TRANSCRIPT OF PROCEEDINGS

PLANNING AND ENVIRONMENT COURT P & E No 18 of 1992

JUDGE O'SULLIVAN

LEWIAC PTY LTD Applicant

and

COUNCIL OF THE CITY OF GOLD COAST First Respondent

and

ERRENMORE PTY LTD (ACN 101 567 745) Second Respondent

BRISBANE

..DATE 04/11/92

JUDGMENT

HER HONOUR: This is the matter of Lewiac and the Council of the City of Gold Coast and Errenmore Pty Ltd, P & E Application 18 of 1992, but it is a specific application concerning a subpoena issued by the appellant to Clayton Utz. I publish my reasons with respect to the application.

I order the documents be produced to the Court by delivery to the Registry by 11 a.m. on 5 November 1992; solicitors for the parties be at liberty to inspect the documents so produced except those documents in respect of which the respondent claims inspection ought not be allowed; the respondent to file and serve a list of those documents by 2 p.m. on 5 November 1992. I order the respondent be given leave to peruse the documents held in the Registry for the purpose of compiling this list. Arguments concerning that list will be heard by Judge Row as a preliminary point of law on 6 November 1992.

Costs of the appearance other than the first appearance and the costs of complying are reserved to be heard by me.

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PLANNING AND ENVIRONMENT COURT

P & E Application No 18 of 1992

JUDGE ROW

LEWIAC PTY LTD — Applicant

and

COUNCIL OF THE CITY OF GOLD COAST — First Respondent

and

ERRENMORE PTY LTD — Second Respondent

BRISBANE

..DATE 02/10/92

ORDER

HIS HONOUR: Objection has been taken by the second respondent to Exhibit 3 to the affidavit of Justin Anthony McDonnell being a letter dated 6 June 1990 from SHK Architects Queensland Pty Ltd to Errenmore Pty Ltd. On behalf of the applicant the document is not put forward as to an admission in relation to the truth of the matters but as original evidence in relation to the various dealings in respect to what is called the Runaway Bay Shopping Centre proposal.

I am satisfied that the document is not admissible as an admission by an agent on behalf of a principal. Its relevance as original evidence, provided it is not utilised as an admission, I concede may be of some materiality. I do not see the fact that there is reference in the affidavit of Mr Bowie to the document in any way assists in the determination as to whether the letter is relevant to the issues before the Court.

Accepting that the document is not being forwarded as an admission made by an agent on behalf of Errenmore, I overrule the objection. I treat the document as being part of the history. The question of weight is only in relation to that part it plays in the proceedings.

Further objection has been taken to the receipt of Exhibit 26 to the affidavit of Mr Lazarides. It is not put forward as a document which is relevant on the basis of constituting an admission but on the same basis as previously adverted to in the earlier objection. In those circumstances, consistent with the previous ruling, I overrule the objection.

Objection was also made to the last paragraph of Exhibit 6, to the affidavit of Justin Anthony McDonnell. That part of the document relates to a telephone conversation with a Mr Kanas, who was a director of the second respondent for a period from 1987 to 1991. He was not, at the date of the note, namely 11 September 1992, a director of the company. It was submitted on behalf of the applicant that that part of the document was a relevant admission. In my opinion, it being a statement made by a person who was at the date thereof no longer a director of the company, the statement is not and cannot be taken as an admission made on behalf of the second respondent at the relevant time. Whilst reference is made in the affidavit of Mr Bowie to matters dependent on information from Mr Kanas, that in itself, in my view, does not render the receipt of that part of the exhibit as being an admission on the part of the respondent. I uphold the objection.

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HIS HONOUR: I adjourn the further hearing of the application until 3 p.m. Monday, 5 October 1992.

TRANSCRIPT OF PROCEEDINGS

PLANNING AND ENVIRONMENT COURT — P & E Application No 18 of 1992

JUDGE ROW

LEWIAC PTY LTD — Applicant

(ACN 008 524 801)

and

COUNCIL OF THE CITY OF GOLD COAST — First Respondent

and

ERRENMORE PTY LTD — Second Respondent

(ACN 010 567 745)

BRISBANE

..DATE 09/09/92

ORDER

HIS HONOUR: In this application, the appellant seeks an order for third party discovery under the provisions of R29 of the Local Government Court rules against Leda Holdings Pty Ltd and Leda Limited. An order is sought that those companies produce for inspection documents in their possession or power relating to the submission or plans to council, City of Gold Coast, for the development of the Runaway Bay shopping centre and/or the purchase or interest in the Runaway Bay shopping centre.

The originating application herein seeks a declaration that the amendments to the town planning scheme the City of Gold Coast by Order-in-Council dated 8 October 1987 are invalid, and further seeks a declaration that the resolution of the first respondent dated 2 June 1989 approving an application by the second respondent for the extension of a shopping centre is invalid.

The relevant material and relevant dates are therefore related to the amendment to the town planning scheme and to the granting of the application for the extension of a shopping centre. The material establishes that that approval 2/259 occurred in December 1989. The principles applicable to an application for third party discovery are collected by Lee J in Rossi Pty Ltd v. Ballymore Tower Pty Ltd (1984) 2 QdR 167 particularly at pages 177 to 178.

Adopting generally what was said therein, I am not satisfied on the material filed therein that the applicant has established the existence of documents or of particular documents by identifying them or that such documents may be relevant.

The documents referred to in the material relate to matters in June 1990 which is much later than the relevant dates in relation to the rezoning and the consent approval.

In addition, the rules specifically require the applicant to show that it is "necessary" for it to have inspection of the documents as at the date of the application. There is no such allegation made in the material filed on behalf of the appellant nor am I able to draw such an inference from the material. The material sought in this matter I am not satisfied relates to a matter in question or in issue. Such documents relate to a much later date in time than is relevant in relation to the relief sought in the originating application.

Even if all the requirements of the rule had been established it is accepted that the Court has a discretion whether or not to make the order sought or any order. The originating application was lodged on 22 July

1992, the application herein was filed on 7 September 1992. Whilst realising that discovery has recently been substantially completed I do not consider that the applicant has been prompt in raising and endeavouring to seek third party discovery. The originating application is set down for hearing for 12 October 1992.

In the circumstances I dismiss the application.

...

HIS HONOUR: In this application the respondent seeks an order for costs on the basis that the Court has jurisdiction under s 7.6(1)(b)(i) and/or (iii).

The fact that the application did not succeed in itself is not a sufficient justification for finding that it was frivolous and vexatious. I am satisfied that the application was not frivolous or vexatious within the terms of s 7.6(1)(b)(i). The power of the Court to award costs under s 7.6(1)(b)(iii) is limited to those circumstances where a party has incurred costs because another party has defaulted in procedural requirements. Whilst the application before the Court may have been made what the Court considers to be at a late point of time, there is no procedure which requires such application to be made within a certain or specified time. In the circumstances I find I have no power to award costs. I make no order as to costs.
