PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*The Chief Executive administering the Environmental Protection Act 1994 v Baal Gammon Copper Pty Ltd & Anor* [2020] QPEC 28
PARTIES:	**THE CHIEF EXECUTIVE ADMINISTERING THE ENVIRONMENTAL PROTECTION ACT 1994** (applicant) **v** **BAAL GAMMON COPPER PTY LTD (ABN 43 149 583 933)** (first respondent) **And** **DENIS WALTER REINHARDT** (second respondent)
FILE NO/S:	4010 of 2018
DIVISION:	Planning and Environment Court
PROCEEDING:	Application to punish for contempt
ORIGINATING COURT:	Planning and Environment Court of Queensland, Brisbane
DELIVERED ON:	1 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	10 May, 26 and 27 June, 16 August, 25 and 26 November 2019
JUDGE:	Williamson QC DCJ
ORDER:	**1. The Amended application in pending proceeding filed on 27 November 2019 is dismissed.** **2. The matter be listed for review at 9:00 am on 5 June 2020.**
CATCHWORDS:	COURTS AND JUDGES – CONTEMPT – PARTICULAR CONTEMPTS – DISOBEDIENCE OF ORDERS OF COURT – where restraint order made under s 506 of the *Environmental Protection Act 1994* – whether order complied with – whether the first and second respondent have a lawful excuse for non-compliance with order – whether the first and second respondent are in contempt of the restraint order.
LEGISLATION:	*Corporations Act 2001*, ss 180, 588G *District Court Act 1967*, s 129

	Environmental Protection Act 1994, ss 363H, 506 *Mineral Resources Act 1989*, s 312 *Planning & Environment Court Act 2016*, s 36
CASES:	*Dowling v Bowie* (1952) 86 CLR 136
	Hafele Australia Pty Ltd & Anor v Maggbury Pty Ltd & Anor [2000] QCA 397
	Lade & Co Pty Ltd & Ors v Black [2006] QCA 294
	Wilson v McDonald [2009] WASCA 39
COUNSEL:	Mr J Dillon for the applicant Mr S Russell (Sol) for the respondent
SOLICITORS:	Department of Environment & Science Russells

Introduction

[1] The Chief Executive, by an Amended application in pending proceeding[1], seeks orders punishing the first and second respondent for contempt of an order I made on 17 December 2018[2]. The order was made under s 506 of the *Environmental Protection Act 1994* (**EPA**).

[2] The application seeks relief that is criminal in nature, and, as a consequence, the contempt must be proved beyond reasonable doubt[3]. Strictness in procedure, and proof, is demanded[4].

[3] The application is opposed by the respondents.

Background

[4] Prior to 14 March 2019, the first respondent was the holder of two mining leases, ML20388 and ML20568. The leases facilitated a mining operation at the Baal Gammon Mine near Mt Garnet in North Queensland. Part of the mining operation involved an open cut pit. Waste rock and water sits within the pit. The water is contaminated.

[5] In September 2015, the Department of Environment and Heritage Protection issued a '*clean-up notice*' to the first respondent under s 363H of the EPA[5]. The notice required the first respondent to: (1) remove all contaminated water from the site; (2) backfill the open cut pit with waste rock; and (3) cap the waste rock in the pit to prevent the ingress of water. The decision to issue the notice was appealed to this court. On 20 November 2015, the appeal was resolved by way of consent orders[6]. The orders had the effect of extending the time for compliance with the clean-up notice to 1 November 2018.

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1 Filed by leave on 27 November 2019.
2 Court doc. 18.
3 *Lade & Co Pty Ltd & Ors v Black* [2006] QCA 294, per Keane JA at [65] and [66].
4 *Hafele Australia Pty Ltd & Anor v Maggbury Pty Ltd & Anor* [2000] QCA 397, per Muir J at [29].
5 Court doc. 43, exhibits pp.113-120.
6 Court doc. 43, exhibits pp.121-131.

[6] On 9 November 2018, the applicant commenced these proceedings. The matter was listed for hearing on 17 December 2018. I made orders that day in accordance with an amended draft. The orders made are attached to these reasons for judgment, and marked "**A**".

[7] The order of 17 December 2018 comprises three key components. First, paragraphs 1 to 6 (inclusive) require prescribed '*interim measures*' to be carried out by the first respondent. Second, paragraphs 7 to 12 (inclusive) require '*final measures*' to be carried out by the first respondent. Third, paragraph 13 requires the second respondent, being a director of the first respondent, to ensure compliance is achieved with paragraphs 1 to 12 of the order.

[8] Interim measures were required to be carried out during the period 17 December 2018 to 30 April 2019. With the assistance of suitably qualified persons[7], the order required the first respondent to, inter alia: (1) develop and implement an environmental monitoring program; (2) commence treating the water in the pit to achieve a pH level of 9.2 to 10[8]; (3) commence dewatering the pit with high capacity evaporators once a pH level of 7, or greater, was achieved[9]; (4) discharge water to Jamie Creek once a number of preconditions were met, including the water achieving, and maintaining, a pH level of 9.2 to 10[10]; and (5) carry out monitoring and sampling in accordance with the Environmental Protection (Water) Policy 2009 – Monitoring and Sampling Manual (Version: February 2018)[11].

[9] Final measures were required to be carried out during the period 30 April 2019 to 1 October 2019. With the assistance of suitably qualified persons[12], the order required the first respondent to, inter alia: (1) develop and implement an environmental monitoring program[13]; (2) reduce the water level in the pit until the mine site water infrastructure had sufficient water storage below the supply level to contain a design storage calculated using the 1:100 annual exceedance probability, 3 month critical wet period[14]; (3) monitor and sample in accordance with the environmental monitoring program[15]; and (4) provide weekly reports to the applicant[16].

[10] It was submitted on behalf of the respondents that the works required to be carried out to comply with the order of 17 December 2018 were substantial, technically challenging and executed over an extended period of time. I accept this submission. The applicant did not contend otherwise.

[11] Further, it can also be accepted that the cost to achieve compliance with the order of 17 December 2017 was significant. The order required the first respondent to retain experts and carry out interim water treatment measures. The evidence establishes that a sum in the order of $200,000 to $250,000 was incurred by the second respondent in this regard.

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7 Order, paragraph 1.
8 Order, paragraph 2(a).
9 Order, paragraph 2(b).
10 Order, paragraph 2(c).
11 Order, paragraph 6.
12 Order, paragraphs 8 and 9.
13 Order, paragraph 8.
14 Order, paragraphs 7 and 12.
15 Order, paragraph 8.
16 Order, paragraph 11.

[12] The terms of the order also required the first respondent, as part of the final measures, to procure costly equipment to reduce the water level in the pit by any one of four alternative methods. The alternative methods that could be adopted included the use of high capacity evaporators, or reverse osmosis, or a combination of both. The cost of compliance with paragraph 7 of the order was allocated an initial budget of $1,000,000, and could have reached a figure as a high as $2,500,000.

[13] The Application in pending proceeding was filed on 24 June 2019[17]. The hearing of the application occupied some 6 days. It was protracted due to extensive objections taken on behalf of the respondents to the applicant's affidavit material. Part way through the hearing, the orders of 17 December 2018 were vacated[18]. The application was also amended by the applicant on 27 November 2019.

[14] The Amended application in pending proceeding alleges the first respondent should be punished for contempt for failing to comply with paragraphs 2(a), 6(a), 6(b), 6(c), 6(d) and 7 of the order of 17 December 2018. It also alleges the second respondent should be punished for contempt for failing to comply with paragraph 13 of the order of 17 December 2018.

Power to punish for contempt

[15] The court's power to punish for contempt is provided by s 36 of the *Planning & Environment Court Act 2016*. It states that s 129 of the *District Court Act 1967* (**DCA**) applies in the same way it applies to the District Court. Relevantly, s 129(1)(a) states:

> "*(1) A person is in contempt of the District Court if the person –*
>
> *(a) without lawful excuse, fails to comply with an order of the court (other than an order mentioned in paragraph (e)[19]), or an undertaking given to the court; or…*"

[16] The respondents resist the Amended application in pending proceeding on a number of bases, one of which includes a contention there is a lawful excuse for non-compliance as contemplated by s 129(1)(a) of the DCA. The parties disagreed as to where the onus lies for this point. In my view, the onus lies with the applicant to exclude the existence of a lawful excuse. It does so because s 129(1)(a) is a single expression of all of the elements that are to be proven to establish contempt[20]. As a consequence, the applicant must negative the existence of a '*lawful excuse*' beyond reasonable doubt as if it were an element of the alleged contempt.

[17] The structure of s 129(1)(a) of the DCA calls for two issues to be examined with respect to each alleged non-compliance with the order of 17 December 2018. The two issues are: (1) has there been a failure to comply with the order? and (2) if non-compliance with the order is established, has the applicant negatived any lawful excuse?

[18] I will now deal with each alleged contempt of the order of 17 December 2018, having regard to the two issues stated above.

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17 Court doc. 46.
18 By order of 28 June 2018.
19 Subsection (e) does not apply to this application in pending proceeding.
20 *cf Dowling v Bowie* (1952) 86 CLR 136, per Williams and Taylor JJ at 144.

Paragraph (2)(a)

[19] Paragraph 2(a) of the order of 17 December 2018 is an interim measure, and states:

> "*2. The First Respondent must carry out the following measures until 30 April 2019:*
>
> *(a) by 16 January 2019, the First Respondent must commence and continue treating the water in the Baal Gammon Pit (the Pit) with calcium hydroxide to achieve and maintain a pH level of 9.2 to 10 using competent suitably qualified person(s);*"

[20] The Amended application in pending proceeding alleges the first respondent failed to comply with paragraph 2(a) of the order. The non-compliance is particularised as: (1) the first respondent did not treat the water in the pit with calcium hydroxide to achieve and maintain a pH level of 9.2 to 10 on and from 8 March 2019 to 30 April 2019; and (2) at no time between 16 January 2019 and 30 April 2019 did the water in the pit achieve a pH level of 9.2 to 10.

[21] The evidence before the court includes a number of affidavits of the second respondent, who is a director of the first respondent. In his capacity as director of the first respondent, he made a number of admissions, which establish that the water in the pit was not treated on, and from, 7 March 2019. More particularly, the evidence establishes that the first respondent, in accordance with the order, retained three experts, namely Ms Hughes, a geologist and environmental scientist, Mr Adil, a registered engineer, and Mr Belcher, a geologist and expert in the preparation of water evaporation plans. Acting on the advice received from these experts, the first respondent commenced treatment of the water in the pit on 16 January 2019. The treatment ceased on 7 March 2019. The water in the pit was sampled on 11 March 2019, and indicated a pH level of 6.4.

[22] Accordingly, I am satisfied there has been non-compliance with paragraph 2(a) of the order of 17 December 2018. This is on the limited basis emphasised below in particular (d) to paragraph 4 of the Amended application in pending proceeding, which states:

> "*The First respondent did not treat the water in the Pit with calcium hydroxide to achieve and maintain a pH level of 9.2 to 9.10 (sic) on and from 8 March 2019 to 30 April 2019.*"

[23] As to item (2) in paragraph [20] above, I do not accept the allegation identified therein has been established beyond reasonable doubt.

[24] There is a substantial body of evidence relied upon by the applicant to prove the pH level of the water in the pit at no time achieved the prescribed pH range of 9.2 to 10. It comprises a large body of testing results for water monitoring carried out by the Department of Environment and Science. The results are expressed in scientific terms, are difficult to read, and oppressive in volume. At face value, the testing data suggests the pH of the water in the pit did not achieve a level of 9.2 to 10.

[25] That said, I was not directed to any particular part of the evidence which negatived the following statement contained in correspondence from the respondents' solicitors to the litigation branch of the Department of Environment and Science, dated 18 March 2019. The correspondence asserts the prescribed pH level was achieved in the pit. The correspondence states:

> "*…measurements taken by our client today indicate that the pH levels of the water in the Pit were 9.4 at depth and 10.00 at the surface…*"

[26] This assertion was not disputed by the Department in any correspondence published in response to the letter of 18 March 2019. Indeed, a letter dated 19 March 2019, sent from the Department's litigation branch to the respondents' solicitor, does not take issue with the assertion. Moreover, the contents of the Department's correspondence suggests the measurements provided by the respondents were consistent with its own monitoring results. All of this this occurred in circumstances where the treatment of the water was known to have ceased on 7 March 2019.

[27] The letter of 18 March 2019 was not the only document asserting the prescribed pH level of 9.2 to 10 had been achieved. Further correspondence sent to the Department, dated 5 April 2019, suggests the water at the surface of the pit achieved a pH level of 9.8. I was not directed to any material that negatived this contention, let alone a response from the Department joining issue with the assertion by reference to known testing results.

[28] Given the matters referred to in paragraphs [25] to [27], the evidence, in my view, raises a reasonable doubt as to whether the water in the pit achieved the pH level prescribed by paragraph 2(a) of the order. The assertion that the pH level was never achieved in the pit has not, as a consequence, been proven by the applicant beyond reasonable doubt.

[29] It is submitted on behalf of the first and second respondent there are two reasons why contempt of paragraph 2(a) of the order has not, in any event, been established.

[30] First, it is submitted that paragraph 2(a) of the order, properly construed, does not impose an absolute obligation to achieve a chemical characteristic, namely a prescribed pH level. Rather, it is said the order required the first respondent to retain and use suitably qualified persons '*for the purposes*' of achieving a chemical characteristic by 30 April 2019. Alternatively, it was said that the order is, in any event, ambiguous in this regard.

[31] I do not accept the primary, or alternative, submission. Paragraph 2(a) of the order does not use the phrase '*for the purposes of*'. The language of paragraph 2(a) of the order is clear. It states in unequivocal terms that the first respondent is to commence, and continue, treating the water in the pit with calcium hydroxide to achieve and maintain a specific pH level. I do not regard this as ambiguous. It states a clear test against which compliance can be measured. Further, that this requirement was to be achieved using suitably qualified persons does not introduce ambiguity, or warrant reading words into the order, which have the effect of altering its meaning (as is suggested by the first and second respondent).

[32] Second, and in the alternative, the first and second respondent submit the non-compliance with paragraph 2(a) is explained by lawful excuse.

[33] This submission was advanced on the footing that the phrase '*without lawful excuse*' is not defined. Rather, the court was invited to adopt a flexible approach to its meaning, and adapt the expression to the nature of the acts or defaults said to constitute the contempt. I accept this submission[21].

[34] What is the lawful excuse relied upon by the first and second respondent?

[35] It was submitted on behalf of the first and second respondents that the State interfered with, and interrupted, compliance with the order. The extent to which this occurred is said to have rendered compliance with the order difficult, if not impossible. The evidence of the second respondent, Mr Reinhardt, points to three events that impeded the respondents' ability to comply with the order of 17 December 2018.

[36] To achieve compliance with paragraph 2(a) of the order, the first respondent retained a number of experts and a contractor, Turbid Water Solutions. As I have already mentioned, the evidence establishes that the first respondent, armed with the necessary advice, commenced treatment of the water in the pit on 16 January 2019. The treatment continued until 7 March 2019.

[37] The evidence establishes that treatment works carried out on behalf of the first respondent were interrupted by the Department of Environment and Science, who elected to instruct its own contractor, Media Water Solutions. This contractor was retained by the Department to become involved in the treatment of the water in the pit. The interference commenced on, and from, 8 February 2019. It ceased on 7 March 2019, but only after a number of written requests were made by the solicitor retained on behalf of the respondents. The interference recommenced on or about 21 March 2019, and was continuous after that time.

[38] There is a substantial body of correspondence before the court detailing the difficulties that arose by reason that two contractors were treating the water in the pit in tandem. The difficulty, which was alerted to by the first respondent's experts, involved a risk that the pit would be over treated, and the pH level exceed 10. This risk was drawn to the Department's attention on numerous occasions. Despite this, the Department maintained that its contractor should continue treating the water in tandem with the contractor retained by the first respondent.

[39] The first respondent ceased treating the water in the pit on 7 March 2019. It did so to allow time for the treatment undertaken by the two contractors to mix and settle, and to sample the resulting pH level. The evidence does not suggest the first respondent's decision to cease treatment of the water was in contumelious disregard of the order of the court. Rather, it suggests the first respondent had adopted a course, based on expert advice, to deal with an issue that arose because of the Department's election to involve itself, and a contractor, in the treatment of the water in the pit.

[40] That the decision to cease treating the water was intended to achieve compliance with the order is supported by correspondence before the court dated 8 March 2019. In that correspondence, the respondents' solicitor informed the Department of Environment and Science that a particular course would be adopted on, and from, that date to treat and sample the water in the pit. Paragraph 4(b) of the letter indicated that a pH level of 9.2 to 10 would likely be achieved on 11 March 2019, or soon thereafter.

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21 Which is supported by *Wilson v McDonald* [2009] WASCA 39, per Martin CJ at [61].

[41] The second event relied upon by the first respondent as a lawful excuse occurred on 14 March 2019. On this date, a delegate of the Minister for the Department of Natural Resources, Mines and Energy decided to terminate mining lease ML 20568. The consequences of the termination are set out in s 312 of the *Mineral Resources Act 1989*, which provides:

> ***"312 Effect of termination of mining lease***
>
> *(1) This section applies on the termination of a mining lease.*
>
> *(2) However, this section does not apply to a mining lease if the termination is for granting a mining claim or a new mining lease over the area of the terminated lease to the holder of the terminated lease.*
>
> *(3) The person who was the holder of the terminated mining lease immediately before its termination must immediately remove each post or other thing used to mark the land under this Act (other than a survey mark or anything else required under another Act not to be removed).*
>
> *(4) On the termination of the mining lease, the ownership of all mineral and property on the land in the area of the terminated lease divests from the owner and vests in the State.*
>
> *(5) However, subsection (4) applies to property only if it was brought on to the land under the terminated mining lease.*"

[42] In a number of affidavits, the second respondent said the decision to terminate the mining lease had various consequences, all of which hampered the first respondent's ability to comply with the order of 17 December 2018. Given s 312 of the *Mineral Resources Act 1989*, and the legal consequences flowing from the decision to terminate the mining lease, it is not difficult to accept this point. The point is also made good by the evidence, which identifies the practical difficulties that arose and impeded the respondents' ability to comply with the order. For example, paragraph 54 of the second respondent's affidavit filed 3 May 2019 states:

> "*54. On or about 18 March 2019, I was informed by Mr Gavin Moore, the foreman on the Mine and I believe, that he and other employees of the first respondent had been told by officers of the DNRME that their personal motor vehicles brought onto the Mine by them each day had become the property of the State due to the cancellation of the Mining Leases. Mr Moore also informed me, and I believe, that officers of the DNRME had refused him access to a computer owned by Ms Hughes, a third party contractor of the third respondent, which was used on the Mine to download and collate weather data from the weather stations on site required in order for the first respondent to comply with its reporting obligations under the Order.*"

[43] The above evidence was not challenged. It vividly reveals the decision to terminate the mining lease had a practical effect on the first respondent's ability to comply with the order. At the very least, the decision created confusion about rights to enter the lease area, and questions about what property, if any, vested in the State. This was in circumstances where the property about which the doubt arose was owned by employees and/or contractors retained to carry out works required to achieve compliance with the order of 17 December 2018. The confusion was the direct product of a decision made by an entity that was not a party to the order made on 17 December 2018.

[44] That the decision to terminate the mining lease impeded the respondents' ability to comply with the order of 17 December 2018 is further supported by paragraph 64 of the second respondent's affidavit filed 3 May 2019. This aspect of the evidence provides a summary of the consequences said to flow from the decision to terminate the mining lease:

> "*In summary, the purported cancelation of the Mining leases has hampered the first respondent's ability to comply with its obligations under the Orders by:*
>
> *(a) requiring that time and resources be devoted from 14 March 2019 onwards into (sic) instructing solicitors to prepare an application to set aside the decision to cancel the Mining Leases;*
>
> *(b) requiring that time and resources be devoted from 14 March 2019 to dealing with contentions made by officers of the DNRME that all property brought onto the Mine by third parties vested in the State by virtue of the cancelation of the Mining Leases;*
>
> *(c) the reluctance of third party contractors to come onto the Mine in order to undertake work in (sic) behalf of the first respondent as a result of those contentions made by officers of the DNRME; and*
>
> *(d) the reluctance of potential lenders to advance funds to the first respondent secured by the Mine in circumstances where the Mining Leases have purportedly been cancelled.*"

[45] I accept this evidence. As I have already said, the consequences of the decision to terminate the lease are not difficult to accept. They are consistent with the contention that the decision to terminate the mining lease had an impact on the first respondent's ability to comply with the order. In simple terms, a review of Mr Reinhardt's various affidavits reveals the decision disrupted relationships with contractors, experts and employees. It was these very persons that were required to enter the lease area and progress the treatment of the water in order to comply with the order of the court.

[46] The applicant relies upon a letter dated 14 March 2019 to overcome the difficulties said to face both respondents in achieving compliance with the order by reason of the decision to terminate the mining lease. The letter makes it clear that the delegate of the Minister consented to the first respondent (by its agents, employees and contractors) entering the land to comply with the order of 17 December 2018.

[47] In a theoretical sense, the letter of 14 March 2019 granting conditional access to the lease area could be said to cure the difficulties facing the respondents in terms of compliance with the order. The real-world position was, as the evidence shows, more problematic than this theory may suggest. The evidence establishes there was confusion on the part of employees, contractors and experts as to the implications of the termination given s 312(3) and (4) of the *Mineral Resources Act 1989*. This confusion made the situation a difficult one. It was an unexpected, and clear, distraction for the respondents from the requirements of the order of 17 December 2018. The situation was particularly problematic given the evidence reveals that contractors and experts retained by the first respondent refused to undertake any works as contemplated by the order of the court after 14 March 2018. Importantly, they could not be compelled by the respondents to enter the land and carry out works required by the order.

[48] The third event interfering with the first respondent's ability to comply with the order occurred on 23 May 2019. On this date, the delegate for the Minister for Natural Resources, Mines and Energy withdrew consent for the first respondent, its contractors and agents to enter the lease area. From this point in time, the respondents could not obtain access to the lease area. Compliance with the order was, as submitted, impossible.

[49] The matters discussed in paragraphs [35] to [47] raise, in my view, a lawful excuse for the purposes of s 129(1)(a) of the DCA and the alleged non-compliance with paragraph 2(a) of the order. The applicant did not negative this lawful excuse.

[50] The third event referred to in paragraph [48] is not a lawful excuse for the alleged non-compliance with paragraph 2(a) of the order of 17 December 2018. It is an event that occurred after the time for compliance with the order had expired.

[51] Submissions made on behalf of the respondents raise a further matter that is relevant to the issue of lawful excuse. It was submitted:

> "*On 14 March 2019, the State of Queensland forfeited the Mining Leases, thus effectively putting paid to any prospect of the Respondents raising finance to comply with the Order (and return to mining operations).*"

[52] As I have already said, I am satisfied the order of 17 December 2018 required the first respondent to incur substantial expense to comply with it. The second respondent was likewise obliged to incur substantial expense as he was required to ensure the first respondent complied with the order.

[53] The evidence establishes that the respondents did seek to comply with the court's order after 14 March 2019. The difficulty they both faced, however, was that they exhausted all funds available to them, and have, since late March 2019, been unable to pay for works required to comply with the order. The point made by Mr Russell in this context was that compliance with the order, from late March 2019 onwards, would have required both respondents to act unlawfully. More particularly, it was submitted that once they exhausted all available funds, the both respondents needed to borrow money to pay for the works required by the order, which neither were able to repay. Borrowing funds to carry out the work was problematic for Mr Reinhardt. As a director, his duties were prescribed by, inter alia, ss 180 and 588G of the *Corporations Act 2001*. These legislative provisions required Mr Reinhardt to: (1) prevent the first respondent from incurring debts it could not repay; and (2) exercise powers and duties, as a director, using reasonable care and diligence.

[54] I accept the submission made by Mr Russell in this regard. The point underlying the submission is to the effect that compliance with the court's order could only have been achieved by a contravention of a statutory duty under the *Corporations Act 2001*. This, in my view, can be fairly regarded in all of the circumstances of this case as a lawful excuse for non-compliance with paragraph 2(a) of the order of 17 December 2018. The circumstances of the case here include the matters set out in paragraphs [10] to [12] above.

[55] In response, counsel for the applicant sought to advance the proposition that the impecuniosity of the first and second respondent should not be viewed as a lawful excuse for non-compliance. It was said that any inability to comply with the orders was the direct result of poor financial management, which had manifested long before the time for compliance with the order arrived. As I understood the submission, it appeared that I was also invited to reject, for reasons associated with credit, the evidence of Mr Reinhardt who deposed to his own financial position, and that of the first respondent.

[56] As to Mr Reinhardt's evidence, he was not shaken in cross-examination. He was frank about his financial position, and that of the first respondent. His evidence also revealed that he had expended considerable funds of his own to comply with the order of 17 December 2018, but was unable to sustain that approach once the mining lease was terminated. I accept this evidence. I was not persuaded by the applicant that this evidence was unreliable or false. The evidence established that upon termination of the mining lease:

(a) the first respondent was unable to fund any works required to comply with the order;

(b) the second respondent was unable to fund any works required to comply with the order; and

(c) neither the first or second respondent were in a position to borrow money to comply with the order.

[57] Whilst it is a legitimate criticism to suggest the financial difficulties facing both respondents were a product of their own making, that submission does not diminish the force of the '*lawful excuse*' when appreciated in context. The reality facing the respondents was that the decision to terminate the mining lease had an impact on their ability to comply with the court's order. That impact disrupted relationships between the respondents and contractors, employees and experts, who were relied upon to carry out the very works required to comply with the order. It had the effect of removing from their control an asset that could be used as security to obtain funding necessary to undertake the considerable schedule of works required to comply with the order. In simple terms, the termination of the mining lease rendered it more difficult for both respondents to comply with the order. This was a decision of a third party not bound by the order of 17 December 2018. That a third party's actions impeded the respondents' ability to comply with the order is, in my view, a valid and lawful excuse to raise in response to an alleged non-compliance with the order of the court. That lawful excuse has not been negatived.

[58] In the circumstances, I am not satisfied contempt with paragraph 2(a) of the order of 17 December 2018 has been established beyond reasonable doubt.

Paragraph (6)(a), (b), (c) and (d)

[59] Paragraph 6(a), (b), (c) and (d) of the order of 17 December 2018 are interim measures, and state:

> "*6. Without limiting Order 1, the First respondent must, in accordance with the Environmental Protection (Water) Policy 2009 – Monitoring and Sampling Manual (Version: February 2018):*
>
> *(a) monitor the pH levels and electrical conductivity levels at a location in Jamie Creek downstream from the agreed upon release point, and also at a location within Jamie Creek within 200 metres of the Junction of the Jamie Creek and Walsh River;*"
>
> *(b) monitor the flow rate at a location within 20 metres upstream from the agreed upon release point;*"
>
> *(c) conduct sampling and analysis at locations in Jamie Creek downstream from the agreed upon release point, and also at locations at the junction of Jamie Creek and Walsh River;"*
>
> *(d) commencing 14 January 2019, provide the Applicant with a report each week identifying:*
>
> *(i) the volume of rain received (if any), and the daily water levels (as a Reduced Level (RL) and volume (in megalitres) in the Pit and the mine water dam;*
>
> *(ii) the measures applied in the preceding week to reduce the water level under Order 2 and the amount of water removed;*

(iii) the measures to be applied in the forthcoming week to reduce the water level under Order 2;

(iv) the results of any environmental monitoring conducted under this, or otherwise required under Environmental Authority EMPL00977513; and

(v) advising of start and stop times (including dates) of any water releases from the Pit."

[60] The applicant alleges the first respondent did not comply with the above order for the reasons particularised at paragraph 5 of the Amended application in pending proceeding. The particulars allege non-compliance with the order because:

(a) the first respondent did not provide reports for the weeks ending 1, 8, 15 and 29 April 2019;

(b) the reports provided by the first respondent for the weeks ending 18 and 25 March and 22 April 2019 did not identify the results of the environmental monitoring required by paragraphs 6(a),(b) and (c); and

(c) given (a) and (b) above, it is to be inferred that the first respondent did not undertake monitoring, sampling and analysis as required by paragraphs 6(a), (b) and (c).

[61] The alleged non-compliances with paragraph 6 of the order of 17 December 2018 can be dealt with briefly.

[62] Paragraph 6 of the order requires the first respondent to take particular steps '*in accordance*' with an identified manual. The manual was not in evidence before the court. Nor was there evidence to establish it had been attached to, and served with, the order of 17 December 2018. The absence of this evidence is fatal. It means the applicant is unable to prove what was required to comply with the manual, and, in turn, the order, in respect of monitoring, sampling and reporting.

[63] Given the above, and given the nature of the proceeding and the requirement for strict proof, I am not satisfied the applicant has proved beyond reasonable doubt all of the elements of the alleged contempt of paragraph 6 of the order. As a consequence, I am not satisfied there has been a non-compliance with paragraphs 6(a), (b), (c) and (d) of the order of 17 December 2018.

[64] I pause to observe that the applicant's case is not improved even if it were assumed the alleged non-compliance with paragraphs 6(a) to (d) of the order had been proven to the requisite standard. This is because I accept that the '*lawful excuse*' discussed in paragraphs [35] to [57] above applies equally to an alleged non-compliance with paragraph 6 of the order. The lawful excuse was not negatived by the applicant.

Paragraph 7

[65] Paragraph 7 of the order of 17 December 2018 is a final measure, and states:

> "*7. The First Respondent reduce the water level in the Pit by at least 1.1 megalitres a day commencing on 30 April 2019 and continuing until 1 October 2019 or until the mine site water infrastructure has sufficient water storage below the full supply level of the Pit to contain a design storage allowance calculated using the 1:100 annual exceedance probability, 3 month critical wet period, with such reduction to be effected by:*
>
> *(a) using high capacity evaporators or irrigation water reduction methods within the Pit catchment area; or*
>
> *(b) using a reverse osmosis water reduction method to treat and release the water to Jamie Creek; or*
>
> *(c) using any combination of the water reduction methods identified in paragraphs 7(a) and 7(b) above; or*
>
> *(d) any such other method agreed to in writing (which will not be unreasonably withheld) by the Applicant and the First Respondent.*"

[66] The particulars contained in paragraph 7 of the Amended application in pending proceeding allege that on and from 30 April 2019 the first respondent did not reduce the water level in the pit using any of the methods specified in paragraphs 7(a), (b) or (c) of the order. This allegation is established beyond reasonable doubt by the evidence. The evidence establishes that the works required by paragraph 7 of the order never commenced within the prescribed time.

[67] For the reasons given above, I am however satisfied that there is a lawful excuse for non-compliance with this aspect of the order. The evidence establishes that the respondents' ability to comply with the order was impeded, if not rendered impossible, after 14 March 2019.

[68] In the context of paragraph 7 of the order, the consequences flowing from the termination of the mining lease for the first and second respondent cannot, in my view, be understated. This part of the order required the first respondent to procure significant plant and equipment. Finance in the order of $1,000,000 to $2,500,000 was required to fund the final measures. The actual sum to be incurred turned upon whether reverse osmosis treatment was, in fact, required. It is clear from the evidence that this sum of money was not readily available to either respondent. They could not borrow the funds. The inability to borrow funds, and its impact on compliance, was dealt with at paragraphs 61 to 63 of Mr Reinhardt's affidavit filed 3 May 2019. He said:

> "*61. Prior to receiving notice of the purported cancellation of the Mining leases on 14 March 2019, I had sought finance from Warburton Partners, Abe Tomas, David Mackintosh, Tom Eadie, Les Mosch, RTS fund, Greenfields contractors, Shandong Guoda, Auctus Minerals and others.*

> *62. As a result of the purported cancellation of the Mining Leases, I have been informed by all bar one of those parties that they are no longer prepared to loan money to the first respondent on the basis of security over the Mine or to invest in anyway, notwithstanding that the first respondent has applied to set aside the decision to cancel the Mining Leases.*
>
> *63. Since 14 March 2019, I have sought finance of up to $1 million from First Fleet Finance, Greenfields Contractors, Warburton Partners, RTS fund, Seymour Engineering, Clive Palmer and other mining investors. They have informed me that they are not prepared to advance any funds to the first respondent until such time as the decision to cancel the Mining Leases has been set aside.*"

[69] The applicant did not challenge this evidence in cross-examination. I accept it. It is but further evidence of the impact of the decision to terminate the mining lease upon the respondents' ability to comply with the order of the court. It is a consequence that flows from the decision of a third party, which was communicated to the respondents prior to 30 April 2019.

[70] Accordingly, I am not satisfied the applicant has negatived the contention there is a lawful excuse for the alleged non-compliance with paragraph 7 of the order. I am therefore not satisfied a finding of contempt is appropriate under s 129(1)(a) of the DCA in respect of paragraph 7 of the order of 17 December 2018.

Paragraph 13

[71] The applicant alleges the second respondent did not comply with paragraph 13 of the order of 17 December 2018, which states:

> "*13. The Second Respondent must ensure that the First Respondent complies with Orders 1 to 12 inclusive.*"

[72] The particulars contained in paragraph 8 of the Amended application in pending proceeding allege that the non-compliance arises here because: (1) the second respondent is a director of the first respondent; and (2) the second respondent failed to ensure the first respondent complied with paragraphs 2(a), 6(a), 6(b), 6(c), 6(d) and 7 of the order of 17 December 2018.

[73] I am satisfied item (1) has been established beyond reasonable doubt.

[74] As to item (2), the applicant's case against the second respondent assumes success has been achieved against the first respondent. For the reasons given above, the first respondent's alleged contempt has not been proven to the requisite standard. The case advanced against the second respondent must therefore, in my view, fail.

[75] Further, I would add that the evidence establishes the second respondent was conscious of the requirements of paragraph 13 of the order of 17 December 2018. He did what he could to ensure compliance with the order. Those efforts were, however, ultimately unsuccessful and thwarted in large measure by the decision to terminate the mining lease. That decision was a matter beyond the second respondent's control. Like the first respondent, the second respondent's reliance upon the decision to terminate the mining lease, and its consequential impacts, gives rise to a lawful excuse for non-compliance with paragraph 13 of the order of 17 December 2018. That lawful excuse was not negatived by the applicant.

Conclusion

[76] The Amended application in pending proceeding is dismissed.

[77] The written submissions prepared on behalf of the first and second respondent indicated they wished to be heard about costs. The matter will be reviewed at 9:00am on 5 June 2020 for this purpose.

"A"

18 OAP mm amended draft.

m.w 17/12/

In the Planning and Environment Court
Held at: Brisbane

No 4010 of 2018

Between:	**The Chief Executive administering the *Environmental Protection Act 1994***	Applicant
And:	**Baal Gammon Copper Pty Ltd (ABN 43 149 583 933)**	First Respondent
And:	**Denis Walter Reinhardt**	Second Respondent

ORDER

Before: Judge Williamson QC

Date of Hearing: 17 December 2018

Date of Order: 17 December 2018

IT IS ORDERED THAT PURSUANT TO SECTION 506 OF THE ENVIRONMENTAL PROTECTION ACT 1994 (QLD):

Interim measures

1. The First Respondent immediately engage suitably qualified person(s) to develop, implement and report on an environmental monitoring program to detect, minimise and manage any potential environmental impacts associated with implementing the measures outlined in Order 2.

2. The First Respondent must carry out the following measures until 30 April 2019:

   (a) by 16 January 2019, the First Respondent must commence and continue treating the water in the Baal Gammon Pit (**the Pit**) with calcium hydroxide to achieve and maintain a pH level of 9.2 to 10 using competent suitably qualified person(s);

(b) once a pH level of 7 or greater has been achieved for the water in the Pit, the First Respondent must commence dewatering the Pit using high capacity evaporators within the Pit catchment area to achieve an average water reduction of no less than 0.2 megalitres a day over any 30 day period, but use best endeavours to achieve 0.5 megalitres a day over any 30 day period, ~~but in any event commence and continue using the onsite irrigation system as well as two enhanced evaporation cannons equivalent to Wet Earth E60 cannons for at least 12 hours per day except when raining~~; and

(c) once a pH level of 9.2 to 10.0, an electrical conductivity level of up to 8,000 uScm, and a turbidity level of less than 5 NTU has been achieved for the water to be discharged from the Pit, or at other times agreed in writing by the Applicant and First Respondent, the First Respondent be required to discharge water from the Pit into Jamie Creek at a rate of up to 5 megalitres per day while there is sufficient flow in Jamie Creek to achieve a dilution factor of at least 1:10 at a release point to be agreed to in writing by the Applicant and the First Respondent in order to reduce the water level of the Pit to 887.30 metres RL.

Note: If turbidity exceeds 5 NTU then two samples (one taken at the surface of the water in the Pit and one taken which is representative of the water at the pump intake) are to be tested to ascertain levels of the metals in Table F4 of Environmental Authority EMPL00977513. If that sample shows levels of any one of those metals exceeding Table F4 of Environmental Authority EMPL00977513 no release is to occur. Otherwise releases may proceed but on no account if the turbidity exceeds 15 NTU.

3. Within 5 days of the engagement of the suitably qualified person pursuant to Order 1, the First Respondent must notify the Applicant of the engagement of the suitability qualified person(s) and include a statement of competency demonstrating that the person possesses the relevant skills, knowledge and qualifications.

4. Within 5 days of developing the environmental monitoring program in accordance with Order 1 and within 5 days of commencing treatment in

accordance with Order 2, the First Respondent must provide a copy of that program to the Applicant.

5. If the Applicant measures a pH level of greater than 8.5 in Jamie Creek at or within 200 metres of the junction of that Creek with Walsh River then the First Respondent will immediately cease all releases and the parties will reassess these interim measures.

6. Without limiting Order 1, the First Respondent must, in accordance with the Environmental Protection (Water) Policy 2009 - Monitoring and Sampling Manual (Version: February 2018):

   (a) monitor the pH levels and electrical conductivity levels at a location in Jamie Creek downstream from the agreed upon release point, and also at a location within Jamie Creek within 200 metres of the junction of Jamie Creek and the Walsh River;

   (b) monitor the flow rate at a location within 20 metres upstream from the agreed upon release point;

   (c) conduct sampling and analysis at locations in Jamie Creek downstream from the agreed upon release point, and also at locations at the junction of Jamie Creek and the Walsh River;

   (d) commencing 14 January 2019, provide the Applicant with a report each week identifying:

      (i) the volume of rain received (if any), and the daily water levels (as a Reduced Level (RL) and volume (in megalitres) in the Pit and the mine water dam;

      (ii) the measures applied in the preceding week to reduce the water level under Order 2 and the amount of water removed;

      (iii) the measures to be applied in the forthcoming week to reduce the water level under Order 2;

(iv) the results of any environmental monitoring conducted under this, or otherwise required under Environmental Authority EMPL00977513; and

(v) advising of start and stop times (including dates) of any water releases from the Pit.

Final measures

7. The First Respondent reduce the water level in the Pit by at least 1.1 megalitres a day commencing on 30 April 2019 and continuing until 1 October 2019 or until the mine site water infrastructure has sufficient water storage below the full supply level of the Pit to contain a design storage allowance calculated using the 1:100 annual exceedance probability, 3 month critical wet period, with such reduction to be effected by:

   (a) using high capacity evaporators or irrigation water reduction methods within the Pit catchment area; or

   (b) using a reverse osmosis water reduction method to treat and release the water to Jamie Creek; or

   (c) using any combination of the water reduction methods identified in paragraphs 7(a) and 7(b) above; or

   (d) any such other method agreed to in writing (which will not be unreasonably withheld) by the Applicant and the First Respondent.

8. By 1 February 2018, the First Respondent engage a suitably qualified person to develop, implement and report on an environmental monitoring program to detect, minimise and manage any potential environmental impacts associated with implementing the measures outlined in Order 7 above.

9. Within 5 days of the engagement of the suitably qualified person under Order 8, the First Respondent must notify the Applicant of the engagement of the suitability qualified person and include a statement of competency demonstrating that the person possesses the relevant skills, knowledge and qualifications.

10. By 1 April 2019 the environmental monitoring program prepared pursuant to Order 8 must be provided to the First Respondent.

11. The First Respondent provide the Applicant with a report each week identifying:

    (a) the volume of rain received (if any), and the daily water levels (as a Reduced Level (RL) and volume (in megalitres) in the Pit and the mine water dam;

    (b) the measures applied in the preceding week to reduce the water level under Order 7 and the amount of water removed;

    (c) the measures to be applied in the forthcoming week to reduce the water level under Order 7; and

    (d) the results of any environmental monitoring conducted under Order 8, or otherwise required under Environmental Authority EMPL00977513.

12. By 1 October 2019, the First Respondent ensure that the mine site water infrastructure has sufficient water storage below the full supply level of the Pit to contain a design storage allowance calculated using the 1:100 annual exceedance probability, 3 month critical wet period.

13. The Second Respondent must ensure that the First Respondent complies with Orders 1 to 12 inclusive.

14. The orders in 1 to 12 above are made against the First Respondent by its officers, servants and agents.

15. The parties have liberty to apply on three days' notice including to vary these orders.

16. The matter be listed for review at 9.00 am on 22 January 2019.

THE PLANNING AND ENVIRONMENT COURT BRISBANE

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Registrar