SUPREME COURT OF QUEENSLAND

CITATION:	*Walls Quarries P/L v Warwick Shire Council & Ors* [2004] QCA 457
PARTIES:	**WALLS QUARRIES PTY LTD** (appellant/applicant) **v** **WARWICK SHIRE COUNCIL** (respondent/first respondent) **WARREN R SKINNER and SANDRA E SKINNER and CRAIG R SKINNER** (co-respondents/second respondents) **STATE OF QUEENSLAND** (co-respondent by election/third respondent)
FILE NO/S:	Appeal No 4800 of 2004 P & E Appeal No 1750 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	26 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2004
JUDGES:	McMurdo P, McPherson JA and Holmes J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal dismissed** **2. Applicant pay the first and second respondents' costs of the application**
CATCHWORDS:	ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – SUPREME COURT – ERROR OF LAW – where the applicant was unsuccessful in a Planning and Environment Court appeal against the granting of a development permit – where the learned judge made a costs order against the applicant pursuant to s 4.1.23 of the *Integrated Planning Act* 1997 on the basis that the appeal had been instituted to delay or obstruct the proposed development – where s 4.1.56 of the *Integrated Planning Act* limits appeals to the Court of Appeal to cases of error of law – whether the primary judge's conclusion that the appeal was lodged merely to delay or obstruct the development was an

error of law

Integrated Planning Act 1997, s 4.1.23, s 4.1.56

Kentucky Fried Chicken Pty Ltd v Gantidis & Another (1979) 140 CLR 675, cited
TW Hedley Pty Ltd v Cairns City Council & Anor [2003] QPEC 039; P & E Appeal No 399 of 2002, 30 May 2003, cited

COUNSEL: A N S Skoien for the applicant
W G Everson for the first respondent
M D Hinson SC for the second respondents

SOLICITORS: V C Catanzaro for the applicant
Gudkovs Power Osborne for the first respondent
Connor O'Meara for the second respondents

[1] **McMURDO P:** I agree with Holmes J's reasons for dismissing the application for leave to appeal with costs.

[2] **McPHERSON JA:** I agree with the reasons of Holmes J. The application for leave to appeal should be dismissed. The applicant is ordered to pay the costs of and incidental to the application of the first and second respondents.

[3] **HOLMES J:** The applicant for leave to appeal, Walls Quarries, was unsuccessful in a Planning and Environment Court appeal against the granting of a development permit. It seeks, however, to appeal not that result but a costs order, made pursuant to s 4.1.23 of the *Integrated Planning Act* 1997, requiring it to pay the costs of the first and second respondents.

[4] Section 4.1.23 provides as follows:

> "(1) Each party to a proceeding in the court must bear the party's own costs for the proceeding.
> (2) However, the court may order costs for the proceeding (including allowances to witnesses attending for giving evidence at the proceeding) as it considers appropriate in the following circumstances -
> (a) the court considers the proceeding was instituted merely to delay or obstruct ..."

Section 4.1.56 of the *Integrated Planning Act* limits appeals to this Court to cases of error of law, including excess of or absence of jurisdiction.

[5] The learned judge in the Planning and Environment Court delivered two judgments: the first, unchallenged here, on the substantive appeal before him ("the appeal judgment"), and the second, the subject of this appeal, on the costs application ("the costs judgment"). In the costs judgment, he drew the inference that the appeal had been instituted to delay or obstruct the proposed development, and exercised his discretion to order that Walls pay the costs of the first and second respondents. (The third respondent, State of Queensland, did not seek or obtain any costs order, and took no part in this application.) The application for leave to appeal was directed to

showing error in the conclusion as to intent to delay or obstruct, rather than any error in the exercise of discretion which followed on that finding. The parties were content to have the arguments on the application for leave to appeal considered as the arguments on any substantive costs appeal.

The appeal in the Planning and Environment Court

[6] Walls carried on a quarrying business in the Warwick Shire, producing hornfels (a hard rock) and "deco" (decomposed granite: a softer, finer material) used for road construction. At first instance, it unsuccessfully appealed against a decision of the first respondent, the Warwick Shire Council, to grant the second respondents here, the Skinners, a development permit for a material change of use of land which enabled them to establish a quarry on an adjoining site, mining similar materials. The third respondent, State of Queensland, was made a co-respondent in respect of two concurrent agencies, the Environmental Protection Agency and the Department of Main Roads.

[7] The learned judge at first instance identified the live issues on the appeal as: the impact of the new quarry on visual amenity; the appropriateness of Department of Main Roads conditions relating to access to the adjoining quarries; the difficulty of distinguishing which of the quarries was responsible for noise and dust emissions; and economic and town planning need for a new quarry in the area. What follows is a summary of how those issues were addressed by the parties and dealt with in the appeal judgment, and how they were referred to in the costs judgment.

The visual amenity issue

[8] Walls had argued that the road widening necessary for vehicle access to the site would require the removal of most of the trees in the road reserve. The learned judge at first instance accepted the evidence of a town planner called by the Warwick Shire Council, concluding that there would be no significant impact on visual amenity. He also found that the trees would in any event have been removed by Walls had it performed road works under Department of Transport conditions attaching to planning permission for its own quarry in 1993. He re-iterated those findings in the costs judgment.

The appropriateness of Department of Main Roads conditions

[9] The Department of Main Roads conditions were a live issue in the appeal, not in the sense that there was to be any evidence or argument about them, but because it remained for the judge to be satisfied that they had been appropriately amended. One of the development permit conditions, formulated by the Department of Main Roads, required the Skinners to carry out work on the access road from the highway to the quarries and to re-seal the affected part of the roadway. The condition proposed that the costs of that work be shared on a 50-50 basis with Walls, and required the Skinners to negotiate with Walls for that purpose. Another condition required the Skinners to negotiate a maintenance agreement with Walls in respect of that part of the shared property access which was within the road reserve. At the beginning of the hearing, in outlining the Skinners' case, their counsel noted that the conditions required negotiations, which were unlikely, and went on to say:

> "modification to the conditions has been sought, between my clients' consultant traffic engineer, and the Department of Main Roads consultant engineer, and they have reached agreement with respect to conditions".

[10] The new conditions required the Skinners to construct a heavy duty sealed driveway from the edge of the roadway to its property boundary, to widen the road north and south of the driveway, and to construct an asphalt overlay adjacent to the driveway. The Skinners were made responsible for the maintenance of the driveway constructed within the road reserve. The learned judge at first instance observed in his appeal judgment that there was nothing to contradict the appropriateness of the amended conditions. They were, accordingly, included in his order as conditions of the development permit, in place of the original conditions.

[11] In his costs judgment his Honour described Walls' argument, that the amendment of condition meant that the appeal was successful, as:

> "unconvincing. The condition imposed required the cooperation of Walls with the applicants. Had Walls wished to act reasonably, it could have indicated that the condition would require amendment as it would not cooperate with the applicants who were commercial competitors."

And he rejected a submission that because the DMR condition was to be amended, the formal order ought to allow the appeal:

> "The reason for modification of the DMR condition has nothing to do with the prosecution of the appeal by Walls. Rather, the modification of the condition has been brought about by reason of the fact that Walls is not prepared to cooperate with the applicants as required by the original condition."

[12] His Honour returned to the question of the Department of Transport conditions imposed on Walls in 1993:

> "So far as the issue relating to the DMR conditions this was an issue entirely of Walls' making because it had failed to carry out appropriate road works in accordance with its 1993 approval and was recalcitrant to co-operate in any respect with the applicants".

[13] The background to the reference to the 1993 approval is this: the Department of Transport (as the Department of Main Roads then was) had set out a list of conditions in connection with the application for use of the Walls land as a quarry. Those conditions required additional work at the site of the turnoff into the quarry, including widening the road at the approach to the quarry and expanding the carriage way on the opposite side of the road to enable traffic to pass trucks turning right into the quarry. Walls was to maintain the access works to the satisfaction of the Department's engineer. The council in its letter to Walls' solicitors advising approval of the application detailed a number of conditions which included "[c]ompliance with the requirements of the Department of Transport, including sealing of turn out onto highway". Mr Robert Wall, the quarry manager, said that Walls had not been made aware of any requirements other than the sealing of the

turnout (that is, the access road), which had been carried out. No issue had been raised with him about Walls' failure to carry out the other work until some time after Walls had launched its appeal in respect of the Skinners' application.

Responsibility for noise and dust

[14] As to the noise and dust issue, the Skinners called Mr Kamst, an engineer, who gave evidence to the effect that there were available methods of dust and noise monitoring which would enable detection of which quarry was responsible. Mr Kamst was cross-examined, without any appreciable impact on his evidence, about how precise such monitoring could be, whether nearby residents would be able to discern which quarry was making the noise which affected them and whether any investigation would be sufficiently prompt to determine the cause of the nuisance. The learned judge at first instance accepted Mr Kamst's evidence. In his costs judgment, his Honour noted, as a matter of significance, that Walls had not called any evidence on the issue.

Need – the construction point

[15] The Warwick Shire planning scheme contained a statement of policy intent for rural pastoral land, which commenced by noting that land within the rural pastoral area was primarily to be used for rural purposes, including grazing and agriculture. It continued:

> "Industrial or commercial activities will only be considered where there is a demonstratable [sic] need for them to be located on the proposed site in order to serve the surrounding rural area or the travelling public."

[16] The document went on to say in the following paragraphs that such development would not be approved if it could be appropriately located in urban areas or where it would contribute to ribbon development along major roads. New industrial uses which could not reasonably be located in an industry land use area might be permitted. Then, in a fresh paragraph, it said this:

> "Extractive industries, subject to assessment of potential impacts on road and the natural environment, and in accordance with the relevant code may also be permitted".

[17] Walls argued that the reference to "industrial or commercial activities" in the first passage quoted included extractive industries. Thus the test of need applied also to quarrying, and the Skinners were required to show a "demonstratable" need for the quarry to "be located on the proposed site in order to serve the surrounding rural area or the travelling public". The reference in the later paragraph to assessment of impacts on road and the natural environment and the need to meet the relevant code simply posed additional tests. The learned judge rejected the argument, concluding that while need was a relevant consideration, the planning scheme did not place any onus on the Skinners to establish need for the quarry at that particular site. He made no reference to the construction argument in the costs judgment, apart from expressing a general view that there was no merit in any of Walls' arguments.

Need and community benefit

[18] The Skinners called a geologist, Mr Siemon, who had supervised drilling for samples from the proposed quarry land, and Mr Robertson, a consultant mining engineer, who, working in conjunction with Mr Siemon, had undertaken some modelling to estimate the resources available on the proposed quarry site. The thrust of their evidence was that it held substantial and readily available quantities of hornfels and deco. They had also conducted a visual examination of the Walls quarry and noted that there was little decomposed granite remaining at surface level; when Mr Siemon was subsequently provided with drilling results for the Walls site, his view of its limited supply remained unchanged.

[19] Mr Rix and Mr See, both employees of the Department of Main Roads, gave evidence for the Skinners about difficulties experienced with Walls' products. Mr See gave specific evidence of a road construction project using gravel supplied by the Walls quarry, which proved to be defective. Mr Rix, a project manager, gave evidence that project supervisors had complained to him of problems with Walls' materials, although generally the quality of the product was satisfactory.

[20] The Skinners adduced reports and oral evidence from a Mr Norling, whose firm specialised in market and economic research, and Mr Vann, a town planner. Both referred, in reaching their conclusions, to anecdotal evidence from a number of sources (in addition to Mr Rix and Mr See) that users of Walls' product were dissatisfied with its quality. They took into account the Skinners' stated intentions to extract quartzite, which could be crushed into sand, as well as hornfels and deco; to introduce quality control measures at the new quarry; and to move into new markets. Another factor in their conclusions was Mr Siemon's opinion that the Walls quarry was close to exhausting its deco. And, they noted, both the Main Roads Department and the Warwick Shire Council, which were the two largest users of quarry material in the area, supported the proposed quarry. Mr Norling and Mr Vann advocated the introduction of another quarry as leading to greater choice, the security of an alternative source of supply, better pricing, and improved levels of quality and service for users of quarry products.

[21] One of the points made by Walls was that if it were forced to close, its quarry site would be left in a state of physical blight, which it would not have the means to remedy. That, Mr Vann said, was the result of Walls' failure to provide for future rehabilitation costs from its profits; and its quarry might well have to close because of its resources running out, whether the new quarry was approved or not. In any event the site was not highly visible, and its appearance from the road would be largely unchanged.

[22] Walls argued that permitting the development of the new quarry was premature when there were still ample reserves of deco on its site. Walls called a driller, Mr Wright, who had for about seven years undertaken drilling assignments at the Walls quarry. He had, at the direction of Mr Robert Wall, the quarry manager, drilled at particular locations in the quarry to obtain samples. Those samples were examined by Mr Bernoth, a geologist by training, who had worked for many years as a quarry manager. Mr Bernoth gave evidence of his conclusion that there were large amounts of deco remaining in the quarry.

[23] Walls also called a consultant geologist, Mr Kershaw. He had not been present for, or seen the results of, drilling on the site, but he gave evidence that there remained a large deposit of decomposed granite on the Walls site, which he had visited twice in order to prepare an environmental management plan. He identified particular areas where he thought it was likely significant quantities of deco remained. But in any event, Mr Kershaw said, deco, which was not of high quality and was not as durable as other substances, was not essential, to meet the market for road based material. According to Mr Kershaw's report on need, average production for the Walls Quarry for the three years from 1999 to 2001 was 105,000 tonnes per annum. In his view, it was unlikely the new quarry would attract more than 50 per cent of the market.

[24] Mr Kershaw made these comments on the Skinners' case: there was no obvious advantage in increasing choice of materials, because it could be expected that the quarries would produce much the same product; mining of quartzite on the Skinner site would be uneconomic, when sand was available in more accessible forms elsewhere; and it would not be economical for the Skinners to expand their market by moving products to a wider area.

[25] Mr Robert Wall gave evidence in Walls' case. He similarly maintained that there was still a substantial amount of deco available for extraction at the site. But demand for deco in road base was diminishing as road-making standards rose, with a preference for quarried hard rock because of the high shrinkage rate of deco. There was already plenty of competition in the industry. Walls was under some financial pressure because of a large bad debt and because it had had to spend money on implementation of an environmental management plan. Under its EPA licence, it was limited to production of 100,000 tonnes per year. If it were unable to maintain sales at their current levels and had to close the quarry, its resources would not meet the cost of rehabilitating and reinstating the quarry site. (Mr Lang, Walls' accountant, had prepared a report which showed that Walls needed to produce more than 41,250 tonnes per year to remain viable.) Mr Wall denied that there had been any fault in the product delivered by the quarry to the project referred to by Mr See.

[26] In the appeal judgment, the learned primary judge rejected a submission that he should disregard the hearsay evidence given by the Skinners' witnesses, noting that there had been no objection raised at the time Mr Norling's and Mr Vann's reports were admitted into evidence. He accepted the evidence of Mr See and Mr Rix as to customer dissatisfaction with the products applied; and the evidence of Mr Vann that there was a continuing need for road base in the form of both deco and hard rock, that the proposed quarry would add to the stock of resources available, that it would introduce a new resource in the form of quartzite as a local source of sand and that it was needed as a source of supply in the event that Walls Quarry closed for any reason. In general, he accepted the Skinners' case that a community benefit would flow from the establishment of their quarry.

[27] The learned judge rejected the evidence of Mr Wall, Mr Wright and Mr Bernoth as to the capacity of Walls to continue to supply. He found the evidence of Mr Wright and Mr Bernoth "particularly unconvincing". Mr Wright, he said, was not an independent witness because he had an ongoing relationship with Walls' quarry, and had drilled holes at the direction of Mr Wall, not under the supervision of a geologist. Mr Bernoth was not an impressive witness and had not worked as a geologist for many years. There were doubts as to the capacity of Walls to continue

to meet market demand, given the limit on its production imposed by its EPA licence. He expressed himself satisfied that whatever deco remained on the Walls' quarry site would not be extracted as conveniently and cheaply as that from the proposed new quarry site, which in turn was likely to have an effect on price. There was likely to be an advantage to purchasers in not having to rely on a single supplier and in the competition resulting from the introduction of a new quarry. Need had been demonstrated. He was not satisfied that either quarry was likely to fail, but even if Walls' quarry did, there would be no net effect on the marketplace. If Walls were to fail its quarry would probably be taken over by someone else; its closure would not inevitably result in blight, and if there were any blight, it was unlikely to be significant.

[28] In his costs judgment, the learned judge noted that Walls was a potential commercial competitor of the Skinners. He said that his earlier reasons for judgment made it clear that he considered there to be no merit in any of Walls' arguments. His Honour referred to his criticisms of Mr Wright's and Mr Bernoth's evidence as "particularly unconvincing", going on to say,

> "I accept also that the fact that Mr Kershaw had not been given sufficient opportunity to undertake a full analysis and had been given only short notice of his requirement to give evidence at trial as indicating [sic] the true motive for the institution of the proceedings by Walls."

Walls had called no town planner. Even on the evidence adduced by Walls, from Mr Kershaw and Mr Lang, that is to say that with an average production of 105,000 tones per annum retaining 50 per cent of the market, Walls would achieve greater than the production level estimated by Mr Lang to allow it to remain viable. The real issue, the learned judge said, was Walls' desire for protection from competition, not any matter of "genuine public interest".

The application for leave

[29] There was no direct evidence, in the form of any statement of intention or admission, before the learned judge as to Walls' motives in instituting the appeal. On the application for leave to appeal, Mr Skoien, for Walls, argued, in what seems to me a reasonable summary of his Honour's reasoning, that there were three considerations from which his Honour drew the inference of an intent to delay or obstruct: the fact that Walls instituted the proceedings as a potential commercial competitor of the Skinners; his finding that there was no merit in any of Walls' arguments; and his finding that Walls' conduct of the case was consistent with a motive to delay or obstruct the development. It was submitted by Walls that the second and third of those conclusions involved errors of law.

Lack of merit in Walls' arguments

[30] The first of the matters which Walls said amounted to an error of law related to the primary judge's construction of the expression "industrial or commercial activities". No reasonable person, it was said, could have found that there was no basis for the construction advanced by Walls. But it seems to me, with respect, that his Honour's construction was clearly correct. Walls' construction was capable of being argued:

there were a couple of points Mr Skoien was able to make in its favour; but it is one thing to say that an argument can be mounted; whether it has any merit is another. Plausibility is a matter of degree. In this case, Walls' argument seems to me to have been so very uncompelling as to justify a description of it as "without merit". That is not the same thing as saying that it was without any foundation at all.

[31] Walls complained that the learned trial judge erred in finding that there were no merits in its arguments on the question of need; in doing so he had failed to address certain aspects of the Walls evidence, or to recognise flaws in the Skinners' evidence. Mr Norling's evidence as to price, quality, quantity and choice had been qualified; he had not maintained that the advantages identified were inevitable and absolute and he had spoken from experience rather than research. Mr Wall had dealt with those issues in his statement, but what he said was not specifically addressed by the primary judge, nor was the evidence of Mr Kershaw on the same points. Mr Kershaw's evidence was accepted in part, and the balance was not specifically rejected. And although the learned trial judge at first instance did not find the evidence of Mr Bernoth and Mr Wright convincing, that was not to say that there was nothing in Walls' case as regards the amount of deco left in its quarry. It was submitted that the learned trial judge had failed to take account of relevant considerations in the form of the qualifications to Mr Norling's evidence, the hearsay nature of some of the evidence of the Skinners' experts, and the unaddressed evidence of the Walls witnesses. Alternatively, no reasonable person could have drawn the inference that Walls had no arguable case from the evidence.

[32] It seems to me that these arguments are an attempt to characterise the primary judge's resolution of questions of facts as questions of law. It was not incumbent on his Honour to identify at every point which parts of the Walls evidence he rejected, when that result was implicit in his findings. There might have been an element of unfairness in Mr Wright's not having the opportunity to respond to the suggestion he lacked independence, but that does not mean that a mistake of law was entailed in the finding, which was open – although by no means inevitable – on the evidence. The conclusion that Walls' arguments were without merit was not the same as saying that there was no evidence in support of them; rather it was a conclusion that the overall effect of the Walls evidence was not such as to convince the learned judge that the arguments ought to be accepted. What is said to be his failure to take into account relevant considerations amounts to no more than matters of preference of, and attribution of weight to, particular pieces of evidence; those are not questions of law.

[33] Walls submitted that the learned judge at first instance erred in determining that the impact on its quarry was not a relevant town planning consideration. It had sought to rebut the Skinners' case that there would be a benefit from the introduction of the new competitor, by making the point that if one of the competitors failed there would be no benefit and possibly a detriment. *Kentucky Fried Chicken Pty Ltd v Gantidis & Another*[1], in which the High Court made it clear that a threat to the profitability of an individually existing business was not a relevant town planning consideration if it carried no community detriment, did not preclude the relevance of such evidence here.

[1] (1979) 140 CLR 675.

[34] Walls' submission about the effect of *Kentucky Fried Chicken v Gantidis* is no doubt correct; but his Honour did not treat the evidence of economic impact on Walls as irrelevant. Rather he found that the impact suggested by Walls was unlikely; and even if it occurred it would not result in community detriment. There is nothing in this point.

[35] Finally, Walls' proposed notice of appeal to this court raised this issue: another submitter, a Mr Ernst, had also lodged an appeal which was subsequently discontinued. It relied on that fact as significant, in resisting the costs order. His Honour dismissed that submission, saying that it seemed to him that the only inference that could be drawn from that fact was that Mr Ernst had realised his appeal was without merit. That approach, it was contended, involved an error of law. I do not think, in fact, that the inference drawn was the only inference; but it was certainly open as an inference, and there is no basis for saying that his Honour erred in law in choosing to draw it.

[36] It was open to the learned trial judge to take, as he did, an unfavourable view of Walls' case. He considered that the arguments were without merit; that was a harsh view, but one which was open. It involved no error of law.

Conduct of the case

[37] Walls argued that the learned judge at first instance erred in drawing an adverse inference as to motive from its conduct of its case.

[38] The relevant passage from his Honour's costs judgment suggests that it was not only the failure to give Mr Kershaw the opportunity to investigate the site properly and the giving of short notice to him that he was needed to give evidence, but also the unconvincing character of the evidence of Mr Wright and Mr Bernoth, which led him to conclude that the proceedings were instituted merely to delay or obstruct. Counsel took issue with the learned primary judge's characterisation of the position as regards Mr Kershaw, saying that the matter was only listed for hearing on 26 September 2003, a couple of weeks before it proceeded. However, as it turned out, the hearing of the appeal had been set down on 20 June 2003 to take place in the October sittings, without specific dates being assigned within those sittings. There was nothing, therefore, in that complaint.

[39] Walls' proposed notice of appeal raises as an error what is said to be the learned judge's failure to consider that Mr Kamst's evidence as to the noise and dust issue was challenged by cross-examination and involved a weighing of advantages and disadvantages. But his Honour's reference to Walls' failure to call any evidence on the point was accurate and relevant. It implicitly dismissed, correctly in my respectful view, Walls' rather feeble suggestion that it somehow had managed to raise an arguable case on the point.

[40] His Honour, clearly enough, inferred that the unsatisfactory nature of the Walls evidence was an indication that it was hastily assembled, without a genuine desire to mount a proper case but rather in furtherance of an ambition of delaying or obstructing the Skinners. That, again, was not a generous approach, but I do not think one can say that it was not open or that it was so unreasonable that no reasonable person could have adopted it.

Public interest

[41] In the course of his costs judgment the primary judge referred to a decision of another judge in the Planning and Environment Court in *TW Hedley Pty Ltd v Cairns City Council & Anor*[2] which included this passage:

> "In my view in light of sub-section 4.1.23(1) it is for the applicant for an order for costs in its favour to establish that the discretion should be exercised in its favour. In the context of this case in my view it is for the respondent Council and the co-respondent to establish that there was no public interest to be served in the institution and hearing of the appeal."

Later, his Honour said this:

> "I accept the submission that the real issue on the hearing was related to Walls's [sic] claim for protection from the consequences of competition. Matters of genuine public interest did not play any significant role."

[42] Counsel for Walls submitted that if his Honour's reference to *TW Hedley Pty Ltd* indicated a premise that the relevant question was whether there was public interest to be served in the institution and hearing of the appeal, that was an error of law. Again, while I accept that that may be correct as a proposition, I do not think that his Honour's reasoning demonstrates any view that the presence of or absence of a public interest aspect was determinative of motive. It is, I think, plain from the way his reasons are expressed that he treated the question of whether matters of public interest were involved as relevant, but not conclusive.

The amendment of the Department of Main Roads conditions

[43] Counsel for Walls argued that the learned judge fell into error of law in these respects: in finding that the Department of Transport conditions attached to Walls' own 1993 development permit; in concluding that Walls' non-compliance with those conditions had contributed to the need for an alteration in the Department of Main Roads conditions in the Skinners' permit; in finding that it was unreasonable of Walls not to have co-operated in terms of the conditions; and in concluding that the alteration of those conditions arose out of Walls' failure to co-operate rather than the prosecution of the appeal. Walls, it was submitted, had no alternative but to bring its appeal in order to challenge the condition. There was no reasonable basis upon which it could be said that it had not achieved one of the desired outcomes in the appeal; and hence no basis upon which it could be said that the proceeding was instituted merely to delay or obstruct.

[44] Section 4.1.23(2)(a) requires the court to take the view that the proceeding was instituted, not principally for a purpose of delaying or obstructing but "merely to delay or obstruct"; that is, with no other object. That purpose must exist at the time the proceeding was instituted; the provision says nothing as to continuing the proceeding with an intention merely to delay or obstruct. Thus it would not suffice that a concession was made which removed any rational base for the proceeding

[2] [2003] QPEC 039.

once commenced; although an unreasonable continuing of an appeal in those circumstances might shed some light on the appellant's motives in the first instance. And although the lodging of a groundless appeal might also indicate that it was meant to delay or obstruct, it does not mean that the proceedings would necessarily be caught under this sub-paragraph, as opposed to sub paragraph (b), which enables the court to order costs where it considers that proceedings are "frivolous or vexatious". Conversely, an appeal which does have some grounds, so as not to be capable of being characterised as frivolous or vexatious, may nonetheless be instituted merely to achieve delay or obstruction.

[45] It was open to the learned primary judge to conclude from the wording of the 1993 permit that Walls was under an obligation to carry out and maintain the road works prescribed by the Department of Transport. It was also open to him to take the view that co-operation on the question of maintenance might have averted the appeal. His Honour's comment that Walls, if it wished to act reasonably, could have conveyed its unwillingness to co-operate, was no more than an observation, and was not, as suggested, a finding that there was an unreasonable failure to co-operate.

[46] The learned judge's conclusion that the modification of the condition had nothing to do with the prosecution of the appeal seems, on its face, odd given that the condition was amended on the first day of trial. However it is not insupportable: one could take the view that the timing of the formulation of the amendment was connected with the appeal, but the necessity for it was not. The learned primary judge evidently considered that the motivation for it was the recognition that there was no prospect of agreement, rather than any perception that Walls would win its appeal against the granting of the development permit on the strength of the unresolved conditions.

[47] Walls' chief argument was that it had no alternative but to challenge the conditions. That led to some debate as to whether the existing conditions, requiring the Skinners to carry out the new construction work and negotiation as to the costs of that work and maintenance work, were a matter of genuine interest to Walls. Counsel for the Skinners and the Warwick Shire Council submitted that the condition as it stood could not have required Walls to do anything; the obligation was imposed on Skinners. That is certainly true of the condition requiring further construction works; but on one view, Walls had an existing obligation to maintain the sealed shoulder of the road giving access to its driveway because of the 1993 conditions. The maintenance condition attached to the Skinners' permit as it originally stood seems to have contained no provision to deal with the situation if agreement was not met for maintenance of that part of the shared property accessing the road reserve. Counsel for the Skinners was unable to point to any legislative provision which might have imposed a requirement on them to maintain the relevant portion of the road in the absence of a development permit condition. Thus, presumably, the status quo with regard to any responsibility on Walls' part would continue in the absence of agreement. But under the condition as amended on the first day of appeal the Skinners assumed full responsibility for maintenance.

[48] If Walls were left, in the absence of a condition requiring the Skinners to maintain the access works, with sole responsibility for the maintenance of a shared driveway, it seems to me it would have an argument that it had a real interest in having the question of the condition in an unworkable form resolved, and thus a justification

for instituting the appeal, independent of other aspects. But the difficulty for Walls is that, although it may on one view have had that responsibility, as at the time of filing the application, it was, on Mr Wall's evidence, unaware of any such conditions attaching to its 1993 permit. Any argument that it had a real concern because it might have to shoulder the maintenance obligation as the current conditions stood, tends rather to dissipate in that light. I do not, therefore, consider that Walls can rely on the late amendment of the condition as itself demonstrating that the appeal was justified.

Conclusion

[49] While the conclusion that the appeal was lodged merely to delay or obstruct may not be one that every judge considering the question would have reached, it was one open to the learned primary judge and Walls has not succeeded in showing that any error of the law affected the process by which he arrived at that conclusion.

[50] I would dismiss the application for leave to appeal and order that the applicant pay the first and second respondents' costs of the application.