

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

DATE OF HEARING: Heard on the papers

DATE OF LAST SUBMISSION: 5 November 2021

DATE OF DECISION: 14 February 2022

**DECISION OF CHAIRPERSON ON PLAINTIFF'S APPLICATION FOR FURTHER
DISCOVERY AND CHALLENGE TO PRIVILEGE CLAIM¹**

¹ [This decision is to be cited as *Guo v PwC (Further Discovery)* [2022] NZHRRT 6.]

INDEX

INTRODUCTION	[1]
Legislative changes	[7]
BACKGROUND CIRCUMSTANCES	[9]
Discovery and the importance of relevance	[14]
Pleadings – the statement of claim	[16]
Pleadings – the statement of reply	[18]
THE APPLICATION FOR FURTHER DISCOVERY	[20]
The application	[20]
Ms Guo’s affidavit in support – “discovery incomplete”	[21]
THE NOTICE OF OPPOSITION BY PWC	[26]
The evidence filed by PwC	[28]
The affidavit sworn by Mr McCulloch on 16 October 2020	[29]
The affidavit of documents sworn by Mr McCulloch on 24 June 2021	[31]
The affidavit of Ms HG Wolk dated 22 October 2021	[32]
The grounds of opposition	[34]
The reply by Ms Guo	[35]
DISCUSSION	[36]
Application of High Court Rules	[36]
ALLEGATION THAT DISCOVERY INCOMPLETE	[37]
The relevant principles	[37]
PwC under obligation to disclose irrelevant documents	[39]
“Significant parts missing”	[40]
“Broken numbering”	[43]
PwC affidavit of documents either unreliable or information was selectively destroyed	[47]
The “CEO Reports”	[49]
Part 5 of affidavit of documents “unreliable”	[54]
Conclusion on application for further and better discovery	[59]
THE APPLICATION TO SET ASIDE OR MODIFY PWC’S CLAIM TO PRIVILEGE	[61]
ORDERS	[71]
FURTHER CASE MANAGEMENT TELECONFERENCE	[72]
COSTS	[74]

INTRODUCTION

[1] As required by the decision in *Guo v PwC (Discovery and Search Order)* [2021] NZHRRT 22 (12 May 2021) at [44], Ms Guo and PricewaterhouseCoopers (PwC) have each given formal discovery by filing and serving an affidavit of documents which is compliant with the relevant High Court Rules. Ms Guo has sworn her own affidavit. The affidavit for PwC was on 24 June 2021 sworn by Mr SJ McCulloch who is employed as the General Counsel for PwC.

[2] At a telephone conference held on 19 August 2021 Ms Guo asserted it appeared to her that the discovery given by PwC was incomplete. An order was sought that the “missing” documents be released to her. She also asserted it was “really unusual” that PwC had claimed privilege in relation to certain documents. She asked that an order be made directing the release to her of the documents for which privilege had been claimed.

[3] As PwC strongly resists the suggestion that its discovery is incomplete and as it further denies privilege has been wrongly claimed, by *Minute* dated 19 August 2021 Ms Guo was directed to file and serve a formal application for further discovery by PwC and for an order setting aside or modifying the claim by PwC to privilege or confidentiality.

[4] The application, affidavit in support and submissions by Ms Guo and the notice of opposition, supporting affidavit and submissions by PwC were all filed on time in accordance with the timetable directions agreed at the teleconference on 19 August 2021 and formalised in the *Minute* of that date.

[5] Because the completion dates for both Ms Guo and PwC fell during the COVID-19 Alert Level 4 which commenced at 11:59pm on 17 August 2021, the affidavits filed by the parties were unsworn. Sensibly, neither party has taken issue with this and the unsworn affidavit dated 1 October 2021 by Ms Guo and the unsworn affidavit by Ms HG Wolk dated 22 October 2021 have accordingly been both read and used, a course which would in any event be open under the Human Rights Act 1993 (HRA), s 105 (Tribunal to act according to the substantial merits of the case, without regard to technicalities) and HRA, s 106(1)(d) (receipt of evidence whether it would be admissible in a court of law). This approach is consistent with the High Court Rules 2016 (HCR), r 9.73(4) and (5).

[6] As recorded in the *Minute* dated 19 August 2021 at [19], both Ms Guo and PwC are in agreement the two applications now made by Ms Guo are to be determined on the papers, that is, without an oral, face to face hearing.

Legislative changes

[7] The information access request under IPP 6 which is at the heart of the present proceedings 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.

[8] 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

[9] The background circumstances to this case have already been set out in *Guo v PwC (Discovery and Search Order)*. For that reason only a brief account follows.

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

[11] 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.

[12] In August 2015, some five years and seven months after those events, Ms Guo made her 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:

[12.1] HRRT024/2016: *Guo v PwC*;

[12.2] HRRT025/2016: *Guo v Culpan*.

[13] 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.

Discovery and the importance of relevance

[14] Central to the obligation on a party to disclose documents that are or have been in that party's control is the relevance of those documents to the matters in issue as defined by the pleadings. See for example *RHH Ltd v Anderson* [2018] NZHC 2039 at [12]:

[12] Relevance is determined by the pleadings. In standard discovery, a document is relevant if the document or its contents could be used as evidence in the proceeding. In other words, if a document or the information in the document (even if the document is hearsay), would have a tendency to prove or disprove a matter in issue in the proceeding, it will be relevant. Accordingly, the relevance test under s 7(3) of the Evidence Act 2006 bears on relevance for standard discovery. Standard discovery does not require a party to disclose documents that are no more than background. Equally, if a matter is no longer in issue between the parties, for example, if a matter is common ground, there is no requirement for documents on that matter to be disclosed. The court does not try the merits of a case before deciding the relevance of documents. Instead, it assumes that the case of the party seeking discovery is true. As a rider to that, if it is clear that a party is on a hiding to nothing on a particular issue discovery will not be ordered for documents on that matter because that will be disproportionate.

[15] It is therefore necessary to briefly review the pleadings in the present case.

Pleadings – the statement of claim

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

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

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

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

[16.4] 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.

[16.5] PwC did not allow the Commissioner's investigating officer to enter PwC's premises to inspect its system.

[17] 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 has been heard and dismissed.

Pleadings – the statement of reply

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

[18.1] 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.

[18.2] On 2 October 2015 PwC provided Ms Guo with a complete duplicate copy of her full personnel file.

[18.3] 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.

[18.4] If there was any delay in complying with the Act, PwC has by email dated 7 March 2016 made apology to Ms Guo.

[18.5] PwC did not in any way obstruct the investigation by the Privacy Commissioner.

[19] Based on the statements of claim and reply and taking into account the various affidavits by Ms Guo and the affidavit by Mr McCulloch sworn on 16 October 2020 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:

[19.1] The terms of Ms Guo's IPP 6 request.

[19.2] Whether the decision on the request by PwC complied with PA 1993, s 40(1).

[19.3] 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.

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

THE APPLICATION FOR FURTHER DISCOVERY

The application

[20] In her application dated 1 October 2021 for further discovery and for release of the privileged documents Ms Guo makes two assertions:

[20.1] The formal discovery given by PwC is incomplete. It is alleged there are "significant" parts of her personal information which have not been disclosed. The affidavit of documents sworn by Mr McCulloch on 24 June 2021 is "both incomplete and unreliable".

[20.2] The claim to privilege made in Mr McCulloch's affidavit of documents is unjustified as the documents in question relate to her privacy requests and contain information about how PwC was responding to those requests. The withheld documents would likely provide evidence relating to the "key" issues whether PwC withheld or destroyed Ms Guo's information as "part of the course of conduct to frustrate the disclosure of [Ms Guo's] personal information as requested and as investigated by the [Office of the Privacy Commissioner]".

Ms Guo's affidavit in support – "discovery incomplete"

[21] In her supporting affidavit dated 1 October 2021 Ms Guo gives four reasons for asserting PwC's discovery is incomplete:

[21.1] Significant parts of her personal information are missing from the discovered documents.

[21.2] The documents listed in Mr McCulloch's affidavit of documents are not numbered sequentially. Instead the numbering is broken.

[21.3] In Part 4 of his affidavit Mr McCulloch discloses that in around 2011 some documents could have been lost or destroyed in the ordinary course of business. This statement is challenged by Ms Guo who refers to the fact that advice given by the Ministry of Business, Innovation and Employment (MBIE) on its webpage is that an employment history must be kept for at least six years. By contrast her

records were destroyed by PwC within two years. Ms Guo reasons this leads to two possibilities regarding Mr McCulloch's evidence:

[21.3.1] His evidence is unreliable. Ms Guo asserts that the information disclosed to her in 2015 related to information created in 2008, 2009, 2010 and 2011 but lacks significant information recording her employment history with PwC in 2009 and 2010. She contends it is highly unlikely PwC just so happened to have selectively lost such information.

[21.3.2] PwC selectively destroyed the information to obstruct potential litigation by Ms Guo. If such destruction was in breach of the MBIE rules, PwC would need to identify what documents were destroyed, why they were destroyed, when they were destroyed and who was involved in the destruction.

[21.4] Mr McCulloch's evidence that PwC have lost or destroyed PwC's "CEO Reports" is unreliable. Ms Guo had been advised by the Office of the Privacy Commissioner such reports were within the scope of Ms Guo's privacy requests even if they did not contain her personal information. She contends it was highly unlikely PwC was unable to retrieve the reports.

[21.5] In Part 5 of his affidavit Mr McCulloch lists as documents that have never been in PwC's control "documents in the possession, power and control of Dr Culpan or CityMed". This evidence is unreliable as PwC had communications with Dr Culpan and/or CityMed about Ms Guo in 2009, 2010, 2011 and 2015.

[22] In relation to the issue of privilege, Ms Guo refers to the fact that her request for her "work emails" had been declined by PwC on the grounds that they fell outside the scope of her request for personal information as the emails contained confidential information belonging to PwC's clients. She asserts this reason was not genuine and also unreliable. She says that because PwC sought legal advice in the course of responding to her requests, it "should have received legal advice that my personal work emails fell within the scope of my privacy requests when it twice refused my requests on unreliable reasons". The privileged correspondence is therefore likely to reveal the "true reason" why the file provided to her was selective and did not contain all her personal information.

[23] In her submissions Ms Guo explains the point in the following terms:

31. Whether PwC has withheld my personal information and/or whether it has destroyed such material as part of the course of conduct to frustrate the disclosure of my personal information as requested and as investigated by the OPC are the fundamental issues in dispute.
32. These privileged correspondences contain critical information of the process in which PwC was making its responses to my requests. Their release is likely to provide evidence assisting the Tribunal to solve the fundamental issues and hence bring critical consequence on the determination of this present case.

[24] Ms Guo further submits there has been an implied waiver of privilege by PwC by reason of the following:

[24.1] In his discovery affidavit sworn on 24 June 2021 Mr McCulloch provides an overview of the searches overseen by him to ensure PwC properly discharged its discovery obligations.

[24.2] Mr McCulloch has voluntarily disclosed correspondence received by PwC from Bell Gully.

[25] Ms Guo submits that to receive a fair hearing she requires complete discovery by PwC as well as access to the documents for which privilege has been claimed.

THE NOTICE OF OPPOSITION BY PwC

[26] Unsurprisingly, the application by Ms Guo is opposed by PwC.

[27] Reference must first be made to the evidence relied on by PwC.

The evidence filed by PwC

[28] PwC relies on three affidavits.

The affidavit sworn by Mr McCulloch on 16 October 2020

[29] On 16 October 2020 Mr McCulloch swore an affidavit in opposition to Ms Guo's application for discovery, subpoenas and search order. As mentioned, Mr McCulloch is employed as General Counsel by PwC. It is not intended to recite at length the content of this affidavit, particularly given that some of the issues addressed by him have since been determined by the Tribunal in *Guo v PwC (Discovery and Search Order)*.

[30] However, the following evidence is of continuing relevance to the present application:

[30.1] At the time Ms Guo made her personal information request PwC held a physical, hard copy of Ms Guo's personnel file in its archives. That file was retrieved from archives and a full copy made. No documents were omitted from the copy.

[30.2] On 2 October 2015 PwC provided Ms Guo with a complete duplicate copy of her full personnel file pursuant to her information privacy request.

[30.3] Included in the information privacy request was a request by Ms Guo for copies of her "work emails". To the extent that her work emails dealt with client matters and did not contain personal information about Ms Guo, PwC took the view the request was outside the scope of the Privacy Act 1993.

[30.4] On the assumption that her "work emails" contained any personal information about Ms Guo, PwC sought to retrieve any such emails but they were not readily retrievable:

[30.4.1] In October 2015 PwC's existing CommVault backups for server NZ-AKLNBX001, which hosted the Lotus Notes mail files, only went back to 23 December 2011.

[30.4.2] Therefore PwC instructed its internal Information Technology business unit, NZiT, to review all backups in 2009 and 2010. All backups of Lotus Notes mail files prior to December 2011 were created on its old ArcServe system. However, the ArcServe backup system was decommissioned some time before October 2015 and the old tape drive for the system dismantled and disposed of.

[30.4.3] For these reasons, it was not possible for NZiT to restore any files from the old ArcServe backup system and PwC was not able to recover any other copies of Ms Guo's mail file.

[30.5] Mr McCulloch explained that in 2009 PwC maintained a "paper based" system of record. In other words, emails and documents were printed and retained on paper files and the electronic copies were not retained. The "personnel file" provided to Ms Guo in 2015 was a complete duplicate copy of the personnel file from 2009 held by PwC in 2015. It is not now possible to retrieve electronic copies of the material from 2009.

The affidavit of documents sworn by Mr McCulloch on 24 June 2021

[31] The affidavit of documents sworn by Mr McCulloch on 24 June 2021 conforms with form G37 prescribed by HCR, r 8.15 and complies with the requirements of the High Court Rules, particularly HCR 8.15 and 8.16. It is not practical to reproduce the content of the affidavit here beyond recording the following key assertions relevant to Ms Guo's complaint:

[31.1] Mr McCulloch explicitly states that he understands the obligations imposed by the discovery order made by the Tribunal.

[31.2] To fulfil those obligations he has overseen searches for potentially discoverable documents and believes PwC has diligently and proportionately searched for all documents required to be discovered under the discovery order. The exercise included taking the following practical steps:

- (a) reviewing the scope and sufficiency of earlier searches for documents that may contain personal information about the plaintiff in response to her Privacy Act requests, which included:
 - (i) searching for and retrieving any files in PwC's hard copy archives that were itemised under the plaintiff's name (the results comprised the plaintiff's personnel file, which was then provided in complete duplicate to the plaintiff);
 - (ii) investigating whether the plaintiff's PwC email account file could be restored from archives, including reviewing available back-ups from 2009 and 2010 for a copy of the email account file;
 - (iii) making enquiries of individuals within PwC who were involved in responding to the plaintiff's personal information requests;
 - (iv) making further enquiries within PwC, including verbally, about whether any of the more specific kinds of documents referred to by the plaintiff in the course of her correspondence were held in records that were readily available, or if they were otherwise aware that these kinds of records once existed; for example, PwC specifically enquired about any "complaint letters" the plaintiff may have sent using her PwC email, any resignation letter, any departure survey, or any CEO report containing personal information about the plaintiff.
- (b) considering whether PwC has or had any other electronic or hard copy records that may have contained personal information about the plaintiff, and which were:
 - (i) readily retrievable in August 2015;
 - (ii) not subject to another ground for withholding (e.g. under s 29(1)(b) of the Privacy Act 1993); and
 - (iii) potentially discoverable in this proceeding;
- (c) searching for potentially discoverable documents related to other matters at issue in this proceeding, including PwC's response to the plaintiff's requests for personal information about her;
- (d) requesting that the defendant's solicitors, Bell Gully, search its own records for potentially discoverable documents;
- (e) sending documents potentially responsive to the discovery order to Bell Gully for filtering, review and listing.

[31.3] In Part 2 of his affidavit Mr McCulloch lists the documents that are in the control of PwC and for which PwC claims privilege. In relation to each group of documents Mr McCulloch states the nature of the privilege which applies. The same references are used in the list in Part 1 to identify the ground(s) of privilege claimed for redacted privileged material.

[31.4] Mr McCulloch deposes that to the best of his knowledge and belief, his affidavit is correct in all respects and carries out PwC's obligations under the discovery order.

The affidavit of Ms HG Wolk dated 22 October 2021

[32] The third affidavit filed by PwC is by Ms HG Wolk, a solicitor in the employ of Bell Gully, the solicitors for PwC. In this affidavit Ms Wolk addresses the contention by Ms Guo that the "broken numbering" in Mr McCulloch's affidavit of documents indicates that documents have been withheld from PwC's discovery.

[33] Ms Wolk explains:

[33.1] That she was part of the team at Bell Gully which was responsible for assisting PwC to comply with its discovery obligations. As part of this exercise, PwC searched for, extracted and compiled a bundle of documents which were potentially discoverable pursuant to the Tribunal's discovery orders.

[33.2] Once the potentially relevant documents had been compiled, each of the documents were uploaded into EDT (Bell Gully's eDiscovery software) and assigned a unique document identification ("Doc ID") number in accordance with the listing and exchange protocol contained in Schedule 9, Part 2 of the High Court Rules.

[33.3] The documents were then reviewed for relevance and privilege.

[33.4] In preparing the list of documents to be exchanged, any irrelevant documents were withheld from disclosure as well as any (wholly) privileged documents. The Bell Gully team also took steps to remove exact duplicate documents (de-duplication). As a result, irrelevant, exact duplicate and (wholly) privileged documents were not listed individually with their Doc ID numbers in Part 1 of the Schedule to Mr McCulloch's affidavit of documents. Because these documents were not listed, "broken numbering" resulted.

[33.5] For a number of documents listed in Part 1 of the Schedule, only part of the document was privileged. Those documents were listed in Part 1 as having redactions. The grounds for redaction were identified for each document in accordance with the listing and exchange protocol.

[33.6] Once the documents were reviewed for relevance and privilege, and de-duplicated, they were then reassembled into chronological order (save for attachments, which were listed after their "parent" document). As a consequence, the document numbering is not sequential.

The grounds of opposition

[34] The grounds on which PwC opposes the orders sought by Ms Guo follow:

[34.1] Ms Guo has not discharged the onus of showing there is credible evidence that the existing affidavit of documents is incomplete.

[34.2] Through its General Counsel PwC has sworn on oath that PwC understands the obligations imposed by the discovery order and has fulfilled those obligations by diligently and proportionately searching for all documents required to be discovered by PwC under the discovery order.

[34.3] Ms Guo has misunderstood the numbering of the documents appearing in the Schedule to the affidavit of documents.

[34.4] PwC has made a reasonable search for the documents within the discovery order and has not selectively destroyed Ms Guo's employment records in an attempt to defeat her claims.

[34.5] PwC has provided a full explanation of the documents that are no longer in its control (Part 4) and documents known to PwC but which have never been in the control of PwC (Part 5).

[34.6] Ms Guo has not put forward credible evidence in support of her challenge to PwC's claim to privilege and cannot go behind PwC's affidavit of documents. The particular grounds of privilege are sufficiently stated in the list of documents.

[34.7] A number of documents listed in Part 1 of the Schedule contain privileged portions. Those documents were discovered with redactions and the basis for claiming privilege in the redacted portions has been clearly identified.

The reply by Ms Guo

[35] In her reply submissions Ms Guo submits:

[35.1] Under the discovery order, PwC was required to discover irrelevant documents. As it failed to do so its discovery is incomplete and the affidavit of documents by Mr McCulloch "incomplete and unreliable".

[35.2] She maintains the loss or destruction of PwC documents could not have been in the ordinary course of business. Agencies should not be allowed to defeat the Privacy Act by losing or destroying information.

[35.3] To serve the interests of justice, the privilege claimed by PwC in Part 1 of the affidavit of documents should be waived.

DISCUSSION

Application of High Court Rules

[36] While the High Court Rules do not apply to the Tribunal, they are relevant because (as in the present case) they are drawn on by the Tribunal to provide guidance when the Tribunal exercises its jurisdiction to require discovery or disclosure of information. Application of the Rules is, however, subject to the proviso they are to be appropriately modified and adapted to the Tribunal's distinctive jurisdiction. See *Boyce v Westpac New Zealand Ltd (Non-Party Discovery)* [2015] NZHRRT 31 at [9] to [12] and *Director of Human Rights Proceedings v Commissioner of Police (Discovery)* [2020] NZHRRT 32 at [24].

ALLEGATION THAT DISCOVERY INCOMPLETE

The relevant principles

[37] As pointed out in *Lighter Quay Residents' Society Inc v Waterfront Properties (2009) Ltd* [2017] NZHC 818 at [16], HCR, r 8.19 allows an order for particular discovery to be made if 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 one or more documents or a group of documents that should have been discovered. The relevant principles were stated in the following terms:

- (a) Existence of the document does not have to be established on the balance of probabilities on a "more likely than not" basis. A lower threshold is required, which may vary given the relevance of the documents and issues of proportionality.
- (b) While there is a presumption that affidavits of documents filed are conclusive, an application under r 8.19 is a proper way to circumvent the conclusiveness rule. The party seeking further discovery has to establish that the existing affidavit of documents is incomplete.
- (c) Whether a document "should have been discovered" should be determined by reference to the "adverse documents" test in r 8.7, or any stricter test imposed under tailored discovery pursuant to r 8.8.
- (d) A four-stage approach is convenient:
 - (i) Are the documents relevant, and if so how important will they be?
 - (ii) What are the grounds, and what is the probative value of those grounds, for the belief that the documents sought exist?
 - (iii) Is discovery proportionate?
 - (iv) Weighing and balancing these matters, is an order appropriate?

[Footnote citations omitted]

[38] The applicant bears the burden of establishing the relevant grounds to believe under r 8.19. See *Lighter Quay Residents' Society Inc* at [17].

PwC under obligation to disclose irrelevant documents

[39] The submission that PwC is required to discover irrelevant documents is so clearly untenable that it will not be addressed. Ms Guo has not demonstrated (in terms of *RHH Ltd v Anderson* at [12]) that PwC has withheld any documents which PwC was required to disclose in the context of standard discovery.

"Significant parts missing"

[40] Ms Guo makes a number of assertions in her affidavit including that "significant parts" of her personal information are "missing" from the discovery given by PwC. But no evidence has been produced to support this allegation. It is not sufficient for a party applying under r 8.19 to nominate possible documents and then require the party resisting discovery to show that those documents are not relevant or do not exist. To allow that would reverse the onus set out in r 8.19 and could lead to speculative applications. See *RHH Ltd v Anderson* [2018] NZHC 2032 at [13].

[41] As against the unsupported allegation made by Ms Guo, PwC (through its General Counsel) has sworn on oath it understands the obligations imposed by the discovery order and has fulfilled those obligations by diligently and proportionately searching for all documents required to be discovered by PwC under the order.

[42] It follows there are no grounds to believe that PwC has not discovered relevant documents.

“Broken numbering”

[43] Ms Guo contends the “broken numbering” in PwC’s list of documents suggests documents have been withheld and that as a consequence PwC’s discovery is incomplete.

[44] As PwC correctly submits, this argument rests on a misunderstanding of the discovery process and (in particular) the process for assigning unique document identification numbers to potentially relevant documents during the discovery process.

[45] The numbering process has been fully explained by Ms Wolk in her affidavit dated 22 October 2021.

[46] There are simply no grounds to support Ms Guo’s suspicions.

PwC affidavit of documents either unreliable or information was selectively destroyed

[47] The argument by Ms Guo appears to be that because she believes “MBIE rules” require retention of certain employment records for a set period of time, the destruction of her records by PwC within that period means it is unlikely her records were accidentally destroyed. She infers PwC destroyed the information to damage the prospect of her filing proceedings against PwC.

[48] This submission is based entirely on suspicion and supposition. Even if taken at face value, the MBIE “rule” provides no logical basis for the inferences drawn by Ms Guo. There are no grounds on which one could doubt or reject the evidence of Mr McCulloch regarding the diligence with which PwC has approached its discovery obligations.

The “CEO Reports”

[49] In Part 4 of his affidavit of documents, Mr McCulloch lists documents which are no longer in the control of PwC. One category is described as:

PwC “CEO Reports” containing personal information about the plaintiff.

[50] Ms Guo submits it is “highly unlikely” PwC was unable to retrieve these reports. However, no evidence has been offered to support this submission.

[51] For PwC it is pointed out that the evidence of Mr McCulloch establishes PwC made a reasonable search for the documents within the discovery order and it is submitted there is no substance to Ms Guo’s serious allegation that PwC has selectively destroyed her employment records in an attempt to defeat her litigation.

[52] The submissions for PwC stress that:

[52.1] PwC is well aware of the obligation to preserve discoverable documents once a proceeding is reasonably contemplated. In the submission of PwC the proceeding was not reasonably contemplated until 31 March 2016, when PwC received a final view letter from the Office of the Privacy Commissioner. This is the earliest day on which litigation could be considered a real likelihood rather than a mere possibility – some six years after Ms Guo’s employment came to an end on 19 February 2010.

[52.2] Documents were not lost or deliberately destroyed. Rather, in Mr McCulloch’s affidavits of 16 October 2020 and 24 June 2021 PwC has explained why:

[52.2.1] Any electronic documents (such as Ms Guo’s “work emails” and PwC “CEO Reports”) were not recoverable after PwC decommissioned its ArcServe system in or around 2011 (many years before Ms Guo made her personal information request); and

[52.2.2] Any personal information which was not kept on Ms Guo’s personnel file cannot now be retrieved electronically.

[52.3] As appears in Mr McCulloch’s affidavits, PwC has met its obligation to make a reasonable and proportionate search for potentially discoverable documents. In particular PwC has carefully considered whether it can take steps to recover any irretrievable documents.

[52.4] In accordance with HCR, r 8.14, Mr McCulloch’s first affidavit explains why certain documents are not recoverable and the reasons why they cannot be recovered: *Weir v Eini* [2020] NZHC 465 at [31] and *Pyne Gould Corporation Ltd v Bath Street Capital Ltd* [2020] NZHC 1247 at [31].

[53] Each of these points is well made. All are accepted. By contrast the bald submission by Ms Guo that she was entitled to the CEO Reports and that it was “highly unlikely” PwC was unable to retrieve them is no more than speculation and assertion. This cannot on any rational basis afford “grounds for believing” under HCR, r 8.19.

Part 5 of affidavit of documents “unreliable”

[54] In Part 5 of his affidavit of documents Mr McCulloch addresses documents that have never been in the control of PwC. The documents are described as follows:

Part 5

Documents that have never been in the defendant’s control –

Documents in the possession, power and control of the plaintiff.

Documents in the possession, power and control of Dr Culpan or CityMed.

[55] Ms Guo says this description is unreliable because it is known there were communications between PwC and Dr Culpan and PwC has clearly been in control of those communications.

[56] But again there is no substance to the point and Ms Guo appears to have misunderstood standard discovery.

[57] As correctly explained by PwC in its submissions, PwC has discovered communications between PwC and Dr Culpan/CityMed under Part 1. However, this section of the affidavit of documents simply identified documents that are **known** to PwC to have **never** been in PwC's control, but which would be discoverable if PwC had control of them.

[58] In other words, PwC knows that Ms Guo, Dr Culpan and CityMed will have possession, power and control of **other** documents which are not (and have never been) in the control of PwC.

Conclusion on application for further and better discovery

[59] As none of the points advanced by Ms Guo come remotely close to providing grounds for believing that PwC has not discovered documents that should have been discovered, the presumption that PwC's affidavit of documents is conclusive continues to apply.

[60] The application for further and better discovery is dismissed.

THE APPLICATION TO SET ASIDE OR MODIFY PWC'S CLAIM TO PRIVILEGE

[61] Ms Guo has applied for the release to her of the documents for which privilege has been claimed in Part 1 of the Schedule to Mr McCulloch's affidavit of documents. Her argument is that because PwC took legal advice relating to her information privacy request, the documents for which privilege has been claimed will likely provide evidence relating to the "key" issue whether PwC has withheld information from Ms Guo or destroyed information to frustrate full disclosure of her personal information.

[62] The first point to note is that for the reasons set out under the previous section of this decision there is no evidence to suggest PwC withheld information from Ms Guo or destroyed any information. The application to set aside the claim to privilege is based on groundless suspicion and amounts to an assertion that because Ms Guo honestly but mistakenly believes PwC has in some way acted inappropriately, Ms Guo can secure an order from the Tribunal directing the release to her of the documents for which privilege has been claimed.

[63] The application rests on a fundamental misconception of the nature of privilege for communications with legal advisers as well as litigation privilege (which together make up legal professional privilege). Both forms of privilege are protected by the Evidence Act 2006, ss 53, 54 and 56.

[64] If a solicitor swears an affidavit as to the privileged status of documents, the court requires cogent evidence to challenge that view, before going behind the affidavit pursuant to HCR, r 8.25. See *Foley's Transport Ltd v Weddel New Zealand Ltd (in rec & liq)* (1996) 9 PRNZ 392 (HC) at 396.

[65] As mentioned, a number of documents listed in Part 1 of the Schedule contain privileged portions. Those documents were discovered with redactions and the basis for claiming privilege in the redacted portions has been clearly identified.

[66] Ms Guo has not put forward a credible reason to support her challenge to PwC's claim to privilege and consequently cannot go behind Mr McCulloch's affidavit of

documents. The particular grounds of privilege are sufficiently stated in the list of documents.

[67] To the degree that the documents listed in Part 1 of the Schedule are the subject of litigation privilege (Evidence Act 2006, s 56) the outcome is the same. Ms Guo has provided no credible basis for challenging the privilege claim. More is required than suspicion on her part.

[68] In the present case the particular grounds of privilege for the redactions are sufficiently stated in the list in accordance with the listing and exchange protocol and HCR, r 8.28(2) and there are no rational grounds for the suspicions held by Ms Guo.

[69] As to the submission by Ms Guo that privilege has been waived, it is necessary to observe that the correspondence which is the subject of the alleged implied waiver is not specified by Ms Guo, nor is the nature of the alleged disclosure other than the fact that Mr McCulloch has followed Form G37 prescribed by the High Court Rules. As to this, listing of the documents in the affidavit of documents does not amount to waiver of the privilege.

[70] Consequently the challenge to the privilege claim must fail.

ORDERS

[71] For the reasons given the application by Ms Guo for further discovery is dismissed as is her challenge to the privilege claim.

FURTHER CASE MANAGEMENT TELECONFERENCE

[72] 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.

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

COSTS

[74] Costs are reserved.

.....
Mr RPG Haines ONZM QC
Chairperson