

**CATCHWORDS** Application for third party discovery – s81 of the *Victorian Civil and Administrative Tribunal Act 1998* – relevant considerations.

**ORDER** 1. The Applicant's application for third party discovery pursuant to s81 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.

2. Costs reserved. Liberty to apply. Any application for costs shall be heard at the next directions hearing on 6 February 2007.

**REASONS : DEPUTY PRESIDENT C. AIRD** : Victorian Civil and Administrative Tribunal. Melbourne. 8<sup>th</sup> December 2006

- 1 The Applicant seeks orders pursuant to s81 of the *Victorian Civil and Administrative Tribunal Act 1998* that Concept Hiring Services Pty Ltd, who is not a party to this proceeding, produce to it the following documents:
  - a. copies of all tax invoices issued by Concept to the Respondent (Dura) in relation to the hire of scaffolding in relation to the Project referred to as the 'Hue Boutique Apartments' at 8010 Lord Street, Richmond, Victoria (Project)
  - b. copies of all documents that identify the actual amounts which have been paid by Dura to Concept in relation to the hire of scaffolding on the Project;
  - c. copies of all documents that identify a hire and/or trade discount applicable to the Project and/or to Dura;
  - d. copies of all documents that identify any agreements in respect of scaffold ownership and/or the value of scaffolding used in relation to the Project;
  - e. copies of all documents that identify and reconcile the scaffolding delivered to and returned from the Project; and
  - f. copies of all documents which detail the labour and transport costs incurred in relation to the hire of scaffolding on the Project.
- 2 Although I am informed by Mr Levin, QC who appeared on behalf of the Applicant, that Concept has been advised of this hearing, Concept did not appear, nor was it represented at the hearing, nor has it otherwise responded to this application. In such circumstances, I am urged to make the orders as they are seemingly unopposed by Concept. However, the application is opposed by the Respondent, and having regard to the provisions of s97 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the Act') I am satisfied that the Respondent should be heard.
- 3 This proceeding is a consolidation of two proceedings relating to applications following two adjudications under the *Building and Construction Industry Security of Payment Act 2002* (Vic). The Applicant contends the Respondent is not entitled to payment of the amounts specified in the respective Adjudication Determination for reasons set out in its Amended Points of Claim dated 1 September 2006.

#### **THE APPLICANT'S POSITION**

- 4 Mr Levin said that it was important that the information sought be obtained promptly to enable the Applicant to properly consider its position in relation to its claims, the subject of this proceeding, particularly in circumstances where the Respondent has claimed four times the amount allowed for scaffolding as a Provisional Sum. Further, the Respondent's Points of Defence are unhelpful being simply bare denials without particulars. If this application is successful it will potentially provide the Applicant with information that will enable a narrowing of the issues.
- 5 I raised with Mr Levin whether, as the parties were still to comply with the orders of the Tribunal made on 15 August 2006 for discovery by 13 October 2006, this application was premature. He submitted that as there are no pre-conditions set out in s81, and in particular, no temporal restrictions, this was not an impediment to an order being made.
- 6 An affidavit of Mr Zaparas, solicitor, has been filed in support of the application, in which he deposes to matters about which he has been informed by Mr Chu, a director of the Applicant, including that the parties are in dispute about the 'proper treatment of the Provisional Sum' in relation to scaffolding. He states at paragraph 6 that:

*In view of the foregoing matters I formed the view that Concept would very likely have documents in its possession which are relevant to the dispute between SC Land and Dura in the present proceeding, including documents that would not necessarily be in the possession, power or control of Dura.*

and at paragraph 7:

By letter dated 31 October 2006 Freehills requested that Concept make the following documents available for inspection by 4.00 pm on Monday 6 November 2006:

1. copies of all tax invoices issued by Concept to Dura in relation to the hire of scaffolding on the Project;
2. copies of all documents that identify the actual amounts which have been paid by Dura to Concept in relation the hire of scaffolding on the Project;
3. copies of all documents that identify a hire and/or trade discount applicable to the Project and/or to Dura;
4. copies of all documents that identify any agreements in respect of scaffold ownership and/or the value of scaffolding used in relation to the Project;
5. copies of all documents that identify and reconcile scaffolding delivered to and returned from the Project; and

6. copies of all documents that identify the labour and transport costs incurred in relation to the hire of scaffolding on the Project.
- 7 Concept declined to comply with this request. Mr Laurie Hartley of Concept responded by email on 3 November 2006 viz:
- Thank you for your letter dated 31 October 2006. I am concerned that the documentation requested therein may be regarded as "confidential information" and cannot comply with your request at this point in time.*
- 8 It is submitted on behalf of the Applicant that this should be regarded as confirmation that the documents exist, and even if they do not, if ordered to produce the documents, Concept can respond accordingly

#### THE RESPONDENT'S POSITION

- 9 Mr Herskope of Counsel appeared on behalf of the Respondent to oppose the application. He submitted that many of the documents sought by the Applicant are not relevant to the Applicant's claims as set out in the Amended Points of Claim dated 1 September 2006, which he described as being a claim for breach of warranty of clause 30.7(g) of the Contract between the parties. Further that the Applicant in effectively seeking 'pre-discovery discovery' is seeking to 'jump the gun' on discovery. In its Outline of Submissions the Respondent sets out five reasons why it contends the application should be refused, or as an alternative adjourned until discovery between the parties is complete:
- the application is premature;
  - there has been no discovery ordered or made in the proceeding; (Mr Herskope conceded that discovery had been ordered);
  - it is apparent from the scope of the classes of documents sought by reference to the pleadings that the application is a 'fishing expedition' – paras 2,3,4,5, and 6 of the proposed order (Mr Herskope corrected this during submissions indicating that the documents sought under paragraph 2 would be discoverable by the Respondent);
  - many of the classes of documents sought cannot be said to be relevant to the questions in issue between the parties – paras 2,3,4,5 and 6 of the proposed order; (a similar correction was made in relation to paragraph 2 as referred to above);
  - the Zaparas' affidavit fails to demonstrate by way of evidence that some of the classes of documents sought are either in existence or are relevant.
- 10 It was also submitted that consistent with the approach adopted by the Courts and, in particular, the Supreme and Federal Courts that the power to order third party discovery should be exercised with caution. I was referred to the commentary relating to Rule 32.07 at page 3937 of Williams Supreme Court Practice where a number of authorities are considered.
- In ***Keviris Pty Ltd v Capital Building Society*** (Supreme Court of Victoria, 9 February 1988, unreported), Kaye J adopted the following comment from Williams *Supreme Court Civil Procedure Victoria*, 1987, Butterworths, at 222, as to the operation of r32.07.30 (Williams Supreme Court Practice at p3937)

*"It can therefore be anticipated that the court will be cautious in exercising the new jurisdiction, and that to obtain an order for discovery from a non-party it will not be sufficient simply to establish the qualifying conditions contained in r32.07. In addition, the court might possibly require the party applying for the discovery to show that the discovery is necessary in the sense that:*

    - there is a real likelihood that the document of which discovery is sought contains information that either will advance his case or damage or destroy the case of his adversary or put him on a train of inquiry that would lead him to obtaining information to that effect;*
    - the person from whom the discovery is sought has refused to allow the party to inspect the document;*
    - the information which the document contains cannot be obtained from any other source; and*
    - if the party were not to have access to the information until trial its value to the party would be lost or seriously diminished."*
  - In ***Lurgi (Aust) Pty Ltd v Gratz*** (Supreme Court of Victoria, 14 November 1995, unreported), Hansen J, after referring to the comment of Kaye J in ***Keviris*** ... said the discretion of the court under r32.07 is to be exercised in light of all relevant circumstances in the particular case, and is not to be circumscribed by observations of judges made in other cases in relation to their own facts.
- 11 The observations of Hansen J in ***Lurgi*** were adopted by Balmford J in ***Harpley Nominees Pty Ltd v City Link Authority*** [2001] VSC 149. Further, in ***McIlwain v Ramsay Food Packaging Pty Ltd*** [2005] FCA 1233 when considering Order 15 A, Rule 8 of the *Federal Court Rules* Greenwood J says at paragraph 33::
- As to Order 15A, Rule 8, Nicholson J in ***McLernon Group Insurance Pty Ltd v. Biron Corporation Limited & Anor*** [1995] FCA 500 identified the features adopted by Burchett J in ***Richardson Pacific Ltd v. Fielding & Ors*** (1990) 26 FCR 188, governing the use of the rule. His Honour, Nicholson J, said:

1. *The purpose of the order is, quite expressly, to enable discovery to be obtained in some case where anything less than the broad obligations imposed by an order for discovery would simply not meet the case.*
2. *The rule provides a more practical and convenient means by which a party may obtain an opportunity to examine documents in advance of the hearing with sufficient time to take such further steps as a perusal of them may suggest.*
3. *The rule is intended, not for the general run of case, but for cases which do have about them something outside of the ordinary so that, by this means, the Court can go beyond what could be done upon a subpoena duces tecum issued in advance.*
4. *Normally an order for disclosure of documents by a stranger to proceedings should be made only when the stranger to the proceedings has the only copies of the particular documents, disclosure of which is sought, and the party to proceedings, who is seeking disclosure, has exhausted his or her rights with respect to discovery against the other party to proceedings.*
5. *That, however, is not a fetter restricting the applicability of the rule in cases where the evidence suggests it would provide an appropriate and reasonable solution to real problems.*
6. *In that particular case, there was a close relationship between the respondents and the non-parties sought to be subjected to the requirement of giving discovery and the relationship was quite unusual so that the circumstances were extraordinary.*
7. *In the drafting of orders sought for third party discovery tighter lines should be followed than may be usually the case, although circumstances may make a broad order appropriate.*
8. *A relevant consideration is whether it is plainly probable that there do exist documents relevant to the issues in the case which orders in the nature sought would be likely to bring to light.*
9. *The jurisdiction under the rules should be exercised with caution.*
10. *The exercise of the discretion to make an order under the rule should not be fettered by any precise rules and the above matters should be taken as general guides."*

## DISCUSSION

- 12 It is common ground that the power to order third party discovery is discretionary. Notwithstanding Mr Levin's eloquent submission that the Tribunal need not have regard to the practices of the Courts in determining whether to exercise the discretion, it is clear that there are a number of factors which must be taken into account when deciding whether to exercise the discretion. These were clearly enunciated by Nicholson J in *McLernon* (supra). Whilst it is true that there are no temporal restrictions on the exercise of the discretion under s81, the same applies to Rule 32.07 and Order 15A Rule 8. This does not mean that the discretion should be exercised without due regard to all the circumstances of the application.
- 13 It seems to me that this application is premature. Both parties have failed to comply with the order for discovery made on 15 August 2006. The Applicant cannot be certain that at least some of the documents it seeks will not be discovered by the Respondent. The documents sought in paragraphs 1 and 2 of the proposed order are documents which are clearly discoverable by the Respondent.
- 14 Further, although it has been held that the seeking of third party discovery might include an element of fishing this is not, of itself, reason to refuse the application (*Russell Kumar & Sons Pty Ltd (in liq) v Bienstein* (unreported, Supreme Court of Victoria, 2 August 1991), I am not persuaded the discretion should be exercised where the information sought might well be obtainable through alternative means. For instance, the extent of the Respondent's discovery will be unclear until it complies with the order for discovery. Further, if what is really complained about is the lack of particulars in the Points of Defence it might well be that the seeking of further and better particulars of the defence would assist the Applicant in its quest to obtain sufficient information to enable it to properly assess its claims.
- 15 The failure of Concept to respond to the application or attend the hearing does not confirm the existence of the documents which are sought. There is simply no evidence in the supporting affidavit confirming why Mr Zaparas has a belief that the documents exist. The email response from Mr Hartley dated 3 November 2006 is not determinative. I should mention that I find it surprising that, rather than filing a supporting affidavit from Mr Chu, a director of the Applicant, the Applicant seeks to rely on an affidavit from its solicitor, Mr Zaparas, in which he deposes to matters about which he has been informed by Mr Chu. Although the Tribunal is not bound by the rules of evidence, direct evidence carries significantly more weight than hearsay, particularly where Mr Zaparas' affidavit, whilst setting out what he had been told by Mr Chu, is decidedly lacking in detail, and as such is of little assistance.
- 16 In urging me to exercise the Tribunal's discretion, Mr Levin sought to rely on the provisions of ss97 and 98 of the Act. However, the provisions of these sections do not, in my view, advance the Applicant's position. The obligations set out in these sections must be construed as imposing obligations on the Tribunal in relation to all parties before it, not simply the Applicant. Denying the Respondent an opportunity to be heard in relation to this application may well have offended those provisions.

- 17 The application was also opposed by the Respondent on the grounds that many of the documents sought are not relevant having regard to the Applicant's claim as set out in the amended Points of Claim dated 1 September 2006. I have now had an opportunity of considering them. The Applicant's claim that Dura is not entitled to payment of the amounts specified in the two Adjudication Determinations is to be found in paragraphs 30-38. The claim appears to be essentially a breach of contract claim. It is unclear from the material before me as to how the documents sought in paragraphs 3 to 6 of the proposed orders are relevant to the proceeding as it is currently pleaded.

**CONCLUSION**

- 18 I am not prepared to exercise the Tribunal's discretion under s81 until such time as all other avenues available to the Applicant to obtain particulars of the Respondent's defence have been explored, and the discovery process between the parties has concluded. Although the Tribunal generally takes a less formal approach to discovery than the Courts, usually requiring the parties to file Lists of Documents, in appropriate circumstances orders requiring discovery in accordance with the Rules of Civil Procedure may be made.
- 19 The application will be dismissed. It would be inappropriate to consider the Respondent's application for costs in the absence of argument, and accordingly I will reserve the question of costs with liberty to apply.

Mr D Levin QC For the Applicant  
Mr A Herskope of Counsel For the Respondent