

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## DIVISION

## LIST

VCAT REFERENCE NO: D702/2008  
AND D705/2008

## CATCHWORDS

Discovery – adequacy – further discovery of in excess of 4000 documents – cost of photocopying discovered documents

<b>APPLICANT/RESPONDENT TO CROSS CLAIM</b>	Shetland Nominees Pty Ltd (ACN 005 352 698) t/as Choice Cabinets
<b>RESPONDENT/APPLICANT BY CROSS CLAIM</b>	Glennvill Pty Ltd (ACN 007 034 451)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C Aird
<b>HEARING TYPE</b>	Directions hearing
<b>DATE OF HEARING</b>	7 October 2009
<b>DATE OF ORDER</b>	13 October 2009
<b>CITATION</b>	Shetland Nominees Pty Ltd tas Choice Cabinets v Glennvill Pty Ltd (Domestic Building) [2009] VCAT 2192

## ORDER

- 1 Declare the agreed rate for providing photocopies of discovered documents, other than those which fall into a special category, is \$0.30 per page plus GST.
- 2 Declare the \$1.10 per page charged for photocopying by Kalus Kenny, Glennvill's solicitors, in its tax invoice dated 1 October 2009, is excessive, and direct Kalus Kenny to withdraw it and re-issue such tax invoice at the rate of \$0.30 per page plus GST.
- 3 Liberty to apply until 4:00PM on 19 October 2009, including to apply by consent in writing for the proceeding to be referred to a further compulsory conference.
- 4 Costs reserved – liberty to apply.

**DEPUTY PRESIDENT C AIRD**

**APPEARANCES:**

For Applicant

Mr J Kenny, solicitor

For Respondents

Mr D Cain, solicitor

## REASONS

- 1 In September 2006 the applicant, Choice Cabinets ('Choice'), was engaged by Glenvill as a cabinetry and joinery sub-contractor for the 'Silverwater Project' – a 32 unit development being constructed by Glenvill at San Remo. There was a limited scope of works and the agreed price was \$260,700. In April 2008 Choice commenced proceedings in the Civil Claims List ('the CCL') seeking payment of the sum of \$194,700 which it claims is outstanding under the contract.
- 2 A counterclaim was subsequently issued by Glenvill, in July 2008, alleging it was a term of the agreement that Choice would pay it \$179 per day by way of liquidated damages if the works were late and that it was entitled to liquidated damages of \$293,684. After setting off the amount claimed by Choice its claim was \$83,379. The proceedings were subsequently transferred to the Domestic Building List under rule 2.05 of the *Victorian Civil and Administrative Tribunal Rules 1998*.
- 3 After a number of interlocutory steps the proceedings were listed for hearing, commencing on 13 July 2009, with an estimated hearing time of 6 days. On the first day of the hearing, Glenvill sought leave to amend its claim. The amendment was significant. Up until that time it had claimed it was entitled to liquidated damages. Under its amended Points of Claim Glenvill claims it is entitled to loss and damage by reason of its obligation to pay the head contractor liquidated damages. In the particulars subjoined to paragraph 15C of the amended Points of Claim it states that it was liable to the head contractor for liquidated damages totalling \$2,239,610; that there was an agreement to reduce the amount paid to the head contractor for liquidated damages to \$1.6 million of which, it says, \$293,684 '*was in respect of and arose from the delays caused by the applicant*'.
- 4 Discovery has been issue since the commencement of this proceeding. Prior to the adjourned hearing each party had filed a list of documents and further supplementary lists. The 'last' supplementary list filed by Choice was dated 26 June 2009 which took its total number of discovered documents to 131. The 'last' supplementary list filed by Glenvill on 1 July 2009 took the total number of its discovered documents to 184.
- 5 When leave was granted to Glenvill to amend its claim, and the hearing adjourned to 26 October 2009, the applicant was also directed to file and serve a further list of documents. In its further list of documents, dated 17 August 2009, Glenvill discovers a further 3840 documents. Not surprisingly, Choice says the volume of discovered documents apparently came as a complete surprise. Although one might have expected a large volume of documents to be relevant to its claim for delay whether for liquidated damages, or for loss and damage occasioned by it having to pay liquidated damages to the head contractor, as noted above, up until the amendment of its Points of Claim, Glenvill had only discovered 184 documents.

- 6 For various reasons, which are not relevant here, the tribunal listed the proceedings for a compliance hearing on 2 October 2009 when, as foreshadowed in earlier correspondence, Choice made application for further discovery and indicated it wished to challenge Glenvill's claim for privilege over certain documents. Orders were made for the filing and service of submissions by both parties and these issues set down for hearing on 7 October 2009.
- 7 The parties have filed lengthy submissions. During the directions hearing I was advised the privilege issue had been resolved. Mr Kenny, solicitor appeared on behalf of Glenvill with Ms Fahey, the solicitor who it appears (from the correspondence which has been filed) has the day to day management of the file. Choice was represented by Mr Cain, solicitor.

### **Discovery and Glenvill's further list of documents**

- 8 The order made by the tribunal on 13 July 2009 was quite specific. It required Glenvill to file a further list of documents *'listing any further discoverable documents relating to the proceeding as amended'*. (emphasis added). In other words it required discovery of any additional documents relating to the claim for loss and damage which Glenvill claims it has suffered by reason of having pay liquidated damages to the head contractor. Although parties have a general obligation to make continuing discovery as further relevant documents are identified, further general discovery was not ordered.
- 9 Although an additional 3840 documents have been discovered, Mr Cain told me that on inspection, after allowing for the bundling of some documents, he found the actual number of documents discovered by Glenvill is in the order of 4200. Despite what he says is the usual convention between solicitors, the documents have not been discovered in categories. Rather they are simply listed in chronological order in 16 lever arch folders (although in their submissions Glenvill say the further discovery ran to an additional 24 volumes of documents). Mr Cain said that hundreds of the discovered documents comprise emails that refer to attachments and enclosures which do not appear to have been discovered, or if they have been, are impossible to identify and locate. Further, he contends that a number of documents have still not been discovered, including all Extension of Time Claims ('EOT's'), the signed statutory declarations, or the documents about the negotiation of the lesser amount payable for liquidated damages.
- 10 Glenvill disputes any suggestion that the further list of documents includes hundreds of emails which refer to attachments and enclosures noting that Annexure 'H' lists 69 documents. I am unable, on the material before me, to make any finding about this noting that in their email of 24 September 2009 Choice's solicitors list 127 documents which they say do not include the 'attachments' and 'enclosures' referred to in them.

- 11 On 24 September 2009 Choice sought copies of a number of the discovered documents and requested full discovery of the ‘enclosures’ and ‘attachments’ referred to in a number of documents which it listed. An annotated list of those documents accompanies the submissions filed in support of this application (Annexure ‘H’).
- 12 Until this application was made, attempts by Choice to obtain clarification and copies of the attachments have proved difficult. For instance, in their letter of 1 October 2009, Glenvill’s solicitors assert:

...

**Request for enclosures and attachments**

In relation to your request for discovery of attachments to emails. Each attachment has been discovered, and were in the documents that you inspected on the 23 September 2009. (sic)

...

**Critical Path documents and Extension of Time claims**

Our client has discovered all such documents in its possession, power and control. These documents are also available for your inspection. It is not our obligation to direct you to which documents are which.

Whilst that may well be the case, where documents are referred to in correspondence or an email as an attachment or enclosure they form part of that correspondence or email, and should be discovered with it. Mr Kenny, said that the further list of documents had been prepared from a disc provided to his firm by Glenvill. He said his instructions were that the project documents had been archived and it had been difficult to identify which documents were the relevant attachments and enclosures.

- 13 Irrespective of how time consuming the preparation of the further list of documents might have been, and although Glenvill says the additional discovery took four members of its solicitors staff, 310 hours to collate, print and sort the material into chronological order, and prepare the further list of documents at a cost of \$57,240<sup>1</sup>, the responsibility to carry out this process rests with the person who has the obligation to discover the documents: Glenvill. Choice is not required to second-guess and try to locate in 16 volumes of documents those which it thinks might be the attachments and enclosures referred to in the listed correspondence.
- 14 At paragraph 46 of its submissions in defence of this application filed on 7 October 2009, Glenvill sets out a table of documents in which it identifies a number of documents referable to the following categories: Extensions of Time, Notice of Delay and Variation Orders; Statutory Declarations; Critical path diagrams/programs.
- 15 At paragraph 26 of its submissions dated 7 October 2009 Glenvill refers to annexure ‘B’ prepared in response to the annotated list prepared by Choice

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<sup>1</sup> Submissions - 7 October 2009 [18]

(annexure ‘H’ of Choice’s submission). Whilst helpful, it would have been of more assistance to Choice’s solicitors and the tribunal if this has been prepared as a responsive schedule as otherwise understanding and reconciling the two tables is a time consuming and complex task.

- 16 However, a brief consideration of the response at Annexure ‘B’ reveals the difficulties in identifying the attachments, if one can be satisfied they are the attachments and enclosures referred to in the discovered correspondence. To take a couple of examples (using the parties’ headings):

<b>Doc</b>	<b>Description</b>	<b>Choice “Attachment referred to (but not contained)”</b>	<b>Glennvill “If discovered, number of document”</b>
900	Email from Payne to Heinnen and Heinnen in reply	Stage 1 program	All Glennvill work scheduled as programs are discovered at 3471
939	Gianforte to Moneir	Silverwater order summaries x 16 individual attachments	1166
1688	Email from Leonida to Spalas	“fax received”	3466

- 17 Surprisingly, having been ordered on 13 July 2009 to file a further list of documents ‘relating to the proceeding as amended’ Glennvill’s response in relation to a number of the attachments sought by Choice is ‘Document not discoverable’<sup>2</sup>, or under the heading ‘Submissions’ objection is raised as to the relevance of the attachment<sup>3</sup>, and in at least one instance, privilege is claimed over the attachment.<sup>4</sup> As Sheppard J said in *EI Du Pont De Nemours & Co v Cmr of Patents* (1987) 16 FCR 423 at 425–6; 83 ALR 499 at 502-3:

There is another side to the coin. Just as it is important for solicitors to make sure that there is full disclosure of documents on discovery, so it is their obligation also to ensure that documents which bear no relevance whatsoever to the issues in question are not produced. If they are, the task of those inspecting them becomes a very difficult one. It is understandable that a party obliged to discover may err on the side of caution and there can be no question but there will be cases where different minds will take different views about whether a document is relevant or not. In those cases it is no doubt wise to take the cautious approach of including the document in the list. But in the light of the number of documents which there must be in this case, a solicitor concerned to determine which documents should be produced and which not, must be careful to ensure that he does not take the easy course of listing everything available and leaving to others the

<sup>2</sup> For example: documents 1070, 1332, 1346, 1521, 1620, 1630 (this is not an exhaustive list)

<sup>3</sup> For example: documents 807, 939, 1070, 1332, 1346 (this is not an exhaustive list)

<sup>4</sup> Document 1458

problem of working out what is relevant. If he produces too much, his sin of commission will not be as great as his sin of omission where he fails to produce a relevant document, but nevertheless his inclusion of irrelevant material is not conducive to the proper administration of justice. (emphasis added)

- 18 It seems to me that whilst criticising Choice for its attempt to obtain relevant discovery with attachments and enclosures being clearly identifiable and locatable, and contending Choice has engaged in what it describes as *'tactic to harass Glenvill and create costs for it'*<sup>5</sup>, it is Glenvill which has obfuscated the process and created unreasonable and unnecessary difficulties for Choice.
- 19 In its submissions Glenvill refers to the recommendations in the VLRD *Civil Justice Review: Report* (2009) at 466 where it proposes that discovery be *'limited to documents which are directly relevant to any issue in dispute'*<sup>6</sup>. Being cognisant of those recommendations and the comments of McKerracher J in *Austral Ships Pty Ltd v Incat Australia Pty Ltd* [2009] FCA 368 at 152 to which Glenvill also referred me, it is difficult to comprehend why it has discovered numerous documents which it now says are irrelevant or not discoverable. The difficulty for Glenvill and its solicitors in obtaining and understanding the electronic archive of the project documents is not a good enough excuse.
- 20 Choice contends that Glenvill has added to the general confusion in discovering multiple duplicate copies of the same document, in particular EOT claims 1 to 4, and 101 to 107. Mr Cain has produced a table headed 'Superfluous documents referred to in respondent's further supplementary list of documents in response to applicant's request for variations'. There might well be a plausible explanation for this.
- 21 As two hours had been allocated to the hearing of this application, I suggested to Mr Cain that he carry out a further inspection of the documents identified in that table to see if this satisfied his concerns. However, I note the documents referred to in paragraph 46 are scattered throughout the discovered documents. He was not confident that his concerns would be satisfied by further inspection, and upon considering Annexure 'B' to Glenvill's submissions it might well be that there are further issues Choice may wish to ventilate in relation to the discovery issues.
- 22 It is most unfortunate when considerable time and expense is incurred in interlocutory arguments about discovery. Discovery obligations should be well understood. Discovery in the tribunal is generally less formal than that required in the courts, although in appropriate cases discovery according to the rules of civil procedure may be ordered. In this case it is clear that all documents relevant to Glenvill's delay claim are discoverable including all EOT's, programmes, critical path indices and the like, relevant to the entire

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<sup>5</sup> Submissions - 7 October 2009 [22]

<sup>6</sup> Recommendation 80 at p474

project, particularly in circumstances where Glenvill has amended its claim to one for loss and damage which it says has been occasioned by its obligation to pay the head contractor liquidated damages.

- 23 By reference to the particulars to paragraph 15 Glenvill says the total claim by the head contractor for liquidated damages was \$2,239,610 which by agreement was reduced to \$1.6m of which Glenvill asserts \$293,684 relates to delays caused by Choice. The basis of the claim for \$2,239,610 is relevant as is the calculation of the reduction to \$1.6 million. As Mr Cain properly identified, it is not unusual for there to be concurrent delays on a construction project. Unless they are on the critical path, delay in the completion of specific works are not of themselves conclusive of the actual delay on a project. Therefore, unless and until all relevant documents have been discovered, Choice is not in a position to properly assess its potential liability for liquidated damages.

### **Photocopying charges**

- 24 Choice has requested the tribunal to determine the appropriate photocopying charge for the provision of documents to it from the further list of documents dated 17 August 2009. Mr Cain contends there was an agreement between solicitors that all copies of discovered documents would be provided at the rate of \$0.30 per copy, with the exception of copies of documents he had obtained from the liquidator for the developer, which he had provided to Glenvill's solicitors at the rate of \$1.10 per page. He relies on the Tax Invoices received from Glenvill's solicitors dated 19 June 2009 and 2 July 2009 where \$0.30 per page has been charged for photocopying discovered documents.
- 25 Following his first inspection of the further discovered documents, Mr Cain requested copies of most of them. In his facsimile of 24 September 2009 he confirmed:

As has been the case throughout the proceeding, my firm undertakes to pay your client's reasonable photocopying costs based on the previously agreed commercial rate for copying.

The urgency of the requests made in this correspondence cannot be overstated and I trust that all the copies of the discovered documents requested, plus confirmation that all additional documents comprising either "attachments" or "enclosures" are similarly discovered, is done by no later than **4:00pm Wednesday 3 October 2009** [sic, 3 October 2009 was a Saturday].

- 26 Under cover of a facsimiled letter of 1 October 2009 Glenvill's solicitors enclosed their tax invoice for copying 4122 pages @ \$1.10 per page – \$4,534.20 plus GST: \$4,987.62. This was the first indication that they would be charging \$1.10 per page for photocopying.
- 27 Glenvill's solicitors deny there was ever any agreement for photocopying discovered documents for \$0.30 per page and they rely on the \$1.10 per

page charged by Choice's solicitors for the provision of documents in July 2009. These documents are those which Choice obtained from the liquidator of the developer. As they were original documents, or the only copy the liquidator had, Mr Cain had been required to give an undertaking that it would not allow any photocopying to be carried out by a third party. They were requested by email by Glenvill's solicitors on 2 July 2009 when Ms Fahey emailed Mr Cain:

Can you please provide our office, as a matter of urgency, full copies of all documents discovered by your client today.

We undertake to pay your costs for this process at the rate of \$0.30 per page plus GST, being the amount that we charged your firm.

28 On 2 July 2009 Mr Cain advised Choice's solicitors by email:

There are many hundreds of pages of documents. The rate you suggested is not appropriate, as I will need to physically copy many of the documents due to their commercial sensitivity, rather than outsourcing.

I propose \$1.10 per page (which is still a fair discount considering the main hours required to performed to make the copies) (sic)

...

29 On 7 July 2009 Ms Fahey of Glenvill's solicitors responded by email. Relevantly she said:

A great deal of documents we have provided your firm have been provided at no cost to you – as they have been scanned and emailed to you in an inordinately timely fashion on each occasion, or copied at a rate of \$0.30 per page. For your client to now impose a cost of \$1.10 for no conceivable or justifiable reason lacks both a professional and commercial approach to this matter.

30 Despite this protestation, \$1.10 was charged for these documents.

31 It is unfortunate that the solicitors for the parties have been unable to resolve this issue between themselves and that it has been necessary for this application to be made. In *Anglo-Italian Holdings Pty Ltd v Varallo* [2005] VSCA 257 when considering whether the County Court's taxing officer's discretion as to quantum was reviewable, the Court of Appeal held (by reference to the headnote at 258):

(3) The taxing officer's discretion had miscarried because he appeared simply to have applied the scale rate in a formulaic manner without considering its appropriateness to the particular circumstances of the cases thereby fettering his discretion or failing to exercise it at all (emphasis added).

32 The factors to be considered were set out by Hollingworth AJA at [34] where she said:

What will be reasonable or proper will obviously vary from case to case. The exercise of the discretion whether or not to allow copying at

scale rate should not be approached in a formulaic manner. A non-exhaustive list of factors which may be relevant in a particular case include:

- (a) The nature of the documents being copied;
- (b) The size and number of pages to be copied;
- (c) The number of copies to be made;
- (d) How quickly the copying is required;
- (e) For whom the copies are being made;
- (f) Whether the documents have any particular commercial or personal sensitivity;
- (g) The quantum in dispute in the proceeding.

33 I find the solicitors initially agreed that photocopying of discovered documents would be at the rate of \$0.30 per page plus GST. When considering each of these factors, I am satisfied the charge of \$1.10 per copy for the commercially sensitive documents obtained by Choice from the liquidator was fair and reasonable. Although Choice requested that the further discovered documents be provided quickly – they were requested on 24 September and were available for collection on 1 October 2009, I am not persuaded the copying could not have been outsourced to a third party (for instance Kwik Kopy which had previously been engaged by Glenvill’s solicitors to copy discovered documents) at the previously agreed rate of \$0.30, particularly noting the large number of documents which were to be copied. Even if I am wrong, and the rate of \$0.30 was not agreed, when considering each of the above factors and, in particular, the large number of documents to be copied, and the quantum of the amounts in dispute which must be piling into insignificance when the interlocutory costs are considered, I find it is a reasonable and appropriate rate. I will so declare that the photocopying rate for discovered documents other than those which are commercially sensitive, is \$0.30 per page.

34 I note the hearing is due to commence on 26 October 2009. At the directions hearing on 7 October 2009 both parties indicated they were keen to preserve the hearing date, although a possible application for an adjournment was foreshadowed by Mr Cain if Choice decides to obtain an expert report in response to that filed and served by Glenvill on 23 September 2009 in relation to the quantum of its claim for loss and damage. As I mentioned at the directions hearing (and as ordered by the tribunal on 2 October 2009), any application for an adjournment should be made promptly. Noting the history of this proceeding and the significant costs which must have been incurred by the parties, I will also grant them liberty to apply by consent for a further compulsory conference to take place during the time allocated for the hearing.

- 35 I will reserve the question of costs of this application with liberty to apply but note it is highly unlikely it could be heard prior to the commencement of the hearing.

**EPUTY PRESIDENT C AIRD**