

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO: D702/2008
AND D705/2008

CATCHWORDS

Application for further discovery – adequacy of further discovery and provision of documents – difficulty of identifying and locating ‘enclosures’ and ‘attachments’ to emails

APPLICANT/RESPONDENT TO CROSS CLAIM	Shetland Nominees Pty Ltd (ACN 005 352 698) t/as Choice Cabinets
RESPONDENT/APPLICANT BY CROSS CLAIM	Glenvill Pty Ltd (ACN 007 034 451)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	21 October 2009
DATE OF ORDER	5 November 2009
CITATION	Shetland Nominees Pty Ltd trading as Choice Cabinets v Glenvill Pty Ltd (Domestic Building) [2009] VCAT 2274

ORDER

- 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.
- 2 **These proceedings are referred to a further directions hearing before Deputy President Aird on 15 December 2009 commencing at 2.15 pm at 55 King Street Melbourne – allow half a day at which time the parties will be heard on the question of costs.**
- 3 Costs reserved – liberty to apply.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant

Mr M Robins of Counsel

For Respondents

Mr D Cain, solicitor

REASONS

- 18 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. Choice claims payment of \$194,700 which it says is outstanding under the contract, and Glenvill claims it has suffered loss and damage by reason of it having to pay the head contractor liquidated damages of \$1.6m and seeks payment of \$293,684 which it claims *'was in respect of and arose from the delays caused by the applicant'*.
- 4 Discovery has been an ongoing issue. Choice made application for further discovery, and for the tribunal to determine whether there was an agreed rate for photocopying discovered documents, which I heard on 7 October 2009. The application for further discovery was adjourned 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. On 13 October I made orders which included a declaration that *'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'*. In the Reasons accompanying those orders I made various observations about the adequacy of Glenvill's discovery.
- 5 After carrying out the further inspection of Glenvill's discovered documents, Mr Cain, solicitor for Choice, wrote to the tribunal on 12 October requesting its part-heard application be listed for further hearing, and advising that further submissions would be filed. This request did not come to my attention until after my decision of 13 October had been faxed to the parties.
- 6 As the hearing was due to commence on 26 October, Choice's part-heard application was listed for hearing on 21 October, the first available date. At this directions hearing Mr Cain, solicitor, once again appeared on behalf of Choice, and Glenvill was represented by Mr Robins of Counsel.
- 7 Notwithstanding its assurances on 7 October that all relevant documents within its possession, power or control had been discovered, on 13 October Glenvill's solicitors sent a facsimile to Choice's solicitors advising that their client had been in touch with its former solicitors to *'check if that firm had any documents which had not been handed over'* to find that there were additional documents which they had just obtained, and which were relevant and discoverable. In this letter Glenvill's solicitors set out the various categories of documents with no indication as to how many additional documents were to be discovered. A further List of Documents was filed on 15 October in which Glenvill discovered an additional 248 documents.

- 8 Choice filed further submissions on 19 October. On 20 October 2009 Glenvill filed an affidavit by Stephen Bloch, Strategic and Development Manager for Glenvill, in which he deposes that, subject to enquiries of the superintendent, Julian Crow of Slattery, to which Glenvill's solicitors were awaiting a response, all Extension of Time ('EOT') claims have been discovered. Further, that the first four EOT's were numbered 1 to 4 inclusive, and that subsequently there was a change in numbering so that all EOT's for stage 1 would be 101 etc, and for stage 2 would be 201 etc – there were no EOT's numbered 5-100. The EOT's for stage 1 are numbered 101 to 108. Consequent upon this I made the following order:
1. By 6 November 2009, following its enquiries of Julian Crow of Slattery, Glenvill must file and serve a further affidavit of Stephen Bloch deposing to:
 - (i) each and every claim for Extensions of Time now or formerly in Glenvill's power or possession and exhibiting copies of any signed claims for Extensions of Time.
 - (ii) the relevant documents referred to in paragraph 3 of his affidavit dated 20 October 2009 by reference to the relevant document discovery numbers. [notices of delay issued prior to April 2007]

Should further discovery be ordered?

- 9 As I indicated to the parties at the directions hearing, which was attended by representatives of both parties, I am concerned they [or their legal advisors] are becoming distracted by the discovery issues. To recap what I said in my earlier reasons¹:

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. [8]

- 10 Although it appears that Glenvill has made general discovery rather than limited its further discovery, as ordered, it is important that Choice's application be considered in the context of the orders of 13 July, and more importantly the issues raised by Glenvill's amended claim. Whilst Mr Cain may have had some difficulty in identifying specific documents it is clear, from his own evidence, that he has spent a considerable period of time inspecting and re-inspecting the discovered documents. He says that he has spent a further 12 hours and 45 minutes re-inspecting the documents following the directions hearing on 7 October.

¹ *Shetland Nominees Pty Ltd t/as Choice Cabinets v Glenvill Pty Ltd* [2009] VCAT 2192

- 11 I accept that inspection of the discovered documents has not been a simple task. The additional 3840 documents comprise 24 lever arch folders. In the absence of any evidence to the contrary, I accept that there is nothing on the outside of those folders to indicate which numbered documents are in each folder. Although Mr Cain said that he gained some familiarity with what was in each folder during the many hours spent inspecting them, a prudent approach would have been to have otherwise noted that information for his own reference purposes (and perhaps he did).
- 12 Any further orders for discovery can only be appropriate if I am satisfied that there are documents which are relevant to the issues in dispute, and which should therefore have been discovered and have not been, or that the documents which have been discovered cannot properly be identified in context.
- 13 Following his further inspection Mr Cain has prepared detailed submissions which, I understand, were emailed to Glenvill's solicitors on Sunday 18 October and were filed on 19 October. These are accompanied by two Annexures in the form of tables: 'Annexures 'R' and 'T'. Annexure 'T' relates to Choice's concerns about discovery of the EOT's. I anticipate that many of these concerns will be addressed when Mr Bloch files his further affidavit.
- 14 Although I accept that Glenvill is not required to provide a narrative commentary in relation to the EOT's which have been discovered, I do think it is incumbent upon it to identify those which are draft EOT's, and those which are copies of the actual EOT's which were submitted, even if they are unsigned copies.
- 15 Choice's Annexure 'R' is headed 'Table identifying discovered documents that are denoted as including "attachments" or "enclosures", cross referenced to Table B of Glenvill's submissions'. Glenvill's Annexure 'B' had been prepared by Glenvill in response to Choice's Annexure 'H' prepared in support of its initial application [prior to the directions hearing on 7 October]. In my earlier reasons I made the following observations at [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 (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 In preparing Choice's Annexure 'R' where he has cross-referenced the various documents, Mr Cain has identified that many of the documents listed in Glenvill's Annexure 'B' which purport to be copies of 'enclosures' or 'attachments' are not. After he took me to some of those documents I accept this. I did not consider it necessary for him to take me to all of them.

- 17 Glenvill has also prepared lengthy submissions which are accompanied by a number of annexures, including Annexure 'K' which is a table headed 'Table responding to Choice's table identifying discovered documents that are denoted as including "attachments" or "enclosures". It is accompanied by those documents which almost fill a large lever arch file.
- 18 Glenvill's Annexure "K" is a five column table. The columns are variously headed, 'Doc no', 'Description', 'Submissions', 'If discovered, number of document', and 'Document enclosed in bundle of documents'.
- 19 It is helpful to consider an example. In the submissions column for document 1071:

Email refers to attachment of a Memorandum of Understanding.

The reference on the email is "SW_RS – Memorandum of Understanding GLENVILL 11.10.06pdf" which is a date after the date of the email.

A search has been conducted on the disc provided to our firm by the client for document "SW_RS – Memorandum of Understanding GLENVILL 11.10.06pdf" [the attachment identifier] and the entirety of this document is the attachment to that email.

Under the heading 'If discovered, number of document'

1081 is the attachment, the finalised version is at 1094.

The "enclosures" and "attachments" in the bundle of documents following Glenvill's Annexure 'K' are not numbered. Therefore, although it is asserted, in the above example, that document 1081 is the attachment to document 1071, the discovered document numbered 1081 has not been included in the bundle of documents, nor has the discovered document numbered 1094. The document included in the bundle of documents is said to be the 'original' copied from the disc provided by Glenvill to its solicitors, not an exact copy of one of the documents which has previously been discovered. This is reflective of the general approach taken by Glenvill in relation to other documents in its Annexure 'K' and the bundle of documents following.

- 18 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.
- 19 Further, there are some documents where privilege is claimed. For instance document 2195 the following appears in the 'submissions' column:

The email attaches a “without prejudice offer to cap liquidated damages”.

This document is privileged as it is a communication that came into existence for the purpose of the parties negotiating settlement of a dispute, as between the head contractor and Glenvill.

The document is marked without prejudice, which claim is made by the head contractor, and as such, it is a confidential communication, which can not be waived by Glenvill, as they are not making the claim.

This privilege is claimed on the basis of the principles espoused *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280, *Verge v De Vere Holdings Pty Ltd* (2009) 258 ALR at [38]

And document 2768 where the following appears in the ‘submissions’ column:

This document is privileged as it is a communication that came into existence for the purpose of the parties negotiating settlement of a dispute, as between the head contractor and Glenvill, and as part of the engagement of their expert. There are references to discussions with Glenvill’s lawyers.

- 20 Again, 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.
- 21 One of my difficulties in considering this application is that it is nigh on impossible to tell what, if any, relevant documents have still not been discovered. Glenvill did not serve its submission and the accompanying documents until late in the afternoon of 20 October. The parties filed Minutes of Consent Orders before lunch on 20 October agreeing to adjourn the hearing due to commence on 26 October.
- 22 It seems to me that Glenvill’s submission and the supporting documents, which Mr Robins said had been prepared cognisant of my observations in my earlier reasons, were prepared, at least in part, in response to the matters raised and identified in Choice’s submissions which they received on 19 October. Somewhat surprisingly the parties did not apply for an adjournment of this directions hearing. An adjournment would have allowed Glenvill sufficient time to properly check all the material it was filing, in an attempt to avoid the earlier mistakes, and provided Choice with an opportunity to consider the new material.

The orders sought by Choice

- 23 Choice seeks orders that Glenvill make further and better discovery as follows:²

² Choice’s submissions dated 18 October 2009 [65]

- (i) All documents that are denoted as including any “attachment”/”enclosure” and that such document be produced in their entirety. [it is unclear whether this has been fully addressed by Glenvill’s Annexure “K” and its accompanying documents]
- (ii) All original/sworn Statutory Declarations filed with the principal
- (iii) All documents that comprise the “original” claims for EOT’s submitted by Glenvill during the project
- (iv) Glenvill prepare a further list of documents that distinguishes between any “draft” (unsigned/unsent) EOT’s and those EOT’s that were submitted
- (v) Glenvill discover all assessments made by either the Principal or the Superintendent in relation to each and every one of the EOT’s claimed by Glenvill
- (vi) A proper officer of Glenvill swear an affidavit deposing to:
 - i. how many claims for EOT’s Glenvill submitted in the project;
 - ii. the date or dates those particulars were so submitted; and
 - iii. the date or dates the relevant Superintendent assessed those particular claims for EOT.

And where Glenvill is unable to discover a document in its entirety that a proper officer of Glenvill swear an affidavit deposing as to which draft or unsigned copy is the identical document to the one submitted or sworn as the case may be.

- 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.

- 26 Each volume of the discovered documents should be clearly labelled so that the number of the primary documents is noted on the front of the file and on the spine.
- 27 As the hearing has been adjourned until 1 February 2010 I will allow Glenvill three weeks to prepare this affidavit. I will reserve costs with liberty to apply noting that Glenvill has indicated it is applying for its costs following my earlier decision, and foreshadowed a further application for costs. I will list this matter for a further directions hearing at which time I will hear the parties on the question of costs.

DEPUTY PRESIDENT C AIRD