Joondanna Investments Pty Ltd v The Minister for Lands, Planning and the Environment & Anor [2014] NTSC 58

PARTIES:	JOONDANNA INVESTMENTS PTY LTD v THE MINISTER FOR LANDS, PLANNING AND THE ENVIRONMENT AND NESFALL PTY LIMITED
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	73 of 2014 (21436275)
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JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice & Procedure - Application for particular discovery –Application in context of proceedings for Judicial Review – Discovery generally in proceedings for Judicial Review – Principles to be applied –Pre-conditions to be satisfied for making an order – When documents are relevant to a "question" in the proceedings – Factors relevant to discretionary considerations.

Planning Act, ss 17, 24, 38, 42, 51, 89
Supreme Court Rules, rr 1.09, 29.08

Cook v Modern Mustering Pty Ltd & Ors [2013] NTSC 78;
Murray Pest Management Pty Ltd v A & J Bilske Pty Ltd and Ors [2009] NTSC 68;
Minkie (NT) Pty Ltd v Wise Channel Marketing Pty Ltd and Anor [2011] NTSC 53;
Chandra v Webber (2010) FCA 785;
Australian Retailers Association v Reserve Bank of Australia (2005) 148 SCR 446;
Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155;
Percerep v Minister for Immigration (1998) 86 FCR 483;
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24;
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332.

REPRESENTATION:

Counsel:

Plaintiff:	A Wyvill SC and L Nguyen
First Defendant:	T Anderson
Second Defendant:	T Hale SC and N Christrup

Solicitors:

Plaintiff:	Roussos Legal Advisory
First Defendant:	Squire Patton Boggs
Second Defendant:	Paul Maher & Associates

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Joondanna Investments Pty Ltd v The Minister for Lands, Planning and the Environment & Anor [2014] NTSC 58
No. 73 of 2014 (21436275)

BETWEEN:

Joondanna Pty Ltd
Plaintiff

AND:

The Minister for Lands, Planning and the Environment
First Defendant

AND:

Nesfall Pty Limited
Second Defendant

CORAM: MASTER LUPPINO

REASONS FOR JUDGMENT

(Delivered 5 December 2014)

[1] The application before the Court is the Summons of the Plaintiff ("Joondanna") seeking particular discovery of documents from both Defendants. Two categories of documents are sought against each of the Defendants. The two categories are described respectively in paragraphs 3 and 4 of the Summons.

[2] The documents Joondanna sought in paragraph 3 of the Summons were sought as against both Defendants. Those documents were provided subsequent to the filing of the application and before the hearing. The dispute is therefore now limited to the documents described in paragraph 4 of the Summons. That seeks against the Second Defendant ("Nesfall"), discovery of:-

1. Documents which comprise a certain report by consultants known as Urbis;

2. Documents relating to the dealings between Nesfall and the City of Palmerston ("the Council") in relation to Nesfall's development between 1 January 2012 and 19 February 2014

[3] The substantive proceedings seek a declaration that a certain Exceptional Development Permit is invalid. There are related proceedings[1] where Joondanna seeks declarations concerning the validity of certain rates concessions given to Nesfall by the Council and Nesfall challenges the standing of Joondanna to seek those orders.

[4] The relevant facts are that Joondanna is the owner of the Palmerston Shopping Centre. Nesfall is constructing a major shopping centre on nearby land. As the zoning of that nearby land did not permit Nesfall's development, it applied to the First Defendant ("the Minister") for an Exceptional Development Permit pursuant to section 38 of the *Planning Act*.

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1 *Joondanna Investments Pty Ltd v City of Palmerston & Anor* No 46 of 2014 (21426859).

[5] The process for the grant of an Exceptional Development Permit under the *Planning Act* requires that the application be first considered by a "Reporting Body".[2] That occurred on 22 May 2013. The Reporting Body comprised five members and, as required by section 89 of the *Planning Act*, included two nominees of the Council, who were Alderman Paul Bunker and Alderman Susan McKinnon.

[6] At the hearing of the Reporting Body on 22 May 2013, Joondanna objected to the grant of the Exceptional Development Permit on the ground that there was insufficient retail demand to support both shopping centres and that therefore the development ran contrary to sound planning principles.

[7] On 24 June 2013 the Reporting Body reported to the Minister who thereafter granted the Exceptional Development Permit on 8 July 2013. Joondanna commenced proceedings in this Court to set aside that Exceptional Development Permit. Those proceedings were resolved by consent orders on 24 December 2013 where the Exceptional Development Permit was declared invalid and the Minister's decision was quashed.

[8] Joondanna's evidence is that it was unaware that, before the hearing of the Reporting Body on 22 May 2013, Nesfall had sought and obtained substantial rates concessions for its development and substantial financial support for road works required to be performed by it as part of the development. Joondanna has reason to believe that Nesfall provided certain

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[2] Part 2 Division 4 of the Planning Act.

information or material to some Council officers and to some Aldermen as part of that process. That information included predictions as to the economic benefits of the development.

[9] Joondanna's evidence is capable of supporting inferential proof, assuming of course the appropriate inference is drawn, that Nesfall holds a report from consultants known as Urbis which supports those predictions. The order described in sub-paragraph 1 of paragraph 2 above seeks that report. The evidence I refer to in this respect is a letter from Nesfall to the Council dated 10 April 2012. In that letter Nesfall relevantly states:-

> "Thank you for the opportunity last Wednesday April 4th to present to Council our revised Gateway development scheme and Urbis' analysis of the benefits to Palmerston's residents economy and Council resulting from its construction and operation."

[10] Nesfall disputes that the evidence demonstrates that a report from Urbis was provided as Joondanna believes. Mr Hale for Nesfall argued that all the evidence establishes is that at the meeting on 4 April 2012 Nesfall submitted a presentation and not a report from Urbis. This is confirmed by other evidence namely the report to the Council by its Chief Executive Officer which, when referring to the meeting on 4 April 2012 only refers to a power point presentation and makes no mention of a report by Urbis, or any mention at all of Urbis.[3] Nesfall does concede however that the presentation was based upon an analysis by Urbis. Having regard to this difference I will

[3] Affidavit of Peter La Pira made 20 September 2014 paragraph 30 and Annexure PLP18.

refer to the documents sought as the Urbis materials whenever the distinction is necessary.

[11] After the order was made in this Court quashing the Minister's decision to grant an Exceptional Development Permit, another Reporting Body held a further hearing on 19 February 2014. That Reporting Body was comprised of the same personnel as the first Reporting Body.

[12] Joondanna made submissions at the hearing of the Reporting Body on 19 February 2014 relevantly that:-

1. The members of the Reporting Body should disqualify themselves from conducting the hearing on the grounds of apprehension of bias; and,

2. The Reporting Body should adjourn the hearing to require the production of documents which evidenced the dealings between Nesfall and the Council including, specifically, the Urbis report.

[13] The Reporting Body rejected those submissions and proceeded with the hearing. On 30 April 2014 the Reporting Body provided its report to the Minister pursuant to section 24 of the *Planning Act*. Then on 17 June 2014 the Minister granted a further Exceptional Development Permit ("the EDP").

[14] Thereafter these proceedings were commenced by Joondanna seeking to set aside the EDP. I set out the grounds on which Joondanna bases its application below, but effectively the grounds are based on:-

1. That the Reporting Body did not observe procedural fairness by reason of but not limited to, the refusal of Aldermen Bunker and McKinnon to disqualify themselves;

2. That Nesfall failed to provide, and the Reporting Body failed to require it to provide, to both it and to the objectors, the material it had provided to the Council in support of its application for rates concessions and financial assistance and the Urbis report.

3. That the Minister ought to have taken into account the failure of Nesfall to produce the material referred to in the preceding sub-paragraph and ought to have either refused the application or first required the production of that material.

[15] Rule 29.08 of the *Supreme Court Rules* ("*SCR*") empowers the Court to order particular discovery. In so far as it is relevant to the current application, that provides as follows:-

> **29.08 Order for particular discovery**
>
> (1A) This rule applies to all proceedings in the Court.
>
> (1) Where at any stage of a proceeding, it appears to the Court from evidence or from the nature or circumstances of the case, or from a document filed in the proceeding, that there are grounds for a belief that a document or class of documents relating to a question in the proceeding may be or may have been in the possession of a party, the Court may order that party to make and serve on any other party an affidavit stating whether the document or any and if so what document or documents of that class is or has been in his possession and, if it has been but is no longer in his possession, when he parted with it and his belief as to what has become of it.

(2) Omitted.

[16] I had occasion to consider the power to order particular discovery in *Cook v Modern Mustering Pty Ltd & Ors*[4] as well as in two other cases.[5] As I said in *Cook v Modern Mustering Pty Ltd & Ors*, the *SCR* confers a discretion to order a party to provide discovery of specified documents where there are grounds to believe that a document or class of documents relating to a "*question*" in the proceeding may be in the possession of that party.

[17] The definition of "*question*" in Rule 1.09 of the *SCR* provides as follows:-

> ***question*** means a question, issue or matter for determination by the Court, whether of fact or law or of fact and law, raised by the pleadings or otherwise at any stage of a proceeding by the Court, by a party or by a person, not a party, who has a sufficient interest.

[18] Rule 29.08 of the *SCR* is not limited to a "*question*" evident on the pleadings and a party is entitled to an order for discovery under that Rule provided that the party has a sufficient interest in the "*question*" to be decided and to which the documents relate.

[19] There are pre-conditions to the making of an order for particular discovery pursuant to Rule 29.08. The pre-conditions are:-

1. That there are grounds for a belief that a document may be or have been in the possession of a party;

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4 [2013] NTSC 78.

5 *Murray Pest Management Pty Ltd v A & J Bilske Pty Ltd and Ors* [2009] NTSC 68 and *Minkie (NT) Pty Ltd v Wise Channel Marketing Pty Ltd and Anor* [2011] NTSC 53.

2. The document relates to a "*question*" in the proceedings;

3. The circumstances of the case call for the Court to exercise its discretion to order that the documents are discovered.

[20] Nesfall does not take issue that the first pre-condition is satisfied, at least nothing was put to the contrary. In any case the evidence discussed in paragraph 9 above sufficiently establishes that.

[21] Nesfall takes issue with the second and third pre-conditions. Mr Hale submitted that the relevance of a particular document must be determined by reference to the grounds of challenge identified by Joondanna. Where proceedings are commenced by Writ and are based on pleadings, relevance is determined on the pleadings. In cases commenced by Originating Motion relevance is assessed by reference to the grounds upon which the Motion is brought: *Chandra v Webber*.[6]

[22] Joondanna acknowledges that in proceedings in the nature of Judicial Review, the general rule is that the review must be based on the material before the decision-maker: *Australian Retailers Association v Reserve Bank of Australia*[7] and *Chandra v Webber*.[8] If that general rule were to be applied strictly, any material not before the decision-maker therefore cannot be relevant to a "*question*" in the proceeding within the meaning of Rule 29.08.

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6 (2010) FCA 785 at para 40.
7 (2005) 148 SCR 446.
8 (2010) FCA 785.

[23] Mr Wyvill for Joondanna relies on two exceptions to the general rule namely:-

1. Where there is readily available relevant material which has not been sought and where it is unreasonable to exercise the decision making power without seeking that material, per Wilcox J in *Prasad v Minister for Immigration and Ethnic Affairs.*[9]

2. Where the consideration of further material is necessary to address a breach of natural justice per *Percerep v Minister for Immigration.*[10]

[24] The exception based on *Prasad* relies on the material placed before the Council by Nesfall (see paragraph 8 above). The exception based on *Percerep* relies on the various allegations of apprehension of bias which are discussed below, including the refusal of Aldermen Bunker and McKinnon to disqualify themselves from the hearing of the Reporting Body.

[25] In *Prasad* Wilcox J said:-

> "….the court is concerned with the manner of the exercise of power. But power is exercised in an improper manner if, on the material before the decision-maker, it is a decision to which no reasonable person could come. Equally, it is exercised in an improper manner if the decision-maker makes his decision – which perhaps in itself, reasonably reflects the material before him – in a manner so devoid of any plausible justification that no reasonable person could have taken this course, for example by unreasonably failing to ascertain relevant facts which he knew to be readily available *[emphasis added]* to him. The circumstances under which a decision will be invalid for failure to enquire are, I think, strictly limited. It is no part of the duty of the decision-maker to make the applicant's case for

[9] (1985) 6 FCR 155.
[10] (1998) 86 FCR 483.

> him. It is not enough that the court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available *[emphasis added]* which is centrally relevant *[emphasis added]* to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised."[11]

[26] Notwithstanding that authority Mr Hale submits that the documents sought in paragraph 4 of the Summons are not documents which relate to a "*question*" in the proceeding. If that is established then an essential pre-requisite to an order pursuant to Rule 29.08 of the *SCR* will not have been satisfied. Nesfall argues alternatively that, if technically it could be said that documents did relate to a "*question*" in the proceeding, this Court should decline an order on discretionary grounds, i.e., based on the third pre-condition.

[27] The specific grounds upon which Joondanna challenges the validity of the EDP are set out in paragraph 46 of the affidavit of Peter La Pira made 20 September 2014, which are summarised as follows:-

1. Ground 1: This ground is based on an alleged failure to consider relevant material mandated by the *Planning Act* and alternatively material demonstrating community detriment;

2. Ground 2: This ground is based on an alleged failure to consider relevant material mandated by the *Planning Act* and alternatively that

[11] (1985) 6 FCR 155 at pp169-170.

Nesfall had relevant information (the Urbis material) which it did not disclose;

3. Ground 3: This ground asserts that the Minister's decision was unreasonable in that it lacked an evident and intelligible justification;

4. Ground 4: This ground is based on the assertion that the valid exercise of the power to grant the EDP required a report of the Reporting Body which complied with the requirements of the *Planning Act* but that the report relied upon was not valid by reason that:-

    4.1. Ground 4.1: The hearing of the Reporting Body lacked procedural fairness due to bias considerations and the failure of Nesfall to provide the Urbis materials;

    4.2. Ground 4.2: The report of the Reporting Body did not comply with the requirements of the *Planning Act*;

    4.3 Ground 4.3: There was a failure to invite one objector to the meeting of the Reporting Body;

    4.4. Ground 4.4: There was a failure to publish notice of the application.

[28] With respect to Ground 1, Mr Hale, apparently relying on the specific wording of the ground, argued that in essence Joondanna alleges that the Minister failed to take into account the considerations mandated by sections

42 and 51(h), (n) and (r) of the *Planning Act*. However the actual wording of the ground alternatively alleges that the Minister failed to take into account a "*relevant consideration*" namely possible community detriment. As this is said to be an alternative to the considerations in the nominated sections of the *Planning Act*, this accepts that the claimed "*relevant consideration*" is not one of the mandatory considerations referred to in those sections. The sections referred to do not specifically stipulate possible community detriment as a mandatory consideration.

[29] This is relevant as one principle in Judicial Review proceedings is that orders can be made to set aside a decision where a decision-maker fails to take into account a mandatory consideration or takes into account something which the decision-maker is not permitted to do: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.[12]

[30] Mr Hale submitted, and I agree, that this ground seeks to establish that the Minister was required to consider whether the shopping and other facilities enjoyed by the community in the Palmerston City Centre would be put in jeopardy by Nesfall's development and if so, whether the community detriment would be made good by the development. Viewed in this way Joondanna's case must be made out on the documents before the Minister and whether the Minister did or did not take into consideration the matters Joondanna asserts he should have is also to be established from those documents and inferences that can be drawn from them.

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12 (1986) 162 CLR 24.

[31] As Joondanna has been provided with the documents that were before the Minister, and as the two exceptions Mr Wyvill relies on cannot apply here, there is no valid basis for an order for particular discovery as those documents sought are not relevant to a "*question*" in the proceedings based on this ground.

[32] Ground 2 alleges that the Minister failed to take into consideration the factors in sections 42 and 51(h), (n) and (r) of the *Planning Act*, or alternatively, a "*relevant consideration*" namely, that Nesfall withheld information relative to the community benefit (referring to the material described in paragraph 9 above).

[33] The essence of the allegation is that the Minister was required to consider the fact that Nesfall held material information which it had not disclosed to the Reporting Body or to the Minister. I agree with Mr Hale that this reads as a complaint that the Minister failed to consider that Nesfall had not disclosed the information, as opposed to a complaint that the Minister failed to consider the actual information. The evidence[13] shows that the Minister had before him:-

1. Joondanna's complaint that Nesfall failed to disclose material (letters from Joondanna's solicitors dated 14 and 18 February 2014);

[13] Affidavit of George Maly made 9 October 2014, Vol 1 pp 23-25, 27 and Vol 2 pp 623-625, 627, 783-784.

2. The letter of 10 April 2012 from Nesfall to the Council which referred to the Urbis material;

3. Joondanna's submission dated 19 February 2014 to the effect that there was a denial of procedural fairness;

4. The report of the Reporting Body which outlined the information Joondanna asserted had not been provided by Nesfall.

[34] If this ground is correctly characterised as a failure to consider that Nesfall did not provide the documents referred to, and I think that is correct, noting the material before the Minister set out above, it is not possible to conclude that the documents sought by Joondanna can be relevant to the "*question*" of whether the Minister failed to consider that Nesfall did not disclose those documents. Joondanna can still argue that the Minister failed to do so but production of the documents is not necessary for that to occur.

[35] Ground 3 is a challenge of a substantive nature. It appears to be based on *Minister for Immigration and Citizenship v Li*.[14] The essence of the ground is that the decision of the Minister to grant the EDP was unreasonable as it lacked justification.

[36] Mr Hale argued that whether the Minister's decision was unreasonable must be determined by reference to the documents on which the Minister made the decision. Although generally speaking that is correct, that however

[14] (2013) 249 CLR 332.

overlooks the precise wording of the ground. The wording specifically ties the question of reasonableness to the objection made by Joondanna. This presumably refers to the objection it made at the meeting of the Reporting Body on 19 February 2014. That objection in part is related to the Reporting Body's refusal to require Nesfall to produce the documents the subject of the current application.

[37] In this way Joondanna takes the ground beyond that as assessed by Mr Hale. Joondanna can only validly do so if it can come within the exception in *Prasad* which Joondanna relies on. Absent that, the ground is not sustainable as that ground seeks to obtain relief in the nature of Judicial Review based on material which was not before the decision-maker and ordinarily that is not permissible in Judicial Review proceedings.

[38] Notwithstanding the precise wording of the ground, in my view the decision in *Prasad* has a narrow application. The reference to "*readily available*" there was a reference to some material which, although not specifically placed before the decision-maker (who was the relevant Minister) for the purposes of the relevant decision, it was material that was on the department's file and hence it was regarded as having been constructively before the Minister. Consistent with the view expressed by Wilcox J that the circumstances under which a decision will be invalid for failure to enquire are strictly limited, the decision in *Prasad* needs to be strictly applied such that it is confined to cases where the decision-maker constructively possesses the material or where the material is able to be accessed by the

decision-maker. That cannot be said to be the case here as neither the Reporting Body nor the Minister were privy to the relevant material. Moreover in *Prasad* the relevance of the subject material was clear. In the current case the relevance of the claimed material is undetermined at this stage given that the available evidence as to the nature of material is vague and uncertain.

[39] I do not think that the exception in *Prasad* can go as far as to suggest that any material which an objector says is relevant yet is not before the decision-maker should be taken into account. The scope and extent of material which could be sought if applied in the way Joondanna argues would have the effect of changing the basic principle of Judicial Review namely that the review is to be conducted on the basis of the material before the decision-maker.

[40] A too broad interpretation of the *Prasad* exception would also give scope for Nesfall to introduce new material. As Mr Hale submitted, and as was acknowledged in *Prasad*, it is really up to an applicant to decide what material it relies on. Nesfall was able to obtain a favourable decision from the Minister based on the material provided. If the matter is to be reopened such that the validity of the Minister's decision is brought into question, it may seek leave to rely upon further material on Judicial Review. Again, that runs counter to the established principles of Judicial Review.

[41] For these reasons, in respect of this ground, in my view the documents required do not satisfy the requirements of Rule 29.08 of the *SCR*.

[42] The grounds collectively referred to as Ground 4 are based on an alleged failure on the part of the Reporting Body to provide a report which complied with section 24 of the *Planning Act*. Joondanna argues that such a report was an essential prerequisite for the valid exercise of the decision-making power by the Minister. Joondanna then argues that the report was invalid firstly, based on deficiencies in respect of procedural fairness and the failure of Nesfall to provide the Urbis materials and, secondly, based on non-compliance with legislative requirements.

[43] As to the first, three instances of deficiencies in procedural fairness are relied on. The first instance is based on the appearance of pre-judgment on the part of the Reporting Body by reason that a previous Reporting Body constituted by the same persons recommended to the Minister that the Minister grant an Exceptional Development Permit. Joondanna therefore claims that the Reporting Body who provided the extant report should have disqualified itself from further involvement.

[44] The second instance is based on the refusal of Aldermen Bunker and McKinnon to disqualify themselves from sitting on the Reporting Body. The apprehension of bias is alleged to result from the fact that those Aldermen are elected members of the Council and that the Council resolved to provide

concessions and financial assistance to Nesfall in respect of the subject development.

[45] The third instance is based on Nesfall's refusal to provide to the Reporting Body, and on the part of the Reporting Body to require it to provide, the Urbis materials.

[46] The first instance can be quickly disposed of for discovery purposes. This alleges pre-judgment by the members of the relevant Reporting Body as they were also the members of the earlier Reporting Body and who made a recommendation to the Minister to approve the grant of an Exceptional Development Permit.

[47] The factual matrix on which the argument will be based is limited. All that is required for Joondanna to argue this point has already been provided namely, evidence of constitution of the two Reporting Bodies and the reports of the two Reporting Bodies. The requested documents are not necessary to enable Joondanna to argue this point.

[48] The second instance has its origins in the meeting and information discussed in paragraphs 8-10 above. The evidence reveals that there was a meeting, but it is not known precisely who was in attendance, save that the evidence can support an inference that the mayor was in attendance. It also shows that some information was presented at the meeting but the nature of that information is not known, save that at least it is possible to infer that what was presented was based on an analysis by Urbis. Joondanna alleges

perception of bias in respect of the two Aldermen on the basis that they were privy to that information. Although that possibility exists, that does not make it either evidence or a basis from which an appropriate inference could be drawn. It remains in the realm of speculation only. The claim to the documents based on this is tenuous. If entitlement to production of the documents had been made out, in the circumstances I would decline an order on discretionary grounds for this reason.

[49] In any event, the argument about relevance fails because the Reporting Body is not the decision-maker. The Reporting Body did not make a recommendation to the Minister. There is no evidence that the composition of the two Reporting Bodies had any impact on the decision made by the Minister and I think that evidence of that nature would be required before Joondanna could make out the ground. The function of the Reporting Body is administrative and not determinative. Its function is largely the collection of submissions and information and then reducing that to report form. That report is the source of the material on which the Minister makes his decision. If entitlement to production of the documents had been made out in the circumstances, again I would decline an order on discretionary grounds for this reason also.

[50] The second basis in Ground 4 by which Joondanna challenges the validity of the report of the Reporting Body, (grounds 4.3-4.5 inclusive), relate to compliance with certain provisions of the *Planning Act*. The ground in 4.4 is a good example to demonstrate this. That alleges that notice of the

application was not published as required by section 17(1)(c) of that Act. The requested documents cannot be relevant to those grounds.

[51] In summary therefore, although I could be satisfied that the requested documents may be in the possession of Nesfall, I am not satisfied that the requested documents are relevant to a "*question*" in the proceedings and hence the second of the pre-conditions required by Rule 29.08 is not satisfied.

[52] That conclusion renders it unnecessary for me to consider the exercise of the discretion as the last pre-condition to an order pursuant to Rule 29.08. I have already made some comments relevant to discretionary factors and I make some further brief observations in that respect. Had relevance been established, I would have rejected the application by Joondanna on discretionary grounds because:-

1. I consider the documents sought are at best only peripheral to the issues and were not before the Minister in any sense. The documents relate largely to matters in the lead up (being a period of some two years) to the relevant meeting of the Reporting Body;

2. This matter is listed for trial in the near future and an order for discovery will necessarily delay the final hearing of the matter, and I think for a significant period.

3. In respect of issues relative to the composition of each Reporting Body, those issues are in respect of two of the five members only, hence the challenge only relates to a minority;

4. Moreover, and, the evidence of how both Aldermen voted in respect of the Council resolutions to grant rate concessions and financial assistance is not clear. Although I accept that the issue is apprehension of bias and not actual bias, I think this is still relevant as a discretionary consideration. At best the evidence can only establish inferentially that Alderman McKinnon voted in favour.[15] In the case of the resolution of the Council to extend the duration of the rates concession (the meeting of the Council on 13 December 2012) where a division was called for, the evidence demonstrates that Alderman Bunker voted in the negative.[16]

5. The Reporting Body is not the decision-maker. It performs an administrative function only. The composition of the Reporting Body is irrelevant to the decision of the Minister;

6. The order sought by Joondanna in paragraph 4 of the Summons is too wide given the argument before me. It requests documents which evidence dealings between Nesfall and the Council in respect of the

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15 The unsigned minutes of the meetings of the Council annexed to the affidavit of Peter La Pira made 20 September 2014 do not record the votes of individual Aldermen, except in the case of the meeting on 13 December 2012 when a division was called for. Other than that it is open to infer that an Alderman who moved or seconded a motion which was then carried, voted in favour of that motion and Alderman McKinnon moved or seconded a number of relevant motions.

16 Affidavit of Peter La Pira made 20 September 2014, paragraph 33(d) and Annexure PLP18.

development over a two-year period. The number of potential documents would be numerous. At best Joondanna could only establish a limited entitlement to documents falling within that category.

[53] In summary, for the foregoing reasons, I dismiss Joondanna's application. I will hear the parties as to any ancillary orders.
