VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D916/2006

CATCHWORDS

Principles governing inspection of documents produced on summons under section 104 *Victorian Civil & Administrative Act* 1998– claim that issue of summons is an abuse of process – legal professional privilege – claim for confidentiality – relevance of documents sought – relevance of application for stay – *Charter of Human Rights and Responsibilities Act* 2006 considered.

APPLICANT	Seachange Management Pty Ltd (ACN 091 443 211)
FIRST RESPONDENT/APPLICANT BY COUNTERCLAIM	Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577)
SECOND RESPONDENT	Bruce Jamieson
THIRD RESPONDENT	Louis Allain
SECOND RESPONDENT TO COUNTERCLAIM	Giuseppe De Simone
THIRD RESPONDENT TO COUNTERCLAIM	Paul Marc Custodians Pty Ltd (ACN 110 485 982) formerly known as Paul Marc Management Pty Ltd
FOURTH RESPONDENT TO COUNTERCLAIM	Martin Jurblum
WHERE HELD	Melbourne
BEFORE	Her Honour Judge Harbison Vice President
HEARING TYPE	Hearing
DATE OF HEARING	7 December 2009, 3 February 2010
DATE OF SUBMISSIONS RECEIVED	12 & 14 January 2010
DATE OF ORDER	18 March 2010
CITATION	Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2010] VCAT 269

ORDER

1. The application of Seachange and De Simone to be granted leave to cross-examine Brendan Archer on the contents of his affidavits sworn in support of the application before me is refused.

2. The application of Seachange and De Simone to be granted leave to summons witnesses to be called on the application that the summonses directed to Chrapot and Brereton be set aside as an abuse of process and on the claim that certain documents should not be released on the ground of confidentiality is refused.

3. I declare the documents produced to the Tribunal by Jack Chrapot in response to the summons to witness dated 29 April 2009 and Michael Brereton in response to the summons to witness dated 16 December 2008 should be made available for inspection by the legal representatives of the respondents with the following exceptions –

   (a) all of the documents which I have determined relate to the subject matter of the stay application, being as follows:

      (i) of the documents produced by Brereton – documents 344-355,documents 348-349, document 331, document 271, document 290-291 documents 212 to 255;

   (b) all of the documents which I have determined may be protected by client legal privilege, being documents numbered as follows:

      (i) in the documents produced by Brereton – the email dated 10 April 2007 contained in document number 984;
      (ii) document 140 dated 18 May 2006;
      (iii) document 186 undated;
      (iv) document 1117 dated 30 April 2007 – but only the second page of this document commencing “There was a hearing today at VCAT”;
      (v) document 1163 dated 3 May 2007;
      (vi) document 1130 dated 2 May 2007;
      (vii) document 1050 dated 20 April 2007;
      (viii) documents 1193-1196
      (ix) document 1192
      (x) document 1023
      (xi) document 1155-1162
      (xii) document 1145;
      (xiii) document 1147 dated 3 May 2007.

(c) The document which I have determined is irrelevant to this proceeding being document 137 in the documents disclosed by Brereton.

4. Prior to inspection of the documents referred to in these orders, the legal representatives of the respondents must file a written undertaking with the Tribunal not to disclose the contents of these documents to any person, including directors and agents of the respondent, until further order of the Tribunal.

Her HonourJudge Harbison
Vice President

APPEARANCES:

For the Applicant	Mr P Lustig, solicitor
For the First, Second and Third Respondents	Mr B Reid of counsel
For the Second Respondent to counterclaim	Mr G De Simone in person
For the Third and Fourth Respondents to Counterclaim	No appearance

REASONS

BACKGROUND

1 In 2007 Seachange Management Pty Ltd (Seachange) issued proceedings in this Tribunal against a building company, Bevnol Constructions & Developments Pty Ltd (Bevnol), with whom it had contracted to perform building works.

2 The works were to have been the first stage of a retirement village project situated in Ocean Grove. The project was potentially very large. Bevnol says that it was initially expected to have comprised 160 residential units, later scaled down to 136 units, and a range of supporting facilities.

3 In an affidavit filed in support of the application before me, the solicitor for Seachange has described the project as comprising "*extensive civil works, large commercial buildings such as an aged care facility, and integrated buildings incorporating a hotel redevelopment*".

4 There is dispute between the parties as to the extent to which Bevnol was to have become involved in the project in its entirety. This proceeding principally concerns disputes which have arisen between the parties arising out of the first stage of this larger project.

This application

5 Bevnol has issued two summonses to produce documents, one to Jack Chrapot and one to Michael Brereton, and documents have been produced to the Tribunal by each of those persons in response to these summonses.

6 It is my task to determine which, if any, of these documents should be released for inspection to the solicitors for Bevnol. In coming to this decision, it has become necessary for me to consider many issues arising out of the pleadings filed by each party. I therefore propose to describe the pleadings in some detail before considering the particular issues of contention in this application.

The Points of Claim

7 The contract which is the basis of this claim provided for Bevnol to construct eleven units on the land for a contract price of $1,809,827.80. Seachange alleges that Bevnol has breached this contract by not completing the units within the building period specified under the contract, and that the works done by Bevnol were not in accordance with the contract, and required rectification.

8 Seachange alleged that the building contract contained particular requirements given that the construction was directed to the retirement home market. Seachange also alleged that it was a term of the contract that the works would be of the highest possible standard and the finishes were of a sufficiently high quality to attract an up market purchaser.

9 There was no mention of these requirements in the specification, but Seachange said that it relied on representations about these matters which it said were made by the directors of Bevnol.

10 Seachange alleges that Bevnol failed to supply and install all of those things and that its work was not up to the requisite standard.

11 The contract contained standard terms for the presentation by Bevnol of claims for progress payments and other terms common to contracts for commercial construction, including a liquidated damages clause.

12 The contract provided that works would be completed within 13-16 weeks after commencement. Seachange alleges that construction commenced on about 21 May 2006 and was therefore due to be completed on or about 31 August 2006 or alternatively 7 November 2006 (Clause 6(d) of the Further Amended Points of Claim dated 23 May 2008).

The settlement agreement

13 Seachange further alleges that when it became evident that the works would not be completed by the completion date and the parties were locked in dispute as to whether or not Bevnol was entitled to a progress payment, Seachange and Bevnol agreed to settle that dispute or, alternatively, to vary the terms of the contract, by providing that Bevnol would complete the first unit by 22 December 2006, and allow Seachange possession of that unit so that it could be used as a display unit for marketing purposes. In exchange Seachange would pay the balance of the second progress claim in the amount of $433,912.06 to Bevnol by 22 December 2006.

14 Seachange alleges that in breach of this settlement agreement Bevnol unlawfully suspended the works on 18 December 2006 shortly before the second progress claim was due to be paid. By February or March 2007 Bevnol had removed part of its plant and equipment from the site.

Allain and Jamieson

15 Two directors of Bevnol, Allain and Jamieson, have been joined as further respondents to the claim. Seachange says that they participated in making the contractual arrangements and in making the representations that Bevnol would complete the works on time, that the works would be completed to the highest possible standard with finishes of a high quality and ideal for occupancy as a retirement village, and that those representations were false, misleading and deceptive in contravention of sections 9, 10 and 12 of the *Fair Trading Act* 1999.

Loss and damage claimed by Seachange

16 As a result of the breach of the contract and representations Seachange claims that it has suffered loss and damage. The way in which this loss and damage is claimed and calculated is, in my view, one of the critical issues in this application, so I will set it out in detail.

17 The first head of damage is the cost of altering, rectifying and completing the works done by Bevnol. The cost claimed under this head is $1,125,591. Those costs are said to include the costs of engaging an alternative builder to complete the works, which costs are separately estimated at $165,000.

18 Secondly, Seachange has claimed for the costs of servicing loans it has incurred from 31 August 2006, which is the date on which it says the work should have been completed, up until the date of trial of this proceeding.

19 In its Further and Better Particulars dated 23 May 2008 Seachange identifies these loans. It says they include a loan from Bank West in the amount of $3,101,696.35, a loan from Galambos Pty Ltd in the amount of $970,197.00, and a pre-paid deposit loan of $6,274,000.00 from Seachange Ridge Nominees Pty Ltd.

20 Seachange says it has suffered loss by continuing to be responsible to service these loans after the time at which the project was due to be completed.

21 As a further head of damage, Seachange specifically claims as part of the damage it has suffered, "*opportunity cost of the funds including the bank loan and the inter partnership advances and deposits at $6,500,000*."

22 It is not clear what the difference is said to be between some of the heads of damage pleaded, or how the opportunity cost referred to in the claim is to be calculated.

23 However, it is clear that Seachange relies on an allegation that because it is unable to complete sales of the units which were the subject of the contract it is unable to realise profits on the sale of the units. Its calculation of its loss of profits for the first year is $380,000.00 per loan/licence fee, or $22,800,000.00 for the first year of delay. It says that it has based this calculation on a market value of $16,150,000 for the site on which the works were constructed.

24 In order to prove its claim at trial, Seachange will therefore need to establish the factual matters set out above and Bevnol will be entitled to test each of these allegations.

25 In particular, Seachange will have to prove, and Bevnol will be entitled to test -

- the cost of alteration to the works
- the cost of rectification to incomplete or defective works
- the costs of servicing the particular loans it has set out in the points of claim
- the opportunity cost of money diverted by it to service those loans which would otherwise have been directed elsewhere
- the lost profit on the units.

The Counterclaim

26 Bevnol filed a defence and counterclaim in May 2007. The counterclaim alleges that Seachange did not pay the progress claims as they became due under the contract and that when Bevnol suspended the works, as it was entitled to do under the contract, Seachange failed to rectify the breach by paying the progress payments and directly undertook completion work on the project without the consent of Bevnol, thus repudiating its contractual obligations.

27 Bevnol claims that it has suffered loss and damage in various ways by reason of Seachange breaches of the contract, being its actual cost on the project, its profit anticipated on the project and interest on the amount due to it under the contract.

The development agreement

28 Further, Bevnol says that during October or November of 2005 it entered into an agreement with Seachange whereby Seachange agreed to engage Bevnol to construct for it not only the 11 initial units which are the subject of the contract so far, but works relating to the total development -a total of 136 aged care units –for the price of $22,176,105.00

29 Bevnol alleges that Seachange was in breach of this agreement in refusing to enter into any contract with Bevnol. As a result Bevnol claims the value of work done in reliance upon the contract and loss of expected profit estimated in the sum of $4,435,000.00.

The misrepresentations alleged in the Counterclaim and the Joinder of De Simone to this proceeding

30 There is a further aspect to the counterclaim. Bevnol alleges that the entire contract relied on by Seachange was conditional on Seachange obtaining finance in the sum of $1,809,827.00, (being the full amount of the construction cost), within 14 days of the contract being signed.

31 Bevnol says that during May, June and July of 2006, and in particular at a meeting on 20 July 2006, Bevnol, through its directors, advised De Simone personally that until Bevnol received confirmation from Seachange that Seachange had obtained the loan funds set out in Clauses 8.1 and Schedule 1, Item 11 of the Contract, Bevnol would not be able to obtain the requisite domestic warranty insurance to commence the work and thus would not be able to obtain a building permit.

32 As I have said, the contract was signed in May 2006.

33 Bevnol alleges that on 27 July 2006 De Simone provided to Bevnol a letter from Seachange's accountant, which advised that the funding necessary to finance the development had been put in place and the funds were available to pay "their chosen builder".

34 Bevnol alleges that this letter and the circumstances of its production by De Simone constitute a representation by Seachange and by De Simone that funding was available to pay the first progress claim and that as a result of receipt of this document, Bevnol commenced work on site on 28 September 2006.

35 Bevnol alleges that Seachange had in fact not obtained finance sufficient to enable it to meet its financial obligations under the contract.

36 Bevnol says that the circumstances which it alleges amount to conduct under s152 of the *Fair Trading Act* by De Simone (and others not represented in the application before me) in contravention of s9 of the *Fair Trading Act* (the misleading and deceptive provisions), contravening of s9 of the *Fair Trading Act*, inducing the contravention of the *Fair Trading Act* or aiding, abetting, counselling or procuring the contravention.

37 Bevnol says further that it relied upon the financial approval representation by these respondents and the truth of the representations made by these respondents and therefore continued to proceed with work under the contract.

38 Thus, Bevnol has joined De Simone as the second respondent to the counterclaim.

The Defence to Counterclaim

39 Seachange Management Pty Ltd and De Simone filed an Amended Defence to the Amended Counterclaim dated 16 June 2008.

40 As well as denying that the contract was conditional upon Seachange obtaining finance, Seachange and De Simone allege that if there was such a condition, the condition had already been satisfied as Bank West, the lender referred in the contract, had advanced Seachange $3,000,000.00, a sum greater than the finance required and that it had done so on 1 May 2006.

41 In particular, paragraph 27 of the Defence to Counterclaim alleges that at or around the time of the commencement of the works, Seachange had raised bank loans of $3,000,000.00 and syndicated loans of $3,000,000.00 had been pledged.

42 It further alleges that Bevnol in any event had waived compliance with this clause by commencing works.

43 It alleges that any conversations between the individual parties did not create any contractual condition and that Paul Marc Management Pty Ltd was not Seachange's accountant.

The police investigation

44 In around March 2007 it appears that Bevnol made a complaint to the police against De Simone in respect of the circumstances surrounding his production to Bevnol of the letter from Paul Marc Management referred to in the counterclaim. A police investigation followed.

45 Some time in April or May 2009 De Simone was in fact charged with several offences arising out of his alleged use of the letter. He was also charged with offences arising out of statements he had made at two VCAT directions hearings. The exact charges are set out in an affidavit sworn by Brendan Archer on behalf of Bevnol dated 25 September 2009 and referred to also in the affidavit of De Simone dated 7 December 2009.

46 Much of the material filed by De Simone in this application before me is concerned with the circumstances in which this investigation came to be instituted and the effect of the investigation and subsequent charges on the conduct of this proceeding.

The stay applications

47 De Simone applied to this Tribunal shortly after the commencement of the police investigation for a stay of determination by this Tribunal of the paragraphs relating to paragraphs 9-12, 27-30 and 36-44 of the counterclaim.

48 He said that in defending those aspects of the counterclaim he may be required to forego or waive the right to protection from self-incrimination which he would otherwise have in relation to the criminal investigation and his defence of the criminal proceedings would thereby be prejudiced.

49 That application was initially heard in the Tribunal by His Honour Judge Ross (as he was then) and dismissed. It was made at a time when De Simone had not been charged with any offences. De Simone unsuccessfully appealed that decision.

50 The matter was brought back to the Tribunal by De Simone once charges had been laid against him and further considered by His Honour Judge Ross on 13 May 2009. At that hearing, at the request of De Simone, Judge Ross referred to the Supreme Court the question as to whether the common law principles to be applied when considering a stay of civil proceedings in these circumstances should be revised in the light of the *Charter of the Human Rights and Responsibilities Act* 2006.

51 His Honour did not make any specific order staying the hearing of those paragraphs of the counterclaim which are the subject of the criminal proceeding. However, since that order was made, this Tribunal and the parties have acted on the basis that the allegations made in those allegations are effectively stayed pending the outcome of the Supreme Court application.

52 It appears that this is in reliance on section 33 (2) of the *Charter* which provides as follows:

> "If a question has been referred to the Supreme Court under subsection 1, the court or tribunal referring the question must not-
>
> (a) make a determination to which the question is relevant while the referral is pending; or

(b) proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question.

53 Accordingly, the Tribunal and the parties have proceeded on the assumption that the issues raised in the counterclaim cannot be determined until the *Charter* application has been determined in the Supreme Court. It is not expected that the Supreme Court will consider the matter until the second half of this year.

The summonses to produce documents

54 On 30 April 2009, Bevnol served a summons to witness on Jack Chrapot seeking production of certain documents. Chrapot answered the summons on 4 May 2009 and has provided a folder of documents in response to the subpoena. At some time in early 2007 Seachange had engaged Chrapot to assist it in respect of the works outstanding on the Ocean Grove project.

55 On 18 December 2008, Bevnol served a summons to produce documents on Michael Brereton. In response to the summons directed to him, Mr Brereton has provided three folders of documents.

56 Mr Brereton's relationship to Seachange is in dispute. As I will outline later in these reasons, it appears that he served in the capacity of solicitor for Seachange for some purposes, and that he also had a financial interest in Seachange or companies associated with Seachange.

57 De Simone has inspected all of the documents produced by both Chrapot and Brereton, and has compiled a spreadsheet setting out the documents which he says should not be released to Bevnol for inspection.

58 Seachange has joined with De Simone in objecting to the release of the documents to Bevnol. I am asked to set aside the summonses, prevent the documents identified by De Simone from being inspected by Bevnol, and order that those documents produced in response to the summonses be released into the custody of Seachange and De Simone.

Who is the applicant in this application?

59 Seachange Management was represented by solicitors and De Simone has represented himself in the proceeding.

60 When this matter was listed before me for hearing there was some controversy between the parties as to whether this application before me was an application by Bevnol that Mr Brereton and Mr Chrapot produce documents for inspection, or an application by Seachange and De Simone that inspection of those documents be not allowed.

61 This application was not initiated by a formal application, but listed before me pursuant to orders made by Deputy President Aird following issues relating to inspection having been raised with her at various directions hearings.

62 VCAT is not a Court of pleadings, and I do not consider that I should be influenced by the lack of formal application. The question to determine is what is the real subject matter of this dispute between the parties.

63 I take the view that the real dispute which I have to determine is between the parties to this proceeding. There is no live dispute between the party issuing the summons and the person to whom the summons is directed.

64 I have thus treated this application as being an application by Seachange and De Simone that Bevnol be prevented from inspecting the documents.

65 De Simone said that if I were to take the approach for which he argued, this would make it clear that there was no burden on himself or Seachange to establish any of the matters on which he relied, and that to the contrary the burden of proof was on Bevnol to persuade me that the documents should be released.

66 This was said to be because it was up to me to determine initially whether the summons was valid and to exercise my discretion as to whether the documents need to be inspected. He said it was not for him to bear any burden of being required to persuade me in respect of these matters, as they are matters the Tribunal should enquire into of its own volition.

67 It is sometimes said that it is inappropriate to characterise proceedings before this Tribunal as involving strict application of a burden of proof.

68 For the purpose of this application it seems to me that where matters are asserted by De Simone and Seachange which they say require me to prohibit disclosure of the documents, the burden of proving those matters lies upon them. Where facts are asserted by Bevnol which are said to be relevant to the decision as to whether or not to release the documents, the burden of proof of those matters is on Bevnol. Unless otherwise referred to in these reasons, the proof required is the civil standard- that is, is it more likely than not that the facts alleged are true.

Objections to disclosure of documents

69 Seachange was represented in this proceeding by solicitors. De Simone has a law degree but as I understand it, has not practised as a lawyer. He represented himself. As far as I could understand it, his reasons for seeking the order preventing the disclosure were as follows.

70 Firstly, he said that certain of the individual documents were protected by client legal privilege.

71 Secondly, he said that even if the documents were not protected by client legal privilege, they were confidential documents and should not be released.

72 Thirdly, he said that many of the documents were not relevant to the issues in dispute in this litigation.

73 Fourthly, he said that certain of the documents should not be released as they covered the matters referred to in the *Charter* referral to the Supreme Court.

74 Lastly, he said that inspection of all of the documents should, in any case, be refused because the issue of these two subpoenas represented an abuse of process which should not be countenanced by the Tribunal.

The materials filed in support of this application

75 De Simone inspected the documents and has produced a spreadsheet as an attachment to his affidavits dated 24 April 2009 and 8 December 2009 which identifies each of the documents provided by Chrapot and Brereton in response to their various subpoenas, and identifies in respect of each document the grounds on which he says, on behalf of himself and Seachange, that inspection should be prevented.

76 This document builds upon an earlier document prepared by him and amended by Bevnol – exhibited to the affidavit of Bevnol's solicitor, Mr Archer. Archer has identified the grounds on which he says that disclosure should be ordered. De Simone has identified the documents which he agrees should be released and those in relation to which he claims inspection should be prevented.

77 The final version of this spreadsheet is exhibit GDS1-15 in relation to Mr Brereton and GDS1-16 in relation to Mr Chrapot. I will attach a copy of each of these exhibits to my decision for convenience.

78 I have also received several affidavits from De Simone, Mr Peter Lustig, solicitor for Seachange, and two affidavits from the solicitor for Bevnol, Mr Brendan Archer.

79 Seachange also relies on the affidavit of Mr Allain, a director of Bevnol, sworn 24 September 2008, which was not filed in this application, but in an application by Bevnol for self-executing orders by reason of the failure of Seachange to provide further and better particulars.

80 Both Seachange and Bevnol have filed submissions. De Simone has not filed submissions. As I understand it, he relies on the Seachange submissions, together with the oral submissions he has made to me at the directions hearings conducted relating to this application.

81 Given that the Tribunal's file is very large, I made orders requiring the parties to specifically identify all material from the file which is said to be relevant in this application, and I have read and considered all the material so identified in coming to my conclusions.

82 Bevnol complied with the timetable set by me for the filing of affidavits and submissions in respect of this application. Seachange and De Simone did not.

83 In addition to these affidavits and submissions, both parties invited me to inspect the documents produced by Chrapot and Brereton. I was initially

reluctant to do so, as the folder produced by Chrapot contains 179 documents, and the three folders produced by Brereton contain in total 1294 documents. However, as will become evident from these reasons, I ultimately decided that I could not properly deal with the issues raised other than by inspecting the challenged documents myself to ascertain whether a particular ground relied on could be upheld.

84 I recognise that it is not usual that documents be inspected in this way. However, given the failure of De Simone and Seachange to identify exactly how it is said that the objections they have made can be made out, I determined that it would be more efficient for me to inspect the documents than to attempt to enforce orders which had already been made for identification of precise grounds of objection, and which had not been complied with by Seachange and Bevnol.

The application to call further evidence

85 Well after the time had elapsed for the filing of his submissions, De Simone sent an email to the Tribunal seeking to be able to cross-examine witnesses and summons further witnesses. I called a directions hearing to consider this application.

86 At that directions hearing, De Simone, supported by Seachange, told me that he wished to call evidence to support his claim that the issue of the summonses was an abuse of process.

87 In particular he said he wishes to prove that the material produced under each subpoena was already in the possession of Bevnol when the summonses were issued, and that they were issued to attempt to hide the premature wrongful release of that material to Bevnol for the purpose of it being passed on to the police informant.

88 In order to prove this allegation, he wishes to call Chrapot and Brereton, and also the police informant Mark Patrick, and also Brendan Archer, solicitor for Bevnol, and Louis Allain, a director of Bevnol.

89 He said that he seeks to also prove through this evidence that Brereton and Chrapot had a fiduciary relationship to Seachange, and perhaps also to the other entities named by De Simone. He said that if he could prove that this was so, he would be able to establish legal professional privilege or breach of confidence.

90 This application was opposed by Bevnol.

91 Bevnol has good reason to complain about De Simone's breach of the orders which I made for the filing of affidavits and submissions, and in respect of the late application to call evidence. Previous orders have been made in this proceeding by Deputy President Aird regulating each party’s right to call evidence and issue summonses. These orders have been made in an attempt to restrict marginally relevant or vexatious applications, and to focus the parties on preparing this case for final hearing.

92 However, I am bound to take into account the fact that De Simone represents himself in this application, and although he has legal qualifications, he cannot be expected to be capable of preparing his case with the degree of expertise of a professional legal adviser.

93 But more importantly, De Simone has told me that he has put preparation of his submissions in this application aside as he has also been required to prepare for the criminal proceedings which I have earlier outlined, and which are listed for committal this June.

94 It is clearly important that this Tribunal's orders are enforced and effective case management principles are applied to prevent unnecessary costs and delay. This principle was recently recognised and reinforced by the High Court in *Aon Risk Management Services Limited v Australian National University* (2009) HCA 27. The following paragraph sets out the approach to be taken in situations such as the one facing me here:

> "Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of the proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon repleading, when delay and cost are taken into account…It cannot therefore be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs…The modern view is that even an order for indemnity costs may not always undo the prejudice a party suffers by late amendment."

95 I rely on this authority to establish that in deciding an application such as this, I am entitled to consider not only the prejudice to be suffered to individual litigants, but also the public interest in the proper and efficient use of public resources allocated to the Tribunal, and the effect that undue delay can have on public confidence in the Tribunals decisions, particularly as this affects the domestic building list of this Tribunal.

96 This does not however mean that I can disregard the effect my order may have on the capacity of a litigant to fully put his case. The test in deciding whether or not to accede to De Simone's application is not simply whether De Simone has previously disregarded my orders, but whether the interests of justice require that I make the orders he seeks.

97 I have decided to formulate my views as to the matters of contest in this application on the evidence as it is currently before me, and in so doing consider whether the interests of justice require that Mr Archer should be called for cross-examination, or leave be given for De Simone to call the witnesses he has identified, for the purposes he has identified, before I make a final determination on the issues in this application.

Relevance

98 The first and most straightforward of the grounds of objection is that of relevance. Seachange and De Simone object to the production of almost all of the documents produced by Brereton as irrelevant to the issues relating to this proceeding. They also object to many of the documents produced by Chrapot on the grounds of relevance.

99 It is clear that documents which are irrelevant to the issues in a proceeding should not be the subject of discovery. It seems to me that the same principles should be applied when considering the release of documents obtained under summons.

100 I have not had the benefit of detailed submissions from either Seachange or De Simone on the question of relevance. Each has, except in the passages to which I refer below, simply baldly claimed that the documents identified in De Simone's spreadsheet are irrelevant to this proceeding.

101 Although De Simone has filed three affidavits in support of his application and in each of those applications has claimed that the documents sought are irrelevant, he has not provided any detail as to the basis for this claim in his affidavit.

102 As counsel for Bevnol has not had an opportunity to inspect the documents, and the documents are very sparingly described in the spreadsheet, Bevnol has likewise not been able to provide detailed submissions about relevance.

103 Doing his best without this information Mr Archer, solicitor for Bevnol, has identified in respect of each document claimed not to be relevant, the relevance claimed by Bevnol by reference to particular paragraphs of the Amended Points of Claim, the Further and Better Particulars, and the Defence to Amended Counterclaim. The categories of relevance he has identified are as follows:

1) relevant financial information in relation to the Bank West loan;
2) relevant financial information regarding funding of Seachange generally;
3) relevant financial information regarding investment in Seachange by Pital;
4) relevant information regarding Seachange's claim for damages under the cost to complete the work under the Bevnol contract;
5) relevant information regarding the claim for damages for financial loss allegedly incurred by Seachange;
6) relevant to the claims made by Seachange for damages resulting from alleged defects and omitted works;
7) relevant to Bevnol's claim for damages under the development agreement; and

8) relevant to steps taken or not taken by Seachange to mitigate its alleged loss and damage.

104 I shall refer at length later in these reasons to a decision of the Supreme Court of New South Wales in *National Employers Mutual General Association Limited v Waind and Hill.* (1978) 1NSWLR 372. This decision is useful in my consideration of the claim that the issue of the summonses is an abuse of process. However the decision is also useful in considering relevance.

105 In that case, the Court said that the crucial question to be decided was whether the documents have "*apparent relevance*" to the issues in the trial. This test is clearly a lesser one than that which must apply when making a final decision as to whether to admit a document into evidence at trial or allow its use for the purpose of cross-examination.

106 On this point the Court observed -

> "The judge is in some difficulty in determining whether documents are relevant prior to the presentation of the evidence or at the commencement of the case. If there is a particular objection from the witness, or questions of privacy are involved, no doubt procedures can be adopted to ensure that only relevant documents are inspected."

107 In *Brand v Digi-Tech (2001) NSWSC 425* Hunter J, faced with an application to set aside a subpoena on the grounds that the documents the subject of the subpoena were manifestly irrelevant, said this (at para 36) -

> "I think it is indisputable that, if the subpoenaed documents are by their description arguably relevant or capable of providing a legitimate basis for cross-examination on credit matters, then an application to set aside a subpoena on the grounds of irrelevance of the documents to the proceedings is misconceived. It is equally clear, in my view, that, if the description of the documents is such as to admit of a finding that the documents are manifestly irrelevant and incapable of touching matters of credit, then the issuing of such a subpoena represents an abuse of process."

108 I have considered whether documents can be said to be relevant if their only or primary relevance is to the credit of witnesses to be called by Seachange or De Simone.

109 In *Fried v National Australia Bank Ltd (2000) FCA 911*, the Federal Court was asked to determine if a subpoena should be set aside because the documents sought were relevant only to impugn the credit of a witness in the proceedings, and had no other relevance to the issues in dispute. In that case, as in the case before me, the application to set aside the subpoena was made by a person other than the recipient of the subpoena.

110 Justice Weinberg (as he then was) reviewed the authorities and discussed in particular the judgment of Moffit in *Waind.* He made observations on the ambit of abuse of process in the context of issue of subpoenas to which I will return later in these reasons.

111 However, he also addressed the question as to whether the issue of a subpoena to produce documents purely relevant to credit was justified. In the circumstances facing him, he held that it was not. He said this;

> "Lengthy cross-examination, particularly cross-examination going only to credit, is responsible for much of the delay and unwarranted cost typically associated with modern litigation. Cross-examination as to credit should be kept, as far as possible, within proper bounds.
>
> It is not appropriate, in my view to allow a subpoena to stand which does little more than trawl for documents which may be used to impugn the credit of a particular witness. This is particularly so when the documents sought have nothing to do with any of the issues in dispute in this proceeding. The Court must be alert to ensure that any subpoena which is issued has a legitimate forensic purpose. That purpose must be identifiable, and likely to facilitate the conduct of the proceeding, not merely to oppress a party or witness.
>
> The explanation given as to the purpose for which the documents identified in the subpoena were sought was altogether too vague and unsatisfactory to persuade me of its legitimacy."-

112 It must be remembered however, that in *Fried*, Weinberg J was considering a completely different fact situation from the one before me. In that case it was acknowledged that the documents subpoenaed were completely irrelevant to the issues in dispute. They related to the tax affairs of the witness, and were sought only on a hunch that they may produce embarrassing material that could be used to attack the credit of a witness.

113 Thus, these observations should not be taken as meaning that it will always be inappropriate to include in a subpoena documents relevant to the credit of witnesses. Each fact situation must be considered on its merits.

114 Applying the principles set out in the cases outlined above, my task is to decide relevance from a broad perspective – as being capable of affecting the probability of existence of a fact which has a connection to the issues in dispute between the parties.

115 It may be that at the trial of this proceeding documents which I may view as potentially relevant to the issues in dispute are found not to have such relevance. Not having the advantage of hearing all of the evidence to be presented at the final hearing, it is impossible for me to make a categorical determination.

116 Not having the benefit of detailed submissions as to why the documents are said to be irrelevant, I have inspected each document said to be not relevant and compared it to the allegations set out in the pleadings.

117 I have done so from the viewpoint that if a document is shown to have a potential connection to an issue in dispute on the pleadings, or to the credit of a potential witness, then that it is sufficient to render it relevant for the purpose of inspection at this stage of the proceeding.

118 As I have outlined below, it seems to me that De Simone has taken an extremely narrow approach to the question of relevance in making his objections to individual documents.

119 He has objected to the relevance of some documents whilst also claiming that those documents are protected by legal professional privilege. He has sought to confine the issues to be proved at trial so as to render irrelevant many documents which appear to me to be clearly relevant on the pleadings, or relevant to his credit. Often it appears to me he has simply claimed irrelevance because he believes the document is damaging to his case.

Chrapot documents - relevance

120 In paragraph 8 of the Points of Claim Seachange has claimed as part of its loss "additional costs associated with engaging an alternative builder to complete the works" and estimates this cost at $165,000.

121 It is clear from the content of many of the documents produced by Chrapot that he was the person engaged by either Seachange or De Simone to arrange for the engagement of the alternative builder and to provide advice and assistance in relation to the completion of the development or part of the development at Ocean Grove.

122 The documents which Chrapot has produced range in dates from 23 January 2007 to 3 February 2008. The documents consist of correspondence between Chrapot and De Simone, correspondence between Chrapot and other parties either engaged in the development or having a connection with the development, and copies of documents relating to the development not generated by Chrapot but which concern the development in some respect.

123 It is difficult to see how a document received by Chrapot relating to his duties as construction manager, engaged for the purpose of completing the works the subject of this claim, could be anything but potentially relevant to the facts alleged in the Points of Claim, and particularly relevant as to whether the claimed $165,000 for the cost of completing the works can be justified.

124 The documents disclosed by Chrapot also appear to be of potential relevance to issues raised in the Counterclaim. In particular, Bevnol asserts that Seachange made direct approaches to and purported to issue instructions to Bevnol's subcontractors. In the defence to counterclaim Seachange denies that it did so. Documents relating to Chrapot's contact with subcontractors appear prima facie extremely relevant to that allegation and denial.

125 However, I have not determined relevance just by reference to these general considerations. I have inspected each of the documents provided by Chrapot in respect of which this objection is taken, to ascertain whether there is potential relevance to the issues in dispute as set out in the points of claim and defence to counterclaim.

126 These documents are not chronologically numbered. In referring to them in these reasons I have, for convenience, followed the numbering of the document prepared by De Simone outlining the objections which is exhibited to his affidavit.

127 The first such document (on page 130) is described as **Building Assist email enclosing invoice to Chrapot.** Building Assist was engaged to produce an inspection report for the Seachange village.

128 De Simone says that the Building Assist report is not relevant because it was not relied upon by Seachange as an expert report in preparing its

calculations of loss and damage. It was prepared for a different "*special purpose*" of obtaining warranty insurance in respect of future works.

129 It is self-evident that the relevance of a document does not depend on whether the party commissioning its production intends to rely on it, or prepared it for other purposes.

130 The Building Assist report is clearly relevant to the proceeding. However the document at page 130 is an invoice for payment of the report and correspondence about payment. It is not the report itself.

131 There are several other documents produced by Chrapot which are also claimed not to be relevant which deal with the payment of accounts by Seachange and financial arrangements with creditors. These include documents 162-165, documents 11-12, documents 13-15, document 116, documents 123-125, documents 175-176.

132 It is apparent that the financial status of Seachange will be a significant issue at the trial of the proceeding. This is because it is an issue which Seachange has itself raised in its Points of Claim.

133 The major reference to the financial arrangements underpinning the project are in relation to Seachange's claim for loss of damage which occurs at paragraph 8 of the Points of Claim. In the particulars to that paragraph Seachange claims that as a result of the works not being completed Seachange was unable to complete sales of the units comprising the works and consequently Seachange was unable to discharge its loan facilities.

134 As part of its damages it claims that it has had to continue to pay interest and it identifies the loan facilities in respect of which interest is claimed. In the Further and Better Particulars dated 23 February 2009 the loan facilities are identified as being a loan from Bank West, a loan from Galambos Pty Ltd, and a pre-paid deposit loan from Seachange Village Nominees Pty Ltd.

135 In order to prove its case at trial Seachange will need to be able to prove the existence of these loan facilities, the terms of the relationship between Seachange and the lenders, and the genuineness of this loss.

136 Thus it appears to me that all documents in Chrapot's possession relating to payment of accounts by Seachange, issues of delay of payment of accounts and any documents generated which may have a bearing upon the capacity of Seachange to pay accounts are relevant to either proving or testing Seachange claim that it has been unable to discharge the loans that it has identified by reason of the failure of Bevnol to complete the works.

137 Further, Seachange claims a loss of opportunity cost of the funds comprised in the loan facility. In order for a lost opportunity cost to be calculated or tested it will be necessary for Seachange's financial status to be proven. Any documents in Chrapot's possession as to the financial relationships between Seachange and its creditors are therefore relevant to that calculation.

138 Further, Seachange has made a claim for rectification and completion of the works at its own cost. In the Amended Statement of Claim the estimated cost of rectification works is $660,000 and the cost to complete the works is $1,125,591.50.

139 Seachange has objected to Chrapot documents which reveal negotiations with various contractors and in respect of documents setting out matters still to be completed on the project, such as the document on pages 38-41 entitled “Development Action List”.

140 Every document identifying transactions between Seachange and other contractors and/or financiers in relation to the Seachange project is, in my view, potentially relevant to the calculation of the costs of rectification and therefore discoverable.

141 Mr Lustig has particularly singled out for comment documents 153-161 which relate to works done at the Ocean Grove Hotel. This is a document which relates to dealings between Seachange and Dudley Builders, the builders apparently engaged to complete some of the works and whose account is presumably part of the cost of rectification. It thus has clear relevance to the facts asserted in the Points of Claim.

142 Document 166-168 Headed **Quote from Dudley for Stage 2** is a quotation for works, the address of which is the site which contains the works the subject of this dispute. On the spreadsheet De Simone comments that the quote does not relate to the works done by Bevnol. This seems to me an issue which is potentially in contention on the pleadings. I am not prepared to conclude that the document is irrelevant at this stage.

143 Having completed the inspection of each document claimed to be irrelevant it is my view that the documents disclosed by Chrapot each potentially bear upon an issue in dispute in this proceeding or to the credit of a potential witness in the proceeding.

Brereton documents - relevance

144 I turn now to the documents produced by Michael Brereton. Seachange and De Simone have not provided detail of the claim in respect of relevance in relation to these documents.

145 I am not at present determining the capacity in which Brereton received these documents. However, whether Brereton received these documents as solicitor for Seachange , or investor in Seachange, it is difficult to see how any of the documents identified as irrelevant are in fact so.

146 Once again I have individually perused each of the documents provided by Brereton from the standpoint of relevance.

147 It is my view that each document which refers to the relationship between Seachange and its financiers as identified in the Points of Claim is potentially relevant to its claim for loss or damage. It is Seachange which asserts that it obtained a loan from Bank West in the amount of $3,101,696.35. It is Seachange which asserts that that loan attracted interest which it was obliged to pay. Thus all correspondence from Bank West to Seachange or which relates to that loan must be potentially relevant to either establishing that allegation or testing it.

148 Further, Seachange must prove loss of revenue from a failure to realise the loan or licence fees. In order to make this claim or make a claim for lost opportunity the financial structure of Seachange, its financial obligations and financial structure are all relevant issues to be taken into account. Thus the documents provided by Brereton which identify loan account transactions, liabilities of Seachange, directorship of Seachange and its relationship with other potential creditors or investments are, in my view, relevant.

149 Many of the documents provided by Brereton relate to the broader Seachange Village development rather than specifically the construction of the 11 units which is the subject of Seachange's claim. As I have outlined, in its counterclaim Bevnol asserts that Seachange entered into an agreement with Bevnol whereby Seachange would engage Bevnol to construct for it the entire village, being 136 aged care units and associated works, for a sum of approximately $22,176,105.

150 In its defence to counterclaim Seachange says that the development agreement was void for uncertainty, that there was no intention on the part of Seachange to enter into contractual relations with Bevnol and that there was no consideration agreed to be paid for the performance by Bevnol of the uncertain requirements of completion of the whole of the village.

151 Further it says that to the extent that Bevnol proceeded with the works connected with the village, it did so on its own accord and not by reason of any act or omission on the part of Seachange.

152 Thus, it appears to me that the documents disclosed by Brereton which relate to the village project generally are potentially relevant to the existence of the village project, the scope of the village project, the question of whether there was a concluded agreement as alleged between Seachange and Bevnol in relation to that project, and the assessment or testing of Bevnol's claim for damages by reason of the alleged breach of the development agreement.

153 Each of the documents claimed not to be relevant appear to me to potentially be relevant to either the establishment of these matters or the credibility of witnesses giving evidence as to these matters.

154 Seachange has brought its own financial situation into scrutiny because of its reliance upon what it says are its financial losses arising out of Bevnol's breach of the contract. It will also need to rely upon the financial arrangements it has made in respect of the development agreement in defending the counterclaim insofar as it relates to a claim for breach of the development agreement.

155 Further, Lustig has, in paragraph 8 of his affidavit, provided evidence as to the relationship between Seachange and various other companies. The relevant part of that paragraph reads as follows:

> "Seachange acts merely as the nominee for a partnership known as the Seachange Development Partnership and that partnership has appointed Seachange as the manager of that partnership. The partnership is comprised of corporate entities representing trusts or funds each controlled by private individuals. For example, from 1 April 2006 prior to when the building contract the subject of this litigation was signed (on 15 May 2006) up to the time when the contract was terminated by repudiation (no later than 4 May 2007) the partners were De Simone Nominees Pty Ltd associated with De Simone and his brother Serafino, ZMB Australia Pty Ltd associated with Brereton and his sister Marie, Dark Star Corporation Pty Ltd associated with Martin Jurblum and Pital Business Pty Ltd associated with Alan Griffiths and his son in law Erin Harte."

156 At paragraph 9 Mr Lustig goes on to say this:

> "As Seachange was merely the nominee and manager of the partnership, it was seeking and obtaining legal advice not for its own benefit but for the benefit of the partners. Seachange conducts this litigation for that same purpose. As such, Seachange had and retains a positive obligation to provide each current partner and its nominated representative with regular updates of the conduct of this litigation, to provide a summary of advice received and must act in accordance with the partners' decisions in relation thereto taken under the provisions of the partnership deed."

157 It seems clear to me from the above that if the structure of Seachange is as alleged by Mr Lustig, then an assessment of the loss and damage suffered by Seachange in this proceeding must include an assessment of the financial relationship between Seachange and the other entities referred to by Mr Lustig and the testing of that claim must potentially involve consideration of all the financial relationships between Seachange and these other entities.

158 Insofar as the Brereton documents relate to the relationship between Seachange and other entities they appear to me to be clearly relevant to establishing its claim for loss of damage. - in particular that part of the claim which seeks damages relating to "interpartnership advances and deposits" quantified at $6,500,000.

159 At paragraphs 29 and onwards of his affidavit Mr Lustig sets out his objection to production of documents concerning not just the Seachange Retirement Development but Seachange Management Pty Ltd, the Galambos partnership and the Seachange partnership.

160 Mr Lustig deposes at paragraph 33 that the Seachange retirement development extends beyond the matters in the proceeding to matters such as –

> "extensive civil works, environmental and sustainability works, large commercial buildings such as an aged care facility and integrated buildings incorporating a hotel redevelopment. The business dealings of Seachange with parties involved in these aspects of the development are commercial in confidence and are of no forensic or evidentiary relevance in this proceeding".

161 The matters outlined by him in that paragraph are clearly relevant to Bevnol's counterclaim insofar as it relates to the Seachange development and to the defence of that counterclaim.

162 Documents relating to the Galambos partnership are potentially relevant to the testing of Seachange's claim that it has been lent money by Galambos Pty Ltd. Lustig says that this summons is a fishing expedition to try to determine the commercial relationship between Seachange and Galambos Pty Ltd. In my view it is fundamental to Seachange's claim in respect of the Galambos loan that the commercial relationship between Seachange and Galambos Pty Ltd is established.

163 At paragraph 34 Lustig asserts that documents relating to the Ocean Grove Hotel are outside the scope of this proceeding. Lustig continues in paragraph 34 -

> "Finally, by seeking all documents relating to or concerning Seachange, the summons asked for or every business dealing or prospect or opportunity undertaken by Seachange which passed between Brereton and De Simone including its operation of the Ocean Grove Hotel, another matter well outside the scope of this proceeding."

164 And further into the paragraph -

> "Brereton therefore has produced documents such as at pages 507 to 509 which relate to the purchase of second hand equipment from Howl at the Moon Chadstone for the Ocean Grove Hotel, an issue entirely extraneous and irrelevant to this proceeding."

165 It is clear from that the redevelopment of the Ocean Grove Hotel was part of the Seachange Retirement Development. Accordingly, it is a matter relevant to the scope of the development works and thus potentially relevant to the counterclaim.

166 The only entity named in the documents produced to the Tribunal by Brereton which is not referred to in the Tribunal pleadings is Pital Business Pty Ltd. I have already reproduced the reference by Lustig to this company at paragraph 158 above.

167 The affairs of Pital are referred to in documents numbered 811 and 817-829.

168 Document 811 is an email from De Simone to various parties regarding the question of whether ZMB Australia will meet its mandatory call obligations and regarding payment to suppliers in respect of the display suite.

169 The final matter dealt with in this email is the status of the payment to Akron Roads.

170 Document 817-829 document consists of an email from De Simone to various persons regarding a transfer from ZMB to Pital.

171 It is accompanied by a 12-page document which is headed Galambos Partnership Flying Minute Contributions and Entitlements. The document is a deed between all the partners of the Galambos Partnership giving effect to transfer of some partnership contributions and in particular a transfer from ZMB Australia Pty Ltd of some of its contributions and units of entitlement to Pital Business Pty Ltd.

172 Bevnol says that these documents, insofar as they relate to Pital and ZMB, are relevant because these documents might throw light on the relationship between Seachange and the Galambos Partnership and thus go towards establishing or testing Seachange's assertion that loan funds were provided to it by Galambos Pty Ltd for the purpose of the development.

173 Bevnol relies upon the oral evidence of De Simone given before the Tribunal on 6 July 2007. That evidence was given in circumstances where Bevnol was seeking the joinder of further respondents, including De Simone, to these proceedings. De Simone gave evidence as to the financial state of Seachange. At page 43 he said this:

> "The applicant is a very substantial organisation, that is Seachange, with assets in excess of $20 million and liabilities to external parties, that is not partners and related entities (sic)."

174 After further identifying the whereabouts of the funding on page 44 of the transcript, he goes on to say that:

> "The balance of its funding comes from corporate partners provided $9.5 million of partnership contributions and around $10 million in temporary loans."

175 Pital is referred to at page 45 of the transcript of that hearing.

176 In my view the documents referring to Pital are relevant as they may throw light upon the relationship between Seachange and its component entities, for the purpose of assessing the entitlement to damages of Seachange or its component entities, and the validity or enforceability of the loans identified by Seachange as part of its claim for damages.

177 Akron Roads was engaged by Seachange to perform some road making works on the project. Bevnol says delay by Akron in performing these works prevented Bevnol from commencing its works under the contract. Therefore, issues relating to payment by Seachange to Akron are clearly relevant to this proceeding.

178 Further the documents I have identified above may potentially be relevant as relating to the credibility of De Simone in giving evidence as to these issues.

179 There is one document which I do not consider to be relevant to the issues in dispute in this proceeding It is a document disclosed by Brereton and numbered 137. It appears to be an email in relation to an unrelated Qantas incident.

180 I will order that this document not be disclosed.

181 Apart from this one document, I have determined that the claim of Seachange and De Simone that the documents identified by them as irrelevant is not made out. Each of the documents has potential relevance to the establishment of a fact in issue, or the credit of witnesses in this proceeding.

Should De Simone be permitted to call evidence on the question of relevance?

182 Although no specific application was made by De Simone to call further evidence as to the ground of relevance, I have considered De Simone's application in the context of this ground.

183 The issue of relevance is not to be decided by any factors other than the pleadings themselves at this early stage of this proceeding. There can be no issues of fact or credit which have any potential bearing on this issue. Thus no grounds exist for the calling of further evidence on the question of relevance.

184 In regard to relevance, the orders I propose to make are –

> "I declare the documents produced to the Tribunal by Jack Chrapot in response to the summons to witness dated 29 April 2009 and Michael Brereton in response to the summons to witness dated 16 December 2008 should be made available for inspection by the legal representatives of the respondents with the following exceptions –
>
> (c) The document which I have determined is irrelevant to this proceeding being document 137 in the documents disclosed by Brereton."

Client legal privilege

185 The second major objection to disclosure of the documents is that Seachange and De Simone say that many of the documents are protected from disclosure on the grounds of legal professional privilege.

186 In his affidavit of 15 July 2009 De Simone sets out the grounds on which he makes the claim in this way:

> "These documents relate primarily to the seeking or obtaining of legal advice from Brereton or Lustig or to confidential communications in relation to the conduct of the litigation between myself and persons or organisations with a direct or indirect interest in Seachange or its current or potential financiers and to whom I owed a duty of reporting the conduct of the litigation and the strategies to be adopted therein. As such the legal professional or litigation privilege is claimed."

187 The concept of legal professional privilege is a concept well rooted in the common law. Legal professional privilege arose from the need to encourage clients to provide full and frank disclosure to their lawyers so that those lawyers could provide legal advice based on an understanding of all of the circumstances relevant to the giving of that advice.

188 It also evolved in order to enable the client to provide complete instructions to a lawyer during the conduct of litigation.

189 Thus at common law it could be said there were two aspects of legal professional privilege, the one being privilege in relation to the obtaining of legal advice and the other being privilege in relation to the conduct of litigation.

190 The test has been set out in many recent authorities. A recent significant High Court decision is *Esso Australia Resources v. Commissioner of Taxation* 201 CLR 49. This case confirmed that legal professional privilege, or client legal privilege, will operate to protect the confidentiality of certain communications made in connection with giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a court, where that communication is made for the dominant purpose of seeking or giving legal advice or obtaining or providing legal services in respect of litigation

191 In this decision the High Court declined to follow the previous authority of *Grant v. Downs* in which legal professional privilege was held to apply only if the communication came into existence for the sole purpose of obtaining legal advice or obtaining legal services in connection with litigation.

192 These principles were recently the subject of codification by reason of Part 3.10 of the *Uniform Evidence Act* 2008. It appears to me that this proceeding, being an application which commenced to be heard prior to 1 January 2010 is not a proceeding to which the *Uniform Evidence Act* applies. This is consistent with the reasoning in *The Queen v Carmody* (2010) VSCA 41, which is the only authority of which I am aware on this issue.

193 By s 98 of the *VCAT Act* the Tribunal is not bound by the rules of evidence, may inform itself on any matter as it sees fit, and must conduct each proceeding with as little formality and technicality as a proper consideration of the matters before it permit. Therefore the rules of evidence apply to VCAT only to the extent that they are adopted by the Tribunal.

194 It is my view that in considering the application of legal professional privilege, the rules of evidence should clearly apply.

195 Neither Seachange nor De Simone has made submissions on the applicability of the *Uniform Evidence Act* 2008. Nor have they provided me with any submissions at all as to the principles of legal professional privilege which they contend for in this application.

196 One of the significant aspects of the privilege to which they have failed to give attention is the need to consider the nature of the communication for which privilege is claimed. Privilege does not attach to documents per se. It attaches to confidential communications. As is was pointed out by Dawson J in *Baker v Campbell* (1983)153CLR 52 at 122:

> "Legal professional privilege attaches only to communications made for the purpose of giving or receiving advice or for use in existing or anticipated litigation. Moreover, if the communication in question is in the form of a document submitted by a client to his solicitor for use in existing or anticipated litigation, privilege will attach to it only if it comes into existence solely for that purpose. The privilege cannot operate to put beyond the reach of the party documentary or other material which has been in existence apart from the process of giving or receiving advice or the conduct of litigation...There is no privilege for physical objects other than documents and there is no privilege for documents which are the means of carrying out, or are evidence of, transactions which are not themselves the giving or receiving of legal advice or part of the conduct of actual or anticipated litigation."

197 I note that this passage contains reference to the sole purpose test, now redundant as a result of *Esso*. However the description otherwise stands as good law.

198 It will be apparent from the factual findings which I have made in this case, that the distinction between the sole purpose and the dominant purpose test has little application to my decision in this proceeding.

199 Apart from the failure of De Simone and Seachange to address the need for each document to be able to be characterised as a confidential communication, it does not appear that there is any real controversy between the parties as to the law relating to legal professional privilege. The crucial issue in this case is to establish the facts which give rise to the privilege.

200 Although De Simone has prepared a spreadsheet setting out a reference to each page number of the document that is said to be privileged, he has provided scant details to describe each of the documents in relation to which the claim for privilege is made and no details as to how it is that he says the document comes within the protection of legal professional privilege other than the references in his affidavits which I have reproduced above.

201 In its written submissions, Seachange makes brief reference to its claim of privilege but does not identify any of the documents in relation to which privilege is claimed other than the supporting spreadsheet reference of De Simone.

202 In the absence of any considered or detailed submissions as to the application of legal professional privilege to the documents over which it is claimed, it has been my task to look at each of the documents individually and make a determination as to whether the claim for privilege can be maintained on the facts as they are established in the affidavits filed on behalf of Seachange and De Simone.

203 In making this assessment I am aware that De Simone acts on his own behalf, and although it appears from the way that this case was argued before me and from the material filed that in preparing his claim for privilege he has had considerable assistance from Mr Lustig, I accept that it is my responsibility to carefully identify whether a potential claim for privilege can be made out on his behalf.

204 In the context of this case I take the critical elements to be as follows. Firstly, that the documents sought to be protected can be properly described as a confidential communication made between Seachange or de Simone and a lawyer acting on their behalf, or the contents of a confidential document prepared by Seachange or De Simone or another person. Secondly, that the confidential communication or confidential document is prepared or made for the dominant purpose of the lawyer who was at the time acting for Seachange or De Simone providing legal advice to De Simone or Seachange or for the dominant purpose of that lawyer providing Seachange or De Simone with professional legal services relating to a proceeding or anticipated or pending proceeding in which De Simone or Seachange is or may be, or was or might have been, a party.

205 It is from the standpoint of these requirements that I have assessed each of the documents in relation to which the claim for legal professional privilege or client legal privilege is made.

206 In my perusal of the documents in relation to which privilege is claimed in this proceeding it is apparent to me that privilege has been claimed in respect of very many documents which are not on their face confidential communications or confidential documents, and which do not appear to have been made between Seachange or De Simone and a lawyer, or prepared by Seachange or De Simone for the dominant purpose of providing legal advice or in preparation of litigation.

207 The privilege is that of the client, not the lawyer. However, it is crucial to establish that the communication was made to a lawyer. The first question I must therefore determine is who the lawyer is and whether either Seachange or De Simone was his client.

208 It is not possible to claim client legal privilege simply because a document has been forwarded to a lawyer, even if that lawyer has been engaged by the

client for other purposes. It is not enough to show that a particular lawyer is the client's customary lawyer, or is acting for the client generally in relation to other of the client's affairs.

209 As it was expressed by Lockhart J in *Somerville v ASC* 131 ALR 517 at page 525 –

> "Fundamental to legal professional privilege is the notion that the privilege is that of the client, or others with whom the client has a common interest in the litigation, a matter to which I shall return, being a client in the solicitor-client relationship. Only confidential communications which are referable to the solicitor-client relationship enjoy the protection of legal professional privilege."

210 In that case it was His Honour's determination that at the relevant time the Australian Securities Commission was not acting in a capacity as agent to the plaintiff and thus the privilege did not apply.

211 On many occasions in the spreadsheet prepared by De Simone privilege appears to have been claimed for a document simply because either Mr Brereton, Mr Chrapot or Mr Lustig has been named, along with many other persons, as recipients to an email. Privilege does not operate to protect a document simply because that document has also been copied to a solicitor. It operates only if each element of the definition of the privilege is satisfied.

The burden of proving that legal professional privilege attaches to the documents

212 In coming to the necessary factual findings I have been required to consider the question of who bears the burden of proving the facts which go to establishing privilege.

213 The Tribunal possesses a general power to regulate the custody and inspection of documents produced to it pursuant to a summons, even though this power is not specifically identified in order 4.14 and order 4.15 of its rules.

214 Seachange and De Simone have submitted that they do not bear any burden of proof in this application, as the Tribunal is exercising a quasi inquisitorial function in regulating the production of documents under subpoena.

215 On the contrary, I take the view that on determining whether the documents identified attract legal professional privilege, it is for the person making the claim to establish the facts which give rise to the privilege.

216 I thus apply the principles set out in various Victorian cases and most recently in *Mitsubishi Electric Australia Pty Ltd v. Victorian Workcover Authority* [2002] 4 VR 332 at 337 that the party claiming privilege has the onus of establishing the privilege, and that that party has the onus of proving the facts which it relies upon to establish the privilege.

217 Thus, although it is true that Bevnol has made an application to inspect the documents the subject of the witness summons and in this respect could be

seen as the applicant for orders, the substance of the application I am now considering is an application by Seachange and De Simone that the documents not be produced because they are protected by legal professional privilege.

218 It is up to Seachange and De Simone to satisfy me that the documents they have identified represent confidential communications, that the documents were made or prepared for the dominant purpose of the lawyer acting on behalf of either Seachange or De Simone providing legal advice to them or legal services to them in connection with litigation.

Chrapot Documents

219 The evidence presented by Lustig and De Simone makes it clear that Chrapot was engaged as a contractor by Seachange. Neither Lustig nor De Simone has deposed that he was at any time engaged as solicitor for either De Simone, Seachange, or any other of the companies referred to in this litigation.

220 The nearest De Simone comes to suggesting a legal role for Chrapot is in his affidavit of 2 February 2010 in which he says this –

> "I confirm that Chrapot was engaged as a contractor by Seachange from early December 2006. Prior to his engagement, Chrapot represented to Seachange that he was a lawyer with a current practising certificate, a qualified building practitioner authorised to supervise building work and engage tradespeople to do building work and had recently successfully completed an assignment to the satisfaction of his client in the case of a large residential construction project. I now believe each of those representations to have been false."

221 And further –

> "In January 2007, I instructed Brereton and Chrapot to engage in settlement discussions with Allain and Jamieson. We agreed the strategy would be that Brereton and Chrapot would act as the "good cops" and I would be the "bad cop" that was reluctant to settle….I instructed Brereton and Chrapot to conduct those discussions on behalf of Seachange as both were qualified solicitors and I therefore felt confident that they could represent Seachange 's interests appropriately."

222 In his submissions before me, De Simone said that Chrapot told him he was a registered building practitioner and held a solicitors practising certificate.

223 At paragraph 25 of his affidavit Mr Lustig deposes that Mr Chrapot is –

> "an Australian lawyer who, via his company Jadeville Pty Ltd, was engaged on retainer by Seachange to act as its construction manager from 1 December 2006 when this litigation was in prospect."

224 He goes on to say –

> "Chrapot and Jadeville's engagement was terminated in May 2008. I have been present when Mr Chrapot provided advice to Seachange in relation to the conduct of the litigation and further have been present when Chrapot received instructions and directions as to the conduct of the litigation and the works to be done to mitigate loss and protect the site and to obtain costings for the value of the rectification works."

225 Bevnol has not required cross-examination of De Simone or Lustig. It objects to the late filing of this affidavit, but has not sought to challenge the matters contained in it.

226 I expect that this is because there is nothing in the affidavits of De Simone or Lustig which expressly asserts that Chrapot acted at any time as solicitor for Seachange.

227 As I have said, neither the formulation under the *Uniform Evidence Act* nor the common law formulation of legal professional privilege will be sufficient to protect a document which is sent to a person merely because the recipient is a solicitor or has a practising certificate.

228 Thus, whether or not Mr Chrapot was, as Mr Lustig asserts, an "Australian solicitor" no privilege will attach to documents held by him merely because he has this qualification. The protection of the privilege will only be available if all of the elements of the privilege are made out.

229 However, even if I were to accept that Chrapot was a solicitor, or had acted as lawyer for De Simone or Seachange in some way during their relationship, in my view the circumstances described in the affidavits filed on behalf of Seachange and De Simone do not attract the protection of legal professional privilege for the documents identified in this application.

230 This is because there is no suggestion in any of the affidavits that any of the documents which Chrapot has provided in response to the summons came into Chrapots possession either for the purpose of him providing legal advice to Seachange or Desimone or for the purpose of the provision of legal services in connection with litigation.

231 Conscious that De Simone is representing himself and may not be assumed to be aware of the elements of the privilege, I have inspected each document for which the claim of privilege is made to ascertain whether it may be argued otherwise.

232 The first such document is document 96-99 dated 1 May 2007. Its Description is **GDS to Chrapot replying to page 92 document**.

233 This is an email exchange between Mr Chrapot and De Simone. It appears to be a report from Mr Chrapot as to various items. There is no suggestion in the document that the information has been provided by or requested from Mr Chrapot in any capacity as lawyer to either Seachange or De Simone. There is no suggestion in the document that the document was prepared for the purpose of obtaining legal advice.

234 Although Bevnol is referred to in the document, there is no suggestion in the document that it was prepared for the dominant purpose of either De Simone or Seachange being provided with professional legal services relating to this or any other proceeding. It is my view that the document is not the subject of privilege.

235 Document 38-41 dated 21 March 2007 is headed **Development Action List**. This is a 7-page document dated 21 March 2007 which appears to identify issues still to be attended to in the development. I have no evidence as to the purpose for which this document was prepared or who prepared it. I have no evidence as to whom it was directed.

236 Although a member of counsel is named in the document the document does not indicate the capacity in which that member of counsel is named or describe any legal advice or confidential document or information provided to that counsel or provided by that counsel.

237 A solicitor is also named at 2.2. The same comments apply in relation to that solicitor. The VCAT litigation is referred to at 3.1 but not in terms which would attract the privilege.

238 There is nothing in this document to characterise it in any way as a confidential communication made for the purpose of obtaining legal advice or assistance in litigation.

239 Document 137 -142 is dated 3 July 2007 and headed **GDS – Hamish Easton re insurance for Stage 2.** This document is a series of email exchanges between De Simone and his insurance broker in relation to the obtaining of builders warranty insurance for the project. There is nothing in these documents or otherwise to indicate that these documents have been prepared either for the obtaining of legal advice or for the purpose of this litigation. Accordingly the claim for privilege for this document is not made out.

240 Document 143 dated 11 July 2007 is headed Chrapot **– GDS re status of hotel works, stage 2 works, Bevnol dispute, Building Appeals Board.** This document is an email and attached document headed "*Overview of Seachange Village Ocean Grove 10 July 2007*".

241 The email indicates that there is a further attachment described as "*Development – Action List – Amended 2006 1213(4) doc*".This second attachment is not in the materials provided to the Tribunal.

242 I have no evidence as to whom it is who has compiled the document headed "*Overview of Seachange Village Ocean Grove*" or the attached document headed "*Project Seachange – the Village Ocean Grove status 27 June 2007*". It appears to be a list of matters which require completion and an update of the document 38 which I have previously described. There is no reference in the body of this document to the Bevnol dispute except a note that Bevnol has been terminated as builder. In my view this document is not the subject of a valid claim for privilege.

243 Document 171 dated 16 January 2008 is headed **GDS – Chrapot re works to be done.** This document is an email from De Simone to Mr Chrapot with instructions as to various matters to be attended to on the project.

244 There is no suggestion in this document that the works described relate in any way to the receiving of legal advice. The document is not privileged.

245 Document 173 dated 1 February 2008 is headed **Chrapot – GDS re alternate builders and building surveyors**. This document is in a similar category to the previous document 171. It is an email from Mr Chrapot to De Simone in relation to various aspects of the construction. There is no aspect or characteristic of this email which would suggest that it is a privileged communication.

246 Document 175 dated 3 February 2008 is headed **GDS – Chrapot re payment of his retainer and new building surveyors.** This is a request by De Simone to Mr Chrapot for a report as to the tasks he is working on, with particular reference to the engagement of a new surveyor. There is nothing in this document which suggests that it was made for any purpose

of either the obtaining of legal advice or the provision of professional legal services in relation to litigation.

Brereton documents

247 There is rather more material filed by Seachange and De Simone directed to establishing that Brereton acted as solicitor for Seachange.

248 At paragraph 13 of Lustig's affidavit he says this:

> "While I act for Seachange in this proceeding, I am aware that Brereton acted as the main solicitor to Seachange from early 2000 to 28 May 2007."

249 In support of this assertion, Lustig exhibits various documents to his affidavit which he says support his contention that Brereton acted as solicitor to Seachange. Exhibits PSL-1 and PSL-2 to his affidavit are a letter from him to Mr Brereton seeking return of documents and a letter on Brereton's letterhead as solicitor responding.

250 Although the Lustig affidavit does not say so clearly, I take it that Lustig wishes me to draw the inference from Mr Brereton's answer to the correspondence that Brereton's answer is an admission that he was acting on behalf of Seachange in respect of the material in the 20 boxes of documents referred to in that letter, and so must have been acting for Seachange in respect of the proceeding before me.

251 Mr Lustig has exhibited various documents to his affidavit relating to a separate proceeding in this Tribunal in the Legal Practice List numbered J89/2008. There are orders in this proceeding compelling Brereton to return some files to Seachange. His affidavit does not clearly say so, but I presume these orders are also relied on to show that, in the proceedings to which these orders relate at least, Brereton acted as solicitor for Seachange.

252 It is necessary to detail some of the background to proceeding J89/2008. This proceeding was an application by the Legal Services Commissioner under the *Legal Profession Act* seeking that Mr Brereton be dealt with for professional misconduct and other various offences applicable to his practice as a solicitor under the *Legal Profession Act* 2004.

253 The proceeding comprised 19 disciplinary charges against Mr Brereton arising out of five separate matters. One of those matters was what was described in the judgment as being "*the Collendina Project*" which was a project relating to the purchase and development of land at Collendina for a retirement village.

254 The particular matters which were the subject of the charges and of which Mr Brereton was found to be guilty by the Tribunal appear to be relevant to the proceeding before me only insofar as it is clear that the purchaser of the land at Collendina was Seachange, the applicant in this case, and the land is the land on which the building works the subject of this proceeding were to be constructed.

255 After a hearing lasting seven days, the Tribunal found Mr Brereton guilty of misconduct in relation to certain of the charges and some of these findings

related to his conduct in respect of what the Tribunal described as the Collendina Project.

256 Mr Lustig relies on certain extracts from the judgment which he says show that Brereton dealt with funds held in his trust account for Seachange and acted as his solicitor. Exhibit PSL-6 is 13 pages of that judgment. The precise findings of the Tribunal are not identified by Mr Lustig but I presume that he relies upon the fact that the Tribunal found the charges under the *Legal Profession Act* made out and in particular found that the acts of misconduct occurred in the course of engaging in legal practice.

257 The extracts from the judgment relied upon by him appear to be based upon the Tribunal's acceptance of the fact that Mr Brereton acted as solicitor for Seachange Management Pty Ltd and Seachange Village Nominees Pty Ltd in respect of the matters which were the subject of the charges.

258 Mr Lustig also exhibits two invoices sent from Mr Brereton's legal firm, one dated 23 April 2007 which appears to be a disbursement account entitled "Seachange Retirement Village", covering invoices which appear to have been generated between 10 October 2004 and 30 June 2004 and another document also described by Mr Lustig in his affidavit as an invoice, being dated 28 May 2007 and headed "Loan Account on behalf of Walton Finance funds used to pay" and identifying disbursement of a total amount of $303,115.80 to 13 separate entities.

259 I note in considering these documents that neither of them appears to be an account for legal advice and neither of them identifies in respect of what matter or for what purpose these disbursements have been incurred or funds paid.

260 In the affidavit of Brendan Archer sworn January 2010, Bevnol has provided further evidence as to the role of Mr Brereton in connection with the development and particularly as to whether or not Mr Brereton acted as solicitor for Seachange at the time the documents the subject of this application were generated.

261 At paragraph 4 of that affidavit he refers to and sets out paragraph 15 of the affidavit of De Simone sworn 14 September 2009 in separate proceedings in the Supreme Court. That paragraph reads as follows:

> "In January 2007, Brereton spoke to Bevnol to attempt to settle the dispute. Brereton has acted exclusively as solicitor for Seachange up to August 2006 when Lustig became involved in formalising the partnership deeds as Brereton was conflicted, being a party to a loan agreement with Galambos. In the VCAT proceeding Brereton was acting as a partnership representative of ZMB and not as a solicitor."

262 At paragraph 5 of his affidavit Archer also deposes that all dealings of his office regarding Seachange files since December of 2006 have been with Lustig and that that firm has received no correspondence from Mr Brereton in his capacity as solicitor, or in any other capacity.

263 He points out that the exhibits to Mr Lustig's affidavit of 16 December which are described as invoices, pre-date the dispute between the parties by several years and that neither of the documents appears to be an invoice for legal services.

264 There does not appear to be any direct claim by De Simone that Mr Brereton acted as solicitor on his behalf as distinct from having instructions to act on behalf of Seachange.

265 I do not regard the evidence which has been produced by Seachange as establishing that Brereton acted for Seachange at the time he received the documents which he has produced on subpoena, or that the documents were forwarded to him in his capacity as solicitor.

266 As I have outlined above, the issue which I must decide is not whether Mr Brereton acted as solicitor to Seachange or to De Simone in relation to some other disputes or matters on which legal advice was required during the time when these documents were generated, or at the time when he received the documents which are the subject of this application.

267 The question is whether the documents which are the subject of this application were generated or received in order for Mr Brereton to provide legal advice to De Simone or Seachange or assistance to Seachange or De Simone in litigation.

268 There is no evidence of this at all in the affidavits filed by Seachange or De Simone.

269 As with the documents provided by Chrapot, I have inspected each document produced by Brereton in respect of which legal professional privilege has been claimed to ascertain whether it could be characterised in this way.

270 The first document is Document 215. It is described as **Title for Lot 2 Seachange Village.** It is in fact an email from De Simone to Brereton and others seeking the whereabouts of a duplicate certificate of title. There in nothing in the email to justify a claim for privilege.

271 Document 792-793 is headed **Seachange- commercial in confidence-for discussions**. It is a lengthy email from De Simone to Brereton dated 25 March 2007. It is copied to Marie Brereton and Kristen Moran.

272 The subject matter of the email is discussion of financial issues to do with the Seachange project. Its assets and liabilities are set out in detail. A proposal is made in relation to the partnership agreement deed and funding of the project.

273 The document does not seek legal advice. It appears to be directed to the gaining of agreement by the parties to which it was sent as to the financial proposals set out in that letter

274 I have set out my conclusion that there is no evidence advanced by De Simone or Seachange that Brereton received any of the documents which

are the subject of this application in his capacity as solicitor. The content of this email is consistent with this conclusion.

275 I find no privilege attaches to this document.

276 Document 1119 dated 1 May 2007 is described as ***Seachange v Bevnol Without Prejudice.*** This is a document addressed to two representatives of Bevnol. It is clearly not a confidential communication and cannot on its face have been generated for the purpose of providing legal advice or providing professional legal services in a proceeding.

277 I am not determining in relation to this document whether the fact that it is marked 'Without Prejudice' means that it is not to be produced at trial. It can, however, not be the subject of a claim of privilege.

278 Document 1171 dated 4 May 2007 headed **Seachange Management against Bevnol 06066.** This is an email from De Simone to various persons forwarding on without comment a series of emails between Mr Lustig and the solicitor for Bevnol in relation to alleged repudiation of the contract and acceptance of the repudiation. This document is clearly not the subject of privilege, as the correspondence between the solicitors is not privileged.

279 Document 140 dated 18 May 2006. The description is **Seachange Village – licence agreement (to Darrer Muir Fleiter)**. This is an email from De Simone addressed to Mark Darrer. It encloses a draft licence agreement.

280 I understand Darrer Muir Fleiter to be a firm of solicitors, although this is not deposed to by De Simone. If De Simone could establish that in receiving this document Mr Darrer was acting as his solicitor or as solicitor to Seachange then this email and the draft document might well be protected. The contents of the email suggest that this is so.

281 I have no evidence one way or the other and this issue has not been referred to in either the affidavits or submissions filed on behalf of either De Simone or Seachange. I have decided not to release this document at this stage. If Bevnol wishes to pursue its application for inspection in respect of this document, I will grant leave to De Simone to call evidence of the circumstances of its creation.

282 Document 169 dated 8 May 2006. The heading is **Seachange Village (to TSA Lawyers).** Although this appears to be an email to a firm of solicitors, it is a request for information as to whether that firm acts for parties who have lodged the document referred to in the email.

283 There is nothing either in the document itself or otherwise to indicate that this document was forwarded for the purpose of obtaining legal advice or being provided with professional legal services. Indeed the wording of the document is to the opposite effect. Accordingly the document is not privileged.

284 Document 186 undated, described as Seachange **licence agreement (draft by MB & Co).** This appears to be a draft licence agreement. The name Michael Brereton & Co appears on the front of the agreement but he is not described there or elsewhere as a solicitor to either Seachange or De Simone or any other entity. There is no evidence as to for whom this document has been prepared or the circumstances of its preparation.

285 There is therefore currently no evidence before me that the document is a confidential communication or the contents of a confidential document prepared for the dominant purpose of providing legal advice to the client.

286 Out of an abundance of caution, I have decided not to release the document at this stage. Prior to its eventual release, if Bevnol requires to inspect it, I will allow the calling of evidence to establish the circumstances of its creation.

287 Page 293 dated 30 June 2006 headed **Seachange payments made today**. This document is an email from De Simone to various persons including Mr Michael Brereton setting out payments made apparently by Seachange to various entities.

288 There is nothing in the document which indicates the capacity in which Mr Brereton has been sent a copy of this email. There is nothing in the email justifying a claim for privilege.

289 No. 456 dated 2 February 2007. This is a one page email which appears to have attached a minutes of meeting and inspection report. Those minutes and inspection report are not in the documents provided. The email itself has no content apart from enclosing these documents. It is sent to Mr Brereton and another person.

290 There is no suggestion in the document that it has been sent to Mr Brereton in his capacity as a lawyer either in relation to the obtaining of legal advice or being provided with professional legal services.

291 This email is therefore not privileged. In making this determination I note that I have not seen or ruled on the documents said to have been enclosed in the email.

292 Document 539 dated 21 February 2007 headed **Seachange Village – NAB declines to provide terms.** This is a series of emails between De Simone and various other parties, apparently in relation to an application for finance to the National Australia Bank. There is no evidence in this email exchange of any reference to the obtaining of legal advice for any purpose. The document is not privileged.

293 Document 744-750 dated 14 March 2007**. Seachange Village – need for funds and books of account – commercial in confidence.** This document is a lengthy email from De Simone to representatives of the various Seachange entities. Mr Brereton is named as one of the many recipients of the email. Page 750 is an account from Akron Roads Pty Ltd.

294 The content of the email appears to be in the form of a report to these various entities on the financial position of Seachange. Brereton is mentioned in his capacity as having a financial interest in Seachange, but not in terms which suggest that he is being asked in the email to provide any legal advice.

295 Although clearly the recipients of the document might well regard it as a confidential document – it is headed "Commercial in confidence" – it is not protected by legal professional privilege. No legal advice is requested in the document. Further, although its contents may well relate to the litigation in this proceeding, it is not a document which could be described as being a document made or prepared for the dominant purpose of either Seachange or De Simone being provided with professional legal services relating to this proceeding or any other proceeding.

296 Document 786 dated 21 March 2007 headed **Seachange Village – Brereton reconciliations.** This is an email to Mr Brereton. There is no identification in the document as to what the Brereton reconciliations are. There is no evidence that Mr Brereton received the document in his capacity as lawyer or that it related in any way to the provision of legal advice or preparation of litigation. Accordingly, the document is not privileged.

297 Document 787 also dated 21 March 2007 headed **Seachange Village discussions with Daryl Clark at Bank West**. This is a document from De Simone to representatives of various of the De Simone entities and including Michael Brereton, describing the financial position of Seachange and in particular a discussion which he has had with the representative of Bank West.

298 There is nothing in this document which indicates that Mr Brereton was sent this document in his capacity of lawyer or that the document comes under the protection of privilege.

299 Document 798-808 is dated 27 March 2007 and headed **Seachange – Trust – ledger movements.** This is an email from De Simone to Mr Brereton and Kristen Moran referring to trust report entries. Attached to the email is a printout of what appears to be suggested or draft account entries.

300 I will presume for the purpose of considering this email and the entries which follow that it relates to trust account entries of Mr Brereton's legal firm, although I have no evidence before me one way or the other as to this. The email is in the form of instructions to Mr Brereton apparently as to some reconciliation to be made to the entries.

301 I presume that Moran is employed by Brereton's legal firm. However, the email does not request legal advice or assistance. It is a clear direction to Brereton to make various accounting entries.

302 There is nothing in the documents which could be described as a confidential communication or document made or prepared for the dominant purpose of being provided with professional legal services.

303 Document 809 dated 27 March 2007 is headed **Seachange – Trust – ledger reconciliation.** This is an email from De Simone to the various representatives of the Seachange entities, and also to Brereton.

304 The email commences, "*Hello partners*". It describes directions that De Simone appears to have given to Mr Brereton in relation to the preparation of documents and the raising of invoices as described in document 798-808.

305 There is no evidence before me that this document was sent to Mr Brereton in his capacity as lawyer for either Seachange or De Simone. Given that I have found that there is no evidence that Brereton was acting in the capacity of solicitor in receiving documents 798-808 this document is also clearly not protected by privilege.

306 Document 1039 dated 17 April 2007 is headed **Seachange Village – civil works costings – overall, already constructed and cost complete**. This is an email sent by De Simone to various persons at Bank West. It refers to several attachments.

307 It is not clear to me as to whether all of the attachments referred to in the email are in fact in the documents before me. I also have no evidence at all as to the purpose of creation of either this email or the attachments. It does not appear to have been sent to a lawyer. It does not seek legal advice. It does not refer to any litigation.

308 There is nothing in the document or the attachments which would support the email or the attachments being described as a confidential document prepared for the dominant purpose of providing legal advice or for the dominant purpose of being provided with professional legal services relating to a proceeding.

309 Document 1089 dated 24 April 2007 headed **Seachange – dates and events in December 2005.** This is a short email from De Simone to two persons, neither of whom appear to be lawyers, requesting dates of various marketing events.

310 Although a copy of this email has been sent to Mr Brereton there is no evidence either through the content of the document or otherwise that it was sent for the purpose of obtaining legal advice or for the purpose of obtaining legal services in relation to this or any other proceeding.

311 Document 1163 dated 3 May 2007 headed **FW – The Computer Supply Store (Australia) Pty Ltd – purchase at Lindfield – 06035.** This is an email and attached account from Mr Lustig in relation to legal work carried out and apparently billed to The Computer Supply Store (Australia) Pty Ltd.

312 Although The Computer Supply Store has not joined in this application, I express the view that that company may be able to claim privilege in respect of these documents. I have no evidence as to the basis on which either De Simone or Seachange can make a claim for privilege in relation thereto.

313 I have decided not to release the document at this stage. If Bevnol requires inspection of this document, I will grant leave to the Computer Supply store to lead evidence of the circumstances of its creation.

314 Document 1198 dated 17 May 2007 headed **Seachange Village – documents – commercial in confidence.** This is a series of emails in relation to what is described as an intending possible purchaser. Although the document is copied to Mr Brereton it does not appear to either relate to the attaining of legal advice from him or from any other lawyer or to relate to any litigation is not made out. Accordingly, the claim for privilege in respect of this document is not made out.

315 Document 1192 dated 14 May 2007 is headed **Seachange – Impact of Peter Hayes situation**. This is an email to Kristen Moran from De Simone relating to the impact of the heart attack of Peter Hayes of counsel on matters in which he may have been engaged as counsel.

316 For the purpose of considering this email I presume that Moran is an employee of Brereton's legal firm. I have referred to the evidence that Brereton acted for Seachange in some litigation, although not the litigation in this proceeding.

317 I am prepared to assume that the matters referred to in this email may relate to that other litigation. On that assumption the email is capable of being characterised as a privileged document if appropriate evidence was led. I have decided not to release it at this stage.

Documents otherwise privileged but no evidence of the circumstances in which they came into Brereton's possession

318 Certain of the documents produced by Brereton appear from their content to be otherwise clearly privileged communications between Seachange and Lustig which have come into Brereton's possession.

319 Although neither Seachange nor Lustig has specifically referred to these documents, I presume that these are the documents referred to by Lustig in the following paragraph of his affidavit of 16 December 2009 ;

> "So far as those documents in respect of privilege is claimed are concerned, I confirm the matters set out in paragraph 5.2 of the April De Simone affidavit. I confirm that legal advice was sought and provided by me and/or counsel to Seachange and that advice is recorded in those documents or referred to generally together with instructions in relation thereto given by Seachange as a result of that advice to its legal team or to its agents and contractors solely for the purposes of the conduct of litigation involving *inter alia* Bevnol and other parties. The documents in respect of which such privilege is claimed are set out in the April De Simone affidavit."

320 Document 1155-1162 is headed **Seachange Management Pty Ltd general files.** It contains correspondence between Lustig and De Simone relating to this litigation and is clearly privileged in Lustig's and De Simone's hands.

321 I have no evidence as to how this document came into the possession of Brereton. I recognise that in order for this document to be protected by privilege this issue needs to be further explored. I will order the document not be released at this stage .

322 Documents 1145 and 984 also appear to me to be privileged documents in the hands of Lustig.

323 Document 1145 is headed **Seachange – draft of acceptance of repudiation letter** and is an email from De Simone to Lustig giving instructions as to a draft letter of repudiation.

324 Document 984 dated 10 April 2007 is wrongly described as an affidavit of Bruce Jamieson but is in fact an email from Peter Lustig enclosing an affidavit of Bruce Jamieson filed on behalf of Bevnol.

325 There is no privilege attached to the affidavit itself as it has been filed in this Tribunal hearing. The most recent authority I rely on as establishing this is *Australian Consumer Commission v Cadbury Schweppes Pty Ltd (2009)FCA FC 32.*

326 The email itself is privileged because it contains advice from Lustig to De Simone in respect of the affidavit. I accept that Lustig acted as solicitor for Seachange in sending the email and that the purpose of the email was to provide advice to De Simone in his capacity as director of Seachange regarding this litigation.

327 As with document 1155-1162, I recognise that there is no evidence before me that documents 1145 and 984 were provided to Brereton for the purpose of obtaining legal advice from him. However, cautious because of the content of these documents and my finding that in Lustig's hands they would certainly be privileged, I will order that these documents not be released at this stage.

328 Document 1023 dated 13 April 2007 is described as **Seachange v Bevnol 06066.** This is an email from De Simone to Mr Lustig describing issues relevant to the conduct of these proceedings arising out of a building experts report. This document is privileged for the same reasons as I have set out in discussing document 984.

329 Document 1193 – 1196 dated 17 May 2007 headed **Seachange and Bevnol**. This is an email exchange between De Simone and Mr Lustig and counsel engaged by Mr Lustig in this proceeding. It is clearly privileged, subject to establishing the circumstances in which it came to be in Brereton's possession.

330 If Bevnol requires access to the documents I have identified in this section, I will allow evidence to be called by Seachange to address the question of

how these otherwise clearly privileged documents came into Brereton's possession.

Communication to other persons

331 There are several emails sent by De Simone for which privilege is claimed which appear to be, or to contain, reports as to this litigation from De Simone to various parties.

332 I have already expressed the view that a report by De Simone to various parties about the affairs of Seachange cannot of itself be described as privileged.

333 However, the documents I now wish to deal with appear to be at least in part, created for the purpose of reporting to various entities about this litigation. Although De Simone does not identify each document precisely, I presume for the purpose of this application that these documents are those he identifies in paragraph 19 of his 7 December 2009 affidavit follows –

> "that in case of documents produced on or after 20 December 2006 and exchanged solely between Seachange and its officers, agents, contractors, partners, partner representatives or financiers, those documents to the extent that they would be relevant to this litigation are also legally privileged as they relate to reports, strategies and instructions on the progress and conduct of the litigation."

334 At paragraph 9 of his affidavit Mr Lustig also identifies these documents in this way;

> "As Seachange was merely the nominee and the manager of the partnership, it was seeking and obtaining legal advice not for its own benefit but for the benefit of the partners. Seachange conducts this litigation for that same purpose. As such, Seachange had and retains a positive obligation to provide each current partner and its nominated representative with regular updates of the conduct of this litigation to provide a summary of advice received and must act in accordance with the partners' decision in relation thereto, taken under the provisions of the partnership deed."

335 Bevnol says that even if any privileged material is contained in these emails, the privilege has been waived by De Simone because he has communicated the privileged material to other persons.

336 Seachange says that the communication is protected as it was required in order to communicate legal advice to parties interested in the litigation.

337 It is clear that a communication may be privileged if it was sent in order to report the progress of litigation, or the receipt of legal advice, to a person or entity in respect of which there was an obligation to make such a report.

338 This "common interest" privilege was considered by Warren J (as she then was) in *Yunghanns & Ors v Elfic Pty Ltd & Ors* [2000] VSC 113. She set out the elements of this aspect of privilege as follows:

> "If two or more persons seek and obtain the advice of a lawyer, then the privilege that attaches to the communications passing between them or one or other of them and the lawyer is joint privilege."

339 In formulating that test, she relied upon observations of Sheller J A in *Farrow Mortgage Services v Webb* [1996] 39 NSWLR 601. At 608 of that judgment Sheller J said this:

> "Two or more persons may join in communicating with a legal adviser for the purpose of retaining his or her services or obtaining his or her advice. The privilege which protects these communications from disclosure belongs to all the persons who joined in seeking the service or obtaining the advice. The privilege is a joint privilege. So is it also if one of the group of persons in a formal legal relationship communicates with a legal adviser about a matter in which the members of the group share an interest. Communications by one partner about the affairs of the partnership or a trustee about the affairs of the trust are examples. Implicit in the relationship is the duty or obligation to disclose to other parties thereto the content of the communication. Accordingly, no privilege attaches to such communication as against others who, with the client, share an interest in the subject matter of communication. But the parties together are entitled to maintain the privilege 'against the rest of the world'."

340 Here, I understand the argument of Seachange to be that the persons to whom various emails were sent were part of the Seachange group, that group being a partnership or joint venture or some other financial arrangement underpinning the Seachange development.

341 It is true that there has been only a cursory attempt by De Simone or Seachange to establish the facts which go to proving the connection between Seachange and the other entities to which these emails were sent.

342 However, I also note that in *Yunghanns*, Warren J pointed out that for the purposes of an application such as this, the Court is not required to make findings of fact about the relationship. Indeed, she found it would have been totally inappropriate for her to have made such a finding of fact in the case before her, at what was a very early stage of the litigation.

343 She expressed the view that the Court need be satisfied of no more than that the parties asserting the joint interest have an arguable case as to the existence of such an interest.

344 I have determined that there is sufficient evidence before me in this application to accept that there is an arguable case that Seachange and the parties nominated by De Simone have a joint interest in this litigation.

345 But that is not the end of the matter. Proof must still be made that the documents exchanged between those entities are otherwise privileged.

346 I have been provided with very little factual information which could enable me to make such a determination.. I have therefore considered each of the emails in relation to which this ground is claimed to ascertain whether they may be so characterised.

347 The first document I will consider is Document 1117 dated 30 April 2007 headed **Seachange – discussions with an investor – ZMB – Bevnol – legal privileged and commercial in confidence.**

348 Although this document is headed "*legally privileged*" the first part of the document deals with a potential investor in the project and various financial issues in relation to Seachange.

349 Seachange and De Simone and the recipients of the email may well have regarded the document as confidential, but there is in my view nothing in the first part of the email which supports a claim that it is a confidential communication made or a document prepared for the dominant purpose of providing legal advice or being provided with professional legal services.

350 Part of the second page of this document contains a description of the current state of the VCAT proceedings and a description of legal advice received. It is my view that this document should be released but that all of the second page of the document, from the sixth line down (commencing "*there was a hearing today at VCAT*")

351 The deleted section is in my view covered by privilege. It is undoubtedly a report as to the stage the litigation has reached, and it is directed to entities which appear to be associated with Seachange.

352 Document 1130 dated 2 May 2007 described as Seachange and Bevnol 06066. This document is a report by De Simone to persons representing the various Seachange interests in relation to an account forwarded by Mr Lustig for his services in this proceeding. This document and its attachments which range from pages 1130 to 1162 are clearly privileged.

353 Document 1050 dated 20 April 2007 is described as **Seachange – Bevnol offer to settle.** This is an email from De Simone to representatives of various interests in the Seachange group, attaching an offer of settlement of these proceedings and commenting on it. In my view this document comes within the protection as having been made for the dominant purpose of being provided with professional legal services.

354 Document 637-650 dated 1 March 2007 headed **Seachange and Bevnol – FYI.** This is an email from De Simone to various entities simply forwarding on documents received from Lustig, being what appears to be the Points of Claim and two letters from Lustig. One of the letters is addressed to the solicitors for Bevnol and the other to the Registrar of the Building list at VCAT.

355 None of these documents are the proper subject of a claim for privilege, and neither is the email.

356 Document 1147 dated 3 May 2007 headed **Seachange Management v. SRO – Bill.** This is an email to De Simone from Mr Lustig and the contents of this email are copied to various representatives of Seachange entities including Mr Brereton. Mr Lustig's email relates to his costing of his file in this proceeding. In my view the email and the attached account are privileged.

Communications with Bank West

357 There are several other documents which are not communications to Seachange interests, but communications to Seachange banker, Bank West.

358 There are three such documents disclosed by Brereton which are emailed reports of various kinds by De Simone to Bank West. They are documents 16, 1206 and 225.

359 It is conceivable that the concept of joint privilege may, in some circumstances, attach to communications between a person and that person's banker if the tests which I have outlined above could be satisfied.

360 For instance, in *DSE (Holdings) Pty Ltd v Intertan Inc.* [2003] 203 ALR 348, the Federal Court held that communications about the acquisition of a business between investment bankers attracted legal professional privilege.

361 However, there are no factual matters asserted in this case to justify privilege being claimed on that ground. In order to attract privilege it must be shown that the communication between De Simone and Bank West was created for the dominant purpose of use in or in relation to existing or anticipated legal proceedings, or in the context of a request for legal advice. No privilege attaches to a communication from Seachange to its banker simply updating the banker in relation to litigation, or in relation to other financial or legal issues.

362 Document 16 dated 1 March 2007 is headed **GDS to Bank West – status report.** This document appears to be a description by De Simone for Bank West as to the status of the project and the progress of construction. It also contains reference to the VCAT proceeding.

363 In paragraph 12 of the above document reference is made to the outcome of an interlocutory application before VCAT and De Simone expresses views on the outcome of the case.

364 There is no indication in that document that the report, including the reference to the VCAT proceeding, was required in order to discharge an obligation which would be protected under the authorities I have considered above. Accordingly it is not a protected communication.

365 Document 225 is dated 27 April 2006 and headed **Seachange Management legal action settled.** This document is an email from De Simone to what appear to be a banker and a lawyer various parties regarding financial issues concerning the putting in place of securities concerned with the development.

366 From the content of that document, it is clearly not addressed to any of those parties as lawyers for Seachange or De Simone.

367 I have considered whether it could be said that De Simone had a reporting obligation to the bank which would render the document privileged.

368 In my view it is not protected. It cannot be described as a confidential communication or the contents of a confidential document prepared for the

dominant purpose of providing legal advice to De Simone or Seachange or providing legal professional services to those entities. There is no evidence that it is a report by De Simone to a party to which he had a reporting obligation.

369 Document 1206 dated 23 May 2007 is an email from De Simone to a representative of Bank West regarding contact to the bank by police in relation to the criminal investigation. The content is comment on the police investigation.

370 This document is not protected as it is not a document prepared for the dominant purpose of obtaining legal advice or for the dominant purpose of being provided with professional legal services. The fact that it relates to potential criminal proceedings against De Simone does not protect it from disclosure under client legal privilege.

Fraud?

371 Mr Archer exhibits to his affidavit a list of various of the documents in relation to which confidentiality and privilege have been claimed in this proceeding which have been produced as exhibits to affidavits in other proceedings. He asserts that the production of these documents in these other proceedings constitutes a waiver of any rights to privilege or confidentiality in respect of these documents.

372 It is, in my view, unarguable since *ACC v Cadbury Schweppes* that any document for which privilege is claimed loses that privilege in the event that it has been relied on by the party claiming privilege in other litigation.

373 I have not been able to marry up the list provided by Archer with the documents I have examined. However, this administrative exercise seems in any event of little practical value as Bevnol would already have access to these documents. I expect the submission is made to suggest De Simone is not bona fide in making his submissions in this application.

374 Bevnol made a strong submission that were I to find that any of the documents were otherwise protected by client legal privilege, the privilege should not be upheld in circumstances where the communications were made for the purpose of guidance or assistance in the commission of a fraud, or to frustrate the legal process.

375 In particular, Bevnol says that privilege does not protect communications disclosing an intention to frustrate the processes of the Tribunal, nor to protect communications between a lawyer and client for fraudulent or illegal actions.

376 Although Bevnol has provided lengthy examination of Seachange pleadings and filed material in support of this assertion, it seems to me that to make a decision on this issue would require me to hear witnesses and form a view on fundamental issues in this case.

377 The outcome would affect only the small number of otherwise privileged documents which I have identified in this section of my reasons.

378 I propose to decline to rule on this assertion at this interlocutory stage of the proceedings.

Should De Simone be given leave to cross-examine witnesses or summons any person to give evidence in respect of the claim for legal professional privilege?

379 De Simone wishes to call both Brereton and Chrapot to give evidence. He has not specifically said that he wishes to elicit evidence from them as to the claim for legal professional privilege, but I will assume this is so for the purpose of considering this issue.

380 As he has not said exactly what evidence he expects they will give, I assume that relevant evidence they may be able to give will relate to whether or not they received the documents in the capacity of legal adviser to Seachange.

381 However, in relation to Chrapot I already have evidence from Lustig and De Simone, and an affidavit filed by Chrapot himself, in which Chrapot is described as a construction manager, not as a solicitor. It is unlikely in the extreme that any credible evidence will be able to be called to the contrary.

382 Even if this evidence was called, I have inspected all of the documents and have decided that absent the exceptions identified in my orders, none of those documents can be sensibly characterised as a confidential communication made for the purpose of giving or obtaining legal advice or in connection with this litigation. The claim to privilege for the remaining documents thus could not be made out even were such evidence to be accepted.

383 In relation to Brereton, similar considerations apply. The question is not whether he acted as solicitor for Seachange generally. It is whether the documents he has produced to the Tribunal can be described as confidential communications made available to him for the purpose of giving legal advice to Seachange or De Simone or for the purpose of him providing professional legal services to either Seachange or Brereton in connection with litigation.

384 The privilege does not protect documents per se. It protects confidential communications. Apart from the exceptions I have specified, my inspection has not revealed any document that could possibly be so characterised, even if it could be established that Brereton was the solicitor for Seachange at the time the document was forwarded to him.

385 I have identified certain documents which may be characterised as privileged depending on the hearing of further evidence. If Bevnol wishes to press with a claim for inspection of these documents, I will allow evidence to be called regarding the circumstances of their creation, or the circumstances in which they came into Brereton's possession.

386 Otherwise, there is no useful purpose to be served by allowing further evidence to be called as to this ground of objection.

Conclusion as to the claim of legal professional privilege

387 I have identified certain documents which I consider may well attract the protection of client legal privilege depending on the circumstances in which those documents came into the possession of Mr Chrapot or Mr Brereton.

388 I consider that those documents, if in the hands of the present solicitors to Seachange, would be clearly privileged. I doubt that the present solicitor for Seachange or De Simone has clearly considered whether or not those documents when provided to Mr Brereton or Mr Chrapot might be properly characterised as documents exchanged between persons who have a common interest in litigation or whether the circumstances of their disclosure to Mr Chrapot or Mr Brereton constitute a waiver.

389 Having identified those documents I will order that in the event that Bevnol presses for inspection of those documents, the documents not be inspected until Seachange and De Simone have had the opportunity of filing further affidavit material as to any facts on which they wish to rely .

390 Other than in relation to these documents I do not consider that the question of waiver is relevant, as my finding on the facts is that none of the documents to be released are otherwise protected by privilege.

391 I have not determined the question of whether by reason of fraud the privilege I have identified is waived.

392 Thus, in regard to the claim that certain of the documents are protected by legal professional privilege, the orders I propose to make are –

> "3. I declare the documents produced to the Tribunal by Jack Chrapot in response to the summons to witness dated 29 April 2009 and Michael Brereton in response to the summons to witness dated 16 December 2008 should be made available for inspection by the legal representatives of the respondents with the following exceptions –
>
> (b) all of the documents which I have determined may be protected by client legal privilege, being documents numbered as follows:
>
> (i) in the documents produced by Brereton – the email dated 10 April 2007 contained in document number 984;
> (ii) document 140 dated 18 May 2006;
> (iii) document 186 undated;
> (iv) document 1117 dated 30 April 2007 – but only the second page of this document commencing "There was a hearing today at VCAT";
> (v) document 1163 dated 3 May 2007;
> (vi) document 1130 dated 2 May 2007;
> (vii) document 1050 dated 20 April 2007;
> (viii) documents 1193-1196
> (ix) document 1192
> (x) document 1023
> (xi) document 1155-1162
> (xii) document 1145;
> (xiii) document 1147 dated 3 May 2007."

The claim of confidential information and the right to privacy under the Charter

393 In addition to the claim for legal professional privilege, both Seachange and De Simone have claimed that certain of the documents are confidential and should not be released on that ground.

394 In its written submissions Seachange has made a claim for confidentiality on its own behalf. Its argument is put in this way:

> "Seachange is entitled to retain confidentiality in its business documents and dealings, particularly as they fall outside the scope of the summons. Even if inside, the applicant for inspection must be able to demonstrate a legitimate forensic purpose to its inspection and which Seachange submits it has not (sic)".

395 De Simone has identified five other companies in which he says he has an interest and which he says he is entitled to represent, whose commercial interests or right to privacy he says would be affected by a disclosure of various of the documents under consideration.

396 Those companies are Galambos Pty Ltd, De Simone Nominees Pty Ltd, The Computer Supply Store (Aust) Pty Ltd, Interesting Developments Pty Ltd and Seachange Village Nominees Pty Ltd.

397 De Simone submitted that because these documents involved third parties not presently involved in this litigation, the Tribunal should give appropriate notice to those parties of the application and ascertain their views.

398 He told me that he was the authorised officer of those companies. On their behalf he objects to production of the documents because he says they are either irrelevant to the issues in dispute in this proceeding or production of the documents would be an interference with their commercially sensitive material.

399 He submitted to me that each of the companies had a sufficient interest in the outcome of this application to intervene in the application.

400 I made orders on 8 December 2009 which included, *inter alia*, an order that Seachange and/or De Simone, or any other entity which wishes to join the application, file and serve submissions identifying each party wishing to make objection to disclosure of the documents and the legal basis on which each entity making objection to disclosure has standing to make such objection.

401 Apart from the oral submissions made to me by De Simone, and the references in the affidavits filed by Seachange and De Simone, I have received no submissions at all from any other entities as to this ground of objection.

402 I will consider it as best I can on the material before me.

403 There appears to be little Victorian law on the capacity of a person not connected to litigation, and not the subject of the subpoena, to object to the production of documents in response to a subpoena.

404 This fact scenario arose in an English case of *Marcel and Ors v Commissioner of Police* (1991) A11 ER, and in allowing the applicant in that case locus standi the Court observed -

> "I was not referred to any case where a third party has made such an application. But I can see no reason why any person whose legal rights will be interfered with by the execution of the subpoena should not be heard. Say a former, disillusioned member of the security services (for example Mr Wright of Spycatcher fame) was subpoenaed to produce secret documents and chose not to resist such subpoena. Can it seriously be thought that the Crown would be held to have no locus standi to apply to set aside the subpoena or otherwise object to the production of the subpoenaed documents?"

405 This issue was also considered in the commercial list of the Supreme Court of New South Wales in a case of *Brand v Digi-Tech* [2001] NSW Supreme Court 425 where Hunter J said this at paragraph 31 of the judgment:

> "In this case, the interests of the plaintiffs who have interests in the businesses whose records are the subject of the subpoenaed audit records, are 'sufficient' in my view, to entitle them to move for the setting aside of the subpoenas as an abuse of process. I think, as parties, the plaintiffs also have a sufficient interest in applying to set aside subpoenas issued in the exercise of an abuse of process, on the basis that, as parties, they have an interest in due process being observed in the preparation for hearing and in the conduct of the proceedings on hearing

406 His Honour then quoted with approval a similar conclusion reached by McClelland J in an unreported decision of the New South Wales Supreme Court of *Compsyd Pty Ltd v Streamline Travel Service Pty Ltd* (New South Wales Supreme Court 12 August 1987). He relied also on several other New South Wales and Federal Court decisions including comments to the same effect by Weinberg J in *Fried*."

407 I accept that a person whose legal rights may be interfered with by issue of a summons has standing to apply to this Tribunal to have the summons set aside. I also accept that this application may be made even when the documents the subject of the summons have already been produced in compliance with the order.

408 I have found some guidance in English authorities as to the way which I should approach a claim that confidential documents should not be made available for inspection under a subpoena.

409 In *Marcel* the application was made to restrain the use of documents seized by the police from the applicant and later produced in a related civil action by the police pursuant to a subpoena issued in that civil proceeding.

410 One of the questions for consideration in that case was whether the subpoena should be set aside to preserve the confidentiality of the documents which had come into police hands, those documents being held by the police under a duty of confidence arising out of the obligation of

police to use the material seized only for the proposed prosecution and for no other purpose.

411 Another question was whether the applicant had a cause of action against the police for disclosure of the documents in breach of the duty of confidence.

412 The Court held that production of the documents by the police was a breach of confidence. It rejected the argument that just because the documents did not attract legal professional privilege, no right of confidentiality existed.

413 In coming to this conclusion, the Court said this -

> "Legal professional privilege is merely a species of confidentiality. Where the confidentiality arises from the legal advisory relationship, in the public interest the law confers special rights of protection, namely privilege. In relation to privilege, the court has no discretion to override it. But the existence of this higher right of privilege does not exclude the existence of the lesser right to confidentiality in documents not covered by legal professional privilege…In my judgment, as in all other instances of conflict between confidentiality and the public interest, the court has to weigh the relevant factors to see where the balance of the public interest is to be struck."

414 This statement of the law may be thought to conflict with another English decision cited in the judgment in *Marcel*, namely *Goddard's case* (1986) 3 All ER 264. A particular passage of that judgment was reproduced in *Marcel* as follows -

> "The equitable jurisdiction is well able to extend, for example, to the grant of an injunction to restrain an unauthorised disclosure of confidential communications between priest and penitent or doctor and patient. But those communications are not privileged in legal proceedings and I do not believe that equity would restrain a litigant who already had a record of such communication in his possession from using it for the purposes of his litigation. It cannot be the function of equity to accord a de facto privilege to communications in respect of which no privilege can be claimed. Equity follows the law."

415 The Court in *Marcel* considered that *Goddard's case* could be distinguished on these grounds:

> "Nourse LJ did not say that the Court had no jurisdiction to restrain the use in litigation of confidential but unprivileged documents; he only said that he did not think the Court would exercise that discretion."

416 In *Marcel*, the Court went on to consider what it characterised as the balance between the public interest in ensuring a fair trial on full evidence against what it identified as the public interest in ensuring that confidential information obtained by public authorities from the citizen under compulsion remains confidential.

417 It determined that given the compulsory nature of the police powers, and the potential for abuse of that power, the public interest lay with the setting aside of the subpoena.

418 In *Alfred Crompton Amusement Machines Ltd v The Customs and Excise Commissioner (No. 2)* [1973] 2 ALL ER 1169 the Court considered the

relationship between legal professional privilege and the existence of a narrower duty of not to disclose private information.

419 *Crompton* concerned an application to inspect documents held by the Customs and Excise Commissioners. The applicant, who was plaintiff in the action, sought to inspect the documents in order to ascertain whether calculations of certain taxes had been properly made. The Customs and Excise Commissioners swore an affidavit of documents in which they identified a bundle of documents such as orders, invoices, confidential price lists, agreements and other information supplied to the Commissioners by other suppliers not connected to the litigation.

420 The commissioners objected to producing those documents on the ground that disclosing them would be injurious to the public interest because they contained confidential information about the affairs of persons other than *Crompton*, who were not parties to the litigation. Significantly, much of the material appears to have been provided by those persons to the Commissioner of Customs and Excise pursuant to their statutory powers.

421 In dealing with this ground of privilege, Lord Denning said this at page 134:

> "Although the commissioners are not entitled to Crown privilege, they are, I think, entitled to claim privilege on another ground. The privilege is quite sufficiently claimed by Sir Louis Petch in his affidavit on the ground of confidence, but is not a privilege peculiar to the Crown. It is a privilege available to all litigants. It comes down to us from the Chancery Court. It is this; a party to litigation is not obliged to produce documents, or copies of documents, which do not belong to him, but which have been entrusted to his custody by a third party in confidence. It frequently happens that a party who thinks he may be involved in litigation goes to a friend who has a material document. The friend allows him in confidence to see it and take a copy of it. He takes a copy and hands it to his solicitor. The original document came into existence long before any litigation was contemplated. It was not prepared for the purpose of getting advice on it. If the party had been entrusted by the owner with the original, it would clearly be privileged from production, simply because it did not belong to him."

422 Lord Denning then quotes some authorities and continues –

> "Likewise the copy in his hands is also privileged, because he was only allowed to take the copy in confidence, and it would be an abuse of that confidence to disclose it without the permission of the owner of the original."

423 It is important, however, to note that those comments were made in the context of a claim for privilege being made in an affidavit of documents. Lord Denning follows these remarks with the observation that the Court may in its discretion order disclosure of the documents and says that a Court would do so "*if it is in the public interest*", remarking further down the page, "*if either party wanted them before the Court, he would have to subpoena the third party to produce them*."

424 Bevnol submitted that confidentiality was not a proper ground of objection to disclosure of documents and cited *Mobil Oil Aust Ltd v Guinea Developments Pty Ltd* (1996)2 VR 34 at 38 in support of that proposition.

425 However, I discern from the authorities which I have set out above that a Court of Tribunal has discretion to prohibit the disclosure of otherwise relevant but confidential material. In exercising its discretion it should balance the legitimate desire of companies and individuals that their affairs be kept private, and the financial or other consequences to them which may flow from disclosure, against the need to ensure a fair trial.

426 On behalf of Seachange, Mr Lustig has filed an affidavit in which reference is made to the fact that Seachange has had confidential dealings with other parties. At page 33 of his affidavit he says this -

> "I am aware that the Seachange Retirement Development extends beyond the matters in this proceeding to matters such as extensive sewer works, environmental and sustainability works, large commercial buildings such as an aged care facility and integrated buildings incorporating a hotel redevelopment. The business dealings of Seachange with parties involved in these aspects of the development are commercial in confidence and are of no forensic or evidentiary relevance to this proceeding."

427 However, neither Seachange nor De Simone has filed any material specifying exactly how either the commercial interests or privacy of these companies would be affected by disclosure of the documents which are the subject of this application before me.

428 It seems to me that this ground of objection has been raised to any document which refers to or concerns these companies, or in which the names of these companies has been mentioned.

429 As neither Mr Lustig nor De Simone have identified the grounds on which each of the documents said to be commercial in confidence are in fact to be so characterised, and because Mr Desimone as a litigant in person cannot be expected to have the legal knowledge to recognise the basis for such a claim, I have individually inspected each of the documents in relation to which this claim is raised.

430 Having so examined each of the documents in relation to which the claim for confidentiality is made I have satisfied myself that each one of these documents may be characterised as broadly relevant to the applicant's claim.

431 In particular, those documents which refer to the financial relationships between Seachange and its backers or its lenders, the composition of companies and/or entities having an interest in the Seachange development, the commercial arrangements between various companies and Seachange, exchanges between De Simone and other persons in relation to the building project all appear to me to be apparently relevant to this proceeding.

432 This is because all of the companies appear to be associated in some way with the development which is the subject matter of this litigation.

433 It is of particular importance to emphasise, as I have when considering relevance generally, that the claim which Seachange makes in its Points of Claim includes as part of its claim for loss and damages an allegation that it

was required to continue to pay interest on three separate loan facilities, and the exact obligations of Seachange under those loan facilities will be required to be proven at trial.

434 Because this claim has been made, the Tribunal will be required to assess the full extent of Seachange's finances to satisfy itself that Seachange has in fact incurred these obligations. It may be, for example, that Seachange would have been able to mitigate these losses by making payment in some way from its own funds.

435 Seachange has also claimed a loss of opportunity for the period of time the project was stalled. This loss of opportunity claim is said in the particulars to paragraph 8 of the Points of Claim to be "*based upon a total of the opportunity costs of the funds including the bank loan and the interpartnership advances and deposits*".

436 It therefore seems inevitable to me that documents which are relevant to establishing the full financial picture of the Seachange Group of Companies and its commercial relationships will all be potentially relevant in this litigation.

437 In its submissions, Seachange refers to the document at page 1057 which it describes as "addressing a range of issues to do with the Ocean Grove Hotel." Seachange queries how it could possibly be relevant for Bevnol and its advisors to know the answer to one query posed on that page, namely whether the local football club will conduct the raffle or not.

438 In truth, however, the document, which is an email from De Simone to a person who appears to have a management role at the Ocean Grove Hotel, canvasses a range of issues in relation to the operation of the Hotel. It canvasses issues to do with staffing, remuneration of staff, daily reports of the operations of the hotel, cash reconciliation, stocktake adjustment reports, and budgets for functions at the hotel.

439 I have separately indicated my view that the financial background to the operation of the hotel is a potentially relevant issue in assessing the solvency of Seachange and thus the validity of its claim for loss and damage. Although this document and many like it may ultimately have only marginal relevance to that enquiry, at this preliminary stage of the proceeding I am not prepared to rule documents such as this as irrelevant.

440 Included in the documents in respect of which a claim for confidentiality is made are several documents which may be said to indicate the difficulty of Seachange in paying creditors, or misunderstandings as to the payment of creditors.

441 Although these documents may perhaps ultimately be characterised as having marginal relevance to the issues in dispute, at the moment it is my view that their relevance is established for the purpose of at least this preliminary stage. At the very least they may be documents which may be

described as relevant to the credibility of De Simone or other persons as witnesses in this case.

442 Often in determining applications for discovery a court or tribunal may make orders to protect confidential information by requiring a solicitor or counsel for a party, or a party itself, to inspect the documents on certain conditions, and to undertake not to disclose the contents of the documents except for the purpose of the court proceeding.

443 Whether this undertaking is made or not, clearly a party to any litigation is subject to an implied undertaking to use the documents only for the purpose of a case and not for any collateral or ulterior purpose.

444 This principle is set out in the judgment of Lord Denning MR *in Riddick v. Thames Board Mills Ltd* [1977] QB 881. The principles set out in this decision have been applied in various Australian decisions and appear to me to be uncontroversial.

445 Any issues as to confidentiality can be addressed by the making of orders restricting access to the documents to the parties and their legal advisers and reinforcing the rule that the documents may be used only for the purpose of this litigation and not for any other purposes.

446 Although this was not clearly stated in the material filed in support of this application, I take it that De Simone also wishes to make a separate claim on his own behalf of confidentiality. This appears to arise in relation to his claim that if the documents are released to Bevnol, this release will compromise his defence to or preparation of his criminal trial.

447 As this issue is closely bound up with his claim that the issue of the summonses is an abuse of process, I will consider this issue when dealing with that ground later in these reasons.

Should De Simone be permitted to call evidence on the issue of confidential information?

448 De Simone applied to be able to call evidence on this issue of confidential information. In particular he wished to call evidence from Chrapot and Brereton to establish that they had duties to Seachange and various other entities to keep the documents which they held confidential.

449 However, I cannot see how, even if established, this evidence would assist me. I have not been able to discern any ground on which such facts would give rise to a conclusion that the documents not be disclosed.

450 As I have already pointed out, neither De Simone nor the companies which he has identified have made submissions in accordance with my previous order. No explanation has been given as to why de Simone, Seachange, or any of the entities he claims to represent regard these documents as commercially sensitive.

451 Davies J commented in *De Simone v Archer* (2009) VSC432, at paragraph 8 citing Bryson J in *Mancini v Mancini* -

> "A case about confidential information cannot be nebulous. Confidential information which once existed may no longer be confidential; it may no longer be available although it was communicated in the past; it may not be material to any use which might now be proposed to be made of information. Without specificity a claim to protection cannot be defended or decided on any fair procedural basis, and a general allegation of the kind put forward here to the effect that from the nature of past legal business confidential information must have been communicated should not in my opinion be upheld."

452 Her Honour added (the application before her being, as in the application before me, in which De Simone was applying for protection of what he said was confidential information owned by several of the same companies mentioned by him in the application before me) -

> "The onus is on the person who asserts the confidentiality to identify definable relevant information, the confidentiality of which the person seeks to preserve. The plaintiff has not done so."

453 Even were I to accept that Chrapot and Brereton were charged with a duty to keep the documents which they held confidential, neither De Simone nor Seachange have indicated any "definable relevant information" to use the words of Davies J in *De Simone v Archer*, disclosing a reason why any of the documents I have to consider should not be disclosed on that ground.

454 Thus the application to call additional evidence on the issue of confidentiality is refused.

The *Charter* claim

455 De Simone has also made a general and brief claim that disclosure of the documents would be in breach of the *Victorian Charter of Rights & Responsibilities* Act 2006 insofar as such an order conflicted with the right enshrined in s 13 of that Act, being the right "*not to have his/her privacy, family, home or correspondence unlawfully or arbitrarily interfered with*".

456 The rights protected under the *Charter* are rights which attach only to human beings and not to companies. Therefore this argument need only be considered in relation to De Simone himself.

457 For the purpose of considering the *Charter* argument, I will assume that disclosure of the documents would engage De Simone's right to privacy under the *Charter*.

458 The question then becomes whether or not disclosure is justified under the general limitations provision in s 7 (2) of the *Charter*. The *Charter* does not provide for the absolute protection of human rights. It requires this Tribunal to consider whether limitation of the right to privacy can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. It further requires the Tribunal to take into account all relevant factors including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

459 I am not aware of any Victorian case in which the *Charter* right to privacy has been applied in an application to resist discovery of documents in litigation.

460 In my view disclosure of the documents in relation to which privacy is asserted by De Simone can be demonstrably justified as reasonable having regard to the need for this proceeding to be conducted in a fair manner.

461 De Simone submitted that disclosure of the documents is unnecessary in determining the issues in this litigation.

462 I do not agree. The documents are relevant to the case which he and his company seeks to prove. Access to these documents will enable the respondent to litigation to properly prepare its case and to defend itself from the claim brought by Seachange and also to properly prepare the counterclaim against both Seachange and De Simone.

463 It is clear that access to the documents is constrained by considerations of relevance, privilege, and the other matters raised by De Simone in this

application. However, there are no additional matters which I can discern which bear on my consideration by reason of the Charter right to privacy.

464 There is nothing that I can see in the material of an intensely private or personally embarrassing nature. No objection of this kind has been relied upon on the submissions by De Simone. All of the material under consideration is material which I have found to be otherwise potentially relevant to the resolution of issues in dispute between the parties.

465 Much of the material appears from its face to have already been disseminated broadly by De Simone to other persons or entities.

466 For all of the above reasons it is my view that the *Charter* does not prevent disclosure of any of the documents in respect of which the claim for confidentiality is made.

Should De Simone be permitted to call evidence on the Charter issue?

467 I have considered whether De Simone should be permitted to call evidence as to the Charter ground, but have reached the conclusion that there is no evidence which he has identified, or which can conceptually be identified by me which would have a bearing on my decision on this ground.

The effect of the stay application upon disclosure of these documents

468 As I have outlined, De Simone has been charged with various offences arising out of the same or similar subject matter to the allegations made by Bevnol in paragraphs 9-12, 27-30 and 36-44 of the counterclaim and has made application to the Tribunal for a stay of the hearing of those allegations and a referral under the Charter of certain questions relevant to the stay application.

469 Judge Ross (as he then was) agreed that it was appropriate to refer the Charter question to the Supreme Court for determination, and did so. The order which he made on that occasion was as follows:

> "The following question is referred to the Supreme Court for determination pursuant to s 33 of the *Charter of Human Rights & Responsibilities Act* 2006 –
>
> Given that the Tribunal has an implied statutory power to stay a civil proceeding, whether the McMahon & Gould guidelines applicable to that power should be revised in the light of the *Charter of Human Rights & Responsibilities Act* 2006, and in particular sections 24 and 25 of that Act and, if so, how."

470 In this application before me De Simone identifies many of the documents which he says relate solely to or contain material that deals with issues that are being agitated in pleadings in the counterclaim that form the subject matter of the application to the Tribunal in relation to a stay of proceedings.

471 It is important to recognise that De Simone's second application for a stay has not yet been determined. Given that the Tribunal has referred a question relating to the stay to the Supreme Court, it is inappropriate that the stay application be dealt with by this Tribunal until the Supreme Court has responded to the Charter referral.

472 The referral by the Tribunal to the Supreme Court was made under s 33 of the *Charter of Human Rights & Responsibilities Act* 2006. That section gives this Tribunal power to refer a question to the Supreme Court if the Tribunal considers that the question is appropriate for determination by the Supreme Court.

473 Section 33 (2) provides as follows:

> "If a question has been referred to the Supreme Court under sub-section (1), the Court or Tribunal referring the question must not (a) make a determination to which the question is relevant while the referral is pending; or (b) proceed in a manner, or make a determination that is inconsistent with the opinion of the Supreme Court on the question."

474 It seems clear enough from s 33 (2) that the Tribunal cannot make a determination as to the stay until the referral has been dealt with by the Supreme Court.

475 It is not as clear whether the fact that there is a pending stay application should affect the disclosure of documents which are relevant to the subject matter of the stay application. The purpose of the stay is to avoid De Simone being placed in a position where he is required to give evidence

which may incriminate him in his criminal trial. This may also extend to him being required to provide documents which may incriminate him in the criminal trial

476 Its purpose is not to prevent the parties from preparing those parts of the counterclaim to which the stay relates, so that the matter is ready to be tried upon conclusion of the stay application or the criminal trial, as the case may be.

477 This is particularly the case as De Simone has sworn that he believes that the documents which are the subject matter of this application have already been inspected by the police pursuant to a warrant directed to this Tribunal, and form part of the police brief of evidence against him.

478 De Simone's material appears to suggest that the Court of Appeal, in determining the Charter application, has indicated that no documents relevant to the stay application should be disclosed until the *Charter* referral has been dealt with. In particular he relies upon what he says was an undertaking given by counsel for Bevnol in response to a question from one of the learned judges of appeal.

479 He reproduces this exchange between bench and bar at the time of his unsuccessful leave application -

> De Simone-"*So the undertaking is that there will be no disclosure by your clients to any party outside its legal advisers of any material which comes into its possession arising from the proceeding*?"
>
> Neave J A to counsel for Bevnol- "*That's correct isn't it, Mr Reid?"*

480 The exchange, however, anticipates publication of the material to third parties, and does not affect the determination of the rights as between the parties themselves for inspection of documents.

481 As far as I understand the stay argument as De Simone puts it, his argument is that any document produced by Chrapot or Brereton which is relevant to the allegations of the subject matter of the stay should be withheld because for this Tribunal to make a decision to release those documents would result in it making a determination relevant to the question referred to the Supreme Court or that in making a determination the Tribunal would be proceeding in a manner or making a determination that was potentially inconsistent with the opinion of the Supreme Court on the question – and thus in contravention of s 33 (2)(b) of the Charter.

482 This issue has not been specifically addressed in the material filed on behalf of Bevnol.

483 I am not persuaded that a decision relating to release of documents can necessarily be characterised as a determination relevant to the Charter question or proceeding in a manner or making a determination inconsistent with the opinion of the Supreme Court on the Charter referral.

484 As I have said, the purpose of the exercise of the power to stay is not to extinguish the causes of action the subject of the stay. It is simply to delay

the determination of those allegations so as to avoid De Simone being placed in a position where his ability to defend the civil proceedings is compromised by reason of the extant criminal proceedings.

485 I do not think it necessarily follows that Bevnol should be denied access to documents relevant to those allegations. I do not think that to grant such access would be properly to be characterised as the making of a determination inconsistent with the opinion of the Supreme Court on the *Charter* issue.

486 However, as this point was not the subject of argument, I have analysed the documents in respect of which this submission is made on the assumption that disclosure of documents which are the subject matter of the proposed stay application should not be allowed until the Supreme Court has considered the referral question.

487 Neither De Simone nor Seachange has identified the manner in which it is said that release of any of the documents identified under this ground of objection would constitute a determination as defined in section 33(2) of the Charter.

488 I take the view that any such document must be arguably relevant to the circumstances in which the letter was handed over by De Simone, and the question of whether the representations made in the letter or in the giving of evidence by De Simone in this hearing were false.

489 I have therefore inspected each of the documents in relation to which objection is taken to see if I can discern this myself.

Chrapot documents relating to the stay application

490 I now go to the documents provided by Chrapot to ascertain the extent to which these documents relate to those issues which I have identified above.

491 Document 84 is headed **Easton to Chariot re insurance application**. It is an email to Chrapot from Hamish Easton, who appears to be an insurance agent, regarding an application form for insurance for the project. The email's date is 27 April 2007, many months after the events alleged in the aspects of the counterclaim for which a stay has been applied. The only reference in that document potentially relating to the issues the subject of the stay is a request for funding details of the developer detailing funding of the project.

492 In my view that document is not sufficiently linked to the allegations the subject of the stay as to be protected from disclosure on that ground.

493 Documents 11 through to 18 are documents relating to payments made by Seachange to various entities and documents being emails between De Simone and a supplier, Centurion Doors and Bank West giving a status report. These documents were generated in February and March of 2007. There is nothing that I can see in any of these documents which bears directly upon the stay application.

494 Document 37 is dated 15 March 2007. It is an email from De Simone to various persons in relation to a meeting to finalise plans for an "interim community facility." There is nothing in that document which appears relevant to the subject matter of the stay.

495 That document is accompanied by documents 38 -42 which are described as **Development Action Lists**. The lists are dated 21 March 2007.

496 De Simone says that page 42 of the Development Action Lists is relevant to the stay. He does not say why.

497 This document was created 8 months after the events alleged in the counterclaim. It does not directly refer to those events. In my view it is not covered by the stay.

498 Document 117 is an email from De Simone dated 31 May 2007 to a Mr Del Bosco in relation to payment of his invoice and purporting to explain changes to the Seachange partnership and Bank West's procedures. It was generated 10 months after the events in the counterclaim. I do not accept that it relates to the stay.

499 Page 119 is a receipt for payment of various accounts. De Simone has indicated that he does not object to the release of this document subject to blacking out the source of funds. This document is dated 30 May 2007. The source of funds to pay for that account seem to me not related to the potential stay application.

500 Documents 143-152 consists of an email from Chrapot to De Simone and two attachments, the first being described as an **Overview of Seachange**

Village Ocean Grove and the second document being a **Development Action List.** This email is dated 11 July 2007. The attached documents are dated 27 June 2007.

501 There is nothing in these documents which appear to me to directly relate to the allegations made in the counterclaim which are the subject of the stay.

502 Document 166-168 Headed **Quote from Dudley for Stage 2** is a quotation for works, the address of which is the site which contains the works the subject of this dispute. On the spreadsheet De Simone comments that the quote does not relate to the works done by Bevnol. As I have previously said, this seems to me an issue which is potentially relevant on the pleadings.

503 There is nothing at all in the document which links it with the matters the subject of the stay.

504 The last document which is said to relate to the proposed stay application is document 179. It is an email dated 15 October 2007 which refers to a copy of an indicative letter of offer for the Seachange Village Development from a financial institution. This letter of offer is not attached.

505 The document is dated 15 months after the events which are the subject matter of the counterclaim. In my view it is not directly linked with the subject matter of the stay.

Brereton documents relating to stay application

506 The first two of the Brereton documents which are said to relate to the subject matter of the stay are pages 346 and 350. Document 346 appears to be an email from De Simone to an official of the National Australia Bank dated 21 July 2006, inviting that official to attend a planning meeting.

507 Document 350 is dated 24 July 2006, the date of the alleged meeting referred to in the counterclaim. It is addressed to James Gladman at Fletchers, which is apparently an estate agency, from De Simone. The email relates to details for a launch of the project. It is not clear what connection there is between this document and the matters which are the subject of the proposed stay.

508 Document 541 is dated 22 February 2007 and is identified as a stocktake spreadsheet. It is in fact an email from De Simone to a person identified as Mark, referring to a stocktake valuation. I am unable to see any connection between this document and the subject matter of the stay.

509 Document 555 is an email from De Simone to various persons apparently at the Ocean Grove Hotel dated 24 February 2007 regarding staff employment issues and shifts at the hotel. I am unable to see any connection between the matters contained in this document and the matters contained in the proposed stay application.

510 Document 557 is an email from De Simone to the Ocean Grove Hotel regarding stock figures and profits for the hotel, giving breakdowns for functions. I am unable to see any connection between the matters contained in this document and the subject matter of the stay application.

511 Document 775 is dated 20 March 2007 and is identified as **Seachange Village Corporation structure.** It is an email from De Simone to various officials at Bank West providing a corporate structure report of the Seachange Village Project and partnership entitlements

512 I presume that the objection to this document is on the basis that it reveals the negotiations between De Simone and Bank West for existing or potential financing of the project. However, the document does not refer to financing of the project although it does refer to contributions by the current partners into the partnership capital.

513 I do not consider this document relates directly to the subject matter of the stay.

514 The next document in relation to which objection is taken is 794. This document is dated 26 March 2007. It is headed "CVs for Key Players". It is an email from Alan Griffiths to De Simone setting out Mr Griffith's CV and is in response to an email from De Simone setting out De Simone's CV. I am unable to see anything in this document which refers to the matters which are the subject of the stay application.

515 Document 1206 headed **Seachange v Bevnol** is an email from De Simone to Daryl Clark at Bank West dated 23 May 2007 in which De Simone refers to contact made to Mr Clark from a Mark Patrick of the Victoria Police. The email clearly discusses the prospect of police charges against De Simone and the prospect of the bank being served with a search warrant. However, this email does not traverse the issues raised in the police investigation or the issues raised in those parts of the counterclaim which are subject to the stay application.

516 The next document identified as relevant to the stay application is document number 15. This document is dated 2 February 2006 and is an email from De Simone to a Leon Marriott of Bank West. It is a business outline and rundown of the loan facility being sought by Seachange from the bank. It was created several months before the letter was sent. I do not consider it to be directly related to the matters the subject of the stay application.

517 The next document, which is at page 17, is also said to be relevant to the stay application. It is a series of emails between De Simone and Miranda Ball regarding the payment for some display flags apparently connected with advertising the project during the course of which De Simone makes some comments on his financial position.

518 Although this email may possibly shed light on Mr Brereton's financial status as at 8 February 2006, it does not appear directly relevant to the matters alleged in the counterclaim. It relates to events which took place several months beforehand.

519 The next set of documents said to be the subject of the stay are documents 212 through to 255. These are emails between De Simone and Bank West. between 21 April 2006 and 1 May 2006. Some of the emails contain draft documents. They relate to proposed transactions between De Simone and Bank West in the months prior to the production of the letter by De Simone.. In my view they relate to the matters alleged in the parts of the counterclaim which are the subject of the stay application.

520 Document 271 is an email from De Simone to Wes Dreir of the National Australia Bank reporting on the corporate structure of Seachange Management Pty Ltd and clearly relating to a loan application to that bank. It is dated 23 June 2006, a month before the letter was produced.

521 I presume that De Simone would say that the contents of this document are relevant to the allegations in the counterclaim in that they may be used to show that De Simone was seeking alternative finance from the National Australia Bank as late as a month before the meeting of 24 July 2006 at which it is alleged that he represented he had finance available from Bank West.

522 I agree that this document is potentially relevant to the subject matter of the stay application.

523 The documents following, being from page 273 to 284 are emails and documents between De Simone and the National Australia bank and other parties. They appear to relate at least in part to a loan application to the National Australia Bank and rearrangement of partnership interests.

524 It is not clear to me whether this loan is said to be referred to in the letter, or whether these financial arrangements have any bearing on those parts of the counterclaim which are the subject of the stay application.

525 Document 285-287 is an email and letter headed "**The computer supply store and McLeod.** The email is dated 28 June 2006 but the letter which it appears to enclose is dated 10 December 2008. Neither of these documents appear to be in any way connected with the stay application.

526 Document 290-291 headed **Lindfield settlement details – update and Lindfield settled** may relate to the settlement which is also referred to in documents 273-284. It is not at all clear to me that this is so, but on this assumption these documents potentially may relate to the stay.

527 Document 303 Headed **Seachange Village valuation** is in fact an email from De Simone to various persons describing various matters to do with the development. There is nothing in this document which appears connected to the matters the subject of the stay application.

528 Document 329, headed **Various Seachange partnership agreements**, is in fact an email from De Simone to various persons seeking partnership and sale agreements. There is nothing in that email which I can see which is related to the matters the subject of the stay.

529 Document 331, headed **NAB Funding conditions –FYI** .is an email from the National Australia Bank to De Simone setting out the banks funding conditions. Given that it is dated 6 July 2006, it does have potential relevance to the subject matter of the stay.

530 Documents 344-345 and documents 348-349 are both emails from De Simone to the national Australia bank. The dates are very close to the dates on which the letter was produced. The emails relate to matters which seem to me potentially closely connected with the subject matter of the stay.

531 Documents 446 to 451 consist of an email from De Simone concerning the development generally, together with a document entitled Seachange Village Project costing cash flow. Although the email was sent shortly after the production of the letter, it does not mention the finances for the project directly. There is nothing in these documents to link them with the subject matter of the stay application.

532 They range in dates from 5 July 2006 to 14 August 2006 and include a series of documents such as a loan agreement at page 358, a fixed and floating charge at 361, a deed between ZMB Australia Pty Ltd and Galambos Pty Ltd, a Galambos partnership deed, an interesting developments partnership deed, a Seachange Village Partnership deed and a costing cash flow which accompanies an email from De Simone to various

persons at the National Australia Bank, containing a great deal of detail as to the project.

533 The documents may be said to be relevant to the issues in the stay application insofar as they show negotiations or arrangements being entered into with another bank. However, their principal relevance appears to me to be in relation to the structure of the various Seachange entities and the viability of the development project. I find them not sufficiently connected to the matters the subject of the stay application to justify refusal to release them at this stage.

534 The next group of documents in relation to which the stay is said to be relevant are those at pages 534 to 559. These documents are dated between 20 February 2007 and 26 February 2007. They consist of emails from De Simone to various Bank West representatives and Colliers representatives in relation to a valuation of Seachange Village, presumably in support of an application for finance.

535 Several of the emails provide information as to the proposed structure of the agreement for financial accommodation from Bank West and the structure of Seachange Management Pty Ltd and the various entities connected with that entity.

536 They show the state of the financial arrangements in February of 2007, four months before the events referred to in the counterclaim. There is no sufficient relevance suggested between these emails and the subject matter of the stay application.

537 Document 634 which is dated 1 March 2007 is an email from De Simone to various officials at Bank West describing the present state of the works and the state of the proceedings at VCAT. There appears to me to be minimal connection between the subject matter of this email and the matters the subject of the stay.

538 This is followed by an email from De Simone to Bank West officials dated 6 March 2007 which is number 655 up to 724 describing the works which have been conducted up until that date, putting a financial proposal to the bank and supporting that proposal with various documents and in particular a valuation which appears to have been prepared under an instruction from the Bank of West Australia Ltd, dated 15 December 2006.

539 It does not appear to me that there is any material in these documents which is principally concerned with the matters which are the subject of the stay.

540 The next group of documents are those from pages 744 to 787 which span the period of time from 14 March 2007 to the 21 March 2007. The documents consist of emails from De Simone apparently to persons interested in the various Seachange entities, commenting on the financial issues relating to the project, and various documents

541 None of these emails or documents refers to the circumstances of production of the letter . Some of the documents detail the financial position

of Seachange and associated entities. However, all of the documents appear to have been generated in March of 2007, some eight months after the letter was produced.

542 I determine that these documents do not relate to the subject matter of the stay.

543 Document 817-829 is an email from De Simone to various persons representing Seachange interests referring to minutes of partnership meetings and transfers of partnership entitlements. It attaches two deeds. The email is dated 28 March 2007, again eight months after the production of the letter. It does not refer to the production of the letter or any circumstances surrounding it. In my view there is nothing in this document relating to the circumstances of the stay.

544 Document 839 headed **Seachange Village- answers to Bank West Credit qs** is an email from De Simone to various persons It attaches various deeds of agreement. It describes the partnership structure of Seachange and its financial arrangements up to October of 2005. It does not appear to directly mention the events set out in the sections of the counterclaim which are subject to the stay application.

545 In my view the connection between these documents and the subject matter of the stay is not established.

546 Document 913 is an email from De Simone to Brereton, and an earlier email from De Simone to various parties regarding the furnishing of the display suite. I can discern no connection at all between this email and the subject matter of the stay application.

547 The last two documents which are said to relate to the stay application are documents 1046-7 and 1063-1080.

548 Document 1046-7 is am email exchange between De Simone and a bank west official regarding newspaper articles relating to an ASIC prosecution of Brereton. I can see nothing at all in this exchange which relates to the subject matter of the stay.

549 Documents 1063-1080, headed **Seachange-urgent** is a series of emails between De Simone and Bank West on 23 and 24 April 2007.Included in the documents are an offer letter and facility terms from the bank. The documents identify funding issues as at April 2007. In my view however they do not directly relate to the events the subject of the stay. They concern future funding, not past funding

550 In regard to the stay application, the orders I propose to make are –

> "3. I declare the documents produced to the Tribunal by Jack Chrapot in response to the summons to witness dated 29 April 2009 and Michael Brereton in response to the summons to witness dated 16 December 2008 should be made available for inspection by the legal representatives of the respondents with the following exceptions –

(a) all of the documents which I have determined relate to the subject matter of the stay application, being as follows:

(i) of the documents produced by Brereton – documents 344-355,documents 348-349, document 331, document 271, document 290-291 documents 212 to 255;"

Abuse of process

551 I am aware that a Court or Tribunal plays a significant role in monitoring the production of documents pursuant to a summons to witness and that production to the parties of documents entrusted to the Tribunal in response to a subpoena, even if that subpoena is judged to have been validly issued, is in no way automatic.

552 It is clear that this Tribunal has the power to regulate its procedures so as to prevent interlocutory procedures such as discovery and the issue of subpoenas being used for inappropriate ends.

553 *National Employers Mutual General Association Limited v Waind and Hill* [1978] 1 NSW LR 372 is a significant judgment dealing with the circumstances in which a summons to witness should be set aside as a n abuse of process.

554 This was a case in which legal professional privilege was claimed by a worker in respect of a workers compensation insurance file. The file had been subpoenaed by the workers employer, who had been sued by the worker for negligence arising out of the accident in relation to which he had also obtained workers compensation.

555 The primary issue in that case was whether a subpoena could be used to compel production of documents so that they could be inspected by a party to ascertain their helpfulness or otherwise to that party's case. It was suggested by the worker that to do so would be a misuse of the power to subpoena, which exists only to require a document to be produced in order to be tendered in evidence.

556 The submission went so far as to say that the person using the subpoena should not have a chance to inspect it at all before tendering it into evidence. It was said that the procedure adopted by the defendant was a "fishing" exercise designed to ascertain if some useful material could be found to support the employers defence.

557 It was in that context that the trial judge analysed the obligations of a court in dealing with materials sought to be produced by way of subpoena by reference to three discrete stages of determination.

558 It is fair to say that the approach of the trial judge in *Waind* does not reflect what has become the usual practice in Courts in this State and in this Tribunal of parties being allowed a fair degree of latitude in the issuing of subpoenas to third parties to locate and inspect documents which may be thought to be useful at trial.

559 This practice has been encouraged by provisions such as order 42 rule 10 of the Supreme Court rules, which provide a mechanism for early return of subpoena and inspection of documents produced under subpoena before trial.

560 However, it must be remembered that the obligation still remains with the Court or Tribunal to supervise this process to ensure that it is being employed in the interests of justice and with due regard to the privacy and convenience of parties whose records are subpoenaed in this way, or who are required to devote time and resources to complying with such subpoenas.

561 The first stage analysed in *Waind* is the determination of any objections made by the person to whom the summons is addressed on the ground that the summons has been improperly issued.

562 The issues for determination at this first stage are analysed from the assumption that it is the person to whom the summons is directed who makes the objection.

563 It is also clear from the discussion that the mischief identified by the Court in its reasons in such a case is that the person to whom the summons is directed is obliged to make a judgment as to what may or may not be relevant to the issues in dispute between the parties, and that this, coupled with the prospect that many documents may be involved, would impose an intolerable burden on a stranger to the litigation.

564 The Court also refers to the prospect that the issue of a subpoena may be an abuse of process for other reasons, and describes those as including –

> "It would be an improper use of the subpoena if it were not sought for the purpose of the litigation, but for some spurious purpose, such as to inspect the documents in connection with some other proceedings, or for some private purpose, or in collusive proceedings to give them publicity."

565 The first step is thus that of the determination of any of the objections made by the person to whom the subpoena is directed for the production of documents.

566 The second stage, once the documents have been brought to Court by the witness and are in the control of the Court, is that of the exercise of the judge's discretion to permit or refuse inspection of the documents. During this second stage the Court still has a responsibility to determine the use to which the documents are to be put, and an overriding discretion to decide whether inspection of the documents should be allowed. Usually it is suggested there will be little reason to prohibit inspection by both parties.

567 But the passage continues -

> "However, the documents are under the control of the judge and, even if the witness has not objected, there may be good reason in the elucidation of the truth why the judge may e.g. defer inspection by one party or the other. …There may be good reason why he may, or indeed should, refuse inspection of irrelevant material of a private nature, concerning a party to the litigation, or concerning some other person who is neither a party nor a witness."

568 The Court then analyses the nature of the power exercised by a judge in deciding upon appropriate orders in relation to those documents. It notes the power to be quite different to that exercised in relation to discovery, in

particular because the power to compel production of documents on subpoena affects the rights of strangers to litigation, not just rights as between parties.

569 The Court decided that the power was to be exercised in order to "*take all steps necessary for the proper trial of the issues before him*" following a course which "*fairly leads to the introduction of all such evidence as is material to the issues to be tried, and the testing of that evidence by the accepted procedures of the court*."

570 The third stage is a ruling by the judge at the trial on questions between the parties as to the relevance of documents and their admissibility according to the rules of evidence. This is not the issue before me.

571 Seachange and De Simone ask me to apply the principles set out in *Waind* and the other authorities to which I will refer in the following way.

572 Firstly an attack is made on the form of the summons. It is said that the description of the documents is too wide and contains a request for some documents which are beyond the scope of this proceeding.

573 Secondly it was said that the process of discovery is incomplete and that summonses to produce documents should not take the place of the Tribunals discovery processes.

574 As an aspect of this argument, it is said that the request for these documents should have been directed to Seachange and De Simone, who are the rightful owners of the documents, and who would have been able to take lawful objections to producing them.

575 It was also said that all of the documents in the summonses either had already been disclosed to Bevnol, in this or in other proceedings, or were identified in De Simone's affidavit of documents, sworn in this proceeding. And so the issue of the summonses was unnecessary.

576 Thirdly, De Simone and Seachange asserted that the documents were confidential and, for that reason, should not be disclosed.

577 I will examine each of these grounds separately and then examine the broader claim that the combination of these factors points to the conclusion that the summonses have been issued as an abuse of process.

Defects in the subpoena itself

578 Firstly, it is said the scope of the summons to Brereton was excessive, requiring production of documents beyond the issues and that some of the documents produced in response to the summons were outside the dates specified on the summons. In the spreadsheet which he has prepared, De Simone identifies many documents produced by Brereton which he says are in this category. He says the issue of the summons in this way is oppressive.

579 Although it would have been clearly open to those persons to whom the summons was directed to apply to this Tribunal for the summonses to be set

aside on the grounds that they were oppressive or irrelevant to the issues in dispute, it does not seem to me that either Seachange or De Simone is able to maintain an argument in relation to the perceived oppressiveness of the summons in circumstances where the documents have in fact already been produced to the Tribunal.

580 Seachange argues that insofar as the documents relate to dates or matters outside the scope of the summons, the Tribunal has no jurisdiction to deal with those documents.

581 However, I take the view that I do have power to deal with any such documents. Sufficient power is contained in s 80 of the *VCAT Act* which gives the Tribunal the power to do whatever is necessary to facilitate the fair hearing of proceedings before it. Further, s 97 imposes an obligation on the Tribunal to act fairly, and s 98(3) of the Act gives the Tribunal the power to regulate its own procedure.

582 In *Fried*, the applicant was successful in submitting that a summons should be set aside where it was in effect a "*wide-ranging trawl for documents which might, theoretically be capable of producing something of forensic value*," but which, "*absent some proper foundation for their being sought, constituted an abuse of process.*"

583 However, as I have said, the question before me is not whether or not the documents should be produced to the Tribunal. They have already been produced to the Tribunal. If there has been substantial work involved in identifying the documents, that work has already been done.

584 The question before me is whether the documents which have been produced should now be made available for inspection by Bevnol. In making a decision on this matter it does not appear to me that I should be swayed by questions of whether or not there are more documents being produced to the Tribunal than those identified in the summons itself, or whether a large number of documents have been produced.

Discovery not yet complete

585 It is asserted that Bevnol should have awaited finalisation of discovery prior to having issued the summonses and that indeed they were issued at a time when Bevnol has not yet sought to inspect the documents by Seachange, let alone having completed those inspections.

586 It is asserted that the summons should have been served on Seachange because Seachange is the owner of the documents held by Chrapot and Brereton and was deliberately not served on Seachange to avoid giving Seachange the opportunity to object to production of the documents.

587 *Commissioner of Railways v Small* [1938] 38 SR (NSW) 564 is relied upon as authority for the proposition that a subpoena cannot be used as a replacement for discovery or as a method of getting discovery and that where the Tribunal is of the opinion that a summons has been issued as a

"*fishing expedition*", then the issue of such summons is an impermissible purpose rendering the summons liable to be struck out.

588 At page 574 of the judgment Jordan CJ said this:

> "Discovery applications should be made at the proper time and place. It would greatly impede the trial of actions at *nisi prius*, and impose an intolerable burden upon the presiding judge, if he were required from time to time to suspend proceedings and wade for himself through masses of documents for the purpose of endeavouring to determine whether any of them are relevant. Especially is this so when the documents may be called for while the case is still at the stage when it is difficult or perhaps impossible for the judge to know what may become relevant and what may not. In the absence of special circumstances, … a party is no more entitled to use a subpoena *duces tecum* than hear a summons for interrogatories, for the purpose of fishing, that is, endeavouring not to obtain evidence to support his case, but discover whether he has a case at all … or to discover the nature of the other side's evidence. Even if the documents are specified, a subpoena to a party will be set aside as abusive if great numbers of documents are called for and it appears that they are not sufficiently relevant.

589 Nevertheless, I do not consider that there is a firm rule that summonses to produce documents must never be issued prior to the completion of discovery. The interlocutory processes of any court or tribunal must be used to maximise cooperation between the parties and to ensure that all available information is exchanged between the parties before the case comes to trial.

590 Earlier authorities on the principles to be applied to interlocutory applications may need to be revised to take into account the contemporary emphasis of the courts on full and frank exchange of material, breaking down the previous emphasis on the adversarial nature of the proceedings and a past tendency of parties and lawyers for those parties to use interlocutory processes to frustrate, rather than to assist in the production of relevant material before trial.

591 The Domestic Building List of this Tribunal places great emphasis on cooperation between parties, on full disclosure of documents and legal submissions before trial and on the efficient and timely disposal of proceedings. In my view, in the particular circumstances of this case, it is not unreasonable for the summonses to have been issued to enable early identification of available documents, and this is so even if the discovery processes had not been completed.

592 Seachange also relies on *Australian Competition and Consumer Commission v Shell Co of Australia Ltd* (1999) FCA 212 as authority for the proposition that a subpoena should be set aside as oppressive if it was in effect a means of obtaining further discovery, for which alternate provision was available under the rules, and if it required the recipient to make fine judgments regarding the relevance of documents, or failed to describe the documents sought with sufficient particularity.

593 However, in that case the recipient protested that compliance with the subpoena would entail a great deal of work to ascertain its true ambit, and that appropriate rules were in place to achieve that result through discovery.

594 It was important in that case that the proceeding was subject to judicial case management, though a managed timetable, the recipient had already provided two affidavits of documents, and that other than for the issues raised in the subpoena, was otherwise ready for trial.

595 The judge noted that the primary consideration in deciding such an application was –

> "The due administration of justice and in particular this consideration manifests itself as a requirement that the parties have available to them all material relevant to the issues to be decided in the case."

596 Having regard to the circumstances outlined, the subpoena was set aside as an abuse of process.

597 De Simone alleges that the solicitor for Bevnol, Mr Archer, has sent a letter to the Tribunal dated 4 December 2007 in which he has suggested that all the documents the subject of the summons are already in the Seachange affidavit of documents and yet he has not bothered to inspect that affidavit of documents.

598 At paragraphs 10 and 11 of Archer's affidavit he identifies the steps taken to date both by Seachange and Bevnol to inspect each others documents. He deposes that he has not arranged to inspect those documents disclosed in the affidavit of documents filed on behalf of Seachange because he takes the view that the discovery made in that affidavit is deficient and that the documents disclosed would not be of assistance to him in preparing the case.

599 As I have said the fact that discovery is not yet complete is not a decisive reason to prohibit inspection of documents obtained under subpoena in this case. The fact that they may have already been discovered through the affidavit of documents of Seachange is also, in my view, not a sufficient reason to prevent disclosure of these documents which have been produced to the Tribunal.

600 This case has already become protracted, with many interlocutory applications and affidavits having been filed. It is not easily to ascertain exactly what documents have been relied on in evidence by each party. In the particular circumstances of the history of this litigation, which has already amassed many volumes of Tribunal documents, over ten preliminary rulings, and a confusion of issues, I take the view that it is not of itself unreasonable or to be characterised as an abuse of process for Bevnol to have decided not to pursue the normal processes of discovery before issuing these summonses.

Production is a breach of duties of confidentiality owed by Chrapot and Brereton

601 Seachange suggests that the production of the documents under the subpoena by Brereton and also by Chrapot is a breach of the duties owed by those persons and these breaches of duty should not be condoned by this Tribunal.

602 In relation to Brereton it is said that Brereton has breached a duty which he owes to Seachange as solicitor for Seachange by producing these documents without obtaining instructions from Seachange. It is also alleged that he has breached the duties of partners to remain just and faithful to each other.

603 The nature of the partnership is not spelled out in the submissions, but I presume that the reference to the duty of a partner refers to the fact that Brereton or companies controlled by Brereton were financially connected with the project.

604 The way in which this argument is put against Chrapot is set out in paragraph 6.8 of the submissions, as follows:

> "In the case of Chrapot, he was a paid consultant to Seachange. Chrapot is also an Australian legal practitioner and has previously held a full practising certificate in Victoria. His engagement through his company Jadeville Pty Ltd commenced on 1 December 2006 shortly before this proceeding, and concluded in May 2008. Any documents Chrapot retains that are relevant to this proceeding are the property of Seachange and have not been returned to it, in breach of his duties."

605 The submission continues on at paragraph 6.9, as follows:

> "In his affidavit of 24 September 2008 at paragraph 6, Allain deposed that Chrapot had discussed matters relating to the litigation with him. This is in clear breach of Chrapot's duty of confidence to Seachange and in circumstances where he ought to be fully aware of his obligations."

606 The duty of fidelity relied on in relation to Brereton is described more fully at paragraph 6.6 of the submission, where it is alleged that –

> "he personally was de facto a partner's representative (for his sister Marie Brereton, the sole director of ZMB Australia Pty Ltd, the trustee for the ZMB Trust of which Brereton was a beneficiary)".

607 I doubt that production of the documents when production is compelled under a subpoena can of itself be characterised as a breach of a fiduciary duty.

Do all of the factors relied on by Seachange disclose that the issue of the summons is an abuse of process?

608 Had the argument in relation to abuse of process consisted only of the above, it is my view that the aspects discussed above would have been insufficient to persuade me that I should exercise my discretion to prevent inspection of these documents on the grounds of abuse of process.

609 However De Simone and Seachange rely on the combination of all of the above factors, occurring in the context of the criminal proceedings instituted against De Simone, as raising a significant question as to the real purpose for the issue of the summonses.

610 De Simone's affidavit dated May of 2009 but apparently actually sworn on July 2009 sets out the argument;

> "I believe the summons represents an abuse of the process of the Tribunal and is designed to cover up co-operation in breach of duty by Mr Jack Chrapot with Mr Louis Allain and also to provide "cover" before the provision of material held by Mr Jack Chrapot which has been volunteered by him to the Victoria Police for the purposes of the police investigation sometime prior to 27 February 2009 when his statement was prepared. There is some evidence before the Tribunal, already notably the affidavit of Allain affirmed in September 2008 that sets out the contents of one such conversation".

611 De Simone requests that before any documents are released under the summons directed to Mr Chrapot or Mr Brereton, the Tribunal should order Chrapot and Brereton to prepare an affidavit detailing any conversations between them and representatives of Bevnol and then attend for cross-examination on the contents of their affidavits. He also asks that orders be made compelling Allain to attend to give evidence.

612 He says this should be done because there are "*serious matters relating to the proper conduct of the proceeding, to the holding of a fair hearing and to the abuse of process which are an issue in this application*".

613 He says that Mr Allain and other persons connected with Bevnol are likely to be Crown witnesses in the criminal case against him. He suggests that information in this proceeding is being fed by Bevnol to the police to assist in the police investigation.

614 In his affidavit of 22 March 2009, sworn apparently in the criminal proceedings, he says this at paragraph 3:

> "I believe that the police investigation of these matters, and the laying of charges against me is malicious and in bad faith and is corrupt. Further, I believe that the charges have been issued at this time for a collateral purpose, that of causing commercial harm to me. I believe that the police would not usually even investigate a matter of this kind but would advise the complainant to pursue the available civil remedies. The fact that the police have now devoted substantial resources to investigation, and have now investigated and charged me, I believe derives from the fact that the complainant is a former senior member of the Victoria Police. I believe that this prosecution is an example of the Victoria Police 'looking after its own'."

At paragraph 4(xvii) he states:

> "In the meantime in May 2008, Lustig advises me and I verily believe Patrick had advised Lustig that Patrick was receiving material from a VCAT civil litigation which Patrick was using for the purpose of his investigation directed to charging me."

615 (The above reference to Patrick is to Officer Patrick who was at the time conducting the police investigation.)

616 De Simone suggests that he was being charged as a "*favour*" for Mr Allain, a director of Bevnol and a former member of Victoria Police, by his "*mates*" within the police force.

617 Thus, De Simone suggests that the summonses have been issued not for the purpose of this proceeding, but for the purpose of making material available to the police for the use of the police investigation an unlawful collateral purpose.

618 He alleges that if these documents are disclosed to Bevnol, then they may be used and perhaps are designed to be used to feed prosecution witnesses with information and perhaps thereby change the evidence they may otherwise have given in the criminal trial.

619 He says this at paragraph 11 of his affidavit sworn 7 December 2009:

> "My right to a fair trial of a criminal proceeding would be further placed in jeopardy if the informant or Crown witnesses are able to access this affidavit. I am particularly concerned that Crown witnesses who are former or current directors, staff or officers of Bevnol or parties to this proceeding may from the information contained herein use it to "fashion" their answers in the criminal proceedings".

620 I will quote paragraph 5.18 of the submissions in which this allegation is made:

> "Given that Brereton has failed to produce these documents to the Tribunal when ordered to do so in proceeding J89/2008 but had no difficulty in providing them under summons, there are strong indications that the summons was not issued bona fide to compel the production of documents but in a process of collusion between Brereton and Bevnol, presumably through the actions of Allain, to get a range of material to Bevnol's attention that would assist Bevnol not just in this proceeding but for collateral purposes, namely the conduct of the criminal matter against De Simone, where Allain and Jamieson, the former directions of Bevnol, are Crown witnesses, and could thereby fashion their evidence to fit facts that ought not otherwise to have been known to them, thereby prejudicing the defence of De Simone."

621 This suggestion is also made in paragraph 5.4.2 of the submissions of Seachange as follows:

> "Whilst charges are pending and not yet completed (a committal hearing has been scheduled in the Melbourne Magistrates' Court for June 2010) De Simone has advised that he will not provide all of the information in his knowledge due to the risk that it will affect any criminal prosecution by alerting potential Crown witnesses (who are also directors or former directors or officers of Bevnol) and the complainants to the police of aspects of his defence. He has been advised (by external counsel) that cross-examination of witnesses is best done when the witnesses are unaware of the line of questioning and the nature of the defence so they may not practice their responses and/or compare notes and recollections".

622 Bevnol does not deny that it made a complaint to the police. However it says that the summonses were issued to obtain information relevant to this proceeding and not for an ulterior purpose.

623 Bevnol says that it is self evident that it can have had no other purpose than the issue of these proceedings, as it has not issued any other proceedings. It says that issues raised by De Simone regarding the Victoria Police investigation are not relevant to this application. It denies the allegation that the summonses were issued for any improper purpose.

624 Bevnol says that De Simone's stance is merely tactical. It says that the argument that witnesses may be able to "fashion their evidence" or not be taken by surprise is not a recognised basis to uphold an objection to the release of otherwise relevant documents.

625 Bevnol refers me to a decision of this Tribunal, *Roberts v Victoria Police* (2003) VCAT 2028, and says that it stands for the proposition that if subpoenaed material is on its face potentially relevant or useful,, there can be no basis for finding that there was an ulterior motive in issuing the subpoena.

626 My reading of the decision is that it stands for the simple proposition that it is necessary to closely examine all of the circumstances relating to the issue of the summons and the potential relevance of the evidence sought to be subpoenaed in determining whether to allow the summons to be issued or the subpoenaed material to be used.

627 These allegations of abuse of process are very serious. There is, however, nothing in the material filed on behalf of Seachange or De Simone which sets out how it is that any of the documents which are subject to either of the two subpoenas might actually prejudice him in relation to the criminal investigation or cause prejudice if revealed by way of response to a subpoena as opposed to being revealed in the normal discovery processes.

628 The documents held by Chrapot can be generally described as documents relating to the building works, at the time of the breakdown in the relationship between Bevnol and Seachange and thereafter, there are also documents which refer to arrangements for insurance of the works, the dismissal of Bevnol, the engagement of plumbers and payments for various creditors, production of specifications and various plan reviews and documents in relation to inspection of the property and engagement of Dudley & Co. as builders.

629 The documents held by Brereton can be described as matters generally concerning the financial structure of Seachange and associated entities, financial and marketing documents relating to the entire development, and documents relating to Seachange relationship to its creditors and financiers generally.

630 As I understand it, the police investigation is relevant only to those paragraphs of the Counterclaim which are stayed by operation of the order

of his Honour Judge Ross. Those issues are therefore issues relating to the alleged production of a letter of 27 July 2006 by De Simone relating to finance of the development and the circumstances in which it came to be produced, and the allegation that Seachange had obtained finance by early December 2006 and had advised Bevnol of this.

631 I have perused all of the material provided in response to each summons and am unable to see how production of this material would in fact prejudice De Simone's defence to these charges.

632 Victoria Police has already exercised powers of inspection by issuing a search warrant on 6 May 2009. Pursuant to this search warrant the informant in the police proceedings has searched and obtained the documents which are the subject of this hearing.

633 Further, it appears to me that any such detriment to the conduct of the defence in the criminal proceedings can be avoided if I were to make orders allowing the solicitors for Bevnol and its counsel to inspect the documents in the first instance. If any documents need to be shown to clients for instructions, a further application can be made in respect of the particular documents and I will be given concrete reasons as to why this is required, or why this should not be allowed.

634 However, the larger question is whether I should conclude from the material filed that it is more likely than not that the summonses have been issued for an improper purpose, and exercise the discretion which I have to determine whether the documents should be inspected, in such a way as will show the Tribunals disapproval of the manipulation of the subpoena process.

635 De Simone suggests that the wording on the police warrant directed at VCAT for inspection of the documents is identical with the wording of the summonses issued by Bevnol. He says this is evidence of a close and unsavoury connection between Bevnol and the police.

636 I understand his argument to be that it is not so much a question as to whether I can make orders which could avoid the unlawful use of this material. It is a question of whether I should, once I determine that the facts relied on by De Simone are established, give emphasis to the Tribunals disapproval of the improper purpose motivating the issue of the summonses by refusing to let the documents produced be inspected or used at trial.

637 Most of the cases I have considered in which abuse of process has been argued are cases where the person issuing the summons has been characterised as attempting to obtain an unfair tactical advantage in the trial. Each case appears to revolve around its own facts. Often the Court has put great store on the stage of the proceeding reached, the fact that other options are available in a judge managed environment, and other like considerations.

638 In *Hamilton v Oades* (1988-89)85 ALR 1 Deane and Gaudron JJ said this;-

> "The inherent power of a court to control and supervise proceedings includes the power to take appropriate action to prevent injustice… (This power) is not restricted to defined and closed categories… In this context injustice is not simply a question of the purpose or motive for which the relevant proceedings were instituted but includes a consideration of the consequences of the proceedings for the person invoking the power."

639 In *Fried*, the judge comments -

> "The terms "oppressive and vexatious are often used to signify those considerations which justify the exercise of the power to control proceedings to prevent injustice, those terms respectively conveying, in appropriate context, the meaning that the proceedings are "seriously and unfairly burdensome, prejudicial or damaging" and "productive of serious and unjustified trouble and harassment" (*Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 79 ALR9 at 45.)

640 In *Marcel* the Court identified the need to balance the public interests considerations relating to the need to ensure a fair trial as against the public interest in discouraging the inappropriate use of compulsory powers requiring disclosure of documents. The Court said this at page 856:

> "It is important to identify the public interests which are in conflict in this case. On the one side, there is the basic public interest in ensuring a fair trial on full evidence. Anything which prevents the full facts coming before the Court may lead to injustice through failure to protect the litigant's rights. If Mr Jaggard is not permitted to use the documents and information already in his hands, or in the hands of the police, he will be deprived of the right to put forward his full case. The position is exacerbated by the fact that it is notoriously difficult to prove fraud. If, in fact, Mr Jaggard has been the victim of fraud, it is unlikely that the company or those associated with it have themselves given full discovery in the main action. Is Mr Jaggard to be deprived of the right to correct this by the use of documents obtained from a third party, the police?"

641 Even so, in that case the Court exercised its discretion against Mr Jaggard and an order was made setting aside the summons as an abuse of process.

642 Thus, I see my task as balancing the various factors thrown up by the facts as I establish them to be. I take the authorities to direct me that it would be an improper use of a summons if it were not sought for the purposes of litigation but for some other purpose. In the words of the Court in *Waind*, it would be improper for the summons to be used for some "*spurious*" purpose or for some "*private*" purpose, or in "*collusive proceedings to give them publicity.*"

643 In *Botany Bay Instrumentation v Control Pty Ltd & Anor & Stewart* [1984] NSW R 3, Powell J considered that an abuse of process had occurred in circumstances much less grave than those alleged here. He set aside the subpoenas as an abuse of process for three main reasons. Firstly, the party issuing the subpoenas had had the benefit of discovery but had not sought further and better discovery and sought to use the power of subpoena instead. Secondly, the subpoenas were issued at a time when there was no trial pending. Thirdly, he considered that since the right to have a subpoena issued was for the purpose of enabling evidence to be made available to tender during a trial which was then pending, the subpoenas had been

issued for a purpose other than to achieve the right conferred on litigants to issue the subpoena.

644 For this last proposition he cited a passage in the judgment of Bowen LJ in *Elder v Carter* [1890] LR 25 QBD 195 at page 201 –

> "I am as certain as one can be of anything with regard to practice, that it is not intended to enact that at any stage of a proceeding a judge may make, subject to his discretion, an order on a third person for production of a document which belongs to the third person, unless the production of it at that moment is a thing to which the parties are entitled for the purpose of justice; and you are not entitled, for the purpose of justice at any moment during suit, simply because you are a litigant, to see what is in the possession of a third person and to have production of it. Such a thing was never heard of …"

645 Bevnol asks me to conclude that the reason why the summonses are directed to dates up to April of 2007 was not because it wished to obtain documents relevant to this proceeding but because it wished to obtain documents relevant to the criminal charges against De Simone.

646 As evidence of this De Simone points out that the pleadings in this case in relation to the alleged financial misrepresentation made by De Simone state that the alleged misrepresentation occurred in July 2006 and that Bevnol became aware of *"the truth"* that no financing had been obtained in December of 2006.

647 Seachange submits that a summons seeking material relating to financing in 2007, well after those dates, cannot possibly be relevant to this proceeding and must have been issued for another purpose.

648 It is suggested this can be gleaned from the evidence that both Chrapot and Brereton cooperated with the solicitor for Bevnol in providing the documents, and in even preparing for the provision of the documents prior to being served with the summons, and also from the fact that there was no evidence that Mr Brereton was paid conduct money or paid the cost of producing the material forwarded in response to the summons, even though this would self evidently have taken a great deal of time.

The Standard of proof of the claim of abuse of process

649 I have not been able to find any authority on the question of the standard of proof which should apply to an allegation that a summons has been issued as an abuse of process. The cases which I have read appear to assume that the matters said to constitute the abuse of process should be proved by reference to the civil standard of proof – that is, is it more likely than not that the matters alleged are true.

650 As I have said, most of the cases appear to involve consideration of procedural flaws –for example the seeking of documents on subpoena without first exhausting the process of discovery, and matters of that nature.

651 However, in support of its claim that the issue of the summonses is abuse of process, De Simone has made grave allegations against Bevnol and its

solicitors. They are allegations which, if proved, one might expect to see the subject of criminal charges.

652 Thus, it is my view that in proving the matters which I have recited as making the foundation for the abuse of process claim, I should follow the authority of *Briginshaw v Briginshaw (1938)60CLR 336.*

653 The observations of Dixon J in *Briginshaw* have been often quoted. They are as follows:-

> "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal."

654 *Briginshaw* has recently been considered by the Victorian Court of Appeal in *Clark v Stingel* (2007) VSCA 292. In that case, the observations of Dixon J in *Briginshaw* were discussed at some length, and the application of those observations to the more recent High Court case of *Neat Holdings v Karajan Holdings Pty Ltd* (1992) 110 ALR 449.

655 The following passage of the judgment refers to the principles of *Briginshaw* as applied in *Neat* (at page 10):-

> "The majority in that case confirmed that the ordinary standard of proof required of a claimant in civil litigation is proof on the balance of probabilities even where the matter to be proved involves criminal conduct or fraud. Their Honours pointed out that statements in cases "that clear or cogent or strict proof is necessary" before such serious conduct is to be found, relate to the strength of the evidence that is necessary to establish such a fact on the balance of probabilities. The strength of the evidence necessary to establish that matter may vary, their Honours said, according to the nature of what is sought to be proved. But that does not bear on what is the standard of proof – that remains the balance of probabilities. The reason strong evidence may be required to satisfy the tribunal of fact on the balance of probabilities that the alleged conduct amounted to a crime or other serious misconduct, is the recognition that persons do not ordinarily engage in such behaviour, and thus the tribunal of fact should not lightly make a finding to that effect on the balance of probabilities. Thus, while the standard of proof in a civil case remains the balance of probabilities, the matters to be considered by the tribunal of fact may be of such seriousness that strong evidence – clear and cogent – may be required before reasonable satisfaction that the allegations have been made out can be attained on the balance of probabilities."

656 I accept the application of *Briginshaw* in the manner outlined above to this case. However, the standard of proof remains the same – is it more probable than not, that the events alleged to constitute the abuse of process occurred?

Should De Simone be permitted to call further evidence in relation to the abuse of process allegation?

657 I have considered whether I should allow De Simone to seek to prove the allegations of abuse of process by calling evidence and cross-examining deponents of affidavits.

658 I firstly consider this application as it relates to Brendan Archer, solicitor for Bevnol. My first impression was that the matters deposed to by Archer are predominantly in the nature of legal submissions. There is little in his affidavits which goes to the proof of the allegations which De Simone makes.

659 However, there are some significant areas of fact alleged in his affidavit which I would need to consider if I were to make factual findings on the abuse of process claim. Archer deposes as to the reasons why he did not press on with inspection of discovered documents. He deposes as to the appropriateness of his contacts with Chrapot and Brereton in relation to the issue and service of the summonses. He deposes as to a conversation he has had with Chrapot.

660 De Simone has also sought leave to subpoena witnesses to give evidence as to the abuse of process claim. He has identified the police informant, and two directors of Bevnol, and Chrapot and Brereton. He says through their evidence he will be able to show that there was in effect a conspiracy between the directors and the police and the recipients of the subpoenas to issue these subpoenas.

661 In deciding whether or not to allow further evidence to be called, I need to balance the need to allow all relevant evidence to be led against the delay which such a course would involve.

662 On the one hand, the course proposed by De Simone would allow the opportunity to fully ventilate the issues raised by him.

663 However, such a course would prolong the time before a final decision is made as to these documents. I have found that almost all of the documents are relevant and very few are actually or potentially covered by privilege or other wise unavailable for release.

664 The application to summons witnesses has been made well after the timetable that I set for the filing of affidavits and submissions. There has been no satisfactory reason provided as to why this application has been made at such a late stage.

665 The introduction of new evidence by Seachange and De Simone would require me to consider any such application by Bevnol. It would require further consideration of legal submissions once all this evidence was heard.

666 I also consider it unlikely in the extreme that any of the proposed witnesses would agree to give evidence as to the matters proposed, or that the evidence they would give would assist me in finding the relevant facts.

667 I am not making a decision on the trial of this action. Even if cross-examination were allowed, it is likely that any finding as to facts I may make would be tentative at this stage. A full analysis of the relationships between the parties, the credibility of witnesses, and the state of the documentary evidence will have to await the trial.

668 It seems to me that the examination of any witnesses, including Mr Archer, cannot be sensibly held at present. It is not feasible that the informant in the criminal trial, Detective Patrick, could presently give any evidence regarding his investigation. The criminal proceedings are in their infancy. The committal and trial have not taken place.

669 So it seems to me presently impossible for this Tribunal to hear from persons who may be witnesses in the criminal trial in respect of matters which will be live issues in that criminal trial.

670 Further, the matters of which De Simone complains are events which occurred in the past. I am not asked to consider whether a summons should be issued. The summonses have already been issued and responded to. The question for me is what orders should be made in respect of these documents, which I have inspected and found otherwise relevant to this case, and which are now in the custody of this Tribunal.

671 The question of the relationship between Bevnol and the police, the appropriateness of the issue of the search warrant, and the effect of the criminal proceedings on De Simone's capacity to defend these proceedings, are all matters which will be squarely raised in the committal and criminal trial, and the eventual stay application.

672 It is my view not in the interests of justice that they be ventilated in this application as well. No finding that I might make will impact on the criminal trial. If I were to attempt to make findings of fact on the abuse of process claim, this would open up the question of whether further and inconsistent findings might be made at later hearings, or indeed at trial, when all of the evidence had been presented and all documents analysed in detail.

673 Finally, any disadvantage in the conduct of the criminal trial can be addressed by the orders which I propose to make releasing the documents to Bevnol's legal advisers, rather than to the clients.

674 For all of the above reasons I have decided to refuse the application to call further evidence or to cross-examine Archer.

675 I am troubled by the fact that Archer’s affidavit is relied on by Bevnol and that this course means there will not be any opportunity for De Simone to test the accuracy of that affidavit by cross-examination.

676 However, as I have earlier pointed out, much of the content of the two affidavits he has filed are in the nature of submissions.

677 Where I have relied on his affidavits to establish facts, those facts have not been contradicted by affidavit evidence from De Simone or Seachange. De Simone wishes to cross-examine Archer on matters not referred to in his affidavits, not to test the accuracy of those matters I have relied on in coming to a decision. The cross-examination is likely to be wide-ranging and to attempt to explore issues which are the subject of the criminal trial, in which Archer may be a witness.

678 Thus from all of the above, I conclude that given the circumstances I have described, the interests of justice do not require Archer to be called for cross-examination or witnesses to be called on the abuse of process claim.

Conclusion

679 I have concluded that the matters relied on by De Simone and Seachange to establish that the issue of the summonses was an abuse of process have not been made out on the material presently before me.

680 In coming to this conclusion, I apply the *Briginshaw* test. These are serious allegations, the collusion suggested is inherently unlikely, and a finding that the matters were true would virtually amount to a finding of criminal conduct by the parties named.

681 In *Yunghanns*, Warren J considered whether the evidence before her in that case established that the respondents had engaged in conduct of an illegal, dishonest, or improper purpose, rendering documents otherwise privileged available for inspection.

682 She observed that the allegations were of a "serious and odious nature" and thus the standard of proof of the allegations needed to be higher than would otherwise be the case. At paragraph 43 of the judgment she referred to various High Court authorities and concluded from them that -

> "it is not sufficient to overcome or displace the privilege by merely making allegations; on the other hand it is not necessary to fully prove the allegations."

683 She adopted the description of Brennan C J in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) HCA3 at 514 that there has to be something to "give colour to the charge", a "prima facie case" that the communication is made for an ulterior purpose.

684 Here the documents received in response to the summonses appear overwhelmingly relevant to the proceeding. It seems unlikely that parties would conspire to attempt to obtain documents on subpoena for the police when the police already possess highly effective powers to issue a warrant. And of course that power has been exercised in this case.

685 Thus, I am not satisfied that a prima facie case has been established that the summonses were issued for an improper purpose, or that the sequence of events alleged "gives colour" to the charges made.

686 However, even had I been satisfied of the accuracy of those allegations, I do not consider that the summonses should be set aside or Bevnol be refused access to inspection of the documents.

687 In deciding whether a summons should be set aside as an abuse of process, this Tribunal is called upon to exercise its discretion having regard to all of the circumstances before it.

688 Even had this application been made in criminal proceedings, it would have not been axiomatic that evidence illegally obtained would be excluded.

689 In *Aon* , describing a history of delay in the case before the Court, French CJ said this:

> "The history of these proceedings reveals an unduly permissive approach at both trial and appellate level to an application which was made late in the day, was inadequately explained, necessitated the vacation or adjournment of the date set down for trial, and raised new claims not previously agitated apparently because of a tactical decision not to do so. In such circumstances, the party making the application bears a heavy burden to show why, under a proper reading of the applicable rules of court, leave should be granted."

690 This description bears an uncanny similarity to many of the issues facing this Tribunal in case management of this proceeding.

691 The Chief Justice went on to say:

> "Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the Court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation and adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system. Given its nature, the circumstances in which it was sought, and the lack of a satisfactory explanation for seeking it, the amendment to ANU's statement of claim should not have been allowed."

692 There are of course some clear differences between the facts set out in the above passage and the facts facing me. However in this case there has already been a multiplicity of applications which have been in the nature of preliminary skirmishes designed to gain tactical advantages, rather than to see the case prepared for a final hearing.

693 The interests of justice require this proceeding to be prepared for trial without any further delay, and with an open exchange of all relevant documents.

694 I will therefore make orders which are designed to that end.

695 I am unable however to allow access to the documents which are the subject of the stay application. Disclosure of those documents must await the determination of the Charter application and the further stay hearing.

Return of Documents

696 Both Seachange and De Simone have asked for all of the documents produced by Chrapot and Brereton to be returned to them. This is because they say the documents are their property, having been generated by Seachange or De Simone, or having been sent to Chrapot and Brereton as their agents.

697 However, I am not in a position to rule on this request without hearing evidence . In any event I am unable to identify any power available to me to order that these documents be returned as requested. The obligation of the Tribunal is to hold the documents pending the conclusion of this proceeding. At the conclusion of the proceeding, in the normal course, the documents would be returned to the person who had provided them under the summons. They should not be released to either the applicant or the respondent. My determination concerns whether or not they should be inspected by the respondent, not whether or not they should be released to it.

698 Furthermore the documents all appear to be computer generated copies and not originals. I expect that Seachange and De Simone already have copies of all of these documents. If they have not, or if they wish to have further copies, then arrangements can be made for these documents to be photocopied, so there can be no possible disadvantage in the documents remaining in the custody of the Tribunal.

Her Honour Judge Harbison
Vice President