IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-007271

BETWEEN	ANZ NATIONAL BANK LIMITED First Plaintiff
AND	ING (NZ) LIMITED Second Plaintiff
AND	TOWER INSURANCE LIMITED Defendant
AND	VERO INSURANCE NEW ZEALAND LIMITED Counterclaim Defendant

Hearing: 23 and 24 July 2009

Appearances: J E Hodder SC and T Smith for the Plaintiffs
C T Walker and M Smith for the Defendant
S A Armstrong for the Counterclaim Defendant

Judgment: 1 September 2009 at 3:00pm

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 1 September 2009 at 3:00pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
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Introduction

[1] The background to these proceedings is set out in [1] to [7] of my substantive judgment dated 11 March 2009. In short, there is a dispute between ANZ National Bank Limited ("ANZN") and ING (NZ) Limited ("INGNZ") on the one hand, and Tower Insurance Limited ("Tower") on the other, arising out of the termination of insurance agency agreements entered into between them. Pursuant to those agreements insurance policies were sold to ANZN customers. The policies were underwritten by Tower. A number of the matters in dispute between the parties were dealt with in my judgment of 11 March 2009, although it should be noted that both ANZN/INGNZ and Tower have appealed to the Court of Appeal.

[2] As recorded in [6] of my judgment, Tower has filed a counterclaim against ANZN and INGNZ. The initial counterclaim was only against those entities. On 12 December 2008, Tower filed an interlocutory application seeking leave to file an amended statement of defence and counterclaim and to join Vero Insurance New Zealand Limited ("Vero") as a counterclaim defendant. Leave was granted and Tower filed an amended statement of defence and counterclaim on 22 December 2008. In that document Tower alleged that ANZN and INGNZ entered into a confidentiality deed with it dated 12 February 2008, and that they have breached that deed in various ways. It also alleged breach of various clauses in the insurance agency agreements and breach of confidence by ANZN/INGNZ and Vero. It alleged that Vero knew or ought to have known that information that Tower says Vero received from ANZN/INGNZ was confidential, and that Vero has used that information for the purpose of purchasing or acquiring from either or both ANZN and INGNZ rights to exploit the portfolio of insurance policies sold by Tower pursuant to the insurance agency agreements.

[3] Tower's counterclaim has yet to be heard.

Interlocutory applications

[4] A number of interlocutory applications have been filed. I list them as follows, by reference to the dates on which they were filed:

a) An application dated 1 May 2009 made by ANZN and INGNZ seeking better particulars of Tower's amended counterclaim dated 22 December 2008 and particular discovery by Tower of various classes of documents.

b) An application by Tower against Vero dated 5 May 2009 seeking further and better discovery, inspection and disclosure.

c) An application by Vero against Tower dated 10 June 2009 seeking further particulars of Tower's amended counterclaim dated 22 December 2008 and particular discovery by Tower.

[5] All parties filed notices of opposition. Extensive affidavits were also filed.

[6] There was significant overlap between the applications made by ANZN/ INGNZ and Vero. Many of the classes of documents sought from Tower were described in similar, albeit not identical, terms. In the course of the hearing, I suggested to counsel for those parties that they should seek to agree on a common description of the documents that they asserted Tower should discover. They readily agreed to that proposal, and I was presented with an amended list describing the documents sought in common terms. I am grateful to counsel for that assistance.

[7] There were other developments either immediately prior to, or at the hearing which affected its scope.

[8] On 20 July 2009 Tower filed a second amended counterclaim. ANZN/ INGNZ's and Vero's applications seeking better particulars of Vero's counterclaim dated 22 December 2008 were in large part overtaken by the amended pleading.

[9] Further, during the course of the hearing, all parties modified their earlier opposition and in part agreed to accommodate the various requests for further discovery. As a result, I have received joint memoranda from counsel which have meant that I can make a number of consent orders. Again I am grateful to all counsel for that co-operation. There are, however, still some matters outstanding in respect of which a ruling is required.

Applications seeking better particulars of Tower's amended counterclaim dated 22 December 2008

[10] The causes of action relied on by Tower in its amended counterclaim dated 22 December 2008 have been outlined briefly above at [2]. In regard to all causes of action Tower asserted that loss had been suffered and stated that particulars of the loss would be given prior to trial. Tower also sought damages in an amount to be quantified before trial.

[11] In their application dated 1 May 2009, ANZN and INGNZ sought further particulars of the categories of loss claimed and an indication of quantum. They also sought further particulars of the profit Tower asserts they made from the information claimed to be confidential, and an indication of quantum in that regard.

[12] Similar information was also sought by Vero in its application dated 10 June 2009. In addition, Vero sought further particulars of various specific allegations made against it in paragraphs 32, 33 and 34 of the amended statement of counterclaim dated 22 December 2008.

[13] The second amended counterclaim dated 20 July 2009 recasts the counterclaim. The reference to the confidentiality deed dated 12 February 2008 is gone. The first cause of action against ANZN/INGNZ is based on the alleged breach of the insurance agency agreements. The second cause of action alleges breach of

confidence by ANZN/INGNZ and the third cause of action alleges breach of confidence by Vero. The loss claimed under each cause of action is now particularised in some detail. The document also amends the claim to damages. It now seeks damages in an amount to be determined on an enquiry.

[14] It is clear that Tower is contemplating two hearings – first a hearing to determine liability and secondly a hearing into damages.

[15] As a consequence, ANZN/INGNZ do not pursue their application for further particulars at this stage pending trial of liability issues. Similarly Vero does not pursue the orders sought in paragraph 1(a) of its application dated 10 June 2009. Nor does it pursue the orders sought in paragraphs 1(f) or 1(g) at this stage, pending trial of liability issues.

[16] Vero had sought additional particulars in its interlocutory application. Those further particulars were detailed in paragraphs 1(b) to (e). At the hearing, it requested that its application for the orders sought under those paragraphs be adjourned pending Tower's review of the further discovery to be provided by Vero. That adjournment was consented to by Tower. Accordingly, and by consent, I adjourn the hearing in regard to the orders sought in paragraphs 1(b) to (e) of Vero's application dated 10 June 2009. I deal with the period of the adjournment below.

Further Discovery

(a) ***General principles***

[17] Before dealing with the orders sought by each party, I note that each of the applications of particular discovery was brought under r 8.24 of the High Court Rules.

[18] That rule provides as follows:

> If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not

> discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—
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> (a) to file an affidavit stating—
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> (i) whether the documents are or have been in the party's control; and
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> (ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control, and who now has control of them; and
>
> (b) to serve the affidavit on any other party.

[19] The rule represents a departure from what was r 300 in the High Court Rules 1985. Rule 300 required an applicant to show that further particular discovery was "necessary". It now suffices if an applicant demonstrates that grounds exist for believing that the respondent has not discovered documents that should have been discovered.

[20] The new rule was considered in *The Oaks Law Centre Solicitors Nominee Company Limited v Quotable Value Limited* HC WN CIV 2008-485-1691, 16 June 2009. Clifford J there observed:

> [21] As to particular discovery, r 8.24 of the High Court Rules provides that, if at any stage of the proceeding it appears to a Judge – from evidence or from the nature or circumstances of the case or from any document filed in the proceeding – that there are grounds for believing that a party has not discovered a document or documents that should have been discovered, the Judge may order that party to file an affidavit stating whether the documents are or have been in the party's control and, if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control, and who now has control of them, and to serve the affidavit on any other party.
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> [22] As noted in *Dale & Ors v Jeffrey & Anor* HC AK CIV-2007-404-002015 22 October 2008 at [17], therefore, a party seeking particular discovery must show:
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> a) The other party is required to give discovery: r 294;
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> b) Grounds for believing that the other party has not discovered documents that are or have been in that party's control: *AMP v Architectural Windows Limited* [1986] 2 NZLR 190;
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> c) Grounds for believing that the documents are relevant to a matter in question in the proceeding: *Comalco NZ Limited v Broadcasting Standards Authority* [1995] 3 NZLR 469;
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> …
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> [23] A party no longer needs to establish the necessity for the order (as required under the former r 300). Arguably, therefore, a conservative approach to discovery orders – as the Court of Appeal in *Commissioner of Inland Revenue v BNZ Investments Ltd & Ors* (2008) 23 NZTC 21,992 held at [32] and [33] was mandated by r 300 – is no longer stipulated.
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> [24] An application for particular discovery may be opposed on the ground that requiring discovery amounts to oppression. Determining this issue will involve balancing considerations of cost and time against the potential value of discovery: *Mao-Che v Armstrong Murray* (1992) 6 PRNZ 371.

[21] In his submissions, Mr Walker for Tower argued that whether the particular discovery sought is necessary should remain an important consideration.

[22] I do not accept that submission. The new rule no longer requires that necessity for an order be established. To my mind this is a significant relaxation and an applicant under r 8.24 no longer needs to show that particular discovery is necessary – cf. *Carl Yung Gems Limited v Leading Design Jewellery Limited* HC AK CIV 2007-404-2545, 28 May 2009 per Sargisson AJ at [20]. The new rule gives the Court a discretion to order particular discovery if there are grounds for believing that documents have not been discovered and they should have been.

What one should do is very different from what it is necessary for one to do. By way of example, counsel should try to reach agreement on discovery – but it cannot be said that it is necessary that they make that endeavour.

[23] Heath J has observed that it will be rare that an order will be made for particular discovery if such an order is not necessary to do justice between the parties – see *Cynotech Securities Limited v People Limited* HC AK CIV 2008-404-1559, 12 February 2009. In broad terms I agree with this observation – but I note that Heath J's reservation goes to the exercise by the Court of its discretion. The reservation does not go to the basis on which the discretion falls to be exercised.

[24] Similarly the Court of Appeal observed that r 300 mandated a conservative approach to discovery orders– see *Commissioner of Inland Revenue v BNZ Investments Ltd* (2008) 23 NZTC 21, 992 at [32]. Rule 8.24 does not contain the same mandate. Particular discovery can only be ordered where discovery has been provided, but there are grounds for believing that a party has not discovered documents that should have been discovered. The rule implicitly refers back to the original discovery order made. Rule 8.18 puts in place default provisions where discovery is ordered. A party must file an affidavit of documents that lists the documents that are or have been in its control and which relate to a matter in question in the proceeding. It seems to me that it is the default provisions, or the provisions of any particular discovery order, which are relevant in considering whether documents should have been discovered, rather than any test of necessity. It may still be that the Court will exercise its discretion in a conservative way even if the grounds for an order are made out – see *BNZ Investments* at [33].

[25] In the present case discovery has already been attended to by the parties. Tower discovered relatively few documents. The affidavits filed by the parties satisfy me that there are grounds for believing that Tower has not discovered documents which are in its possession or power and Mr Walker appearing for Tower has not suggested otherwise. The more important question in this case is whether the documents which Tower has not discovered should have been discovered because they relate to a matter in question in the proceeding.

[26] As is noted in *McGechan on Procedure* HR 8.18.03(1), the words "relate to" are treated as being equivalent to "relevant to" and the classic formulation of relevance in the context of discovery is that of Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 63. Documents which not only would be evidence upon any issue, but also which "may … either directly or indirectly enable [the applicant] either to advance his own case or damage the case of his adversary" relate to a matter in question in a proceeding. This includes those documents that "may fairly lead him to a train of inquiry which may have either of those two consequences". This expansive test, although criticised by many, has been endorsed in New Zealand – see, for example *M v L* [1999] 1 NZLR 747 at 750.

[27] The matters which are in question have to be identified by reference to the pleadings – *New Zealand Rail v Port Marlborough New Zealand Ltd* [1993] 2 NZLR 641 at 644.

[28] As already noted, the causes of action raised by Tower allege breach of both contractual and common law obligations of confidence. An action for breach of confidence lies where a person has received information of a confidential nature, in circumstances importing an obligation of confidence, and that person has made, or is about to make, an unauthorised disclosure or use of the information to the detriment of the party asserting the confidence.

[29] To succeed in its claim Tower will have to prove that the information it asserts has been made available by ANZN/INGNZ to Vero has the necessary quality of confidence about it. It will fail if the information in question is already in the public domain – see e.g. *Hunt v A* [2008] 1 NZLR 368 at [65].

[30] The further discovery sought by both ANZN/INGNZ, and Vero, is said to be relevant, because their primary defence to Tower's allegations is to say that the information in respect of which confidentiality is claimed by Tower is in fact publicly available information, and as such is not confidential. As Mr Armstrong for Vero put it, whether or not information can properly be considered to be confidential may well depend, at least in part, on how widely the information has been

disseminated, and whether the information is available from other sources without any restrictions on its confidentiality.

[31] I consider the applications that have been made against this background.

(b) ***ANZN/INGNZ's and Vero's applications***

Orders 2(a) and 2(b) - policy/quotation reports

[32] In relation to orders 2(a) and 2(b) sought in ANZN/INGNZ's application, the following orders are made by consent:

> Tower is to provide, within 15 working days of the order being made, a document stating the number of ANZN-branded policies, and the number of quotations for ANZN-branded policies, issued by Tower for each of the product categories set out below, in the two periods between 1 August 2007 and 31 July 2008, and 1 August 2008 and 28 February 2009:
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> a) ANZ House insurance;
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> b) ANZ Contents insurance;
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> c) ANZ Motor insurance;
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> d) ANZ Boat insurance;
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> e) ANZ Farm insurance;
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> f) ANZ Small business insurance;
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> g) National Bank farm insurance ("Farm Cover");
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> h) National Bank Four Seasons Farm insurance;
>
> i) National Bank Travel insurance ("Travel Cover");

j) National Bank Personal Banking, Fire and General insurance ("Mastercover"), separated into each of the following categories:

i) House;

ii) Contents;

iii) Motor;

iv) Caravan;

v) Boat;

vi) Lifestyle Block;

k) National Bank Tertiary and Graduate insurance;

l) National Bank Major Loss Farm insurance ("Major Cover").

[33] In relation to orders 2(a) and 2(b) sought in Vero's application, the following orders are made by consent:

In addition to producing the document described in [32] above, and within 15 working days of this order being made, Tower is to file and serve a further affidavit of documents containing the following documents in its possession, power and control which are relevant and discoverable:

a) Any monthly reports or other documents created and provided to ANZN/INGNZ (as indicated in paragraph 8 of the fifth affidavit of Kathleen Margaret Stirrat) since August 2007 that indicate:

i) the number of customers or potential customers who have received from Tower any of the ANZN's branded policy wordings, quotations, information, booklets or other information forming part of the disputed information; and

ii) the number of copies of the ANZN's branded policy wordings, information booklets or other information forming part of the disputed information printed or published for distribution to customers or potential customers by TOWER or its agents in the ordinary course of business.

b) Any monthly reports provided to ANZN/INGNZ (as indicated in paragraph 8 of the fifth affidavit of Kathleen Margaret Stirrat) by Tower since August 2007 that indicate the number of ANZN's branded policies underwritten by Tower and/or the number of such policies underwritten in respect of each of the relevant types of risk.

[34] I record that the parties are agreed that irrelevant information in the monthly reports (or other responsive documents) may be redacted by TOWER. It is further agreed that inspection of the documents discovered in response to the orders identified in [32] and [33] above shall be restricted to counsel, experts and one representative from Vero, subject to the provision of appropriate undertakings as to confidentiality.

Order 2(c) – Tower Bank-branded documents provided to customers

[35] In relation to order 2(c) sought by both ANZN/INGNZ and Vero, the following orders are made by consent:

Within 15 working days of the order being made, Tower is to file and serve a further affidavit of documents containing the following documents in its possession, power and control which are relevant and discoverable:

(c) *Pro forma*, and/or template documents that may be provided to potential or actual customers (whether through the ANZN or otherwise) for each policy type underwritten by Tower under ANZN's brand which have been created since August 2007, including but not limited to policy wordings, quotation correspondence, lists of

underwriting questions, brochures or information sheets setting out benefits offered by Tower;

(ca) anonymised copies, or anonymised re-creations generated from information held on Tower's databases, of documents that have been provided to potential or actual customers during March 2008 in relation to policies underwritten by Tower under the ANZN's brand.

[36] Counsel for Tower is instructed, and has advised the Court, that no documents responsive to order (ca) in [35] above may presently exist. ANZN/INGNZ and Vero therefore seek an additional order that Tower discover within 15 working days:

(cb) all information Tower holds (either in hardcopy or on its databases) that record the underwriting questions asked of and the answers provided by potential or actual customers during the month of March 2008 in relation to policies underwritten by Tower under the ANZN's brand.

[37] Tower does not now dispute that the documents sought in order (cb) detailed in [36] are or have been in its control. It does not dispute that the documents should have been discovered because they relate to a matter in question in the proceeding. Rather it opposes this order and indeed any order which would allow inspection of documents that contain personal information about identifiable individuals. It is concerned about the provisions of the Privacy Act 1993.

[38] I accept that, in the context of this litigation, it was appropriate for Tower to take a cautious approach. Nevertheless, its reservation can be readily resolved. Privacy Principle 11 contained in s 6 of the Privacy Act provides that an agency shall not disclose personal information unless it believes on reasonable grounds that such disclosure is necessary for the conduct of proceedings before any Court or tribunal. For the purpose of the Act Tower is an agency. The information sought is clearly necessary for the conduct of the proceedings before this Court. In addition, under s 7(4), Tower's actions in disclosing the information would not be in breach of

Privacy Principles 1 to 5, 7 to 10, or 12 contained in s 6 of the Privacy Act if its actions are authorised or required by or under law. I refer to *C v Complaints Assessment Committee* [2006] NZLR 577 at [135] and *Tozer v Attorney General* (2001) 15 PRNZ 642 at [26]. I am satisfied that the documents should be discovered, and accordingly I direct that Tower is to discover the information detailed in order (cb) noted in [36] above. This direction will resolve any problem with the provisions of the Privacy Act 1993.

[39] Again I record that it is agreed that inspection of the documents discovered in response to orders 2(c), (ca) and (cb), detailed in [35] and [36], be restricted to counsel, experts and one representative from Vero, subject to the provision of appropriate undertakings as to confidentiality.

Order 2(d) – Tower non-Bank documents provided to customers

[40] ANZN/INGNZ and Vero have conferred on the terms of the particular discovery order sought against Tower in relation to this category of documents. They jointly seek an order in the following terms.

> Within 15 working days of the order being made, Tower is to file and serve a further affidavit of documents containing the following documents in its possession, power and control which are relevant and discoverable:
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> (d) One example per policy type of each *pro forma*, template, or anonymised document~~s~~ that may be provided to potential or actual customers in relation to Tower's non Bank-branded business that set out the product ranges and types of benefits offered by Tower where those or similar benefits are also offered and sold to the public under the ANZN's branded policies underwritten by Tower.

[41] This order is opposed by Tower.

[42] As can be seen, ANZN/INGNZ and Vero seek documents provided by Tower to members of the public that set out Tower's product range, and the types of benefit offered by Tower to customers where those or similar benefits are also offered to the public under ANZN branded policies. It is asserted that documents in this class are relevant because, if information on benefits and premiums offered by Tower to ANZN customers could have been gleaned by collecting publicly available information regarding Tower's non-ANZN branded policies, which have the same or similar coverage and benefits, then there can be no confidence in the information. It is further asserted that even if there are slight variances in cover and price, a competitor would still have been able to understand Tower's general rating structure by considering its non-ANZN branded products. Indeed Vero has stated in an affidavit from a Mr Bentley, who is one of its Products, Pricing and Analysis Managers, that it has undertaken such an exercise previously by obtaining quotations for Tower's non-ANZN branded products, i.e. direct insurance policies, from its website. Although Tower through an affidavit from a Mr Davies, a consulting actuary, has queried how useful such surveys are, it is not in dispute that the exercise was undertaken.

[43] ANZN/INGNZ and Vero also point out that in the second amended counterclaim, Tower seeks as against Vero, first, an injunction to restrain it from selling ANZN branded polices of insurance to customers of ANZN, and secondly, an injunction restraining it from selling ANZN branded policies of insurance to customers of ANZN who held, as at 28 February 2009, ANZN branded policies of insurance underwritten by Tower. It is submitted that the first injunction claimed can only be sustained if knowledge of ANZN branded Tower product is equivalent to knowledge of Tower's other products. It is argued that the second order should be sufficient if Tower's only fear is that Vero has obtained a competitive advantage in relation to ANZN customers who have ANZN branded policies underwritten by Tower. It is said that if this argument is right, Tower cannot resist discovery. It is further submitted that if the information disclosed by Tower to the public in relation to its direct products also discloses, albeit indirectly, information about the ANZN branded policies underwritten by Tower, then this must be relevant to issue of confidentiality and also to damages. The point is made that even if information was disclosed by ANZN/INGNZ to Vero, and even if that information was in fact

confidential, if Vero could have obtained the same insights into Tower's methodology from information in the public domain, Tower will be entitled to only nominal damages.

[44] Tower's response is to assert that the argument is flawed. It argues that information about a Tower direct product made available to a customer does not tell that customer anything about the equivalent bank branded product. It submits that the terms of a bank branded product might be identical to, or completely different from its direct insurance product, and that disclosure by Tower of information about its direct product does not constitute disclosure of information about its bank branded products. In regard to the relief sought in the second amended counterclaim, Tower says that it is asserting that Vero has built up a system, using confidential Tower information, and that equity should stop Vero from using it. Mr Walker submitted that disclosure by Tower of its direct products is irrelevant to whether or not it gets the injunction it seeks, because it has nothing to do with Vero competing for Tower's direct business.

[45] There is no dispute but that the documents sought in order 2(d) set out in [40] exist. Further there is no dispute that they have not been discovered. The only issue is whether they should have been discovered. As I have noted above, in my judgment they should have been discovered if they relate to a matter in question in the proceeding, and the classic formulation of relevance in this context is that given in the *Peruvian Guano* case.

[46] In my judgment the documents sought in order 2(d) set out in [40] could either directly or indirectly enable ANZN/INGNZ and/or Vero to advance their respective cases, or to damage Tower's case. Mr Bentley's affidavit – and to an extent Mr Davies affidavit – suggests that the information available in the public domain, e.g. Tower's website which can be used to generate quotes for Tower's direct insurance product, can be used to glean information about Tower's rating structure. While that information does not directly reveal anything about Tower's rating structure for its ANZN-branded policies, I cannot dismiss the possibility that the information may be relevant in the context of the claims made by Tower in this proceeding. In particular, I agree with Mr Smith for ANZN/INGNZ and

Ms Armstrong for Vero that the relief sought by Tower in its second amended statement of claim against Vero is widely caste. In my view there is some justification for their assertion that Tower can only be claiming the injunction in the terms sought if there is a wider competitive effect, and a broader market has been or will be damaged as a consequence of the alleged breaches of confidence. Further, to the extent that Tower may seek to argue that the information is not available from other sources, it must, in my view, be relevant to consider Tower's own practices of distributing its allegedly confidential information. If the information made available to Tower's direct customers discloses, or can be used to glean, information about Tower's ANZN-branded product, then this could have an impact on the causes of action raised by Tower and on the quantum of any damages claimed.

[47] In my view, the class of documents sought should have been discovered, because it relates to a matter in question in the proceeding. Accordingly Tower is directed to discover in terms of order 2(d) set out in [40] above.

[48] I record that the parties have agreed that any inspection of the documents discovered in response to order 2(d) detailed in [40] should be restricted to counsel, experts, and one representative from each party subject to the provision of appropriate undertakings as to confidentiality.

Order 2(e) – Processes

[49] The following order is made by consent:

> Within 15 working days of the order being made, Tower is to file and serve a further affidavit of documents containing the following documents in its possession, power and control which are relevant and discoverable:
>
> (e) Documents prepared or in use since August 2007 (including without limitation the full set of underwriting questions from WESS) which record any processes and procedures for:

(i) providing any such information described in subparagraph 2(c) to customers and potential customers on request either through Tower's 0800 line or any other customer contact point; and

(ii) requesting information from actual or potential customers for the purposes of providing an insurance quotation for insurance policies underwritten by Tower on behalf of ANZN/INGNZ including but not limited to scripts or guidelines used by call centre operators.

[50] I also record that by consent, Tower is to allow inspection of the WESS system *in situ* to the extent that it relates to ANZN-branded policies. Access to the system, the information gleaned from the resulting inspection, and the documents discovered pursuant to order 2(e) detailed in [49] above, are to be provided on the basis that they are confidential to counsel, experts, and one nominated Vero representative who will each provide appropriate undertakings as to confidentiality.

[51] ANZN/INGNZ and Vero also seek an order in the following terms:

> Within 15 working days of the order being made, Tower is to file and serve a further affidavit of documents containing the following documents in its possession, power and control which are relevant and discoverable:
>
> (ea) Documents prepared or in use since August 2007 which record any processes and procedures for:
>
> (i) providing any such information described in subparagraph 2(d) to customers and potential customers on request either through Tower's 0800 line or any other customer contact point; and
>
> (ii) requesting information from actual or potential customers for the purposes of providing an insurance quotation for insurance

policies underwritten by Tower other than on behalf of ANZN/INGNZ including but not limited to scripts or guidelines used by call centre operators.

[52] As can be seen ANZN/INGNZ and Vero are seeking particular discovery of documents which record underwriting processes used by Tower for its non-ANZN, or direct, business. The reasons for this application are the same as is detailed in [42] and [43]. Tower opposed this application, for the same reasons as I have noted above at [44].

[53] For the same reasons as are detailed in [46] above in my view it is appropriate to make the order sought and I do so.

Orders 2(f) and 2(g) – Competitor information

[54] ANZN/INGNZ and Vero had conferred on the terms of the particular discovery orders against Tower in relation to this category of documents. An order is sought on the following terms:

> Within 15 working days of the order being made, Tower is to file and serve a further affidavit of documents containing the following documents in its possession, power and control which are relevant and discoverable:
>
> (f) Any documents provided to the chief executive or any persons reporting directly to the chief executive of Tower over the last two years that record Tower's acquisition or use of information relating to its competitors for the purpose of carrying out comparisons and analysis, including any documents that record information relating to the business of such competitors.
>
> (g) Any pricing papers, benefit comparison papers or other documents provided to the chief executive or any persons reporting directly to the chief executive of Tower over the last two years which include comparisons between Tower's products, benefits and/or pricing and

the products, benefits and/or pricing of other insurers, including (without limitation) the pricing paper referred to in paragraph 85 of the third affidavit of Kevin Terence Meekan sworn 17 April 2009.

[55] These orders are opposed by Tower.

[56] Both ANZN/INGNZ and Vero are seeking particular discovery of documents which indicate whether Tower has accessed information about its competitors and whether it used that information for the purpose of carrying out competitor comparisons in bench mark analyses. Counsel argue that this information is highly relevant to the matters in question. They submit that Tower, in broad terms, is asserting that Vero has been provided with information by ANZN/INGNZ and that when it obtained that information, it obtained a competitive advantage that it would not have otherwise have had. By way of example, they note that it has been asserted by Tower that Vero has obtained sample Tower quotations along with Tower policy wording. They say that it will be necessary for Tower to establish that Vero could not have obtained such information from a source other than ANZN/INGNZ. It is said that the documents sought in orders 2(f) and (g) are relevant because they demonstrate the general availability in the marketplace of the type of information which Tower is claiming is confidential. It is said that Tower's ability to acquire equivalent information about its competitors indicates that the information is of a type that does not have the necessary quality of confidentiality about it. Equally, it is asserted that Tower's ability to acquire equivalent information may be relevant to the question of damages.

[57] Ms Armstrong for Vero asserts that Vero is entitled to discovery from Tower of documentation that assists Vero in undermining Tower's case. She has intimated that Vero intends to cross-examine Tower's witnesses on the extent to which it follows the practice of obtaining information about its competitors in the marketplace, the type and accuracy of the information that can be obtained, and the reasons why Tower carries out that practice. Mr Smith for ANZN/INGNZ submits that the extent to which Tower undertakes this activity is relevant in disputing Tower's contention that such activities are deceptive and reprehensible, as opposed to legitimate conduct carried out in the normal course of business.

[58] The application is opposed by Tower. First, it says that documents sought are irrelevant. It says such information as Tower has acquired about its competitors will tell the Court and the parties nothing about whether the information which Tower says has been obtained by Vero could have been lawfully obtained. Further, it says the information tells the Court and the parties nothing at all because it begs the question of how it was obtained. Mr Walker submits that the fact that information A about insurer B can, for example, be brought from a specialist provider providing information to the insurance industry, does not tell you that you can buy information C about insurer D from the same provider. Mr Walker submits that ANZN/INGNZ and Vero will have to show at trial that the information it asserts has been passed to Vero could have been obtained by other lawful means.

[59] Secondly, Tower submitted in its notice of opposition that the request would be oppressive. The wording now proposed is rather more restrictive than was initially proposed and in my view it is not necessary to further consider this ground in opposition. It was not advanced at the hearing by Mr Walker.

[60] There is no dispute that Tower has such information. Affidavits have been filed recording that Tower has provided competitor analyses to ANZN/INGNZ at various times over the course of the relationship under the insurance agency agreements. Indeed, Ms Stirrat exhibits copies of documentation which would fall within the terms of the order and which were made available by Tower during the course of the relationship.

[61] Once again, the only outstanding issue is whether or not the information sought relates to a matter in question in the proceeding.

[62] In my view, Tower should provide the information sought. If comparative information is available about insurers and their product in the marketplace, and if that information is used by Tower in the ordinary course of its business, it seems to me that it could be relevant to the assertions Tower is making regarding breach of confidence. Indeed the fact that such information was made available by Tower to ANZN while the insurance agency agreement were in place suggests that it has a bearing on those insurance contracts. I accept that the fact that Tower is able to

acquire information about its trade competitors does not compel the conclusion that they can obtain information about Tower and its product, but if it can be established that Tower has access to and obtains information relating to its competitors from sources in the marketplace, Tower's allegation that this type of information could not otherwise be lawfully obtained from other sources could be undermined. Moreover, Tower could have difficulty asserting that it has suffered loss as a result of the alleged breach of confidence.

[63] Similarly such documentation should also be discovered by Vero to the extent it has not already done so.

Orders 2(h) to 2(m) – Attack on State book (Vero only)

[64] In relation to orders 2(h) to 2(m) in Vero's application, it is agreed as between Vero and Tower that the following orders may be made by consent:

> Within 15 working days of the order being made, Tower is to file and serve a further affidavit of documents containing the following categories of documents that have been but are no longer in its control and stating to the best of its knowledge and belief, when those documents ceased to be in its control:
>
> (h) Documents that identify the categories of information held by Tower in relation to State Insurance's insurance book.
>
> (i) Documents that show how Tower obtained information about State Insurance's insurance book, including whether information was obtained from publicly available sources.
>
> (j) Documents that show how Tower identified the parts of State Insurance's insurance book to be targeted.
>
> (k) Documents that identify the methods used by Tower to attack State Insurance's insurance book.

(l) Documents that show the type and number of policies procured by Tower from State Insurance's insurance book.

(m) Documents that show the timeframes involved in Tower's attack on State Insurance's insurance book (including when Tower received or obtained relevant information, when Tower began its attack and when and over what time period customers moved from State Insurance to Tower).

Order 2(n) – Privileged documents (Vero only)

[65] In relation to order 2(n) in Vero's application, it is agreed between Vero and Tower that the following orders may be made by consent:

> Within 15 working days of the order being made, Tower is to file and serve a further affidavit of documents containing the following categories of documents in its possession, power and control which are relevant and discoverable:
>
> (n) Documents relevant to Tower's counterclaim over which Tower claims privilege.

Order 2(o) – Tower rating documents for Bank-branded business (Vero only)

[66] In its application dated 10 June 2009, Vero sought particular discovery of documents that show the rating structure and rates used between August 2008 and December 2008 by Tower to rate its bank-branded book of business.

[67] The parties advise that Tower has undertaken to Vero that it will not, without Vero's consent or order of the Court, instruct its expert to conduct any pricing comparisons using any information about the Tower prices other than that information disclosed in documents provided by ANZN to Vero.

[68] In reliance on this undertaking, its agreed that order 2(o) in Vero's application can be adjourned by consent pending advice from the parties' respective experts as to the nature of the rating comparison exercise required. The period of adjournment is dealt with below.

Order 2(p) – Documents relating to profile of Tower's Bank-branded business (Vero only)

[69] In relation to this order, it is agreed between Vero and Tower that the following orders may be made by consent:

(p) Tower is to:

(i) create a report showing the number of policies in its book of business underwritten on behalf of the plaintiffs as at October 2008 containing information in relation to each risk as to the:

(a) policy type;

(b) regional location of risk;

(c) sum insured band (or equivalent where appropriate e.g. an agreed value band for motor risks and a square metre band for house risks);

(d) age band; and

(e) premium band.

(ii) within 15 working days of the order being made, file and serve a further affidavit of documents containing the report referred to in subparagraph (p)(i) above.

[70] I record that it is agreed between Vero and Tower that inspection of the report discovered in response to order 2(p) detailed in [69] is restricted to counsel

and experts only subject to the provision of appropriate undertakings as to confidentiality.

Order 2(q) – Documents relating to loss (Vero only)

[71] Vero does not pursue order 2(q) in its application pending trial of liability issues.

Tower's application

[72] Tower does not pursue its application in respect of orders 1(a)(i), 1(a)(ii)(2) to (6), 1(a)(iii), 1(a)(iv), 1(c)(ii) to (vi), 1 (d), 1(f) and 1(g) sought in its application dated 5 May 2009.

[73] Prior to the hearing Vero agreed to provide further information and discovery in response to orders 1(a)(ii)(1) and 1(e) of Tower's application. Counsel advise that it has been further agreed that:

a) the particular discovery will be provided within the same timeframe as the particular discovery to be provided by Tower;

b) inspection of documents from Vero's rating software (and relevant databases within that software) will be permitted by Vero on the basis that such information is confidential and inspection is restricted to counsel and an independent expert only, subject to the provision of appropriate undertakings as to confidentiality; and

c) inspection of documents from Vero's underwriting and sales software will be permitted by Vero on the basis that such information is confidential and inspection is restricted to counsel, independent expert(s) and one representative from Tower, subject to the provision of appropriate undertakings as to confidentiality.

[74] Counsel also advise that, in light of Tower's agreement to allow inspection of its WESS system *in situ*, Vero has agreed to allow reciprocal access to, and inspection of, its "Vero online" system (*in situ*). Such access will be provided on the basis that the information within that system remains confidential to counsel, independent expert(s) and one nominated Tower representative, subject to the provision of appropriate undertakings as to confidentiality.

[75] On the basis of the agreements described in [73] and [74] above, an order adjourning Tower's application for orders 1(a)(ii)(1) and 1(e) is made by consent. The period of adjournment is dealt with below.

Order 1(b) - discovery and inspection of the unredacted Master Insurance Agreement

[76] Concerns were expressed by Mr Walker for Tower about the accuracy of the redactions that have been made to the Master Insurance Agreement. Vero proposed that Tower's counsel should be allowed to inspect a complete (unredacted) copy of that agreement. The provision of the Master Insurance Agreement in this form to Tower's counsel is without prejudice to Vero's position that those parts of the Master Insurance Agreement that have not been discovered by Vero are not relevant to the matters in issue in this proceeding and therefore not discoverable by Vero.

[77] Pending review by Tower's counsel of the full Master Insurance Agreement, an order adjourning Tower's application for order order 1(b) is made by consent. Again, the period of adjournment is dealt with below.

Order 1(c)(i) - setting aside confidentiality in the Master Insurance Agreement

[78] Tower accepts that it is appropriate to adjourn this element of its application until its counsel has had the opportunity to review the unredacted agreement. Tower's application to set aside Vero's claim of confidentiality as against Tower in respect of the redacted and unredacted parts of the Master Insurance Agreement is adjourned by consent for the period noted below.

Order 1(h) - inspection of Vero's confidential documents by Tower representatives

[79] To enable the process proposed by the Court and described in [80] below to occur, an order adjourning order 1(h) of Tower's application is made by consent.

[80] In relation to the inspection of the documents listed in Part 3 of the Schedule to the affidavit of documents sworn by Ross Nigel Edmiston on behalf of Vero dated 23 March 2009, it is agreed that:

a) Subject to the exception noted in paragraph (b) below, Tower's counsel, an independent expert and Kevin Terence Meekan ("Mr Meekan") be permitted to review copies of those documents for the purposes of identifying on an individual basis which confidential documents require the involvement of and inspection by other officers or employees of Tower in order for Tower to conduct the proceeding.

b) To the extent that the documents contain any highly confidential rating information of the kind referred to in [73]b) above, that information will not be reviewed by Mr Meekan.

c) Prior to the inspection described in (a), counsel, the expert and Mr Meekan are to provide appropriate undertakings as to confidentiality to Vero's solicitors;

d) The confidential documents are to be kept in the control of Gilbert Walker and any record made by Mr Meekan (or the independent expert) of information contained in Vero's confidential documents will be returned to Gilbert Walker at the conclusion of the proceeding;

e) Following the review described in [80]a), counsel for Tower and Vero will confer on the scope and extent of any special protection for individual documents before any judicial inspection of those documents occurs in connection with order 1(h) of Tower's application.

Other matters

[81] An order granting the parties liberty to apply in relation to orders 1(a)(ii)(1), 1(b), 1(c)(i), 1(e) and 1(h) of Tower's application is made by consent.

Costs

[82] The costs of these various applications are to be reserved.

Adjournment

[83] A number of the applications made by the parties have been adjourned by consent. The parties did not consider it necessary to set a time limit to bring the adjourned application back before the Court. Despite that view, I consider it appropriate to keep the matter under review to ensure that progress is made in bringing the proceeding on for hearing. I direct the Registrar to put in place a telephone conference with me in the first available time after 1 November 2009. The parties are directed to file a joint memorandum not less than three days prior to that conference setting out what progress has been made and what applications if any still require resolution.

[84] Leave is reserved to the parties to bring this matter back before me if any of the orders that I have made are unclear or if there is any other item arising out of the applications filed that I have not fully dealt with.

Wylie J