IN THE HUMAN RIGHTS REVIEW TRIBUNAL	[2021] NZHRRT 22
I TE TARAIPIUNARA MANA TANGATA	

	Reference No. HRRT 024/2016
UNDER	THE PRIVACY ACT 2020
BETWEEN	YAN GUO
	PLAINTIFF
AND	PRICEWATERHOUSECOOPERS
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson

REPRESENTATION:
Ms Y Guo in person assisted by Ms Li Yan (her mother) as *McKenzie* friend
Mr TL Clarke for defendant
Ms HC Stuart for CityMed Medical Centre Ltd (non-party)

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **12 May 2021**

DECISION OF CHAIRPERSON ON APPLICATION BY THE PLAINTIFF FOR DISCOVERY AND SEARCH ORDER[1]

[1] [This decision is to be cited as *Guo v PwC (Discovery and Search Order)* [2021] NZHRRT 22.]

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INTRODUCTION

[1] Although these proceedings were filed on 6 May 2016 little progress has been made. The reasons are to be found in the eleven *Minutes* which precede this decision.

[2] The plaintiff now applies for a discovery order against PricewaterhouseCoopers (PwC), a search order against PwC and non-party discovery against CityMed Medical Centre Ltd (CityMed) which provides primary healthcare services in the Auckland CBD.

Legislative changes

[3] The information access request under IPP 6 was made by Ms Guo in 2015 at a time when the then Privacy Act 1993 (PA 1993) had application. That Act was repealed from 1 December 2020 by the Privacy Act 2020 (PA 2020) which came into force on that date. The effect of the transitional provisions in Schedule 1, Part 1, cl 9(1) of the 2020 Act is that the present proceedings must be continued and completed under that Act:

> **9 Proceedings**
>
> (1) Any proceedings commenced before the Human Rights Review Tribunal under Part 8 of the Privacy Act 1993 before the commencement day, but not completed by that day, must be continued and completed under this Act.

[4] In this decision the provisions of the 1993 Act will be referred to unless otherwise expressly indicated as it was the 1993 Act which applied at the relevant time. However, any provision of the 2020 Act affecting the Tribunal's procedure will have present application.

Background circumstances

[5] As the proceedings are still in their interlocutory stages, there are as yet no witness statements nor is there a common bundle of documents.

[6] Consequently evidence in support of the competing claims advanced by the parties has yet to be provided, underlining why discovery issues are necessarily determined by reference to the pleadings. It follows any brief summary of the circumstances of the case provided in this decision does not comprise findings of fact regarding the ultimate merits of the competing claims. The background is provided for the purpose of assisting an understanding of the issues relevant to the discovery obligations of the plaintiff and of the defendant.

[7] Ms Guo was employed by PricewaterhouseCoopers (PwC) full-time from about February 2009 until approximately January 2010.

[8] It would appear that from about mid-2009 PwC began to hold concerns about Ms Guo's health. By mid-November 2009 those concerns led PwC to contact Dr SJ Culpan now retired, but then a registered medical practitioner who practised at CityMed. Ms Guo met with Dr Culpan on 20 November 2009 and on 22 January 2010.

[9] In August 2015, some 5.8 years after these events, Ms Guo sent IPP 6 requests to both PwC and Dr Culpan. The terms of those requests and the degree to which PwC and Dr Culpan complied with their responsibilities under PA 1993 have been put in issue by Ms Guo in two sets of proceedings under that Act:

[9.1] HRRT024/2016: Guo v PwC

[9.2] HRRT025/2016: Guo v Culpan.

[10] The proceeding against Dr Culpan was struck out by the Tribunal on 19 June 2018 because at the substantive hearing Ms Guo refused to answer questions in cross-examination by Dr Culpan's counsel. See *Guo v Culpan* [2018] NZHRRT 25 (19 June 2018). Ms Guo's appeal to the High Court was dismissed in *Guo v Culpan* [2019] NZHC 1963. The decision of the High Court was unsuccessfully challenged in the Court of Appeal (*Guo v Culpan* [2020] NZCA 293) and Ms Guo's application to recall that judgment on an issue of natural justice was dismissed in *Guo v Culpan* [2020] NZCA 377. Although Ms Guo was unsuccessful in her recall application the Court of Appeal did grant leave for her to file an appeal in relation to her parallel judicial review proceedings. Little, if any, of this litigation is relevant to the present decision other than as background.

[11] For reasons explained in the eleven case management *Minutes* earlier referred to, the proceedings against PwC have taken longer to bring to a hearing.

[12] To complete the list of related litigation it is mentioned that according to the affidavit sworn on 16 October 2020 by Mr SJ McCulloch, General Counsel, PwC, Ms Guo has brought two other proceedings against PwC in relation to the same matters which are alleged to have taken place during her employment relationship with PwC:

[12.1] On 23 December 2016 Ms Guo lodged a statement of problem with the Employment Relations Authority (File No. 3001443) claiming that she was unjustifiably constructively dismissed and unjustifiably disadvantaged by PwC. While that proceeding was stayed on 12 April 2017, the proceeding remains on foot.

[12.2] On 22 December 2016 Ms Guo filed a statement of claim in the High Court (CIV 2016-404-3267) alleging PwC breached its duties to her during her employment relationship. That proceeding was struck out by the High Court on 21 May 2018. Ms Guo then appealed to the Court of Appeal and then to the Supreme Court. That Court has yet to deliver judgment.

[13] Mr McCulloch has deposed that it is his belief the purpose of the discovery and search order applications filed in the present proceedings against PwC is to obtain documents to support Ms Guo's claims (for example bullying and discrimination) in the two additional proceedings referred to. This issue will be returned to later in this decision.

The proceedings against PwC under the Privacy Act

[14] In these present proceedings Ms Guo alleges (inter alia) PwC breached IPP 6 and s 40 of the 1993 Act. It is understood from the affidavit evidence filed by Ms Guo she will also allege PwC withheld from her personal information communicated to PwC by Dr Culpan when he was practising at CityMed.

The interlocutory applications filed by Ms Guo

[15] In the proceedings against PwC Ms Guo has filed five interlocutory applications seeking:

[15.1] A discovery order against PwC.

[15.2] A witness summons addressed to unspecified PwC staff to produce "any further information that is missing from PwC's formal discovery".

[15.3] A search order against PwC.

[15.4] Non-party discovery against CityMed.

[15.5] A witness summons addressed to unspecified CityMed staff to produce "any further information that is missing from CityMed's formal non-party discovery".

[16] Both PwC and CityMed oppose the various applications.

[17] The two witness summons applications were withdrawn at the teleconference convened on 18 December 2020. See *Guo v PwC (Non-Party Discovery – Oral Hearing)* [2020] NZHRRT 51 at [7] and [21].

[18] In respect of the discovery and search orders sought against PwC, the parties are in agreement that the applications are to be dealt with on the papers by the Chairperson. See the above decision at [4]. As to the non-party discovery order sought against CityMed, Ms Guo sought an oral hearing as she wished to cross-examine Dr Culpan on his affidavit sworn on 19 November 2020 opposing the making of a non-party discovery order against CityMed. That application has been dismissed for the reasons set out in *Guo v PwC (Non-Party Discovery – Oral Hearing)*.

[19] Ms Guo, PwC and CityMed have all now filed affidavit evidence and written submissions.

[20] The discovery and search order applications sought against PwC will be addressed first.

PWC – THE DISCOVERY APPLICATION

The Tribunal's power to order discovery

[21] Neither Ms Guo nor PwC challenged the jurisdiction of the Tribunal to direct a party to give discovery. Nevertheless, reference should be made to the explanation of that jurisdiction given in *Boyce v Westpac New Zealand Ltd (Non-Party Discovery)* [2015] NZHRRT 31 at [9] to [11]:

> **Non-party discovery – the legal position**
>
> **[9]** Neither the Privacy Act 1993 nor Part 4 of the Human Rights Act 1993 (incorporated into the Privacy Act by s 89 of the Privacy Act) employ the term "discovery" when setting out the powers of the Tribunal or its Chairperson. The Tribunal nevertheless has jurisdiction to order parties before it to give discovery either on a formal or informal basis. This power flows from three primary sources:
>
> > **[9.1]** Section 106(1)(a), (b) and (c) of the Human Rights Act which confers power on the Tribunal to call for evidence and information from the parties or any other person and to require the parties or any other person to attend the proceedings to give evidence. The "any other person" phrase is of particular relevance to non-party discovery:
> >
> > > **106 Evidence in proceedings before Tribunal**

(1) The Tribunal may—
  (a) call for evidence and information from the parties or any other person:
  (b) request or require the parties or any other person to attend the proceedings to give evidence:
  (c) fully examine any witness:

[9.2] Section 104(5) which confers power on the Tribunal to regulate its own procedure:

> (5) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal may regulate its procedure in such manner as the Tribunal thinks fit and may prescribe or approve forms for the purposes of this Act.[2]

[9.3] Regulation 16(1) of the Human Rights Review Tribunal Regulations 2002 which confers power on the Chairperson to give such directions as may be necessary or desirable for the proceedings to be heard, determined or otherwise dealt with, as fairly, efficiently, simply and speedily as is consistent with justice:

> **16 Conduct of proceedings: power to give directions, etc**
>
> (1) Subject to decisions of the Tribunal, the Chairperson may give any directions and do any other things—
>   (a) that are necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice; and
>   (b) that are not inconsistent with the Act or, as the case requires, the Privacy Act 1993 or the Health and Disability Commissioner Act 1994, or with these regulations.[3]

[10] The Tribunal's power to order discovery of even confidential documents was not questioned in *Alpine Energy Ltd v Human Rights Review Tribunal* [2014] NZHC 2792 (11 November 2014) and see also the discussion of discovery in the Tribunal's subsequent decision in *Hood v American Express International (NZ) Inc (Discovery)* [2015] NZHRRT 1 (23 January 2015) at [5] to [10].

[11] As to the procedure for ordering a non-party to give discovery in proceedings before the Tribunal, s 104(5) gives the Tribunal a wide discretion. In the exercise of that discretion appropriate account must be taken of the procedure prescribed by the High Court Rules. While those Rules do not apply to the Tribunal, they are often drawn on to provide guidance on such matters as discovery subject to the proviso the Rules are to be appropriately modified and adapted to the Tribunal's distinctive jurisdiction. Rule 8.21 has specific application to particular discovery against a non-party after proceedings have been commenced and provides:

> **8.21 Order for particular discovery against non-party after proceeding commenced**
>
> (1) This rule applies if it appears to a Judge that a person who is not a party to a proceeding may be or may have been in the control of 1 or more documents or a

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[2] Note the Human Rights Act 1993, s 104(5) as reproduced here was replaced on 14 November 2018 by the Tribunals Powers and Procedures Legislation Act 2018, s 89(5) and now provides:

> (5) The Tribunal may regulate its procedure as it thinks fit, subject to this Act and any regulations made under it, and any practice notes issued under section 121A.

[3] Note the Human Rights Review Tribunal Regulations 2002, reg 16(1) as reproduced here was amended on 29 October 2019 by the Tribunals Powers and Procedures Legislation Act 2018, s 340(3). In its amended form reg 16(1) now provides:

> (1) Subject to decisions of the Tribunal, the Chairperson or a Deputy Chairperson may give any directions and do any other things—
>   (a) that are necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice; and
>   (b) that are not inconsistent with the Act or, as the case requires, the Privacy Act 2020 or the Health and Disability Commissioner Act 1994, or with these regulations.

group of documents that the person would have had to discover if the person were a party to the proceeding.

(2) The Judge may, on application, order the person—
  (a) to file an affidavit stating—
    (i) whether the documents are or have been in the person's control; and
    (ii) if the documents have been but are no longer in the person's control, the person's best knowledge and belief as to when the documents ceased to be in the person's control and who now has control of them; and
  (b) to serve the affidavit on a party or parties specified in the order; and
  (c) if the documents are in the control of the person, to make those documents available for inspection, in accordance with rule 8.27, to the party or parties specified in the order.

(3) An application for an order under subclause (2) must be made on notice to the person and to every other party who has filed an address for service.

[22] The basic structure of discovery before the Tribunal is (subject to such modifications as may be necessary to recognise the Tribunal's unique jurisdiction) that found in the discovery rules set out in the High Court Rules 2016, Part 8, Subpart 1, rr 8.1 to 8.33. Only the provisions relating to standard discovery need be set out here:

8.7 Standard discovery

Standard discovery requires each party to disclose the documents that are or have been in that party's control and that are—
(a) documents on which the party relies; or
(b) documents that adversely affect that party's own case; or
(c) documents that adversely affect another party's case; or
(d) documents that support another party's case.

[23] To reduce cost and inconvenience, discovery is usually directed to be carried out on an informal basis in the first instance. More formal directions are required from time to time depending on the facts of the particular case. The present is one such particular case.

[24] In the context of the present case two basic principles must be mentioned:

[24.1] A document should be discovered if it is relevant to matters which will actually be before the Tribunal.

[24.2] Relevance is determined by the pleadings.

Pleadings – the statement of claim

[25] The key allegations in the statement of claim dated 4 May 2016 are:

[25.1] On 28 August 2015 Ms Guo made an IPP 6 request to PwC.

[25.2] PwC did not thereafter respond within the 20 working days allowed by PA 1993, s 40(1).

[25.3] When on 2 October 2015 PwC did provide personal information to Ms Guo, the disclosure was incomplete.

[25.4] PwC wanted to obstruct the course of justice and asked their lawyer to lie about PwC's intentional breaches of the Act in order to frustrate the inquiry by the Privacy Commissioner.

> **[25.5]** PwC did not allow the Commissioner's investigating officer to enter PwC and to inspect its system.

[26] Only allegations 1, 2 and 3 are relevant to the alleged breach of IPP 6 and of s 40(1). The Tribunal does not have jurisdiction to determine allegation 4 which is in any event not relevant to the question whether there has been an interference with privacy as defined in PA 1993, s 66. Allegation 5 has relevance only to the application by Ms Guo for a search order. That application is addressed later in this decision.

Pleadings – the statement of reply

[27] The key responses made by PwC in their statement of reply dated 2 June 2016 are:

> **[27.1]** PwC complied with its obligations under PA 1993, s 40. By email dated 25 September 2015 Ms Guo was advised by PwC it intended complying with her request subject to the statutory exceptions allowed by the Act.
>
> **[27.2]** On 2 October 2015 PwC provided Ms Guo with a complete duplicate copy of her full personnel file.
>
> **[27.3]** PwC did not provide Ms Guo with copies of her "work emails" as they were not considered to be personal information about her, nor was the information readily retrievable as the backup on the relevant server dated back only to 23 December 2011 which was after Ms Guo's employment had ended. This point has since been expanded upon by Mr McCulloch in his affidavit sworn on 16 October 2020.
>
> **[27.4]** If there was any delay in complying with the Act, PwC has by email dated 7 March 2016 made apology to Ms Guo.
>
> **[27.5]** PwC did not in any way obstruct the investigation by the Privacy Commissioner.

Assessment – the issues which will determine the scope of discovery

[28] The purpose of the present decision is to determine the scope of the discovery obligations of the parties, not to determine the ultimate merits of their competing cases. This point needs to be stressed because the submissions by Ms Guo appeared at times to address the substantive merits of her case.

[29] Based on the statements of claim and reply and taking into account the various affidavits by Ms Guo and the affidavit by Mr McCulloch it would appear the essential issues in these proceedings relate to the terms of the IPP 6 request, the timeliness of the response by PwC, whether PwC gave access to all of the personal information to which Ms Guo was entitled and whether any of the withholding grounds applied. The issues can be formulated as follows:

> **[29.1]** The terms of Ms Guo's IPP 6 request.
>
> **[29.2]** Whether the decision on the request by PwC complied with PA 1993, s 40(1).

[29.3] Whether subsequent to the decision on the request under PA 1993, s 40(1) PwC gave access to the personal information about Ms Guo and which was then held by PwC and which could readily be retrieved.

[29.4] Whether any of the withholding grounds listed in PA 1993, ss 27 to 29 had application.

[30] It is these issues which will determine the scope of the discovery obligations of the parties irrespective whether discovery is to be informal or formal. For the avoidance of doubt, if as at the date of the IPP 6 request PwC was holding personal information about Ms Guo and that information was readily retrievable but access was not given, that personal information would be discoverable in these proceedings. See [29.3] above.

[31] It should now be possible for both parties to identify the documents which are to be disclosed by way of standard discovery. If further clarification is required, application can be made.

Whether formal discovery should be ordered

[32] The next issue is whether discovery should be formal under the High Court Rules or informal. The key issues are lack of trust on the part of Ms Guo and PwC's concern at the potential collateral use of the discovered documents.

[33] Ms Guo has deposed in her affidavit sworn on 9 October 2020 at paras 21 and 22 that she does not trust PwC to make full disclosure if informal discovery only is ordered. Her memorandum dated 17 June 2020 at para 8 provides the following explanation:

> 8. On 2 October 2015, PwC provided me a copy of my personnel file. However, the file provided lacks so much information that it cannot be a personnel file in essence.
>   a. I was bullied from the very beginning after I joined PwC and the Human Capital team at PwC acted on some events. But the file provided contains no record about these events except my oral complaint to PwC on 25 June 2009, which PwC used to seek advice from its regular occupational health adviser Dr Stephen James Culpan behind my back, intending to terminate my employment because of my mental health as indicated in its notes provided;
>   b. The file provided contains no record of my work performance ratings, no information about my three month performance review, and even no information about my year-end review that PwC failed me against my high work performance ratings;
>   c. The file provided contains no my complaint letters.

[34] In the same memorandum at para 22 Ms Guo provided an extensive list of what she expects to receive from PwC by way of formal discovery:

> 22. I am therefore respectfully seeking orders that PwC releases all communications of any nature in any format (e.g. hard copy and electronic copy) relating to me that is in PwC's possession, custody or control for the period 2009 onwards and verifies by affidavit that the material released is full and complete. Particular attention is drawn to below parts to be released:
>   a. Communications of any nature in any format recording any events relating to me that happened at PwC;
>   b. Communications of any nature in any format recording any determinations relating to me including:
>   i. in relation to PwC's remarkably different treatment towards me compared to other graduates, e.g. why it required me to see clients on my third day into the job by which the bullying on me started; why it did not assign work coaches to me until months later; why it did not provide me any further opportunity to see clients until it failed my year-end review; why it significantly delayed the result of my year-end review and why it did not provide me a letter of that result signed by its CEO;

ii. in relation to all my work performance ratings and review results;
iii. in relation to my mental health;
iv. in relation to PwC's decision/s to fail my year-end review against my high work performance ratings;
v. in relation to PwC's decision/s on my resignation and refusing my request to withdraw my resignation;
vi. in relation to PwC's decision/s on my privacy request;

c. Communications of any nature in any format relating to me between PwC and its lawyers including any legal advice sought and received by PwC concerning my mental health and PwC constructively dismissing me;
d. Communications of any nature in any format relating to me between PwC (including any staff of PwC) and Dr Culpan and CityMed where Dr Culpan practised;
e. Communications for the period 2015 onwards since I requested respectively to PwC and to Dr Culpan for my personal information covering communications among PwC, PwC's lawyers, Dr Culpan, CityMed and Dr Culpan's lawyers including communications between PwC's lawyers and Dr Culpan's lawyers, given Dr Culpan contacted PwC on the next working day following my request and then conducted his interferences with my privacy and has now still concealed relevant documents between PwC and him;
f. A list of any missing information, together with details of the missing documents and why they were missing;
g. All communications between PwC and the OPC.

[35] In reply PwC submits:

[35.1] While it is not opposed to giving discovery of relevant documents, it is not required to give disclosure to the degree sought by Ms Guo. In submissions reference is made (inter alia) to the fact that PwC is not required to discover documents which are not relevant to the issues in the proceedings or which are the subject of legal professional privilege.

[35.2] Ms Guo intends using the discovered information for a collateral purpose, namely her proceedings against PwC in the ERA and in the High Court.

Reasons for formal discovery being ordered

[36] There are two reasons for ordering formal discovery.

[37] Whether there is a rational basis for Ms Guo's belief that PwC will not give full discovery is not for determination on the present application. What is clear is that whether the parties are directed to give discovery informally or formally, there is a high degree of certainty Ms Guo will contest the discovery made by PwC. In these circumstances the first reason which justifies formal discovery is that the filing by both parties of an affidavit of documents will facilitate the downstream determination of any challenge as to whether full discovery has been given.

[38] This decision should not be taken as a finding that there is an objective basis for Ms Guo's distrust of PwC, that the extensive discovery "wish list" advanced by Ms Guo is justifiable or that the Tribunal is encouraging her to challenge PwC's affidavit of documents. It is simply a pragmatic solution which preserves the position of both parties until clarity has emerged regarding the content of the affidavits of documents to be filed by Ms Guo and by PwC and the nature of any challenge made.

Use of discovered documents – the implied undertaking

[39] The second reason relates to the reference which has been made to the concerns held by PwC that Ms Guo intends using any documents produced in discovery for a collateral purpose.

[40] Given Ms Guo is self-represented it is necessary to stress the principle that documents obtained by a party in the course of litigation may be used only for the purposes of those proceedings and may not be used for any other purpose. Originally, the common law implied an undertaking, to the court, not to use a disclosed document for a purpose other than for the purpose of the proceedings in which it was disclosed. Before that undertaking came to be implied, the courts spoke of requiring an express undertaking as a condition of granting an order for production of documents. The High Court Rules, r 8.30(4) presently provides:

> **8.30 Use of documents**
>
> …
>
> (4) A party who obtains a document by way of inspection or who makes a copy of a document under this rule—
> (a) may use that document or copy only for the purposes of the proceeding; and
> (b) except for the purposes of the proceeding, must not make it available to any other person (unless it has been read out in open court).

[41] That the ban on the collateral use of documents is binding on anyone into whose hands the documents might come if that person knows that the documents have been obtained by way of discovery is confirmed by the commentary on this rule in *McGechan on Procedure*. The drift of authority is that the implied undertaking applies to any material obtained compulsorily in legal proceedings, the requirement for compulsion being one of substance, not form. It has also been confirmed the undertaking applies where discovery is informal. The rationale of the rule, as explained in *Wilson v White* [2005] 3 NZLR 619 (CA) at [20] is twofold:

[41.1] The first is that parties may not comply with discovery obligations unless such restrictions are meaningfully imposed; and

[41.2] Secondly, a sense of fairness associated with the privacy expectations of a party who is required to produce documents for one purpose, and is entitled to expect that they will not be used for another.

[42] If necessary the party to whom discovery is made can be required to give an express undertaking not materially different from the terms in which the implied undertaking is customarily expressed. See *Waters v Alpine Energy Ltd (Discovery No. 3)* [2015] NZHRRT 13 at [17.3]:

> **[17.3]** Confidentiality concerns can be addressed by different mechanisms, depending on the strength of the privacy interest in issue. For example, limiting inspection (see High Court Rules, r 8.28(3)) and the undertaking as to use of the document (refer High Court Rules, r 8.30(4)). As to such undertaking we refer to the judgment of Rodney Hansen J in *Telstra New Zealand Ltd v Telecom New Zealand Ltd* (2000) 14 PRNZ 541 at [47] and [48]:
>
>> [47] It was agreed that the terms of the express undertaking did not differ materially from the terms in which the implied undertaking is customarily expressed. The implied undertaking is, however, an undertaking to the Court imposed by operation of law by virtue of the circumstances in which the documents are obtained: *Taylor v Serious Fraud Office* [1999] 2 AC 177, 207; *Crest Homes plc v Marks* [1987] 1 AC 829, 853 (HL). The rationale for the undertaking was put this way by Lord Denning in *Riddick v Thames Board Mills* [1977] QB 881, 895-896; [1977] 3 All ER 677, 687:
>>
>>> "The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties …
>>>
>>> Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion

> should not be pressed further than the course of justice requires. The courts, therefore, should not allow the other party, or anyone else, to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice … In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed. "

> [48] The undertaking is sometimes expressed in the negative, not to use the documents for any ulterior, alien or collateral purpose, but often as a positive obligation to use discovered documents only for a particular purpose. That purpose was said in *Taylor* to be "the conduct of the litigation" (at p 207), in *Crest Homes* "the proper conduct of that action on behalf of his client" (at p 853) and frequently as "the purposes of the proceedings in which they are disclosed": see most recently in *Bourns Inc v Raychem Corp* [1999] 3 All ER 154, 169.

[17.4] In the present case Mr Waters has given an undertaking in the following terms:

> I, Kevin Allan Waters, hereby expressly acknowledge that the documents received by me from Alpine Energy and Farrow Jamieson in the course of my proceedings before the Human Rights Review Tribunal in HRRT011/2013 may be used for the purpose of those proceedings only and except for the purposes for those proceedings, I will not make them available to any other person without leave of the Chairperson of the Tribunal (unless the document has been read out in open court).
>
> I undertake to maintain the confidence of the documents, to store them securely and to return or destroy copies after the final determination of these proceedings.

[43] Given the concerns held by PwC I have determined that an additional reason for requiring the parties to give formal discovery is to protect against use of the discovered documents outside these present proceedings.

Orders that Ms Guo and PwC give formal discovery

[44] The following orders are made:

[44.1] Both Ms Guo and PwC are to give formal discovery in a manner and form which complies with the relevant High Court Rules, Part 8, Subpart 1 adapted where necessary to take account that discovery is being given at the direction of the Tribunal, not by the High Court.

[44.2] In particular, each party must file and serve an affidavit of documents that complies with High Court Rules, r 8.15.

[44.3] The affidavits of documents are to be filed and served within a period of 30 working days after delivery of this decision and in any event no later than 4pm on Thursday 24 June 2021.

[44.4] Leave is reserved to both parties to make further application should the need arise.

PWC – THE SEARCH ORDER APPLICATION

The application

[45] As explained in her search order application dated 9 October 2020, Ms Guo's approach to what might be generally described as PwC's disclosure obligations proceeds from the premise she does not believe PwC's statement that her "missing" personal information was not readily retrievable. In her submissions dated 15 January 2021 she asserts that the fundamental issues in dispute are whether PwC has:

… withheld my personal information and/or whether it has destroyed such material as part of a course of conduct to frustrate the disclosure of my personal information as requested and as investigated by the Office of the Privacy Commissioner.

[46] This has led her to pursue three separate tracks in her application to the Tribunal:

[46.1] First, her application for formal discovery by PwC.

[46.2] Second, if the formal discovery given by PwC is otherwise than full and complete, she seeks orders "to call relevant PwC staff under subpoenas".

[46.3] Third, if relevant information is not "fully and completely released" after the issue of subpoenas, Ms Guo seeks a search order permitting:

> Examination of PwC's databank by a computer expert is a proper process that enables an objective empirical evaluation to be brought to bear on the primary issues in dispute. As my then counsel Mr Sharp advanced, if relevant material has been destroyed, details of what the material was, when it was destroyed and by whom it was destroyed are relevant.

The objective (as stated in the application dated 9 October 2020 at para 1) is for Ms Guo to secure a search order authorising a computer specialist:

> … to access and search PwC's data bank for the period 2009 onwards to determine whether in its data bank there is information about me of any nature that has been withheld and/or destroyed.

[47] PwC submits that should Ms Guo's case reach the third track no search order could in any event be made as the Tribunal has no jurisdiction to make such order. PwC submits the jurisdiction issue should be addressed now. The issue of timing was discussed at the teleconference held on 18 December 2020 and as already mentioned it was agreed the jurisdiction issue is to be determined at the same time as the discovery application. See *Guo v PwC (Non-Party Discovery – Oral Hearing)* at [4].

[48] For jurisdiction Ms Guo relies on the search order provisions contained in the High Court Rules, particularly r 33.2 which provides:

> **33.2 Search order**
>
> (1) This rule applies only if the evidence is, or may be, relevant to an issue in the proceeding or anticipated proceeding.
> (2) The court may make an order (a search order), in a proceeding or before a proceeding commences, with or without notice to the respondent, to—
>   (a) secure or preserve evidence; and
>   (b) require a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence.
> (3) Form G 39 must be used but may be varied as the circumstances require.
> (4) A search order must be served on the respondent.

[49] The standard terms of a search order are prescribed by Form G39:

> Form G 39
> Search order
>
> r 33.2(3)
>
> **To** the Respondent [*name*]
>
> 1 This order notifies you that the court is satisfied—
>   (a) the applicant has a strong prima facie case on an accrued cause of action; and

(b) the potential or actual loss or damage to the applicant will be serious if this search order is not made; and

(c) there is sufficient evidence in relation to you that—

(i) you possess important evidentiary material; and

(ii) there is a real possibility that you might destroy that material, or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court.

2 You are required to permit the persons named or described above paragraph 4 to enter the premises described in paragraph 5 for the purpose of securing or preserving the evidentiary material listed or described in paragraph 6.

3 The applicant's undertaking as to damages is attached.

To the following persons [*names or description of persons authorised to enter and search*]

4 This order authorises you to search for, inspect, and remove the things listed or described in paragraph 6 and to take any further steps set out in paragraph 7*.

*Omit reference to further steps if none is authorised.

5 The specified premises are: [*full address of premises*].

6 The things that may be searched for and inspected or removed are: [*set out comprehensive list or description of these things*].

7 *Omit this paragraph if the search order does not authorise further steps*

The persons named or described above paragraph 4 may take the following further steps: [*list steps*].

8 The following independent solicitors are appointed to supervise the carrying out of this order and to report to the court: [*full names and addresses of independent solicitors*].

9 *Omit this paragraph if the court has not included this additional power.*

The independent solicitors are also authorised to do the following things: [*specify things*].

To the Respondent and the persons named or described above paragraph 4

10 On [*date fixed under rule 33.6(3)*] the court will consider a report on the search from the independent solicitors. The applicant and the respondent and the independent solicitors are entitled to be heard on that date. The court will also consider the following:

(a) what is to happen to any goods removed from the premises or to any copies that have been made:

(b) how the confidentiality to which the respondent is entitled is to be maintained:

(c) any privilege claim:

(d) any application by a party:

(e) any issue raised by an independent solicitor.

Date:

Signature:

(Registrar/Deputy Registrar*)

*Select one.

[50] Ms Guo submits the provisions of the High Court Rules are to be read with the Tribunal's power to call for evidence (HRA, s 106(1)(a)), to act according to the substantial merits of the case (HRA, s 105) and to regulate its own procedure (HRA, s 104(5)). She also relies on the Human Rights Review Tribunal Regulations, reg 16(1).

[51] In her application Ms Guo explains that when investigating her complaint against Dr Culpan, an investigating officer from the Office of the Privacy Commissioner conducted an on-site inspection of Dr Culpan's records and computer system. Although the Commissioner did not seek the same access when investigating the complaint against PwC, Ms Guo believes PwC would have permitted the Commissioner to conduct such inspection. It follows, she says, that it is her belief PwC will not oppose the search order application.

[52] In this she is mistaken.

The grounds of opposition by PwC

[53] By notice of opposition dated 16 October 2020 PwC advances seven grounds for opposing the making of a search order and further relies on the affidavit of Mr McCulloch sworn on 16 October 2020. The grounds of opposition are:

> **[53.1]** The Tribunal does not have jurisdiction to issue a search order.
>
> **[53.2]** There is no evidence suggesting PwC intends to destroy or conceal any relevant evidence in its possession.
>
> **[53.3]** Ms Guo's request for a search order is wider than her IPP 6 request and goes beyond the scope of the investigation by the Privacy Commissioner.
>
> **[53.4]** The Tribunal has no jurisdiction to hear matters which were not investigated by the Commissioner under Part 8 of PA 1993. Therefore, any other documents which are outside the scope of the Commissioner's investigation are not relevant and are not required to be discovered.
>
> **[53.5]** Ms Guo has not discharged the heavy onus required of an applicant for a search order, given the draconian effects of such order.
>
> **[53.6]** Ms Guo has not given an undertaking as to damages.
>
> **[53.7]** Ms Guo has not given an undertaking not to use any material obtained on discovery for any purpose other than this proceeding. To the contrary, in her affidavit sworn on 9 October 2020 at paras 5 and 6, she confirms her discovery application is made to enable her to pursue her claims for constructive dismissal in the Employment Relations Authority and High Court.

Whether any conclusions to be drawn from the inspection of Dr Culpan's records

[54] Because Ms Guo places some weight on the fact that the investigation of her complaint against Dr Culpan involved an on-site inspection of his records by the Privacy Commissioner, it is necessary to stress such inspection took place with the consent and willing participation of Dr Culpan. The Commissioner has never possessed powers of entry and search.

[55] A full account of the circumstances of the visit by the Commissioner's investigating officer to Dr Culpan's practice is provided by Dr Culpan in his affidavit sworn on 19 November 2020, Exhibit A at paras 77 to 81:

> 77. I only found out about the complaint to the OPC when I was telephoned by Mr Tony Collins, an Investigating Officer. He said Ms Guo had complained to the OPC that she had not received a full copy of her medical notes and that he wished to visit me at CityMed to establish whether indeed Ms Guo had received a full copy of her notes from our computer file.
>
> 78. I did not receive any written notice via mail or e-mail of the complaint from the OPC or Mr Collins. Nor did I receive any data on the scope of any investigation the OPC was intending to make. As I had checked and rechecked my computer notes and was confident I was not in breach of the Health Information section of the Privacy Act in respect of providing a full copy of my notes, I eagerly made an appointment within two days for Mr Collins to see me and go through the computer notes with me.

79. Mr Collins then visited CityMed on 1 December 2015 to investigate the complaint. He was present for 50 minutes. He did not inform me that he would be looking into any possible breach of the Privacy Act.

80. I assisted Mr Collins to inspect our electronic database for patient Information, MedTech 32, in relation to Ms Guo. I brought up her file and showed him all sections of her medical file including her administrative sections, Daily Record, Inbox and Outbox Documents and any scanned documents. I also let him check all the audit logs of all entries to show any deletions, alterations or additions made after any date entries - of which there were none. I then carefully went through with him step by step the processes taken to print out a full copy of the notes from the computer medical files, and again printed out a full copy of Ms Guo's notes. I also showed Mr Collins my e-mail to Ms Guo with the attached PDF file which was sent to her on 30 September 2015. At his request, I printed out a second copy of these notes from this scanned PDF document.

81. Mr Collins instructed me to not correspond further on the matter with Ms Guo. He instructed me that I should instead forward all such e-mails to him and the OPC. He then took both sets of notes with him and left CityMed.

[56] It is clear Ms Guo's reliance on what happened in Dr Culpan's case is misplaced. His consent to an on-site inspection by the Privacy Commissioner was voluntary and consensual. In the present case PwC opposes the making by the Tribunal of a search order on various grounds, including an absence of jurisdiction.

The jurisdiction challenge – discussion

[57] It has been agreed by the parties that the jurisdiction challenge by PwC is to be determined at the same time as the discovery application. See *Guo v PwC (Non-Party Discovery – Oral Hearing)* [2020] NZHRRT 51 at [4].

[58] As the Human Rights Review Tribunal is a creature of statute it has no inherent jurisdiction. It does, however, possess certain powers necessary to enable it to act effectively within its jurisdiction. See *Dotcom v Crown Law Office (Inherent Powers)* [2018] NZHRRT 36 at [26] to [54] (*Dotcom*). However, there can be no implied power arising from the Human Rights Act to do something ancillary to a power not conferred by that statute or by any other statute (*Dotcom* at [54.2]).

[59] The primary reason why the Tribunal can direct a party to give discovery of documents (or a non-party) is because, as earlier explained, HRA, s 106(1) confers express power to call for evidence from the parties or any other person and to require the parties (or any other person) to attend the proceedings to give evidence. That provision and the Tribunal's power under HRA, s 104(5) to regulate its procedure as it thinks fit allow it to direct discovery (both informal and formal) by the parties under the High Court Rules. Such discovery is ancillary to the power to call for evidence.

[60] But the same cannot be said in relation to the issue of a search order which, by permitting entry to premises and removal of items, is both drastic and highly invasive. There is nothing in the text of the HRA or of the PA 1993 which even remotely suggests the Tribunal possesses a power to which a search order is ancillary. It is because the order is so invasive, Part 33 of the High Court Rules contains a comprehensive "code" regulating (inter alia) the requirements for the grant of a search order and the terms of such order. The plaintiff must show there is "a real possibility" that the respondent might destroy relevant evidentiary material or cause it to be unavailable for use in evidence in the proceeding. It is also required that the applicant give various undertakings relating to damages and to the costs of any independent solicitor appointed under the rule. PwC points out Ms Guo has complied with none of these requirements, all of which recognise

the severity of the inroad made into the rights of the defendant and highlight the need for jurisdiction to be expressly conferred.

[61] No matter how generous an approach is taken to the implied powers of the Tribunal and to its power to call for evidence and to regulate its own procedure, it is simply not possible to infer a power to issue a search order of any kind, particularly that envisaged by High Court Rules, Part 33:

> **[61.1]** The power to grant a search order under Part 33 is a significant aspect of jurisdiction and cannot be implied.
>
> **[61.2]** As emphasised in *Dotcom* at [54.2], there can be no implied power arising from the Human Rights Act to do something ancillary to a power not conferred by that statue or by any other statute. As stated by Wylie J in *Department of Social Welfare v Stewart* [1990] 1 NZLR 697 at 701, the statutory function must exist for the necessary power to be implied.
>
> **[61.3]** The Tribunal draws on the High Court Rules only where those rules are relevant to a power or jurisdiction already possessed by the Tribunal. The Rules cannot confer on the Tribunal a jurisdiction it does not have.
>
> **[61.4]** The Tribunal has no statutory power to authorise what would otherwise be a flagrant and inexcusable trespass. It would also be a breach of the prohibition on unreasonable search or seizure in the New Zealand Bill of Rights Act 1990, s 21. To similar effect see *Guo v Culpan (Agent)* [2017] NZHRRT 57 at [23] and [24].

Conclusion on application for search order

[62] The application for a search order must for these reasons be dismissed on the ground that the Tribunal has no jurisdiction to make such order.

The application under HRA, s 122A for removal of jurisdiction issue to High Court

[63] Ms Guo submits that should the Tribunal find it has no jurisdiction to make a search order, that issue should be removed to the High Court pursuant to HRA, s 122A.

[64] It is acknowledged that HRA, s 122A (incorporated into proceedings under the Privacy Act 1993 by s 89 of the latter Act and under PA 2020 by s 111) does permit the Tribunal to remove into the High Court either the entire proceedings or "a matter at issue in them":

> **122A Removal to High Court of proceedings or issue**
>
> (1) The Tribunal may, with the leave of the High Court, order that proceedings before it under this Act, or a matter at issue in them, be removed to the High Court for determination.
> (2) The Tribunal may make an order under this section, with the leave of the High Court, before or during the hearing, and either on the application of a party to the proceedings or on its own initiative, but only if—
> (a) an important question of law is likely to arise in the proceedings or matter other than incidentally; or
> (b) the validity of any regulation is questioned in proceedings before the Tribunal (whether on the ground that it authorises or requires unjustifiable discrimination in circumstances where the statutory provision purportedly empowering the making of the regulation does not authorise the making of a regulation authorising or requiring unjustified discrimination, or otherwise); or

(c) the nature and the urgency of the proceedings or matter mean that it is in the public interest that they or it be removed immediately to the High Court; or
(d) the High Court already has before it other proceedings, or other matters, that are between the same parties and involve issues that are the same as, or similar or related to, those raised by the proceedings or matter; or
(e) the Tribunal is of the opinion that, in all the circumstances, the High Court should determine the proceedings or matter.

(3) Despite subsection (2), if the validity of any regulation is questioned in proceedings before the Tribunal and the leave of the High Court is obtained for the making of an order under this section, the Tribunal must make an order under this section.

(4) If the Tribunal declines to remove proceedings, or a matter at issue in them, to the High Court (whether as a result of the refusal of the High Court to grant leave or otherwise), the party applying for the removal may seek the special leave of the High Court for an order of the High Court that the proceedings or matter be removed to the High Court and, in determining whether to grant an order of that kind, the High Court must apply the criteria stated in subsection (2)(a) to (d).

(5) An order for removal to the High Court under this section may be made subject to any conditions the Tribunal or the High Court, as the case may be, thinks fit.

(6) Nothing in this section limits section 122.

[65] However, the Tribunal may make such order only with leave of the High Court and only if (inter alia) an important question of law is likely to arise in the proceedings "other than incidentally" or if the Tribunal is of the opinion that, in all the circumstances, the High Court should determine the proceedings or matter.

Conclusion on application for removal

[66] The application by Ms Guo fails on the following grounds:

[66.1] Leave of the High Court has not been obtained.

[66.2] Jurisdiction to make a search order is not on the facts an important issue nor does it arise for determination other than incidentally.

[66.3] Removal of the jurisdiction issue will only exacerbate the delays which have already beset this case.

CITYMED – APPLICATION FOR NON-PARTY DISCOVERY

The application

[67] Ms Guo has applied for non-party discovery against CityMed as she believes CityMed and Dr Culpan have concealed (and continued to conceal) information about her. It is submitted discovery of all information about her and held by CityMed is critical evidence that goes to the heart of the issues in her proceedings against PwC. She further alleges in her affidavit sworn on 9 October 2020 Dr Culpan has produced "a large amount of untrue evidence" in the witness statement he filed in the Tribunal proceedings heard on 14 May 2018. She has applied for non-party discovery by CityMed so she can test any assertion that full and complete discovery has been made by Dr Culpan.

The grounds of opposition by CityMed

[68] By notice of opposition dated 13 November 2020 CityMed has made three key points:

[68.1] All correspondence between PwC and Dr Culpan/CityMed has already been discovered to Ms Guo in connection with her claim against Dr Culpan (HRRT025/2016: Guo v Culpan). There are no other documents to discover.

[68.2] CityMed/Dr Culpan do not have any objection to the documents previously discovered to Ms Guo being used by her for the purpose of the present proceeding against PwC.

[68.3] The interlocutory applications by Ms Guo against CityMed are therefore unnecessary and disproportionate.

[69] The grounds of opposition are supported by a detailed affidavit sworn by Dr Culpan. After deposing that he is authorised to swear his affidavit on behalf of CityMed in response to the various applications by Ms Guo against CityMed, Dr Culpan sets out the background and addresses the issue of discovery at some length. He provides full justification for the grounds of opposition. His affidavit is, in functional terms, an affidavit of documents:

Guo v Culpan HRRT No. 025/16

5. In May 2016, Ms Guo brought a claim against me in the Human Rights Review Tribunal alleging that I had deliberately delayed providing her with a copy of her medical file in order to harm her relationship with her employer, PwC. She also alleged that I withheld parts of her medical file from her for that same purpose.

6. I understand these are similar allegations to those made by Ms Guo against PwC in the present proceeding.

7. In November 2017, my statement of evidence responding to Ms Guo's allegations against me was filed. This addresses many of the allegations made by Ms Guo in her affidavit of 9 October 2020 in support of her non-party discovery application against CityMed. A copy of the statement of evidence, signed by me on 3 November 2017 is therefore annexed and marked Exhibit "A." I have redacted three paragraphs on the final page which are irrelevant to the matter currently before the Tribunal.

8. I confirm that the contents of that statement are true and correct to the best of my knowledge and belief.

Discovery

9. On 6 November 2017, I provided discovery to Ms Guo through my counsel. The following categories of documents were disclosed:

   a. The correspondence between myself and staff at PwC in connection with the report completed on 22 December 2009. These documents had been attached to Ms Guo's medical file on MedTech 32, CityMed's practice software;

   b. Ms Guo's clinical records. These were minimal because Ms Guo had specifically asked me not to write notes during her two appointments on 20 November 2009 and 22 January 2010;

   c. Emails between me and staff at PwC between 17 January 2011 and 18 April 2011 in which the staff raised further concerns about Ms Guo's mental health. These were not attached to Ms Guo's medical file at the time for various reasons outlined in my statement of evidence. They were thus not provided to Ms Guo in response to her Privacy Act request for her medical file;

   d. Emails between me, Ms Guo and CityMed reception regarding Ms Guo's request for her medical file in 2015;

   e. Emails between me and staff at the Office of the Privacy Commissioner regarding Ms Guo's complaints, including an apology letter I wrote to Ms Guo in respect of the delay in providing her medical file; and

   f. Administrative file notes on Ms Guo's file.

10. The list of documents disclosed is annexed and marked Exhibit "B."

11. In order to fulfil my obligations in respect of discovery, I had searched for all documents required to be discovered, taking the following particular steps:

    a. I searched my CityMed email, my home email and the CityMed reception email systems for all documents relating to Ms Guo;

    b. I searched CityMed's practice management software, MedTech 32 for any documents/information relating to Ms Guo; and

    c. I made enquiry of other staff at CityMed as to whether they had any other documents in their possession that may be relevant to the proceeding. They did not.

12. All correspondence to and from PwC came through me, rather than receptionists or other staff at CityMed. Other than the information in the above referred email systems, and the information which I had attached to Ms Guo's medical file on MedTech 32, there was no other information available.

13. I was not aware of anyone other than myself, and the receptionists referred to in my statement of evidence, who were involved with Ms Guo's matter.

14. At the time of searching for these documents, I was unable to locate a report dated 2 July 2009 which had been sent to PwC. This is referred to in my statement of evidence. The report was a follow-up, to record in writing what had been discussed with Neil Haines, a partner at PwC, over the phone.

15. The report had been sent from a personal email address which I discontinued in 2012. I was unable to access any data from that account. Although I did copy myself in on my CityMed email address, I expect this did not come up in my searches as the correspondence did not name Ms Guo. At the time of giving my advice in 2009, I was not aware of her identity. The report therefore would not have been made available through a search of Ms Guo's name.

16. The report was later provided to me through my counsel, who had received it from counsel for PwC. This was sent to Ms Guo on 22 December 2017 by my lawyer, with an email saying: "By way of further discovery, please find attached Dr Culpan's report to PwC from July 2009. This was only recently forwarded to me by the lawyers for PwC. As you know, Dr Culpan had been unable to locate a copy."

17. A true copy of that email is annexed and marked Exhibit "C."

Response to Ms Guo's affidavit sworn 9 October 2020

18. There is no other correspondence between CityMed staff or PwC held on CityMed's practice software or email systems.

19. Further, contrary to the particular allegations made in Ms Guo's affidavit sworn 9 October 2020:

    a. I did not, at any stage, mislead the investigator for the Office of the Privacy Commissioner during his investigation in December 2015 (see Ms Guo's paragraph 8).

    b. I have not sought to "cover up" what Ms Guo characterises as "deficient medical notes" (see Ms Guo's paragraphs 13).

    c. In paragraph 16, Ms Guo refers to a note that was present in the version of the notes printed on 29 September 2015 which was not present on the version printed on 30 September 2015. I am unable to explain how or why this happened.

    d. In paragraph 18 Ms Guo alleges that her medical information was released to PwC on 31 August 2015. It was not.

Use of documents

20. Neither I nor CityMed oppose Ms Guo having access to the documents that were provided to her by way of discovery in her claim against me, for the purposes of her claim against PwC.

Application by Ms Guo for an oral hearing declined

[70] By email dated 19 November 2020 Ms Guo gave notice she wished to cross-examine Dr Culpan and for that reason applied to have her discovery application against CityMed determined at an oral hearing.

[71] That application was dismissed in *Guo v PwC (Non-Party Discovery – Oral Hearing)* [2020] NZHRRT 51.

[72] In later submissions dated 15 January 2021 at para 18 Ms Guo contended CityMed should not be permitted "to shift its own discovery obligations to Dr Culpan who is no longer a CityMed staff".

[73] But as to this Dr Culpan has in his affidavit deposed that he has been authorised to swear the affidavit on behalf of CityMed in response to the applications by Ms Guo, that he has personal knowledge of the matters to which he deposes (save for where the context indicates otherwise) and that all correspondence to and from PwC came through him, rather than receptionists or other staff at CityMed. His affidavit contains an averment that the contents of his statement are true and correct to the best of his knowledge and belief.

[74] As Ms Guo has established no grounds to doubt the veracity of this evidence and simply asserts an objection to the standing of Dr Culpan, her objection is dismissed.

[75] In her lengthy submissions dated 15 January 2021 and even longer affidavit sworn on the same date Ms Guo sets out at length the reasons for her belief that Dr Culpan failed to comply with the IPP 6 request she made to him virtually simultaneously with her similar request to PwC.

[76] But as to this the appropriate forum for the determination of Ms Guo's complaints against Dr Culpan was the hearing before the Tribunal on 14 May 2018; but as earlier explained, Ms Guo's proceedings were struck out after she refused to submit to cross-examination by counsel for Dr Culpan. This deprived Dr Culpan of the opportunity to challenge the allegations made by Ms Guo (and now repeated in the present proceedings) particularly her claim that full disclosure of her personal information was not made. In these circumstances the application for non-party discovery against CityMed (but in practical effect, against Dr Culpan) is not an appropriate forum within which to determine Ms Guo's complaints that Dr Culpan has concealed personal information about Ms Guo.

Basis on which non-party discovery application to be determined

[77] Rather, the non-party discovery application against CityMed is to be determined by reference to the following:

> **[77.1]** Dr Culpan has stated on oath he provided full discovery to Ms Guo on 6 November 2017 and there is no other correspondence between CityMed staff or

PwC held on CityMed's practice software or email systems. The categories of documents disclosed are described in his affidavit at paras 9 and 11.

[77.2] Dr Culpan and CityMed have expressly authorised Ms Guo to use the discovered documents in her proceedings against PwC.

[77.3] There are no other documents to discover.

[78] In these circumstances CityMed submits the non-party application is unnecessary and disproportionate.

Discussion

[79] There is no basis for any suggestion that what Dr Culpan has said in his affidavit is incorrect, namely:

[79.1] He has conducted a thorough search for all relevant documents relating to Ms Guo, including both his and CityMed's email systems and the practice management software.

[79.2] All such documents have been provided to Ms Guo already.

[79.3] Neither Dr Culpan nor CityMed oppose Ms Guo using the discovered documents in her claim against PwC.

[80] The following general principles apply:

[80.1] Non-party discovery is discretionary, as the opening words of High Court Rules, r 8.21(2) make clear.

[80.2] A non-party discovery order must be necessary so that the discretion should be exercised. It must be shown the documents sought may make a real difference, and are not merely marginal. See *Vector Gas Contracts Ltd v Contact Energy Ltd* [2014] NZHC 3171, [2015] 2 NZLR 670 at [30].

[80.3] Discovery directions given under the Human Rights Review Tribunal Regulations 2002, reg 16(1) must be necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice. These criteria will guide the discretion. Consequently not only relevance but also proportionality will come into consideration.

[80.4] The discovery process starts with a process of self-assessment by litigants and that assessment will not be disturbed without reason being shown. See *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] 1 NZLR 598 at [28] (CA).

[80.5] On an application for particular discovery under High Court Rules, r 8.19 the starting point is a presumption that the affidavit of documents already filed is conclusive. The party seeking further discovery has to establish that the existing affidavit of documents is incomplete. See *McCullagh v Robt Jones Holdings Ltd* [2015] NZHC 1462, (2015) 22 PRNZ 615 at [7].

[81] There are two reasons why the application for non-party discovery against CityMed must be dismissed.

[82] First, Dr Culpan has already filed an affidavit which is, in effect, an affidavit of documents. Non-party discovery has in fact been achieved. It is therefore not necessary for the Tribunal to make a formal discovery order. Duplication would be unnecessary, disproportionate and inconsistent with the just, speedy and inexpensive determination of these proceedings.

[83] Ms Guo's real complaint is that she does not believe Dr Culpan properly complied with her IPP 6 request. She believes this failure has continued into his affidavit. However, she has not shown good reason to believe that what Dr Culpan has said on oath is incomplete or wrong.

[84] Second, the proper venue for a determination of the complaint of incomplete compliance by Dr Culpan with the IPP 6 request was the hearing before the Tribunal on 14 May 2018 in which Ms Guo was the plaintiff and Dr Culpan the defendant. As stated in the decision given on 18 December 2020 declining Ms Guo's application for an oral hearing of the non-party discovery application, it is wrong in principle that an application for non-party discovery against CityMed be permitted to involve a collateral re-hearing of Ms Guo's complaint that Dr Culpan failed to make full disclosure when responding to her IPP 6 request.

[85] Put another way, the issue whether Dr Culpan gave access to such of Ms Guo's personal information which was held by him and CityMed in a way that permitted the information to be readily retrieved is not appropriate for determination in the context of proceedings to which neither Dr Culpan nor CityMed is a party. Particularly when, in proceedings in which Dr Culpan was a party, Ms Guo frustrated determination of her complaints by refusing to allow counsel for Dr Culpan opportunity to challenge and test her claims by way of cross-examination.

[86] This fundamental objection is not surmounted by the procedural device of seeking discovery against CityMed rather than Dr Culpan. The IPP 6 request was directed to Dr Culpan and as he has explained in his affidavit sworn on 19 November 2020, the records were essentially about his dealings with Ms Guo and PwC. In particular, all correspondence to and from PwC came through him rather than the receptionists or other staff at CityMed.

Conclusion on application for non-party discovery

[87] For the above reasons the application by Ms Guo for non-party discovery against CityMed is dismissed.

ORDERS

[88] The following orders are made:

> **PwC – discovery**
>
> **[88.1]** Both Ms Guo and PwC are to give formal discovery in a manner and form which complies with High Court Rules, Part 8, Subpart 1 adapted where necessary to take account that discovery is being given at the direction of the Tribunal, not by the High Court.

[88.2] In particular, each party must file and serve an affidavit of documents that complies with High Court Rules, r 8.15.

[88.3] The affidavits of documents are to be filed and served within a period of 30 working days after delivery of this decision and in any event no later than 4pm on Thursday 24 June 2021.

[88.4] Once the affidavits of documents have been filed the Secretary is to convene a further case management teleconference to determine the next steps in these proceedings. Memoranda are to be exchanged three working days prior to the teleconference setting out the further directions sought by the parties.

[88.5] Leave is reserved to both parties to make further application should the need arise.

PwC – application for search order

[88.6] The application by Ms Guo for a search order against PwC is dismissed.

PwC – application under HRA, s 122A

[88.7] The application by Ms Guo under HRA, s 122A (removal of issue to High Court) is dismissed.

CityMed – application for non-party discovery

[88.8] The application by Ms Guo for non-party discovery against CityMed is dismissed.

PwC and CityMed – application for witness summons

[88.9] The two witness summons applications addressed to unidentified staff at PwC and CityMed are confirmed as having been withdrawn by Ms Guo.

Leave reserved

[88.10] Leave is reserved to both parties and to the non-party to make further application should the need arise.

COSTS

[89] Costs are reserved.

....

Mr RPG Haines ONZM QC
Chairperson