

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2015-404-3152
[2017] NZHC 204**

BETWEEN RAPID METAL DEVELOPMENTS NZ
 LIMITED
 Plaintiff

AND ACCESS ONE SCAFFOLDING
 LIMITED
 Defendant

Hearing: 20 February 2017

Appearances: A Henwood for the Plaintiff
 A Barker for the Defendant

Judgment: 20 February 2017

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL

Solicitors:

Stephens Lawyers Ltd (Alan Henwood), Wellington, for the Plaintiff
Davis Law, New Lynn, Auckland, for the Defendant

Counsel:

Andrew Barker, Barrister, Auckland, for the Defendant

[1] There are two applications under r 8.19 of the High Court Rules for further discovery. Access One Scaffolding Ltd did not file a notice of opposition to the application against it. I will make unopposed orders for further discovery by Access One Scaffolding Ltd. The argument has been primarily about the application by Access One Scaffolding Ltd for Rapid Metal Developments NZ Ltd to provide further discovery.

[2] While both the plaintiff and the defendant are based in Auckland, the dispute in this proceeding relates to the hire of scaffolding by Access One Scaffolding Ltd from Rapid Metal Developments NZ Ltd in Christchurch. Rapid Metal Developments NZ Ltd sues Access One for \$78,894.00 as being the balance outstanding for hire of scaffolding between January 2013 and April 2015. It also says that Access One Scaffolding Ltd did not return all the scaffolding it hired. For that, it claims damages of \$186,300 plus interest, and also seeks damages for loss of income for the scaffolding that was not returned. The claim for failure to return all of the equipment has led to these discovery applications. Associate Judge Doogue ordered standard discovery on 7 June 2016. Both sides filed affidavits of documents at the end of July or the beginning of August 2016.

[3] Rule 8.19 says:

8.19 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.

[4] In *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* Asher J set out the principles that may be applied:¹

- (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, assessing the proportionality in accordance with Part 1 of the Discovery Checklist in the High Court Rules?
- (d) Weighing and balancing these matters, in the Court's discretion applying r 8.19, is an order appropriate?

[5] I add these further comments. Pleadings determine the limits of relevance.² In determining relevance, the case of the party seeking discovery must be assumed to be true, not that of the party from whom discovery is sought.³ Similarly the court will not try the case during a discovery application to decide the ultimate relevance alleged by the party seeking discovery. There is a presumption that an affidavit of documents is conclusive.⁴ It is for the party seeking further discovery to establish grounds for the belief that there are further documents in control of the other party which should have been discovered. Under standard discovery under r 8.7 of the High Court Rules, a party must disclose its own documents which it relies on in support of its contention in the proceeding, and it must also disclose adverse documents of which it was aware and which adversely affect its own case or support another party's case. Standard discovery does not require a party to disclose documents that are part of the story or background which, though relevant, may not be necessary for the fair disposal of the case. Nor does it require disclosure on a "train of enquiry" basis under the old *Peruvian Guano* test.⁵ Under standard

¹ *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760 at [14].

² *New Zealand Rail Ltd v Port Marlborough New Zealand Ltd* [1993] 2 NZLR 641 (CA) at 644.

³ Edward Bray *The Principles and Practice of Discovery* (Reeves & Turner, London, 1885) at 18.

⁴ *McCullagh v Robt Jones Holdings Ltd* [2015] NZHC 1462, (2015) 22 PRNZ 615 at [7].

⁵ *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 (CA).

discovery, documents are to be disclosed if they or the information in them are capable of being used in evidence, either because they support the case of the party making discovery of any other party, or because they are adverse to the case of that discovered party. Of course it does not mean that the documents will necessarily be used in a hearing.

[6] As background to the defendant's discovery application, it is helpful to understand the systems used by Rapid Metal Developments NZ Ltd to record the receipt of orders for scaffolding, the despatch of orders, the equipment sent out and the return of scaffolding. Rapid Metal Developments NZ Ltd is not a scaffolding contractor but hires out equipment to scaffolding contractors. At one stage it apparently had up to 400 customers in Christchurch. It supplied Access One Scaffolding Ltd with scaffolding for over 30 projects.

[7] Rapid Metal Developments NZ Ltd's Christchurch office manager started in December 2014. I accept her affidavit as describing the business systems of Rapid Metal Developments, even though some of the history of this matter goes back before she started with the company. Rapid Metal Developments NZ Ltd might receive orders by email, phone or customers' employees would bring a slip of paper. However the order was placed, it was put on Rapid Metal Developments NZ Ltd's computer system known as "AXAPTA". This is a system used for tracking stock. When an order is placed on AXAPTA, a "picking list" is generated for the project specified by a customer. The list is given to a yard manager who arranges for the order to be picked and set aside for the customer or loaded onto the customer's transport. Sometimes Rapid Metal Developments NZ Ltd could not supply a particular item specified by the customer. When this occurred, Rapid Metal Developments NZ Ltd would either not supply an item or substitute another and the picking list would be amended. It was sent to the office staff who put those details into AXAPTA. That generated a delivery note for the order for the particular project. She says that the delivery note was emailed to the customer as confirmation of the equipment that had been hired. In this proceeding Rapid Metal Developments NZ Ltd will rely on delivery notes as evidence of equipment supplied to Access One Scaffolding Ltd.

[8] When customers return equipment to the yard, staff give the driver a “general purpose note”. That note records the name of the customer returning the gear, the project the gear is returned from and a brief description of the equipment returned. The system requires the staff member and the driver to sign the general purpose note. A copy is given to the driver as proof of return. A return list is generated for the project from which the customer returned the equipment. The return of equipment is counted, checked, and the number of specific items is recorded on the return list by the yard manager. The return list is given to the office staff to input the return against the specific project on AXAPTA. AXAPTA then produces a return note stating the number of items returned which is emailed to the customer as confirmation of equipment returned from a project. In this proceeding, the case for Rapid Metal Developments NZ Ltd relies on the return notes as showing the equipment actually returned.

[9] The office manager says that there were difficulties in the case of Access One Scaffolding Ltd. Drivers would come back to the yard not knowing the name of the site for the equipment which they were returning. There were returns from multiple sites at the same time. The loads were not sorted according to project. She says that Access One Scaffolding Ltd moved equipment between sites and returned equipment from their own yard where it may have sat for some time. She says that a result was that often the site the equipment was booked out to was not the site the equipment was returned from. There was difficulty in accounting for the returns and this led to differences between the parties. The office manager has made enquiries to assess the value of the outstanding equipment not returned. That has been a work in progress. She initially believed that the value of equipment not returned was some \$375,000. But that has been revised downwards to reach the amount now claimed in the statement of claim - \$186,300.

[10] For its part, Access One Scaffolding Ltd maintains that it did return that equipment. It says that its own equipment is aluminium whereas Rapid Metal Developments NZ Ltd’s equipment is steel, which it does not use. It also points out that the equipment of Rapid Metal Developments NZ Ltd has a form of identification – a painted red band. I was also advised from the bar that no item of its equipment has a unique identifier.

[11] I now consider the particular categories of documents for which Access One Scaffolding Ltd seeks discovery.

- (a) *Documents that relate to the despatch and return of scaffold from the plaintiff's yard for the various projects that are subject to the plaintiff's claim including without limitation all source documentation on which the plaintiff's records are based.*

[12] The differences between the parties are essentially this. Access One Scaffolding Ltd does not accept that the AXAPTA system can be relied upon to record accurately all the items of scaffolding that were sent out of the yard to it, or all scaffolding that was returned. Its evidence is directed at showing that there were good reasons to doubt the accuracy of the records that Rapid Metal Developments NZ Ltd is relying on. On the other hand, Rapid Metal Developments NZ Ltd says that any documents other than those generated by its own AXAPTA system are not likely to yield anything of great relevance or probative value. It will rely primarily on its records in its AXAPTA system.

[13] I accept that source documents within the category sought by Access One Scaffolding Ltd do exist. Plainly they relate to the matters in issue. The real objection by Rapid Metal Developments NZ Ltd goes to proportionality. It says that while individual picking lists can be located relatively easily, finding relevant general purpose notes will be very time-consuming. General purpose notes are in carbonised books. It will be necessary to make a page by page review of books covering a period of over two years. The office manager says that she has already spent over 60 hours collating source documents and envisages that many more hours will be required. She notes that Rapid Metal Developments NZ Ltd has disclosed over 400 delivery notes and returns, whereas Access One Scaffolding Ltd has provided approximately 130 returns and delivery notes in its possession and it has raised queries relating to four only. She says that the gross value of those items is some \$45,000 and the queries can be readily explained. The thrust of the case for Rapid Metal Developments NZ Ltd is that combing through books of general purpose notes would be very much a "needle in a haystack" exercise - without the promise of a needle at the end of the day.

[14] If I were to rule that the source documents, which are the foundation for the records in the AXAPTA system, did not have to be disclosed, I would in effect be ruling before trial that the records from the AXAPTA system are to be conclusively presumed to be correct. In my view, that is a trial issue and I cannot decide it before the trial. This is the point made by *Bray on Discovery*:⁶

Nor will the court for the purpose of determining the relevancy of the discovery to a particular issue try that issue for the purpose of determining the relevancy of the discovery, for it is in order that that issue may be rightly determined that the discovery is required.

[15] Instead, the discovery application is to be assessed on the basis that the systems of Rapid Metal Developments NZ Ltd for recording the despatch and return of scaffolding are under challenge and are in issue. On that basis, source documents are obviously relevant. Indeed, I would expect Rapid Metal Developments NZ Ltd to produce those documents itself in support of its case. They are relevant as supporting its own case. I can appreciate that going through piles of books to locate particular general purpose notes will be tedious and time-consuming. No doubt that will divert the Christchurch manager from other important work for the plaintiff. But given the issue raised by the defendant, I do not regard the discovery of these documents as disproportionate. After all, they will be the best evidence of the despatch and return of equipment. In describing them as “best evidence” I do not mean that Rapid Metal Developments NZ Ltd may not prove its case by other means as well, including proof of the AXAPTA system and the associated office systems. To a large extent it is in the plaintiff’s own interests to disclose the source documents so as to show a proper basis for its claim.

[16] Mr Henwood submitted that if these documents were required to be disclosed, he would seek a costs shifting order. Unsurprisingly Mr Barker objected. A costs shifting order is invariably applied when it is necessary to avoid some injustice. I accept Mr Barker’s submission that these are really documents that Rapid Metal Developments NZ Ltd would be using to prove its own case anyway and Access One therefore should not have the costs of producing those documents imposed upon it. In the first instance the costs of discovery will fall on the plaintiff.

⁶ Above n 3, at 19.

That, of course, may change with the outcome of the trial. That will decide where the costs should ultimately fall.

(b) The plaintiff's scaffold design for the YMCA building

[17] Access One Scaffolding Ltd says that the design for the YMCA building is relevant because the design by Rapid Metal Developments NZ Ltd indicated that a particular tonnage of scaffolding would be required for the job. Access One says that it re-designed the scaffolding for the job so that less would be required. It believes that the scaffolding recorded as going out may have been for the initial design by Rapid Metal Developments NZ Ltd, rather than the scaffolding that was actually required. To that end, it seeks discovery of the scaffold design.

[18] Rapid Metal Developments NZ Ltd responds that it has not found the design. The evidence on this matter is not, however, strong. The person who swore the affidavit of documents for Rapid Metal Developments NZ Ltd is the chief executive. He made the affidavit in Auckland. He must have relied on his staff to carry out enquiries for him. He has not deposed to having searched for this particular scaffold plan. The Christchurch office manager does not directly state whether she made any search herself. For good order, I direct that in a new affidavit of documents Rapid Metal Developments NZ Ltd should depose as to enquiries made to locate the scaffold design for the YMCA project.

(c) Original computer reports that detailed the initial alleged stock losses and all documentation relating to the amendments to those stock loss reports, including the reasons for those amendments

[19] As I have outlined, the evidence of the office manager shows that the initial assessment was that the missing equipment not returned by Access One Scaffolding Ltd was thought to be worth about \$375,000. I understand that under this head Access One Scaffolding Ltd wants disclosure of documents that show how the initial losses were calculated, and then the later documents to produce the final calculations.

[20] Those documents are in my judgment, relevant to the challenge to the accuracy of the AXAPTA system. The office manager has explained in her first affidavit how she made some of the changes. She says, for example, that the YMCA project was originally set up as a hire unit rate project on AXAPTA and it was later changed to a bulk lump sum project. Notwithstanding those explanations, given the challenge to the accuracy of the plaintiff's records, the documents within category (c) are to be disclosed so that the accuracy of the records can be properly tested at trial. I accordingly order disclosure of all documents in category (c).

(d) Photographs of stock movements

[21] That category is no longer pursued.

(e) Audit reports and stock-takes for the years 2014-2015 including discussion of any reasons for variances in any stock figures.

[22] It appears that Rapid Metal Developments NZ Ltd undertakes stock takes every six months. From Mr Henwood's submissions I understand that stock kept in the stores of Rapid Metal Developments NZ Ltd is counted but there is no separate stock take of scaffolding out on hire. Total stock figures are derived by calculation. The argument for Rapid Metal Developments NZ Ltd is that the stock take figures are not going to show any variance with what would be shown by the AXAPTA system.

[23] The submission for Access One Scaffolding Ltd is that if \$168,000 of scaffolding had gone missing, that would surely show up in the stock records. The stock records could be a useful source of information. The office manager says that she did have regard to stock records herself with a view to check the claims of Access One Scaffolding Ltd that it did return all its scaffolding.

[24] I reach the same conclusion as for the source documents under category (a). Any stock take will be relevant in showing whether there are discrepancies such as \$168,000 worth of scaffolding going missing.

[25] The evidence also referred to specific stock takes by Rapid Metal Developments NZ Ltd of six lines of equipment. I accept from Rapid Metal Developments NZ Ltd that no records of those stock-takes were kept. I do not require discovery of any documents for these specific stock takes.

(f) *Document relating to complaints by other customers as to the accuracy of the plaintiff's computerised stock control system*

[26] Two particular customers were referred to: Fulton Hogan and Southern Lakes Scaffold Ltd. I do not order discovery of these documents. In my view it is unlikely that disclosure of these documents will serve a useful purpose. They can be relevant at best on only a "train of enquiry" basis. I envisage difficulties if documents relating to these disputes were required to be disclosed. In particular, it will be necessary to look into the matters in dispute between the parties. That is likely to throw up more clouds of uncertainty than clarity in determining issues in this proceeding. That is, disputes with other parties are unlikely to cast any useful light on the issues as to the despatch and return of scaffolding by Access One Scaffolding Ltd. Mr Barker did try to soften the impact by asking for only a limited class of documents but I am concerned that going down that route would lead the parties into matters that are far from relevant to the issues in this case.

(g) *Documents relating to the cost or value of the scaffold that the plaintiff claims has not been returned.*

[27] Rapid Metal Developments NZ Ltd has disclosed some documents which show a sale value for its equipment. Access One Scaffolding Ltd says that is not sufficient. One issue will be whether the defendant is bound by the terms of contract pleaded by the plaintiff. The terms include this:

The customer shall pay the full replacement cost of equipment listed in the quotation for loss of irreparable items as specified by the plaintiff, based on the plaintiff's price list, current at the date of the repudiation or termination as appropriate.

Access One Scaffolding Ltd denies that it is bound by those terms.

[28] First, Rapid Metal Developments Ltd will need to disclose the price lists from which it derived the amounts for sales values disclosed in its discovery. Secondly, it

will also need to prepare on the basis that these terms may not be upheld at the hearing. It will need to prove a case for common law damages, both for breach of contract and in tort. It has a claim in detinue. Presumably the measure of damages will be either the value of the equipment at the time of the loss or the cost of going into the market to buy replacement equipment. The measure may not be what Rapid Metal Developments NZ Ltd would charge if it were to sell the equipment, save for one qualification. Conceivably there might be a claim in restitution based on waiver of tort. But that is not a live issue at present. Clearly, documents that bear on the measure of damages are relevant and need to be disclosed. There will therefore be an order for discovery of documents under item (g).

(h) Internal correspondence for the plaintiff in respect of the issues raised by the plaintiff's claim

[29] Rapid Metal Developments NZ Ltd has disclosed some documents, but not very many. Access One Scaffolding Ltd has the onus of showing grounds to believe there are further documents beyond those in the affidavit. In other words, it has to overcome the presumption in favour of the affidavit of documents. For this class it has not persuaded me there are documents other than those already disclosed. I do not order any discovery under this head.

[30] In summary then, I make orders for discovery of items (a), (b), (c), (e) and (g) in the application, but not (f) and (h).

[31] Mr Henwood believes that that the plaintiff should be able to file and serve a further sworn affidavit of documents by **17 March 2017**. I direct that accordingly, but reserve leave to the parties to come back to the court for further directions.

[32] I direct a conference before Associate Judge Doogue **after 31 March 2017** to consider whether the trial directions should be adjusted and in particular whether the case can keep its present fixture.

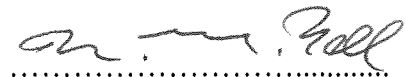
Discovery by Access One Scaffolding Ltd

[33] As I noted, no notice of opposition to the application was filed. Some matters are being attended to. I make orders for Access One Scaffolding Ltd to make discovery of the items in 1(c) and 1(f) of the cross-application dated 16 November 2016. Again, the affidavit of documents should be filed and served by **17 March 2017**.

Costs

[34] Mr Barker seeks costs for Access One Scaffolding Ltd but acknowledges that there should be some allowance because the orders were made against his client on the plaintiff's application. More work was required to deal with the application against Rapid Metal Developments NZ Ltd. Rapid Metal Developments NZ Ltd was also required to bring an application and it has been vindicated in the result, but in my judgment it has had to do less work. Its application was not opposed.

[35] I make an order for costs in favour of Access One Scaffolding Ltd under category 2 band B, but I apply a one-third discount on account of it also being required to make discovery on the plaintiff's application. If counsel cannot agree costs, memoranda may be filed.


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Associate Judge R M Bell