

# SUPREME COURT OF QUEENSLAND

CITATION: *Lewiac P/L & Anor v Gold Coast CC & Ors* [2003] QCA 141

PARTIES: **LEWIAC PTY LTD** ACN 008 524 801  
(appellant/applicant)  
**ING REAL ESTATE JOONDALUP BV** ABN 884 550 10  
(appellant/applicant)  
v  
**GOLD COAST CITY COUNCIL**  
(first respondent/first respondent)  
**MACQUARIE ASSET SERVICES LTD**  
(second respondent/second respondent)  
**GIBBS HOLDINGS PROPERTY LTD**  
(third respondent/third respondent)  
**CFS MANAGED PROPERTY LTD**  
(respondent/fourth respondent)  
**COLONIAL FIRST STATE INVESTMENTS LTD**  
(respondent/fourth respondent)  
**STATE OF QUEENSLAND**  
(respondent/fifth respondent)

FILE NO/S: Appeal No 1028 of 2003  
P&E Appeal No 1169 of 2001

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Integrated Planning Act*

ORIGINATING COURT: Planning and Environment Court at Southport

DELIVERED EX TEMPORE ON: 25 March 2003

DELIVERED AT: Brisbane

HEARING DATE: 25 March 2003

JUDGES: de Jersey CJ, Williams JA and Atkinson J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **Application refused with costs to be assessed**

CATCHWORDS: ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – SUPREME COURT – LEAVE TO APPEAL – where judge found that proposed development would exceed level and role of centre within town planning hierarchy – whether judge made errors of law – whether granting of leave would involve futility

*Integrated Planning Act* 1997 (Qld), s 4.1.56(1)(a)  
*Local Government (Planning and Environment) Act* 1990 (Qld), s 4.13(5A)

*Hymix Industries Pty Ltd v Alberton Investments Pty Ltd & Anor* [2001] QCA 334; Appeal No 7206 of 2000, 21 August 2001, considered

COUNSEL: M D Hinson SC for the applicant  
C L Hughes SC for the first respondent  
E J Morzone for the second respondent  
M F Marshall (*sol*) for the third respondent  
D R Gore QC, with T Trotter for the fourth respondent

SOLICITORS: Freehills for the applicant  
McDonald Balanda & Associates for the first respondent  
Phillips Fox for the second and third respondents  
Minter Ellison for the fourth respondent

THE CHIEF JUSTICE: On the 20th of December 2002 the Planning and Environment Court dismissed the applicant's appeal against a deemed refusal of the applicants' application for a development permit for a material change of use and preliminary approval for building work for extensions of the Harbour Town Shopping Centre at Biggera Waters. The applicant must demonstrate error of law. It submits that the learned Judge did fall into such error which could have affected the outcome and has significance extending beyond the resolution of this case.

The Judge's essential findings were that the proposed development would exceed the level and role intended for Harbour Town Centre in the Town Planning hierarchy and that sufficient need for it had not been established. As to the former, as Mr Hughes for the Council has emphasised, his Honour effectively found factually that the proposed expanded development would be simply too expansive to sit comfortably within the hierarchy envisaged by the planning instruments.

Although he necessarily had to pass through various legal issues on the way to that factual conclusion, it is difficult in the end to see that they carried instrumental or decisive

significance. So that if error were, for argument's sake, identified, it would be difficult for this Court to be satisfied that there would be great point in requiring the Planning and Environment Court now to reconsider the appeal. This Court does not grant leave if the result of remitting the case would involve a futility. For my part I am satisfied that that is the situation here.

We have had the benefit of very comprehensive written submissions from the parties to the application with some further oral elaboration today. Since this is an application for leave to appeal it is not necessary to canvas in depth the points which have been raised so comprehensively before us. I will very briefly, but I hope concisely, indicate my view on the arguability of the matters said to warrant a grant of leave:

1. Intent that regional centres provide a wide range of consumer services and major administrative functions. The Judge is said to have erred in proceeding on the basis that each regional centre must provide those things. In view all he did was point to inconsistency with the planning documents which as he put it in some instances "envisaged" or "intended" certain things. It is not sufficiently arguable, bearing in mind the overall context that in using the word "required", as he did from time to time, he was saying that such provision was mandated.
2. That having found inconsistency the Judge should have gone through the section 4.13(5A) exercise. The simple

point is that the Judge was not asked to do so. He was not therefore obliged to do so as a matter of law. It is the situation that this point is first raised on appeal without adequate justification.

3. The significance of the total retail floor space exceeding 40,000. It is complained that the Judge did not address performance criterion 8, but in my opinion his finding as to adverse impact on centre hierarchy necessarily carried with it failure to satisfy PC8.
4. Suggested error in calculating size of proposed retail facilities. If there was any error it was factual in character. Further, even on the applicant's own figures, the proposed development would make Harbour Town in relative terms too big for its place in the hierarchy, which was the significant issue.
5. Suggested erroneous reference to local area plans. Conflict with these plans and the prospect of jeopardy to the achievement of their stated intents, which is what the Judge apparently found, was relevant to the primary issue of impact on the centre hierarchy. Otherwise the applicant's complaints relate to factual not legal matters. In any case this issue seems not to have assumed any great significance to the determination of the appeal.
6. Suggested misapplication of the activity centre strategy. That document was relevant as the applicant's conduct of its appeal assumed. It may assist in the construction of the draft scheme, and the Judge dealt with it in that context. The Judge said he attributed the document only

some relevance. He accurately quoted its indicative centre sizes. No error of law occurred.

7. The condition to limit 10,000 square metres to outlet stores. There is authority that whether a condition should be imposed is a question of fact: *Hymix Industries Pty Ltd v. Alberton Investments Pty Ltd* 2001 Queensland Court of Appeal 334. But the accuracy of the Judge's legal analysis aside, he found as a fact that the condition was "likely to be unworkable". Any separate legal error is unlikely, therefore, materially to have affected the ultimate determination.
8. The Judge's treatment of need. The issue of need can relate to an application for Town Planning consent just as on what was formally a rezoning application. The Judge rightly focused on community interest rather than the interests of the applicant. He appears to have addressed the correct issues. His ultimate conclusion was of a factual character. The process through which he proceeded to that point was not attended by apparent error of law.

There being no relevant error of law for those reasons, and in light of what I said at the outset, I would refuse the application.

WILLIAMS JA: Mr Hinson, for the applicant, has demonstrated some arguable errors of law in the course of the reasoning of the learned Judge at first instance. However, it does not appear that such errors were decisive in his reaching his

ultimate decision that the proposal was too big given the relevant hierarchy.

In those circumstances it is not, in my opinion, an appropriate case in which to grant leave to appeal. I agree with all that has been said by the Chief Justice and the order he proposed.

ATKINSON J: The application for leave to appeal is made pursuant to section 4.1.56 of the Integrated Planning Act 1997, in particular subsection 1(a) an error or mistake in law on the part of the Court. The test to be applied for leave to appeal is whether or not any alleged error of law on the part of the Court could have materially affected the decision.

In my view, for the reasons given by the Chief Justice, no alleged error of law could have materially affected the decision and I would refuse the application for leave to appeal.

THE CHIEF JUSTICE: The application is refused with costs to be assessed.

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