SUPREME COURT OF QUEENSLAND

CITATION:	*Conquest & Anor v Bundaberg Regional Council* [2016] QCA 203
PARTIES:	**In Appeal No 236 of 2014:** **CONQUEST, Ann** (applicant) **v** **BUNDABERG REGIONAL COUNCIL** (respondent) **In Appeal No 237 of 2014:** **CONQUEST, Robert John** (applicant) **v** **BUNDABERG REGIONAL COUNCIL** (respondent)
FILE NO/S:	CA No 236 of 2014 CA No 237 of 2014 DC No 49 of 2012 DC No 48 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane – [2014] QDC 166
DELIVERED ON:	19 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2016
JUDGES:	Fraser and Philip McMurdo JJA and Daubney 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 is refused.** **2. Leave granted to the parties to make submissions about costs of the application.**
CATCHWORDS:	ENVIRONMENT AND RESOURCES – PLANNING LAW – APPEALS, OFFENCES AND ENFORCEMENT – ENFORCEMENT NOTICES – SPECIFIC REQUIREMENTS OF ENFORCEMENT NOTICES – where the applicants were found guilty of an offence against s 4.3.15 of the *Integrated Planning Act* 1997 ("the Act") for failing to comply with an enforcement notice – where the District Court dismissed their appeals – where the applicants apply for leave to appeal under s 118 of the *District Court of Queensland Act* 1967 ("the

District Court Act") – where the applicants contend that it is a condition of the validity of an enforcement notice that the person to whom the enforcement notice is given has committed a development offence – where the applicants contend that they should be acquitted of the offences because it was not proved beyond reasonable doubt that the relevant works on the property were "building works" rather than "operational works" – where the respondent submitted that the elements of the offence against s 4.3.15 of the Act were that a person was given an enforcement notice and did not comply with that notice – whether it is a condition of validity of an enforcement notice, and an element of the offence against s 4.3.15 of the Act, that the person to whom the notice is given had committed a development offence – whether the work carried out by the applicants amounted to "building work" or "operational work" under the Act

ENVIRONMENT AND RESOURCES – PLANNING LAW – APPEALS, OFFENCES AND ENFORCEMENT – ENFORCEMENT NOTICES – OFFENCES RELATING TO ENFORCEMENT NOTICES – where the applicants were found guilty of an offence against s 4.3.15 of the Act for failing to comply with an enforcement notice – where the District Court dismissed their appeals – where the applicants apply for leave to appeal under s 118 of the District Court Act– where the applicants raised a new point of contention – whether leave to raise new contention is granted – whether the Court's jurisdiction is limited by ss 118 and 119 of the District Court Act

District Court of Queensland Act 1967 (Qld), s 118, s 119
Integrated Planning Act 1997 (Qld) s 4.3.1(1), s 4.3.11, s 4.3.12, s 4.3.15

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41, cited
Burke v Commissioner of Police [2016] QCA 184, cited
Commissioner of Police v Stehbens [2013] QCA 81, cited
Conquest v Bundaberg Regional Council [2014] QDC 166, cited
Gobus v Queensland Police Service [2013] QCA 172, cited
McLean Bros & Rigg Ltd v Grice (1906) 4 CLR 835; [1906] HCA 1, considered
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597; [2002] HCA 11, considered
Ousley v The Queen (1997) 192 CLR 69; [1997] HCA 49, considered
Selby v Pennings (1998) 19 WAR 520; (1998) 102 LGERA 253, cited
Tsigounis v Medical Board of Queensland [2006] QCA 295, cited

COUNSEL: A S Skoien, with M G Batty, for the applicants
M A Williamson for the respondent

SOLICITORS: Payne Butler Lang for the applicants
Connor O'Meara for the respondent

[1] **FRASER JA:** The applicants apply for leave to appeal from decisions in the District Court dismissing their appeals against decisions in the Magistrates Court finding each of them guilty of an offence against s 4.3.15 of the *Integrated Planning Act* 1997[1] of failing to comply with an enforcement notice.

[2] The central issue which the applicants seek to agitate in their proposed appeal to this Court is whether all of the work done on the applicants' land was "for, or incidental to" building or underpinning.

Statutory, factual and procedural background

[3] Section 4.3.15(1) of the *Integrated Planning Act* 1997 provides that, "[a] person who is given an enforcement notice must comply with the notice" and it imposes a maximum penalty for contravention of that provision of 1665 penalty units.

[4] In the Magistrates Court, the respondent submitted that the elements of that offence were that:

> "…the Defendants:
> (a) have committed a development offence;
> (b) have been given a valid enforcement notice; and
> (c) have failed to comply with the enforcement notice."[2]

[5] The central question litigated in the Magistrates Court concerned supposed element (a), whether the applicants had committed the development offence mentioned in the enforcement notice. It was ultimately not in issue that: works were carried out without a development permit on land of which the applicants were the registered proprietors; those works included "the construction of a tiered … revetment wall, stockpiling of fill behind the revetment wall, excavation of a dam, construction of a manoeuvring area and access road, construction of a pad area and a stock pile of soil", with a calculated volume of fill material on the land in the order of 730m^3;[3] the respondent gave to the applicants what purported to be an enforcement notice requiring them to cease works and take action to remove works, including to restore as far as practicable the land to the condition it was in before the development was started; and the applicants did not comply with the requirements of the enforcement notice to take action to remove the works.

[6] The enforcement notice recited that it was given to the applicants pursuant to s 4.3.11 of the *Integrated Planning Act* 1997, "in respect of you committing a development offence under the *Integrated Planning Act* 1997. Namely, the operational works being carried out at [the land] which is assessable development and a development permit has not been issued." The last numbered paragraph of the enforcement notice identified the development offence by the statement that, "[i]n accordance with s 4.3.1 of the *Integrated Planning Act* 1997 it is an offence for a person carry out [sic] assessable development without a valid development permit…".

---

1 The applicants cited reprint 8H of the Act, which was in force on 23 November 2007. In this judgment reference to the Act refers to reprint 9, which was in force at the date the enforcement notice was given.

2 Written submissions on behalf of the complainant: Record p 1166.

3 *Conquest v Bundaberg Regional Council* [2014] QDC 166 at [9] – [10].

[7] Section 4.3.1(1) provides that, "[a] person must not carry out assessable development unless there is an effective development permit for the development", and it imposed a maximum penalty of 1665 penalty units. The definition of the term "development" comprehends carrying out "building work" and "operational work". The term "assessable development" is defined as meaning development stated in Sch 8, Pt 1. (There are qualifications and additions to that definition but they are not presently relevant.) Schedule 8, Pt 1 describes "assessable development" as including "Building work that is not… self-assessable…". The respondent did not secure a finding that if the work was building work it was not self-assessable. The term "building work" is defined to mean various kinds of work described in the definition, including:

> "(a) building,…underpinning (whether by vertical or lateral support),…; or
>
> …
>
> (c) excavating or filling –
>
> (i) for, or incidental to, the activities mentioned in paragraph (a); or …"

[8] Paragraph 1 of the definition of "operational work" comprehends various kinds of work, including "(c) excavating or filling that materially affects premises or their use…". The work done on the applicants' land (or at least much of that work[4]) was within that description. Paragraph 2 of the definition provides, however, that "operational work does not include", for the relevant items in paragraph 1, "any element of the work that is – (i) building work other than building work for reconfiguring a lot … ." It was not suggested that the work done on the applicants' land was "for reconfiguring a lot". Thus, if the work done on the applicants' land was "for, or incidental to" building or underpinning, then that work was "building work", it was not "operational work", and the respondent did not prove that the applicants committed the development offence mentioned in the enforcement notice.

[9] The applicants contended, and the respondent denied, that the applicants should be acquitted of the offences alleged against s 4.3.15 because the respondents failed to prove beyond reasonable doubt that the relevant work was not "for, or incidental to" building or underpinning works, and thus "building work" rather than "operational work".

[10] The Magistrate found for the respondent. The relevant conclusions were expressed in the following passage of the Magistrate's reasons:[5]

> "I do accept the submissions on behalf of the complainant … that the works carried out by the defendants were objectively equivocal, and in that, when the relevant facts and circumstances are viewed objectively, those works would be for the purposes other than the construction of a house or other structure and, in this regard, the following facts are noted, none of which are controversial: … that no building works have ever been commenced on or in the vicinity of the excavation or filling works; … there is no evidence that the pad area was designed and constructed in a way to accommodate a structure

---

4 The applicants acknowledged that the enforcement notice referred also to the construction of retaining walls but argued that only filling and excavation were identified as the "operational work" which was the subject of the enforcement notice : transcript 4/2/2016, p 9. It is not necessary to consider whether that argument was correct.

5 Record p 638, line 41 to p 639, line 41.

> and in that regard it is noted there is no evidence of footings or foundations or the like; no development applications have ever been made or approvals granted for the building works in that location, notwithstanding that such works constitute assessable development and require approval from a private certifier and the Bundaberg Regional Council; and the fact that the defendants have not removed the works despite abandoning any intention to build a house in that location over three years ago, preferring instead to consider constructing their house in a different location further to the south and on piers, supports the view that the excavation and filling works may have but not necessarily been for purposes other than just the construction of a house.
>
> I accept that the complainant has discharged their onus to disprove the contention that the subject works were, in fact, not for, or incidental to, building works and not building works but, in fact, operational works."

[11] The applicants confined their appeal in the District Court to their contention that the Magistrate erred in failing to find that the work was "building work" rather than "operational work" because the work was "for, or incidental to" building or underpinning.[6]

[12] The primary judge rejected that contention. The primary judge acknowledged that the onus was upon the respondent to prove beyond reasonable doubt that the works done on the land were not "building work". He found: that the extent of the works done on the land was not in issue; no development approval had been granted to authorise the filling works; no building approval had ever been issued for a proposed detached dwelling; no building application had ever been formally accepted or assessed by a private certifier for the construction of such a dwelling, and the works required by the enforcement notice had never been completed; it was not asserted that the Magistrate erred in the test in relation to the onus of proof; and that the evidence accepted by the Magistrate "was more than sufficient to satisfy the onus upon the respondent".[7]

[13] As indicated in [2] of these reasons, the applicants seek to agitate again in their proposed appeal the contention rejected both in the Magistrates Court and the District Court. That contention assumes that it is an element of the offence against s 4.3.15 that the person who was given the enforcement notice had committed a development offence. At the hearing of the applications the Court sought submissions from the parties upon the preliminary question whether that was an element of the offence.

[14] The answer to that preliminary question turns upon the proper construction of the relevant provisions of the *Integrated Planning Act* 1997. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*,[8] Hayne, Heydon, Crennan and Kiefel JJ referred to previous occasions on which the High Court had stated that statutory construction must begin with a consideration of the text and observed:

> "Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of

---

6 See the applicants' outlines of argument in the District Court filed 29 January 2014, paragraphs 1–6 and the outline of argument on behalf of the applicants filed 11 April 2014: record pages 1310–1311 and 1314.

7 [2014] QDC 166 at [10], [17], [19], [41], [45] and [51].

8 (2009) 239 CLR 27 at [47]. Citations have been omitted.

> the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

The legislative text and context

[15] The offence of failing to comply with an enforcement notice is created by s 4.3.15(1) of the *Integrated Planning Act* 1997: see [3] of these reasons. Relevant context is found in other provisions in Chapter 4 of the *Integrated Planning Act*. Part 3 of Chapter 4 concerns development offences, notices, and orders. Division 1 of Part 3 includes s 4.3.1, which makes it an offence for a person to carry out "assessable development" without an effective development permit: see [7] of these reasons. That Division creates other development offences, including offences of carrying out assessable development without a permit, carrying out self-assessable development without complying with applicable codes, contravening a development approval, and contravening a code identified in the Act as applying to the use of premises.

[16] Division 2 concerns show cause notices. Subject to exceptions which are presently irrelevant, Division 2 applies if an assessing authority proposes to give a persons an enforcement notice.[9] Section 4.3.9 obliges an assessing authority which gives an enforcement notice to a person first to give a notice inviting the person to show cause why the enforcement notice should not be given. Requirements for a show cause notice are specified in s 4.3.10. Division 3 concerns enforcement notices. The circumstances in which an enforcement notice may be given are set out in s 4.3.11. Section 4.3.11(1) provides:

> "If an assessing authority reasonably believes a person has committed, or is committing, a development offence, the authority may give a notice (an ***enforcement notice***) to the person requiring the person to do either or both of the following –
>
> (a) to refrain from committing the offence;
>
> (b) to remedy the commission of the offence in the way stated in the notice." (footnote omitted).

[17] Other provisions in s 4.3.11 regulate the giving of show cause notices in certain circumstances and how such a notice may be given to a person carrying out development who is required to stop carrying out the development. Section 4.3.12 provides that, "[s]ubject to section 4.3.8, the assessing authority may give the enforcement notice only if, after considering all representations made by the person about the show cause notice within the time stated in the notice, the authority still believes it is appropriate to give the enforcement notice." Section 4.3.13 sets out specific requirements which an enforcement notice may impose. These include requirements to stop carrying out development and to restore premises to the condition the premises were in immediately before development was started, such as are included in the enforcement notice given by the respondent. Section 4.3.14 prescribes requirements of an enforcement notice, including that it must be in writing, describe the nature of the alleged offence, and inform the person to whom the notice is given that the person has a right to appeal against the giving of the notice. Section 4.3.17 empowers the assessing authority to do the thing required by an enforcement notice and to recover as a debt owing to it by the person to whom the notice was given any reasonable costs or expenses incurred by the assessing authority in doing that thing if the person to whom the enforcement notice was given contravened it by not doing that thing.

---

[9] Section 4.3.8.

[18] Division 4 concerns offence proceedings in the Magistrates Court. Under s 4.3.18, such proceedings may be brought by the assessing authority for offences against specified provisions which include s 4.3.1 and s 4.3.15. Part 1, Division 12 is headed "[c]ourt process for appeals". Section 4.1.50(5) provides that, "[i]n an appeal by a person who is given an enforcement notice, it is for the entity that gave the notice to establish that the appeal should be dismissed." Section 4.1.52(1) provides that, "[a]n appeal is by way of hearing anew". Section 4.1.54 confers upon the Court which decides the appeal the power to make orders and directions the Court considers appropriate, including (in s 4.1.54(2)), an order confirming the decision appealed against, changing that decision, or setting aside that decision and making a decision that replaces it.

[19] Part 1 of Chapter 4 concerns the Planning and Environment Court. Division 9 concerns certain appeals to that court. Section 4.1.32 provides that a person who was given an enforcement notice may appeal to the Court "against the giving of the notice". Such an appeal is required to be started within 20 business days after the notice was given. Section 4.1.33(1) provides that the lodging of such a notice of appeal stays the operation of the enforcement notice until the court decides otherwise, the appeal was withdrawn, or the appeal was dismissed. Section 4.1.33(2) provides, in effect that the operation of the enforcement notice is not automatically stayed in certain circumstances, such as where the enforcement notice states that the entity issuing the notice believes that work the subject of the notice is a danger to persons or a risk to public health. Division 7, Chapter 4 gives the Planning and Environment Court jurisdiction to make declarations in a broad range of matters, which would comprehend declarations concerning the validity of an enforcement notice.[10]

[20] It was not submitted that any other contextual matter bore upon the proper construction of s 4.3.15(1) or any other relevant provision.

The parties' main contentions upon the preliminary issue

[21] The applicants contended that:

> "(a) the validity of the Enforcement Notice constitutes an element of the offence with which the Applicants have been charged (being an offence against section 4.3.15 of the IPA);
>
> (b) even if the validity of the Enforcement Notice does not constitute an element of the offence, the Applicants are entitled to raise a question of validity as an issue in the proceeding;
>
> (c) in all of the circumstances, it could not be said that the issue of the validity of the Enforcement Notice (effectively the proper characterisation of the Works as either "*building* work" or "*operational work*") was not properly raised in the proceedings (indeed, it was accepted as an issue by Council before the Magistrate);
>
> (d) once raised as an issue, the validity of the Enforcement Notice was required to be proved by Council beyond reasonable doubt;
>
> (e) Council failed to discharge its onus of establishing the validity of the Enforcement Notice, because at least:
>
> (i) there was no underlying development offence (upon the proper construction of the relevant definitions in the IPA);
>
> …"

---

10 See 4.1.21(1).

[22] The respondent submitted that the elements of the offence against s 4.3.15 were "that a person was given an enforcement notice and the person failed to comply with the notice, being an enforcement notice which:-

(i) was given as prescribed by ss. 4.3.11 and 4.3.12:
(ii) complied with the requirements of ss. 4.3.13 and 4.3.14 as to form and contents;
(iii) remained in force, not having been set aside on appeal or in other proceedings challenging its validity."

[23] The respondent submitted that an "enforcement notice" was that which was described in s 4.3.11(1) and that the obligation to comply with the notice arose if (in addition to the matters in (i) – ii)) "the occasion for giving the notice arose (the beliefs referred to in ss 4.3.11(1) and 4.3.12 were held and consideration was given to the representations as required by s 4.3.12)".

Consideration

[24] The applicants' arguments were put in different ways, but the essential proposition was that it is a condition of the validity of an enforcement notice or it is otherwise an element of the offence against s 4.3.15(1) that the person to whom the enforcement notice is given has committed a development offence. That proposition finds no support in the legislative text. Neither the text of s 4.3.15(1) itself nor the text of those provisions which concern the power of an assessing authority to give an enforcement notice (s 4.3.11(1) and s 4.3.12) expresses or implies a requirement that the person has committed a development offence. Any implication to that effect would be inconsistent with s 4.3.11(1) and s 4.3.12. As the respondent argued, those provisions relevantly require the assessing authority only to hold a reasonable belief that a person has committed or is committing a development offence and (after the assessing authority has considered all representations made within a specified time by the person to whom a show cause notice was given) a belief that it is still appropriate to give the enforcement notice.

[25] An offence against s 4.3.15(1) differs materially from a development offence which might be the subject of the required beliefs. One significant difference is revealed by the show cause provisions in Division 2 and the provision in s 4.3.17 for the assessing authority to do the thing required by an enforcement notice and recover as a debt the assessing authority's costs and expenditure of so doing if the person to whom the enforcement notice was given contravened it by not doing that thing.

[26] Whilst those consequences might be thought unjust if that person had not committed the development offence which the assessing authority reasonably believed the person had committed, the potential for such injustice is ameliorated by the person's entitlement to challenge the enforcement notice by way of an "appeal" in the Planning & Environment Court or by way of declaratory proceedings. In any case, the statutory context supplies no support for the marked departure from the legislative text which is required by the applicants' construction.

[27] Upon the proper construction of this legislation, it is not a condition of the validity of an enforcement notice and it is not an element of the offence against s 4.3.15(1) that the person to whom the notice is given had committed a development offence. Thus the question about the development offence which the applicants seek to litigate in their proposed appeal is irrelevant to their liability for the offence against s 4.3.15(1) of which each was convicted.

[28] The applicants emphasised that in the Magistrates Court the respondent assumed the onus of proving that the applicants had committed a development offence. That might be thought to have afforded the applicants an unwarranted forensic advantage. In any case it did not disadvantage the applicants, and the applicants remained free to make any submissions they wished to make to the magistrate about the elements of the offence or the validity of the enforcement notice. That the applicants did not contradict the respondent's submission about the elements of the offence and that the magistrate and the primary judge assumed the correctness of those submissions does not justify the Court in granting leave to appeal upon the hypothetical question raised by the application for leave to appeal.

The applicants' new points

[29] In the applicants' written submissions upon the preliminary point raised by the Court, the applicants argued that the respondent, having assumed the onus of proving the validity of the enforcement notice in the Magistrates Court, failed to prove that when the enforcement notice was given the respondent reasonably believed that the applicants had committed the development offence.

[30] In the Magistrates Court the applicants did not make any similar submission and they did not seek to challenge the validity of the enforcement notice on that ground. Nor did the applicants make that an issue in their appeal in the District Court. In either court or both courts the applicants could have argued, but they did not argue, that the respondent's acknowledgment that it was element of the offence that the enforcement notice was valid required the respondent to adduce evidence to prove that it held the beliefs described in s 4.3.11(1) and s 4.3.12. No question of that kind was litigated in the Magistrate Court or the District Court. That militates against the grant of leave to appeal to permit the applicants to litigate such questions.

[31] If the applicants had sought to make this new point an issue in the Magistrates Court or the District Court, the respondent might have invoked the presumption that "where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act"[11] or that " the validity of an administrative act or decision and the legality of steps taken pursuant to it are presumed valid until the act or decision is set aside in appropriate proceedings."[12] (The courts may be reluctant to apply such a "presumption of regularity" where a challenge is made to the performance of a condition which is essential to the validity of an administrative act upon which an offence depends,[13] but here the validity of the enforcement notice was not challenged upon the ground now sought to be advanced by the applicants.[14]) Alternatively, the respondent might have adduced further evidence in the Magistrates Court to establish the beliefs described in s 4.3.11(1) and s 4.3.12; and if the applicants had taken this point for the first time on appeal in the District Court, the respondent might have sought to persuade the primary judge that there were special grounds which justified the grant of leave to adduce fresh evidence upon the point pursuant to s 223(2) of the *Justices Act* 1886. That the proceedings might have taken a different course if the applicants had taken this new point in the Magistrates Court or the District Court also militates against the grant of leave to appeal.

---

11 *McLean Bros & Rigg Ltd v Grice* (1906) 4 CLR 835 at 850 (Griffith CJ).

12 *Ousley v The Queen* (1997) 192 CLR 69 at 130-131 (Gummow J).

13 *Selby v Pennings* (1998) 19 WAR 520 at 265 (Ipp J).

14 See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [151] (Hayne J).

[32] It is also necessary to bear in mind the limitations upon appeals from decisions of the District Court in the exercise of its appellate jurisdiction. Section 118(8) of the *District Court of Queensland Act* 1967 provides that, "[a]n appeal from the District Court in its original jurisdiction is by way of rehearing." The proposed appeal in this case is instead from the District Court in its appellate jurisdiction. (Such an appeal is permitted by s 118(1)(b), and s 119(3) imposes a requirement for the leave of the Court of Appeal.) Section 119(1) provides:

> "On the hearing of an appeal the Court of Appeal shall have power to draw inferences of fact from facts found by the judge or jury, or from admitted facts or facts not disputed provided that where the appeal is not by way of rehearing such inferences shall not be inconsistent with the findings of the judge or jury."

[33] There are a number of difficulties in construing s 119(1). In *Gobus v Queensland Police Service*[15] I adverted to one such difficulty, concerning authority for the view that appeals to this Court from decisions of the District Court in its appellate jurisdiction are limited to errors of law for the reason that they are "strict appeals" rather than appeals by way of rehearing.[16] I did not decide that point. The application in that case failed in any event because the express terms of the proviso in s 119(1) precluded the Court from drawing the inferences which were required if that applicant were to succeed in his proposed appeal. In *Burke v Commissioner of Police*[17] Morrison JA applied *White v Commissioner of Police*[18] in holding that in such an appeal it is necessary for the appellant to identify an error of law in the decision of the District Court,[19] but the President and Atkinson J left that question open.[20]

[34] Another difficult in construing s 119(1) concerns the meaning of the expression "the findings of the judge or jury". For example, does that expression encompass findings of fact made for the first time on appeal in the District Court? It is not necessary here to resolve these questions. On any view, s 119(1) of the *District Court of Queensland Act* 1967 was designed to impose a limitation upon the scope of appeals from decisions of the District Court in its appellate jurisdiction. At least in some cases, that limitation might be circumvented if the Court grants leave to appeal upon a factual question where there is no relevant factual finding as a result of the applicant not putting the relevant matter in issue at first instance and/or on appeal to the District Court. In the present case, if the applicants had put in issue the question whether the respondent held a belief required as a condition of the validity of the enforcement notice, there might have been concurrent findings of fact in the Magistrates Court and the District Court which, by application of s 119(1), precluded a challenge in this Court upon that ground. That supplies a further ground for declining to grant leave to appeal on the new point.

[35] The applicants raised another, related point. They argued that the enforcement notice on its face revealed that the respondent misdirected itself in law as to the circumstances in which filling or excavation was "building work" rather than "operational work", and that this misdirection revealed that the respondent did not hold the necessary

---

15 [2013] QCA 172 [3] – [5].

16 *Tsigounis v Medical Board of Queensland* [2006] QCA 295 at [14] – [15] and *Commissioner of Police v Stehbens* [2013] QCA 81.

17 [2016] QCA 184.

18 [2014] QCA 121 at [8].

19 [2016] QCA 184 at [15] – [16].

20 [2016] QCA 184 at [2] – [7], and [52].

reasonable belief that the applicants had committed a development offence. The suggested misdirection in law was that excavation and filling for a dwelling could not amount to "building work" unless at the time when that excavation and filling was done there was an extant development permit or development application for approval to build a dwelling. For the reasons given in relation to the first new point, I would refuse to grant the applicants leave to appeal on this point. Nevertheless I will say a little more about it.

[36] The enforcement notice was described as such in a heading. There followed a subheading, "Section 4.3.11 of the *Integrated Planning Act 1997*". Beneath that subheading, the enforcement notice was addressed to the applicants, followed by this text:

> "THE FACTS AND CIRCUMSTANCES which form the basis of the Council's belief that an enforcement notice should be given include:
>
> 1. The respondent's representations to the 'Show Cause Notice' dated 27 March 2008 do not alter the Council's initial contentions about the unlawful nature of the works. Representations reinforce the accuracy of Council's original contentions and provide further evidence of the offence being committed.
>
> …
>
> 3. Works on the site have continued since Council's initial contact with the proponent on 20 March 2008 and despite the Council's assertion that the works were being unlawfully conducted. The Council is in possession of site photographs which illustrate the continuance of works on the site.
>
> 4. In the absence of a development application or permit for building works for a dwelling house (which the works allegedly support) the 'works' (including all carried out and described excavations, filling and retaining) cannot be construed as incidental to building work. Moreover, the magnitude of the 'works' are such that the premise has been materially affected and therefore, the works are considered to be consistent with the *Integrated Planning Act 1997* definition for Operational Works.
>
> …
>
> 5. The 'works' including numerous excavations, construction of retaining walls and filling are of a magnitude that would ordinarily warrant assessment by the Local Authority. Representations allege that filling is in the order of 360 cubic metres, not including imported or locally sourced rock for retaining walls. However, Council representatives (Development Engineer, technical officer) estimate that based on the collective quantities of the filling and excavation works on the sites; figures are in excess of 500 cubic metres. Furthermore, No additional information / evidence / or engineering documentation was provided within the respondents representations to vary the above consideration.
>
> The threshold related triggers stated in the original 'Show Cause Notice' are considered to be valid. An application for operational works is triggered under the following parts of the Burnett Shire Planning Scheme 2006 which contain threshold related triggers for code assessment.

…

6. The following Planning Scheme codes and policies and State Planning Policies would form applicable codes for the assessment and decision making process.

    - Filling and Excavation Code;
    - Natural Features and Resources Code;
    - State Coastal Plan; and,
    - Stormwater Management Planning Scheme Policy.

    Ordinarily, a development application would be required to be lodged in accordance with the *Integrated Planning Act 1997* and demonstrate compliance with the applicable codes and policies for the subject works in order to justify acquiescence.

7. The works are of a nature and scale which materially affect the premise.

…

9. Council has no evidence that a development permit has been issued for the works.

10. Council is not in receipt of any other associated development applications for the subject land, nor is ·there evidence that any other development permit has been issued.

11. In accordance with s.4.3.1 of the Integrated Planning Act 1997 it is an offence for a person [to] carry out assessable development without a valid development permit. …"

[37] The applicants' argument focussed upon paragraph 4. As the respondent argued, that paragraph must be understood in its context. The reference to s 4.3.11 in the first subheading in the enforcement notice and the references to s 4.3.11 and s 4.3.12 at the beginning of the substantive part of the notice suggest that the respondent directed itself to the relevant statutory provisions, which recited the beliefs which the respondent was required to hold before issuing an enforcement notice. The apparent purpose of the paragraphs after the words "The Facts And Circumstances" is to identify at least some of the bases of the respondent's "belief that an enforcement notice should be given". In that context, paragraph 4, refers to three matters: the absence of a relevant development application or permit for building works, the nature of the works conducted at the premises, and the respondent's statement that those works are "regarded as operational works". Furthermore, the word "allegedly" in the phrase "which the works allegedly support" makes it clear that the respondent did not find that the "described excavations, filling and retaining" were in truth for the support of a dwelling house.

[38] The present question is not whether those matters alone or with others taken into account by the respondent justified a belief that the work was "building work" rather than "operational work", but rather whether the reference to the first of those matters itself indicates that the respondent did not hold a reasonable belief that the applicants had committed a development offence. As the respondent argued, paragraph 4 does not have the effect advocated by the applicants. Rather, it expresses factual conclusions which the respondent considered were relevant to the question whether the works carried out on the land were "operational work" because those works were not "for,

or incidental to" building or underpinning work. That does not evidence a misdirection in law. The circumstance that the works were done when there was no application or permit for building works for a dwelling house (such as referred in paragraph 4 of the enforcement notice) was at least capable of supplying support for a reasonable belief that those works were not "for, or incidental to" such building works. The enforcement notice was not invalid on its face upon the ground articulated by the applicants.

[39] The applicants also argued that the Magistrate found no more than a possibility that the work could have been for a purpose other than the construction of a dwelling, and that this finding itself revealed that the respondent could not reasonably have believed that the work was not "for" or "incidental to" the construction of a building. I would not grant leave to appeal upon this ground for reasons already articulated, but I will also say a little more about this point.

[40] This argument was based upon one part of the extract from the Magistrate's reasons quoted in [10] of these reasons. The applicants relied upon the following words at the end of the first quoted paragraph: "supports the view that the excavation and filling works may have but not necessarily been for purposes other than just the construction of a house". There may be a typographical error in that part of the text. Its meaning is not clear but the first paragraph in the quoted extract ("… those works would be for the purposes other than the construction of a house or other structure…") and the last quoted paragraph ("I accept that the complainant has discharged their onus to disprove the contention that the subject works were… not for, or incidental to, building works…") nevertheless demonstrate that the Magistrate found that the respondent had proved beyond reasonable doubt that the works were "operational works".

[41] The part of the Magistrate's reasons upon which the applicants now rely does not justify acceptance of the applicants' new argument. It had no relevance to the decision by the primary judge against which the applicants now seek leave to appeal. Furthermore, even if, upon the evidence at the trial, it was only a possibility that the work could have been for a purpose other than the construction of a dwelling, that would not necessarily indicate that, upon the information available to the respondent when it gave the enforcement notice, it could not reasonably have believed that the work was not for, or incidental to, building.

[42] I would add that the respondent argued that it was not open to the applicants in the prosecution proceedings to mount a collateral challenge to the validity of the enforcement notice. The respondent argued that the provisions in the legislative scheme which entitle the recipient of an enforcement notice to challenge its legality before being charged with an offence justify the conclusion that the words "enforcement notice" in s 4.3.15(1) mean only "an enforcement notice which is formally valid and has not been quashed".[21] The applicant submitted that those provisions did not reveal a legislative intention to that effect.[22]

[43] Since the applicants did not in the Magistrates Court or the District Court seek to mount a collateral challenge to the validity of the enforcement notice upon the grounds they now seek to raise in the present application it is not appropriate to adjudicate upon that point. However it might be decided, it would not affect my conclusion that this is not an appropriate case for the grant of leave to appeal.

---

21 The respondent cited *R v Wicks* [1998] AC 92 at 119B – C, 122D – G, *Boddington v British Transport Police* [1999] 2 AC 143 at 161G, and *Krulow v Glugmorgan Spring Bay Council* [2013] TASFC 11 at [169] – [181].

22 The applicants cited *Gray v Woollahra Municipal Council* [2004] NSWSC 112 and *Boddington v British Transport Police* [1999] 2 AC 143 at 161F– G and 162G – H.

Proposed order

[44] I would refuse the application for leave to appeal and grant leave to the parties to make submissions about the costs of that application.

[45] **PHILIP McMURDO JA:** I agree with Fraser JA.

[46] **DAUBNEY J:** I agree with Fraser JA.