SUPREME COURT OF QUEENSLAND

CITATION:	*Holts Hill Quarries P/L v Gold Coast City Council* [1999] QCA 510
PARTIES:	**HOLTS HILL QUARRIES PTY LTD (ACN 079 443 762)** (Appellant) v **GOLD COAST CITY COUNCIL** (First Respondent/Applicant) AND **NERANG COMMUNITY ASSOCIATION INC, PAUL STEVEN STEMP & ORS** (Second Respondent) AND **LYNN OGDEN** (Third Respondent) AND **PETER THOMAS BURKE** (Fourth Respondent)
FILE NO/S:	Appeal No 7006 of 1999A Southport P&E Appeal No 1028 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Application to strike out
ORIGINATING COURT:	Planning and Environment Court at Southport
DELIVERED ON:	7 December 1999
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 1999
JUDGES:	de Jersey CJ, Thomas JA, Helman J
ORDER:	**First respondent's application refused.** **First respondent to pay the appellant's costs of the application to be assessed.** **No order in relation to costs with respect to the third and fourth respondents.**
CATCHWORDS:	LOCAL GOVERNMENT – APPEALS – QUEENSLAND – PLANNING AND ENVIRONMENT COURT – whether necessary for appellant to obtain leave to appeal to Court of Appeal against decision in Planning and Environment Court - –construction of s 6.1.25 and s 6.1.26 *Integrated Planning Act* 1997 – whether sections apply only to appeals to the Planning and Environment Court or also to further appeals

Colonial Sugar Refining Co v Irving [1905] AC 369, considered
Sunskill Investments Pty Ltd v Townsville Office Services Pty Ltd [1991] 2 Qd R 210, considered

Integrated Planning Act 1997, s 4.1.56, s 6.1.23(1)(b), s 6.1.25, s 6.1.26, s 6.1.39
Local Government (Planning and Environment) Act 1990, s 4.3(1), s 4.13(12), s 7.4

COUNSEL: Mr D Gore QC, with him Mr T Trotter, for the appellant
Mr P Lyons QC, with him Mr S Ure, for the first respondent
The third respondent appeared on her own behalf
The fourth respondent appeared on his own behalf

SOLICITORS: Minter Ellison for the appellant
King & Company for the first respondent
The third respondent appeared on her own behalf
The fourth respondent appeared on his own behalf

[1] **THE COURT:** The appellant unsuccessfully applied to the Gold Coast City Council ("the Council") on 10 February 1998 for approval for rezoning of land at Nerang from "Rural" to "Extractive Industry", and for town planning consent for the development and operation of a quarry. The appellant then appealed unsuccessfully to the Planning and Environment Court, which on 21 June 1999 dismissed the appeal. On 30 July 1999 the appellant filed a notice of appeal to this Court, against the dismissal of the appeal by the Planning and Environment Court. The Council has applied for an order that the appeal be struck out, on the basis that the appellant failed first to obtain leave to appeal. The issue is whether that was necessary.

[2] The Council's contention that it was derives from s 4.1.56 of the *Integrated Planning Act* 1997, which provides for appeal to the Court of Appeal, but only with leave. The operation of that provision commenced on 30 March 1998, with the repeal of the *Local Government (Planning and Environment) Act* 1990. Section 7.4 of that latter Act provided for an appeal "as of right" to the Court of Appeal, although, as with its successor provision, limited to the ground of error or mistake in law or absence or excess of jurisdiction.

[3] Whether or not leave for the commencement of this appeal was necessary rests on the construction of s 6.1.25 and s 6.1.26 of the *Integrated Planning Act*. Those provisions, which also commenced on 30 March 1998, relate to the treatment of applications made, but not finally determined, before that day. Section 6.1.25 has been amended since its commencement, but not in a way material to the outcome of this application. Its terms are:

"**Division 7-Applications in Progress**
Effect of commencement of certain applications in progress
6.1.25 (1) If an application was made before the commencement of this section for a matter mentioned in section 6.1.23(1)(a) to (d)-
(a) processing of the application and all matters incidental to the processing (including any appeal made in relation to a decision about the application) must proceed as if the repealed Act had not been repealed; and
(b) any approval issued is a preliminary approval or development permit, as the case may be."

Section 6.1.26, so far as it is relevant, is as follows:

"Effect of commencement on other applications in progress
6.1.26.(1) This section applies to –
(a) applications made before the commencement of this section under section 4.3(1), section 4.6(1) or section 4.9(1) of the repealed Act;
…
(2) An application mentioned in subsection (1) must be processed and all matters incidental to the processing (including any appeal made in relation to a decision about the application) must proceed as if the repealed Act had not been repealed."

The application for rezoning was made under s 4.3(1) of the repealed Act, and so s 6.1.26 of the *Integrated Planning Act* applies to it. The application for a consent permit, which would issue under s 4.13(12) of the repealed Act, is a matter mentioned in s 6.1.23(1)(b) of the *Integrated Planning Act*. Sections 6.1.25(1)(a) and 6.1.26(2) are to the same effect: that any appeal made in relation to a decision about specified applications must proceed as if the *Local Government (Planning and Environment) Act* had not been repealed.

[4] Mr Lyons QC, who appeared for the Council, submitted that the bracketed references in s 6.1.25(a) and s 6.1.26(2) should be read as restricted to appeals to the Planning and Environment Court. He relied in part on s 6.1.39 which provides that a proceeding started before the Planning and Environment Court but not finished prior to the commencement of the *Integrated Planning Act*, may be continued and completed by that court as if the repealed Act had not been repealed. On any view the operation of that provision overlaps with s 6.1.25 and s 6.1.26, so far as all three sections apply to appeals to the Planning and Environment Court. Mr Lyons raised the issue why s 6.1.25 and s 6.1.26 should be read as applying also to appeals to the Court of Appeal whereas s 6.1.39 does not expressly go that far.

[5] On the other hand, the language of s 6.1.25 and s 6.1.26 is apt to extend to the further appeals, and giving it a broadly beneficial construction accords with the approach to statutory interpretation to be gathered, with relation to such situations, from *Colonial Sugar Refining Co v Irving* [1905] AC 369 and following cases. In *Sunskill Investments Pty Ltd v Townsville Office Services Pty Ltd* [1991] 2 Qd R 210, 218, McPherson J, as he then was, offered the following summary:

> "There is high authority for saying that a right of appeal in an action is not a matter of mere procedure that is subject to the retrospective operation of an amending statute. See *Colonial Sugar Refining Company v Irving* [1905] AC 369, at 372, where Lord Macnaghten said that, to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right, `is a very different thing from regulating procedure'.
>
> A right of appeal that exists when the proceedings are instituted is considered as inhering in the proceedings from commencement of the action, and so will not be affected by subsequent statutory restriction unless it is plain that the restriction is intended to have retrospective application. *Colonial Sugar Refining Co v Irving* is itself an illustration of that principle. There the action was commenced on 25 October 1902. On a case stated to the Full Court judgment was delivered on 4 September 1903. In the meantime, the *Judiciary Act* 1903 (Cth) had been assented to on 25 August 1903, making the jurisdiction of the High Court in that matter exclusive, and correspondingly restricting appeals to the Privy Council. The Judicial Committee nevertheless held, affirming the decision of this Court (see *Colonial Sugar Refining Co v Irving* [1904] St R Qd 18), that the right of appeal survived the provisions of the *Judiciary Act*."

[6] In our view, s 6.1.25 and s 6.1.26 mean that the appellant had a right of appeal in this situation. We were invited to consider additionally the operation of s 20 of the *Acts Interpretation Act* 1954, and cases such as *Kentlee Pty Ltd v Prince Consort Pty Ltd* [1998] 1 Qd R 162 and *Durrisdeer Pty Ltd v Nordale Management Pty Ltd* [1998] 1 Qd R 138. There is however no need in this case to go beyond s 6.1.25 and s 6.1.26 properly construed in accordance with orthodox authority.

[7] We shall refuse the first respondent's application, and order the first respondent to pay the appellant's costs of the application to be assessed. No order should be made in relation to costs with respect to the third and fourth respondents.