

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO: D702/2008  
AND D705/2008

**CATCHWORDS**

Costs of applications for further discovery – ss78 and 109 of the *Victorian Civil and Administrative Tribunal Act 1998* – party/party, solicitor-client or indemnity costs – relevant considerations

<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>	Glenvill Pty Ltd (ACN 007 034 451)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C Aird
<b>HEARING TYPE</b>	Costs hearing
<b>DATE OF HEARING</b>	15 December 2009
<b>DATE OF ORDER</b>	18 February 2010
<b>CITATION</b>	Shetland Nominees Pty Ltd trading as Choice Cabinets v Glenvill Pty Ltd (Domestic Building) [2010] VCAT 179

**ORDER**

1. Glenvill must pay Choice's party/party costs of the directions hearing on 7 October 2009 including its application for further discovery and the preparation of the initial supporting material.
2. Glenvill must pay Choice's costs of and incidental to the directions hearing on 21 October 2009, including the renewal of the application, and the preparation of the further supporting material on a solicitor-client basis.
3. Glenvill must pay Choice's costs of the further inspection of its discovered documents following the directions hearing on 7 October 2009 on a solicitor-client basis.
4. Glenvill must pay Choice's costs thrown away (if any) occasioned by the adjournment of the hearing scheduled to commence on 26 October 2009. I certify for counsel for one day in the sum of \$3,300. Such costs are otherwise to be paid on a party/party basis.
5. Where the parties are unable to agree the amount of costs to be paid, I refer the assessment of such costs to the Victorian Costs Court on County Court Scale 'D'.

**DEPUTY PRESIDENT C AIRD**

**APPEARANCES:**

For Applicant

Mr D Cain, solicitor

For Respondents

Mr M Robins of Counsel

## REASONS

- 1 Choice Cabinets ('Choice') was engaged by Glenvill as a cabinetry and joinery sub-contractor for the 'Silverwater Project' – a 32 unit development constructed by Glenvill at San Remo. In the proceeding where it is the applicant, Choice sought payment of the balance it said was outstanding under the contract, and in its proceeding, Glenvill claimed loss and damage arising from alleged delays by Choice in performance of its works. Discovery by Glenvill was an ongoing issue during the proceeding, which settled shortly prior to the hearing which was scheduled to commence on 1 February this year. The settlement is subject to delivery of my reserved decision on Choice's application for costs of and incidental to its applications for further discovery<sup>1</sup> and the adjournment of the hearing from 26 October 2009 to 1 February 2010.
- 2 In support of its application for costs, which it seeks on an indemnity basis, Choice relies on ss78 and 109 of the *Victorian Civil and Administrative Tribunal Act 1998*. Section 78(2)(c) provides the tribunal may make an order for costs under s109 if it believes a party has conducted the proceeding in a way which has unnecessarily disadvantaged the other party. However, s109(2) provides the tribunal can only make an order for costs if it is satisfied it is fair to do so. In *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J set out the approach to be taken by the Tribunal when considering an application for costs:
  - i. The prima facie rule is that each party should bear their own costs of the proceeding.
  - ii. The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so having regard to the matters stated in s109(3). That is a finding essential to making an order. (emphasis added)
- 3 I am satisfied it is fair to make an order for costs having regard to the matters set out in s78(1) and s109(3). For reasons which I will discuss, I am not persuaded that it is fair that Glenvill be ordered to pay all of the costs claimed by Choice, and there will only be a partial order for solicitor-client costs.
- 4 There can be no doubt that Glenvill conducted this proceeding in a way which unnecessarily disadvantaged Choice. The hearing was first scheduled to commence on 13 July 2009. At the commencement of that hearing Glenvill sought and obtained leave to amend its claim and consequently the hearing was adjourned. Orders were also made requiring Glenvill to file and serve a further list of documents '*listing any further discoverable documents relating to the proceeding as amended*'.

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<sup>1</sup> *Shetland Nominees Pty Ltd t/as Choice Cabinets v Glenvill Pty Ltd* [2009] VCAT 2192 and *Shetland Nominees Pty Ltd trading as Choice Cabinets v Glenvill Pty Ltd* [2009] VCAT 2274

## The first discovery application

- 5 The first application for further discovery was made during a compliance hearing on 2 October 2009 when Choice also 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 for two hours.
- 6 At the directions hearing on 7 October, where Choice was represented by Mr Cain, solicitor, and Glenvill was represented by Mr Kenny solicitor with Ms Fahey, the solicitor who has the day to day management of the file, I was advised the privilege issue had been resolved. After hearing from the parties, I adjourned the application part-heard with liberty, to Choice, to renew the application after carrying out a further inspection of Glenvill's discovered documents, to ascertain whether its concerns had been satisfied by the material filed by Glenvill in response to Choice's application.
- 7 Up until the commencement of the hearing, in July 2009, Glenvill had discovered 131 documents. In its further list of documents Glenvill discovered a further 3840. The further discovered documents comprised 24 lever arch volumes. The documents were filed in chronological order, not in categories, making inspection and cross-referencing difficult for Choice's legal advisors. As I said in my first decision:

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. [12]

and

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>2</sup>, it is Glenvill which has obfuscated the process and created unreasonable and unnecessary difficulties for Choice. [18]

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<sup>2</sup> Submissions - 7 October 2009 [22]

- 8 Therefore, the first application was necessitated by Glenvill's persistent failure and seeming refusal to understand and comply with its discovery obligations.
- 9 At the time of the first discovery application, I was also requested by Choice to determine the appropriate photocopying charge for the provision of documents to it from the further list of documents dated 17 August 2009. As I noted in my earlier reasons, it was unfortunate that agreement had not been reached necessitating this application.

### **The second discovery application**

- 10 After carrying out a further inspection of Glenvill's discovered documents, Mr Cain wrote to the tribunal on 12 October 2009 requesting its part-heard application be listed for hearing. As the hearing was scheduled to commence on 26 October, Choice's part-heard application was set down for hearing on 21 October. On 15 October, despite assuring me on 7 October that all relevant documents had been discovered, Glenvill filed a further list of documents after checking with its former solicitor whether it had any further documents.
- 11 At the directions hearing on 21 October, Choice was once again represented by Mr Cain, solicitor, and Mr Robins of counsel appeared on behalf of Glenvill. Once again, both parties filed lengthy submissions accompanied by schedules and tables. In my second reasons I expressed concern about the number of documents which had been discovered by Glenvill which were clearly not relevant, or over which privilege was now claimed. As I noted in those reasons:

There are a number of documents in Glenvill's Annexure 'K' for which under the heading 'If discovered, number of document' appears 'Document not discoverable'. In most instances, a copy of the document is enclosed in the bundle of documents following, but this begs the question as to how they (or their covering email) came to be included in the further list of documents in August, particularly given the specificity of the orders made by the tribunal on 13 July. Documents, which if they had not been discovered, would not have been inspected and thereby saved both parties significant time and cost. [18]

and

...one can't help but wonder how these documents came to be included in the further list of documents in August. Whatever the explanation might be (and one has not been proffered), it is clear that this has created significant confusion.

- 12 Glenvill's continued reluctance to comply with the tribunal's orders and its discovery obligations was demonstrated by its facsimile to the tribunal dated 5 November 2009 seeking clarification of my orders of 5 November 2009 that:

1. By 27 November 2009 Glenvill must file and serve an affidavit of documents, sworn by a proper officer, deposing to all documents in its power possession or control which relate to the proceedings, as amended, consistent with the orders of the tribunal made on 17 July 2009 and having regard to the paragraphs 25 and 26 of the Reasons for these orders.

viz:

24. In the interests of progressing this matter as expeditiously as possible, and being mindful of the tribunal's obligations under ss97 and 98 of the VCAT Act, and noting that on 21 October I ordered that Glenvill file a further affidavit in relation to the EOT's, I consider it appropriate to order Glenvill to make specific discovery as required by the orders of 17 July 2009 in the form of an affidavit sworn by a proper officer of Glenvill. Despite the protestations on behalf of Glenvill, that any further orders for discovery would be unduly onerous, its attempts to date have been such that I do not have any confidence that any further lists of documents will be reliably accurate unless they are in the form of an affidavit.
25. Noting the extensive review which has been carried out by Glenvill's lawyers of the material on disc, and the further documents recently obtained from its former solicitors, this should not be too difficult, accepting of course that the un-numbered "enclosures" and "attachments" following Glenvill's Annexure 'K' correspond with the discovered document number, as asserted. Much of the work in marrying up the "enclosures" and "attachments" with the relevant email or fax has now been carried out (assuming that Glenvill's Annexure "K" is accurate). So as to avoid any unnecessary renumbering of the primary documents it would seem appropriate for the existing document numbers to be retained. An attachment or enclosure should maintain its existing document number and be listed as such, with an extra column denoting the document number to which it is an attachment or enclosure, but for the purposes of any inspection should be filed behind the document to which it is an attachment or enclosure. Two copies are not required to be included in the volumes of discovered documents provided the cross referencing is clear and complete. Where draft and final documents are discovered these should be clearly identified by the inclusion of the word 'draft' or 'final'. If there is more than one draft, then this should also be clear.

### **Should there be an order for costs of the applications for further discovery?**

- 13 I am satisfied it is fair that Glenvill pay Choice's costs of and incidental to its applications for further discovery heard on 7 and 21 October. The applications were made in circumstances where Glenvill filed and served a further list of documents discovering approximately 4000 documents, a number of which it claimed privilege over, and a significant proportion of which do not appear to have been relevant to the issues raised by its

amended points of claim. This has necessarily caused Choice to incur significant costs in seeking to have Glenvill comply with its discovery obligations.

- 14 Having regard to the matters set out in s78(1) and s109(3) of the VCAT Act I am satisfied it is appropriate to exercise the tribunal's discretion and order Glenvill to pay Choice's costs of and incidental to its applications for further discovery. Choice seeks its costs on an indemnity basis and relies on its solicitor's facsimile to Glenvill's solicitors dated 12 October 2009 in which it gave notice to Glenvill it would be seeking costs on an indemnity basis. This is, of course, but one of the factors to be taken into account when considering the appropriate orders to be made.
- 15 Mr Cain also referred me to a number of authorities<sup>3</sup>. However, those authorities, whilst relevant and indicative of the approach the courts might take where costs generally follow the event, are not relevant in the context of s109. As Nettle JA said in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165:

... where an order for costs is made in favour of the successful party in domestic building list proceeding, the costs should ordinarily be assessed on a party/party basis ... Of course there may be occasions when it is appropriate to award costs in favour of the successful client in domestic building proceedings on an indemnity basis. Those occasions would be exceptional ...' [91-92]
- 16 Although Glenvill's discovery of the further documents was less than adequate I consider it fair that it should pay Choice's costs of the directions hearing on 7 October 2009 including its application for further discovery and the preparation of the initial supporting material (including the submissions and all material relied on at that directions hearing) on a party/party basis. There is nothing so exceptional in its conduct at that time to warrant an order for indemnity or solicitor-client costs.
- 17 Having regard to Glenvill's continuing failure to comply with its discovery obligations after my first decision, I am satisfied it should pay Choice's costs of and incidental to the directions hearing on 21 October 2009, including the renewal of the application, and the preparation of the further submission and material, on a solicitor-client basis. In this regard I refer the parties to my second decision where I discuss at length my concerns about Glenvill's understanding and failure to comply with its discovery obligations.
- 18 Glenvill must pay Choice's costs of the further inspection of its discovered documents following the directions hearing on 7 October 2009 on a solicitor-client basis. This was a second inspection of the documents carried out after I adjourned Choice's first application for further discovery, part-heard, to enable Choice to carry out a further inspection to ascertain

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<sup>3</sup> *Colgate Palmolive Pty Ltd v Cussons Ltd* (1993) 46 FCR 225,  
*Ugly Tribe Co Pty Ltd v Sikola* [VSC] 189

whether its concerns had been satisfied by the material filed by Glenvill in response to Choice's application.

**Costs of the adjourned hearing**

- 19 Choice also seeks an order that Glenvill pay its costs thrown away occasioned by the adjournment of the hearing listed for 26 October 2009. The hearing had previously been adjourned in July 2009 when Glenvill sought leave at the commencement of the hearing to amend its claim. The further adjournment was a direct result of Glenvill's failure to comply with the tribunal's orders of 13 July 2009 to make limited further discovery, and its continuing failure to comply with its discovery obligations. Having regard to the matters set out in s109(3) I am persuaded it is appropriate to exercise the tribunal's discretion under s109(2) and order Glenvill to pay Choice's costs thrown away occasioned by the second adjournment of the hearing.
- 20 Choice has asked that I certify for counsel for one day in the sum of \$3,300 which, in the circumstances of this proceeding, I consider appropriate. Otherwise the costs should be assessed on a party/party basis on County Court Scale 'D'.

**DEPUTY PRESIDENT C. AIRD**