

COURT OF APPEAL FINDS THE MISSING LINC

Date: 13 March 2018

Australia Financial Services Alert

By: Ian Dorey, Rebecca Dalais

On 9 March 2018, in what was a highly anticipated judgment for many liquidators, the Queensland Court of Appeal reversed the controversial first instance Supreme Court decision in the matter of Linc Energy Pty Ltd (In Liquidation)[1].

BACKGROUND

Shortly prior to the appointment of liquidators to Linc Energy Limited (in Liquidation) (Linc) in May 2016, the Department of Environment & Heritage Protection (Department) issued an environmental protection order (EPO) to Linc in relation to its coal seam gas project at Chinchilla in Queensland.

The Liquidators disclaimed the relevant Chinchilla property and mining licences pursuant to section 568 of the *Corporations Act 2011* (Cth) (Corporations Act) which terminates the rights, interests and liabilities of the company in the disclaimed property. Whilst the Department admitted that the relevant land and licences had been validly disclaimed by the Liquidators, the key issue for the Liquidators was whether, notwithstanding the disclaimer, the company would be obliged to comply with the EPO.

SUPREME COURT PROCEEDINGS

The Liquidators of Linc applied for directions from the Supreme Court that they would be justified in not causing Linc to comply with the EPO or any future EPOs issued by the Department.

The Liquidators' argument was that the liability to comply with the EPO imposed by the Environmental Protection Act 2007 (Qld) (EPA) was "inconsistent with the termination of that liability by section 568D of the Corporations Act in respect of disclaimer of property".[2]

Despite there being a direct inconsistency between the State and Federal laws which would usually be resolved in favour of the federal laws pursuant to section 109 of the Constitution, Justice Jackson held at first instance that section 5G of the Corporations Act meant that the Queensland EPA provisions prevailed and the inconsistent Corporations Act disclaimer provisions did not operate in Queensland to eliminate Linc's obligations to comply with the EPO. On that basis, the Liquidators were obliged to cause Linc to meet the requirements of the EPO.

THE APPEAL

The Liquidators appealed the Supreme Court decision[3] and the Queensland Court of Appeal unanimously found in favour of the Liquidators, on the basis that "once the land, plant and equipment and mining licence had been disclaimed, there was no cause or entitlement for Linc to carry out any activity on the site, so that there was no

obligation for it to perform the general environmental duty [and] section 5G of the Corporations Act cannot be applied to roll back the effect of the disclaimer in terminating the liabilities under the EPO". [4]

ISSUES CONSIDERED ON APPEAL

- *Should Linc's liability to comply with the EPO be characterised as a liability in respect of property which the liquidators had disclaimed by the disclaimer notice?*[5]

Each of the three judges concluded affirmatively in response to the first question.

McMurdo JA articulated that:

"Once the land and [licences] had been disclaimed, there was no activity which could be carried out by Linc to which the general environmental duty could attach, and for which this EPO could have operated in the pursuit of its stated purpose. The connection between the disclaimed property and the liabilities under the EPO is thereby clear and immediate: the liabilities under the EPO were premised upon Linc's carrying out activity which it could not and would not carry out, once the land and the [licences] had been disclaimed." [6]

His Honour went on to say that "if, as he concluded, the requirements of the EPO were liabilities in respect of property which was disclaimed, the appellants say that there is no further question to be determined, because the disclaimer of the property necessarily involved the termination of those liabilities".[7] This position was accepted and the Court determined that the trial judge should have found that the EPO imposed liabilities in respect of the disclaimed property and that those liabilities had been terminated.

- *Did the Corporations Act operate so that the disclaimer notice could not be taken to have terminated Linc's liability to comply with the EPO as and from the date the notice took effect?* [8]

The Attorney-General for the State of Queensland, as a Second Respondent in the Appeal, contended that section 5G of the Corporations Act effects a disapplication of section 568D to the extent necessary to preserve a company's liabilities in respect of disclaimed property which are imposed under a law of the State of a kind to which section 5G applies. Under this argument, Linc would have no right or interest in the disclaimed property, but would remain liable to meet in some way the requirements of the EPO, which McMurdo JA could not accept. [9]

McMurdo JA summed up the outcome of the trial judge's interpretation of the Corporations Act inconsistency clauses when he said:

"Section 5G(11) should not be construed and applied to produce an operation of the Corporations Act which the Commonwealth Parliament could not have intended. It could not have been intended that by a disclaimer of property, a liquidator could cause a company to lose all of its rights and interests in or in respect of the property, but remain burdened by a liability in respect of it.... as a matter of construction, section 5G cannot displace the effect of section 568D on some or all of a company's liabilities but not upon the other effects of a disclaimer. Consequently, the appellants are correct in submitting that section 5G(11)

could be applied in this case only by impugning the disclaimer itself." [10]

- *What Directions Should be Made?*

The Court of Appeal allowed the appeal and set aside the order made by the trial judge.

CONCLUSION

The decision is one which will cause a collective sigh of relief by insolvency practitioners many of whom had concerns after the decision of Justice Jackson. Having said that, all insolvency practitioners still need to carefully consider all environmental obligations of a company upon being appointed.

It will be interesting to see, having effectively lost on all arguments, whether the Department decides to make an Application for Special Leave to the High Court.

Notes:

1. *Linc Energy Ltd (In Liq)* [2017] QSC 53.
2. Ibid at 15.
3. *Longley & Ors v Chief Executive, Department of Environment and Heritage Protection & Anor* [2018] QCA 32.
4. Ibid at 11.
5. Ibid at 152 being the first question posed by Bond J.
6. Ibid at 106.
7. Ibid. at 111.
8. Ibid at 153 being the second question posed by Bond J.
9. Ibid at 112.
10. Ibid at 113.

KEY CONTACTS



IAN DOREY
PARTNER

BRISBANE
+61.7.3233.1236
IAN.DOREY@KLGATES.COM

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