*Trepang Services Pty Ltd v Sodexo Remote Sites Australia Pty Ltd* [2014] NTSC 23

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| PARTIES: | TREPANG SERVICES PTY LTD<br><br>v<br><br>SODEXO REMOTE SITES AUSTRALIA PTY LTD |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | 122 of 2013 (21354548) |
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| JUDGMENT OF: | MASTER LUPPINO |

**CATCHWORDS:**

Costs – Application for pre-action discovery – Principles applicable to costs orders in pre-action discovery applications – Compliance costs following order for pre-action discovery –– Impact of contractual right to requested documents – Application of disclosure obligations and costs sanctions in PD6.

Supreme Court Rules rr 32.03, 32.05, 32.11, 45.04 and 63.03
Practice Direction No 6 of 2009 paras 2.1, 4.1, 6.2, 6.5, 10.2, 10.3, 13, 27
Uniform Civil Procedure Rules (NSW), r 42

Williams, *Civil Procedure Victoria*, para I 32.11.0

*C7 Pty Ltd v Foxtel Management Pty Ltd* [2001] FCA 1864;
*Morton v Nylex Ltd* [2007] NSWSC 562;
*J & A Vaughan Super Pty Ltd v Becton Property Group Ltd* [2103] FCA 340;
*Re Minister for Immigration and Etnic Affairs; ex parte Lai Qin* (1997) 186 CLR 622;
*One.Tel Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548;
*United Super Investments Pty Ltd v Randazzo Investments Pty Ltd* [2010] NTSC 31;
*Greg Meyer Paving Pty Ltd v Can-Recycling (SA) Pty Ltd* [2013] NTSC 16;
*NT Pubco Pty Ltd v DNPW Pty Ltd (Subject to Deed of Company Arrangement)* [2011] NTSC 51;
*Proctor v Kalivis (No 3)* [2010] FCA 1194;
*Stefan v ANZ Banking Group Ltd* [2009] NSWSC 883;
*Airways Corporation of New Zealand & Anor v The Present Partners of PriceWaterhouse Coopers Legal & Anor* [2002] NSWSC 521;
*Schmidt v Won* [1998] 3 VR 435;
*Kallitsis v Emerson Finance Pty Ltd* [2008] VSC 180;
*Riley v Jubilee Gold Mines NL* [2000] WASC 114.

**REPRESENTATION:**

*Counsel:*

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| Applicant: | Mr S. Keizer |
| Respondent: | Mr T. Anderson |

*Solicitors:*

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| Applicant: | Cridlands MB Lawyers |
| Respondent: | Ward Keller Lawyers |

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

*Trepang Services Pty Ltd v Sodexo Remote Sites Australia Pty Ltd* [2014] NTSC 23
No. 122 of 2013 (21354548)

BETWEEN:

**Trepang Services Pty Ltd**
Applicant

AND:

**Sodexo Remote Sites Australia Pty Ltd**
Respondent

CORAM: MASTER LUPPINO

REASONS FOR JUDGMENT

(Delivered 10 June 2014)

[1] This matter commenced as an application by the Applicant ("Trepang") by Originating Motion seeking orders firstly for a declaration in respect of a contractual entitlement to production of documents and secondly, for pre-action discovery pursuant to Rule 32.05 of the *Supreme Court Rules* ("the SCR").

[2] The background facts are that Trepang and the Respondent ("Sodexo") are parties to an agreement dated 11 January 2013 ("the VMSA") whereby Sodexo provided services in the nature of accommodation management at

Trepang's workers' hostel situate at Wickham Point. Relevant terms of the VMSA include;

a) Sodexo was to provide specified management services in respect of the hostel in consideration of payment of a service fee;

b) The services included invoicing of patrons, the collection of payments and the accounting to Trepang;

c) Sodexo was obliged to keep records to enable scrutiny of its compliance with the VMSA and the integrity of the invoices;

d) Sodexo was obliged to provide Trepang with various records.

[3] The VMSA provided that either party could terminate it by notice. Trepang gave notice for that purpose with effect from 13 July 2013.

[4] During the period of the VMSA, Trepang ascertained that Sodexo had charged cancellation fees when accommodation was booked and not taken up. Sodexo did not account to Trepang for those fees, its reason being that it was of the view that Trepang had no entitlement to those fees. There were no provisions in the VMSA which specifically related to or contemplated such fees. Sodexo also charged other fees to patrons which were not specifically provided for in the VMSA namely, fees for bus services, fees for advance bookings and fees for additional catering services provided to the patrons. Sodexo did not account to Trepang for those fees either.

[5] After notice of termination was given by Trepang and before the termination became effective, the chain of correspondence which is the prelude to the current application occurred.

[6] Trepang alleges that it was clear from the correspondence that it was seeking documents for the purpose of auditing all fees payable under the VMSA. Sodexo's position was that the extent of the request was not clear and that as expressed in the correspondence, the request was limited to documents relating to the cancellation fees.

[7] Sodexo claims and maintains that it had provided Trepang with all documents which Trepang was entitled to under the VMSA and which Sodexo was able to provide. It refused to provide documents relating to cancellation fees as it was of the view that Trepang had no entitlement to those fees.

[8] Following the issue and service of the Originating Motion and the supporting affidavit, Sodexo claims that it then realised for the first time that Trepang was seeking documents for the purposes of a full audit and not only documents relevant only to cancellation and other like fees. Thereafter, Sodexo provided numerous additional documents. The additional documents provided included documents relevant to cancellation and other additional fees.

[9] In the letter from Sodexo's solicitors dated 20 February 2004, the reason why the documents relevant to the cancellation fees were subsequently provided, notwithstanding Sodexo's claimed position, was that it appeared to Sodexo that Trepang had been confused by the documents provided until then and hence gave complete versions of the documents without redaction

"*to avoid any further confusion on your client's part*". Whether genuine or not, by this time Sodexo had completely capitulated on the position it had taken at the outset and which it rigidly maintained until the commencement of the proceedings.

[10] Trepang issued the Originating Motion in the current proceedings on 3 December 2013. An Amended Originating Motion was filed on 16 December 2013 to correct typographical errors. The amendments are of no consequence to this decision, hence a reference herein to the Originating Motion interchangeably refers to either as the context requires. The Originating Motion sought firstly an order for pre-trial discovery and secondly, in the alternative, a declaration that in any case those documents were documents which Sodexo was contractually obliged to provide to Trepang pursuant to the VMSA.

[11] The Summons on Originating Motion required by Rule 45.04(1) and (2) of the SCR was also filed on 3 December 2013. That was not the subject of amendment. That Summons only sought orders for pre-action discovery. The summons makes no mention of the alternative relief sought in the Originating Motion. Rule 45.04(1) and (2) of the SCR is relevant. The combined effect of those rules is that an applicant is not entitled to judgment on an Originating Motion absent such a Summons once an appearance has been entered. Other than Mr Anderson, for Sodexo, pointing out that the Summons on Originating Motion did not also seek the declaration expressed in the Originating Motion, he made no further submissions concerning that.

This procedural issue can be rectified by an appropriate amendment to the Summons and I would ordinarily require that for procedural correctness. In this case that appears pointless if the Originating Motion is now to be dismissed and the matter will not proceed to judgment on the Originating Motion (see paragraph 52 below).

[12] The agreement by Sodexo to provide further documents after the issue of the proceedings rendered the application obsolete as Trepang provisionally accepted the agreement to provide those documents as compliance with the request for production. As a result, all that was left to litigate was the question of costs.

[13] The general rule in respect of costs in proceedings in this Court is that costs are in the discretion of the Court.[1] There is a specific costs provision in Rule 32.11 which sets out specific orders the Court can make.[2]

[14] Practice Direction No 6 of 2009 – Trial Civil Procedure Reforms ("PD6") also has application as PD6 sets out, *inter alia*, disclosure obligations prior to the commencement of proceedings[3] and cost sanctions for non-compliance.[4] Included in the chain of correspondence in evidence before me was a letter written pursuant to PD6.

[15] The relevant costs provisions in PD6 are:-

[1] Rule 63.03(1) of the SCR.
[2] These orders are consistent with the various orders that have been made in other jurisdictions in any case.
[3] See generally paragraphs 3.1, 4.1, 6.2, 6.5, 10.2 and 10.3.
[4] See paragraphs 13 and 27.

13. If, in the opinion of the Court, non-compliance with this Part has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to delay or costs being incurred in the proceedings that might otherwise not have been incurred, the orders the Court may make include:

    13.1 an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;

    13.2 an order that the party at fault pay those costs on an indemnity basis;

    13.3 if the party at fault is a plaintiff in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;

    13.4 if the party at fault is a defendant and an order for the payment of damages or some specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate than the rate at which interest would otherwise have been awarded.

27. The Court will take into account, amongst other matters, whether a party has complied with its duties under the Rules and further this Practice Direction when considering:

    27.1 the exercise of its discretion as to costs under r.63.03;

    27.2 the exercise of its discretion in relation to interest under s 84 of the Supreme Court Act.

[16] I was referred to a number of authorities dealing with costs on applications for pre-action discovery. The authorities show divergence in the various jurisdictions in respect of preferred costs orders in pre-action discovery applications, mostly with respect to the costs of the application but also with respect to the costs of the consequent compliance. Some authorities look at

costs for pre-action discovery as discrete and separate to any substantive proceedings that may result from the discovery. Indeed, that is the justification in some cases for declining to make what has been described as a usual or a conventional order.[5] The approaches range from deferring costs to the subsequent substantive proceedings at one end of the spectrum to orders for the applicant paying the costs of the application.

[17] In this jurisdiction, the general rule of costs means that a full discretion is available to the Court. Therefore no one order can be ruled out depending, as it does, on the particular circumstances of each case. Additionally, as discussed above, compliance with PD6 is a relevant factor.

[18] The authorities generally acknowledge that ordinarily a respondent will be awarded the costs of compliance, as opposed to the costs of the proceedings. This is because the power of the Court to order pre-action discovery is considered to be an indulgence which invades the respondent's private affairs and then only to determine if a subsequent action should be brought. The consensus seems to be that a respondent should not be out of pocket by the requirement to comply.[6]

[19] Trepang argues that that these principles do not necessarily apply in the current proceedings by reason of the contractual obligation on Sodexo to provide the requested documents.

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[5] For example, in *C7 Pty Ltd v Foxtel Management Pty Ltd* [2001] FCA 1864, at paragraph 50 where see Gyles J said "An application pursuant to Order 15A is a discrete application and may never lead anywhere. There is no reason why a party which is out of pocket because of costs should await some indefinite future event."

[6] Williams, *Civil Procedure Victoria*, para I 32.11.0, citing *Vaughan*, *Schmidt v Won* and *Kallitsas v Emerson Finance Pty Ltd*

[20] Additionally Trepang argues that Sodexo's actions in refusing to provide documents before proceedings was unreasonable. This is an established basis for an award of costs.[7] Trepang also argues that the effect of the compliance with their requests occurring almost immediately after service of the proceedings when compared to the steadfast refusal until that time, amounts to a total capitulation and that therefore costs should be awarded to it according to the line of authority dealing with that principle.[8]

[21] *J & A Vaughan Super Pty Ltd v Becton Property Group Ltd*[9] ("*Vaughan*") dealt with costs of a preliminary discovery application in the Federal Court. I was told that the relevant Federal Court Rules are sufficiently similar to those under the SCR to validate direct comparison of authorities. In *Vaughan*, Kenny J, after observing that there was a tendency for courts to award costs of preliminary discovery applications as costs of the subsequent substantive proceedings, qualified that by adding "*...much depends on the nature of the case, including the way the parties conducted the preliminary discovery litigation, the nature of any anticipated proceeding and the likely passage of time before resolution at trial.*"[10] The extent of an adversarial

[7] *Re Minister for Immigration and Etnic Affairs; ex parte Lai Qin* (1997) 186 CLR 622; *One.Tel Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548.
[8] See generally *United Super Investments Pty Ltd v Randazzo Investments Pty Ltd* [2010] NTSC 31; *Greg Meyer Paving Pty Ltd v Can-Recycling (SA) Pty Ltd* [2013] NTSC 16; *NT Pubco Pty Ltd v DNPW Pty Ltd (Subject to Deed of Company Arrangement)* [2011] NTSC 51.
[9] [2103] FCA 340
[10] [2103] FCA 340 at para 12

approach taken by a respondent as well as the conduct of an applicant in the lead up to proceedings was considered to be a relevant consideration.[11]

[22] In *Vaughan* the applicant for the order for pre-action discovery was ordered to pay the respondents costs, both of the application and of compliance. The applicant had sought orders making the costs of the application and the cost of compliance as costs in the cause of the proposed substantive proceedings.

[23] In *Proctor v Kalivis (No 3)*,[12] another case based on the Federal Court Rules, Besanko J concluded that there was no established conventional approach to costs orders in pre-action discovery claims. He added that costs caused by an adversarial approach will not necessarily include compliance costs. He said that ordinarily an applicant should pay compliance costs and at best they could be deferred. In that case his Honour concluded that the respondents had not adopted an unnecessarily adversarial approach to the application generally and he ordered the applicant to pay the respondent's costs of the application unless the applicant commenced substantive proceedings within two months, in which case costs were deferred to the substantive proceedings. This latter order was to address the problem of deferred costs orders where substantive proceedings do not issue following an order for pre-action discovery.

[11] [2103] FCA 340 at para 13
[12] [2010] FCA 1194

[24] *Stefan v ANZ Banking Group Ltd*,[13] is a New South Wales Supreme Court authority. Care is required in the application of this authority to the extent that the authority depends on the different general rule of costs that applies in the New South Wales Supreme Court i.e., that costs follow the event unless the Court otherwise orders.[14] The basis for such a distinction was acknowledged in that case.[15] The application before the Court was in respect of costs of the application as the applicant had agreed to pay the compliance costs. The case involved identity pre-action discovery[16] but I do not think that anything turns on that distinction. The Court expressed the view that the better approach to costs orders in pre-action discovery cases is to avoid deferring those costs to subsequent substantive proceedings and to avoid contingent orders. Further, where the respondent takes an adversarial approach to the application, an order awarding the respondent costs in any case is not necessarily appropriate. This approach was consistent with that taken by Simpson J in *Airways Corporation of New Zealand & Anor v The Present Partners of PriceWaterhouse Coopers Legal & Anor*.[17]

[25] In *Schmidt v Won*,[18] a decision of the Victorian Court of Appeal, an order that the applicant for pre-action discovery should pay the compliance costs was described as the customary order. The applicant was also ordered to pay the respondent's costs of the application. The rationale for these orders was

[13] [2009] NSWSC 883
[14] Uniform Civil Procedure Rules (NSW) 2005, rule 42
[15] [2009] NSWSC 883 at para 29
[16] SCR rule 32.03
[17] [2002] NSWSC 521
[18] [1998] 3 VR 435

that if substantive proceedings were commenced by the applicant and were ultimately successful, the applicant would likely be awarded costs including any costs awarded against the applicant for the pre-action discovery application. At that time the relevant rules applicable in Victoria mirrored the SCR as they currently stand.

[26] In *Kallitsis v Emerson Finance Pty Ltd*,[19] a decision of Judd J in the Victorian Supreme Court, a submission had been made in that case that the usual order for compliance costs in an action for pre-action discovery is to defer those costs to the substantive proceedings. His Honour rejected that and followed *Schmidt v Won*.[20]

[27] In *Riley v Jubilee Gold Mines NL*[21] the Court ordered the applicant to pay the costs of the application, notwithstanding that the applicant was successful in the application, because the respondent had not acted unreasonably in declining discovery. The Court was of the view that the applicant was seeking an indulgence and a respondent should not be obliged to consent to a discovery order without sanction of the Court as it was a serious intrusion into the respondent's rights. As to compliance costs, the order made was to reserve the compliance costs to the substantive proceedings. The rationale for this was that if substantive proceedings were commenced then the discovery process in those proceedings would be reduced by reason of the pre-action discovery. The Court however agreed

[19] [2008] VSC 180
[20] [1998] 3 VR 435
[21] [2000] WASC 114

that the respondent should have the compliance costs if substantive proceedings were not commenced.

[28] The principles which apply to the decision to be made, as I understand them based on these authorities, and in addition to the specific requirements of the SCR and PD6, in summary form, are:-

(a) an award of costs is discretionary;

(b) the particular circumstances of the case are taken into account including the nature of the case including the way the parties conducted the preliminary discovery litigation;

(c) it may be appropriate not to award costs against a party unless that party is shown to have acted unreasonably;

(d) if the respondent to an application takes an adversarial approach the respondent may be required to pay costs as a result of that approach;

(e) an order deferring costs to subsequent proceedings should not routinely being made because such substantive proceedings may not issue;[22]

As is evident from this summary, some principles counter others and there are variances in the different jurisdictions.

[22] To counter that, in some cases, for example *Proctor v Kalivis (No 3)* [2010] FCA 1194, an order was made providing for costs to be deferred if substantive proceedings were commenced within a set time and failing that costs were awarded to the respondent.

[29] An analysis of the correspondence is required to put the relevant considerations into proper context.

[30] The correspondence commences with an email from Trepang to Sodexo dated 4 July 2013. It sought a "*detailed breakdown of the man nights charged to your clients during their stays*." It referred to "*no-show*" revenue, which is clearly a reference to cancellation fees. It asserted that the VMSA did not allow Sodexo to use the property to generate additional income. Viewed in the context of those assertions the request for the detailed breakdown can rightly be interpreted as a request for information in respect of cancellation fees.

[31] The immediate reply from the Sodexo relevantly stated Sodexo's position that they were not obliged to account for cancellation fees and therefore declined to provide documents relevant to those fees.

[32] Then followed a letter from Trepang's solicitors dated 5 July 2013 to Sodexo. This letter set out in detail the argument propounded on behalf of Trepang that cancellation fees were covered by the VMSA. In respect of disclosure obligations and of the nature of the information sought, it is asserted that by reason of specified clauses in the VMSA, Sodexo was obliged to provide disclosure of "*its accounts and records... to enable Trepang to properly assess that the Daily Fees and other fees referred to in clause 4.1(b) are duly accounted for*". The summary at the end of that letter then again referred to cancellation fees. That letter, again read in context of

the clauses of the VMSA referred to and the arguments espoused in respect of cancellation fees, could again rightly be interpreted as a request for information in respect of those cancellation fees.

[33] The response from Sodexo was by letter dated 8 July 2013. It set out in detail the argument of Sodexo that Trepang was not entitled to any part of the cancellation fees. It denied that full and proper disclosure in accordance with the VMSA had not been given by Sodexo. It asserted that as Trepang's recent request was in respect of cancellation fees, it declined to provide those for the reasons given. The letter then asserted that "*as far as I am aware this is the only information that has been requested by your client that Sodexo has not provided*". Again it could be rightly interpreted that the focus of the letter is in respect of cancellation fees.

[34] Next, by email dated 18 July 2013, Trepang's solicitors make a request for documents in the nature of:-

1. Weekly reservations;
2. Weekly room check in and checkout times;
3. Weekly individual room occupancy days;
4. All invoices issued and outstanding for room occupancy;
5. The terms of trade in connection with brackets a particular contractor);
6. Trading terms with other residents.

The wording of this request mirrors clause 16 of the VMSA.

[35] Although Sodexo apparently still viewed this as a request only in respect of documents relevant to cancellation fees, on my reading of it the letter

clearly goes beyond the previous requests. It appears to seek documents in respect of all revenue. Sodexo provided some additional material in response under cover of emails dated 24 July 2013 and 29 July 2013. The additional information was provided in the form of records from a software package of Sodexo referred to as Guestpoint.

[36] Trepang's solicitors then again wrote to Sodexo on 1 August 2013. There it was asserted that the documents provided up to that point did not entirely satisfy the request made in the email of 18 July 2013. The letter then requested further information. The letter said relevantly, (with emphasis as it exists in that letter)

> "We request…. you provide the following class of documents to us in order for Trepang to make an informed and considered decision, which Trepang is entitled to, pursuant to the provisions of the VMSA. The smaller list (superseding the list of 18 July 2013) is:
>
> 2.1 Daily reconciliation of ALL revenue derived including an itemised list of in-house guests to reconcile back to invoices. This is commonly referred to as a night audit;
>
> 2.2 Receipts for payments of cancellation fees;
>
> 2.3 All Daily Fees reports for the duration of the Contract, pursuant to clause 5.1(f) of the VMSA;
>
> 2.4 All invoicing and receipts for the following services that Sodexo has provided:
>
> 2.4.1 the advanced booking service;
> 2.4.2 Bus services; and
> 2.4.3 Catering services."

[37] Sodexo maintains that, even after this email, it considered that the documents sought were only those in respect of the cancellation fees as

opposed to documents for the purposes of a full audit. In my view this position is untenable. That is the case even if that email were viewed alone but more so when read with the email of 18 July 2013 (see paragraph 34). Noting that the cancellation fees are separately dealt with in paragraph 2.1 of the letter, noting that the other fees are also discreetly referred to in paragraph 2.4 of the letter and, lastly having regard to the comment that the request superseded the previous request, an interpretation of the request for "*Daily reconciliation of ALL revenue*" as being confined to cancellation and other similar fees cannot be justified.

[38] Sodexo's response to Trepang's request, utilising corresponding numbering, was as follows:-

> "2.1 Sodexo will not be providing this information. Sodexo has already provided you with full details (including copies of all invoices) of all revenue from accommodation fees. Sodexo has no obligation under the VMSA to account to your client for any other revenue.
>
> 2.2 Sodexo will not be providing this information as it has no obligation to account to your client for this revenue under the VMSA.
>
> 2.3 Sodexo has already provided reports of daily fees.
>
> 2.4 Sodexo will not be providing this information as it has no obligation to account to your client for this revenue under the VMSA."

[39] Next is the letter sent pursuant to PD6 by Trepang dated 14 August 2013. It repeats the request made for the information sought in the email of 18 July 2013. It then repeats the request for the information sought in the letter of 1

August 2013. It then adds that *"… to properly quantify what is owed by Sodexo for all accounts and the Cancellation Fees, as it is contractually entitled to pursuant to clause 4 of the VMSA, Trepang pursuant to clauses 5.2(e), 15, and 16 respectively of the VMSA requested…*". It then goes on to summarise the documents previously requested and the manner of those requests. The letter then set out the relief claimed by Trepang namely:-

> "14. An account as at 13 July 2013 of:
>
> 14.1 All invoices delivered on payments made to Trepang;
>
> 14.2 All invoices delivered and payments by or to any third party and the receipts thereof, touching and concerning the Village.
>
> 14.3 All invoices that do not charge Daily Fee of $220.00 per night."

[40] The form of that letter, the summary of the request made, the documents previously provided, the demarcated references to cancellation and other fees incorporated by extract from previous correspondence and the statement that Trepang wished to quantify "*what is owed by Sodexo for <u>all</u> accounts <u>and</u> the Cancellation Fees…*" (emphasis added), makes it clear in my view that the request goes beyond documents relevant only to cancellation and other like fees. Notwithstanding that, Sodexo maintained beyond the time of this letter that it understood that the request was in respect of cancellation fees only, documents which according to its interpretation of the VMSA it was not obliged to provide in any case.

[41] Sodexo claims that it was only on the issue of the Originating Motion that it was clear that the scope of the requested documents went beyond cancellation fees. The letter from Sodexo's solicitors to Trepang's solicitors dated 10 December 2013 asserted that there was "*a different basis*" for the requested documents to that previously formulated. It added "*I note that this appears to be the first time that your client has raised these matters with my client or sought further documents to assist your audit*". Later, and in the context of pre-action discovery it is said, "*I note that your client has now, for the first time, outlined the basis for that order, which is different from that previously raised in your correspondence with my client and Mr Anderson concerning this matter. I assume … that your client has now abandoned the contention that the Additional Fees were payable pursuant to the VMSA*".

[42] The additional fees referred to include the cancellation fees. Sodexo had steadfastly refused to provide relevant documents in relation to those fees on the basis of its view that Trepang had no entitlement to payment of cancellation fees.

[43] However, even if Sodexo disputed Trepang's entitlement to payment of a portion of the cancellation fees, Trepang had made it sufficiently clear in the requests for documents that Trepang was seeking documents which included documents relevant to the cancellation fees and on the basis that they claimed an entitlement to those cancellation fees. They had expressed an entitlement as early as their correspondence of 1 August 2013. Whether or

not that interpretation is ultimately found to be correct is not the point. At the very least the existence of the dispute concerning the cancellation fees made those fees an issue. Even leaving aside contractual entitlements, given the clear expression of this position in the PD6 letter, the obligation to disclose those documents pursuant to PD6 then manifested itself, notwithstanding the disputed interpretation.

[44] In my assessment the claim by Sodexo that Trepang expressed the request for documents on a "*different basis*" in the Originating Motion, if genuine, cannot be justified. That claim is also difficult to justify when the nature of the documents requested is compared to the precise orders sought. The orders sought sufficiently match the documents described correspondence preceding the commencement of proceedings.

[45] Although the request in the initial correspondence was expressed in a way which could rightly be said to be limited to cancellation fees, whether Trepang intended that or not, this later changed to a request for documents to enable Trepang to conduct a full audit. I suspect that this was done deliberately as a legitimate way of overcoming, and rendering irrelevant, the claim by Sodexo that Trepang was not entitled to cancellation fees. The change was sufficiently clear given the words used (see paragraphs 39 and 40 above). The claim by Sodexo to having misunderstood the request is not credible in my view. The explanation given by Sodexo for subsequently providing all documents in respect of cancellation fees is likewise not convincing.

[46] In *Morton v Nylex Ltd,*[23] the requirements for an order for pre-action discovery were discussed and it was said that an applicant must disclose the information he or she already has relevant to making a decision as to whether to commence proceedings and to identify what information is lacking. Further, that the application cannot be used to shore up a case which the applicant has already decided to bring, or that the applicant could decide to bring on the available material. Mr Anderson for Sodexo relied on this decision and argued that this went as far as requiring the applicant to have, before commencing the application, clarified its request for documents such that any confusion in that regard be avoided. However I do not agree. That argument is predicated on the basis that there was confusion as to the extent of the request for documents. I do not accept that for the reasons given and I have formed the view that the request for Trepang was clear enough.

[47] Given that, I do not see that the onus on an applicant for an order for pre-action discovery goes as far as that, at least not on the facts of this case. Trepang was entitled to rely on an apparently clear expression of the nature of the documents requested. No evidence has been presented from which I would deduce that Trepang knew that Sodexo had misunderstood Trepang's request. It is illogical to require Trepang to elaborate on its request in those circumstances, especially when viewed in light of the rigid refusal expressed by Sodexo to produce more documents than it already had.

[23] [2007] NSWSC 562

[48] In my view Trepang should have the costs of the application. Based on the authorities discussed earlier it is appropriate to award costs were a party acts unreasonably. Sodexo has acted unreasonably as a result of its claimed error in interpreting Trepang's request. It was also unreasonable because of the contractual obligation to provide documents and because of the disclosure obligations in PD6. Costs can also be ordered against a party who completely capitulates. That occurred here shortly following the commencement of proceedings. Sodexo ultimately capitulated on the rigid position previously taken and gave an untenable explanation for earlier refusals based on confusion concerning the precise request. The operation of PD6 is also relevant because the PD6 letter specifically requested documents to enable Trepang to conduct a full audit. Notwithstanding that Sodexo disputed Trepang's claim to entitlement to cancellation fees, Trepang was entitled to documents to do a full audit and therefore it was clearly an issue at that time. Therefore PD6 obliged Sodexo to disclose those documents. Sodexo did not comply with their obligations and is therefore liable to pay costs in pursuant to paragraph 13 of PD6. The contractual entitlement to the documents under the VMSA only strengthens Trepang's position. A costs order against Sodexo is justified on each of these bases.

[49] Trepang claims costs commencing from the date of the PD6 letter, namely 14 August 2013 and I believe that is appropriate.

[50] The question of compliance costs requires further consideration. It is complicated in this case by reason of the contractual obligation to provide

the requested documents and the disclosure obligations in PD6. Ordinarily compliance costs are awarded to the party making discovery or those costs are deferred to be costs in the proceedings of any substantive proceedings which follow from the pre-action discovery.[24] That is the order which Sodexo seeks in this case. But for the contractual entitlement and the operation of PD6, that order might have been appropriate. If the contractual entitlement is ultimately made out, and on the limited evidence presented on this application I expect that it will be, the appropriate order should be that there be no order in respect of compliance costs as, had Sodexo provided those documents when requested, that would have been at its own cost.

[51] However on a fuller consideration of all evidence the possibility exists that the proper extent of the contractual obligation, and the proper interpretation of the relevant provisions in the VSMA, might result in a different conclusion. It is for that reason that I propose to defer compliance costs to any substantive proceedings. In doing so I will adopt the approach taken by Besanko J in *Proctor v Kalivis (No 3),*[25] namely that if substantive proceedings are commenced within a specified time (I contemplate three months but I will hear the parties on that before fixing a time period), then costs in respect of compliance will be costs in those proceedings, else there will be no order for compliance costs.

[24] Per Schmidt, proctor and Vaughan to name a few
[25] [2010] FCA 1194

[52] As far as the current Originating Motion is concerned, Trepang asks that it now be dismissed. Although Mr Anderson queried whether that is a logical and appropriate way to dispose of the matter, he did not oppose that. Hence I propose to make such an order in conjunction with the order for costs.