

10.1 Confidential Leases of the Almond Train and Carriage Café McLaren Vale

This report provides information requested by Council on the leases and legal issues regarding the Almond Train and Carriage Café McLaren Vale.

This is an update on a previously reported project, concept or issue.

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Contact Number: 8384 0016
Attachments: 1. Legal Advice of John White (3 pages)

1 Executive summary

1.1 Topic

This report provides information requested by Council on the leases and legal issues regarding the Almond Train and Carriage Café McLaren Vale.

1.2 Context

At its meeting of 7 July 2009 Council resolved:

'That Council receives a report by the Council meeting of 21 July 2009 on the current leasing arrangements for the Carriage Cafe and Almond Train including:

- *The names on the current lease agreements*
- *The terms and conditions of the lease agreement in particular to sub leasing*
- *The legal action that the lessees have undertaken and Councils involvement to date, in particular any Council exposure.'*

1.3 Suggested outcome

It is suggested that Council consider this item in confidence. Section 90(3)(i) of the Local Government Act 1999 is suggested as the most appropriate to use for this purpose.

This item is presented as a confidential item because it contains information pertaining to commercial agreements and a court hearing.

The possible implication of not considering this item in confidence is the release of confidential information that will be detrimental to council's position in the continuance of the court hearing.

2 Recommendation(s)

1. That

- (a) under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting in order to consider in confidence this item.**
- (b) Council is satisfied that it is necessary that the public be excluded to enable the Council to consider the matter at the meeting on the following grounds:**
 - (i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council.**
 - (c) That accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential.**
- 2. That Council receive this report.**
- 3. That an order be made under the provisions of Section 91(7) and (9) of the Local Government Act 1999 that the abovementioned document (or part of such document) including the minutes and the report of the Council relating to discussion of the subject matter of that document, having been dealt with on a confidential basis under Section 90 of the Act, should be kept confidential on the grounds of information contained in 90(3)(i) until the court hearing is finalised.**

Key Factors

3 Discussion

3.1 Legal action

During the lease negotiations, which occurred late in 2008, disputes occurred between the business owners of the two carriages. The water service infrastructure from the lease boundary to the carriages had previously fallen into disrepair and was replaced at that time by the Carriage Café operator. The water connection was consequently in the name of the Carriage Café and they paid costs associated with the supply and use of water. The same water connection provided the sole supply of water to the Almond Train. The Carriage Café had an arrangement to invoice the Almond Train with a proportioned (50/50) amount for water usage on an ongoing basis. Ground Leases traditionally require that infrastructure on the lease area is the responsibility of the lessee, the water supply to this site is a part of this infrastructure. The issue has now arisen due to the unique circumstance that two lessees share the site infrastructure.

The Carriage Café proprietors subsequently alleged that they had provided the Almond Train with an invoice for water usage which they failed to pay. The water

supply to the Almond Train was reported to have been severed and blocked sometime late in November 2008, rendering the Almond Train with no water supply.

The disconnection of water supply to the Almond Train resulted in court action being instigated by the Almond Train proprietors seeking restoration of the mains water supply to the Almond Train and the payment of costs by The Carriage Café and the City of Onkaparinga. Council was joined as a second defendant to the action, with the Carriage Café named as the first defendant.

Consequently an injunction was granted at the ex-party hearing on 24 December 2008. The court ordered:

The first defendant be restrained and an injunction hereby granted restraining the first defendant from taking any or further steps to prevent or restrict the supply of water to the Piece marked 'Almond Train' in GP No 76 of 1997 being portion of the land in Certificates of Title Volume 5752 Folio 432 and Volume 5658 Folio 156.

This application and accompanying affidavit and this order be served upon the first and second defendants personally on or before 31 of December 2008.

The parties be at liberty to apply on short notice.

The question of costs be reserved.

Council and the first Defendant were served with the application and supporting affidavit in accordance with the court order on 30 December 2008.

3.1.1 Council intervention

Council administration has offered various solutions to the matters in dispute in an effort to resolve the issue prior to the hearing date. In early December 2008 we gave permission to the proprietors of the Almond Train to make an application to SA Water for their own separate water connection or installation of a sub-meter to provide an expedient and inexpensive solution to the water supply issue.

When it became clear that this solution was not preferred by the Almond Train proprietors we assumed control of the water connection. This was achieved following contact with SA Water and transferring the account to council's name. We instructed the Almond Train proprietors on 23 December 2008 to facilitate the reconnection of the plumbing to the Almond Train.

3.1.2 Mediation process

Throughout the process we have actively pursued the avenue of mediation to avoid legal proceedings. This has included discussion with the Almond Train's counsel regarding the possibility of staying the District Court proceedings and suggesting that the parties attend mediation to be run by the Office of Consumer and Business Affairs.

Council, through legal avenues urged the applicant to discontinue the court proceedings and we again requested resolution of any disputes by way of mediation.

A letter from our solicitors, 'Wallmans Lawyers', to the Almond Train's solicitors, 'am Legal' dated 8 May 2009 stated: 'Our client does remain amenable for these proceedings to be stayed and for the parties to attend a mediation to resolve their dispute. Our client believes that the only commercial way to reach a resolution of this matter is for the District Court proceedings to be referred to mediation. We therefore request that your client seriously reconsider its position in respect of mediation.' In our submissions to the District Court we specifically addressed the matter of mediation.

The Almond Train lessees advised that they would only attend such mediation if council pay their legal fees (\$20,757.60 prior to the summary judgement hearing). This proposal was not accepted as we had received legal advice that council has a strong legal defence against the action.

3.1.3 Summary judgment:

Council's application for a summary judgement for council's release from the proceedings was heard by the court on 28 May 2009 and council's case was represented by Barrister John White. A summary of the hearing and further advice by John White is attached (Attachment 1).

The parties were given an opportunity to discuss settlement and it was agreed:

1. *To stay the action including the application to dismiss*
2. *To mediate or conduct settlement discussions*
3. *To invite the first defendant to participate (proprietors of the Carriage Café - Hamence)*
4. *The matter to be brought back for further directions in say eight weeks'*

Costs were reserved to be determined by the court at a later date.

3.1.4 Court proceedings

In relation to the current court proceedings between the Almond Train and the Carriage Café the matter has been deferred by the court in order to give council sufficient time to mediate between the Almond Train and Carriage Café proprietors and to put a rescission motion before Council to ensure the current business owners are reflected on the leases.

4 Council exposure

Council could potentially be ordered to pay the applicants legal costs associated with the legal action, this amount is currently \$20,757.60. However, it is clear from the advice of John White (attachment 1) that this is unlikely to occur.

Council's legal costs are currently \$19,029.41. Both council and the applicant's legal costs may increase pending the outcome of proposed mediation and any further legal proceedings. All parties are now willing to negotiate and therefore we believe there is a real prospect of resolving the outstanding matters.

5 Next steps

- Rescission motion to be heard and determined by Council to ensure the current business owners are reflected on the leases.
- Separate meetings to be facilitated with the Almond Train and Carriage Café proprietors during July in an attempt to resolve disputes regarding shared lease areas and agreement regarding products to be traded by both parties.
- Lease negotiations to be finalised between the two proprietors and council for a new 5 year term.
- Continuance of the summary hearing at a date to be negotiated and agreed upon by all parties and the court (deferred from 20 July 2009) to hear the parties argument for allocation of costs.

RELEASED

Attachment 10.1

Leases of the Almond Train and Carriage Café McLaren Vale

3 pages

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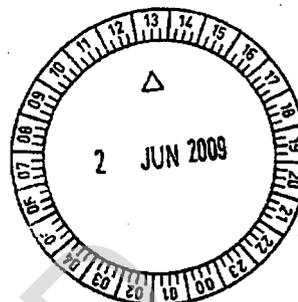
Wallmans Lawyers
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By Email: susan.otoole@wallmans.com.au

Attention: Susan O'Toole

Dear Susan

Almond Train



I refer to my attendance with you before Master Bampton on the application to dismiss on 27 May 2009.

I commenced argument, but after a while Master Bampton interrupted to express her concern at the lack of any pleading from which to identify the plaintiff's causes of action. That led to a certain amount of mutual position-taking at the bar table, after which we adjourned and slowly negotiated a compromise position. That position involved a confirmation of the Council's willingness to grant a lease to Mr and Mrs Egan, and otherwise agreement to mediate or negotiate to settle the outstanding issues. The basis of the agreement, as read out in Court, was:

"The Council has resolved to enter into a ground lease with Mr Hand in August 2008. The Council's manager of property undertakes to seek consent of the Council to instead enter into a ground lease with Mr and Mrs Egan on normal commercial terms, subject to Council being provided with documents in which Mr Hand consents.

It is noted that the manager will use her best endeavours to bring the matter before Council at its next available meeting on 16 June 2009.

As between the plaintiffs and the second defendant, it is agreed:

1. *To stay the action including the application to dismiss.*
2. *To mediate or conduct settlement discussions.*
3. *To invite the first defendant to participate.*
4. *The matter to be brought back for further directions in say eight weeks."*

I had a separate discussion with Mr Di Sizio for the first defendant, and invited him to obtain instructions from his client to participate in mediation. His client refused.

Mr Teague for the plaintiffs indicated that, if there was not to be a mediation, Mr and Mrs Egan would be prepared to negotiate direct with the Council, without solicitors.

These matters were discussed in Court. By consent, orders were made:

1. The plaintiff's claim against the second defendant is stayed until further order allowing time for the plaintiff and the second defendant to engage in some settlement discussions:
2. Further directions adjourned to Monday 20 July 2009 at 9:30 am.
3. Liberty to apply.
4. Costs of today reserved.

I note that we had careful discussion with the Council's representatives, and confirmed that subject to resolving the question of any competing claim by Mr Hand, they have been at all times willing to enter into a lease with the Egans, and they were willing to give the undertaking. The form of the undertaking was discussed and drafted in several revisions before being offered.

I think this is a good resolution. Mr and Mrs Egan heard the argument that was put concerning the way in which their case had been presented, and its dubious legal status. They heard the Master express her concern about the absence of a Statement of Claim, and the prospect that there was no claim against the Council. They heard the Council distinguished from the first defendant. Hopefully this was a salutary experience.

There being no dispute about willingness to grant a lease, the real issue between the Council and Mr and Mrs Egan is outstanding costs. I am very sceptical about any claim by the Egans for damages. There is at present no actual lease, and the Egans seem to be holding over for Mr Hand. I think on balance the Retail and Commercial Leases Act probably applies¹, but its effect is not clear. If the Egans managed to demonstrate there was a lease (say by estoppel) or that the Act had that effect, arguably they might have a claim for breach of the covenant of quiet enjoyment or s.38 of the Act. However, on the facts of this matter, I doubt it. Finally, there is nothing to suggest any actual damage.

The quantum of the plaintiff's costs seems excessive by any measure. Further, bearing in mind:

1. The proceedings were arguably completely unnecessary,
2. They were issued ex-parte,
3. No orders were ever obtained against the Council. As far as I can see, no orders were actually sought,
4. There was no basis for the proceedings to continue (except for tidying up) after the order was made against the first defendant,

¹ Bearer v Knuckey [1965] WAR 118

5. No costs have been incurred by the plaintiffs advancing substantive claims in the proceedings (probably because there are none),
6. The comments of the Master were more than enough to justify the application to strike out: -

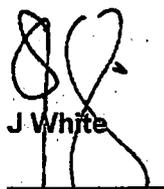
it seems to me that there is a very strong argument that Council should pay no costs at all, and indeed that the Egans should pay some of its costs. Commercially I suspect that may not be an achievable result.

I also confirm briefly my oral observations about the applicability of the Retail and Commercial Leases Act to these tenancies. It seems to me on balance the Act is likely to apply, but there is some uncertainty and the question is certainly arguable. The Council may wish to consider the wording of the ground lease to minimise the impact of the Act.

I note that the basis of the discussion between Mr Teague and me, and the basis of the agreed orders, is that neither party has conceded or compromised its claims in the proceedings. The settlement discussions will be intended to deal with that. However, to avoid any unintentional compromise of that position, the Council should make it clear that in providing a new lease (assuming that it does) it does not concede anything in the proceedings.

Thank you for instructing me. I enclose (with the mail copy of this letter) an account for the work done. I have diarised the return date, but I hope the matter can be resolved before then.

Yours faithfully


J White
Account