SUPREME COURT OF QUEENSLAND

CITATION:	*Hammercall Pty Ltd v Robertson & Anor; Hammercall Pty Ltd v Robertson & Ors* [2011] QCA 380
PARTIES:	**HAMMERCALL PTY LTD** ACN 002 663 587 (applicant) **v** **THE HON STEPHEN ROBERTSON** (first respondent) **ENERGEX LIMITED** ACN 078 849 055 (second respondent) **HAMMERCALL PTY LTD** ACN 002 663 587 (applicant) **v** **THE HON STEPHEN ROBERTSON** (first respondent) **ENERGEX LIMITED** ACN 078 849 055 (second respondent) **THE HON PAUL LUCAS** **Minister for Local Government and the Attorney-General** (third respondent)
FILE NO/S:	Appeal No 2750 of 2011 Appeal No 3608 of 2011 P & E Appeal No 574 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	Planning and Environment Court
DELIVERED ON:	20 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2011
JUDGES:	Chesterman and White JJA, and Boddice J Judgment of the Court
ORDERS:	**In Appeal Nos 2750 of 2011 and 3608 of 2011:** **1. The applications of 5 September and 14 November 2011 are dismissed.** **2. The applicant is to pay the respondents' costs of and incidental to the applications, to be assessed on the indemnity basis**

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – GENERALLY – where the applicant owns several parcels of land which it intends to develop for residential purposes – where the second respondent proposed to construct a power line through parts of the applicant's lands – where the applicant commenced proceedings in the P & E Court seeking declarations that the second respondent's proposal to have the land designated for community infrastructure was unauthorised – where the primary judge made directions in relation to resolving the dispute by way of filing affidavits – where the applicant sought to have those orders set aside – where the applicant filed a separate originating application in the Court of Appeal regarding the designation of the land – where the second respondent subsequently suspended the designation process – where the applications came on for hearing on 11 August 2011 – where the Court of Appeal dismissed the application for leave to appeal and the originating application – where the Court ordered the applicant to pay the Ministers' costs and refused to order ENERGEX to pay the applicant's costs on 30 August 2011 – where the applicant then filed a further application on 5 September 2011 seeking the judgment of the Court of 30 August 2011 to be reconsidered in the inherent jurisdiction, for the judgment to be set aside, for errors in the judgment to be corrected pursuant to *UCPR* 388(2), for the applicant to have leave to appeal under s 253 of the *Supreme Court Act* 1995, for the application for costs to be heard by a differently constituted court, and costs – whether the Court has power to set aside its orders of 30 August 2011 – whether, if the power exists, it should be exercised in accordance with the applicant's wishes

PROCEDURE – COSTS – ORDER FOR COSTS ON INDEMNITY BASIS – where the respondents sought indemnity costs of the applications on the ground that they were frivolous, vexatious and an abuse of process – whether an order for costs on the indemnity basis should be made

PROCEDURE – COURTS AND JUDGES GENERALLY – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – IN GENERAL – OTHER MATTERS – where the applicant filed an application on 14 November 2011 requesting Chesterman JA to recuse himself from hearing the application filed 5 September 2011 on the grounds of his Honour's apprehended bias – whether the application for recusal should be granted

Constitution of Queensland 2001 (Qld), s 58
Judicial Review Act 1991 (Qld), Pt 5
Supreme Court Act 1867 (Qld), s 21, s 22
Supreme Court Act 1995 (Qld), s 253

Supreme Court of Queensland Act 1991 (Qld), s 8, s 9
Uniform Civil Procedure Rules 1999 (Qld), r 661, r 667(2)(d), r 667(2)(e)

Bailey v Marinoff (1971) 125 CLR 529; [1971] HCA 49, considered
De L v Director-General, NSW Department of Community Services [No 2] (1997) 190 CLR 207; [1997] HCA 14, considered
DJL v Central Authority (2000) 201 CLR 226; [2000] HCA 17, considered
Gamser v Nominal Defendant [1976] 1 NSWLR 520, cited
Gamser v Nominal Defendant (1977) 136 CLR 145; [1977] HCA 7, considered
GU v TO [2005] QCA 480, considered
Hammercall Pty Ltd v Robertson & Anor; Hammercall Pty Ltd v Robertson & Ors [2011] QCA 214, approved
In re Swire; Mellor v Swire (1885) 30 Ch D 239, considered
Ivanhoe Gold Corporation Ltd v Symonds (1906) 4 CLR 642; [1906] HCA 71, considered
Jackson v Sterling Industries Ltd (1987) 162 CLR 612; [1987] HCA 23, cited
Newmont Yandal Operations Pty Ltd v J Aron Corporation and the Goldman Sachs Group Inc (2007) 70 NSWLR 411; [2007] NSWCA 195, considered
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd & Ors [2011] QCA 22, cited
R v Pettigrew [1997] 1 Qd R 601; [1996] QCA 235, considered
Reid v Howard (1995) 184 CLR 1; [1995] HCA 40, considered
Stubberfield v Paradise Grove Pty Ltd [2000] QCA 299, considered

COUNSEL: A Abaza (solicitor) for the applicant
P J Flanagan SC, with S A McLeod, for the first and third respondents
M D Hinson SC for the second respondent

SOLICITORS: A Abaza (solicitor) for the applicant
Crown Solicitor for the first and third respondents
Freehills Lawyers for the second respondent

[1] **THE COURT:** The applicant is the owner of several parcels of land over which ENERGEX Ltd ("ENERGEX") proposed to construct a power transmission line. In January 2011 it wrote to the applicant giving notice that it intended to designate part of the applicant's land for community infrastructure. In response, the applicant commenced proceedings in the Planning and Environment Court ("P&E Court") seeking declarations that the proposed designations were invalid and/or unlawful on a number of postulated grounds. At a preliminary hearing the P&E Court made directions for the conduct of the proceedings which were not to the applicant's liking. It applied to this Court ("2750/11") for leave to appeal against the

directions. It later filed an Originating Application ("3608/11") claiming relief largely duplicating that sought in the P&E Court.

[2] Shortly before the applications came on for hearing on 11 August last ENERGEX told the applicant that it was reconsidering how it might transmit additional electricity to the southern end of the Gold Coast, and had decided, in the meantime, not to proceed with the proposal to construct transmission lines over the applicant's land, or with the designation process.

[3] ENERGEX's decision destroyed the legal controversy between it and the applicant. There was no longer a dispute for the P&E Court, or this Court, to consider. On 11 August the applicant's solicitor confirmed that it did not persist with the application for leave to appeal, or with its Originating Application, but did wish to proceed with an application filed that day by leave seeking orders against ENERGEX for costs and the rectification of its website which the applicant thought contained information damaging to its prospects of developing its land. Accordingly the Court dismissed the application for leave to appeal, and the Originating Application.

[4] The applicant could demonstrate no source of power for making the order to delete information from the website, and senior counsel for ENERGEX informed the Court that the offending information had been removed or access to it by the public had been blocked. For those reasons the application filed by leave appeared to serve no useful purpose. The application for costs could be dealt with, and was dealt with, as part of the disposal of the other applications. The application filed by leave was therefore also dismissed. The applicant does not complain about the dismissal of this application.

[5] The Court heard argument on the question of costs. The applicant sought costs against ENERGEX. Two Ministers whom the applicant had made parties to the proceedings in both Courts sought orders for their costs against the applicant. The applicant submitted there should be no order for costs as between it and the Ministers.

[6] On 30 August 2011 the Court ordered the applicant to pay the Ministers' costs and refused to order ENERGEX to pay the applicant's costs. It published reasons for these orders. They were that the application for leave to appeal had no prospect of success for reasons wholly unconnected with ENERGEX's late decision to withdraw from the designation process; directions as to procedure made by the P&E Court were never a proper subject for a grant of leave to appeal. Likewise the Originating Application would have been dismissed in any event because it duplicated the proceedings underway in the P&E Court, and the Court of Appeal was not an appropriate forum for the determination of contested questions at first instance.

[7] The reasons for making the costs orders against the applicant had nothing to do with the merits of its dispute with ENERGEX or the Ministers. There was no enquiry into the factual or legal basis for the relief the applicant claimed. The costs orders related only to the manner in which the applicant had gone about claiming relief in the Court of Appeal.

[8] On 5 September 2011 the applicant filed a further application seeking the following orders:

1. That the judgment of the Court of 30 August 2011 "be recalled and reconsidered in the inherent jurisdiction of [the]…Court".
2. That the judgment be set aside pursuant to *UCPR* 667(2)(d) and/or (e).
3. "[T]hat the errors in the Judgment" be corrected pursuant to *UCPR* 388(2).
4. The applicant have leave to appeal under s 253 of the *Supreme Court Act* 1995 against any decision that it pay costs.
5. That the application for its costs against ENERGEX be heard by a differently constituted court.
6. Costs.

[9] On 15 November 2011 the applicant gave notice that it wished to amend its application to substitute for order 1:

> "That the Judgment of [the Court] delivered 30 August 2011 be set aside:
> - *ex debito justiciae* in the inherent jurisdiction of [the Court];
> - pursuant to s.58 of the *Constitution of Queensland* 2001;
>
> under UCPR 667"

and to abandon proposed orders 2 and 3. Proposed orders 4, 5 and 6 were unaffected.

[10] The application came on for hearing on 22 November 2011. There was no objection to the proposed amendments and leave was given to make them.

[11] Two questions arise. They are whether the Court has power to set aside its orders of 30 August, and if the power exists, whether it should be exercised as the applicant wishes.

[12] Before considering the questions, two further observations should be made. The first is that the only orders made on 30 August 2011 were that the applicant pay the Ministers' costs, and there be no order as to costs between the applicant and ENERGEX. The application did not seek to set aside the orders made on 11 August 2011 dismissing the applications, but it emerged in oral submissions that that omission stemmed from the applicant's failure to understand that the orders for dismissal were made on 11, not 30, August, despite that fact clearly appearing in the Court's written record of the orders and the applicant's solicitor's presence in the Court on 11 August when the orders were pronounced. The applicant nevertheless persisted with its application to set aside the dismissal of its proceedings, and argument proceeded on that basis. Presumably the applicant would contend that the costs orders would become nullities if the orders for dismissal were set aside. It is not necessary to consider the validity of this contention.

[13] The second observation is that the Court's orders have been perfected by being filed: see *UCPR* 661.

[14] The applicant's complaints and submissions are difficult to comprehend and equally difficult to summarise. They appear to assert, inconsistently, that the Court was wrong to rule that it would not have determined the points raised by the Originating Application and that it did determine them adverse to the applicant without hearing argument. This seems to be the substance of the complaints. It is as well contended that the Court has in effect given judgment for the respondents on all issues when the Court should have found in the applicant's favour on all points.

[15] The reality of what happened is very different. The Court did not consider or judge any of the points. There was no dispute to adjudicate, and the Court did not attempt to do so.

[16] The applicant's misunderstanding of the subject matter with which the Court dealt in the earlier judgment, and the reasons given for the costs orders made, has particular relevance to the question of the Court's power to make the orders sought by the applicant. The premise underlying the application is that the Court made orders that it did not intend, or misunderstood the nature of the dispute before it. The premise is distinctly wrong. The Court made the orders it intended to make and did so on the narrow basis identified in the reasons.

[17] The applicant's submissions are extravagant in their misunderstanding of the Court's earlier reasons. It asserts that the earlier judgment of the Court is "fundamentally flawed" and is so replete with egregious errors that it is an affront to justice and fairness. The submissions imply that the errors and misunderstandings in the judgment are so obvious, so basic and so damaging to the applicant that the Court cannot have meant what it said in its reasons and cannot have understood the effect its orders had.

[18] What is equally remarkable about the submissions is their failure to come to terms with the Court's expressed reasons for making the orders. Those reasons made it clear that the orders for costs were made because the applicant had unnecessarily and inappropriately invoked the jurisdiction of the Court of Appeal. It is not possible, from a fair reading of the reasons, to think that the Court had given any consideration to the merits of the applicant's dispute with ENERGEX or the Ministers. The reasons, and the judgment, made no pronouncement on any point sought to be litigated by the Originating Application.

[19] Not surprisingly, we do not accept the applicant's premise that the orders do not reflect the Court's intention. The Court's reasons, we venture to say, contain a clear, rational and persuasive explanation for making the orders.

[20] In *Bailey v Marinoff* (1971) 125 CLR 529 Barwick CJ said (at 530):

> "Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance…beyond recall by that court. It would, in my opinion, not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed."

Menzies J said (at 531-2):

> "This appeal is not concerned with the power of a court to alter orders in pending litigation. It is concerned with the power of a court to make an order in litigation which, without any error or lack of jurisdiction, has been regularly concluded and is no longer before the court. To recognize the problem is, I think, to solve it. However wide the inherent jurisdiction of a court may be to vary orders which have been made, it cannot, in my opinion, extend the making of orders in litigation that has been brought regularly to an end."

[21] Walsh J (at 535) referred with approval to the judgment of the Court of Appeal in *Thynne v Thynne* [1955] P 272 in which:

> "…the principle seems nevertheless to have been accepted that it is beyond power to alter a perfected judgment so as to get rid of the 'operative and substantive part' of it…".

[22] *Bailey* was a case in which an appeal was dismissed pursuant to an order that it should stand dismissed if the appellant did not take certain steps by a fixed date. The appellant performed the acts late and the Court of Appeal reinstated the proceedings. The High Court held it had no power to do so.

[23] *Gamser v Nominal Defendant* (1977) 136 CLR 145 was a case in which after a successful appeal by the defendant in a personal injuries case, facts emerged which showed the award of damages to be wrong. Following *Bailey* the Court of Appeal held it had no power to re-open proceedings and increase the damages. The High Court confirmed that judgment, but itself gave leave to appeal and made the necessary upward adjustment.

[24] The principal judgment was given by Aickin J who said (154):

> "As to the question of whether there was in the Court inherent jurisdiction to make the order sought, Glass JA took the view that the decision of this Court in *Bailey v Marinoff* was fatal to the argument. In that case this Court held that when an appeal has been finally disposed of in a court of appeal by an order duly entered it has no inherent power to reopen the case on an application made after the order has been entered. That general proposition is no doubt subject to the rule that a judgment apparently regularly obtained may be impeached upon the ground of fraud…although it is difficult to visualize how a judgment of an appellate court could be obtained by fraud, other than in circumstances in which the original judgment which the appellate court had upheld had itself been obtained by fraud. The majority judgments in *Bailey v Marinoff* appear to me to make it clear that there is no inherent power to set aside judgments by reason of changed circumstances on application made after the case has been finally disposed of." (footnotes omitted)

[25] The judgment of the Court of Appeal, which Aickin J endorsed, was given by Glass JA. See *Gamser v Nominal Defendant* [1976] 1 NSWLR 520. His Honour said (at 523):

> "The judgments of the majority in *Bailey v Marinoff*…contain a proposition expressed in general terms that, when an appeal has been finally disposed of by this Court, it has no inherent power to re-open it. Counsel…argued…[the] proposition…must be taken to be subject to an implicit exception in the case of fraud. One may accept this to be so. … Counsel then submitted that the general proposition was also subject to an unexpressed exception in the case…where a party's situation has radically changed subsequent to the disposal of the appeal. For this proposition no authority was adduced. Indeed it was not possible for counsel for the plaintiff to refer to a single case in the law reports where a court of appeal, or any other court, had set aside its *own* judgment by reason of events which happened subsequently to the formal entry of its decision. I believe that the absence of any such recorded exercise of power is due to the fact that it would be wholly destructive of the finality of judgments, a concept which is ingrained in our system of adjudication."

[26] In *DJL v Central Authority* (2000) 201 CLR 226 the High Court considered whether the Full Court of the Family Court had power to re-open and re-hear an appeal in which it had given judgment before a subsequent change in the law showed the decision to have been wrong. The High Court held by majority that there was no such power. The Family Court being created by statute had no inherent jurisdiction. It had only the powers conferred on it expressly or by necessary implication by the statute. Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in a joint judgment noted the limited exceptions in which common law courts might re-open a concluded proceeding and said that "[those] qualifications apart" the law was as stated by Barwick CJ in *Bailey*, quoted above.

[27] The applicant refers to *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 as authority for the existence of the power to re-open and re-consider an earlier judgment. The case is of no assistance because it is concerned with the power of the High Court to re-open one of its own judgments:

> "… if it is convinced that, in its earlier consideration of the point, it has proceeded 'on a misapprehension as to the facts or the law', where 'there is some matter calling for review' or where 'interests of justice so require'. …By such expressions of the power to reopen final orders, court's seek to recognise competing objectives of the law. On the one hand, there is the principle of finality of litigation … . … On the other hand, courts recognise that accidents and oversights can sometimes occur which, unrepaired, will occasion an injustice. In the case of a final court of appeal, such as this Court, that injustice may be irremediable, unless the Court itself … is persuaded to reopen its orders …". (footnotes omitted).

Per Toohey, Gaudron, McHugh, Gummow and Kirby JJ at 215.

[28] Kirby J in his (dissenting) judgment in *Central Authority* noted (at 265) "that orders made by ultimate appellate courts may be reopened by such courts in exceptional circumstances to repair accidents and oversights which would otherwise occasion a serious injustice." The circumstances in which the High Court is prepared to re-open its judgments are more generally expressed than is the case with other appellate courts whose power is more circumscribed.

[29] The power of intermediate appellate courts to re-open earlier judgments is limited to the powers conferred by the statutes applicable to those courts, their rules of court and the limited common law exceptions to the finality of judgments identified in the majority judgment in *Central Authority*.

[30] This case does not fall within any of the qualifications to the rule against re-opening judgments discussed in *Central Authority* at [34] to [36]. The applicant submits that it does because "the purported orders give effect to matters never adjudicated upon, and in respect of which the Applicant was not heard." This view of the case is completely wrong, as we have endeavoured to explain.

[31] The applicant refers also to the judgment of the Court of Appeal in *Newmont Yandal Operations Pty Ltd v J Aron Corporation and the Goldman Sachs Group Inc* (2007) 70 NSWLR 411 which does not help the applicant. It was a case in which an order did not reflect the judgment of the Court, and had unintended consequences which would have worked serious injustice on one of the parties. The case was within the exceptions identified in *Central Authority*.

[32] The parties were engaged in two sets of legal proceedings. Those commenced later in time were meant to litigate, as a discrete issue, one of the points in issue between the parties in the earlier proceedings. A judgment on the point might have determined the whole of the litigation. It did not do so but the judgment was given in such a form, as to relate to the whole action, thus disposing of the balance of the issues which had never been tried.

[33] Spigelman CJ (with whom Santow JA and Handley AJA agreed) said (at 419):

> "The facts in *Bailey v Marinoff* were quite different from those in the present case. There were, in fact, no unintended or unforeseen consequences. Indeed, the actual consequences were precisely what the Court intended to occur by the orders it had made. By reason of the events that transpired, the Court, in substance, formed the view that it would have been preferable if the order had not been made. *Bailey v Marinoff* is clearly distinguishable."

The Chief Justice then referred (at 421) to the judgment of Griffiths CJ in *Ivanhoe Gold Corporation Ltd v Symonds* (1906) 4 CLR 642 at 655:

> "In my opinion, if, at the trial of an action in which two claims are joined, one only is tried, and without the fault of either party judgment is entered on the whole case, it can be amended both under this rule and under the inherent power of the Court."

[34] Spigelman CJ noted (at 423) the judgments in *In re Swire; Mellor v Swire* (1885) 30 Ch D 239 and said:

> "As Cotton LJ indicated … :
>
> > '… the Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its record, that it may be in accordance with the order really pronounced.'
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> Similarly Lindley LJ said … :
>
> > '… There is no … magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would, … be shocking to say that the party aggrieved cannot come here to have the record set right, … if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not'."

[35] It may be accepted, therefore, that if the circumstances were as the applicant described them the Court would have power to recall and re-open the applications heard on 11 August 2011. As the circumstances are not as the applicant pretends them to be, and as the Court intended to make the orders it did make, and the consequences, far from being unforeseen, were precisely those which the Court

intended to bring about, this case is within the general rule expressed by Barwick CJ in *Bailey v Marinoff*. The Court has no power to recall or re-open the orders.

[36] One turns then to the statutory provisions and Rules of Court, on which the applicant relies, to see whether the Court of Appeal has the power.

[37] The applicant relied particularly on s 58 of the *Constitution of Queensland* 2001 which provides:

> "(1) The Supreme Court has all jurisdiction necessary for the administration of justice in Queensland.
>
> (2) Without limiting subsection (1), the court—
>
> (a) is the superior court of record in Queensland and the supreme court of general jurisdiction in and for the State; and
>
> (b) has, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise."

[38] The section originally appeared as s 9 of the *Supreme Court of Queensland Act* 1991. It was headed "Jurisdiction generally", and followed s 8 which provided that:

> "The Supreme Court of Queensland, as formerly established as the superior court of record in Queensland, is continued in existence."

[39] Given its location in the Act which established separate divisions in the Supreme Court and effected some re-organisation of the Court, s 9 appears to have been no more than a modern, terse, restatement of the Court's jurisdiction conferred on its establishment by the *Supreme Court Act* 1867. Section 21 of that Act gave the Court:

> "… the same jurisdiction power and authority as the Superior Courts of Common Law and the High Court of Chancery in England … have or has in the administration of the law of England and … jurisdiction … to hear and determine all actions whatsoever … as fully and amply to all intents and purposes as Her Majesty's Courts of Queen's Bench, Common Pleas and Exchequer of Pleas … ".

[40] Section 22 conferred:

> "… such power and authority to do exercise and perform all acts matters and things necessary for the due execution of such equitable jurisdiction as is possessed by the Lord High Chancellor or other equity judges of England …".

[41] That being the likely provenance and intent of s 58 the jurisdiction of the Court which it conferred is to be exercised in accordance with established rules of law and legal principle. One such principle is finality in litigation and the sanctity of judgments. The principles recognised and restated in *Bailey*, *Gamser* and *Central Authority* govern the manner in which the Court's jurisdiction is to be exercised. Section 58 does not confer power on the Supreme Court to do whatever it likes. The section is not intended to abrogate the important and well established principles just mentioned.

[42] The applicant relied on *R v Pettigrew* [1997] 1 Qd R 601 in which it was held that the Court of Appeal could reconsider an application for leave to appeal against

sentence which had earlier been heard and disposed of. Section 9 (then s 8) of the *Supreme Court Act* 1991 was relied on. The authority of the case has been circumscribed. In *GU v TO* [2005] QCA 480 at [68] Jerrard JA (with whom the President agreed) said:

> "[68] In *R v Pettigrew* [1997] 1 Qd R 601, the majority of this Court considered that the equivalent section (then) in the *Supreme Court of Queensland Act* 1991 empowered this Court to set aside its own earlier judgment dismissing an application for leave to appeal against sentence, grant leave to appeal against that sentence, and make orders on that sentence appeal. Despite that decision, in *Stubberfield v Paradise Grove Pty Ltd* [2000] QCA 299 this Court held its earlier decision in *Pettigrew* could not be taken as meaning the section gave any wider charter for the re-opening of judgments in civil matters than had been expressed by the High Court in *DJL v Central Authority* (2000) 74 ALJR 706. In the latter decision the High Court restated the position declared by Barwick CJ in *Bailey v Marinoff* (1971) 125 CLR 529 at 530. Subsequently, in *R v Alexanderson* [2001] QCA 400 Williams JA, with whom the other judges agreed, noted that in each of *R v Lowrie* [1998] 2 Qd R 579 and in *Re Robert Paul Long* [2001] QCA 318 a majority of this Court had held that s 8 (now s 58(1) of the *Constitution of Queensland* 2001) of the *Supreme Court of Queensland Act* 1991 did not confer a criminal appellate jurisdiction on this Court not already conferred by Chapter 67 of the *Criminal Code*; and remarked that *Pettigrew* could be regarded as a decision essentially involving an application of the slip rule. He considered that in *Pettigrew* this Court had acted in error when it heard the first appeal, and had later acted to correct that error."

[43] To the same effect is the judgment in *Stubberfield v Paradise Grove Pty Ltd* [2000] QCA 299 at [18] and [19] in which it was said:

> "[18] Without doubting the correctness of the order that was made in *Pettigrew*, it is apparent that the decision of the High Court in *DJL* re-emphasises the very narrow limits within which a superior court may revisit the finality of its own decisions. Pincus JA did not in *Pettigrew* suggest that the Queensland Court of Appeal has any greater powers in this respect than the New South Wales Court of Appeal.
>
> [19] In our view *Pettigrew* cannot be taken as giving any wider charter for the re-opening of judgments in civil matters than that expressed by the High Court in *DJL* above. It is unnecessary to decide whether any different principles might be justified in criminal jurisdiction."

[44] The reference to the powers of the New South Wales Court of Appeal to revisit its own judgments was a reference to what the High Court had said in *Bailey* and *Central Authority*.

[45] Section 58(1) is in similar terms to s 23 of the *Supreme Court Act* 1970 (NSW), as to which Wilson and Dawson JJ said in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 (at 617) that the section confirms the inherent power of the Supreme Court, without increasing it. Speaking of s 23 Toohey, Gaudron, McHugh and Gummow JJ said in *Reid v Howard* (1995) 184 CLR 1 (at 16 and 17):

> "Although it has been said that the inherent power of a superior court cannot be restricted to defined and closed categories, the power is not at large. Nor is the jurisdiction conferred by s 23 of the *Supreme Court Act*. Neither the inherent power nor the completely general terms of s 23 can authorise the making of orders excusing compliance with obligations or preventing the exercise of authority deriving from statute. … Moreover, and of more importance, the inherent power and the jurisdiction confirmed by s 23 of the *Supreme Court Act* are to be exercised only as necessary for the administration of justice."

The administration of justice will not be advanced if the established rules limiting the re-opening of regularly entered judgments are ignored.

[46] We conclude from this review of the authorities that s 58 does not extend the Court's power to set aside the earlier decision and embark upon a fresh hearing of the applications, which it has dismissed, beyond the limits set by the authorities.

[47] The third source of power is said to be *UCPR* 667(2)(d) and/or (e). The rule provides that the Court may set aside an order at any time if it does not reflect the Court's intention at the time the order was made, or if the party who has the benefit of the order consents. Neither provision applies. The respondents oppose any alteration to the order of the Court made on 30 August 2011. It is probably the first provision that the applicant relies upon.

[48] For reasons we have given this is not a case in which the orders made do not reflect the Court's intention when the order was made. *UCPR* 667 has no application.

[49] We conclude that there is no power to make the orders sought by the applicant. But even if the power existed it should not, in this case, be exercised. In the course of submissions the correctness of the decisions made on 11 August 2011 to dismiss the applications, 2750/11 and 3608/11, was demonstrated. When asked what it intended in respect of the applications should the order dismissing them be set aside, the applicant's solicitor said that application 2750 should be remitted to the P&E Court and application 3608 be adjourned to the Registry, where it might be amended to include a claim for damages against ENERGEX, and by the addition of further unidentified respondents. This intimation is, by itself, enough to show that both applications were properly dismissed because the applicant does not intend to pursue the relief sought in them.

[50] In addition the suggestion that application 2750/11 could be remitted to the P&E Court shows a misunderstanding of the respective jurisdictions of this Court and that of the P&E Court, and of the nature of the application, which was a proceeding started in the Court of Appeal seeking leave to appeal against directions for the conduct of proceedings which remain extant in the P&E Court. The appellate jurisdiction involved in the application for leave to appeal cannot be remitted to the P&E Court. It is apparent from the suggestion that the application be

remitted that the applicant does not wish to pursue its challenge to the directions. The application for leave to appeal can serve no purpose and was properly dismissed.

[51] The Originating Application, 3608/11, fares no better. The applicant either wishes it to lie dormant in the Registry, or to amend it to claim damages against ENERGEX and unknown others. If the applicant does not wish to proceed with it, it should be dismissed. It is a proceeding in the Appeal Division of the Supreme Court of Queensland. It would be wholly inappropriate to amend an application in this Division of the Court to seek relief which should be sought by way of claim and statement of claim filed in the Trial Division.

[52] There is no utility at all in setting aside the orders made on 11 August 2011 when the applicant has confirmed the intimation made then that it does not wish to proceed with either application.

[53] The respects in which the applicant's submissions identify the "fundamental flaws" in the judgment of 30 August 2011 show the grounds for recalling and setting aside that decision to be fanciful.

[54] The first is that it was an obvious error to conclude, as the Court did, that it would not itself have embarked upon a determination of questions raised by the Originating Application. Cases were cited for the proposition that a party who has regularly invoked the jurisdiction of the Court has a right to insist upon its exercise. The contention overlooks, perhaps wilfully, the explanation given in the reasons that the Court's jurisdiction was not properly invoked because the application duplicated proceedings in the P&E Court, and invited the Court of Appeal to exercise the jurisdiction of the Trial Division.

[55] Then it is said that the Court of Appeal, as successor to the Full Court of the Supreme Court, was the only Court which could grant relief pursuant to the *Judicial Review Act* 1991. There are many objections to this contention. It is only necessary to mention one. The Originating Application does not seek judicial review. Extraordinarily the applicant contended that it sought relief from the Court of Appeal because identified provisions in various legislation relevant to the applicant's case against ENERGEX forbade judicial review at all. The applicant did not explain how the Court of Appeal could be exempt from the prohibition. If it meant that proceedings under Part 5 of the *Judicial Review Act* were still available they can be brought in the Trial Division. See *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd & Ors* [2011] QCA 22 at [35] and [36].

[56] Then the applicant recited the Court's reasons which (at [24]) recorded the respondent's contention that the applicant's proceeding would have been unsuccessful whether or not there was merit in its dispute with ENERGEX. From this brief summary of the respondents' submission the applicant builds an assertion that the costs orders amount to a considered judgment adverse to the applicant on all points of law it sought to agitate in the P&E Court and in application 3608/11. The contention is so bizarre that nothing more need be said about it.

[57] The applicant complains also that the orders give rise to estoppels against it precluding it from commencing "subsequent legal proceedings against ENERGEX", and the Ministers. The complaint is unfounded and, indeed, fanciful. The only

issues as to which the judgment might create an estoppel are that the application for leave to appeal could not have succeeded, and the Court of Appeal would not have determined the Originating Application. No other points were considered or made the subject of judgment.

[58] Moreover, ENERGEX has abandoned the designation process which gave rise to the applicant's concerns about the infringement of its property rights. Any steps taken in furtherance of those proposals for designation, whether lawful or unlawful, have no continuing effect. If ENERGEX should in the future proceed with fresh designations it would have to issue new notices and comply afresh with statutory requirements. Any complaint that it had not done so will give rise to a new dispute, a new cause of action and new rights. Legal proceedings in respect of the new dispute will be unaffected by what happened in the past with respect to a different attempted designation.

[59] The only question before the Court in August was whether the applicant had acted reasonably in seeking leave to appeal against directions made in the P&E Court, and in commencing proceedings in the Court of Appeal which duplicated the relief sought in the lower court. For the reasons it gave the Court found the applicant's conduct was unreasonable and made costs orders consequent upon that conclusion. The applicant's submissions ignore that basic fact.

[60] The applicant then submitted that the Court "was bound to hold that the proposed designation of the [transmission line project]…was unlawful…". This ignores the point that with the abandonment of the project the subject matter of the dispute between the applicant and ENERGEX ceased to exist and the Court could not determine a dispute which had become purely hypothetical. The Court expressly did not deal with the question of costs on the basis that one or other of the litigants would have been successful. It dealt with the question on the limited basis already explained and which was clearly set out in the earlier reasons.

[61] The application that "in respect of any adverse Order in respect of costs … either existing or as recalled and/or corrected" by which the applicant is ordered to pay costs, it have leave to appeal pursuant to s 253 of the *Supreme Court Act* 1995 is misconceived and portrays a profound misunderstanding of the section and of the appellate process. The section applies with respect to appeals to the Court of Appeal from costs orders made by single judges.

[62] The applicant's written submissions are replete with disrespectful and provocative criticisms of the Court's reasons for judgment given on 30 August 2011. It said that "the Court misapprehended, the whole course of the proceedings" and "misunderstood" the circumstances in which The Hon Paul Lucas became a party to proceedings, and to have "misapprehended completely that 3608/11 was not a 'merits review' … *requiring evidence, the testing of evidence, adjudication on the merits of the rival contentions in dispute*". The misapprehension was said to occur in paragraph [29] of the earlier reason in which it was said:

> "[29] This application faced obvious and intractable difficulties. The only orders made by the P & E Court which might be the subject of an appeal were procedural, preliminary and related only to the manner in which the substantive hearing of the applicant's challenge should be conducted. Secondly, the application seeks final orders giving it victory in the

> proceedings without the production of any evidence, or the testing of evidence, or an adjudication on the merits of the rival contentions in dispute."

The paragraph appears immediately under a heading "Application for Leave to Appeal". It is, therefore, beyond understanding why the applicant would contend the paragraph misapprehended the nature of the Originating Application.

[63] The applicant is clearly and deeply dissatisfied with the costs orders. Its remedy was to apply for special leave to appeal to the High Court, if it could find some rational basis for criticising the orders which it has not set out in submissions to this Court. It asks instead for an order the Court has no power to make.

[64] There was as well an application filed on 14 November 2011 that Chesterman JA not sit to hear the application filed on 5 September 2011 because of his Honour's apprehended bias. There was no objection to the other members of the Court who had agreed with the orders made on 30 August 2011 and for the reasons given for making the orders.

[65] The submissions filed in support of the application were absurd. In tone and content they were contemptuous. Their premise was that the judgment is so unfair to the applicant and so disparaging of its case as to demonstrate a lack of judicial impartiality. This application, like the other, misunderstands what the Court decided on 30 August 2011 and imputes to it decisions it did not make on points it did not consider.

[66] During the course of the argument the applicant abandoned the objection to the judge.

[67] The applicant was able to identify one error in the orders made in proceeding 2750/11. The order as filed is that:

> "The applicant is to pay the costs of the first respondent and the costs of Paul Lucas of and incidental to the application for leave to appeal … to be assessed on the standard basis."

[68] The Hon Paul Lucas was not a party to that proceeding and that part of the order is an error which can be corrected under the slip rule. Accordingly, it is ordered that the words "and the costs of Paul Lucas" be deleted from the order of the Court dated 30 August 2011 in Appeal No. 2750/11.

[69] The respondents, ENERGEX, The Hon Stephen Robertson and The Hon Paul Lucas seek indemnity costs of the applications on the ground that they were frivolous, vexations and an abuse of process. They clearly justify that description. The applications were brought in the absence of any power in the Court to grant the relief sought; they argued for the setting aside of orders which were made without objection, and for a purpose which was obviously insufficient to justify the making of the order, had the power to do so existed. As well the argument advanced in support of the applications misstated what had occurred on 11 August 2011 and did not address the Court's reasons for making the costs orders. The arguments were, as senior counsel for ENERGEX submitted, "based on fantasy, not reality."

[70] Accordingly, the applications of 5 September and 14 November 2011 are dismissed. The applicant is ordered to pay the respondents' costs of and incidental to the applications, to be assessed on the indemnity basis.