IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-109

BETWEEN	VAUGHAN BRANDON JACK MAYBURY Plaintiff
AND	IRENE HELENA COOK First Defendant
AND	KENNETH WILLIAM RAE Second Defendant
AND	HELEN JENNIFER RAE Third Defendant

Hearing: 29 July 2008

Appearances: C.S. Chapman - Plaintiff
K.W. Rae - Second Defendant in person

Judgment: 6 August 2008

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 6 August 2008 at 4.00 p.m. pursuant to r 540(4) of the High Court Rules 1985.

Solicitors: Gibson Sheat, Private Bag 31 905, Lower Hutt

Introduction

[1] On 16 July 2008 the plaintiff filed an application for particular discovery and production in this proceeding against the second and third defendants.

[2] The application was opposed by the second and third defendants by Notice of Opposition dated 28 July 2008.

[3] Significant discovery has already taken place in this proceeding. On 20 May 2008 the plaintiff filed his list of documents and the first, second and third defendants filed their initial verified list of documents. This, however, was in a non-complying form and following a direction issued by Associate Judge Abbott on 12 June 2008 the first defendant filed her second list of documents and the second and third defendants filed their second list of documents on 26 June 2008.

[4] The plaintiff's position is that this discovery is deficient. In his 16 July 2008 application he seeks the following discovery orders:

> *"1. That the second and third defendants discover and produce for the plaintiff's inspection all documents relating to poolside supervision at the Otaki pool during periods of public time from 1 July 2006 to 9 May 2007 inclusive including:*
>
> *a) records of staff qualifications for poolside duties and their first aid currency;*
>
> *b) staff rosters;*
>
> *c) staff time sheets;*
>
> *d) staff payroll records;*
>
> *e) all file notes or internal memoranda (including emails) in any way relating to poolside staffing matters;*
>
> *f) the record of any incident or complaint that refers to the number of staff engaged on poolside duties;*

g) all written communications concerning poolside staffing matters between the second and third defendants or either of them on the one hand and any supervisory, certifying, monitoring or testing agency on the other hand;

h) all written communications concerning poolside staffing matters between the second and third defendants or either of them on the one hand and their public liability insurers on the other hand; and

i) all written communications concerning poolside staffing matters between the second and third defendants or either of them on the one hand and officers of the Kapiti Coast District Council on the other hand;

2. That the second and third defendants discover and produce for the plaintiff's inspection the unredacted originals of documents 25 and 44 to 51 in their second list of documents sworn 25 June 2008;

3. That the second and third defendants discover and produce for the plaintiff's inspection the unredacted copies of documents 25 and 44 to 51 in their second list of documents sworn 25 June 2008;

4. That the second and third defendants itemise the documents referred to in item 11 of their second list of documents sworn 25 June 2008 showing the date, description, author and, if applicable, addressee of each such item;

……”.

Background Facts

[5] In this proceeding the plaintiff, an architect living in Otaki, claims against each of the defendants in defamation.

[6] The events in question appear to relate to two incidents at the Otaki pools complex on 9 May 2007 and 28 June 2007 and subsequent events which have arisen.

[7] The plaintiff says he has lived in and operated his architecture business from the Kapiti area for the past 18 years.

[8] The first defendant is a pool attendant employed by the second and third defendants at the Otaki pools complex.

[9] The second and third defendants have a contract with Kapiti Coast District Health for the management and servicing of both the Otaki pools complex and the Waikanae pools complex.

[10] On 9 May 2007 the plaintiff was swimming at the Otaki pools complex and at some point it seems he entered into a discussion or altercation with the first defendant. This discussion involved a complaint made by the plaintiff to the first defendant about the lack of adequate supervision at the Otaki pools complex on that day.

[11] Subsequently, the plaintiff alleges that the first defendant stated in a document she had prepared and delivered to the second defendant on 10 May 2007 that, in the course of the plaintiff making the complaint to her at the Otaki pool complex on the preceding day, he had acted entirely inappropriately and in an aggressive and intimidating manner. On this, the plaintiff contends that she defamed him. He says that the natural and ordinary meaning of the offending words in question used in this document were defamatory and were understood to mean:

> *"1. The plaintiff dealt with the first defendant in an unpleasant, argumentative, overbearing, threatening, intimidatory, objectionable, offensive, unreasonable and unacceptable manner;*
>
> *2. The plaintiff intimidated the first defendant by waving his hands.*
>
> *3. The plaintiff shouted at the first defendant.*
>
> *4. The plaintiff swore at the first defendant.*
>
> *5. The plaintiff lost his temper.*
>
> *6. The plaintiff gratuitously disparaged the first defendant's work as a pool attendant.*

7. *The plaintiff told the first defendant that she was useless.*

8. *The plaintiff did not treat the first defendant with appropriate courtesy and respect.*

9. *The plaintiff's behaviour towards the first defendant was such as to require him to apologise to her.*

[12] The plaintiff complains that the first defendant published the words in question in delivering this document to the second defendant who then republished it by forwarding the document to both the Chief Executive and the Parks and Recreation Manager of the Kapiti Coast District Council.

[13] The plaintiff complains further that also on 9 May 2008 the first defendant spoke to another person, a pool user, about the plaintiff's complaint on that date and said that he, the plaintiff, had *"gone on to abuse me by swearing …"* that *"the plaintiff had commented on my personal life"* and *"the plaintiff had said he would have me dismissed as he knew either a Cabinet Minister/Member of Parliament or the Kapiti Coast District Council Parks and Recreation Manager*."

[14] Next, the plaintiff maintains that on 28 June 2007 the first defendant again defamed him, on this occasion to a Mrs Christine McBeth and a Mrs Anna Morris. This occurred, he said when the first defendant told these two women that the plaintiff *"was abusive to me"* and also that he had described another pool user who was the subject of the plaintiff's original complaint as *"fat, useless and obese"*.

[15] The plaintiff contends that these allegedly defamatory statements made by the first defendant had two major effects. First, he said they caused or contributed to his access to the Otaki pools being suspended from 10 May 2007 until 1 November 2007, and secondly he said they have seriously damaged his reputation and caused him distress and embarrassment.

[16] Finally, as against the second and third defendants the plaintiff contends in his statement of claim that, as employers of the first defendant, they are vicariously liable for the first defendant's alleged defamation. In addition, the plaintiff brings a last cause of action against the second defendant. This relates to a 4 page written

report, a hand-written memorandum and a type-written letter each dated 10 May 2007, which the plaintiff claims contain defamatory material. He says these were published by the second defendant when he passed the report, memorandum and letter to the Chief Executive and Recreation Manager of Kapiti Coast District Council on or about 10 May 2007.

[17] In response, the defendants initially deny that any statements made about the plaintiff were defamatory. Next, they plead by way of affirmative defence, that publication of the incident was protected by qualified privilege. They claim that both the first defendant and the second and third defendants had obligations to communicate the material in question in the case of the first defendant to the other defendants under their employment relationship and in the case of the second and third defendants to the Kapiti Coast District Council in the course of their contractual relationship.

Counsel's Arguments and My Decision

[18] Turning now to the present discovery application before the Court, it is brought pursuant to r 300 and 307 *High Court Rules*. Together with the general discovery requirements set out in r 295, it is clear that documents *"relating to any matter in question in the proceedings"* must be discovered, that is to be discoverable the documents must be relevant.

[19] The long-established test of relevance set out in the judgment of Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 54 (CA) at p63 states:

> It seems to me that *every document* relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, *contains information which may* – not which must – *either directly or indirectly* enable the party requiring the affidavit either to *advance his own case or to damage the case of his adversary*. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the

> case of his adversary, if it is a document which may *fairly lead him to a train of enquiry*, which may have either of those two consequences…
>
> (emphasis added)

[20] This "train of enquiry approach" from the *Peruvian Guano* test has been the subject of some criticism by a number of Judges and commentators, and indeed the Rules Committee in 2003 unsuccessfully recommended that discovery should be confined to documents "directly relevant" to a matter in question in the proceeding. Some have suggested that the *Peruvian Guano* test results in a "monumentally inefficient" process, and indeed the test has been the subject of judicial criticism in New Zealand in *Air New Zealand Limited v Auckland International Airport Limited* (HC AK, M1634-SD00, 30 April 2001, Priestley J). In this case Priestley J noted that the documents under scrutiny in the *Peruvian Guano* case were few in number and significantly fewer than were likely to be involved in the case before him.

[21] Notwithstanding this, the Court of Appeal in *M v L* [1999] 1 NZLR 747, 750 have referred to and implicitly adopted this test for relevance in New Zealand as set out in *Peruvian Guano*, although in doing so, it was noted that it is an "expansive" test.

[22] And, the present position is clearly that the scope of a party's obligation to discover, remains with the traditional wide *Peruvian Guano* test formula.

[23] Under R.300, to grant the order for particular discovery sought here, the Court needs to be satisfied that:

> (1) There are grounds for believing that the plaintiff has not disclosed one or more discoverable documents or a group of documents, and
>
> (2) That it is satisfied that the order <u>is necessary at the time the order is made</u>. (my emphasis)

[24] The documents sought by way of discovery from the second and third defendant here essentially fall into 4 categories. The first of those categories is noted

at paragraph [4](1) of this judgment. Those documents all come under the general heading relating to poolside supervision.

[25] The second category relates to unredacted originals of certain documents outlined in paragraph [4](2) above. Essentially these are said by the plaintiff to be in the possession of the Kapiti Coast District Council, although it is clear from the first affidavit of documents provided by the defendants that these documents were previously in the possession of the defendants. As such, it is said they need to be included in the defendants' discovery exercise.

[26] The third category of documents is outlined in paragraph [4](3) of this judgment. It is clear from their notice of opposition and their first affidavit of documents filed in this proceeding that the defendants do have photocopies of these documents 25 and 44 to 51. It is unredacted copies of these documents which the plaintiff seeks.

[27] Finally, the fourth category of documents outlined in paragraph [4](4) of this judgment relates to a broad group of material for which the defendants claim privilege. The plaintiff complains that it is not clear from the unspecific description of these documents whether or not privilege is properly claimed here. The plaintiff seeks an individual listing of these documents so that he is in a position to decide whether privilege has been properly claimed.

[28] The defendants' Notice of Opposition to the present discovery application lists six grounds of opposition which are as follows:

> *"1. The information in item 1 of the Application for Particular Discovery sought is not relevant to any matter properly at issue in these proceedings.*
>
> *2. The Defendants do not have in their power or control the original of document 25 – they only have a photocopy.*

3. *The Defendants do not have in their power or control the originals of documents 44 to 51 – they only have photocopies.*

4. *The information in item 4 of the Application for Particular Discovery sought is privileged and is not relevant to any matter properly at issue in these proceedings.*

5. *The Defendants do not control the information sought by the Plaintiff beyond what they have disclosed in their second list of documents sworn 25 June 2008.*

6. *The order is not necessary."*

[29] I will deal with each of these grounds of opposition in turn as I consider the four categories of documents sought by the plaintiff outlined in paras. [24]-[27] of this judgment.

First Category – Poolside Supervision Documents

[30] This first category of documents, as I have noted above, relates to poolside supervision issues. The documents sought are set out at para. [4](1) of this judgment.

[31] In response, the defendants' Notice of Opposition with regard to the request for this category of documents contests their discoverability solely upon the ground of relevance.

[32] The documents in this category relate to the period 1 July 2006 to 9 May 2007 and are said by the plaintiff to go directly to the question of the adequacy of poolside supervision at the Otaki pools complex. As to the issue of relevance, the plaintiff contends that as the defendants have pleaded the affirmative defence of qualified privilege and the plaintiff has responded by pleading particulars of ill will these documents are relevant. The plaintiff says the particulars of ill will alleged will include an allegation that the second defendant was directly motivated by ill will or took improper advantage of the occasion to attempt to discredit the plaintiff

because the plaintiff had indicated that he would raise the issue of inadequate poolside supervision with the Council. This, in turn, it was said, might prejudice the second and third defendant's pool management contract with the Kapiti Coast District Council and its renewal, hence their desire to blunt the plaintiff's criticism by passing the allegedly defamatory material to the Council and others.

[33] The plaintiff goes on to argue that whether or not the poolside supervision met the requirements of the contract the second and third defendants had with Kapiti Coast District Council is clearly relevant to the issues raised by the particulars of ill will. If the supervision at the pool had not, in fact, met the requirements of that contract then the second defendant would have had a motive to discredit a person such as the plaintiff who had foreshadowed raising that very issue with the Council. The plaintiff suggests that documents which show what poolside supervision there was are relevant and must therefore be discovered. He says that all the documents outlined at paragraph [4](1) of this judgment fall within that category.

[34] Before me, in response Mr Rae contended that this present defamation action had nothing whatever to do with the contract held by the second and third defendants with the Kapiti Coast District Council. He specifically acknowledged, however, that the defendants do not deny the Otaki pools complex was short staffed at the time but he explained that this was and is a perennial issue for all public swimming pools throughout New Zealand. Mr Rae maintained that the second and third defendants have never hidden the fact that they were *"short of staff"*.

[35] As to the contention by the plaintiff that the second and third defendants were predominantly motivated by ill will here, the relevant part of the plaintiff's *"Particulars of the Defendants' Ill Will"*, filed 23 April 2008 states:

> *"3. The second defendant was predominantly motivated by ill will towards the plaintiff:*
>
> *<u>Particulars of Second Defendant's Ill Will</u>*
>
> ***Reckless or Indifferent as to Truth***
>
> *a) On 9 and 10 May 2007 the second defendant had the opportunity to discuss the first defendant's complaint with the plaintiff by telephone or in person but did not do so either*

before suspending the plaintiff's use of the Otaki pool or before publishing as alleged in paragraph 17 of the amended statement of claim.

Objective of discrediting the plaintiff

b) On 9 May 2007 the plaintiff said to the first defendant that the contract referred to in paragraph 4 of the amended statement of claim (the pool contract) required [a] not less than two supervisors being in attendance poolside during periods of public time, that in his experience as a regular user of the pool there were frequently fewer than two staff in attendance poolside and that he would be taking up the matter of staffing with Mike Cardiff, Kapiti Coast District Council's parks and recreation asset manager.

c) From the second defendant's conversations with the first defendant on 9 May 2007, the second defendant was aware of what the plaintiff had said.

d) Such a report from the plaintiff to Mr Cardiff had the potential to prejudice the second and third defendants' renewal of the pool contract for two further one year periods from 1 July 2007 and to prejudice the renewal of a contract between the Kapiti Coast District Council and the second and third defendants for the management of the Waikanae pool.

e) The second defendant was motivated by a desire to undermine the plaintiff's credibility with officers of the Kapiti Coast District Council in an attempt to deflect the plaintiff's criticisms of his and the third defendant's performance of the pool contract.

[36] Essentially, as I understand it, the plaintiff's position is that all the poolside supervision documents are relevant to this issue of ill will. This is on the basis that the plaintiff says the attempts by the second and third defendants to discredit him were significantly heightened by the possibility that the plaintiff's inadequate supervision contentions might prejudice renewal of the second and third defendants'

pool management contract (for both the Otaki and Waikanae pools) with the Kapiti Coast District Council.

[37] On this, the plaintiff argues further that a paramount consideration in all public swimming pool complexes must be issues of safety and, where local authorities are involved, there is a notorious aversion to taking any risks. The plaintiff goes on to suggest that if, in this case the Kapiti Coast District Council had become aware of a significant failure to exercise proper safety procedures and to provide adequate supervision, then the renewal of the pool contract would be likely to be at significant risk. As a result the plaintiff suggests that the second and third defendants were clearly motivated by a desire to blunt the plaintiff's criticism of their operation and thus were motivated by ill will when passing the various documents in question to senior officers of the Kapiti Coast District Council.

[38] According to the plaintiff, that must make relevant here documents concerning pool supervision at the Otaki pool complex over the period leading up to 9 May 2007.

[39] In my view, there is some substance in this argument advanced by Mr Chapman for the plaintiff in so far as it relates to the bulk of this first category of poolside supervision documents. Before me, Mr Rae for the second and third defendants, addressed no real argument to this issue.

[40] In my view, given the wide *Peruvian Guano* test of relevance and the fact that allegations of ill will on the part of the defendants have been made here, a number of documents relating to poolside supervision are relevant and should be discovered. As I see it, these are documents containing information which <u>may</u> directly or indirectly advance the case of the plaintiff or damage the case of the second and third defendants in terms of this *Peruvian Guano* test.

[41] I turn now to the particular list of documents sought by the plaintiff. In my view, some but not all of these documents should be discovered. I now deal with this issue. In each case I note that the documents in question are to relate to the periods of public time at the Otaki pool from 1 July 2006 to 9 May 2007:

a) Records of Staff Qualifications for Poolside Duties and their First Aid Currency

In my view these records are relevant to the supervision question and the need to be satisfied as to the adequacy of properly qualified and competent supervisory staff (with life-saving, first aid and other appropriate skills). And also for the reasons outlined in more detail at para. [41](b) below, I am satisfied these records should be discovered.

b) Staff Rosters

Again, in my view these documents are relevant. They relate to possible short-falls in staffing supervision at the time and the magnitude of those short-falls, and therefore the vulnerability of the second and third defendants to the Council on the question of the overall adequacy of supervision provided under their contract. This vulnerability of these defendants to a possible complaint to the Council by the plaintiffs might possibly have provided a motivation for the defendants to misuse the alleged defamatory statements about the plaintiff such that attempts were made thereby to undermine the plaintiff's credibility with the Council. Those rosters should be discovered.

c) Staff Time Sheets

Again, these documents are relevant to the issue of what actual properly qualified staff were employed by the second and third defendants and on supervision duty at the relevant times. They should be discovered.

d) Staff Payroll Records

These records in my view fall into a different category. They will relate no doubt to sensitive employment relationship matters (such as wage rates) between the second and third defendants and their staff. They are not relevant to the issues arising here and should not be required. No discovery order is to be made for these documents.

e) All File Notes or Internal Memoranda (including emails) in any way relating to poolside staffing matters)

Again, in my view, as these documents are to relate to pool-side staffing and thus supervision issues, for the reasons outlined above they must also be seen as relevant here, and should be discovered.

f) The record of any incident or complaint that refers to the number of staff engaged on poolside duties.

Again, for the reasons I have noted above, these documents are directly relevant to staffing and supervision issues and should be discovered.

g) All Written Communications Concerning Poolside Staffing Matters Between the Second and Third Defendants or Either of Them on the One Hand and any Supervisory, Certifying, Monitoring or Testing Agency on the Other Hand

Again, for the reasons noted above, these documents would relate directly to poolside staffing and thus supervision issues and related communications with outside regulatory agencies and should be discovered.

h) All Written Communications Concerning Poolside Staffing Matters Between the Second and Third Defendants or Either of Them on the One Hand and their Public Liability Insurers on the Other Hand

Again, for the reasons noted above these documents will also relate directly to poolside supervision issues and potential liability for inadequacies and should be discovered.

i) All Written Communications Concerning Poolside Staffing Matters Between the Second and Third Defendants or Either of Them on the One Hand and officers of the Kapiti Coast District Council on the Other Hand

Again these documents would relate directly to poolside staffing issues and the contract between the second and third defendants and

the Kapiti Coast District Council which the plaintiff maintains could be at risk and should be discovered.

[42] Orders with regard to these various categories of documents to be discovered are to follow.

[43] I turn now to deal with the second category of documents sought.

Second Category - Unredacted Original Documents 25 and 44-51

[44] On this, as I noted at para. [3] above, the first, second and third defendants filed an initial list of documents on 20 May 2008 and then, following a direction of Associate Judge Abbott on 12 June 2008, each filed a second list of documents on 26 June 2008.

[45] The plaintiff complains that there is a discrepancy between the two sets of affidavits of documents which have been filed. In the first list of documents filed 20 May 2008 the second defendant deposes that the originals of documents 25 and documents 44 to 51 are *"now in the possession or power of the defendant"*. The second list of documents filed on 26 June 2008 by the second and third defendants states that none of these documents 25 and 44 to 51 either originals or copies are held by the defendants but instead *"We believe these documents are in the control of the Kapiti Coast District Council."*

[46] And, curiously, at paras. [2] and [3] of the defendant's Notice of Opposition to the present application filed 28 July 2007, they confirm that the defendants do not have in their power or control the originals of document 25 or documents 44 to 51 but they do have photocopies of these documents.

[47] Before me counsel for the plaintiff suggested that it would seem the originals of these documents may now be with the Kapiti Coast District Council although it was confirmed earlier they had been in the possession of the defendants previously.

[48] That said, these documents at least should have been listed with some explanation in the Fourth Part of the defendants' second list of documents, that is as

being *"Documents that are no longer in our control and when to the best of our knowledge and belief each document ceased to be in our control and the persons who, to the best of our knowledge and belief, now have control of each document."* The second and third defendants' second list of documents filed 26 June 2008 in fact answered *"no documents"* to this Fourth Part question. This should be rectified and the questions posed in this Fourth Part properly answered.

[49] An order to this effect is to follow. That also leaves on one side the question of whether in any event, the second and third defendants had an enforceable right of access to these original documents as their documents, and that therefore the documents were within their *"power"* in the sense outlined in *Johansen v American International Underwriters (NZ) Ltd* (1997) 11 PRNZ 22. That is a different matter and leave is reserved here for the plaintiff to pursue that aspect by further application to this Court if he so wishes.

Third Category – Unredacted Copies of Documents 25 and 44-51

[50] From the comments I have noted above, it will be clear that there appears to be little real opposition to this aspect of the plaintiff's application other than a possible confidentiality claim. There seems to be no question that the second and third defendants do have in their possession photocopies of these documents.

[51] The defendants in their Notice of Opposition have confirmed this. They said specifically that they do have photocopies of document 25 and documents 44-51. As I understand it, redacted copies of document 25 and possibly documents 44-51 have already been produced for the plaintiff on inspection. But the only reason why unredacted copies have not been produced it seems is that the defendants appear to claim some degree of confidentiality with respect to these documents.

[52] As to this claim for confidentiality r 297(2)(e) *High Court Rules* states:

> *"2. In the affidavit of documents, the party must –*
>
> …
>
> *(e) If the party claims confidentiality for a document or part of a*

document, state the restrictions that the party proposes to apply in order to protect that confidentiality."

[53] *McGechan on Procedure* at para. HR297.03 in dealing with this confidentiality question states:

> *"HR297.03 Confidentiality*
>
> *The provision of the requirement to assert and explain a claim to confidentiality in r 297(2)(e) was introduced in 2004. This means that confidentiality continues to not be a ground for resisting discovery, but recognises the prospect of constraints sought to be imposed on inspection where confidentiality concerns warrant that. The basis for concerns should be addressed individually in respect of each document or part document. The approach adopted to restricting access, prior to this rule, should still be followed: see Port Nelson Limited v Commerce Commission (1994) 7 PRNZ 344 and HR307.17."*

[54] In the second and third defendants' second list of documents the "*Third Part"* which deals with documents for which they claim confidentiality states that *"Nil Documents"* are claimed as confidential. At the very least this is an oversight on the part of the second and third defendants. The proper course here if, as it appears, those defendants claim confidentiality to this third category of documents is for them to be listed in the Third Part of their second list and in addition the basis for their confidentiality concerns should be addressed with respect to each document or part of a document. That has not occurred however.

[55] As I understand the position, the second and third defendants contend that documents 44-51 in particular which are principally letters written to the "*Otaki pool*" said to be "*in support of the Otaki pool"* in response to an advertisement placed by the plaintiff are confidential in the sense that the identity of the author of each letter should not be disclosed. Before me, Mr Rae, the second defendant, noted that these documents had been the subject of a ruling by the Privacy Commissioner provided to the Kapiti Coast District Council some time ago.

[56] On this, counsel for the plaintiff argued that it was an important part of the plaintiff's case to know the names of the individuals who had written these letters in response to his advertisement. Mr Chapman for the plaintiff contended that it was irrelevant what the Privacy Commissioner may have said regarding the letters, especially as this appeared to relate only to privacy concerns from the Kapiti Coast District Council's perspective.

[57] It is clear that commercial sensitivity of information is not a ground for opposing discovery. The sole test is relevance. Although r 297(2)(e) *High Court Rules* which I have noted above recognises the prospect that confidentiality of the contents of documents may justify judicial supervision of their inspection and use, where the scope of such confidentiality claims is contested, r 307 provides for resolution by the Court – see *McGechan on Procedure* HR307.17.

[58] Although in the present case the Notice of Opposition filed by the second and third defendants does not specifically claim confidentiality with regard to document 25 or documents 44 to 51, in essence this was the position argued before me by Mr Rae the second defendant.

[59] On this r 307(1) states:

> *"If a party challenges a claim to privilege or confidentiality made in an affidavit of documents, the party may apply to the Court for an order setting aside or modifying the claim."*

[60] In this case, as I understand the submissions advanced for the second and third defendants, the redacted portion of these documents relates to the names and identity of the authors of each document.

[61] It is clear from the authorities that where part of a document is considered to be either irrelevant or confidential and the party concerned does not wish to disclose the whole document it is permissible to cover up the confidential or irrelevant parts – *GE Capital Corporate Finance Group Limited v Bankers Trust Company* (1995) 2 AllER 993 and *Marr v Arabco Traders Limited* (1986) 2 PRNZ 72.

[62] Further, orders for non-disclosure of discovered documents on confidentiality grounds can generally be made only when the Court considers it necessary. It must be apparent from the document itself or some other evidence that disclosure would be likely to prejudice the party making discovery in some significant way – *Port Nelson Limited v Commerce Commission* (1994) 7 PRNZ 344 and see *McGechan on Procedure* para. HR307.17 (3).

[63] Turning now to the specific documents in question here, the first noted as document 25 is a *"Statement by Irene Cook (the first defendant) dated 9 May 2007"*. Nothing has been put before the Court to indicate why this statement should be seen as confidential or why certain aspects of the statements should be redacted. The defendants have acknowledged that they have a photocopy of this document in their possession and they do not to any extent question its relevance to this proceeding. I find that disclosure of this document should be made here.

[64] An order therefore is to follow regarding discovery and inspection of this document 25.

[65] So far as documents 44-51 are concerned (with the exception of document 46) these are all described as "*letters to Otaki pool in support of Otaki pool in response to an advertisement placed by the plaintiff*". Again their relevance is not questioned by the defendants and they have acknowledged in their Notice of Opposition that they have photocopies of these documents in their possession. On the confidentiality claim, which I have described above, I am satisfied that unredacted copies of these documents should, at this point, be provided but only to the plaintiff's counsel and solicitor. *McGechan on Procedure* at para. HR307.17 (3)(a) notes that directions restricting the normal use of discovered material are relatively common in New Zealand to meet genuine concerns which are raised – see *T D Haulage Limited v New Zealand Railways Corporation (1986)* 1 PRNZ 668. Inspection of the previously redacted portion of these documents by the plaintiff himself is prohibited at this point.

[66] Leave is however reserved to the plaintiff to apply to this Court on notice for relaxation of this restriction in the case of any particular document if this is thought to be justified.

[67] Document 46 is described as *"Memo KCDC to Manager, Otaki Pool, 14 May 2007"*. No argument was advanced to the Court to suggest that this document was either irrelevant or on its face confidential. I am satisfied therefore that this document should be available to the plaintiff.

[68] Orders to the effect as noted above are to follow.

Fourth Category of Documents – Item 11 – Privilege Claim

[69] As I have noted at para. [27], this fourth category of documents which is outlined in paragraph [4](4) of this judgment relates to a broad group of material for which the second and third defendants claim privilege. These documents are described in para. 11 of the second and third defendants' second list of documents as *"Various file notes and computer records, entered over various dates, forming records as to the progress of the issue."* Solicitor/client litigation and legal professional privilege and legal advisers/litigation privilege are claimed with respect to these documents.

[70] Although these claims to privilege might seem somewhat strange here, given that the defendants are all formally unrepresented in this proceeding, nevertheless, at this point, the plaintiff, in his application seeks simply that the second and third defendants be required to fully itemise these Item 11 documents showing the date, description, author and if applicable addressee of each such item. The purpose of this is so that the plaintiff can be in a proper position to decide whether the defendants' claim to privilege here is a proper one. At present, in my view quite properly, the plaintiff notes that this question cannot be properly addressed and determined given the defendants' very unspecific description of the Item 11 documents in question.

[71] Again, before me there was little opposition or comment addressed to this aspect of the application from Mr Rae for the second and third defendants.

[72] In my view, the request from the plaintiff is a reasonable and proper one.

[73] An order regarding further itemisation of these Item 11 documents is to follow.

Conclusion

[74] It will be apparent, for the reasons I have outlined above, that the plaintiff's discovery and production application filed 16 July 2008 succeeds almost in its entirety.

[75] The following discovery, inspection and related orders are now made:

(a) The second and third defendants are within 15 working days of the date of this judgment to discover and produce for the plaintiff's inspection all documents relating to poolside supervision at the Otaki pool during the periods of public time from 1 July 2006 to 9 May 2007 inclusive, including specifically:

(i) records of staff qualifications for poolside duties and their first aid currency;

(ii) staff rosters;

(iii) staff time sheets;

(iv) all file notes or internal memoranda (including emails) in any way relating to poolside staffing matters;

(v) the record of any incident or complaint that refers to the number of staff on poolside duties;

(vi) all written communications concerning poolside staffing matters between the second and third defendants or either of them on the one hand and any supervisory, monitoring or testing agency on the other hand;

(vii) all written communications concerning poolside staffing matters between the second and third defendants or either of them on the one hand and their public liability insurers on the other hand;

(viii) all written communications concerning poolside staffing matters between the second and third defendants or either of them on the one hand and officers of the Kapiti Coast District Council on the other hand.

(b) The second and third defendants are within 15 working days of the date of this judgment to file and serve a third verified affidavit of documents that deals specifically with the unredacted originals of document 25 and documents 44 to 51 noted in their second list of documents sworn 25 June 2008 and in particular if these original documents are said to be no longer in the control of the first and second defendant they are to provide full details and explanation of when each document ceased to be in their control and the persons who to the best of their knowledge and belief now have control of each document. In addition, leave is reserved as outlined at para. [49] hereof.

(c) The second and third defendants within 15 days of the date of this judgment are to discover and produce for inspection:

(i) by counsel and solicitor for the plaintiff (but no others) unredacted originals (if they are held) and/or unredacted copies of documents 44 to 45 and 47 to 51 in their second list of documents sworn 25 June 2008; and

(ii) by the plaintiff unredacted originals (if they are held) and/or unredacted copies of document 25 and document 46 in their second list of documents sworn 25 June 2008.

(d) With regard to the documents referred to in the preceding paragraph 75(c)(i), leave is reserved to the plaintiff on notice to apply to this Court for any order that may be thought appropriate and justified to relax or remove the restriction on inspection of these documents noted in that sub-paragraph.

(e) The second and third defendants within 15 working days of the date of this judgment are to file and serve a verified third list of documents which specifically itemises the documents referred to in Item 11 of the second list of documents sworn 25 June 2008 showing the date, description, author and if applicable, addressee of each such item.

Costs

[76] The plaintiff has been largely successful in his application for particular discovery and production. I see no reason why costs should not follow the event in the normal way.

[77] An order is made therefore that the second and third defendants are to pay to the plaintiff costs on this discovery application calculated on a Category 2B basis together with disbursements, if any, as approved by the Registrar.

'Associate Judge D.I. Gendall'