

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST**

CIV 2007-404-7237

UNDER	Sections 27 and 30 of the Commerce Act 1986
BETWEEN	THE COMMERCE COMMISSION Plaintiff
AND	VISY BOARD (NZ) LIMITED First Defendant
AND	VISY BOARD PTY LIMITED Second Defendant
AND	RICHARD PRATT Third Defendant
AND	HARRY DEBNEY Fourth Defendant
AND	JOHN RODERICK STEPHEN CARROLL Fifth Defendant
AND	JAMES GEORGE HODGSON Sixth Defendant

Hearing: 8 May 2009

Counsel: F Cooke QC and A Wing for the plaintiff
S Keene for the first to fourth defendants

Judgment: 11 June 2009

**REASONS OF POTTER J
for interim judgment of 8 May 2009 re discovery**

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Introduction

[1] On 8 May 2009 I issued an interim judgment at the hearing, declining various orders sought by the first defendant (“Visy NZ”) to define and limit the scope of discovery by Visy NZ in these proceedings (“the interim judgment”). I said that my reasons would follow. These are the reasons.

Orders sought

[2] The orders sought by Visy NZ were set out in written submissions filed for the hearing. They were:

- (a) Discovery provided to date pursuant to the terms of the notices issued by the Commission pursuant to s 98 of the Commerce Act 1986 (“s 98 Notices”) satisfies the obligations of discovery.
- (b) Visy NZ should provide by affidavit discovery of the following categories of hard copy documents:
 - (i) Any hard copy documents held by Visy NZ that would fall within scope of the Commission’s Previous Searches but that for any reason have not already been provided to the Commission; and
 - (ii) All hard copy documents relating to the 2003 tender issued by Huhtamaki for the supply of CFP including correspondence to or from Huhtamaki or internal Visy documents, excluding artwork and documents relating to administrative issues.
- (c) If any further electronic searches are necessary, the Commission should either run those searches itself in accordance with the process set out in the search warrant dated 10 December 2004, as further prescribed in the Electronic Search Process Agreement between Visy NZ and the Commission dated 20 October 2005 (“ESPA”), or, at the Commission’s discretion, it may require Visy NZ to undertake such searches at its request and provide by list of documents all relevant results.

Background

[3] The plaintiff, The Commerce Commission (“the Commission”), alleges that the defendants were engaged in a “cartel” relating to the supply of corrugated fibre packaging (“CFP”) within New Zealand in contravention of ss 27 and 30 of the Commerce Act 1986. Visy NZ is a company incorporated in New Zealand. The other defendants are based in Australia.

[4] Proceedings of a similar character have been conducted in Australia. The Amcor and Visy groups of companies were the dominant players in the market for the supply of CFP in Australia and New Zealand (in New Zealand Carter Holt Harvey also had a significant market presence). The Amcor group of companies approached the Australian Competition and Consumer Commission (“ACCC”) and the Commission in New Zealand under the respective “leniency” policies, admitting they were involved in a cartel with the Visy group of companies. The proceedings brought by the ACCC have essentially been determined.

Procedural background

[5] These proceedings were filed and served in November 2007. Visy NZ filed a statement of defence in February 2008.

[6] The second to fifth defendants have filed notices objecting to the jurisdiction of the New Zealand Courts. Timetable orders made at [6] of the interim judgment provide for the plaintiff to file any application to set aside the protests to jurisdiction by 24 July 2009 (subject to compliance with previous timetable orders relating to discovery). This order was made with the consent of the parties and varied the timetable order on this aspect made on 28 November 2008.

[7] On 28 November 2008 I recorded the following in a minute:

Counsel advised they had undertaken useful discussions concerning the discovery process, the plaintiff recognising that considerable discovery has already been made by the first defendant. In order to facilitate further discovery and to enable the parties to identify discovery still to be made by the first defendant, the plaintiff is to provide to the first defendant a list of

discovery already in the hands of the plaintiff with a view to the parties then determining by agreement an appropriate process for outstanding discovery to be made.

[8] Pursuant to directions made on that date:

- a) The Commission filed a memorandum on 3 April 2009 proposing that orders be made that Visy NZ provide discovery of further categories of documents (excluding documents already provided); and
- b) On 9 April 2009 the Commission provided Visy NZ with a list of the documents of Visy NZ already in the Commission's possession as a result of previous document production requests and searches.

Issue

[9] It is common ground between the parties that Visy NZ is not required to make discovery of documents already held by the Commission.

[10] Visy NZ says that given the extent of previous disclosure pursuant to s 98 notices it should only be required to provide discovery within the limited categories set out in the orders sought (refer [2] above).

[11] The plaintiff says that Visy NZ should comply with its normal discovery obligations, although there is no need for it to re-list documentation that has been previously provided.

Rule 8.18 High Court Rules

[12] Unless modified, the discovery obligations of Visy NZ are in terms of r 8.18 of the High Court Rules:

Default terms of discovery order

- (1) A discovery order is in the terms set out in this rule unless those terms are modified by the order.

- (2) Each party must make an affidavit of documents that lists the documents that-
 - (a) are or have been in that party's control; and
 - (b) relate to a matter in question in the proceeding.
- (3) The affidavit of documents must-
 - (a) comply with rules 8.20 and 8.21; and
 - (b) be filed and served on every other party who has given an address for service.
- (4) Each party must comply with the order within 20 working days after the date on which the order is made.

Submissions for Visy NZ

[13] Visy NZ submitted:

- It is accepted that the onus rests with Visy NZ to show why orders other than for general discovery should be made.
- Full discovery in the circumstances of this case is inappropriate and oppressive. The Court has an inherent jurisdiction to prevent the Court's procedures being exercised oppressively: *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* (2002) 20 NZTC 17,792 (HC).
- The Commission is empowered under s 79A of the Commerce Act 1986 to obtain discovery and administer interrogatories, but that provision was designed to avoid the common law rule against discovery where a penalty is sought.
- The Commission's requirement of Visy NZ to cross-check documents contained in the extensive list of documents provided by the Commission would effectively be more onerous than ordinary discovery, and is oppressive.
- This case departs from the standard situation where a defined set of documents has been requested and provided to a regulatory agency. In particular:

- a) A full clone has been taken of Visy NZ's server, individuals' laptops, PCs and PDAs, and the Commission has retained the ability to search all these electronic items as it sees fit, subject to the process set out in the warrant under s 98 of the Commerce Act;
 - b) Amcor as a leniency applicant would have been obliged to provide the Commission with all documents and information necessary to assist the Commission in its investigation.
- Accordingly, the Commission must now have had most or all documents relevant to the proceeding and has access to every document stored electronically by Visy NZ as at 10 December 2004.
 - Under its extensive investigatory powers the Commission has received any information "it has wanted" concerning Visy NZ's documents.
 - The categories of documents sought by the Commission are wider than general discovery would permit and the process of cross-checking with documents already in the possession of the Commission and providing discovery by category would create more work than simple general discovery.
 - The search warrant executed by the Commission on 10 December 2004 was very wide in scope and in terms plainly broader than, but consistent with, the causes of action in the Commission's amended statement of claim dated 23 November 2007 filed in this proceeding. Thus, the requests for documents under the search warrant "effectively mirror" the documents which would be required to determine the issues in this proceeding.
 - In responding to the search warrant, Visy NZ essentially provided full discovery in a format almost identical to a list of documents exchanged in ordinary discovery and "it is difficult to envisage any documents held on Visy NZ's server not captured by the electronic searches and provided to the Commission".

- In these circumstances, Visy NZ ought not to be put to the expense of providing further discovery of documents stored electronically, or at the very most, it should only be required to run additional search terms that the Commission specifies.

[14] Thus, the orders sought by Visy NZ reflect the following approach to Visy NZ's discovery obligations:

- a) In respect of documents stored electronically, Visy NZ may treat the searches already conducted as sufficient to meet its discovery obligations.
- b) If any further electronic searches are "necessary" the Commission should run those searches itself or, at the Commission's discretion, require Visy NZ to undertake such searches at its request and provide by list of documents all relevant results.
- c) Regarding hard copy documents, Visy NZ may treat the provision of documents in response to the broad document requests in respect of the Overarching, Coca-Cola, Goodman Fielder, Inghams, Mainland, Apple Boxes, Fonterra and PPCS understandings, as sufficient to meet its discovery obligations in respect of those categories of documents identified by the Commission.
- d) In respect of hard copy documents concerning the Huhtamaki understandings, Visy NZ may provide discovery by reference to the "broad" category of request framed by the Commission in relation to other understandings.
- e) To provide discovery by reference to a final category to capture any hard copy documents that should have been produced pursuant to earlier requests made by the Commission but not so produced. (Visy NZ says that it does not consider any documents exist in this category).

[15] Counsel submitted that a suitable analogy arises in the procedure for providing particular discovery and referred to *AMP Society v Architectural Windows Ltd* [1986] 2 NZLR 190: oppression must be determined with regard to the reasonableness of the imposition of the burden of discovery in the circumstances of the case, and that in determining whether the burden is reasonable, the Court should have regard to the likely probative value of the documents sought by the applicant. (That case related to non-party discovery).

Submissions for the Commissioner

[16] The Commission submitted:

- The discovery obligations of Visy NZ should be restricted only to the extent that it does not need to list what has already been provided.
- The proceedings involve serious allegations of cartel behaviour and discovery is a vital component of identifying and proving cartels: *Geotherm Energy v Electricity Corp of NZ Limited* unreported HC AK CL 101/90 25 September 1991, Barker J; *Commerce Commission v Qantas Airways Limited (No 2)* (1992) 5 PRNZ 227; and *Commerce Commission v Armourguard Security Ltd* (1993) 8 PRNZ 86 at 91 where Barker J held:

It is no answer to the discovery application for the defendants to say that the commission has wide powers of investigation, search and interrogation. Legislation has given this additional right of civil action to the commission. All the normal incidents of civil action, including discovery, must follow. A defendant to a claim must comply with discovery in the normal way subject to any defendant's right to seek privilege or to claim confidentiality for specific categories of discovered documents.

- The Commission provided the list of categories to assist Visy NZ in complying with its discovery obligations. By identifying categories the Commission did not intend to exclude any category of documents that should be provided by way of discovery.
- There is no compelling reason, and Visy NZ has provided none, why it should avoid the normal discovery obligations. These obligations require Visy NZ to

engage in a comprehensive search for relevant material. Its discovery duties may have particular significance in cases of the present kind.

- The earlier processes (in response to the s 98 search warrants) are not co-extensive with what would be covered by discovery. Those processes reflect avenues of inquiry pursued at the time and will not be comprehensive, e.g. the particular search terms were limited by what the Commission thought was relevant at the time.
- Ultimately, Visy NZ must address and comply with its discovery obligations. It is not appropriate for the first defendant to seek to obtain an indirect limitation upon its discovery obligations by obtaining a kind of “sign-off” from the Commission and/or the Court as to the steps required to comply with those obligations. It is difficult for the Commission to give such a sign-off as it does not have the knowledge that Visy NZ has about its own records (computer or otherwise).

Discussion and conclusions

[17] The Commission’s final submission set out immediately above, is at the heart of this matter. Visy NZ is in effect asking the Court to give it “a tick” in respect of its discovery obligations, because it has provided discovery pursuant to notices and search warrants issued under the powers vested in the Commission by the Commerce Act, in particular the search warrant issued on 10 December 2004.

[18] I do not see how the Court can properly grant such a general approval or dispensation. The powers of inquiry and search vested in the Commission under the Commerce Act do not create obligations which are co-extensive with the obligation of a party to civil proceedings to make discovery in terms of the High Court Rules. The Commission may well have received any information “it has wanted” pursuant to the exercise of those powers, as the submissions for Visy NZ pointed out. But the obligation of Visy NZ on discovery is not just to provide information the Commission identifies or “wants”, but to identify and discover all documents that

“relate to a matter in question in the proceeding”. That is the obligation of Visy NZ; it is not for the Court to limit the extent of the first defendant’s obligation.

[19] While counsel for Visy NZ may justifiably claim that “the world of competition enforcement has moved on”, since the relevant principles were articulated in cases such as *Commerce Commission v Armourguard Security*, such an assertion can only relevantly apply to the technology applicable to the retention, search and provision of documents. It cannot apply to the principles which underpin discovery obligations of parties to legal proceedings.

[20] The flaw in the first defendant’s arguments is highlighted by the limitation in (c) of the orders sought:

If any further electronic searches are *necessary*, the Commission should ...

Visy NZ says that if further electronic searches are necessary, the Commission should either run the searches itself or require Visy NZ to undertake specific searches at its request. But it is not for the Commission to identify what further searches may be “necessary”. The knowledge about what further searches may be “necessary” rests with Visy NZ, as does the obligation to make discovery of all relevant documents whether electronically stored or retained by other means and in other forms.

[21] The practicalities of making discovery are a different matter. It is common ground that duplication is not required of documents already made available to the Commission in response to previous processes under the Commerce Act. If the categorisation provided by the Commission is unhelpful to Visy NZ then, as Mr Cooke accepted, it can be re-addressed. The practical aspects of Visy NZ carrying out its discovery obligations require further co-operation by counsel as I indicated at [5] of the interim judgment.

Result

[22] I am not satisfied that Visy NZ has discharged the onus it carries to show that it should be excused by the limitations it seeks, in complying with its discovery obligations. The application was accordingly dismissed.