IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV 2009 412 000219

BETWEEN	VANDA INVESTMENTS LIMITED Plaintiff
AND	KIM TE RANGIAOUNUI JOHNSTONE LOGAN AND GLENNYS ANN LOGAN Defendants

Hearing: 28 October 2009

Counsel: J McCartney SC for Defendants/Applicants
J M Rushton for Plaintiff/Respondent

Judgment: 27 November 2009 at 2pm

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
as to Discovery

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[1] The defendants applied for various orders by way of further and better discovery. A number of the issues were resolved by the day of hearing. Two areas of issue remained, namely as to the identification of documents in the plaintiff's affidavit of documents and as to possible further discovery of three categories of documents.

Identification of documents

[2] The defendants have no issue with the form of list of privileged documents contained in Part 2 of the plaintiff's affidavit of documents. Part 2 of the affidavit follows this format:

VANDA INVESTMENTS LIMITED FILE:

Doc No	Date	Description	Parties	Privilege Category
01 010	08/12/08	O/F	PBB/VI	P1
01 011	26/11/08	C/L	VI/PBB	P1

A table at the start of the schedule explains the abbreviations used. The list of privileged documents runs to three pages, all following the format of the first two entries set out above.

[3] That presentation stands in contrast to the presentation of the documents in Part 1 of the affidavit dealing with "open" documents in the plaintiff's control. The defendants' complaint is as to the manner in which the open documents are listed in Part 1 of the affidavit. They are listed in four groups relating respectively to the "Vanda Investments Limited File", the solicitor's correspondence file 1, the solicitor's correspondence file 2; and the solicitor's purchase file. The first set of entries illustrates the format taken in Part 1:

VANDA INVESTMENTS LIMITED FILE:

Doc No.	Date	Description	Parties	Privilege Category
01001-01009, 01012-01019, 01023, 01026-01045, 01047-01051, 01054-01055, 01057-01064, 01066-01083, 01087-01089, 01091-01104, 01106-01126, 01128-01146, 01149-01154, 01156-01185, 01189, 01191	Various	Various	Various	

[4] The defendants' complaint in relation to Part 1 is that each document, or group of documents as numbered, are not sufficiently described to enable the defendants and the Court to identify the document or group of documents. The

defendants say that there has been non-compliance with High Court Rules 8.20 and 8.21. The plaintiff responds that the rules have been complied with.

The discovery rules themselves

[5] The discovery rules are contained in Part 8, subpart 3 of the High Court Rules.

[6] Rule 8.18(3) provides that the affidavit of documents must comply with rr 8.20 and 8.21.

[7] Rule 8.20(2)(d) provides:

> (2) In the affidavit of documents, the party must-
>
> ...
>
> (d) Identify or list the documents required to be discovered under the order in a schedule that complies with rule 8.21;
>
> ...

[8] Rule 8.20(3) provides that the affidavit of documents may be in form G37. Form G37 (which is not a compulsory form) contains (after Parts 1, 2 and 3 of the form) an instruction which reads:

> List and number the documents concerned.

[9] One then comes to the central rule, r 8.21 (previously r 298). This rule deals with the schedule to be appended to the affidavit of documents. It reads:

> **8.21 Schedule appended to affidavit of documents**
>
> (1) The schedule referred to in rule 8.20(2)(d) must identify or list documents –
>
> (a) in the control of the party giving discovery and for which the party does not claim privilege or confidentiality, identifying them by number:
>
> (b) in the control of the party giving discovery for which privilege is claimed, stating the nature of the privilege claimed:

(c) in the control of the party giving discovery for which confidentiality is claimed, stating the nature and extent of the confidentiality:

(d) that have been, but are no longer, in the control of the party giving discovery, stating when the documents ceased to be in that control and the person who now has control of them:

(e) that have not been in the control of the party giving discovery but are known by that party to relate to a matter in question in the proceeding, stating who has control of them.

(2) Documents of the same nature in category (b), (c), (d), or (e) may be described as a group or groups.

...

[10] An appreciable body of case law has grown over the years in relation to the requirements of discovery due to changes to the rules from time to time. I refer for instance to *Hunyady v Attorney General* [1968] NZLR 1172; *Guardian Royal Exchange Assurance of NZ Limited v Stuart* [1985] 1 NZLR 596, 607 – 608; and *Attorney General v Wang NZ Limited* (1990) 2 PRNZ 245. Notwithstanding changes to the rules over the last decade, these cases continue to be referred to as authoritative: see for instance *McGechan on Procedure* HR 8.21.02 – HR 8.21.05; *Sim's Court Practice* HCR 8.21.3. Similarly, see the decisions of the Court in *Ferrier Hodgson v Siemer* HC AK CIV 2005-404-1808, 19 April 2007 Rodney Hansen J, at [46] – [47]; and *Todd Pohokura v Shell Exploration Limited* HC WN CIV 2006-485-1600 25 July 2008 Dobson J, at [38].

[11] I will return to those sources but first deal with what the current rules themselves say.

[12] I identify these requirements in the rules:

(a) The party discovering must "identify or list" the documents to be discovered – this applies to all documents: r 8.21(1).

(b) The open documents must be identified by number: r 8.21(1)(a).

(c) Documents of the same nature in categories (b),(c),(d) and (e) of r 8.21(1) may be described as a group or groups. A question arises as to whether by implication documents of the same nature in category (a) (i.e. open documents in the control of the party giving discovery) may therefore not be described as a group or groups: r 8.21(2)).

(d) These are the standard requirements in terms of a discovery order: r 8.18.

(e) A discovery order may modify standard discovery, i.e. by specifying the method of discovery of the documents: r 8.16(4)(b). That indicates that there was to be a generally applicable requirement for discovery which was subject to adaptation to meet the requirements of a particular case – such as where necessary to counter oppression: see *McGechan on Procedure* HR 8.16.6.

[13] Questions which remain unanswered on the face of r 8.21 may include:

(a) Is there a significant difference between "identifying" documents and "listing" documents (r 8.21(1))?

(b) Given that open documents in the control of the discovering party have to be "identified by number", is any other "identifying or listing" required?

(c) Does the fact that documents of the same nature in categories (b), (c), (d) and (e) may be "described" as a group or groups indicate a difference between "describing" (r 8.21(2)) and "identifying or listing" (r 8.21(1))?

[14] While some tentative conclusions might be reached from r 8.21 in relation to those issues, I do not consider that upon the basis of the wording of the rule itself one can conclusively determine the requirements intended by Part 8, subpart 3 of the High Court Rules. One must look to the broader context in which the rules exist.

The purpose of the discovery rules

[15] Discovery is covered within the High Court Rules alongside interrogatories and notices to admit facts. These processes collectively are now referred to in some jurisdictions as "disclosure". An overarching purpose of disclosure rules has been to require parties to civil litigation to put as many cards on the table as possible: *Green v CIR* [1991] 3 NZLR 8, at 11. Each party should be able to assess the strengths and weaknesses of the other's case at a relatively early stage: *McGechan on Procedure* HR Pt8 Subpt 3.02.

[16] Discovery in particular has long been recognised in New Zealand as serving slightly different objects for different categories of documents:

(a) For open documents in the control of the discovering party, it enables disclosure of the nature and significance of the documents so that the party seeking discovery can decide whether to seek production and it enables the Court to order production and to ensure that such order is enforced.

(b) In relation to privileged documents it enables the party seeking discovery to become aware of the documents for which privilege is claimed and to judge whether the claim should be challenged: see *Guardian Royal Assurance v Stuart* at 607; *Hunyady v Attorney General* at 1173 – 1174; *Attorney General v Wang NZ* at 250.

[17] Even after allowing for the grouping of like documents (as recognised as appropriate in *Hunyady v Attorney General*) there is recognition that discovery which meets the objectives at [16] could become extremely onerous. Master Williams observed in *Attorney General v Wang NZ* at 251:

> This [separate enumeration of documents] may still make compliance with discovery onerous but, once counsel have complied with the high standard expected of them in discovery and accepted that certain documents are relevant...then compliance is required however onerous it may be.

[18] That judgment was written in 1990. To understand the current position it may be necessary to take into account a push for simplification of discovery procedures which followed both abroad and in New Zealand. That movement found voice in the United Kingdom through Lord Woolf (*Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO London 1995); and in New Zealand (New Zealand Law Commission *General Discovery* (Report 78, 2002).

[19] I now turn to consider the extent to which the previous case law and these moves for reform properly inform the requirements of the rules as they now exist.

The development of approaches to identification of documents or groups of documents

Rule 162 of the Code of Civil Procedure

[20] In *Hunyady v Attorney General*, decided by the Court of Appeal in 1967, the majority, North P and Turner J, stated that it was clear upon authority that the affidavit of discovery must identify the documents discovered sufficiently to enable the party having the benefit of the discovery, and if necessary the Court, to call for the production of any of them individually. The majority commented that to comply with that requirement it was not sufficient to refer e.g. to "one bundle of documents" or "one file" with some distinguishing mark or letter for the whole; the proper course is at least to number or letter the individual pages of documents of the file or bundle so as to enable any one of them to be specified in a subsequent application for inspection or production. The majority did not consider in the circumstances of that case that it was necessary for the documents on various Departmental files to be enumerated one by one in the affidavit of discovery; rather they should be numbered successively.

Rule 298 of the High Court Rules

[21] High Court Rule 298 replaced r 162 of the Code of Civil Procedure. As Master Williams explained in *Attorney General v Wang NZ*, however, decisions

under the Code had defined the parties' obligations to the point where r 298 was, in large part, a codification of earlier acceptable practice. Master Williams observed at 251 that the provisions of r 298(4) were in large part "*Hunyady* codified".

[22] The relevant provisions of r 298 were:

> (3) The list shall enumerate the documents which are or have been in the possession, custody, or power of the party making the list.
>
> (4) The list shall enumerate the documents in a convenient sequence and as shortly as possible, but shall describe each document or, in the case of a group of documents of the same nature, shall describe the group, sufficiently to enable the document or group to be identified.

[23] In *Attorney General v Wang NZ* at 250 Master Williams elaborated on the purposes of discovery of open documents as also including:

> (a) The description of the documents must be such as to enable the Court to decide whether a document which a party seeks to put in evidence is admissible as having been discovered or whether it was omitted (then r 313; now r 8.37). The significance of the Court's power to exclude non-discovered documents from evidence was soon afterwards illustrated in *Shipbuilders Limited v Benson* [1992] 3 NZLR 549 (CA).
>
> (b) The description of documents in the possession of other parties must be sufficient to enable the party seeking discovery to decide whether to now seek discovery against a third person or whether to issue a subpoena duces tecum to that person.

[24] Although Master Williams referred to r 298(4) as "in large part *Hunyady* codified" in *Attorney General v Wang NZ*, there was a shift in r 298(4) to identifying what sort of groups of documents might be discovered on a group basis. Whereas in *Hunyady* the Court of Appeal had been dealing with documents on Departmental files, and had approved in the circumstances of that case grouping by file (but with successive numbering) r 298 expressly required any grouped documents to be "of the

same nature" and described in such a way as to sufficiently identify the group. This led Master Williams to reject the files being considered in that case as appropriate groups. His Honour observed at 252:

> They are clearly of disparate nature and in those circumstances, the individual pages or documents of the files are required to be described and numbered so as to be identifiable in any application for inspection or production. They have been enumerated in a convenient sequence but they have not been described sufficiently to enable their identification.

[25] Earlier in his decision Master Williams had identified two instances of appropriately grouped documents. First he referred to "a number of identical documents" and secondly to "a receipt book numbered sequentially".

Law Commission proposals for reform and 2004 amendment

[26] The comments by Master Williams as to compliance being required, however onerous, reflected the judicial approach in New Zealand through the 1990's. From 2001 the Law Commission, with the concurrence of the Rules Committee, investigated and reported upon the requirements of general discovery, including both the *Peruvian Guano* test of relevance and the extent of the obligation to list. The Law Commission summarised the submissions it received on the extent of the obligation to list (at [11]) in this way:

> 11. Submitters pressed on us, and we accept, the view that the major cost of discovery is the need to compile a written list of documents. This dispiriting task involves culling the discoverable from the irrelevant and assigning a description to documents in the former category. It was said that it would be sufficient and cheaper:
>
> - to produce documents for inspection or provide copies of documents without the need to list them at all ; or
>
> - to number documents sequentially without describing them and to certify that documents number 1-x comprise all discoverable documents; or
>
> - where documents comprise a file, to number without describing either documents or pages, listing the file by its description followed by some such words as "comprising documents [pages] numbered for the purposes of discovery from 1-x".
>
> On this last point Rule 298(4) already permits a group description of documents "of the same nature" but it has been held to be confined

> to situations where it is possible to provide an accurate global description of the individual documents in a group for example:
>
> > Correspondence between the defendant and its solicitors between [earlier date] and [latest date] prepared by solicitors/counsel for the party and addressed and forwarded to [eg managing director] of client, all such documents being headed with or referring to this proceeding and requesting or giving legal advice in relation to it and assisting in the conduct of the litigation.

[27] Significantly, at [12] of the report the Law Commission identified a difficulty with the submissions summarised at [11] in that those proposals:

> ...create for time consuming arguments at trial as to whether a particular document has or has not been discovered.

Reference was made to the intended strengthening of the rule excluding reliance at trial on undiscovered documents (now r 8.37).

[28] The Law Commission accordingly rejected any blanket change along the lines of the proposals recorded in its paragraph [11] and instead proposed what it referred to as "ad hoc" variations. The Commission proposed in Appendix C certain changes to the High Court Rules. A new rule 295 was proposed to allow the Court to authorise modes of discovery less expensive or time consuming than providing such a list enumerating the documents as r 298 requires. A number of other amendments were proposed.

[29] In relation to the proposed new rule 295, the Commission at [17] said:

> ...the court's discretion should extend beyond determining the ambit of discovery to prescribing the manner of compliance. It may be, for example, that in appropriate cases, the court will direct the adoption of one of the methods of avoiding itemised listing that we discussed in paragraph 11.

[30] The concept therefore was that r 298, including r 298(3) and (4), would remain intact but that the Court would have the power to modify the general discovery obligation on a case by case basis.

[31] The Rules Committee elected to alter the rules as to discovery in a wholesale way, substituting new rules 298 to 317A as from 1 November 2004. Rule 298 from that date provided:

> **298 Schedule appended to affidavit of documents**
>
> (1) The schedule referred to in rule 297(2)(d) must identify or list the documents in the following categories and provide the information specified in relation to each category:
>
> (a) documents that are in the control of the party giving discovery and for which the party does not claim privilege or confidentiality. These documents may be identified by number:
>
> (b) documents that are in the control of the party giving discovery for which privilege is claimed, together with a statement as to the nature of the privilege claimed:
>
> (c) documents that are in the control of the party giving discovery for which confidentiality is claimed, together with a statement as to the nature and extent of the confidentiality:
>
> (d) documents that have been, but are no longer, in the control of the party giving discovery, together with a statement as to when the documents ceased to be in the party's control and the person who now has control of them:
>
> (e) documents that have not been in the control of the party giving discovery but that are known by that party to relate to a matter in question in the proceeding, together with a statement as to who has control of them.
>
> (2) Documents in any of categories (b), (c), (d), or (e) may be described as a group or groups if all documents concerned are of the same nature.
>
> ...

[32] In the more recent decision in *Todd Pohokura Ltd v Shell Exploration NZ Limited*, Dobson J referred to groups of documents with a common character. He gave as examples invoices and periodic recordings such as temperatures or weights over a period to which the litigation refers. His Honour contrasted such group listing with the requirements of individual items where information is conveyed on a given date between individuals. His Honour observed (at [50]) that:

> The reality is that a list will be in breach of the Rules if it does not list individual documents. The recognised exception to this requirement is for groups of documents with a common character...

[33] The old r 298 and the new r 298 (especially r 298(1) and 298(2)) were contrasted by Rodney Hansen J in *Ferrier Hodgson v Siemer* at [44] – [47]. The rule now introduced into listing requirements a distinction between the two categories of documents (open within the control of the discovering party and all other documents). Rodney Hansen J, at [46] recognised that documents in the first category now "may be identified by number", quoting the exact wording of the rule. I will return shortly to a subsequent amendment in 2009 which changed that wording.

[34] Rodney Hansen J noted at [46] that in line with the *Hunyady* approach the open documents in categories (b), (c), (d) and (e) could, where appropriate, be grouped by generic description provided individual documents or pages are numbered (thus preserving the ability of the opposite party, and if necessary the Court, to call for the production of any documents individually).

[35] Rodney Hansen J noted (at [47]) that the separate numbering of privileged documents was not required where the documents were of the same nature, given that the general description will still be sufficient to enable the opposite party to determine whether the claim for privilege is properly based.

[36] In the *Ferrier Hodgson v Siemer* decision, Rodney Hansen J was not called upon to draw any conclusion as the potential relevance of the omission of the verb "describe" from the new r 298 (as contrasted with the old r 298(4) which required the list to describe each document or group of documents of the same nature as shortly as possible).

Current High Court Rules

[37] The present High Court Rules collecting the rules into parts and sub-parts, came into force on 1 February 2009. Rule 8.21 is set out at [9] above.

[38] There is a significant amendment to the requirements as to numbering. Open documents in the possession of the discovering party must now be identified by number. The "may be identified" discretion in r 298(1)(a) as applied at the time of the decision in *Ferrier Hodgson v Siemer*, has been replaced by the words "must be identified": r 8.21(1).

[39] Although the wording of r 8.21(2) as to grouping of documents has been altered from the previous wording, I do not detect any change of meaning in substance. Rule 8.21(2) continues to allow documents to be described as a group or groups if the documents are of the same nature (in categories (b), (c), (d) and (e) of sub clause (1)).

Discussion

[40] The plaintiff's affidavit of documents identifies, in Part 1 (identifying open documents), four files. Taking the description of the Vanda Investments Limited file (see [3] above) as an example, it identifies the existence of documents with various numbers from 01001 to 01191 and describes each of "Date", "Description" and "Parties" as "Various". In short, all the defendants and the Court are told about the Vanda Investments Limited file is that there is a series of documents on that file which have been given a range of numbers.

[41] Ms Rushton for the plaintiff submitted that by giving numbers in relation to a file the plaintiff has done all that is required. She relies specifically upon the commentary in *Sim's Court Practice* HCR 8,20.3:

> The documents in the first part do not need to be individually described. Each document should be numbered and the affidavit will simply refer to the range of numbers. This specific rule cuts across earlier authorities requiring first part documents to be listed.

The plaintiff's case is that for Part 1 documents all that is required is a number for each document.

[42] I do not consider that the passage in *Sim's Court Practice* correctly states the law.

[43] It is correct that under the default rules 8.20 and 8.21 each document in Part 1 must be numbered – that is what r 8.21(1)(a) expressly provides.

[44] However, the concept that the affidavit of documents will then simply refer to the range of numbers given to the documents, and that there is no need for "individual description", does not represent the law.

[45] At another level of submission, Ms Rushton relied upon *Ferrier Hodgson v Siemer* as supporting her submissions. But the relevant passage (at [46]) in the judgment of Rodney Hansen J does not support the plaintiff's position. His Honour, referring to r 298(1)(a) as it stood in 2007 noted that the rule documents in category A "may be identified by number". His Honour went on to note that in terms of "the rule laid down in *Hunyady*" identification (in the List) may be by a generic description in the case of a file, or bundle of documents, the documents or pages still having to be numbered. The judgment does not support a view that all that is required is a number. The fact that the Court recognised that a bundle of documents would still require "a generic description" recognises that something more than mere identification by number is required.

[46] The plaintiff's approach places emphasis upon the fact that the rules do not contain any express requirement as to the discovering open documents has to describe the documents. A contrast is drawn with the old r 298(4), (in force until 2004), which required the list to "describe each document or...describe the group...".

[47] The plaintiff in effect suggests that the abandonment of the old r 298(4) signalled an abandonment of the requirement to describe documents. That is an inference which cannot be sustained either in the context of the rules themselves or in the broader context of the disclosure regime explained above.

Summary of the purpose of the relevant rules

[48] Collecting together those discussions, the Court should recognise that in New Zealand the adequate identification of discovered document should achieve or facilitate at least the following purposes:

(a) To ensure (to the reasonable satisfaction of the Court and other parties) that all disclosure has been given.

(b) In relation to open documents:

i. To enable the opposite party to identify the documents; and

ii To enable the opposite party to request particular documents for inspection or copying; and

iii. To enable the Court to order production and to ensure that such an order is enforced.

(c) In relation to privileged documents –

i. To enable the opposite party to become aware of the documents claimed to be privileged.

ii. To enable that party to meaningfully consider a challenge to the claim of privilege.

(d) In relation to documents no longer in the possession of the discovering party, to enable the opposite party to decide whether to seek discovery against a third party or to issue a subpoena to that person.

(e) To enable the opposite parties and the Court to meaningfully apply the provisions of r 8.37 as to the effect of failure to include a document in an affidavit of documents.

(f) To enable the Court to enforce the provisions of r 8.38 as to the admissions as to documents being originals or true copies.

[49] Against that background, the rules in New Zealand may be properly understood in the following way:

(a) While r 8.21 (and before it, the amended r 298) no longer expresses a requirement of "describing" documents, the rule requires that the schedule "identify or list the documents". That is consistent (without using the word "describe") with the long-standing requirement that listing of documents be sufficient to enable the party requiring discovery to identify a document or group.

(b) If it were correct that r 298(1) did not implicitly contain a requirement of description of documents, then r 298(2) would have been unnecessary. Rule 298(2) was the provision which allowed documents other than open documents in the control of the discovering party, where they were of the same nature, to be described as a group or groups. In other words, as Rodney Hansen J indicated in *Ferrier Hodgson v Siemer*, the current rules preserve the approach taken in *Hunyady* but in the specific context of unprivileged documents within the control of the party giving discovery.

(c) Rule 8.16 (permitting an alteration of the default discovery order by providing for a discovery order specifying the method of discovering documents) is clearly an intended means of guarding against situations where a default rule requiring description of documents might become oppressive (this was the very mischief intended to be met by the Law Commission when promoting the predecessor of the current r 8.16 (r 295).

(d) Rule 8.38 – providing deemed admissions as to the authenticity of discovered documents – assumes a degree of description beyond the mere listing of documents. In the case of original documents the deemed admission arises if the document has been described in the affidavit of documents as an original document. In the case of a copied document the admission arises if the document is described in the affidavit of documents as a copy. If r 8.21 is construed so as to allow a list to identify documents by number only, without a description identifying whether the document is an original or a copy,

a party would be able to entirely undermine r 8.38. I note that the abbreviations adopted by the plaintiff in Part 2 of its affidavit provide for all the obvious types of documents including "O" for original, "C" for copy and "D" for draft.

(e) As the Law Commission identified in its General Discovery report (paragraphs 11 and 12), what is now r 8.37 – precluding a party relying on a document not included in its affidavit of documents - works effectively if there is adequate identification and description of documents in the affidavit of documents. The Law Commission recognised that proposals such as simply numbering documents sequentially without describing them might lead to time consuming arguments at trial as to whether a particular document had or had not been discovered. Simple numbering may lead to ambiguity or even mischief. Numbering combined with adequate description is likely to remove any ambiguity or mischief.

(f) In the broader context – beyond the rules themselves – all the reasons which led to the creation of discovery rules and the case law with regard to discovery continue to have force today Criticism of a requirement to describe documents has not generally been on the basis that the underlying reasons for requiring description were misconceived. Rather, criticism appears to have arisen out of a concern that the benefits obtained by having someone describe documents were outweighed by the onerous consequences in relation to particular cases. Those consequences can properly be met by the Court's power (under r 8.16) to depart from default orders (under rr 8.20 and 8.21).

(g) The question then remains as to whether within Part 1 of the list, the plaintiff is entitled to group documents and, if so, in what format. It might be suggested that, because r 8.21(2) expressly provides that "documents of the same nature in category (b), (c), (d), or (e) may be described as a group or groups", group identification is excluded for

documents in Part 1. I do not read r 8.21(2) as being intended to bar group identification for Part 1 documents. Rather, I read it as a permissive provision, confirming so that there is no doubt that privileged and other documents may be described as a group or groups. The *Hunyady* decision, which is often taken as the New Zealand starting point for grouping of documents, was focussed on documents which have to be produced for inspection (i.e. open documents in Part 1 of an affidavit). Identification by bundle or file was envisaged as an appropriate means of achieving that. What r 8.21(2) makes clear is that that approach is acceptable for privileged and other categories of documents. I do not regard r 8.21(2) as being intended to abrogate the application of the *Hunyady* approach to group documents.

[50] The English approach to listing documents is a useful point of comparison. The rules for standard disclosure in England are contained in r 31.10 Civil Procedure Rules. Identification is dealt with in r 31.10(3):

> **31.10(3)** The list must identify the documents in a convenient order and manner and as concisely as possible.

A Practice Direction was added:

> "In order to comply with rule 31.10(3) it will normally be necessary to list the documents in date order, to number them consecutively and to give each a concise description (e.g. letter to defendant). Where there is a large number of documents all falling into a particular category the disclosing party may list those documents as a category rather than individually, e.g. 50 bank statements relating to account number at Bank, 19 to 19 ; or, 35 letters passing between and between 19 and 19 "

[51] The purpose of the English disclosure rules is summarised in a slightly different, fourfold, manner in *Disclosure* Paul Matthews et al (2007) (3rd ed of "Discovery") at 6.11 in these terms:

> 6.11 The principal reasons for the provisions as to enumeration and description are fourfold. First, it is intended to ensure that all disclosure has been given. Secondly, it enables the opposite party to identify the documents of which disclosure is being made and to request particular documents to be produced for inspection or for

> copying. Thirdly, it will enable the court, if necessary, to make an effective order for the production of particular documents. Fourthly, it enables the provisions contained in CPR, r32,19 (deemed admissions of authenticity of documents disclosed under CPR, Pt 31) to operate effectively.

Style of presentation of list

[52] In relation to the identification of documents, including in groups, I do not detect any material difference between the standard discovery requirements in New Zealand and in England. The Practice Direction in relation to the English Rule 31.10(3) therefore is a useful reference point for the completion of lists in New Zealand also.

[53] For an example of an acceptable form of identification of group documents (in that case in relation to privileged documents), see *Attorney General v Wang NZ* at p 252 where Master Williams gave this example of one possibility for the correct phrasing of a list:

> Correspondence between the defendant and its solicitors between (earliest date) and (latest date) prepared by solicitors/counsel for the party and addressed and forwarded to (eg, managing director) of client, all such documents being headed with or referring to this proceeding and requesting or giving legal advice in relation to it and assisting in the conduct of the litigation.

Irrelevance of style of presentation of list in other cases

[54] In support of its argument as to grouping documents by files and a set of numbers for the file, the plaintiff produced "solely by way of example" two affidavits of documents filed by opposing firms in litigation where the plaintiff's solicitors are acting for other parties. In one of the affidavits a firm of solicitors acting for a council in what appears to be a leaky building case have had their client complete an affidavit of documents in which, in Part 1, there are five "groups" of documents referred to as "Council file 1" and so on, and within that reference referring to "Documents 001 to 427 inclusive".

[55] I do not consider the exhibited affidavits of assistance, for two main reasons. First, the issue before me is not whether a particular form of affidavit has been used either sometimes or frequently, but rather whether the form of affidavit as used in this case complies with the requirements flowing from the rules. Secondly, I do not have before me evidence as to the particular context of the exhibited affidavits. I have no evidence as to whether the affidavits were provided pursuant to the default rules (r 8.20 and r 8.21), or by other arrangement, or by agreement between the parties. If the parties wish to take their discovery outside the default rules either for reasons relating to a specific case or for reasons applicable to a class of cases, that is open to them. I am dealing with a case with relatively limited documentation which is suitable for the application of the default rules.

The Plaintiff's List in this case

[56] The Part 1 list in this case does not meet the requirements I have identified as to identifying or listing documents. It is not helpful to suggest that the other party can identify and call for a particular document by reference to a number, as the recipient of the list has no idea what the particular document is. To use the same word "various" to refer to all three headings regarding "Date", "Description", and "Parties" underlines the fact that the compiler has chosen not to provide that information. Yet it is precisely the information which would enable someone to meaningfully identify a document, as can be done in this case in relation to the documents individually listed in Part 2 of affidavit.

[57] In the course of submissions, I put to Ms Rushton for the plaintiff the situation of solicitors in different cities who decide to carry out inspection by requesting photocopies. The recipient of a list such as the plaintiff's Part 1 list in this case effectively has no choice but to ask for the entire file. Ms Rushton suggested that it is not unreasonable in cases such as this for the requesting party to be expected to simply request a photocopy of the whole file. I reject any invitation to the Court to tolerate such an approach. The inexpensive determination of litigation remains one of the three primary objectives of the High Court Rules under

r 1.2. The ability of a party to identify within a list the documents in which the party is interested and to call for those particular documents is fundamental to discovery.

[58] The identification and listing of documents which occurred in this case was insufficient.

[59] The plaintiff in Part 2 of its affidavit of documents has already provided a method of describing documents. The format of that part of the list is set out in [2] above. The identification provided in Part 2 of the plaintiff's affidavit is an appropriate means of identifying individual documents. The High Court Rules do not prescribe a particular format for such listing or identification of documents and the Court will not impose a particular form. It is sufficient to say for the purposes of this case that a form which followed that used in Part 2 of the plaintiff's affidavit would meet the requirements as to identifying individual documents. I note that the reference to originals ("O") or copies ("C") under "Description" meets the needs.

Proper identification in this case

[60] I calculate that the plaintiff's open documents are fewer than 400. This compares with over 100 individually listed privileged documents. The privileged documents were listed with document number, date, description, parties and privilege category. There is no evidence to suggest that similarly listing the open documents would have been unduly onerous or difficult. One could contemplate a competent litigation solicitor dictating a draft comfortably in less than three hours.

[61] The reasonable time requirements for completing an affidavit of documents are also relevant. Counsel agreed at the first case management conference that this litigation was appropriately categorised as 2B. Upon that basis, Schedule 3 of the High Court Rules allocates 1.5 days for the completion of the list of documents. Under r 14.5, 1.5 days is considered a reasonable time for that step. The Court was not provided with any evidence from the plaintiff as to how long was spent in preparing the Chapman-Smith list of documents. Having regard to the fact that the section of the affidavit containing the lists is only 4 pages long it is inconceivable that 1.5 days was required. It is likely that the additional time to individually list less

than 400 documents in Part 1 would still keep the total time taken within the 1.5 day assumption of "reasonable time".

Utility of further affidavit

[62] Inspection of the plaintiff's files has been completed. This raises an issue as to the utility of the Court's directing the filing of a complying affidavit at this point. The Court should not order the doing of something which no longer has a useful purpose.

[63] It is not necessary for the Court to identify a number of purposes. It is sufficient that one of the purposes for the proper identification of documents remains. Ms McCartney illustrated the remaining need for completion of a proper list by reference to two discovered documents which contain similar but differently-detailed information relating to the investment which the defendants were making. Ms McCartney submitted that a proper identification of the documents would include the identification as to whether each document was a draft or an original. The relevant date, or approximate date, of creation would also be a relevant point of identification. I agree.

[64] Similarly, for the purposes of dealing with documents as either original documents or copy documents for the purposes of r 8.38 (in terms of my discussion at [49(d)]) above, it is necessary for a list to include differentiation of that point.

[65] For these reasons, the completion of an appropriate list would continue to serve a useful purpose in this litigation.

Orders

[66] I order:

(a) The plaintiff is within 10 working days of the handing down of this decision to file and serve a verified list of documents which sufficient describes all discoverable documents.

(b) Without limiting the particular method of description, the plaintiff's description of the documents may follow the format and detail of the descriptions contained in Part 2 of the affidavit of Michael Chapman-Smith sworn 3 June 2009.

Further and better discovery

[67] The defendant sought ten categories of documents by way of further and better discovery. By the time of the hearing the defendants considered it unnecessary to pursue seven of those categories by reason either of documents having been provided or confirmation having been received that documents did not exist in the particular categories.

[68] The litigation involves an arrangement by which the defendant acquired an option to purchase a share in a property bought by the plaintiff in 2007. The purchase price of the defendant's share was to be calculated by reference to the purchase price paid by the plaintiff and by reference to fees, disbursements and outgoings incurred in relation to the property.

[69] For the defendant Ms McCartney says that any GST accounting by the plaintiff after the property purchase in November 2007 is relevant for three reasons. First, if GST was involved and accounted for in the purchase of Donegal Street, it affects the capital expenditure on purchase. The purchase price is in turn directly relevant to the issues between the parties in relation to the option. Secondly, if the plaintiff claimed GST inputs in relation to outgoings on the property (such as for utilities), that is again directly relevant to the issues between the parties in relation to the option. Thirdly, while the defendants seek remedies under the Fair Trading Act by reason of the plaintiff's having been in trade, the plaintiff makes no admission that it was in trade. Ms McCartney submits that evidence of any GST accounting by Vanda through the period from November 2007 will be relevant to the defendants' case that the plaintiff was in trade.

[70] In terms of the *Peruvian Guano* test of relevance, any GST documents for the period from November 2007 would be relevant to the defendants' case for the reasons submitted by Ms McCartney.

[71] The opposition to an order in relation to GST returns is upon the basis that "Vanda has not filed any GST return in the past three years (or any time) relating to, touching upon or concerned with any expenditure related to Donegal Street". Ms McCartney submits that the evidence upon which the notice of opposition rests is ambiguous in that Mr Chapman-Smith states:

> **Item (i) – Vanda's GST Returns for the past three years**
>
> 3. The only GST Returns which would be relevant to these proceedings are GST returns related to or touching upon the property the subject of this claim and any works performed thereon.
>
> 4. Vanda Investments Ltd ("Vanda") has not claimed any GST inputs for Donegal Street. There are no returns to discover.

[72] Notwithstanding Ms McCartney's submission in this regard, I would have found that Mr Chapman-Smith's evidence was sufficiently clear to indicate there were no GST returns made by Vanda relating to Donegal Street. However, the matter does not rest there. There mains an issue as to whether Vanda was in trade. Vanda's GST returns generally are relevant and will be covered by the order I make below.

[73] The second category of documentation which the plaintiff seeks is bank statements showing mortgage payments for monies raised to purchase Donegal Street. The defendants' case is that there may have been advances to Michael Chapman-Smith, Akarana Real Estate Limited or other parties which were then available to Vanda to assist with the purchase of Donegal Street. Any such statements would show the amount of interest charged. The point is a simple one. In relation the defendants' option, the plaintiff calculated expenses including interest on loans. The plaintiff's discovered documents include copies of some (but not all parts) of certain ASB statements. But it is clear from interest calculations prepared by the plaintiff that interest on other accounts, apparently raised by other entities, was included in the plaintiff's calculations of expenses. I refer for instance to an entry which reads:

Interest on average via Akarana @ 10.75%

[74] The documents relating to all such interest expenses are clearly relevant. They are to be discovered in terms of the order below.

[75] The third category of documents requested is:

Statements from Akarana bank account for 3 years

[76] The Akarana bank account is relevant in relation to the interest payments to which I have referred. The Akarana bank account will be encompassed by the directions I make in relation to the previously discussed items.

[77] Without addressing detailed submissions in relation to the confidentiality or commercial sensitivity of any documents, it was clear from Ms Rushton's submissions that the plaintiff may have concerns as to the confidentiality of some information contained within the documents sought. Such confidentiality is not a reason justifying a failure or refusal to make discovery of relevant documents. Any claim for confidentiality can be dealt with appropriately in the affidavit of documents with the assistance of counsel, having regard to any confidential aspects of the documents. The documents themselves must be discovered in the affidavit. What must be available for inspection in the documents are the non-confidential portions, including all such portion as are relevant to the calculation or interest or other expenses associated with the Donegal Street property.

[78] Ms Rushton in her submissions did not suggest that the documents of Akarana Real Estate Limited or any other related party are not able to be accessed by Vanda.

Orders

[79] I order:

(a) The plaintiff shall file and serve by *11 December 2009* an affidavit of documents which complies with rr 8.20 and 8.21, by meeting the requirements of description referred in this judgment.

(b) Such affidavit of documents shall include by way of further and better discovery:

- The GST returns of the plaintiff for the period from and including November 2007; and

- To the extent that the plaintiff is able to obtain the co-operation of related entities, all bank statements showing interest payments which have been taken into account in any of the plaintiff's interest or outgoings calculations connected with 23 Donegal Street.

[80] Having regard to the relationship between Vanda Investments Limited, Michael Chapman-Smith, Cromwell Investments Limited, and Akarana Real Estate Limited, the Court anticipates that the plaintiff will not encounter difficulty in accessing and making available within its discovery the documents referred to in this judgment. In the event that for any reason the plaintiff does not have access to the relevant documents and is unable to obtain copies, then the identification of those documents will be required to be included in the affidavit to be filed in terms of r 8.21(1)(e). If the plaintiff for any reason has not obtained a full set of copies, then upon the basis of the information before the Court on the present application it will become almost inevitable that an order would be granted against the non-parties requiring discovery. To enable the Court to deal with such eventuality in an efficient manner, I direct in that event that counsel for the plaintiff is to file with the further affidavit of documents a memorandum indicating whether the plaintiff's solicitor will receive instructions to act for the non-parties in relation to such discovery.

Costs

[81] The general principle is that the party who fails with respect to an interlocutory application should pay costs to the party who succeeds: see r 14.2(a). The defendants have succeeded in this application. As to the form of affidavit, I have found that the plaintiff's affidavit was substantially inadequate. As to the matters of further and better discovery, I found for the plaintiff on each of the three remaining items. Other matters previously pursued have fallen away but that does not detract in any significant way from the overall success of the defendants' applications.

[82] Counsel have previously recognised that this is appropriately a Category 2B proceeding.

[83] I anticipate that counsel will be able to resolve the quantum and payment of costs. In the event that that is not the case the parties are to file sequential affidavits no longer than 5 working days apart (four pages maximum). In that event, unless otherwise requested, the Court will determine the costs on the papers.

Solicitors
Price Baker Berridge, Henderson, Waitakere for Plaintiff
Zelijan Unkovich, Auckland for Defendants
J McCartney SC, Auckland – Counsel for Defendants

Addendum

Since this judgment was drafted counsel for the plaintiff has filed a memorandum and affidavit as to the GST aspect of the transactions referred to in the proceedings. Leave was not reserved to file additional submissions or evidence and the Court has therefore not considered the memorandum filed: see *Practice Note* [1968] NZLR 608.