

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP350/2016

CATCHWORDS

Domestic building – application for further discovery – whether keyword discovery acceptable when not agreed by parties – whether categories for discovery should be ordered when the discovery process is well advanced.

APPLICANTS

Owners Corporation No.1 of PS613436T,
Owners Corporation No. 2 of PS613436T,
Owners Corporation No. 4 PS613436T,
Sammy Yip and Nancy Chen, Nie Fong Lie,
Hans Roderico Lianto and Owen Ricardo
Lianto, Sam Loncar and Anita Renata Loncar,
Kevin John Marsh and Christine Marsh, Ms
Patricia Frances Miller, Ms Sarah Shu, Biplab
Kumer Roy and Shahana Roy, Simon Philip
Tannard and Suzanne Jacqueline Tannard, Mr
Wai Leung Raymond Cheung, Mr Khoon Lim
Chuah, Mr Daniel Patrick Loughnan, Huynh
Le Vo and Elizabeth Rachel Van Den Aakster,
Hartono Kuswanto, Meily Kuswanto Kam and
Kho Eng Eng, Man Chi Chung and Tuyet
Chung, Interimpex Pty Ltd (ACN: 097 734
622), Mr Limin Zhou, Chong Lok Ho and Sau
Ling Wong, Mr I-Mei Li, Dayong Jin and
Zhihong Li, Zhao Min Xue and Wei Ming Yao,
Mr Xingyang Wang, Cheng Chang Wang, Ms
Cherrie Ann Ramos MacAhilig, Ms Mandy
Yee Fung, Robert Kevin Peter Campbell and
Julie Susan Edge, Lee Foo Keong Lee and
Wong Huey Shyan, Xiao Ling Huang, Lan
Zhao, Mr Gary Michael De Bruyn, Hong Wang
and Jiaping Xie, Rebecca Lee Pig Hah, Farah
Binti Gulamoydeen and Sarah Binti
Gulamoydeen, Lai You Kim, Liza Jane
Hammersley and Sonya Margarete Szymanski,
Rosendo Baltazar and Elvira Baltazar, Viet
Cuong Nguyen, Junwei Zhu, Bi Yong Zhang
and Ren Wang, Jinsheng Gao and Rongqing
Gu, Wai Yee Wong, Hoang Long Vu, Marlowe
De Chavez Ricamora, Chei How Ng and Lai
Fong Low, Hon Kong Liew, Simon Cee and

Karen Wang, Mr George Angel, Rishi Shatrughan Singh, Mr Mathew Alexander, Mr Johannes Kwistianus, Mr George Stamatakis, Tan Swee Seong, Low Ping Lin and Cheow Wai Yee, Nonato De Chavez and Maria Jesusa De Chavez, Adam James Gawne, Peter Thomas Gawne and Julie Elizabeth Gawne, Mr Joseph Gerard Philip, Mr Bary Besfari, Woo Wai Lek and Suzanna Tan Ren Tsy, Sook Yin Hon, Steven Wayne Roberson and Leonie Christine Roberson, Beng Lee Tan and Dee Jun Ong, Mr Suparman Edhie Wahidin, Lim Cheng Seng and Tai Yuet Ying, Jun Li, Yanzhuo Li, Mr Michael Hon Lien, John Joseph Mottolini and Tammy Lee Mottolini, John Andrew Kus and Kelli Jean Kus, Jie Yun Huang, Ngoc Tan Mai, Mr Rohan Paul Cherry, Annakkarage Uthpala Kanchana Peiris, D & K Blowes Pty Ltd (ACN 154 473 042), Mr Ulric Otto Walter Meffert, Zahar Mohd Hashim Bin Zainuddin and Shafinaz Binti Shaukat, Mr Hogun Lee, Nykes General Trading Pty Ltd (ACN 101 535 540), Ai Hue Truong, Xiao Min Mo and Kwong Leung William Chung, Ms Helen Monika Campbell, Qingzhi Liu and Qiqi Wang, Peter Martin Kennedy and Debra Jane Kennedy, Andrew James Millward and Bernadette Millward, Frank Gaston Hedley Bhujoharry and Marie Paquerette Maryse Clair Bhujoharry, Mr Peter Joseph Irvine, Xiao Wei Quan and Jia Xin Liu, Mr John James McKinlay, Ameer Adnan Alaraji and Sahira Alaraji, Steven Mark Angus and Geraldine Frances Angus, Shireen Bangah, Huat Beng Cheong and Mee Chin Lo, Kevin James Cann and Made Seneng Cann, Qing Zhao, Chow Shung Chee, Nor Shahidah Binti Khairullah, Hoang Long Vu, De Lima Custodian Pty Ltd (ACN 157 968 593), Ho Eun Jang, Lim Sook Luan, Kolap Hang, Glenn Robert Attenborough and Glenys Ann Attenborough, Ms Julie Krista Howes, Lillis Mario Abraham and Ann Abraham, Ping Shi and Xiaowan Bao, Ayu Trisana and Surya Tirtana The, Eddy Siu Tim Ng and May Mei Ling Wong, Lingjuan Jiang, Rhymney Pty Ltd (ACN 008 537 568), Hin

Chiong Tiong and Peak Tin Teo, Mark Campbell Brown and Christine Burke, Thi Hue Hoang, Chien-Jen Huang, Hsinag-Meng Liu, Lei Huang and Yen Huang, Xuan Loc Nguyen and Thi Thanh Sang Nguyen, Shuai Pei, Yuxuan Li, Chui Ngik Hwong, Sohail Ashraf, Kamil Akkurt and Nalan Akkurt, Mr Terry Bahat, Soon Chai Lim, Romulo Sevilena Dacaya and Arlene Canicula Dacaya, Yan Wang, Stephen Noel Whyte and Leesa Gaye Ryrrie, Gang Fei, Yew Fong Lai and Choi Wah Kok, Julian Lee Hou Law and Bee Siew Chua, Weng Shin Leong and Kui Yoon Chong, Mr Scott Stephen Crawford, Li-Yu Tu, Yvonne Khanh Phung Chau, Thi Tuyet Co Tran, Mr Anthony Vincent Sammut, Mei Qing Herbst and Andreas Michael Helmut Karl Herbst, Mr Ethan Tony Chien, Janisha Pty Ltd (ACN 401 733 379), Phillip John Marriott and Carolyn Patricia Marriott, Sukumar Banala and Bianca Virginia Vaguez, Zalewski Property Investments Pty Ltd (ACN 156 576 831), Beng Kit Lim

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| FIRST RESPONDENT | Lu Simon Builders Pty Ltd (ACN: 006 137 220) |
| SECOND RESPONDENT | Stasi Galanaos |
| THIRD RESPONDENT | Gardner Group Pty Ltd (ACN 056 178 262) |
| FOURTH RESPONDENT | Elenberg Fraser Pty Ltd (ACN 081 961 855) |
| FIFTH RESPONDENT | Tanan Mereh Vic Pty Ltd (ACN 098 935 490) t/as Thomas Nicolas |
| SIXTH RESPONDENT | Gyeyoung Kim |
| SEVENTH RESPONDENT | Jean-Francois Gubitta |
| EIGHTH RESPONDENT | Property Development Solutions (Vic) Pty Ltd |
| WHERE HELD | Melbourne |
| BEFORE | Deputy President C. Aird |
| HEARING TYPE | Directions hearing |

DATE OF HEARING 21 and 29 May 2018
DATE OF ORDER 8 June 2018
CITATION Owners Corporation No.1 of PS613436T v Lu
Simon Builders Pty Ltd (No 2) (Building and
Property) [2018] VCAT 880

ORDERS

1. By 15 June 2018 the fourth and eighth respondents must file proposed orders to give effect to the following Reasons. If they are unable to agree on the form of orders they must each file their proposed orders. **Upon receipt of the proposed orders I direct the Principal Registrar to immediately refer them to Deputy President Aird.**
2. Liberty to apply.
3. Costs reserved.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

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| For Applicant | Excused on 21 May 2018, Mr La La, solicitor on 29 May 2018 |
| For First Respondent | Mr R Andrew of Counsel |
| For Second and Third Respondents | Ms V Blidman of Counsel on 21 May 2018 and Mr J Evans QC on 28 May 2018 |
| For Fourth Respondent | Mr J Forrest of Counsel |
| For Fifth Respondent | Mr S Donley, solicitor |
| For Sixth Respondent | No appearance |
| For Seventh Respondent | No appearance |
| For Eighth Respondent | Mr A Downie of Counsel |

REASONS

- 1 In 2016 the Owners Corporations and individual lot owners commenced these proceedings against the first respondent builder, L.U. Simon Builders Pty Limited ('LUS') following the fire at the Lacrosse apartment building. The following respondents were subsequently joined as parties to the proceeding, upon application by LUS, both for the purpose of its defence under Part IVAA of the *Wrongs Act 1958* and also seeking contribution under s23B of that Act:
 - (i) Stasi Galanos and Gardner Group Pty Ltd as the second and third respondents – the building surveyor ('GG')
 - (ii) Elenberg Fraser Pty Ltd as the fourth respondent – the architect ('EF')
 - (iii) Tanah Mereh Vic Pty Ltd as the fifth respondent – the fire engineer ('TM')
 - (iv) Gyeyoung Kim – the tenant of the apartment where the fire is alleged to have started as the sixth respondent. Mr Kim has not participated in these proceedings.
 - (v) Jean-Francois Gubitta – the occupier - as the seventh respondent Mr Gubitta has not participated in these proceedings
 - (vi) Property Development Solutions (Aust) Pty Ltd ('PDS')
- 2 On 19 April 2018 EF filed an Application for Directions Hearing or Orders seeking further discovery from various parties. These Reasons are concerned with EF's application for further discovery from PDS only.
- 3 At the commencement of the directions hearing on 21 May 2019 Mr Forrest of counsel for EF handed up Proposed Orders.

APPLICATION FOR FURTHER DISCOVERY FROM PDS

- 4 PDS was the superintendent on the Lacrosse project. PDS has discovered 168 documents which it says are relevant to the matters raised in EF's Points of Defence insofar as EF alleges it is a concurrent wrongdoer for the purposes of its defence under Part IVAA of the *Wrongs Act 1958* and its claim for contribution under s23B of that Act.
- 5 Initially EF sought an order that PDS discover 24 categories of documents with extensive descriptors. When the matter returned to a further directions hearing on 28 May 2018 EF had reviewed and refined the categories. The application is opposed by PDS, notwithstanding that it concedes that there are 7 categories of documents which may include relevant documents which have not been discovered (categories 5, 6, 11, 12, 16 and 22). Further, category 21 relating to PDS' fee proposal was not discovered.

PDS' discovery

- 6 PDS contends that it has taken all reasonable steps to satisfy its discovery obligations. Further, that many of the documents in the categories suggested by EF will either already be in EF's possession or will have been discovered by one of the other respondents.
- 7 PDS relies on an affidavit from its solicitor Rui Chen affirmed 23 April 2018 in which she sets out the process by which PDS undertook discovery. In her affidavit Ms Chen states that a two stage process was carried out to review the approximately 70,000 de-duplicated electronic documents. First a keyword search was carried out. The keywords included 'cladding', 'aluminium', 'composite', 'panel', 'ACP', 'external wall', 'façade', 'aluco', 'aluca', 'combust', 'polyethylene', 'WP3', 'MC1', 'tape', 'fold', 'fixing', 'affix'.
- 8 The keyword searches reduced the number of documents to approximately 20,000. A team of four paralegals reviewed the 20,000 documents and reduced the number to approximately 1,000. A senior associate then reviewed the remaining approximately 1,000 documents which reduced the number of documents to 168 which were included in PDS' affidavit of documents.
- 9 PDS estimates that if the discovery process was repeated within the proposed categories, confined to the remaining 55,000 documents (those excluded by the keyword search) the likely cost would be \$230,000. If all the documents were to be reviewed the cost would be even greater.
- 10 PDS has offered two alternatives to EF: first, for EF to suggest additional keywords to be used in a further search; alternatively, for PDS to provide all of its documents to EF (with appropriate undertakings) for EF to carry out whatever search it wishes.
- 11 Whilst Mr Forrest confirmed at the directions hearing on 28 May 2018 that EF was pressing its application for PDS to provide further discovery in categories. However, in the alternative, it sought an order be made consistent with the proposal set out in Ms Chen's affidavit of 23 April 2018, with the exception of paragraph (b) which he anticipated could lead to further disagreement and disputation between the parties.
- 12 The specific proposal as set out in Ms Chen's affidavit of 23 April 2018 is:
 - 14.2 PDS is prepared to provide NRF [EF's solicitors] with access to all data in the Ringtail Platform for it to search and/or manually review to identify documents that are within the Proposed Categories. Access will be made available subject to appropriate undertakings by EF including:
 - (a) access to all data in the Ringtail Platform will be limited to EF's legal representatives, NRF;
 - (b) EF will provide PDS with a list of any documents that it believes are relevant and discoverable for PDS' consideration.

PDS will review the list and note any areas of disagreement. The parties may apply to VCAT for a ruling on the areas of disagreement before the relevant documents can be used in the proceeding;

- (c) EF agrees that in providing it with access to its data, PDS does not waive privilege over any documents that would otherwise attach;
- (d) EF will agree to an appropriate confidentiality regime in respect of any material that PDS may consider commercially sensitive.

Should PDS be required to provide further discovery?

- 13 Mr Downie, counsel for PDS, prepared written submissions in opposition to the application. These were handed up at the directions hearing on 21 May 2018. At the directions hearing on 28 May 2018, he handed up submissions in reply to EF's reply submissions which were also handed up at the directions hearing.
- 14 First, although PDS concedes that the documents in categories 5, 6, 11, 12, 16 and 22 may be relevant, it contends this does not mean they should necessarily be discovered. Further, that documents which do not specifically relate to other aspects of the project not associated with the cladding, for example, documents related to the swimming pool, door hardware, landscaping, floor coverings, concrete slabs structural components, electrical components, *are not relevant or would at least have marginal relevance and it would be disproportionate and unreasonable to order they be discovered.*
- 15 PDS contends that the Tribunal should have regard to and follow the practices in the Supreme Court of Victoria for electronic discovery. Further, that PDS can conduct discovery in any manner it chooses provides it undertakes a reasonable search and discovers the documents within the categories set out in Rule 29.01.1 of the *Supreme Court Rules*. However, Supreme Court practices only apply to the Tribunal to the extent they are adopted by it.¹
- 16 Mr Downie also referred me to a number of authorities where the Supreme Court has indicated that discovery should be efficient, relevant, and proportionate, which it is unnecessary to refer to here, as I agree. He also provided me with a copy of the Federal Court case management handbook requirements for discovery.
- 17 However, the difficulty here is that protocols for electronic discovery or discovery by category were not agreed by the parties *before* discovery was completed. Rather, PDS embarked on electronic discovery without first agreeing a protocol with the other parties, and seemingly now expects the Tribunal to retrospectively approve its unilateral approach, particularly in

¹ Section 98(1)(b) *Victorian Civil and Administrative Tribunal Act 1998*

circumstances where EF has expressed concerns as to whether PDS has undertaken a reasonable search. Further, EF has also sought to now impose its own process requirements for discovery, requesting that orders be made for further discovery in categories which it has nominated and crafted without reference to the other parties.

- 18 The issue of categories and a protocol for electronic inspection of documents was first raised at a directions hearing on 25 October 2017 by the second and third respondents, without notice to the other parties. I declined to make an order but gave the parties liberty to apply for this to be considered at the directions hearing on 19 December 2017. On 25 October 2017 I made the following order:

By 31 January 2018 the parties must file (sic) and confirm in writing to the principal registrar they have done so, an affidavit of documents. If the parties are unable to agree whether discovery should be confined to categories of documents and/or the categories of documents and/or are unable to agree on a protocol for the electronic discovery of documents for inspection, an application for directions hearing or orders including proposed categories should be made with such application to be heard at the directions hearing listed for 19 December 2017.

- 19 No application was made, and the date for compliance with the order for discovery was extended to 14 February 2018 at a directions hearing on 25 January 2018. No application was made for discovery to be by way of categories, or for an electronic protocol for discovery to be ordered. If any party had considered that electronic discovery, whether by category or utilising keyword searches was appropriate, they should have first attempted to agree a protocol with the other parties and if agreement could not be reached, made application to the Tribunal as provided for in my orders of 25 October 2017.
- 20 Further, it is now too late for EF to now attempt to stipulate the form of electronic discovery and categories. Where discovery is well advanced, in my view, it would be unreasonable to impose a new process for discovery for the convenience of one of the parties.
- 21 In circumstances where PDS, as the superintendent, has discovered only 168 documents I can understand EF's concerns that there are relevant documents which have not been discovered. Although the limited keyword search identified approximately 20,000 documents, these were reviewed and culled to approximately 1,000 documents by four paralegals, whose qualifications and experience in carrying out discovery are unclear. I am not persuaded that it would be reasonable to order EF to identify further keywords for PDS to carry out a further keyword search. The discovery obligation rests with PDS and it is not for another party to specify the keywords.
- 22 In my view the appropriate course is to make an order consistent with the proposal set out in Ms Chen's affidavit with a modified paragraph (b). I am

satisfied that EF should provide PDS with a list of any other documents which it identifies. It would then be appropriate for PDS to file and serve a further affidavit of documents by reference to that list, as all parties should also be able to inspect those documents. Clearly any documents over which it claims privilege can be identified in the affidavit. PDS should advise EF of any documents which it does not consider relevant or discoverable with any such objections being referred to the Tribunal for determination, preferably during the final hearing ('the documents objected to'). A ruling on whether the objected to documents should be discovered, should not otherwise delay the discovery process.

- 23 As no dates have been provided by EF and/or PDS for the provision of access to EF of PDS' documents, when EF will provide EF with a list of the documents they have identified, and the date by which PDS will file and serve any further affidavit of documents, I will order that EF and PDS file proposed orders to give effect to these Reasons by 15 June 2018. I will reserve EF's and PDS' costs of this application and of the further discovery process to be carried out in accordance with these Reasons.

DEPUTY PRESIDENT C. AIRD