SUPREME COURT OF QUEENSLAND

CITATION:	*Trinity Park Investments Pty Ltd v Fabcot & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 276
PARTIES:	**In Appeal No 9894 of 2021:** **TRINITY PARK INVESTMENTS PTY LTD** **ACN 123 732 525 ATF AND L'ARMONIA PTY LTD** ACN 140 784 576 (applicant) **v** **FABCOT PTY LTD** ACN 002 960 983 (first respondent) **CAIRNS REGIONAL COUNCIL** (second respondent) **DEXUS FUNDS MANAGEMENT LIMITED** ACN 060 920 783 (third respondent) **CAIRNS COMBINED BEACHES COMMUNITY ASSOCIATION INC** (fourth respondent) **In Appeal No 11066 of 2021:** **DEXUS FUNDS MANAGEMENT LIMITED** ACN 060 920 783 (applicant) **v** **FABCOT PTY LTD** ACN 002 960 983 (first respondent) **CAIRNS REGIONAL COUNCIL** (second respondent) **CAIRNS COMBINED BEACHES COMMUNITY ASSOCIATION INC** (third respondent) **TRINITY PARK INVESTMENTS PTY LTD** **ACN 123 732 525 ATF AND L'ARMONIA PTY LTD** ACN 140 784 576 (fourth respondent)
FILE NO/S:	Appeal No 9894 of 2021 Appeal No 11066 of 2021 P & E Appeal No 201 of 2018 P & E Appeal No 221 of 2018 P & E Appeal No 223 of 2018

DIVISION:	Court of Appeal
PROCEEDING:	Applications for Leave *Planning and Environment Court Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2021] QPEC 40 (Everson DCJ)
DELIVERED ON:	10 December 2021
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2021
JUDGES:	Morrison and Bond JJA and Bradley J
ORDERS:	**In Appeal No 9894 of 2021 and Appeal No 11066 of 2021:** **1. Application for leave to appeal refused.** **2. Application to remit to a different judge refused.** **3. The applicant pay the respondents' costs of and incidental to the application, to be assessed on the standard basis.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – OTHER MATTERS – where the Council issued preliminary approvals and development permits for a proposed development – where the P&E Court allowed an appeal associated with that preliminary approval and leave was sought to appeal to the Court of Appeal – where the appeals were allowed and remitted to the P&E Court – where the parties applied for leave to adduce further evidence at the remitted hearing – where the P&E Court made an order to adduce further evidence in the remitted hearing but limited in some respects – whether the order wrongly excludes certain evidence advanced on the applications in the P&E Court *Planning and Environment Court Act 2016* (Qld), s 63 *Fabcot v Cairns Regional Council (No 2)* [2020] QPEC 17, related *Just GI Pty Ltd v Pig Improvement Co Aust Pty Ltd* [2001] QCA 48, cited *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd* [2019] QCA 160, cited *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95, related
COUNSEL:	G A Thompson QC, with E J Morzone QC and K W Wylie, for the applicant/fourth respondent Trinity Park Investments Pty Ltd and L'Armonia Pty Ltd B D Job QC, with M J Batty, for the first respondent Fabcot

Pty Ltd
R S Litster QC, with L V Sheptooha, for the second respondent Cairns Regional Council
D R Gore QC, with J G Lyons, for the third respondent/applicant Dexus Funds Management Pty Ltd

SOLICITORS: Emanate Legal for the applicant/fourth respondent Trinity Park Investments Pty Ltd and L'Armonia Pty Ltd
Keir Steele Waldon for the first respondent Fabcot Pty Ltd
McCullough Robertson for the second respondent Cairns Regional Council
Hopgood Ganim for the third respondent/applicant Dexus Funds Management Pty Ltd

[1] **MORRISON JA**: These applications arise out of long running litigation in the Planning and Environment Court.

[2] Fabcot Pty Ltd applied to the Cairns Regional Council for preliminary approvals and a development permit in relation to a proposed development which included a Shopping Centre with Health Care Services, a Child Care Centre, Service Station and a Food and Drink Outlet.

[3] In October 2018 the Council issued the preliminary approvals and development permits. The operators of two other shopping centres in the area, Trinity Park Investments Pty Ltd and Dexus Funds Management Limited, formed the view that their commercial interests may be adversely affected by the proposed development. Each of them appealed against the Council's decisions, seeking to have them reversed.

[4] Fabcot also appealed,[1] seeking particular approvals for the proposed development. The P&E Court heard all appeals together, with Fabcot having the carriage of the proceedings.

[5] After a hearing that commenced in March 2020, the P&E Court allowed Fabcot's appeal subject to the imposition of lawful conditions and dismissed the other appeals which sought orders that the proposed development be refused.[2]

[6] Trinity and Dexus then sought leave to appeal to this Court. They were granted leave, the appeals were allowed and the planning appeals were remitted to the P&E Court for further determination.[3]

[7] In May 2021 the P&E Court commenced the management of the remitted planning appeals. Trinity and Dexus applied for leave to adduce further evidence at the remitted hearing. Those applications were heard on 14 July 2021, and on 12 August 2021 the P&E Court made the following order:

> "Leave to adduce further evidence granted, limited to the extent set out in paragraphs [22] – [25]."

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1 Appeal 201 of 2018.
2 *Fabcot Pty Ltd v Cairns Regional Council & Ors* [2020] QPEC 17.
3 *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95.

[8] Trinity and Dexus now seek leave to appeal against that order. They each contend that the order wrongly excludes certain evidence they advanced on the applications in the P&E Court.

[9] For the reasons which follow the applications for leave should be refused.

The error leading to the remitter

[10] The previous appeal to this Court succeeded on only one ground. It appears from the following passages in the reasons:[4]

> "[115] In my view although Fabcot and the Council put forward persuasive arguments, "local residents" and "local community" in the LMDR Zone Code should be construed consistently with how they are used in the LMDR Zone Code, having regard to the fact that the stated purpose is to provide for "small scale services and facilities that cater for local residents." Although "small scale" is used only in the context of the extension in PO4 of the LMDR Zone Code, PO3 of the LMDR Zone Code requires a development to be consistent with the purpose and overall outcomes. Construing the meaning of "local community" to be comparable to non-residential uses of a small scale is consistent with and supported by:
>
> (a) PO4 of the LMDR Zone Code providing for "non-residential uses that serve the local community" including "providing for the identified convenience needs of the local community" (emphasis added);
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> (b) PO4 of the LMDR Zone Code contemplates non-residential uses being established in more than one area given the reference to "locations";
>
> (c) PO2 in the Smithfield Local Plan which refers to "small scale retail, business and restaurants establish (sic) to support local communities where they are within a walking distance or catchment of predominantly residential neighbourhoods";
>
> (d) the extrinsic evidence in s 7.2.8.2 which supports the fact that the Smithfield Local Plan is to provide for two anchors in the Smithfield local area to achieve its stated purpose but otherwise "Small scale and boutique retail markets may be established elsewhere to support local communities and tourist markets, although it is anticipated that these do not occur in significant shopping centre developments";
>
> (e) while Local Centres refers to "local community," the relevant provisions refer to "small cluster" of uses as opposed to scale and "small scale of uses", the former referring to the nature of uses as opposed to size of the non-residential use which is relevant to scale, indicating

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4 Internal footnote omitted.

"local community" is to be interpreted differently to the LMDR Zone Code; and

(f) the reference to not compromising the hierarchy of centres can be read consistently as a reference to either a neighbourhood centres insofar as it refers to small scale convenience shopping or Local centres which refers to a small cluster of uses serving not just weekly needs but daily needs of the surrounding local community.

[116] However, while the meaning of "local residents" or "local community" must still be consistent with the reference to "small scale," it is not confined to a part of a suburb or even a single suburb. The fact that a shop is "small scale" does not mean it necessarily may only serve people in a particular suburb depending upon the speciality of the shop concerned. Thus it may serve people beyond the immediate suburb in which the shop is located to an adjacent or surrounding suburb, which supports the fact that "local community" or "local residents" has a broader meaning. The reference to "small scale" development in PO4 of the LMDR Zone Code contemplates the establishing of centres within the meaning of the hierarchy and is not defined by a 250 square metre benchmark. That is consistent with PO2 in the Smithfield Local Plan which provides for "small-scale retail, businesses, and restaurants" to support "local communities."

[117] In the present case however the size of the proposed Fabcot development, particularly the supermarket, and its PTA extends beyond what could be regarded as serving the "local community" within the meaning of the LMDR Zone Code given the large scale of the development. That is different from what is contemplated by a Local Centre which contemplates uses which can meet the daily and weekly shopping and service needs of their surrounding local community which suggests, at least in relation to retail, something larger than small scale non-residential uses. The primary trade area identified as being served by the proposed development spans two suburbs or part thereof with an estimated population in 2022 of 13,130. There was evidence accepted by the primary judge that the Fabcot shopping centre would be centrally located to serve an estimated 8,000-10,000 people located outside a radius of three kilometres from other shopping centres.

[118] The definition adopted by the primary judge adopted the area that would be primarily be met by a full line supermarket which could meet weekly shopping needs by reference to Local centres in the Strategic Framework rather than examining the scope of "local community" in the context of the LMDR Zone Code. In doing so the primary judge asked the wrong question by reference to the provision for the Local

> centres assuming the meaning of "local community" was the same as when it was used in the LMDR Zone Code. In doing so, his Honour adopted a meaning of "local community" consistent with meeting weekly needs of a local community rather than commensurate with "small scale" development.
>
> [119] The use of such general words such as "local residents" and "local community" made the task before his Honour a difficult one, particularly when the same phrase is used in different contexts in other provisions. While his Honour noted "local" is a flexible concept, his Honour erred insofar as his Honour acted upon the basis that the PTA defined the area which was a "local community" or "local residents," in relation to the LMDR Zone and did not have sufficient regard to the reference to "small scale," used in connection with catering for the needs of local residents."

[11] In summary, the error made by the learned primary judge was in failing to consider the question of non-compliance with the requirements of a "local community" in the Low-Medium Density Residential Zone Code of CP 2016 (the **LMDR Zone Code**), which require non-residential uses to serve the local community. It was that error which, this Court held, may have caused his Honour's discretion to miscarry.

The proposed grounds of appeal

[12] The proposed grounds of each appeal[5] were expressed expansively but can be summarised as being that the learned primary judge erred in law:

(a) by determining that rehearing of the remitted P&E appeals were confined to the error in construction identified by the Court in the previous appeal;

(b) by holding that all of the findings of fact in the reasons for judgment delivered after the first hearing are undisturbed, and that that issue is not a matter for debate at the remitted hearing;

(c) by ruling that the further evidence to be adduced at the remitted hearing was limited to the extent set out in paragraphs [22]-[25] of the reasons delivered on 12 August 2021;

(d) by failing to conclude that on the remitted hearing it was relevant to have regard to the extent to which the proposed shopping centre and its main trade area exceeded the size of a centre and trade area anticipated by provisions of the LMDR Zone Code;

(e) by failing to conclude that on the remitted hearing changes to the planning scheme and the progression of Trinity's own application for a proposed development, including its impact on town planning needs, were relevant; and

(f) by mischaracterising the evidence for which leave was sought.

[13] As will become apparent all of the proposed grounds suffer from a misconception as to the nature and extent of the orders made on 12 August 2021. Further, the

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5 Trinity's draft notice of appeal, Supplementary Appeal Book 2F, p 111; Dexus' draft notice of appeal, Supplementary Appeal Book 2F, p 123.

applications for leave to appeal tended to stray from the fact that any appeal would only be against the orders made, rather than the reasons handed down on 12 August 2021.

The remitted hearing – undisturbed findings of fact?

[14] I would not grant leave to appeal in respect of this contention. There are several reasons for that.

[15] First, on 28 May 2021 the learned primary judge made an order concerning the determination of the rehearing, in these terms:[6]

> "The determination on the rehearing of the appeal requires the re-exercise of the Court's discretion having regard to the identified error in the construction of the identified provisions of the LMDR zone, having regard to the reasons of the judgment of the Court of Appeal and the undisturbed findings of fact and law."

[16] No challenge was made to that order.

[17] Secondly, in so far as the contention relies on what his Honour said in paragraph [16] of the Reasons below, it is misconceived. As to the order of 28 May 2021 his Honour said:

> "For the avoidance of any further doubt, the order dated 28 May 2021 contemplates the rehearing of the appeal being confined to the identified error in construction referred to in the passages of the judgment of Brown J quoted above and nothing else. The discretion which I must re-exercise arises pursuant to s 46 of the PECA and ss 45 and 60 of the PA. All of the findings of fact are undisturbed. Only the error of law identified above is the subject of the remitter. It is not a matter for debate at the remitted hearing."

[18] There having been no challenge to that order it was right to say that it was not a matter for debate. Such a debate had been belatedly foreshadowed, and in terms that suggested a revisiting of any or all factual findings.[7]

[19] Thirdly, in so far as the learned primary judge said that all of the findings of fact are undisturbed, that was true. None of the challenges in the previous appeal had succeeded except in respect of the error by failing to take into account the non-compliance with the requirements of a "local community" in the LMDR Zone Code. This Court's decision did not disturb any findings of fact. By saying so his Honour cannot be understood to have foreclosed any necessary new findings that might need be made when considering that area the subject of the error.

Non-compliance with the LMDR Zone Code not an issue?

[20] I would not grant leave to appeal based on this contention.

[21] In the previous appeal this Court identified the error held to have been made. The learned primary judge identified that error in the course of his Honour's reasons given on the applications to adduce further evidence and set out the passages above

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6 Reasons below [14].
7 Reasons below at [15].

from this Court's reasons.[8] In doing so his Honour set out extensive parts of the relevant reasons.

[22] The order of 28 May 2021 expressly proceeded on the basis that that error was to be addressed at the re-hearing, and that would require the re-exercising of the P&E Court's discretion. Leave to adduce further planning and need evidence was granted, subject to some limitations to which I will come shortly.

[23] In my view, it cannot be said that his Honour mistook the question to be examined at the remitted hearing.

[24] Given that the re-hearing is still some way off, and only interlocutory matters were being dealt with, it is hardly surprising that his Honour did not express any conclusions beyond those he did; it was not necessary to do so at that time.

Failure to find that changes in the planning scheme and Trinity's application were relevant

[25] For the same reasons it cannot be concluded that the learned primary judge ruled against an examination of relevant town planning issues, including any changes in the scheme or the impact, if any, of the further progress of Trinity's application. His Honour accurately identified the error that caused the matter to be remitted for further hearing, and permitted new evidence, including evidence as to need, to be adduced on that issue, subject to some limitations, to which I shall come.

[26] I would not grant leave to appeal on the basis of these proposed grounds.

[27] That leaves for consideration the contentions based on the order giving leave to adduce further evidence.

The application to adduce further evidence

[28] Each of Trinity and Dexus applied to the learned primary judge for leave to adduce further evidence at the remitted hearing.

[29] For that purpose each advanced further statements of experts who had already given evidence at the first hearing. Those statements were from; (i) Mr Leyshon (an economist) and (ii) Mr Cooper (shopping centre manager);[9] and (iii) Mr Brown (an economist) and Mr Schomburgk (a town planner).[10]

The order below

[30] The order made by the learned primary judge was in these terms:

> "Leave to adduce further evidence granted, limited to the extent set out in paragraphs [22] – [25]."

[31] On its face the order was a general grant of leave to adduce evidence, but subject to particular limits.

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8 *Fabcot v Cairns Regional Council (No 2)* [2021] QPEC 40, at [12], [14].
9 Mr Leyshom and Mr Cooper were called by Dexus.
10 Mr Brown and Mr Schomburgk were called by Trinity.

[32] The reference to "paragraphs [22] – [25]" is to those paragraphs in the reasons below.[11] Therefore, the construction of the order requires that those paragraphs be examined to ascertain what the limitations are.

[33] Paragraphs [22]-[25] of the reasons below state:[12]

> "[22] As Brown J observed in the Court of Appeal decision, the words which must be construed by me at the rehearing of the appeal are "general words". Accordingly, I am of the view that I would not benefit from further planning evidence or evidence from other experts concerning the meaning of the relevant words in CP 2016 which must be construed by me at the re-hearing.
>
> [23] The amendments which have been proposed to CP 2016 may give rise to an application of the Coty Principle. A bundle of these amendments should be prepared for tender as an exhibit together with a statement identifying their status at the time of the rehearing. So too an agreed bundle showing the current status of the TPI development application should be prepared and tendered at the remitted hearing.
>
> [24] In my view considerations of procedural fairness warrant any changes in demographics and economic activity in the primary and secondary trade areas identified in the P&E Court decision, being taken into account at the rehearing. The statement of Mr Cooper which addresses tenancy issues at Smithfield Shopping Centre can be adduced. Each of the parties is also given leave to adduce need evidence limited to changes in circumstances relevant to the economic, community and planning need for the proposed development from the date of the hearing of the appeals, which commenced on 16 March 2020, until the present. The need evidence which has been placed before the court in the course of the applications before me by Dexus and TPI goes well beyond this and includes opinions as to what relevant terms in the respondent's planning scheme mean. Each party to the appeals is given leave to prepare fresh evidence from their need experts which is limited to the parameters I have set out above.
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> [25] In the exercise of my discretion, no evidence ought to be adduced by any of the parties save for the additional evidence expressly set out above. The rehearing of the appeals is to otherwise proceed on the basis of the evidence which has already been adduced and the undisturbed findings of fact which have already been made."

[34] There are two limits revealed on the face of those paragraphs.

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11 *Fabcot v Cairns Regional Council (No 2)* [2021] QPEC 40.

12 Internal footnotes omitted.

[35] First, evidence from experts concerning the meaning of relevant words in the town planning scheme, CP 2016, which the judge was required to construe at the re-hearing.[13] Before this Court no party contended that such evidence was admissible.

[36] Secondly, further evidence on the issue of need was limited to changes in circumstances relevant to the economic, community and planning need for the proposed development from 16 March 2020,[14] until the present.[15]

[37] To understand the true scope of the second limitation, that relating to evidence going to need, one must go further back in the reasons below.[16]

[38] The learned primary judge identified that the additional evidence which had been advanced on the application fell into two categories: first "planning evidence", then secondly, "evidence relevant to considerations of economic impacts and need".[17]

[39] His Honour also identified those areas where Trinity submitted that there were relevantly changed circumstances (a submission supported by Dexus):[18]

> "1. the proposed major amendment package to CP 2016 known as version 3.0;
>
> 2. the progression and status of the TPI code assessable development application for a shopping centre which was lodged on 6 November 2020 ("the TPI application");
>
> 3. population growth and projections and their impacts on the extent of the economic, community and planning need for the proposed development; and
>
> 4. whether and to what extent the trading performance and tenancy vacancy rates at Smithfield Shopping Centre have changed since the hearing."

[40] His Honour then noted that both Dexus and Trinity sought leave "to call further expert evidence addressing **these issues and also as to the meaning of the provisions** of the LDMR Zone Code in the context of the proposed development".[19]

[41] That then lead to what his Honour said in paragraph [20]:

> "[20] To the extent factual circumstances relevant to the exercise of my discretion on the rehearing have changed, I am of the view that considerations of procedural fairness make it appropriate to allow further evidence to be called, but only to the extent it updates the evidence which has already been considered by me. In my view, there is no warrant for completely fresh evidence being given about a matter already the subject of a finding of fact, which remains unaffected by any changes in circumstances since the P&E Court decision."

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13 Paragraph [22] and fourth sentence of paragraph [24].
14 The date of commencement of the hearing of the appeals in the P&E Court.
15 Third and fifth sentence of paragraph [24].
16 *MacQuarrie v Hunter New England Local Health District* [2019] NSWCA 98, [8].
17 Paragraph [18].
18 Paragraph [19].
19 Paragraph [19]; emphasis added.

[42] It is, in my view, evident that his Honour reference in paragraph [20] to "relevant factual circumstances … [that] have changed", was to those set out in paragraph [19] of the reasons below: see paragraph [39] above. The changes were to matters concerned with what might be called the existing need evidence, i.e. the evidence on the issue of need that had been adduced at the first hearing. That was what his Honour referred to in paragraph [24] of the reasons when his Honour referred to "changes in demographics and economic activity in the primary and secondary trade areas" (first sentence), and "need evidence" (third sentence). In other words, in my view, his Honour's reference to need evidence in paragraph [24] was only to that category of need evidence which arose out of that evidence which had been adduced at the previous hearing and which involved changed circumstances.

[43] However, as will be apparent from what I have said above, that was evidently different from the "planning evidence" (the first category identified in paragraph [18] of the reasons), and also "need evidence" that did not fall into the specific category of that which had been adduced at the previous hearing and which involved changed circumstances.

[44] Such a construction derives support from the fact that the error found by this Court in the previous appeal was the learned primary judge's failure to consider any non-compliance with the requirements of parts of the LMDR Zone Code which require non-residential uses to serve the local community. Both Trinity and Dexus submitted to this Court that no evidence whatever had been lead on that issue at the first hearing. That submission was not contradicted by the other parties. Therefore, it is evident that when his Honour referred to changes in circumstances with respect to need evidence it cannot have been to evidence on that issue, as there was none.

[45] In my view, the reasons make it plain that his Honour did not place a limitation on need evidence other than as explained above. In so far as it might be sought to adduce need evidence relevant to the issue the subject of the previous appeal to this Court,[20] namely consideration of any non-compliance with the requirements of parts of the LMDR Zone Code which require non-residential uses to serve the local community, there was no limitation imposed under the order made on 12 August 2021. It would be surprising if there was, given that this Court remitted the matter in order that that consideration be undertaken, and the learned primary judge clearly identified the area to be considered as a consequence of the remitter.

[46] It is also plain, in my view, that his Honour did not mischaracterise the evidence sought to be adduced. The two limitations placed on the general grant of leave show that to be so.

[47] Further, reliance was placed on one sentence in paragraph [24] of the reasons below, the contention being that it revealed an unparticularised finding that the limitation on the new need evidence extended beyond mere changes in circumstances relevant to the economic, community and planning need for the proposed development from 16 March 2020. The sentence is the fourth sentence:

> "The need evidence which has been placed before the court in the course of the applications before me by Dexus and TPI goes well

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20 *Trinity Park Investments Pty Ltd v Cairns Reginal Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95.

> beyond this and includes opinions as to what relevant terms in the respondent's planning scheme mean".

[48] The contention reads the word "and" as meaning that the words which follow are a separate topic from the words before the "and". I do not consider that to be the proper meaning of that sentence. In my view, the reference to the inadmissible opinions was intended as the explanation of the way in which that evidence went beyond the updating of existing need evidence.

[49] It is apparent from the foregoing that the applications for leave to appeal are misconceived.

[50] Further, before this Court each of Dexus and Trinity were pressed as to whether the evidence to which they referred[21] was caught by the limitations under the order. Each submitted that it was not, but they went on to submit that they were apprehensive that it might be.

[51] In the course of oral address[22] Mr Gore QC put the Dexus submission as:

(a) because the learned primary judge thought it necessary to impose limitations in the order, it necessarily must be the case that his Honour thought that parties were seeking to lead evidence that would infringe upon those limitations; and

(b) on that basis the inference to be drawn is that the particular paragraphs of the evidence identified in argument are the only realistic candidates for such infringements.

[52] That approach is an unsatisfactory way to identify legal error because it seeks to assume what the target of the limitation or exclusion was in the order, without identifying whether there was an error in the exclusion or limitation. If the order itself was not in error, and there was no error in the reasons in the paragraphs referred to in the order, then the current applications to this Court proceed on the basis of an anxiety that the P&E Court will act inconsistently with its own order. That is not something that this Court should assume.

[53] Furthermore, that approach is an unsound basis upon which leave to appeal should be granted as it is tantamount to seeking an advisory opinion from this Court.

[54] Nothing in what I have said above should be read as making any finding on the terms of the evidence that Trinity and Dexus sought to adduce below. Plainly the learned primary judge intended that the evidence would be reformulated to take into account his Honour's ruling. Any reformulation of the evidence is a matter for his Honour to deal with.

[55] In the circumstances it is unnecessary to address the issue, urged by the Council and Fabcot, that leave should not be granted because the order was made as a matter of discretion, at an interlocutory stage, and as to a matter of practice and procedure. However, applications for leave to appeal from interlocutory orders as to matters of practice and procedure will often be viewed as unlikely candidates for the grant of leave. As was said in *Just GI Pty Ltd v Pig Improvement Co Aust Pty Ltd*:[23]

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21 The new evidence from Mr Cooper, Mr Brown, Mr Leyshon and Mr Schomburgk.

22 Appeal transcript T 1-25 lines 13-24.

23 [2001] QCA 48 at [14].

> "It has been recognised at the highest level (*Adam P. Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177) that appellate courts exercise particular caution in reviewing such decisions. Generally, in addition to error of principle, the order appealed from must work a substantial injustice to one of the parties before an appellate court would interfere."

[56] Similar comments were made in *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd*, referring to *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc*:[24]

> "[2] The appellants have the formidable task of persuading this Court to reverse a discretionary judgment, and on a matter of practice and procedure. Nevertheless, each case must be considered in the light of its own particular circumstances, and, if there is a demonstrated basis, according to *House v The King*, for interfering with the decision, this Court should do what is necessary to avoid a substantial injustice."

Remitter to a different judge

[57] Each of Dexus and Trinity sought, as part of the application for leave to appeal, an order that the further hearing be remitted to a judge other than the primary judge.

[58] For Dexus it was submitted that order should follow if this Court found that the learned primary judge took too narrow a view about the scope of the remitted hearing.[25] The proper construction of the order made below shows that his Honour did not err in the way contended.

[59] It may also be observed that on the previous appeal Dexus (but not Trinity) agitated for a different judge to deal with the remitter. That order was refused by this Court. The remitter was to the learned primary judge because of "his Honour's understanding of the evidence in the case".[26] The Court said:[27]

> "I find no good reason for a different judge to rehear the case or any good reason to make an order remitting it to a different judge as was sought by the appellants. While his Honour did make comments about TPI' s application given the context in which they arose they do not indicate that his Honour cannot hear the matter impartially."

[60] Trinity adopted the approach of Dexus on these applications. Its submission was that[28] the "apprehension [it] has is fortified by the fact that there is currently an application before the primary judge brought by Fabcot for the primary judge to hear (consecutively with the remitted appeal) an appeal brought by [Trinity] against the refusal of the Council of [Trinity's] development application (P&E Court No. 2386 of 2020) in circumstances where the primary judge made adverse comments about that development application in the original hearing."

[61] Trinity's contention is too vague and unsatisfactory to establish a basis to effectively overturn this Court's remitter to the learned primary judge. No

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24 [2019] QCA 160 at [2]; internal citations omitted.
25 Dexus' outline paragraph 35.
26 *Trinity Park* [2021] QCA 95 at [94].
27 *Trinity Park* [2021] QCA 95 at [221].
28 Trinity Park outline paragraph 29.

reasonable basis for apprehension has been shown. Furthermore, whatever was said by the learned primary judge:

(a) it was about Trinity's development application, not Fabcot's application; and

(b) it was apparently said at the original hearing of the three appeals that are now remitted; necessarily that means that Trinity was aware of those comments when the question of remitter to a different judge was raised by Dexus in the previous appeal to this Court, yet Trinity did not then join in the submission for remitter to a different judge.

[62] In the circumstances the submission for remitter to a different judge would amount to a de-facto reversal of this Court's refusal to do so in the previous appeal, in circumstances where there was no attempt to challenge that outcome by appeal. Nor was there an application to the learned primary judge to recuse himself.

[63] Further, to make such an order where an application for leave to appeal on the substantive grounds has failed would be an unusual course to take.

[64] No proper reason has been advanced for taking that step, especially when the learned primary judge has already spent a considerable time exploring the issues in the case and digesting the expert evidence. Were such an order to be made, the potential for unnecessary waste of the P&E Court's resources is manifest, as is the unnecessary burden on the parties.

Conclusion and disposition

[65] For the reasons I have given above I would make the following orders in each application:

1. Application for leave to appeal refused.
2. Application to remit to a different judge refused.
3. The applicants pay the respondents' costs of and incidental to the application, to be assessed on the standard basis.

[66] I also agree with the additional reasons of Bond JA.

[67] **BOND JA:** I have had the advantage of reading in draft the reasons for judgment of Morrison JA. I agree that the matters identified by his Honour justify a refusal of leave to appeal for the reasons he gives. I agree with his Honour that the application for remitter to a different judge must also fail.

[68] To my mind, there were two other considerations which also justified a refusal of leave to appeal. I wish briefly to identify them.

Failure to identify the error or mistake in law

[69] Pursuant to s 63 of the *Planning and Environment Court Act 2016*, an appeal to this Court from the Planning and Environment Court is "only on the ground of error or mistake in law or jurisdictional error" and "only with the leave of the Court of Appeal". In this case, the applicants do not rely on jurisdictional error.

[70] It is axiomatic that an applicant for leave to appeal under s 63 should clearly and distinctly identify the error or mistake in law which is said to have been made by the primary judge.

[71] As Morrison JA has explained, the primary judge was responsible for the conduct of hearing a planning appeal which had been remitted back to him because the Court of Appeal had identified an error in the construction of a statute made in the first hearing of the appeal. Consequent upon such a remitter, the primary judge had a broad discretion as to how the appeal should be concluded in a fair and just way and it was open to him to conclude that undisturbed findings of fact stood, and that what was called for was a determination of the outstanding issues on the existing evidence in accordance with law, subject to the discretionary admission of further evidence: *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2009) 168 LGERA 1 per Basten JA (with whom Beazley and Young JJA agreed) at 22 [86]. The primary judge made such an order,[29] and that order was not challenged.

[72] The impugned order of the primary judge was an interlocutory order made on an application for leave to adduce some specific further evidence. The order granted the leave sought "limited to the extent set out in paragraphs [22] – [25]." It would follow that if there was error of law it must have been error of law in either the imposition or formulation of the limitations set out in those paragraphs.

[73] However, the applicants were unable identify any such error of law at all.

[74] For its part, Dexus advanced this general statement:[30]

> "While the decision of the primary judge involved the exercise of a discretion, it is established that an applicant which brings itself within the principles discussed in the well-known decision in *House v The King 1936 55 CLR 499* satisfies an error of law ground such as that contained in s.63 of the *PECA*[31]. The grounds also assert errors in principle, and it is established that it is an error of law to act on a wrong principle[32]."

[75] And Trinity contended that leave should be granted because:[33]

> "(a) wrongful rejection of admissible evidence is *prima facie* an error of law if it may affect the outcome.[34] It is sufficient to demonstrate that the error was material in the sense that it "*could have materially affected the decision*";[35] and
>
> (b) the primary judge misconceived the legal consequence of the earlier appeal to this Court being upheld and the remittal of the proceeding back to the primary judge to be determined according to law."

[76] The first problem with both statements is that they are hopelessly general and do not condescend to the identification of any particular legal error or mistake in either the imposition or formulation of the limitations set out in paragraphs [22] to [25] of the

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29 See the reasons of Morrison JA at [15].
30 Written submissions dated 19 October 2021 at [18], footnotes in original.
31 *Wyatt v Albert Shire Council* [1987] 1 Qd R 486 at 487.
32 *Nerinda Pty Ltd v Redland City Council* [2019] 1 Qd R 523 at 528 [12].
33 Written submissions dated 26 October 2021 at [4], footnotes and emphasis in original.
34 *Balenzuela v De Gail* (1959) 101 CLR 226 per Dixon CJ at 236, Taylor J at 238, Menzies J at 239 and Windeyer J at 242; *Hamod v Suncorp Metway Insurance Ltd* [2006] NSWCA 243 at [11].
35 *Savage v Cairns Regional Council* (2016) 214 LGERA 192 at [8] per Morrison JA.

primary judge's reasons. On an application of the present nature, it is not up to this Court to wade through the documents to see if a question of law can somehow be found by the examination of written or oral arguments which in an undifferentiated way merely contend that a primary judge erred "in law" in reaching a particular outcome. If there is legal error, it must be specifically identified. As Posner J famously observed in *US v Dunkel* 927 F. 2d 955 (7th Cir 1991), "Judges are not like pigs, hunting for truffles buried in briefs."[36]

[77] But, second, the general propositions advanced were in some respects wrong, at least given the absolute manner in which they were expressed.

[78] In the first place, *House v The King* error may be established if a judge "mistakes the facts" in exercising the discretion. Such an error could not amount to "error or mistake in law" within the meaning of s 63. I accept, of course, that there are many ways in which a miscarriage of discretion may be attributed to legal rather than factual error, and in such circumstances, *House v the King* error may be characterised as "error or mistake in law".[37] The case footnoted by Dexus is an example of this. But it follows that the first sentence advanced by Dexus is wrong, or at least inaccurate as stated.

[79] And as to the proposition advanced by Trinity, it may be accepted that an erroneous rejection of relevant evidence **may** constitute a basis for dissatisfaction with the ultimate judgment or order of a Court as being erroneous in point of law, because it amounts to a denial of natural justice, but as Basten JA also observed in the case which Trinity cited (*Hamod v Suncorp Metway Insurance Ltd* [2006] NSWCA 243 at [10], Beazley and Santow JJA agreeing), "… to decide a factual question adversely to one party is not as such a denial of procedural fairness. Nor does every evidential ruling involve a question of law." And in *Capitol Carpets Pty Ltd v Schwartz Family Co Pty Ltd* [2016] NSWSC 1753 at [47] McCallum J, after citing *Hamod v Suncorp Metway Insurance Ltd* observed that "[a]n allegedly erroneous evaluation of material that has been admitted into evidence is, prima facie, even less likely to involve a question of law." Rejection of relevant probative evidence will not necessarily involve an error of law e.g. if there is good reason not to admit the evidence in the particular circumstances concerned.

Failure to demonstrate why leave should be granted

[80] In any event, identification of error or mistake in law should be regarded as a necessary but not sufficient basis for a grant of leave pursuant to s 63.[38] The discretion to grant leave is a discretion to be exercised judicially and no hard and fast rule can be laid down as to the nature of the additional considerations beyond identification of legal error which might be necessary to warrant a grant of leave. Tests which might be regarded as providing useful guidance include that leave is necessary to correct a substantial injustice; that the proposed appeal raises an

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36 The observations of Posner J have recently been applied in different contexts but to similar effect by Martin J: see *Mineralogy Pty Ltd v The State of Western Australia* [2020] QSC 344 at [78]; *Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd* [2012] QSC 314 at [29].

37 For example the determination of what considerations are relevant and must be taken into account (and what are irrelevant and must not be taken into account) in the exercise of a discretion conferred by statute is a question of law which must be determined as a matter of construction of the statute which created the power: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 per Mason J at 39–40; *Underwood v Queensland Dept of Communities (State of Queensland)* [2013] 1 Qd R 252 per Muir JA, with Dalton J agreeing, at 258-259 [32].

38 See *Savage v Cairns Regional Council* (2016) 214 LGERA 192 per Morrison JA at 195 [8].

important point of law or principle; and that the proposed appeal raises a question of general or public importance.[39]

[81] No persuasive consideration was advanced as to why it would be appropriate to grant leave to appeal in this case even if an arguable error of law could be identified. As Morrison JA notes, this was an appeal from an interlocutory decision which imposed some constraints on the new evidence which could be adduced for the purposes of the remitted planning appeal. The primary judge contemplated that evidence could be reformulated with a view to meeting those constraints. No attempt had yet been made to seek leave to adduce the evidence as reformulated. The applicants could not demonstrate that the imposition of the constraints caused them a substantial injustice. Nor did the proposed appeal raise any important point of law or principle, or any question of general or public importance.

Conclusion

[82] In my view, the matters which I have identified were, by themselves, sufficient reason to refuse to grant leave to appeal in this case.

[83] I agree with the orders proposed by Morrison JA.

[84] **BRADLEY J:** I agree with the orders of Morrison JA and with his Honour's reasons. I also agree with the further reasons of Bond JA.

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[39] *Redland City Council v King of Gifts (Qld) Pty Ltd* (2020) 3 QR 494 per Philippides JA at 504-505 [30]; *Bond v Chief Executive, Department of Environment and Science* [2020] QPELR 650 at 656 [2] to [3]; *Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd* [2017] 1 Qd R 13 at 35 [53] per McMurdo P (with whom Atkinson J agreed).