SUPREME COURT OF QUEENSLAND

CITATION:	*Hawkins & Anor v Permarig Pty Ltd & Ors* [2002] QCA 58
PARTIES:	**DALLAS COOPER HAWKINS** **LINDA ROSEMARY IZZARD** (applicants/applicants) **v** **PERMARIG PTY LTD** ACN 086 570 854 (first respondent/first respondent) **BRISBANE CITY COUNCIL** (second respondent) **STATE OF QUEENSLAND** (third respondent)
FILE NO/S:	Appeal No 4261 of 2001 P & E Appeal No 4516 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Application for costs
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	8 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	18 February 2002
JUDGES:	McMurdo P, Thomas JA and Byrne J Judgment of the Court
ORDER:	**The first respondent to pay one half of the applicants' costs of the application for leave to appeal and of the first respondent's application to strike out the applicants' application and that otherwise there be no order for costs of the application or appeal**
CATCHWORDS:	PROCEDURE – COSTS – APPEALS AS TO COSTS – CONDUCT OF PARTIES – UNNECESSARY PROCEEDINGS – where applicants filed application for leave to appeal against earlier judgment knowing that such appeal may be unnecessary – where applicants sought co-operation of first respondent to adjourn further proceedings until position clarified – where first respondent refused to co-operate and countered with an application to strike out
COUNSEL:	The appeal was heard on the papers P J Favell, with R J Anderson for the applicants G R Allan for the first respondent

SOLICITORS: F G Forde, Knapp & Marshall for the applicants
McInness Wilson for the first respondent

[1] **THE COURT:** The parties to this application are the applicants (Hawkins and Izzard) and the first respondent (Permarig). They have agreed that the application be determined on the papers.

[2] The letter of application which led to this matter being set down before the court is imprecise in that it asks that the court "hear argument and make an order as to costs". It is not immediately clear what costs are sought. We mention in passing that such applications should not be set down unless the nature of the application is clearly designated. In the present matter the outlines of argument reveal that the applicants are seeking an order against Permarig for the costs of two applications heard by this court on 25 July 2001 on which costs were reserved; and for an order for the costs of the appeal.

[3] The relevant litigation between these parties was in the Planning and Environment Court following the purchase by the applicants from the respondent of land at Rocklea. Brabazon DCJ's order included a requirement that Permarig perform certain remedial work on the land. His Honour also determined (adversely to the applicants' submissions) that the Council's conditions of approval did not require removal of poor quality or uncompacted fill. The applicants formed the view that it was possible that the performance of the remedial works would make it unnecessary for it to challenge that part of the order which determined that the Council's conditions did not require removal of poor quality or uncompacted fill.

[4] Thus the applicants filed an application for leave to appeal against the judgment in the knowledge that the bringing of such appeal might in due course be unnecessary. Having filed the application for leave to appeal, they sought the co-operation of Permarig in adjourning further proceedings until the position was clarified. Permarig did not co-operate, and indeed countered with an application to strike out the applicants' application for leave to appeal. Both those applications were heard and determined by the court on 25 July 2001, adversely to Permarig. Leave to appeal was granted; Permarig's application to strike out was dismissed; and it was ordered that, in effect, no step be taken for two months and that the applicants' solicitors should have the opportunity of notifying the other parties of their position in relation to further prosecution of the appeal.

[5] On 25 September 2001, exactly two months after the making of that order, the applicants gave notice that they were "discontinuing" the appeal. The difficulty with that is that no notice of appeal was ever formally filed and no appeal was ever instituted. It is therefore inappropriate that any order be made for the costs of the appeal. Even if such an appeal existed, it would be extraordinary for the costs of such an appeal to be awarded against a party against whom it was unnecessarily brought. The application for costs of the appeal is entirely without merit.

[6] The same however cannot necessarily be said about the proceedings of 25 July. Sufficient notice was given to Permarig of the applicants' desire to adjourn proceedings and avoid costs, but Permarig opposed such a course. There are two conflicting factors which make the decision on the costs of the applications heard on that date a difficult task. On the one hand, although it was by no means

unreasonable for the applicants, given the complex combination of orders made in the Planning and Environment Court, to bring proceedings to protect themselves against a then unknown contingency, in hindsight they have brought proceedings in pursuit of an appeal that has turned out to be quite unnecessary and which they no longer wish to pursue. On the other hand, costs were incurred on 25 July 2001 which could largely have been averted, and in respect of which Permarig was unsuccessful.

[7] In these unusual circumstances it seems to us that the appropriate order will be to order Permarig to pay one half of the applicants' costs of the application for leave to appeal and of Permarig's application to strike out the applicants' application and that otherwise there be no order for costs of the application or appeal.