PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Wagner Investments Pty Ltd v Toowoomba Regional Council* [2018] QPEC 023
PARTIES:	**WAGNER INVESTMENTS PTY LTD** (appellant) **v** **TOOWOOMBA REGIONAL COUNCIL** (respondent)
FILE NO/S:	178 of 2017
DIVISION:	Planning and Environment
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court
DELIVERED ON:	3 May 2018, ex tempore
DELIVERED AT:	Brisbane
HEARING DATE:	3 May 2018
JUDGE:	Everson DCJ
ORDER:	**Application dismissed**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION IN PENDING PROCEEDING – EXPERT EVIDENCE – whether the issues the subject of the application should be heard and determined as a preliminary point – the proper utilization of expert evidence *Sustainable Planning Act 2009* (Qld) s 478 *Uniform Civil Procedure Rules* (Qld) r 483 *Queensland Harness Racing Ltd v Racing Queensland Ltd & Anor* [2011] QSC 125
COUNSEL:	R Litster QC & L Sheptooha for the appellant D Gore QC & M Batty for the respondent
SOLICITORS:	QUDA for the appellant Corrs Chambers Westgarth for the respondent

[1] This is an application in pending proceeding, brought by the respondent, which seeks a determination that, upon the proper interpretation of the respondent's Charges Resolution No. 2, for trunk infrastructure with respect to the development category of "specialised uses" in Table 3:

> "(a) the expression 'the charge that council determines should apply' is intended to refer to a charge elsewhere in Table 3; and
>
> (b) the expression 'based on an assessment of use and demand' does not intend that any modelling exercise needs to be undertaken on the trunk road usage generated by the proposed use."

[2] The application is brought in the context of a much wider dispute concerning the development of the Brisbane West Wellcamp Airport ("the airport") and Wellcamp Business Park ("the business park"). There are 10 separate appeals which have been filed pursuant to section 478 of the *Sustainable Planning Act 2009* (Qld) against infrastructure charges notices issued by the respondent for various development approvals relating to the airport and the business park. The infrastructure charges levied in each of those notices concern charges for both stormwater and transport networks.

[3] On 24 February 2017, upon the application of the respondent, the 10 appeals were ordered to be heard together. The application before me arises out of a difficulty which was identified by the traffic engineers engaged by the parties. Before undertaking the modelling exercise relevant to their area of expertise they requested that the threshold question of the meaning of Table 3 be clarified. Did the phrase "The adopted charge is the charge that the Council determines should apply…based on an assessment of use and demand" require a detailed modelling exercise to be undertaken of the trunk road usage generated by the proposed uses or did it mean that the respondent could select an appropriate "best fit" from uses elsewhere defined in Table 3.

[4] It is submitted by the parties that the hearing today should simply be confined to whether the issues the subject of the application should be heard and determined as a primary point. It is submitted by the respondent that ultimately the determination of the issues the subject of the application would facilitate the expeditious resolution of four of the 10 appeals referred to above, including the appeal the subject of the application before me. Conversely, the appellant submits that I should not order a separate hearing of the issues raised in the application, as it would not resolve the critical matters in dispute between the parties. It is submitted that the disputes concerning the appropriate charges to be levied are much wider and in circumstances where all 10 appeals have, pursuant to the respondent's application, been ordered to be heard together, an order to this effect will result in a "break-away" proceeding which would serve only to prolong and increase the litigation and the attendant costs of conducting it.

[5] Effectively what is telegraphed is that an unfavourable determination of these issues will inevitably result in an application for leave to appeal to the Court of Appeal, the resolution of which will delay the progress of all the appeals to a wider resolution of the dispute between the parties.

[6] The power of the court to grant the relief the subject of the application is set out in rule 483 of the *Uniform Civil Procedure Rules 1999* (Qld) which relevantly states:

> "(1) The court may make an order for the decision by the court of a question separately from another question, whether before, at, or after the trial or continuation of the trial of the proceeding."

[7] The discretion to make such an order is obviously a wide one. The principles that govern the exercise of this discretion were considered recently by Daubney J in *Queensland Harness Racing Ltd v Racing Queensland Ltd & Anor* [2011] QSC 125 at [32] where his Honour stated, inter alia:

> "In *Reading Australia Pty Ltd v Australian Mutual Providence Society*, Branson J summarised the principles that govern an application such as the present. Those principles include (omitting references):
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> (a) The judicial determination of the question must involve a conclusive or final decision based on concrete and established or agreed facts for the purpose of quelling a controversy between the parties;
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> …
>
> (c) Care must be taken in utilising this procedure to avoid the determination of issues not "ripe" for separate and preliminary determination. An issue may not be "ripe" in this sense where it is simply one of two or more alternative ways in which an applicant frames its case and determination of the issue would leave significant other issues unresolved…"

[8] The impasse which developed in the course of the joint meeting of the traffic experts has arisen in circumstances where they appear to have not only misapplied principles of statutory interpretation, having stated their question in the context of selecting an appropriate "best fit" use from Table 3 in Charges Resolution No. 2, but also as a consequence of them being engaged to consider the statutory parameters of the dispute between the parties. It has been said on many occasions that questions of statutory interpretation are matters of law for the court, not matters which are properly within the province of expert evidence.[1] It is conceded by the respondent that the need for expert evidence from the traffic engineers only arises in the event that the interpretation of the relevant provisions of Table 3, which it contends for, is unsuccessful.

[9] Although there is some superficial appeal in acceding to the application before me, the application itself misapprehends the appropriate procedure for engaging experts

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1 See *H.A. Bachrach Pty Ltd & Ors v Council of the Shire of Caboolture and Anor* [1993] QPLR 33 at 37.

and presenting the evidence of experts. The wider dispute between the parties requires expert evidence in certain respects. The complexity of the different challenges to the different infrastructure charges, in the context of 10 separate appeals all being heard together, is such that it cannot be said that the issues between the parties, which are the subject of this application, are ripe for separate and preliminary determination.

[10] The parties have different interpretations of the relevant provisions of Charges Resolution No. 2. One of these interpretations requires appropriate modelling by traffic engineers in order to calculate the appropriate charge. The traffic engineers have already been engaged. They should be instructed to proceed to undertake the modelling exercise required of them. That is the only basis on which they can assist the court in resolving this dispute. In my view, it is not appropriate to hive off a particular aspect of a dispute for separate determination in circumstances where the wider dispute remains unresolved and it has not been demonstrated to me that the wider dispute will resolve any sooner should I accede to the application before me. On the contrary, the approach foreshadowed by the appellant is redolent of the opposite scenario. Having regard to these matters, I therefore dismiss the application.