

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2013-404-1899
[2020] NZHC 82**

UNDER Consumers Guarantees Act 1993, the Fair
Trading Act 1986, the Building Act 2004

BETWEEN THE MINISTER OF EDUCATION AND
OTHERS
First to Fourth Plaintiffs

AND JAMES HARDIE NEW ZEALAND
First Defendant

STUDORP LIMITED
Second Defendant

CARTER HOLT HARVEY LIMITED
Third Defendant

...../continued

Hearing: 13 and 15 November 2019

Counsel: NF Flanagan, J Carlyon and MM Moon for plaintiffs
DM Salmon and M Heard for third defendant

Judgment: 4 February 2020

**JUDGMENT (No. 7) OF FITZGERALD J
[Ministry's application for order that Carter Holt file compliant list of
documents]**

This judgment was delivered by me on 4 February 2020 at 3:30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar..... Date.....

Solicitors: Meredith Connell, Auckland
LeeSalmonLong, Auckland

CSR BUILDING PRODUCTS (NZ)
LIMITED
Fourth Defendant

AND

AUCKLAND COUNCIL AND OTHER
TERRITORIAL AUTHORITIES LISTED
IN SCHEDULE 1 TO THE FIRST
AMENDED STATEMENT OF CLAIM BY
THIRD DEFENDANT AGAINST FIRST
TO FIFTIETH THIRD PARTIES
First to Fiftieth Third Parties

Introduction and background

[1] The underlying background to this litigation is set out in previous judgments and will not be repeated here.¹ A Stage 1 hearing of the Ministry's claims is scheduled to commence in May 2020. That hearing is set down for approximately six months.

[2] The parties have recently completed a substantial discovery exercise. The Ministry and Carter Holt's briefs of evidence have also been served, and the Ministry is in the process of completing its evidence in reply.² The parties are also dealing with a number of residual discovery matters. In the coming months, I expect the parties and their advisers will progress to various pre-trial matters, such as preparing witnesses/experts for the hearing; preparing cross-examination; briefing and preparing expert witnesses for expert caucusing; and preparing common bundles of documents and submissions.

[3] In this context, the Ministry applies for an order that Carter Holt file and serve a new list of discovered documents which complies with the Listing and Exchange Protocol (the Protocol) in Schedule 9 to the High Court Rules 2016 (the Rules). It says Carter Holt's existing list is deficient in a number of material respects, which has hampered, and will continue to hamper, the Ministry's preparation for the Stage 1 trial.

[4] Carter Holt accepts that its list does not comply in all respects with the requirements of the Protocol. But it says the Ministry has all Carter Holt's discovered documents in an electronic, fully text searchable PDF format, being a much more powerful "resource" than what might be obtained from a compliant list. It says being required to produce a compliant list at this time (particularly when both parties' main evidence has been briefed and served) is an unnecessary distraction from preparation for the Stage 1 hearing, and would therefore be disproportionate.

The Rules' requirements concerning discovery lists

[5] The starting (and perhaps in this case, the end) point is r 8.15(1). It states that "[e]ach party must file and serve an affidavit of documents that complies with this

¹ See for example, *The Minister of Education v James Hardie Ltd* [2018] NZHC 1481 at [1]–[21].

² Due at the end of February 2020.

rule, subject to any modifications or directions contained in a discovery order”. On its face, the rule is clear and mandatory. There is no discovery order in this case permitting or ordering modifications to the form of the affidavit of documents.

[6] Rule 8.15(2) sets out the various matters which must be addressed or contained in an affidavit of documents. Rule 8.15(2)(e) requires the affidavit to “list or otherwise identify the documents required to be discovered under the order in a schedule that complies with rule 8.16 and Part 2 of Schedule 9...” (emphasis added). The affidavit of documents “may” be in form G 37, which identifies each of the mandatory elements under r 8.15(2).³ Rule 8.16 goes on to set out what must be included in the schedule to be appended to an affidavit of documents.

[7] The requirements of Part 2 of Schedule 9, namely the Protocol, are at the heart of the Ministry’s application. Before turning to Part 2, however, it is notable that Part 1 of Schedule 9 contains a discovery “checklist”, which deals with potential modifications to what is required by Part 2. Clause 4(1)(a) of Part 1 requires the parties to “consider whether the listing and exchange protocol is appropriate and seek to agree any modifications”. Given the matters arising on the present application, it does not appear the parties engaged in this process.

[8] Clause 3(a) of Part 1 also provides that to reduce unnecessary costs of listing documents, the parties are encouraged to “use the extracted metadata from native electronic documents as much as possible, instead of manually listing documents”. This reflects the rise (and rise) in use of electronic documents and thus the size (and resulting cost) of many discovery exercises. Importantly, however, the use of metadata is to enable electronic, rather than manual, population of the required fields in the discovery schedule. It does not override or change the content of the required fields.

[9] The Protocol contains the detailed requirements for listing and exchanging discovered documents. Clause 6 provides as follows:

- (1) Parties are required to—
 - (a) list documents, providing the following detail for each document:

³ High Court Rules 2016, r 8.15(3).

- (i) document ID:
 - (ii) date:
 - (iii) document type:
 - (iv) author:
 - (v) recipient:
 - (vi) parent document ID:
 - (vii) privilege category; and
- (b) exchange documents electronically by way of—
- (i) a single, continuous table or spreadsheet, with each column exclusively containing the detail from paragraph (a); and
 - (ii) multi-page images in PDF format (or another format if agreed).

[10] Clause 7 sets out the format required for document descriptions. Relevantly for present purposes, it requires:⁴

- (a) the “date appearing on the face of the document”;
- (b) the type of document (for example, email, letter, report and so on);
- (c) the name of the author(s) and recipient(s) of the document; and
- (d) the parent document ID (if applicable).

[11] Clause 7(3) provides that “[o]ther than document ID, if information cannot be determined for a description it must be left blank”. This contemplates that if the information is not available on the face of the document (for example, the document is undated, or the author not stated), a party is not required to take active steps (at least for the purpose of listing documents) to research and find out these matters.

⁴ Schedule 9 cl 7(1).

The Ministry's complaints and Carter Holt's response

The Ministry's position

[12] The Ministry says Carter Holt's list is defective in a number of material respects, including by failing to list document type, author and recipient, and incorrectly listing dates. The Ministry says Carter Holt did not raise with it in advance the approach it proposed to take to listing its documents, and thus the Ministry was entitled to assume that a compliant list would be produced.⁵ The Ministry says that rather than coding its documents in accordance with the discovery protocol, Carter Holt appears to have used metadata to automatically populate the fields of the discovery list, to the exclusion of all other requirements.

[13] The Ministry has filed an affidavit in support of its application sworn by a Ms Martins, a Litigation Support Coordinator at Meredith Connell (the Ministry's solicitors). She says the review of Carter Holt's discovery has been made more difficult because of its list's non-compliance with the Rules. By way of example, she notes that:

- (a) 12,034 documents are simply described as "document", "word processing" or "pdf", rather than a particular document type as required by cl 7(1) of the Protocol.
- (b) 204 documents are undated, despite "often" being clearly dated.
- (c) Many (though how many is not stated) are listed with incorrect dates.⁶
- (d) 8,649 documents do not identify any parties (that is, they have no author or recipient listed, despite examples being given of such documents having, on their face, authors and recipients).

⁵ I note in passing that the obligation to cooperate and discuss the approach to discovery falls on both parties. It does not appear the parties engaged in this to any real or substantive extent in this case. Had they done so, the current issues might have been avoided.

⁶ For example, referring to the "date last modified" rather than the date on the face of the document.

- (e) Many documents (again precisely how many is not stated) have indecipherable or clearly wrong authors (for example, authors being said to be “laptop”, “13507” “t” or “_”).
- (f) Many document families (again how many is not stated) have not been listed as such, but listed as individual documents with non-consecutive document IDs. Ms Martins states that this has made it extremely difficult to identify document attachments.
- (g) The list does not use consistent names for the same person or entity.

[14] Ms Martins says there are a number of consequences of the defects, including that:

- (a) the documents cannot be easily grouped by reference to the list (for example, grouping all similar document types, or from a particular period, or relating to a particular person); and
- (b) where a document relevant to a particular witness or issue is identified, it is very difficult to identify related documents, including documents/attachments in the same family.

[15] Ms Martins gives a number of specific examples of the issues being caused, by reference to particular documents the Ministry was interested in when briefing its evidence.

[16] Ms Martins says that searching the text searchable PDF versions of the documents produced by Carter Holt for inspection is not sufficient, or does not sufficiently ameliorate the issues encountered given:

- (a) searching text searchable PDF documents does not enable the Ministry to identify particular document types (for example, reports rather than, say, emails);⁷
- (b) search terms do not enable document groups to be isolated by time period (exacerbated by the fact that the date code given by Carter Holt is said to often be incorrect);⁸
- (c) OCR has difficulty with some text (such as smaller or older text); and
- (d) OCR cannot read unclear documents (Ms Martins says that many documents in the set appear “fuzzy” and testing shows that words contained in some of them are not being returned on word searches).

[17] Mr Flanagan, counsel for the Ministry, addressed these issues in his submissions on the application. While the Ministry’s evidence has now been served (and its reply evidence is due in a matter of weeks), he explained that these issues will continue to hamper the Ministry’s preparation for the Stage 1 trial, and the concerns being raised are not merely technical or insignificant. He notes that being able to accurately group documents by type, date range, author and/or recipient will be required when:

- (a) working with experts and other witnesses in the lead up to and during the trial;
- (b) preparing cross examination of Carter Holt’s witnesses;
- (c) considering and researching documents or topics of particular interest, and ensuring all related documents and attachments can be identified;

⁷ For example, a search of the word “report” will capture all document types which mention that word; and all reports might not contain the word “report” on their face.

⁸ Searching for documents by date will capture documents of that date (if correctly coded) as well as all documents that mention that date, irrespective of the date on which they were produced.

- (d) identifying documents of priority (for example, by a particular author or at a particular date); and
- (e) ensuring all attachments/parent documents are correctly identified.

[18] Mr Flanagan emphasises that the Protocol, while encouraging the use of metadata, does not envisage that use overriding the requirements of a proper list. Nor, he says, does the ability to search across text searchable PDF documents obviate the need for a proper list. If it did, the Rules would reflect that.

[19] Mr Flanagan says that it would not be disproportionate or onerous to require Carter Holt to prepare a compliant list. He notes Ms Martins' evidence that there are a range of external providers that can code documents efficiently and cost effectively. Carter Holt could therefore outsource the exercise if it wished, so there is no distraction to the tasks it and its advisers are presently engaged on. Mr Flanagan also proposes that, if Carter Holt prefers, the Ministry arranges for the compliant list to be produced, with the costs to be met by Carter Holt on an indemnity basis.

Carter Holt's response

[20] As noted, Carter Holt accepts that its list, at least in some respects, does not comply with the Protocol. It confirms that the information contained in the list of documents was "primarily" populated using extracted metadata from native electronic documents. Mr Weir, a partner of the firm Deloitte, to whom Carter Holt outsourced the electronic side of its discovery, notes that the decision to use extracted metadata for listing purposes was made due to the size of Carter Holt's discovery, given manually reviewing each of the over 27,000 documents listed to fill out the information for coding would have taken significant additional time and resource. He also confirms that many of the documents, such as photographs or spreadsheets, do not have a document date on their face, hence the undated documents in the list.

[21] Mr Weir sets out the steps required to produce a fully compliant list, and expects it would take several weeks to complete (by an external provider). He does not take issue with Ms Martins' initial estimate of three weeks for 10,000 documents. He produces a quote from Streamlined Litigation Services, who have estimated that a

comprehensive re-review would take between five and eight weeks at a cost of \$14,606.⁹

[22] Mr Weir also notes that some of the issues identified by Ms Martins are not uncommon with large scale electronic discoveries. He refers, for example, to 224 documents listed in the open section of the Ministry's list (which is much smaller than Carter Holt's) that also have no date (compared to 204 in Carter Holt's list).

[23] In relation to 8649 documents that do not identify any author or recipient, Mr Weir notes that the vast majority are attachments (with no identified author/recipient), and that the author and recipients "may" be able to be identified from the parent documents. And using the examples given by Ms Martins of incorrect authors, Mr Weir notes that only approximately 30 of the 27,000 documents discovered by Carter Holt have the author identified as "laptop", "13507", "t" or "_". Mr Weir accepts that the use of metadata to populate fields means there is not a consistent use of names for the same person or entity. But he notes that this is a limitation inherent in using metadata, the use of which is encouraged by the Protocol.

[24] Mr Weir says that in his experience, it is usually much more efficient to group documents by reference to their content or subject matter, rather than by document type, and many modern discovery databases can carry out this type of grouping. He does appear to accept (implicitly at least) that grouping of documents in the list by party or person can be problematic. Mr Weir also provides suggestions as to how various "string searches" (searches across multiple document fields and/or with multiple words being searched for) could cure or ameliorate many of the problems Ms Martins identifies.

[25] Ultimately, Mr Weir notes that there can be advantages with manually coded metadata, but also advantages with using electronic metadata (which can be more accurate). He opines that the level of detail provided in Carter Holt's affidavit of documents is typical of a document list of the size in issue. He notes that in his

⁹ In a reply affidavit, Ms Martins produces a quote (from an Australian supplier) to manually code 27,000 documents, which estimates the task could be completed in 12–14 days, with a first batch of 9000 document returned within six days.

experience, it would be unusual to replace the extracted metadata with manually coded metadata in a discovery of this size. Mr Weir says the way the Ministry appears to want to interrogate Carter Holt's documents does not appear very efficient, and he would expect more sophisticated techniques to be deployed, such as keyword searches, concept searches, near duplicate analysis, email threading and clustering, none of which rely on coding documents manually.

[26] In his submissions for Carter Holt, and building on Mr Weir's observations, Mr Salmon says that reliance on the list of documents, rather than fully text searchable copies of the underlying documents, has essentially "gone out of fashion".¹⁰ While accepting Carter Holt's list does not meet the Protocol's requirements in some respects, he says that requiring a fully compliant list now, particularly when the Ministry's main evidence has been briefed and the parties are in the lead up to trial, would be disproportionate to the issues raised.

[27] Mr Salmon further submits that Carter Holt's list is compliant in many respects, and the suggestion the defects will cause significant prejudice going forward is simply not credible. Mr Salmon also notes, in relation to complaints at the difficulty in organising documents by type (and in particular, test reports), that the Ministry's evidence contains extensive commentary on Carter Holt's test reports, which does not suggest there has been any real difficulty in working with the material.

Discussion

[28] The default position is that the Ministry is entitled to a list that meets the Protocol's requirements.¹¹ From the content of Schedule 9 as a whole, it is clear that those developing it had close regard to (and detailed knowledge of) the impact of electronic documents on discovery, and the benefits of being able to use metadata to electronically populate the required document fields.

[29] Nevertheless, utilising metadata in this way will only be beneficial and cost effective if it produces sensible and useable results. I note the issues raised by

¹⁰ My words, not Mr Salmon's.

¹¹ See, for example, *Sealegs International Ltd v Zhang* [2017] NZHC 1789 at [46].

Ms Martins. From Mr Weir's affidavit, it seems *some* of the issues might be relatively limited, at least in the context of a 27,000 document set. But ultimately, the Ministry's evidence on this application demonstrates a number of practical issues arising from the manner in which Carter Holt's discovery list has been populated. I am also not persuaded that going forward, such issues will not continue. While the Ministry's main evidence is now complete, there is no doubt that analysis and interrogation of Carter Holt's discovery set will continue as part of the Ministry's preparation for the Stage 1 trial.

[30] Clearly some of the sophisticated discovery techniques Mr Weir refers to could ameliorate some of the problems. As a matter of principle, Ms Martins does not refute that. But the Ministry is entitled to approach its review and analysis of Carter Holt's documents in the manner it prefers and, importantly, on the basis of a discovery list that contains the information required by the Protocol.

[31] I agree with Carter Holt that being able to electronically search across PDF document images is a powerful tool, particularly when looking to collate documents by topic or issue. But there are also real benefits in being able to sort and collate documents from a parties' electronic discovery list, such as by date, author and recipient. The former will be important when considering documents on particular topics arising at specific points in time. The latter might be especially useful when preparing cross-examination. The evidence on the present application demonstrates that at least in some respects, Carter Holt's reliance on metadata to populate document description fields makes such sorting difficult.

[32] I am also not persuaded that to order Carter Holt to produce a discovery list which complies with the Protocol is disproportionate, particularly in a case of this size and scale. Discovery, while at times a difficult and tedious task for parties and their advisers, is one of the most crucial aspects of civil proceedings, together with witnesses' oral evidence at trial. It enables the relevant contemporaneous documentary record to be before the parties and the Court, and is often decisive of issues to be determined at trial. And where a very large number of documents have been discovered, it is vital the opposing party can work with and manipulate the data set in a meaningful way. That is the very purpose of the Protocol's requirements.

[33] I am conscious that the parties are entering a busy period, in the lead up to a significant trial. The Court is anxious not to burden the parties with unnecessary tasks at this stage of the proceedings. But it appears both parties envisage that the work to re-code the list would be outsourced to an external provider, and therefore would not be an unnecessary or substantial distraction for Carter Holt. And based on the quotes provided by Mr Weir and Ms Martins, it seems the work can be done in a reasonably short timeframe and at a relatively modest cost.

[34] Compliance with the Protocol's requirements is also important as a matter of broader principle. Its requirements provide a detailed and considered "baseline" to which all parties should be working when completing their discovery. The requirements are not for guidance; they are not optional. Working to that "baseline" will avoid issues such as those arising on the present application, which only add more time and cost to the overall exercise. Further, knowing that compliance with the Protocol will be required will encourage parties to discuss and agree any suggested modifications to the process in advance, as Schedule 9 envisages.

Result and costs

[35] There is an order that Carter Holt provide a list of documents that complies with the Listing and Exchange Protocol in Schedule 9 of the High Court Rules.

[36] I direct the parties to confer on the scope of work required, given parts of Carter Holt's list will no doubt comply with the Protocol. For example, the Ministry may be able to identify the key ways or areas in which the list needs to be re-coded, which might reduce the work required.

[37] The parties are encouraged to agree costs (on a 3B basis). If they cannot agree, the Ministry may file and serve a memorandum as to costs within 10 working days of the date of this judgment, with Carter Holt to file and serve any memorandum in response within a further five working days. I will thereafter determine costs on the papers.

Fitzgerald J