IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

COMMERCIAL PANEL

CIV-2017-404-001975
[2019] NZHC 1416

BETWEEN	NZ IRON SANDS HOLDINGS LIMITED Plaintiff
AND	TOWARD INDUSTRIES LIMITED First Defendant
	TAHAROA IRONSANDS LIMITED Second Defendant

Hearing: 13 May 2019

Appearances: M O'Brien QC and M H A Ho for Plaintiff
J E Hodder QC and J A McKay for First Defendant
No appearance for or by Second Defendant

Judgment: 20 June 2019

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 20 June 2019 at 10.30 am
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Gilbert Walker, Auckland
Chapman Tripp, Auckland
Minter Ellison Rudd Watts, Auckland

Counsel:
M O'Brien QC, Auckland
J E Hodder QC, Auckland

Introduction

[1] This proceeding arises out of unsuccessful attempts by the plaintiff, NZ Iron Sands Holdings Ltd (NZIS), to purchase the shares in the second defendant, Taharoa Ironsands Ltd (Taharoa), from the first defendant, Toward Industries Ltd (TIL).

[2] TIL is a wholly owned subsidiary of BlueScope Steel Ltd (BSL), an ASX listed company.

[3] Very broadly, NZIS says that it entered into a conditional agreement with TIL to purchase the shares in Taharoa on 14 November 2016, that the agreement required both TIL and it to use all reasonable endeavours to ensure that each condition was fulfilled by 14 December 2016, to cooperate and provide all reasonable assistance to each other to fulfil each condition, to keep the other fully informed of communications with relevant third parties, and not to do anything likely to hinder fulfilment of the conditions. NZIS says that TIL failed to comply with these obligations and then wrongly terminated the agreement on 15 December 2016, asserting that the conditions had not been met.

[4] TIL, again very broadly, says that it fully discharged its obligations under the share purchase agreement, that the conditions were not fulfilled by 14 December 2016, that when the deadline specified in the agreement expired, it had no obligation to and did not waive the same, and that it properly terminated the agreement in accordance with its terms.

Discovery - background

[5] Regrettably, and as is all too common, particularly in commercial proceedings, achieving satisfactory discovery has proved to be difficult.

[6] After extensive toing and froing between the parties, counsel eventually agreed to tailored discovery and, on 28 June 2018, I made an order in accordance with their agreement. I required that tailored discovery be attended to by 5 October 2018. I also ordered that any further interlocutory applications regarding discovery (or otherwise) were to be filed and served by 9 November 2018.

[7] Taharoa complied with the 5 October 2018 date. Neither NZIS nor TIL did so. Both filed their affidavits of documents late. They then said that they needed more time to consider the discovery which the other had provided and that they could not comply with my further direction that any further interlocutory applications regarding discovery be filed and served by 9 November 2018. Time was extended and on more than one occasion.

[8] On 5 February 2019, NZIS filed an application against TIL seeking particular discovery and consequential orders. Inter alia, it challenged claims to privilege made by TIL, sought the disclosure of specific emails identified in an affidavit sworn by its executive director, Selva Nithan Thirunavukarasu, and an order directing that TIL reconsider all of its various claims to privilege, file an affidavit individualising each document dated between 14 November 2016 and 21 December 2016 (the "critical period") and provide detail of the privilege claimed for each.

[9] TIL filed a notice of opposition. It also filed an interlocutory application seeking that Mr Thirunavukarasu's affidavit not be read and that it be removed from the Court file (or sealed). It asserted that the affidavit referred to and exhibited privileged documentation provided to NZIS in the course and for the purposes of an unsuccessful mediation between the parties.

[10] On 8 March 2019, NZIS filed an amended application, again seeking particular discovery and consequential orders. TIL filed a fresh notice of opposition.

[11] The applications were called before me on 26 March 2019. After hearing from counsel, I indicated to the parties my preliminary view that:

(a) it was not open to NZIS to put before the Court privileged documents made available to NZIS by TIL in the course of the mediation;[1] and

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[1] Relying on:
(a) the mediation agreement entered into between the parties – "documents provided or disclosed … during the course of the mediation" not to be used for any purpose other than the mediation;
(b) *Vaucluse Holdings Ltd v Lindsay* (1997) 10 PRNZ 557 (CA) at 559; *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* (2001) 15 PRNZ 379 (CA) at [23]-[24]; *Farm Assist Ltd (in liq) v The Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC), QBD at [31], [40], [42]-[44]; *Union Carbide Canada Inc v Bombardier Inc* [2014] 1 SCR 800 (SC) at [38]-[41].

(b) the discovery undertaken by both TIL and NZIS – where documents over a given date range were listed in bulk, without itemising the same, and where privilege was claimed on a global basis, without detailing the claim to privilege for each document – was unsatisfactory, and not in accordance with the directions I had made on 28 June 2018, which inter alia required that lists of documents "specifically enumerate and described all documents claimed to be privileged".

Neither party required a judgment from me on those issues and there was a measure of agreement between them. In anticipation that it might crystallise the disputes between them, both agreed to file amended lists of documents individually listing all documents in respect of which privilege had been claimed and detailing the grounds for the claim to privilege for each document so listed.

[12] Individual listings of documents created over the critical period and in respect of which privilege had been asserted, were exchanged on 3 April 2019.

[13] Unfortunately, this process did not resolve all difficulties between the parties, and, on 24 April 2019, NZIS filed a second amended application relying on rr 8.15, 8.19 and 8.25. It sought that:

(a) TIL produce to a Judge or independent Queen's Counsel the following documents for inspection, so that a determination can be made as to whether privilege has been properly claimed:

(i) each document for which privilege has been claimed under s 54 of the Evidence Act 2006, including documents parts of which have been redacted for privilege; or

(ii) all documents for which privilege is claimed under s 54 of the Evidence Act and which were created over the critical period, and any board paper or part of any board paper of BSL.

(b) TIL undertake searches of, and provide discovery of documents held by, various named custodians – namely board members, senior management staff and communications personnel with BSL, a director of TIL, and management personnel of New Zealand Steel Mining Ltd (now Taharoa).

[14] This amended application was also opposed by TIL.

Submissions

[15] Mr O'Brien QC, for NZIS, noted that TIL has discovered on an open basis relatively few documents over the critical period. He argued that it is inconceivable that there were not more open documents of relevance over that period, and suggested that one possible explanation may be that TIL has claimed privilege in respect of documents that are not properly privileged. In support of this assertion, he noted that TIL has changed its stance on some of the documents as a result of challenges made by NZIS, in particular that:

(a) TIL belatedly accepted that eight of the emails disclosed in the course of the mediation previously said to be privileged should have been discovered on an open basis;

(b) a number of other documents were opened on 25 March 2019, namely:

(i) 47 which had previously been the subject of privilege claims; and

(ii) seven which had previously been redacted but where the redactions had been removed.

Mr O'Brien noted that of these 62 documents, 12 were created in the 10 to 21 December 2016 period, and 26 (including the 12) in the period 1 December 2016 to 21 December 2016. He noted that TIL still claims legal professional privilege over 517 documents (504 in their entirety and 13 in part) created over the critical period. He advised that NZIS remains concerned about the number of documents in respect

of which privilege is still claimed, and submitted that the fact that there are more privileged documents than open documents is an oddity. He argued that it appears that TIL, on the face of it, has adopted an overly liberal approach to privilege, particularly in relation to documents sent or received by its in-house counsel. He argued that not all documents that have passed through in-house counsel are necessarily privileged, submitting that there must be a legal context to the document, pursuant to which the legal counsel gives or is asked for legal advice, before privilege can attach.

[16] In regard to the further search sought of additional custodians, he submitted that TIL has accepted that it has not searched various custodians believed to hold a number of documents, including persons at BSL, and that there are reasonable grounds to believe that the named persons were involved in the transactions at issue.

[17] Mr Hodder QC, for TIL, argued that his client and its advisors have done all that can reasonably be required. He advised that TIL has undertaken an extensive discovery exercise, collating over half a million documents, and that its solicitors – Chapman Tripp – have manually reviewed over 112,000 documents. He argued that NZIS's criticism of TIL's privilege claims are both speculative and unjustified, and that NZIS has failed to provide a proper evidential basis for the dislodging the presumption that the affidavits of documents filed are accurate. He submitted that significant cross-checks have been undertaken by responsible counsel, and that as a result supplementary discovery has been provided. He argued that the orders sought are unnecessary and a disproportionate response to the relatively few privilege issues which have arisen.

[18] In regard to the additional custodians' issue, Mr Hodder again argued that the orders sought are speculative, unjustified and disproportionate. He submitted that TIL has not only complied with the tailored discovery order made, but also has provided added comfort to NZIS, beyond that required by the terms of the discovery order, by conducting searches of additional custodians and by making further enquiries. He argued that there is no evidence to support NZIS's speculative claim that any of the additional custodians named in NZIS's application will likely be in possession of relevant and disclosable documents.

Analysis

Claims to privilege

[19] TIL has disclosed 9,671 documents and NZIS has disclosed 2,322 documents. Privilege has been in issue from the outset and, as already noted, since the parties exchanged their initial lists of documents in mid-October 2018, a number of issues in respect of the other party's discovery, including privilege, have been raised. Once NZIS made its initial particular discovery application on 5 February 2019, TIL's solicitors conducted a further review of the documents created during the critical period over which TIL had claimed privilege. As a result, on 25 March 2019, and again as already noted, TIL provided supplementary discovery of an additional 62 documents. There are still 517 documents created over the critical period in respect of which TIL has claimed privilege, as against 500 documents which TIL now accepts are open for inspection.

[20] The challenge to the privilege claims by NZIS is brought pursuant to r 8.25. It provides as follows:

> **Challenge to privilege or confidentiality claim**
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> (1) If a party challenges a claim to privilege or confidentiality made in an affidavit of documents, the party may apply to the court for an order setting aside or modifying the claim.
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> (2) In considering the application, a Judge may require the document under review to be produced to the Judge and may inspect it for the purpose of deciding the validity of the claim.
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> (3) The Judge may—
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> (a) set aside the claim to privilege or confidentiality; or
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> (b) modify the claim to privilege or confidentiality; or
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> (c) dismiss the application; or
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> (d) make any other order with respect to the document under review that the Judge thinks just.

[21] Clearly the Court has a discretion whether to inspect a document, and the rule does not qualify that discretion in any way. There is no requirement that a Judge be satisfied of any particular circumstances before inspecting and, in appropriate cases,

overruling a claim to privilege. A ruling after inspecting a document said to be privileged, even without the benefit of submissions, is more likely to further the ends of justice than a ruling without inspection.[2] Nevertheless, documents should not be provided to the Court for inspection "as a matter of automatic practice".[3]

[22] It has been suggested by the learned authors of *McGechan on Procedure* that there has been a greater willingness in recent times to inspect documents in the interests of getting to the truth of the matter.[4] However, at least one commentator in the United Kingdom has suggested that there are inherent difficulties in inspection by the Court. He has noted as follows:[5]

> Day to day decisions as to whether to disclose specific documents are taken by the lawyers. No-one else is in a position to make those decisions, and there is in practice no supervision by the court as to whether, for example, the lawyers have taken wrong view of privilege or relevance. Applications for specific disclosure only provide the most limited supervision because the other party simply will not be aware in most cases of the facts relied upon to justify a particular claim for privilege or irrelevance, and the basis for such decisions will not usually be apparent. Given that basic premise, it is illogical that a Court to be asked to intervene other than in a case where there is a reason to believe on evidence that the lawyers have either misunderstood their duty or are not to be trusted with the decision making. These will be very exceptional cases. But, more importantly, inspection by the court is usually effected in circumstances in which only one party has seen the documents in question. … It is extremely unsatisfactory that the court should be asked to make a decision where the information available to the parties is different. … There has more recently been greater recognition of the problems to which inspection by the court gives rise. It now seems to be treated as "a solution of last resort". …

[23] Most of the claims for privilege asserted by TIL are made under s 54 of the Evidence Act 2006 – privilege for communications with legal advisers – and many of the communications were between management and in-house counsel at TIL. This clear from the expanded list exchanged with NZIS on 3 April 2019.

[24] Under s 53 of the Evidence Act, a person who has a privilege conferred by, inter alia, s 54 in respect of a communication or any information, has the right to refuse

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[2] *Seamar Holdings Ltd v Kupe Group Ltd* [1995] 2 NZLR 247, (1995) 8 PRNZ 427 (CA) at 247-249.

[3] *General Accident Fire & Life Assurance Corp Ltd v Elite Apparel Ltd* [1987] 1 NZLR 129, (1987) 1 PRNZ 41 (CA) at 133.

[4] A C Beck and Others "McGechan on Procedure" (online ed, Thompson Reuters) at [HR8.25.02].

[5] C Hollander "Documentary Evidence" (13th ed, Sweet and Maxwell, London, 2018) at 7-64.

to disclose in a proceeding, the communication and the information and any opinion formed by a person that is based on the communication or information.[6]

[25] The rationale for allowing parties to claim privilege for communications with legal advisers, is to enable those parties to confide unreservedly in their legal advisers, and to encourage candour in the exchanges necessary to provide instructions to, and receive advice from, the legal advisers.[7] Privilege arises from the public interest requiring full and frank exchange of confidence between solicitor and client to enable the latter to receive necessary legal advice.[8]

[26] Section 54 of the Evidence Act refers to a legal adviser – defined in s 51(1) of the Act, as a lawyer, a registered patent attorney or an overseas practitioner. A lawyer in turn is defined as a person who holds a current practising certificate as a barrister or as a barrister and solicitor.[9] Privilege applies to a communication between a person and a legal adviser if the communication was intended to be confidential and was made in the course of and for the purpose of professional legal services. There is no additional requirement that the legal adviser be independent. Salaried legal advisers (in-house lawyers) communicating internally with other employees of their common employer come within the scope of the privilege, provided they have a current practising certificate and the communications relate to the provision of professional legal services.[10]

[27] Where in-house counsel have multiple duties, whether or not privilege attaches to any particular document depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which the advice was sought and rendered.[11]

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6 At common law, legal advice privilege attached to communications between lawyer and client for the purpose of giving and receiving legal advice – *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC).

7 *Wheeler v Le Marchant* (1881) 17 Ch D 675 (CA).

8 *B v Auckland District Law* Society, above n 6 at [37], [43], [44], [47], [50] and [54]; *Balabel v Air India* [1998] Ch 317, [1988] WLR 1036 (CA) at 1040; *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, [2004] UKHL 48, at [29]-[38].

9 Evidence Act 2000, s 4(1) and Lawyers and Conveyancers Act 2006, s 6.

10 *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No 2)* [1974] AC 405, [1973] 2 All ER 1169 (HL); *Bain v Minister of Justice* [2013] NZHC 2123, [2014] NZAR 892 at [72]; *Robert v Foxton Equities Ltd* [2014] NZHC 726, [2015] NZAR 726 (HC) at [28]-[29].

11 *Robert v Foxton Equities Ltd*, above n 10 at [30].

The Court of Appeal in the United Kingdom has observed in *Balabel v Air India* as follows:[12]

> Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. … Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do". But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

[28] This approach was followed by the House of Lords in *Three Rivers District Council v Governor and Company of the Bank of England (No 6).*[13] Lord Scott observed as follows:[14]

> There is a strong public interest that … in civil cases the claimant should succeed if he is entitled to do so and should fail if he is not, that every trial should be a fair trial and that to provide the best chance of these desiderata being achieved all relevant material should be available to be taken into account.

His Lordship went on to acknowledge legal advice privilege, recording that it is necessary in a society built upon a belief in the rule of law that communications between clients and lawyers should be secure from scrutiny by others.[15] His Lordship then considered the scope of legal advice privilege. He stressed that there was "no doubt" that there must be "a relevant legal context" for advice to attract legal professional privilege. He then observed as follows:[16]

> … If a solicitor becomes the client's "man of business", and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may

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12 *Balabel v Air India*, above n 8 at 1046.
13 *Three Rivers District Council v Governor and Company of the Bank of England (No 6)*, above n 8.
14 At [28].
15 At [34].
16 At [38].

> lack a relevant legal context. There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one.

[29] The approach in *Balabel* and *Three Rivers* has been adopted in New Zealand.[17] It has been held by the Court of Appeal that the privilege should be as narrow as its principle necessitates, and that a client's document that was not prepared for the purpose of seeking advice does not attract privilege merely because it was sent to the legal adviser as an adjunct to a communication in which advice was sought or given.[18]

[30] Where a document contains both privileged and non-privileged material, the approach should be to redact the portion of the document that contains legal advice and disclose the balance.[19] Indeed, the Supreme Court has noted, without adverse comment, that there are authorities supporting this proposition.[20] Where redaction is impossible, because the privileged and non-privileged material is interwoven, commentators have suggested that the balance is generally struck in favour of maintaining privilege.[21] Australian authority supports this approach.[22] I am not aware of any authority in New Zealand to this end, but the approach suggested seems sensible and consistent with principle.

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17 See e.g. *Brandline Ltd v Central Forklift Group Ltd* HC Wellington CIV-2008-485-2803, 11 February 2011; *Bain v Minister of Justice* [2013] NZHC 2123; *Public Trust v Hotchilly Ltd* HC Wellington CIV-2009-485-701, 31 March 2010; *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 February 2006; *Robert v Foxton Equities Ltd*, above n 10; *Commerce Commission v Caltex New Zealand Ltd* HC Auckland CL 33/97, 10 December 1998.

18 *Sinunovich Fisheries v Television New Zealand Ltd* [2008] NZCA 350 at [165] and [169].

19 *Wellington City Council v Local Government Mutual Funds Trustee Ltd* [2015] NZHC 1151 at [26(a)].

20 *Beckham v R* [2015] NZSC 98, [2016] 1 NZLR 505 at [82].

21 See Bankim Thanki "The Law of Privilege" (3rd ed, Oxford University Press, Oxford (UK), 2018) at [4.06].

22 *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54 at [103]; *12 Years Juice Foods Australia Pty Ltd v Commissioner of Taxation* [2015] FCA 741 at [22].

[31] Here, NZIS says that there is reason to believe that TIL has misunderstood the relevant law and taken an unduly liberal approach in claiming privilege. Mr Thirunavukarasu, has expressed concern that TIL "may have" claimed privilege over documents which are of a transactional or commercial nature, rather than of a legal nature, and even if they had been produced by or sent to a lawyer. To illustrate this argument, he noted:

(a) the lack of internal emails and reports between TIL staff and BSL board members;

(b) there have been no relevant internal emails disclosed between 10 December and 14 December 2016 notwithstanding that 14 December 2014 was the due date for satisfaction of the conditions in the sales agreement;

(c) the lack of disclosed documents around the second tender process which BSL invited NZIS and others to participate in after the first agreement with NZIS had been terminated;

(d) there are no records of meetings, minutes, call logs or emails around the relevant time;

(e) the comparative absence of instructions given by BSL to the investment banker engaged by it to run the first sales process – Moelis & Co; and

(f) only a small number of documents have been discovered to or from BSL's senior corporate counsel; and

(g) while various BSL board papers have been discovered, appendices have been redacted.

[32] Mr O'Brien emphasised these matters. He also pointed to various of the documents which were initially said to be privileged, but which have since been made available on an open basis. He took me through some of them and argued that there was clearly never a proper claim to privilege in respect of those documents. He

submitted that this points to the fact that TIL has taken an unduly liberal approach to privilege. He pointed to the number of privileged documents as opposed to the number of open documents disclosed. He argued that there must have been "marginal calls" in determining whether privilege could be claimed, and he submitted that where the balance should be struck should be decided on a document by document basis, by a Judge or by an independent Queen's Counsel.

[33] Mr Hodder submitted that NZIS's proposal is unprecedented, and that there is simply no ground for making the order sought. He argued that the starting presumption is that the affidavits of documents already filed are complete. Mr Hodder pointed out that the initial affidavit of documents for TIL was sworn by a Ms Morrison. She was seconded to BSL's legal team from an external law firm. Mr Hodder suggested that this cuts across any suggestion that her likely role was to provide commercial as opposed to legal advice. Further, the discovery process was undertaken by TIL's solicitors – Chapman Tripp – and not by TIL's in-house counsel. Affidavits have been filed from a Mr Kerkin, who is a barrister and solicitor employed by Chapman Tripp. Mr Kerkin has deposed that he was directly and extensively involved in the discovery process. He has exhibited copies of the extensive correspondence which passed between the respective solicitors, and then stated that, in response to NZIS's discovery application and in the interests of trying to resolve the issues raised, Chapman Tripp conducted a further and thorough review of all relevant and privileged documents over the critical period. He was closely involved in that review. In the course of the review, careful regard was had to the relevant authorities on solicitor/client privilege, the need to take particular care when claiming privilege in relation to documents involving in-house counsel (bearing in mind the potential for such counsel to have roles which involved more than providing legal advice), and the factual context over the critical period. In addition, discussions were had with representatives of TIL about the roles and responsibilities of particular individuals involved over the period, to ensure that those roles and responsibilities were properly understood. Mr Kerkin said that Chapman Tripp reviewed each of TIL's privileged documents over the critical period, and prepared TIL's list detailing those documents and explaining the basis on which privilege was claimed in respect of each. The further discovery provided on 25 March was a result of this review as well.

[34] Where a solicitor swears an affidavit as to the status of documents, the Court will normally require cogent evidence to challenge that view, before going behind the affidavit of documents.[23] When solicitors swear affidavits of documents, they are of course officers of the Court, and there is an obligation on them to consider each document, and make a careful evaluation as to whether it is proper to make a claim for professional privilege in respect of the document.[24] It has been held in the United Kingdom that the Court should not itself inspect documents unless there is credible evidence that the lawyers have either misunderstood their duty, or they are not to be trusted, or there is no reasonably practicable alternative.[25]

[35] Here, Ms Morrison's initial affidavit of documents has been proved, at least in part, to have been wrong. Claims to privilege were made which should not have been made. However, there is nothing to suggest that the review exercise undertaken by Mr Kerkin and others at Chapman Tripp was undertaken in anything other than a thorough manner.

[36] Nevertheless, the issues which confronted Chapman Tripp in its review were not simple. The application of the law relating to the scope of legal advice privilege, particularly where the claim is in relation to communications to and from in-house counsel and where legal advice is likely to be intermingled with commercial advice, is not always simple. The dominant purpose for the creation of the document may not always be clear and the answer in each case will not necessarily be obvious. Where commercial advice and legal advice are intertwined, issues of facts and degree will arise, involving a weighing of the relevant importance of the identified purposes for which the communication was prepared.

[37] I agree with the observations of the Federal Court of Australia to such issues in *Seven Network Ltd v News Ltd.*[26] It was there observed as follows:

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23 *Jones v Monte Video Gas Company* (1880) 5 QBD 556 (CA); *Carter Holt Harvey Ltd v Fletcher Holdings Ltd* [1981] 2 NZLR 613 (HC); *Foley's Transport Ltd v Weddel NZ Ltd (in rec & liq)* (1996) 9 PRNZ 392 (HC); *McCullagh v Robt. Jones Holdings Ltd* [2015] NZHC 1462, (2015) 22 PRNZ 615 at [7]; *Lighter Quay President's Society Incorporated v Waterfront Properties (2009) Ltd* [2017] NZHC 818 at [16(b)].

24 *Seven Network Ltd v News Ltd* [2005] FCA 142 at [33].

25 *National Westminster Bank plc v Rabobank Nederland* [2006] EWHC 2332 (Comm) at [34] and [49]-[51].

26 *Seven Network Ltd v News Ltd*, above n 24.

(a) The purpose for which the document was prepared is particularly important in relation to in-house counsel, because they may be in a closer relationship to the management than outside counsel, and therefore more exposed by participation in and the commercial aspects of an enterprise.[27]

(b) In order to attract privilege, the legal adviser should have an appropriate degree of independence so as to ensure that the protection of legal professional privilege is not conferred too widely. Commercial reality is that in-house advisers may often be involved in giving advice of a commercial nature related to the giving of legal advice. Such involvement does not necessarily disqualify the documents relating to that role from privilege. The matter is necessarily one of fact and degree and involves a weighing of the relative importance of the identified purposes.[28]

(c) There is no bright line separating the role of a lawyer advising in-house and his or her participation in commercial decisions. It is often practically impossible to segregate commercial activities from purely legal functions; the two will often be intertwined and privilege should not be denied simply on the basis of some legal involvement.[29]

[38] Where the Court is minded to go behind an affidavit of documents, there are various options open to it. It can conclude that the person claiming privilege has not discharged the burden that lies on him or her and order disclosure and/or inspection. It can order a further affidavit to deal with matters the earlier affidavit did not cover or on which it is unsatisfactory. It can order cross-examination of the deponent, who has produced the affidavit of documents. It can inspect the documents itself.[30]

[39] While I do not doubt the endeavours that Chapman Tripp has made, it seems to me that, given the intrinsic difficulties with legal adviser privilege, given the

27 At [3]-[4].
28 At [5].
29 At [38].
30 *West London Pipeline & Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) at [74].

"margin calls" that will have been required in this case, and given the need to ensure that the substantive issues in dispute are fully and properly heard by reference to all properly admissible material, the most sensible solution in the present case is to direct discreet inspection of sample documents, to see whether there has been any systemic error, which may have resulted in an overly liberal approach being taken to the issue of legal professional privilege.

[40] I have considered whether I should undertake the inspection myself, or whether it should be undertaken by another Judge or an Associate Judge. Both Mr O'Brien and Mr Hodder submitted that an Associate Judge would be appropriate if I got to this stage. Mr O'Brien acknowledged that there is no jurisdiction permitting the appointment of an independent QC to undertake the task, and in any event, it is properly a judicial function. Here, these proceedings have been allocated to me as a Commercial Panel member. I am the allocated Judge, and I will be conducting the trial. Authorities in the United Kingdom suggest that in such circumstances, investigation by a Judge not connected with the case is preferable.[31] I adopt that approach.

[41] Accordingly, I direct as follows:

(a) Within 10 working days of the date of the release of this decision, NZIS is to nominate for inspection 52 documents (being approximately 10 per cent of the documents in respect of which privilege has been claimed).

(b) TIL is to make those documents available in full to the Court for inspection by an Associate Judge.

(c) The Associate Judge is also to receive the following from the Registrar:

(i) a copy of this judgment;

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31 *Atos Consulting v Avis plc (No 2)* [2007] EWHC 323 at [57]; *National Westminster Bank plc v Rabobank Nederland* [2006] EWHC 2332 (Comm) at [57].

(ii) copies of the parties' pleadings;

(iii) a copy of the merged pleadings document prepared by TIL;

(iv) a copy of the list provided by TIL to NZIS on 3 April 2019 – exhibit JIK-3 – annexed to Mr Kerkin's affidavit of 7 May 2019;

(v) any further materials counsel agree should be made available. In this regard, counsel are to advise, by joint memorandum, within the same 10 working day period, whether or not they consider that the Associate Judge should have any other material made available to him or her.

(d) Once the Associate Judge has inspected the documents and advised whether or not the claim to privilege in respect of each of the 52 sample documents is or is not properly made, I will convene a telephone conference with counsel, or if necessary a hearing, to determine whether or not any issues revealed by the inspection are systemic and such that the balance of the documents in respect of which privilege has been claimed should be inspected by an Associate Judge.

Inspection of "additional custodians"

[42] NZIS's application in this regard is made pursuant to r 8.19 of the High Court Rules. It provides as follows:

> **Order for particular discovery against party after proceeding commenced**
>
> 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—
>
> (a) to file an affidavit stating—
>
> (i) whether the documents are or have been in the party's control; and

(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 the other party or parties; and

(c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the other party or parties.

[43] In considering whether or not to order particular discovery under r 8.19, a four-stage approach is adopted. It was set out by Asher J in *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd*[32] and it has been widely adopted. That approach asks as follows:

(a) Are the documents sought relevant, and if so, how important will they be?

(b) Are there grounds for belief that the documents sought exist? This will often be a matter of inference. How strong is that evidence?

(c) Is discovery proportionate (balancing the time and cost of discovery) against the potential value of discovery?

(d) Weighing and balancing these matters, and the Court's discretion applying r 8.19, is an order appropriate?

[44] Typically, the Court will have regard to affidavit evidence, pleadings, and the circumstances of the case to establish whether there are grounds to believe that a party has not discovered documents that should have been disclosed. Such grounds for belief may be established from evidence, the nature or circumstances of the case or the pleadings. It does not require existence of the document to be established on the balance of probabilities. All that is necessary is to show some credible evidence that the documents exist.[33]

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32 *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760, [2015] NZAR 600 at [14].

33 At [12].

[45] In the present case, the tailored discovery orders agreed to by the parties and made by me, recorded that for the purposes of discovery, relevant documents in the control of inter alia BSL were to be treated as within the control of TIL and discoverable by TIL. All parties agreed that they would make reasonable enquiries of their directors, advisers, contractors and agents to ensure that the discovery obligations were properly discharged.

[46] Mr Thirunavukarasu complained in his affidavits that it appears that no searches "were run over" documents held by board members and a number of key personnel at BSL, and BSL's then subsidiary, Taharoa. He identified the following persons:

(a) Derek Charge – the then Vice President of what is now Taharoa;

(b) Charlie Elias – the CFO of BSL;

(c) BSL board members John Bevan, Penelope Bingham-Hall, Ewen Crouch, Kenneth Dean, Rebecca Dee-Bradbury, Daniel Grollo, Lloyd Jones and Paul O'Malley;

(d) Mark Vassella – CEO of BSL;

(e) Alex Highnam – BSL's Executive Group Manager, People and Performance;

(f) Margaret Gracie – Taharoa's Vice President, People and External Affairs, Don Watters – BSL's Vice President, Investor Relations, and Vicki Woodley – BSL's Manager, External Affairs;

(g) Tania Archibald – Vice President, Corporate Finance and Strategy;

(h) Andrew Birdsall, John Hetherington, Grant Huggins and Peter Schulze – key management employees within Taharoa;

(i) Mathew Kari – a director of TIL.

He asserted, for a variety of reasons, that each of these individuals was involved in the sales process and expressed his concern that no (or few) documents have been discovered from or to any of them.

[47] TIL's response was to assert that it searched the custodians most likely to hold relevant documents. It said that the orders sought are unnecessary and disproportionate and that there are no grounds for believing that any of the additional "custodians" named by Mr Thirunavukarasu are likely to hold relevant documents. It asserted that it has disclosed relevant and non-privileged agendas, board papers and minutes provided to the board, and that any further communications within the board are likely to have been captured by TIL's searches of other custodians' records, including searches of several members of BSL's executive leadership team. It also asserted that a number of the individuals named were not involved in the transaction team and had no material involvement with the transactions at issue.

[48] The tailored discovery order made by me required the parties to make "reasonable enquiries" of their directors. I agree with Mr Hodder that what is reasonable needs to be measured against the extent to which the directors were likely involved in the transactions at issue, and the likelihood that they are in possession of relevant documents.

[49] Having perused the correspondence which was exchanged between the solicitors, it is clear that TIL was aware of its obligations in this regard. It considered that relevant documents held by the directors would likely only comprise agendas, board papers and minutes. These have been disclosed. Further, it is clear from a letter of 25 March 2019, annexed to one of Mr Kerkin's affidavits, that Chapman Tripp contacted each of BSL's directors, and that each has confirmed that they do not have any additional documents beyond those that have already been disclosed. NZIS's assertion that directors are likely to be in possession of file notes or email correspondence relating to board meetings or decisions is speculative at best, and TIL has not provided any evidence to support this assertion.

[50] The same applies to the other named "custodians". There are no grounds to suspect that any of them hold any relevant documents that have not already been

disclosed. The inference which Mr Thirunavukarasu asks me to draw to the contrary is unsupported and speculative.

[51] In my judgment, it is neither reasonable nor proportionate to require TIL to further search the records of the named custodians. I am not persuaded that there has been any failure by TIL to make enquiries of relevant persons. This aspect of NZIS's application is, in my view, nothing more than a fishing expedition and it would be disproportionate to make orders in the terms sought. I decline to do so.

General

[52] The Registrar is directed to return to NZIS's solicitors the copies of the unredacted version of Mr Thirunavukarasu's affidavit dated 4 February 2019, together with the unredacted copies of the exhibits to that affidavit. I confirm that I have not read the same.

[53] In addition, I record counsels' advice that the document at page 216 of the exhibit to Mr Thirunavukarasu's affidavit of 4 February 2019 is privileged, and that it was disclosed inadvertently. Again, I have not read the document.

Costs

[54] It is premature to award costs at this stage. Whether or not costs are payable, and if so, by whom, to whom and in what amount, must await the outcome of the limited inspection to be undertaken by an Associate Judge.

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Wylie J