indeed support an argument that non-compliance was a matter that could be addressed at any stage of the process. With such a statutory framework it is difficult to argue that failure to comply with s 155 would automatically result in invalidity as Arcturus contends.

[55] Counsel for Arcturus also placed significant reliance on *Forrest and Forrest Pty Ltd v Wilson*[19] to argue that a single application for an environmental authority was an essential preliminary requirement to the exercise of power and that non-compliance with s 155 necessarily results in invalidity. However, once again it is necessary to consider the actual legislation under consideration and the language of s 74 of the *Mining Act* 1978 (WA) in that case was such that the legislation did possess a "rule like" quality. It was clear that the High Court considered that the legislation established a regime for the grant of mining leases and a consideration of the relevant provisions indicated that there had to be strict compliance given both the express terms and the structure of the provisions as sequential steps in an integrated process.[20] The High Court also stated that "effect should have been

[19] (2017) 346 ALR 1.
[20] At [64].

given to the text of the Act, bearing in mind that it established a regime to facilitate the grant of rights to exploit the valuable resources of the State."[21]

[56] A consideration of s 155 of the EP Act indicates that it does not contain anything like the requirements that were set out in s 74 of the *Mining Act* (WA), particularly the fact that s 155(4) allowed for the administrative authority to issue one environmental authority for all the activities or two or more environmental authorities for the activities meant the section did not have the determinative character that s 74 possessed. It was clearly open to the Member, after a consideration of the provisions of s 155 and the Act as a whole, to come to a conclusion that given the statutory regime under the EP Act it could not be established that the legislative purpose was that invalidity would result from non-compliance with s 155.

[57] Furthermore having considered the Member's decision it would seem to me that the Member in fact clearly identified the relevant test and made a decision based on the evidence as she found it to be. There is no basis for a finding that there has been an error of law or an improper exercise of power in that no reasonable person could have made such a finding. There was a basis for the determination that was made. There was a legislative basis for the conclusion that the Act allowed for flexibility and the legislative purpose of the Act included an ability to respond to environmental issues as they arose. Whilst Arcturus argued in its submissions in reply that the Land Court failed to make a relevant finding about s 155, I do not accept those submissions for the reasons set out above.

[58] I consider therefore that Arcturus' application for judicial review based on s 155 must fail.

[59] I turn to the other grounds contended for.

[60] Section 155 was then replaced by s 118 by the time the second application for an environmental authority was made and the terms "mining project" and "mining activities" were replaced by the terms "environmentally relevant activities" and "an ERA project". Section 118 then provided that the section applied if an entity proposes to carry out "environmentally relevant activities as an ERA project" and that the entity "may only make a single application for a single environmental authority for all relevant activities that form the project". The term ERA project was then defined in s 112 to include a "prescribed ERA project or a resource project" with resource project defined as "resource activities carried out, or proposed to be carried out, under 1 or more resource tenures, in any combination, as a single integrated operation".

[61] Section 113 then referred to single integrated operations as follows:

> "**113 Single integrated operations**
>
> Environmentally relevant activities are carried out as a single integrated operation if—
>
> (a) the activities are carried out under the day-to-day management of a single responsible individual, for example, a site or operations manager; and

[21] (2017) 346 ALR 1 at [81].

(b) the activities are operationally interrelated; and

(c) the activities are, or will be, carried out at 1 or more places; and

(d) the places where the activities are carried out are separated by distances short enough to make feasible the integrated day-to-day management of the activities."

[62] In relation to the submission by Springsure Creek and the third respondent that the project was not one mining project, the Member referred to s 113(a) of the EP Act and the definition of "a single operation" by reference to a number of preconditions, the first of which being that the activities are carried out under the day to day management of a single individual. The Member then referred to the evidence that the transportation of the coal was to be managed by an independent contractor and as such the proposed mine was not a "single integrated operation" and accordingly Springsure Creek did not have to make a single environmental application as follows:

> "[47] Robert Johansen is the managing director and company secretary of Springsure Creek. He gave evidence that Springsure Creek decided the best way to manage the transportation of the coal was by an independent contractor. Springsure Creek asked Toll Mining Services to provide a proposal for the provision of those services. In cross-examination, Mr Johansen stated that he expected that the transport operator would be responsible for that part of the operation, that it would appoint a supervisor, and that Springsure Creek would not interfere in the management of that aspect of the operation. His evidence was not challenged.
>
> [48] Arcturus submitted that I should not accept Mr Johansen's evidence because Springsure Creek knew that it needed a separate mining lease application before it submitted the first environmental authority application. That may be true, but Springsure Creek also knew that it did not intend to operate as one single integrated operation and Arcturus provided no basis for rejecting that evidence. I accept that the proposed mine was not a 'single integrated operation' within the meaning of s 113 of the EP Act. Therefore I find that Springsure Creek did not have to make a single application for an environmental authority."

[63] The member therefore concluded that on the evidence before her it was not a single integrated operation and accordingly ss 113 and 118 did not require Springsure Creek to make a single application. There can be no doubt that there was evidence upon which such a conclusion could be drawn given the unchallenged evidence of Mr Johansen. His evidence was that it was always contemplated that an independent contractor would be used for the haul road and rail out facility because Springsure Creek did not have any expertise in hauling coal. It would seem clear therefore that the activities relevant to EA 4713 were not of a kind which were integrated with those activities in EA 1613 as they were not to be carried out under the day to day management of the same person and were quite different activities.

[64] Given that evidence, it was obviously open on the evidence for the Member to conclude that the environmental applications did not relate to a "single integrated operation". Just because a particular operation is within the contemplation of a party and a necessary part of such, an operation does not make them a single integrated operation as defined. Clearly

the activities to be carried out in relation to MLA 70486 in relation to the longwall thermal coal mine by Arcturus were quite distinct from and were not integrated with MLA 70502 which involved the construction of a haul road and associated infrastructure to link the coal mine to a rail load-out facility by a different entity.

[65] That factual finding by the member is not therefore open to challenge on that basis. Counsel for Arcturus argued however that this finding was unnecessary and inappropriate given that the member had already determined that the failure to make a single application had not made the application itself invalid. Whether such a finding was necessary or not I do not consider that it affects the other findings that had already been made. As Counsel for Springsure Creek noted it was logical to examine how the phrase 'single integrated operation' was subsequently defined. I cannot discern any error in the approach taken by the member. I turn therefore to the other substantive grounds.

Grounds 4 and 5 which relate to s 93 of the *Strategic Cropping Land Act* 2011

[66] Counsel for Arcturus argued before the Land Court that s 93 of the *Strategic Cropping Land Act* 2011 (SCL Act) required a decision under that Act before an environmental authority could issue and that failure to comply with that provision meant that the draft environmental authority was invalid. The Member held that the provision stated that an environmental authority could not issue until a SCL protection decision had been made but noted that the term 'environmental authority" was defined by reference to the EP Act which made a distinction between a *draft* environmental authority and an environmental authority. The Member held that a draft environmental authority was what had issued rather than an environmental authority and accordingly there was no invalidity as "no environmental authority was issued prior to the SCL decision."

[67] Counsel for Arcturus argued that the definition of environmental authority in the SCL is not a discrete reference to either a draft environmental authority or an environmental authority and therefore it must apply to both. In particular, it is argued that this is consistent with the policy of the legislation as the only way that relevant resource developments can take into account SCL considerations is if they are in the forefront of the process. It should be at this early stage that there is the interaction between the SCL protection conditions and the EA conditions which should be properly considered and be the subject of the objections process. Furthermore, it is argued that s 93 must refer to a draft environmental authority because if s 93 permitted a draft environmental authority to be issued before a SCL protection decision then the public notices process would be rendered nugatory. In this case, the draft EA was issued on 21 February 2017 and the SCL protection decision was issued on 26 February 2017 and refers to EA 1613. Arcturus argued that there is no reason why the SCL protection decision could not have directed the imposition of SCL conditions on any EA that issued in relation to MLA 70486.

[68] The difficulty with that argument, as Counsel for both the second and third respondents point out is that s 19 of the SCL Act provided that an environmental authority is an environmental authority as defined under the EP Act Schedule 4. Schedule 4 then provides that an environmental authority means an environmental authority under Chapter 5 or 5A. It is significant that Schedule 4 has a separate definition for a draft environmental authority:

> "***draft environmental authority***, for an application for an environmental authority, means the draft environmental authority prepared by the administering authority under section 181(2)(b)(i)."

[69] It would seem therefore that the Act itself makes a clear distinction between an environmental authority and a draft environmental authority.

[70] There is no substance to this argument.

The arguments in relation to the standard of rehabilitation (Ground 7)

[71] Counsel for Arcturus argued that the making of the EA decision was an improper exercise of the power conferred by the EP Act in that the EA decision was so unreasonable that no reasonable person could have made the decision. It was argued that the land which was the subject of the mining lease application included large areas which were covered by the *Strategic Cropping Land Act*. Section 290 of the Act provided that it was a condition of the environmental authority that its holder must use "all reasonable endeavours to rehabilitate all impacts on the land from underground coal mining carried out under the lease". It is argued that in the initial decision, the member found at paragraph 148 that the draft EA conditions, by using different language, appeared to conflict with the *Strategic Cropping Land Act* protection conditions and at paragraph 152, the member found that the EP Act requires the draft conditions to include conditions about rehabilitation objectives, indicators and criteria and that at paragraph 155, the member found that there was a real issue as to what is the standard of rehabilitation for EA 1613.

[72] It is argued, therefore, that the effect of the member's findings was that there was insufficient evidence to permit her to make a determination. Rather than refusing to recommend that the environmental authorities be issued in the terms of the draft environmental authorities, the member inappropriately relied on the protocol between the Land Court and the Chief Executive who administered the *Environmental Protection Act*, to seek advice as to how a condition of the environmental authority could be drafted or varied. It was argued that the protocol does not identify the statutory basis for the court to enter into such protocol and there is no power for the court to enter into such a protocol as the Land Court's power is limited to issuing directions. Furthermore, it was argued the protocol was not entered into until 15 March 2018 and there was no indication that it was to operate retrospectively in relation to objections hearings that were already reserved for determination.

[73] It is argued that whilst s 222(1)(b) of the EP Act permitted the Land Court to recommend the draft EA on conditions that were different to conditions in the draft environmental authority, the Land Court was required to make the recommendation on the evidence before it. If there was no evidence or inadequate evidence before the Land Court to make the variation at the conclusion of the hearing, then it is argued that there was no basis upon which the court to make a decision to approve the applications for the environmental authorities and therefore the Land Court ought to have refused to issue EA 1613.

[74] Counsel contends therefore that the decision of the Land Court to recommend the issue of the EA was so unreasonable that no reasonable person could have made it. In particular, the environmental authority Condition J5 stated "that the land disturbed by mining must be rehabilitated in accordance with Appendix 1" and Appendix 1 required certification that the final land form represents "the equivalent good quality agricultural

land criteria as per the pre-mining condition and referred back to the SCL Act approval conditions". It was argued by Counsel for Arcturus that when the assessing officer Mr Tarlinton was cross-examined about that, his evidence was that he did not know whether he would have approved the draft EA conditions if he had known that the land could not be returned to the class of land equivalent to that prior to the development taking place.

[75] Counsel argued that at paragraph [150] of the initial decision,[22] the member found that Mr Tarlinton must have known that the land could not be returned to the class of land equivalent to that prior to the development taking place:

> [151] But Mr Tarlinton must have known that the land could not be returned to the class of land equivalent to that prior to the development taking place. He had access to the SCL protection conditions which made that point clearly. His assessing officer reported that the effects of the subsidence were not yet known and further modelling and testing was required. There is a specific condition (J1) that gives precedence to the SCL protection conditions. I am not prepared to assume that Mr Tarlinton's admission under cross-examination means that he would never have issued draft EA conditions if he was aware of the "true situation". In re-examination, this was addressed by counsel for Springsure Creek:
>
> > "And finally, the issuing of an environmental authority, is it fair to say that it's an outcome based outcome based process rather than effectively prescribing conduct?---Yes, that's correct, and that's the - the intent of the – the way the conditions are framed, to not be prescriptive but to allow the EA holder to determine their own methodologies and approaches to how they comply. What the department's interested in is the outcome".

[76] It is argued that without the appropriate evidence the court was not entitled to assume that Mr Tarlinton must have known the land could not be returned to the relevant standard. Arcturus contends therefore that there was insufficient evidence to commit the Court to make a determination and accordingly the Court should have refused to recommend that the environmental authorities be issued in the terms of the draft EA's. Whilst I note Arcturus' argument in this regard having read paragraph [151] of the member's reasons as set out above I do not consider the state of the evidence was as Arcturus argued. I consider the member indicated that the state of the evidence was such that she was not satisfied that Mr Tarlinton had agreed that he would not have issued the EA if he had been aware of the true situation because he must have been aware of the true situation given the state of information provided to him and he in fact issued the EA. I am satisfied there was a basis in evidence for the member to reach the conclusion that she did. Such a finding was open and I can discern no error as such a conclusion was neither unreasonable nor illogical.

[77] There is no doubt that there was a difference in opinion between the experts who gave evidence in the Land Court. Given the state of the evidence, the Court sought to invoke paragraph 6 of the Protocol by requesting the third respondent to advise how the environmental authority conditions could be varied to provide clarity about the standard of rehabilitation. It would seem that it is this action which the applicant contends means

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[22] *Springsure Creek Coal Pty Ltd v Arcturus Downs Limited & anor (No. 2)* [2018] QLC 8.

there was insufficient evidence upon which to make a decision and therefore the Court should have refused that EA's be issued in terms of the draft EA's.

[78] The question therefore is whether, given the state of the evidence, this was an appropriate step for the member to take. As Counsel for the second respondent points out and as I have previously recognised, it is important to remember that the function of the Land Court in this regard is not judicial but rather administrative and its function is to make an administrative assessment of applications under the *Environmental Protection Act.*[23] It would seem to me that when the Court is exercising this administrative function there is nothing inappropriate in seeking information from the third respondent who is the statutory party. Whilst the member sought to rely on a Protocol, which had been introduced after she reserved her decision, that document simply formalised a process that would seem to have already been in place for this very purpose. The real issue in my view is whether in adopting that process the rules of natural justice were satisfied.

[79] This was also raised as a ground of review by the applicant so I shall now turn to a consideration of that ground of review.

The natural justice argument (Ground 8)

[80] Counsel for Arcturus argued that the decision reveals that the member had found that there was a real issue as to what the standard of rehabilitation was for EA 1613 and that while several options had been identified, none had been agreed upon.[24] Arcturus is critical of the process that was then adopted by the member in relation to the determination of this issue and argued that there was a denial of natural justice in the way in which the member dealt with this issue. In this regard, I note that the member stated that the uncertainty about the standard of rehabilitation meant that the assessment of compensation due to Arcturus would be impossible in the near future unless there could be agreement on a "theoretical framework" against which the conditions could be assessed and monitored. It was against that background that the member considered it was appropriate to ask the statutory party to advise how the EA conditions might be varied to provide clarity about the standard of rehabilitation contemplated.

[81] The process that was then put in place by the member was that she made the following orders:

> "3(a) Subject to the following recommendations in relation to the draft environmental authority being adopted, I recommend that the environmental authority be issued in the terms of the draft environmental authorities EPML 00961613 and EPML 01584713.
>
> 3(b) I recommend that the draft environmental authority conditions relating to the standard of rehabilitation of Strategic Cropping Land be read subject to the requirements of the Strategic Cropping Land Decision.
>
> 3(c) I recommend that the draft environmental authority conditions relating to the standard of rehabilitation of Strategic Cropping Land be amended to provide clarity about the standard of rehabilitation contemplated.

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[23] *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 at [6] per Bowskill J.
[24] *Springsure Creek Coal Pty Ltd v Arcturus Downs Limited & anor (No. 2)* [2018] QLC 8 at [155].

(i) By 4:00pm on 4 May 2018, the Department of Environment and Heritage Protection must file in the Land Court Registry and serve on each other party a written advice on how the environmental authority condition might be varied to provide clarity about the standard of rehabilitation contemplated.

(ii) By 4:00pm on 18 May 2018, Springsure Creek Coal Pty Ltd and Arcturus Downs Limited must each file in the Land Court Registry and serve on each other party their submission about the proposed variations to the environmental authority conditions."

[82] The third respondent filed its written advice on how the environmental authority conditions might be varied on 4 May 2018 as required by those orders made 12 April 2018.

[83] Arcturus however objected to the process and the requirement that it serve its submissions on the proposed variations at the same time as Springsure Creek. In particular, Arcturus noted that the Department met with the applicant in relation to the proposed conditions but that they were not a party to that meeting. Arcturus requested that the order be varied so that its submissions be filed after Springsure Creeks so that it could address the changes proposed by the Department and any changes proposed by Springsure Creek. Arcturus also argued that such a course would allow it to know what Springsure Creek was seeking prior to filing its submissions and would overall be a more efficient exercise as it would avoid having to seek leave to file a second set of submissions and would also potentially reducing the scope of its submissions.

[84] Springsure Creek objected to that course. On 16 May 2018, the Land Court declined to vary the form of the orders made on 12 April 2018.

[85] Whilst Arcturus filed submissions on 18 May 2018 as directed, it argued that it was in limited terms given that it did not have an opportunity to know Springsure Creek's position about the variations and given it did not have an opportunity to test those variations during the course of the hearing. In its submissions, Arcturus argued that the inclusion of a new Figure in the advice from the third respondent about the variations was likely to cause confusion and lead to inconsistency. Furthermore, it submitted that the variations contained in the advice filed by the third respondent on 4 May 2018 did not resolve the issue of the standard of rehabilitation required.

[86] Counsel for Arcturus also argued that the Reasons for Decision of 12 July 2018 contained omissions and errors in the evidence as follows:

i. At paragraph [21] the Member noted that the statutory party had filed submissions in support of its proposed amendment of condition J10 but did not explain why the change had been made.

ii. At paragraphs [24] – [31], the Member noted that neither SCC nor Arcturus agreed with Figure 2 to the EA conditions which proposed different levels of rehabilitation to different areas of the land and that the data set that was likely to be the source of the information was not provided. Despite these issues, the Member accepted SCC's submissions about the appropriate selection of a data set and adopted the "GTES report" as the appropriate data set. The Member noted at [35] that:

> Substituting the GTES report plan should also allay Arcturus Downs' concerns about inconsistent conditions between the SCL Protection Decision and the EA conditions. That plan forms part of the SCL Protection Decision; by importing it into the EA conditions, there will be no scope for inconsistency.

[87] Accordingly, Arcturus argued that the process adopted meant that there was a denial of procedural fairness. Importantly, Arcturus argued that whilst it could make submissions, the way in which the Member dealt with the issues of inadequate evidence meant that Arcturus had no opportunity to ascertain whether there was any further evidence that may have been relevant to the variations to the EA conditions. Furthermore, Arcturus could not test the varied conditions or even make submissions which were responsive to Springsure Creek's arguments about the appropriate changes to the conditions. In addition Arcturus argued that the member made assumptions about what would or would not allay Arcturus concerns without hearing Arcturus on the issue.

[88] Accordingly it is argued that Arcturus was denied natural justice. Counsel relied on the decision of the Queensland Court of Appeal in *Wall v Windridge*[25] which considered the issue of procedural fairness in relation to the actions of a mining warden who had gathered further information from an applicant relevant to the objections to a mining lease after the conclusion of the objections hearing without informing the objector. The Court held that there had been a breach of the rules of natural justice. Pincus JA held that the warden, who was fulfilling functions under the *Mineral Resources Act* 1989:

> "was obliged to comply with the principles of natural justice, which required him to afford the appellant a reasonable opportunity to press his case as an objector and to answer any evidence which might be put forward in an endeavour to induce the Warden to decide against his objections."

[89] In coming to a determination on this issue of whether there has been a breach of the principles of natural justice there are a number of factors I need to take into account. I note in particular that there had been a hearing occupying five days before the Land Court member in January and March 2018 and a 36 page decision was delivered on 12 April 2018. That detailed decision dealt with the application before the Court by Arcturus, the evidence relevant to the application and the submissions and arguments of Counsel. The decision dismissed the application by Arcturus and recommended that the Minister grant the two mining leases subject to a number of recommendations in relation to the draft environmental authority being adopted. Those recommendations included the recommendation that the draft environmental authority conditions relating to Strategic Cropping Land be subject to the requirements of the Strategic Cropping Land protection conditions and the recommendation that the draft environmental authority conditions relating to the standard of rehabilitation of Strategic Cropping Land be amended to provide clarity about the standard of rehabilitation contemplated, in consultation with the Department. It was against that background that the orders were made on 12 April 2018 setting the timeframes for advice by the Department by 4 May 2018 and the submissions in response by both parties on the same date of 18 May 2018.

[90] It would seem clear therefore that both Arcturus and Springsure Creek were given the advice by the Department on the same date. As the orders made clear they were given

[25] [1999] 1 Qd R 329.

exactly the same information and the same response times. Significantly, both parties had an opportunity to respond to the advice by the Department. It would seem to me that against the background of a full hearing and orders which outlined an impartial procedure for the obtaining of further information to clarify an issue and where both sides were given an opportunity to respond, there can be no complaint that the principles of natural justice have been breached. True it is that Arcturus wanted an opportunity to argue the matter further, but that does not mean that procedure outlined by the member involved a breach of the rules of natural justice.

[91] The classic ingredients of the principles of natural justice include requirements that a party is made aware of the case that is put against them and is given an opportunity to present its material to the decision maker and be given an appropriate opportunity to address the issues raised. In my view the process adopted by the member allowed Arcturus ample opportunity to press its case and it clearly had ample opportunity to respond to the advice of the Department. Whilst Arcturus would have liked to know what Springsure Creeks submissions were those submissions did not contain any new evidence that Arcturus needed to respond to. Indeed in its submissions to the member, Arcturus was critical of the inclusion in the advice by the Department of Figure 2 as the area covered was different to the area referred to in the SCL Protection Decision and was likely therefore to cause ongoing confusion and inconsistency. In the reasons delivered on 12 July 2018 the member noted this contention and in particular specifically referred to the fact that neither party agreed to Figure 2 and referred to Springsure Creek's submissions about the inappropriate data set underpinning the Figure was out of date. The member then determined what information she relied upon and concluded that she could only act on the evidence before her and she clearly considered that she was constrained by the evidence before her which was clearly known by both parties.

[92] In my view the circumstances here are entirely different to the situation in *Wall v Windridge* where there was new evidence which was not known to one party and which could have influenced the warden in circumstances where there was no opportunity for the objector to respond to that information in any way.

The Utility Argument

[93] Springsure Creek and the third respondent both argued that the present application has no utility given that the Minister has already made the decision under s 225 to grant the environmental authorities.

[94] As I do not consider that Arcturus have established a basis for the declarations or orders sought pursuant to the amended application I do not consider that I need to address that aspect of the argument by the respondents.

Order

The Amended Application is dismissed.