

CITATION: *Wickham Point Development Pty Ltd v Commonwealth of Australia & Ors (No 2) [2018] NTSC 50*

PARTIES: WICKHAM POINT DEVELOPMENT PTY LTD

v

COMMONWEALTH OF AUSTRALIA

AND

TREPANG SERVICES PTY LTD

AND

SERCO AUSTRALIA PTY LTD

AND

SECURITY AND TECHNOLOGY SERVICES (NT) PTY LTD

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO: 25 of 2017 (21715635)

DELIVERED: 26 July 2018

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JUDGMENT OF: Luppino AsJ

CATCHWORDS:

Practice and Procedure – Discovery – Discovery in matters regulated by PD6 – Disclosure obligations in PD6 – When dispensing with discovery is appropriate – What is an essential document for the purposes of PD6 – What is a document which might significantly impair a party's case for the purposes of PD6.

Supreme Court Rules, 29.02, 29.03, 29.05.

Practice Direction 6 of 2009 – Trial Civil Procedure Reforms, paras 4, 5, 6, 7, 10, 22.

Wickham Point Development Pty Ltd v Commonwealth of Australia [2018] NTSC 7.

Mulley v Manifold (1959) 103 CLR 341.

Northern Territory of Australia v John Holland Pty Ltd [2008] NTSC 4.

REPRESENTATION:

Counsel:

Plaintiff:	A Harris QC and N Christrup
Defendant:	D Robinson SC
First Third Party:	Not represented
Second Third Party:	Not represented
Third Third Party:	Not represented

Solicitors:

Plaintiff:	HWL Ebsworth
Defendant:	Clayton Utz
First Third Party:	Not represented
Second Third Party:	Not represented
Third Third Party:	Not represented

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Wickham Point Development Pty Ltd v Commonwealth of Australia & Ors
(No 2)
[2018] NTSC 50

No. 25 of 2017 (21715635)

BETWEEN:

**WICKHAM POINT DEVELOPMENT
PTY LTD**
Plaintiff

AND:

COMMONWEALTH OF AUSTRALIA
Defendant

AND:

TREPANG SERVICES PTY LTD
First Third Party

AND

SERCO AUSTRALIA PTY LTD
Second Third Party

AND

**SECURITY AND TECHNOLOGY
SERVICES (NT) PTY LTD**
Third Third Party

CORAM: Luppino AsJ

REASONS

(Delivered 26 July 2018)

- [1] The current application is by the Plaintiff and seeks three orders in the nature of discovery against the Defendant. The recently joined Third Parties were not represented on the application and no orders are sought against them.
- [2] The first order sought was for mutual discovery limited to a specified issue (that issue is hereinafter referred to as “the Estoppel claim”). The second order was no longer sought by the time of the hearing. The third order sought was that discovery, inspection and/or production be conducted electronically.
- [3] I can quickly deal with the third order. The Defendant agrees in principle that if an order for discovery is made, electronic discovery would be appropriate. Although the Defendant has raised some technology issues, both parties agree that those issues can be resolved. I am content to allow the parties an opportunity to do so. In light of that I intend to simply adjourn further consideration of that order *sine die* with liberty to apply.
- [4] A summary of the Plaintiff’s claim is required to put the current application into context. The Estoppel claim is the major part of the Plaintiff’s claim and is based on alleged representations that the Defendant would occupy the Plaintiff’s premises for at least 10 years. In reliance of that the Plaintiff alleges that it expended sums to effect works on the premises to accommodate the Defendant’s intended use. The Plaintiff claims that it would not have effected those works without the representations. The

Defendant vacated the premises in a little over five years. *Inter alia* the Plaintiff claims, as damages, lost rent at the rate of approximately \$1.6 million per calendar month for the approximate 60 calendar months balance of the term. The next most significant part of the claim is in respect of breaches by the Defendant of its repair obligations. There are also claims for rent and outgoings which the Plaintiff claims the Defendant failed to pay as required.

- [5] To demonstrate the likely complexity of the case,¹ the current Statement of Claim, including the Schedule which sets out particulars in respect of the repair claim, is in excess of 600 pages. The Schedule contains almost 9,000 instances of breach. Another indicator of the complexity of the matter is quantum as that is in the tens of millions of dollars. Quantum is relevant because *Practice Direction 6 of 2009 Trial Civil Procedure Reforms* (“PD6”) applies to these proceedings and discovery orders pursuant to paragraph 22 of PD6 must have regard to what is just, economical and proportional. I am satisfied that documentary evidence will be a significant part of this case.
- [6] Both parties complain of the adequacy of the PD6 disclosure of the other. Although the Defendant requires the Plaintiff to provide discovery, and not confined only to the Estoppel claim, the Defendant argues that it should not be obliged to provide discovery to the Plaintiff at all as its PD6 disclosure is

1 I said that this is a complex case in *Wickham Point Development Pty Ltd v Commonwealth of Australia* [2018] NTSC 7 when dealing with the pleadings in these proceedings.

sufficient. On that basis the Defendant's position is that the requirement for the Defendant to give discovery should be dispensed with.

- [7] The question of the appropriate discovery orders is to be determined by reference to PD6 and Order 29 of the *Supreme Court Rules* ("SCR"). The applicable paragraphs of PD6 are paragraphs 4, 5, 6, 7, 10 and 22 and they provide:-

4. Parties to a potential dispute should follow a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation. The procedure should not be regarded as a prelude to inevitable litigation. It should normally include:
 - 4.1 the plaintiff writing to give details of the claim;
 - 4.2 the defendant acknowledging the claim letter promptly;
 - 4.3 the defendant giving within a reasonable time a detailed written response; and
 - 4.4 the parties conducting in good faith genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.
5. If there are circumstances which require a plaintiff to commence proceedings before complying with this part, the parties should endeavour to comply with the spirit of this part as soon as reasonably possible after proceedings have commenced.

Note: For example, urgent applications to the Court for injunctions, or to avoid the action becoming statute barred, might excuse non-compliance.

6. The plaintiff's letter should:
 - 6.1 give sufficient concise details to enable the recipient to understand and investigate the claim without extensive further information;

- 6.2 enclose copies of the essential documents on which the plaintiff relies and any documents (except privileged documents) which might significantly impair the plaintiff's case;
- 6.3 ask for a prompt acknowledgement of the letter, followed by a full written response within a reasonable stated period;

(For many claims, a normal reasonable period for a full response may be one month.)

- 6.4 state whether court proceedings will be issued if the full response is not received within the stated period;
- 6.5 identify and ask for copies of any essential documents, not in the plaintiff's possession, which the plaintiff wishes to see;
- 6.6 state (if this is so) that the plaintiff wishes to enter into mediation or another alternative method of dispute resolution; and
- 6.7 draw attention to the Court's powers to impose sanctions for failure to comply with this Practice Direction and, if the recipient is likely to be unrepresented, enclose a copy of this Practice Direction.

7. The defendant should acknowledge the plaintiff's letter in writing within 14 days of receiving it. The acknowledgement should state when the defendant will give a full written response. If the time for this is longer than the period stated by the plaintiff, the defendant should give reasons why a longer period is needed.
10. If the defendant does not accept the claim or part of it, the response should:
 - 10.1 give detailed reasons why the claim is not accepted, identifying which of the plaintiff's contentions are accepted and which are in dispute;
 - 10.2 enclose copies of the essential documents on which the defendant relies, and any documents (except privileged documents) which significantly impair the defendant's case;

10.3 enclose copies of documents asked for by the plaintiff, or explain why they are not enclosed;

10.4 identify and ask for copies of any further essential documents, not in the defendant's possession, which the defendant wishes to see; and

(The plaintiff should provide these within a reasonably short time or explain in writing why he is not doing so.)

10.5 state whether the defendant is prepared to enter into mediation or another alternative method of dispute resolution.

22. In exercising its case management powers referred to under Part 3 above, the Court will make an order under r.29.05 dispensing with the requirement for discovery under r.29.02 (save for ongoing discovery of the documents referred to in paras 6.2 and 10.2 of this Practice Direction) unless it is satisfied that:

22.1 discovery should be limited to particular documents or class of documents, in which case it will make an order under r.29.05 to that effect;

22.2 discovery under r.29.02 is necessary to resolve the real issues of substance which are in dispute between the parties justly, promptly, economically, and in proportion to the nature of the dispute.

[8] The relevant provisions of the SCR are rules 29.02, 29.03 and 29.05 and they provide:-

29.02 Discovery

- (1) When the pleadings between the parties to a proceeding have closed, there is to be discovery by the parties of all documents that are or have been in their possession relating to a question raised by the pleadings.
- (2) Nothing in this Order is to be taken to prevent the parties from agreeing to dispense with or limit the discovery of documents that, but for the agreement, they would be required to make to each other.
- (3) Except where a pleading contains allegations of a kind referred to in rule 13.10(3), unless the Court orders otherwise,

a party is not required to discover a document that is relevant only because it may lead to a train of enquiry.

29.03 List of documents

- (1) Subject to this rule, the parties to a proceeding between whom pleadings are closed shall make discovery by exchanging lists of documents.
- (2) In compliance with subrule (1), each party shall, within 21 days after the pleadings are closed as between him and any other party or within such other time as the Court allows, make and deliver to that other party a list of the documents which are or have been in his possession relating to a matter in question between them in the proceeding.
- (3)-(7) Omitted

29.05 Order limiting discovery

In order to prevent unnecessary discovery the Court may, before or after a party is required to make discovery by virtue of rule 29.02, order that discovery by a party shall not be required or shall be limited to such documents or classes of document, or to such of the questions in the proceeding, as are specified in the order.

[9] The combined effect of these provisions is that the parties are required to effect discovery upon the close of pleadings unless discovery is dispensed with. Paragraph 5.4 of the Explanatory Statement to PD6 contemplates that there will be a specific review of discovery orders in every case and

paragraph 22 of PD6 contemplates that an order dispensing with discovery will be the usual order.

[10] PD6 is the Practice Direction which requires that certain pre-action steps are to be undertaken by the parties. However, compliance is not a precondition to the commencement of proceedings. The only sanctions for non-compliance are costs and interest penalties, albeit subject to the Court's

discretion in any case.² The required steps are, firstly, a detailed letter of claim and the provision of specified documents by the intending plaintiff, secondly, the response together with the provision of specified documents by the intended defendant, and lastly, the parties undertaking alternative dispute resolution.

[11] The provision by the parties of the documents specified by PD6 is the disclosure process and that is intended to be the prelude to dispensing with discovery. It requires each party to provide to the other party “*essential*” documents and any other documents which “*might significantly impair*” the case of the party making disclosure.³ The ability of a party to request other essential documents from the other party⁴ is an important safety net in the PD6 disclosure process as the parties may disagree as to what is an essential document, or as to the sufficiency of compliance with PD6, by the other party.

[12] PD6 disclosure is intended to ensure that each party discloses to the other the documents required to establish each element of the case of each party as set out in their PD6 letters. In routine cases documents which are disclosable pursuant to PD6 would likely be the majority of documents which would otherwise be discoverable. What is an essential document or a document which might significantly impair a party’s own case (hereinafter collectively referred to as “disclosable documents”) is not defined in PD6. However I

² PD6 paras 13, 27-30.

³ PD6 para 6.2 and 10.2.

⁴ PD6 paras 6.5 and 10.4.

think it is clear from PD6 and the Explanatory Statement that PD6 disclosure is intended to result in the production of less documents compared to full general discovery.

- [13] In general discovery, in broad terms, there are two bases for determining whether a document is discoverable, that is, if the document either advances a party's case or damages the case of the other party,⁵ in each case determined by reference to the pleadings.⁶ This is subject to the limitation in Rule 29.02(3) of the SCR which provides that a party is not required to discover a document that is relevant only because it may lead to a train of enquiry. Disclosure of essential documents pursuant to PD6 is a restricted form of the first basis, i.e., documents which advance a party's case.
- [14] Where general discovery applies, multiple documents which advance a party's case are all discoverable even though the documents may only, or largely, corroborate other documents in respect of that advancement. In contrast, where PD6 applies, documents which are only entirely corroborative of other documents do not need to be disclosed as they are not essential documents. Documents relevant only because they may lead to a train of enquiry would ordinarily not be essential documents.
- [15] The second basis of discoverability also operates in a restricted way in respect of PD6 disclosure. It is concerned not with documents which damage the other party's case but with documents which "*might significantly*

⁵ *Mulley v Manifold* (1959) 103 CLR 341.

⁶ *Northern Territory of Australia v John Holland Pty Ltd* [2008] NTSC 4.

impair" the case of the party making disclosure. Documents falling within this limb are distinguished from essential documents given the absence of the word "*essential*" in the context of this second basis of disclosable documents in paragraphs 6.2 and 10.2 of PD6. Therefore, any document which significantly impairs the case of the party making disclosure must be disclosed notwithstanding that it may merely be corroborative of another document.

- [16] The range of documents which might significantly impair the case of the disclosing party will likely be less than the range of documents which would damage the opposing party's case under the test for discovery. The use of the word "*significantly*" in this context means that a minor impairment can be disregarded. Whether an impairment is significant or is minor is a question of degree which will need to be determined according to the nature of the document, the party's PD6 letter and the circumstances of the case. No doubt there will be many instances of disagreement concerning that but I expect that the penalties which can apply if PD6 is not complied with should mean that when in doubt, parties will disclose more rather than less documents.

- [17] Paragraph 22 of PD6 requires discovery to be dispensed with unless the Court is satisfied of either of two alternative matters. Only the second has application here and that is that an order for general discovery must be shown to be "*necessary*" to resolve the real issues of substance in dispute "*...justly, promptly, economically, and in proportion to the nature of the*

dispute." On its wording that is not limited to cases of insufficient compliance with the PD6 disclosure obligations and therefore discovery may be ordered, notwithstanding adequate compliance with the PD6 disclosure obligations, if the need for production of more than just disclosable documents in the circumstances of the case is established.

[18] Whether discovery is "*necessary*" within the meaning of paragraph 22 of PD6 will depend on the circumstances of each case. The nature, substance and complexity of the claim are relevant considerations.

[19] The approach usually taken by the Court to assess whether discovery should be dispensed with is that at a directions hearing in the early stages of the proceedings, the Court enquires of the parties:-

- (a) whether each party is satisfied that they have fully complied with their PD6 disclosure obligations;
- (b) whether each party is satisfied with the PD6 disclosure of the other party;
- (c) whether any further documents requested pursuant to paragraphs 6.5 and 10.4 of PD6, as the case may be, have been provided.

[20] Where the answer to all of those questions is in the affirmative the Court will dispense with discovery. Where the answer to any of those questions is in the negative, the Court then enquires as to whether the parties are prepared to revisit PD6 disclosure. If they are, the Court then assesses the

likelihood of subsequent compliance. A further opportunity to complete PD6 disclosure is given in appropriate cases and discovery will subsequently be dispensed with if that compliance occurs. Where, for whatever reason, the parties do not revisit PD6 disclosure, the Court considers whether it can determine the question of necessity for the purposes of paragraph 22 of PD6 in the normal way, i.e., based on evidence.

- [21] As part of that approach the Court considers whether it will be able, consistent with the objectives of PD6, to decide the question in a practical, prompt and effective way. If the Court proceeds to make that determination, the parties will likely be required to produce all of the applicable documents, together with any other evidence to support their respective views. Where the determination required is only to decide whether certain documents are not disclosable, the task is much simpler as the Court will then only need to examine the applicable documents and consequently less affidavit evidence will be required. One downside if the Court proceeds to make that determination is that in the event that the Court finds that the documents are not disclosable, the approach means that the documents would have been disclosed in any case and therefore that results in an anomaly.

- [22] Given the objectives of PD6 I think it will not be practical for the Court to determine the question of necessity for the purposes of paragraph 22 of PD6 in complex cases or in document intensive cases. It would likely take up more of the Court's and the parties' time and resources (therefore resulting

in the parties incurring more costs) than is justified for a preliminary step in the proceedings. Much of the work that would be required for general discovery may well need to be done for that purpose in any case. The anomalous situation previously referred to would recur. Moreover hearing evidence on a preliminary basis just for that purpose should be avoided as the costs in that event could be prohibitive and there would be substantial delays. For these reasons, I think that in the early stages of the proceedings the Court can only take a broad approach to the resolution of this question in complex or document intensive cases.

[23] With that background I now turn to consider the appropriate discovery orders to be made in the circumstances of this case and the following summary of events relative to the disclosure process will help to put the considerations into context.

[24] The Plaintiff's initial PD6 letter was sent on 22 November 2016. It was a very detailed letter, however only two documents were disclosed. The limited disclosure was conceded by the Plaintiff and was claimed to be justified because the disclosable documents were said to primarily be documents common to both parties, such as formal lease documents and correspondence. That would not necessarily be correct in respect of the repair claim as I suspect that there could have been numerous documents relevant to that part of the claim, such as inspection reports, repair invoices, quotes and the like, which would be essential documents and which would only likely be in the possession of the Plaintiff.

[25] In any case, common possession of disclosable documents does not justify non-compliance. PD6 requires production of the documents. It is a combined form of discovery and inspection. It is insufficient simply to identify what are disclosable documents in this way, unless that is with the agreement of the other party. Merely saying that all disclosable documents are documents common to both parties, even if that were to be correct, does not satisfy that requirement as that identifies every possibly relevant document, not just disclosable documents. This requirement is analogous to the requirement to provide material facts in pleadings. That the other party knows the facts, although often true, does not justify insufficient pleading of material facts or particulars. The knowledge of the other party is irrelevant as the other party is entitled to know what the pleading party says are the material facts.

[26] The Plaintiff's PD6 letter had an obvious instance of non-compliance with the Plaintiff's PD6 disclosure obligations. The Plaintiff failed to disclose an email dated 17 October 2014 from the Plaintiff to the Defendant ("the McLean email") which contained admissions dramatically inconsistent with the Estoppel claim. The level of detail in the Plaintiff's PD6 letter suggests that extensive consideration of documentation occurred in the course of its preparation and therefore the omission is unlikely to have occurred through inadvertence. Although the Plaintiff correctly pointed out that the email was not necessarily determinative of the ultimate result, there cannot be any doubt that it is a document which significantly impairs the Plaintiff's case. Therefore it should have been disclosed notwithstanding that it also was a

document common to both parties. Any other similar documents, or any other documents which impaired the Plaintiff's case which the Plaintiff held were also required to be disclosed.

- [27] The Plaintiff's PD6 letter sought a response by 29 November 2016, i.e., within seven days, or failing that, by 22 December 2016. The Plaintiff was not entitled to stipulate seven days for a full response. PD6 contemplates an interim response by the Defendant, essentially a letter acknowledging receipt of the Plaintiff's PD6 letter, within 14 days⁷ and a full response within a "*reasonable*"⁸ time thereafter. The Plaintiff asserts that the abridged timeframe was justified by urgency, namely due to the Defendant's stated intention to vacate the Plaintiff's premises within a short period of time. I think that it was unlikely that anything was going to be achieved by either the PD6 process or by the commencement of proceedings in that short time period. Subsequent events have confirmed that, hence abridging the time for the PD6 process was not justified on that basis, nor did the circumstances come within those contemplated by paragraph 5 of PD6.⁹

- [28] The Defendant responded to the Plaintiff's PD6 letter within three days and advised that a full response could not occur before 22 December 2016 owing to the volume of material that needed to be reviewed. That is an indicator that there were many relevant and discoverable documents, although not necessarily disclosable documents. I can understand that such a statement

⁷ PD6 para 7.

⁸ PD6 para 4.3.

⁹ That acknowledges the existence of possible circumstances which might justify the commencement of proceedings before complying with PD6.

could lead the Plaintiff to expect that numerous documents would soon, or ultimately, be provided.

[29] By letter dated 13 December 2016 the Defendant pushed back the expected response time until mid-February 2017.

[30] On 23 December 2016 the Plaintiff disclosed a further 24 documents. Of these nine were lease documents, six were searches and the remainder were a number of permits, news articles and media releases. The McLean email was still not disclosed and no other documents which impaired the Plaintiff's case were disclosed. The lease documents are likely to only have been essential in respect of the claims for damage and unpaid rent. Although the lease documents would be peripherally relevant to the Estoppel claim,¹⁰ I doubt that they were an essential document for that part of the claim. The searches, permits and media articles may be relevant to that claim in the discovery sense but unless they contained something which confirmed, even by inference, the term of lease which the Plaintiff asserts, it is difficult to see how they would be essential documents in respect of that claim.

[31] Next, by letter dated 31 January 2017 the Defendant pushed back the estimated response time to late February 2017. The Defendant apparently not having corresponded by then, on 24 February 2017 the Plaintiff warned the Defendant of the Plaintiff's intention to commence proceedings. On 1

10 As it can be proof that less than a total term of 10 years was specified.

March 2017 the Defendant yet again extended the response time, this time until the week commencing 20 March 2017.

- [32] By 27 March 2017 the Defendant had still not provided that response although it was indicated in an email of that date that a response was expected “*shortly*” thereafter. The Plaintiff filed the Writ on the same day.
- [33] The Defendant did not provide the Plaintiff with a PD6 response letter and did not disclose any documents prior to the issue of proceedings.
- [34] The Plaintiff submits that it was reasonable for the Plaintiff to issue proceedings when it did. This essentially depends on whether four months is a “*reasonable*”¹¹ time for the Defendant’s response. The Defendant argues that more time than that was actually required due to the complexity of the case, the nature of the enquiries that were required to be made and the extent of the documents to be reviewed for that purpose, comments which I think support, at least in part, the Plaintiff’s contention that aspects of the claim warrant an order for discovery in any event.
- [35] A period of four months is longer than the time contemplated for a full response by paragraphs 4 and 6 of PD6. That suggests that one month would normally be a reasonable time. If that is the benchmark for a typical case, four months might be considered to be a reasonable time for a full response in complex cases, such as in the current case. It does however depend on all the circumstances of the case. I think that the Court is poorly placed to

11 PD6 para 4.3.

determine that in the early stages of the proceedings without descending into the pre-action process. Conducting an enquiry to determine that would be impractical, especially in cases such as the current case. The cost and resulting delay would effectively defeat the objects of PD6. It is however something which might be able to be determined in retrospect at the end of the case, for example, concurrently with the determination of costs and/or interest.

- [36] Leaving aside for the present whether a reasonable time had elapsed, it is telling that by 20 April 2017, some five months after the Plaintiff sent its initial PD6 letter, the Defendant had still only disclosed one document. That was alleged in a letter from the Plaintiff to the Defendant dated 20 April 2017 but the single document which had been disclosed was not identified. This allegation was not challenged by the Defendant. It is difficult to accept that the Defendant had adequately complied with its PD6 obligations by that time if, in the five months following the Plaintiff's very detailed PD6 letter, the Defendant had not provided its PD6 response letter and had only located and disclosed a single document. Although a more detailed analysis and further evidence would be required before this could be conclusively determined, nonetheless it is difficult to accept the Defendant's claim of compliance to that time.

- [37] Less than one month later the Defendant disclosed a further 38 documents. Of those, six had redactions of alleged confidential information. A successful application was required before unredacted versions were

provided, resulting in a delay until 18 February 2018. More similarly redacted documents were provided in July 2017 and in October 2017 the Defendant conceded and provided unredacted copies. The Plaintiff submitted that this was an indicator that the Defendant had no intention of complying with its PD6 disclosure obligations in the short term. That is not overly relevant after the event and I think that submission is based on the Plaintiff's belief that the redactions were a deliberate ploy by the Defendant to obstruct or delay the process. That is not a finding that I would be prepared to make on the evidence.

[38] Further disclosures were made on 19 July 2017 and 10 May 2018. The disclosures made on 10 May 2018 only occurred after the Plaintiff had filed and served the current Summons. The Defendant says that those further disclosures were simply ongoing disclosure that the Defendant was obliged to make pursuant to paragraph 22 of PD6 and that is an arguable position. What was not explained is why those documents were not, or could not have been, disclosed earlier.

[39] The Plaintiff also complains that the Defendant has not made genuine efforts to identify relevant documents. The Plaintiff relies in part on the further disclosure of documents made by the Defendant referred to in the preceding paragraph and that may be indicative of insufficient effort. The Plaintiff's complaint relates to the nature of the searches which the Defendant has conducted of its records and databases. To demonstrate the relevance of this point, the Plaintiff relied on internal procedures required to be undertaken

by the Defendant before it could enter into the type of contractual arrangements as in the current case, such as the preparation of management plans, obtaining consultant's reports and similar such enquiries. The Plaintiff argues that these requirements would likely have regard to the intended duration of the proposal and therefore could be evidence of the representations which form the basis of the Estoppel claim.

[40] However if the documents did not contain any reference to the contemplated term, whether directly or inferentially, the document would not be essential to the Defendant's case. Noting that the Defendant's case is to deny the alleged representations, it is unlikely that the Defendant would have any essential documents which proved that there were no representations, i.e., proving a negative. Rather the only disclosable documents of this nature that the Defendant would likely have are documents disclosable by reason of the second basis of discovery, i.e., documents which might significantly impair the Defendant's case. Any document which directly or inferentially indicated that a 10 year term was contemplated would clearly impair the Defendant's case in a significant way.

[41] The Plaintiff also argued that the Defendant has either not properly conducted searches or the searches have proven ineffective by reason that the relevant databases were not first indexed. The Plaintiff submitted that indexing would improve the reliability of the electronic searches. That was little more than a bare assertion. The available evidence does not sufficiently establish the inadequacy of the searches or whether a different

approach, such as the indexing the Plaintiff refers to, was necessary, or appropriate, or would have been more successful.

[42] In answer to that the Defendant relies on the proviso in paragraph 22 of PD6 arguing that as that requires efficiency, economy and proportionality, the utility of the search and the likely cost involved must be assessed against the documents likely to be revealed by those searches. I do not agree. The submission attempts to apply the necessity test in paragraph 22 of PD6 to the extent of disclosure whereas I think the test is only to determine whether an order dispensing with discovery is appropriate.

[43] The reasons why the Plaintiff says that a discovery order should be made are, firstly, the non-compliance with the pre-litigation steps in PD6 and that each party asserts non-compliance with PD6 by the other. This has been partly discussed above. I am satisfied that the Plaintiff has not adequately complied with its PD6 obligations. Although it appears that its PD6 letter complied with the requirements of PD6 in respect of providing details of the claim, its compliance in respect of disclosure of documents was inadequate.

[44] The Defendant submits that the Plaintiff has conceded that its disclosure is deficient. This relies on the Plaintiff's submissions where, at paragraph 28.1, the Plaintiff says "*WPD accepts that it has further documents to provide, although it does not accept that all of the documents sought by the Commonwealth fall within the scope of PD6 or its discovery obligations*".

The Plaintiff may argue that this is not an admission of insufficiency of

disclosure given that it specifically claims that the further documents are outside of the Plaintiff's PD6 obligations. However, if the Plaintiff has further documents to provide to the Defendant, if they were not initially disclosable then they are likely to be documents which fall within ongoing disclosure pursuant to paragraph 22 of PD6 and should have been disclosed in any event.

- [45] In the case of the Defendant, although it does not concede that its disclosure is inadequate, I am not convinced that is the case. The Defendant had not provided its PD6 response within four months and had not disclosed any documents within that time. Given the nature of the dispute, the history of the negotiations leading up to documentation of the substantial agreement between the Plaintiff and the Defendant and the numerous personnel involved on the part of the Defendant, I find it surprising that the Defendant has to date disclosed as few documents as it has. It seems inconceivable that the Defendant has properly complied with its PD6 disclosure obligations in those circumstances. As of the date of these reasons it is now more than 15 months after proceedings were issued and more than 18 months since the Plaintiff's initial PD6 letter and yet searches are apparently still proceeding. That appears inconsistent with proper compliance.

- [46] The parties have now been arguing about discovery and/or disclosure for many months. The Defendant has made, it appears, numerous enquiries to obtain and review presumably relevant documents to determine if they are disclosable, as opposed to discoverable. It seems that determining the lesser

form of disclosure in lieu of discovery is taking an inappropriately disproportionate amount of time. The time arguing about sufficiency of disclosure or determining which documents were disclosable documents would have been better spent in simply undertaking the discovery process. I am confident that the time required for each party to file and serve a List of Documents will be much less than the time that has already been spent on disclosure. Work that has been done in that respect to date and costs that have been incurred to date will not be lost as I expect that much of the work done to date in that respect can be applied to the discovery process. It seems to me therefore that the PD6 disclosure process, rather than efficiently promoting the resolution of the proceedings, is having the contrary effect in this case. In that sense discovery will ultimately save time and money. These are important considerations for the purposes of determining necessity pursuant to paragraph 22 of PD6.

- [47] I am therefore satisfied that neither party has adequately complied with PD6. On the other hand, if the Defendant is correct and it has disclosed all documents it was required to provide by PD6, I think that is indicative of the insufficiency of the disclosure process in the current proceedings. As I have already stated, ordering general discovery pursuant to paragraph 22 of PD6 can occur even if there has been compliance by the parties with their disclosure obligations and that acknowledges that disclosure may not be a sufficient substitute for full discovery in some cases. Given the nature and complexity of the current case I think this is one such case.

[48] The Plaintiff also argues that a discovery order should be made because the Defendant refused to entertain alternative dispute resolution until it was satisfied of the sufficiency of the Plaintiff's disclosure. I cannot criticise the Defendant for that as alternative dispute resolution would likely be ineffective before proper disclosure, hence this basis adds little to the first basis.

[49] Thirdly, the Plaintiff argues that the Defendant has failed to adequately search its records and databases to sufficiently identify disclosable documents. This has been discussed above. Fourthly, that the Defendant's disclosure to date is inadequate, especially as a substitute for discovery. Again, this overlaps with the first and second bases and has been sufficiently dealt with for current purposes.

[50] Fifthly, that the Estoppel claim is of a size, value, scope and complexity which calls for general discovery. The Defendant argues that the Estoppel claim is not a matter of great complexity largely I think because it is only based on oral representations.¹² I think that is an overly simplistic way to view the issue in the context of disclosure or discovery in the current case. Although the representations may be oral, given the nature of the claim, the involvement of multiple personnel on the part of the Defendant and the need for appropriate governmental enquiry, reporting or recording, if the representations were made then there could be numerous documents which could be evidence of the representations. Any such documents would be

¹² That is correct per para 10.2 of the Second Amended Statement of Claim.

discoverable documents. I believe this sufficiently establishes the need for discovery as I agree with the Plaintiff that the Estoppel claim is sufficiently complex to require general discovery.

[51] Lastly, the Plaintiff relies on the Defendant requiring full general discovery from the Plaintiff. Presumably the Plaintiff argues that mutuality of orders should occur. I agree with the submission of the Defendant that mutuality of orders is not required. There have been instances of non-reciprocal orders, usually in straightforward cases and where it is clear that only one party has not properly complied with the PD6 disclosure obligations. However, I think it is unrealistic to expect in complex matters such as this, that one party should make full general discovery without a reciprocal obligation on the other party. That is especially so in the current case where I have formed the view that neither party has sufficiently complied with the PD6 disclosure obligations.

[52] The Plaintiff seeks to limit discovery only to the Estoppel claim. I think it is clear that such an order can be made pursuant to SCR Rule 29.05 or paragraph 22 of PD6. As with the question of the sufficiency of PD6 disclosure, determining the sufficiency of limiting discovery in that way must be determined in a practical way and I am also of the view that cannot realistically occur at this stage of the proceedings. Therefore if discovery is to be ordered it should be full discovery unless the parties are able to agree on a limited form of discovery.

[53] To conclude, in applying the usual approach, both parties complain of the sufficiency of the compliance of the other with the PD6 disclosure obligations and I am satisfied that each party's PD6 disclosure compliance is deficient. The considerations that I have discussed above makes it impractical for the Court to attempt to determine the question as I think that will result in considerable delays and will result in costs being unnecessarily incurred. The nature of the case leads me also to conclude that a general discovery order would have been appropriate even had proper disclosure been made by the parties. Moreover, I consider that an order for general discovery would be proportional having regard to the nature and quantum of the claim. I think it then follows that it can also be said to be economical within the meaning of paragraph 22 of PD6. Therefore, for the foregoing reasons, I have come to the conclusion that general discovery is necessary to resolve the real issues in dispute.

[54] Therefore the parties are required to give full discovery pursuant to Rule 29.02 of the SCR. Order 2 of the Summons is dismissed. Order 3 of the Summons is adjourned *sine die* with liberty to apply.

[55] I will hear the parties as to any ancillary orders, such as time for compliance and, if the parties have resolved the issues with respect to electronic discovery in the interim, in respect of electronic discovery.

[56] I remain willing to order limited discovery or discovery by category but I do not think that the Court can practically determine the precise order for that

at present. I am prepared to allow the parties 14 days to agree limited discovery or discovery by category. I am happy to vacate the order for general discovery if the parties are able to agree within the specified time.