FEDERAL COURT OF AUSTRALIA

City of Swan v McGraw-Hill Companies, Inc

[2014] FCA 1271

Citation:	City of Swan v McGraw-Hill Companies, Inc [2014] FCA 1271
Parties:	**CITY OF SWAN, MOREE PLAINS SHIRE COUNCIL (ABN 45 566 790 582) and BARON-HAY INVESTMENTS PTY LTD (ACN 008 703 151) v MCGRAW-HILL COMPANIES, INC (A COMPANY INCORPORATED IN NEW YORK) and STANDARD & POOR'S INTERNATIONAL, LLC**
File number:	NSD 656 of 2013
Judge:	**RARES J**
Date of judgment:	6 November 2014
Catchwords:	**PRACTICE AND PROCEDURE – DISCOVERY** – whether documents obtained by party on discovery or pursuant to subpoena or notice to produce in other proceedings and subject to implied undertaking of confidentiality discoverable in current proceedings – whether documents obtained in other proceedings pursuant to compulsory process under "control" of party for purposes of giving discovery under r 20.14(1)(c) of the *Federal Court Rules 2011* (Cth) – whether co-applicant in representative proceedings brought under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) obliged to give discovery of documents relating to issues in contention only between other co-applicants and respondents – requirement that discovery be for the just resolution of proceedings as quickly, inexpensively and efficiently as possible
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) *Federal Court of Australia Act 1976* (Cth) *Federal Court Rules 2011* (Cth) *Income Tax Assessment Act 1936* (Cth)
Cases cited:	*Alcoa of Australia Ltd v Apache Energy Ltd [No 6]* [2014] WASC 287 applied *Buxton & Lysaught Pty Ltd v Buxton* [1977] 1 NSWLR 285 applied *City of Swan v McGraw-Hill Companies Inc* (2014) 99

	ACSR 280 referred to *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10 applied *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Limited* (1977) 143 CLR 499 applied *Hearne v Street* (2008) 235 CLR 125 applied *Johnston Fear & Kingham & The Offset Printing Company Pty Ltd v Commonwealth* (1943) 67 CLR 314 applied *Kennedy v Dodson* [1895] 1 Ch 334 applied *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 distinquished *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 applied *Turner v Davies* [1981] 2 NSWLR 324 referred to *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1 referred to
Date of hearing:	6 November 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	30
Counsel for the Applicants:	Mr C Withers
Solicitor for the Applicants:	Piper Alderman
Counsel for the Respondents:	Mr JC Hewitt
Solicitor for the Respondents:	Clifford Chance

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 656 of 2013**

BETWEEN:	**CITY OF SWAN** **First Applicant**
	MOREE PLAINS SHIRE COUNCIL (ABN 45 566 790 582) **Second Applicant**
	BARON-HAY INVESTMENTS PTY LTD (ACN 008 703 151) **Third Applicant**
AND:	**MCGRAW-HILL COMPANIES, INC (A COMPANY INCORPORATED IN NEW YORK)** **First Respondent**
	STANDARD & POOR'S INTERNATIONAL, LLC **Third Respondent**

JUDGE:	**RARES J**
DATE OF ORDER:	**7 NOVEMBER 2014**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The applicants provide on or before 14 November 2014 a further response to the respondents' request for particulars of paragraph 84 of the amended statement of claim including:
   (a) such further particulars as the applicants are currently able to provide; and
   (b) any explanation as to why no further particulars can be provided at this time or are otherwise unnecessary.
2. The respondents file and serve any amended defence to the amended statement of claim by 5 December 2014.
3. The applicants produce a list of the documents sought in the notice to produce issued by the respondents dated 25 August 2014 (**notice to produce**) by 14 November 2014 and provide to the respondents for inspection each of the documents included on the list that are not subject to order 6 below.

4. In relation to documents produced in *Wingecarribee Shire Council and Ors v Lehman Brothers Australia Limited (in Liquidation)* NSD 2492 of 2007 (**Wingecarribee proceedings**), the applicants and group members, together with their legal representatives in this proceeding (**Swan proceedings**) and Bentham IMF Limited (the litigation funder in both the Wingercarribee proceedings and the Swan proceedings) are granted leave to review the following documents including documents produced by the parties identified in Annexure A to these orders for the purposes of ascertaining if they are required to be discovered by the first applicant pursuant to Order 3 of Rares J made on 26 September 2014 or produced in answer to the notice to produce:

   (a) all documents discovered by the applicants in the Wingecarribee proceedings;

   (b) all documents discovered by the respondent in the Wingecarribee proceedings;

   (c) all documents produced in answer to subpoenas in the Wingecarribee proceedings, issued at either the request of the applicants and/or the respondent; and/or

   (d) all documents produced in answer to any notice to produce in the Wingecarribee proceedings.

   (together referred to as the **Wingecarribee documents**).

5. The first applicant has leave to discover and (subject to Order 6) produce for inspection in the Swan proceedings any of the Wingecarribee documents that are discoverable by it in the Swan proceedings pursuant to Order 3 of Rares J made on 26 September 2014 or responsive to the notice to produce.

6. Upon the giving of discovery by the first applicant pursuant to Order 3 of Rares J made on 26 September 2014:

   (a) the first applicant produce for inspection all of the documents listed in its discovery except any documents (**the excluded documents**) that were produced in answer to subpoenas or notices to produce in the Wingecarribee proceedings and in respect of which the person that originally produced the documents has not provided consent to use the same in the Swan proceedings (**the non-consenting third parties**);

   (b) the respondents notify each non-consenting third party of the documents produced by that party in respect of which the respondents seek an order for

production and that they will make an interlocutory application seeking inspection of the documents at the risk of the non-consenting third party as to costs if appropriate arrangements for inspection cannot be made;

(c) for the purpose of (b), the respondents have liberty to contact, on notice to the applicants, the associate to Rares J for the purpose of making any consequential consent orders;

(d) the respondents may file one or more interlocutory applications seeking orders for inspection of the excluded documents joining any non-consenting third party to such application.

7. For the avoidance of doubt, in relation to the documents produced or discovered by Lehman Brothers Australia Limited (in liq) in the Wingecarribee proceedings (**the LBA discovered documents**):

(a) the implied undertaking applies to any documents produced or discovered pursuant to the leave granted by Order 3, 4 or 5 above as if the documents had been produced by LBA in answer to a subpoena to these proceedings;

(b) any implied undertaking in the Wingecarribee proceedings continues to apply to any of the LBA discovered documents which are not produced for inspection or discovered pursuant to the leave granted by Order 3, 4 or 5.

8. The parties have liberty to apply on 3 days' notice.

Annexure A

	Party producing documents in the Wingecarribee proceedings
1.	Wingecarribee Shire Council
2.	City of Swan
3.	Parkes Shire Council
4.	Lehman Brothers Australia Limited (In Liquidation)
5.	Moody's Investors Services Pty Ltd
6.	Moody's Group Australia Pty Ltd
7.	Standard & Poor's (Australia) Pty Ltd
8.	McGraw-Hill Australia Pty Ltd
9.	Fitch Australia Pty Ltd
10.	J.P Morgan Chase
11.	Deutsche Bank Aktiengesellschaft
12.	Credit Suisse AG, Sydney Branch
13.	BTA Institutional Services Australia Limited
14.	Austraclear Services Limited
15.	Permanent Custodians Limited
16.	Barclays Capital
17.	Perpetual Trustee Company Limited
18.	IPAC Securities Limited
19.	Mercer (Australia) Pty Ltd
20.	Transcap Investments Pty Ltd
21.	Westpac Banking Corporation
22.	Australia and New Zealand Banking Group Limited
23.	Laminar Group Pty Ltd
24.	Oakvale Capital Limited
25.	Structured Credit Research and Advisory Pty Ltd

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 656 of 2013**

BETWEEN:	**CITY OF SWAN** **First Applicant**
	MOREE PLAINS SHIRE COUNCIL (ABN 45 566 790 582) **Second Applicant**
	BARON-HAY INVESTMENTS PTY LTD (ACN 008 703 151) **Third Applicant**
AND:	**MCGRAW-HILL COMPANIES, INC (A COMPANY INCORPORATED IN NEW YORK)** **First Respondent**
	STANDARD & POOR'S INTERNATIONAL, LLC **Third Respondent**

JUDGE:	**RARES J**
DATE:	**6 NOVEMBER 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

(REVISED FROM THE TRANSCRIPT)

1 On 26 September 2014, I ordered that the parties give standard discovery in electronic form by 30 January 2015, pursuant to r 20.14 of the *Federal Court Rules 2011* (Cth). Two issues in the course of preparation for giving discovery have arisen that require determination.

2 *First*, City of **Swan** has retained documents produced during the course of earlier proceedings in which Swan was one of the three applicants: see *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1 (**the Wingecarribee proceedings**). Those documents include documents produced on discovery by Lehman Brothers, together with documents to which Swan obtained access in the course of those proceedings, that had been produced by third parties on subpoena. Each of those classes of documents is subject to the implied undertaking of confidentiality. The first issue is whether

they are discoverable in these proceedings and, if they are, the ability of Standard & Poor's to have inspection of them and, if so, on what, if any, terms.

3 The second issue is whether each of the applicants in these group proceedings, under Pt IVA of the *Federal Court of Australia Act 1976* (Cth), is obliged to give discovery of documents that support or adversely affect one of their co-applicants' cases, regardless of whether there is anything in that co-applicant's case in relation to such documents that has any bearing on the discovering party's obligations.

The relevant rules

4 Relevantly, rr 20.11, 20.14 and 20.32 provide:

> **20.11 Discovery must be for the just resolution of the proceeding**
>
> A party must not apply for an order for discovery unless the making of the order sought will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible.
>
> **20.14 Standard discovery**
>
> (1) If the Court orders a party to give standard discovery, the party must give discovery of documents:
> (a) that are directly relevant to the issues raised by the pleadings or in the affidavits; and
> (b) of which, after a reasonable search, the party is aware; and
> (c) that are, or have been, in the party's control.
>
> (2) For paragraph (1)(a), the documents must meet at least one of the following criteria:
> (a) the documents are those on which the party intends to rely;
> (b) the documents adversely affect the party's own case;
> (c) the documents support another party's case;
> (d) the documents adversely affect another party's case.
>
> **20.32 Order for production from party**
>
> (1) A party (the ***first party***) may apply to the Court for an order that another party (the ***second party***) produce for inspection any document that is included in the second party's list of documents and that is in that party's control.
>
> (2) The Court may order that production for inspection be by electronic means.

5 The Dictionary in Sch1 of the Rules provides the following definition:

> ***control***, if referring to a document, means possession, custody or power.

Background

6 Each of the three applicants, Swan, **Moree Plains** Shire Council and **Baron-Hay** Investments Pty Limited, acted separately in acquiring synthetic collateralised debt obligation instruments (**SCDOs**) that were rated by one or both of the respondents, McGraw-Hill Companies, Inc and Standard & Poor's International, LLC (**Standard & Poor's**), and each applicant now complains about those ratings. Swan was one of the applicants in the Wingecarribee proceedings, in which I found that Lehman Brothers, as its investment adviser, had induced it to make investments in the SCDOs that are also the subject of these proceedings, in breach of contract, negligently, in breach of s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) and in breach of fiduciary duty. One of the issues in those proceedings was whether Standard & Poor's and other ratings companies were concurrent wrongdoers. On the evidence in those proceedings, I held that they were not, as I have more recently discussed in relation to the present proceedings in *City of Swan v McGraw-Hill Companies Inc* (2014) 99 ACSR 280. Accordingly, it is likely that there is a large amount of documentation that Swan, as a party to the Lehman Brothers proceedings, still will have in its control that is discoverable in these proceedings. That is because those documents are directly relevant to the issues raised by the present pleadings, Swan is aware of them and they are in its control, within the meaning of r 20.14(1).

Consideration – discovery of documents produced by third parties in other proceedings

7 The word "control" is defined in the Dictionary to the Rules, when referring to a document, as meaning possession, custody or power. It is sufficient for the purpose of giving discovery that a person has documents in his or her possession or custody as one of the partners in a firm of solicitors: e.g. see *Turner v Davies* [1981] 2 NSWLR 324 at 326B-C, F-G. A bank holding documents in a locked safe deposit box will have custody or control of those documents for the purposes of meeting an obligation to produce those documents under statutory requirements such as s 264 of the *Income Tax Assessment Act 1936* (Cth): *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Limited* (1977) 143 CLR 499 at 519-520 per Gibbs ACJ, 532-533 per Mason J, with whom Jacobs J and Murphy J agreed at 541 and 547 respectively. Mason J pointed out, by reference to the definition of "custody" in the *Shorter Oxford English Dictionary* as "Safe keeping, protection; charge, care, guardianship", that the fact that the bank's customer in that case had a contractual right of access to the contents of the safe deposit box did not alter the legal consequence that, while the deposit box was locked, it was within the bank's premises, so

that the bank had custody of those documents. Mason J said the content of the word "control" was somewhat different from "custody" but that both words were "wide enough to include many types of possession which are not commensurate with full ownership", relying on what Rich J had said in *Johnston Fear & Kingham & The Offset Printing Company Pty Ltd v Commonwealth* (1943) 67 CLR 314 at 324.

8 In *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 145 Mason J, with whom Wilson J agreed at 151 (and see too per Gibbs CJ at 139 and Murphy J at 149), observed that the obligation to produce documents pursuant to a subpoena for production is a qualification upon, or an intrusion into, the citizen's rights to keep documents to himself or herself. He said:

> In the absence of some compelling reason it is right that the owner of the documents should decide in the first instance whether any of them are caught by the subpoena and that he should bear the responsibility for not producing such of them as are ultimately held to be covered by the subpoena. To acknowledge that the employee's possession is sufficient in itself to sustain an obligation to produce, without reference to his employer, would be to disregard the employer's rights with respect to his documents.

9 There, Mason J (and the other justices) recognised that the owner of documents that are in another's possession ordinarily has a legitimate interest in assessing whether the documents should be produced to the Court and made available to the parties for inspection under its compulsory processes. However, he said that the owner's interests had to yield to the public interest in the efficient administration of justice where the two interests collided.

10 In my opinion, the documents that Swan has retained from Lehman Brothers' discovery and the answers by others to subpoenas in the Wingecarribee proceedings are documents within Swan's control within the meaning of r 20.14(1)(c) and, accordingly, are discoverable by it in these proceedings.

11 Nonetheless, those documents were produced in the other Wingecarribee proceedings under the compulsory processes of the Court and, so far as Swan is concerned, it holds those documents subject to the implied undertaking not to disclose their contents or information in them without the leave of the Court for any other purpose than that for which the documents were originally obtained, namely, the conduct of the Wingecarribee proceedings: *Hearne v Street* (2008) 235 CLR 125 at 154-155 [96] per Hayne, Heydon and Crennan JJ.

12 The obligation to give discovery in separate proceedings necessarily compels Swan, as a person who has control of the documents, to produce them on discovery by virtue of the ordinary operation of the discovery rules, as Mason CJ (with whom Dawson and McHugh JJ agreed) foreshadowed in *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10 at 33, where he said:

> No doubt the implied obligation must yield to inconsistent statutory provisions and to the requirements of curial process in other litigation, eg discovery and inspection, but that circumstance is not a reason for denying the existence of the implied obligation.

13 The consequence of Swan's obligation to discover the documents pursuant to r 20.14 is that in the ordinary course, unless the Court otherwise orders, Standard & Poor's will have immediate access to those documents, notwithstanding that, but for the discovery obligation and the circumstances in which Swan obtained the documents, Standard & Poor's would not be able to obtain such access without leave of the Court.

14 Le Miere J discussed the exercise of the discretion to permit inspection of documents produced in a list of documents under the analogue of r 20.32 in *Alcoa of Australia Ltd v Apache Energy Ltd [No 6]* [2014] WASC 287 at [17]-[22]. He said that the burden was on the party seeking inspection to show why he, she or it should have inspection. He explained that the existence of the implied undertaking did not create a privilege entitling a party in Swan's position to resist discovering or producing such documents for inspection. However, he said that the discretion to permit inspection would be exercised having regard to whether or not production was necessary for disposing fairly of, or for saving costs in, the subsequent or other proceeding. His Honour said ([2014] WASC at [20]-[21]):

> The discovery and inspection process facilitates fairness to both sides, playing 'with all the cards face up on the table', clarifying the issues between the parties, reducing surprises at trial and encouraging settlement. Production of relevant documents for inspection should be ordered unless there is some countervailing disadvantage.
>
> … It is in general wrong that a party who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings and, in particular, that they should be made available to third parties who might use them to the detriment of the party who has produced them on discovery. It has been said that the implied obligation is a matter of justice and fairness, to ensure that a person's privacy and confidentiality are not invaded more than is necessary for the purposes of justice: *Taylor v Serious Fraud Squad* [1999] 2 AC 177, 210.

15 Here, Lehman Brothers has indicated that it does not object to Swan producing the documents that it discovered in the Wingecarribee proceedings or to those documents being inspected by Standard & Poor's. However, Lehman Brothers limited its acquiescence to the discovery and inspection of documents in Swan's control to those documents that relate discretely to Swan's case, and has not acquiescenced to discovery to or inspection by Swan on the wider basis sought by Standard & Poor's. Moreover, inquiries that the applicants have made of other persons who produced documents in answer to subpoenas in the Wingecarribee proceedings elicited a variety of responses, ranging from consent to subpoenaed documents being made available to Standard & Poor's for inspection, to resistance to that course.

16 In my opinion, the Court must be careful to ensure that the purpose for which the implied undertaking exists is not circumvented in a way that could cause prejudice to a third party who had produced documents under a compulsory process in different proceedings merely because a party to those different proceedings becomes compellable to produce those documents on discovery in them. There may be reasons why that third party could or would seek to have other parties in the present litigation prevented from having access, or having access conditioned on certain restricted bases, of which the parties and the Court would be ignorant unless that third party had the opportunity of being heard. Here, third parties should have such an opportunity to advance whatever interests they may have in restricting the exercise by Standard & Poor's of any right of inspection under r 20.32 in respect of documents produced under compulsion in the Wingecarribee proceedings.

17 The purposes for which the Court imposes the implied undertaking on parties is to advance the administration of justice. That purpose might be inadvertently, or otherwise, frustrated if the Court were not mindful that the obligation that a person may have had to produce documents in its possession, custody or power in other proceedings may also involve the revelation in different proceedings of documents the subject of the implied undertaking to persons whom the party who originally produced the documents never understood or intended could have access to them.

18 For these reasons, I am of opinion that, once the list of documents has been served by Swan, Standard & Poor's should identify any discovered document of any third party who has not given consent to its inspection that it seeks to inspect, notify each such third party of its wish to do so, and give the third party notice that it (Standard & Poor's) will make an interlocutory application in these proceedings for access to those documents. The notice

should indicate that the interlocutory application would be made, with the possibility that it may be at the third party's risk as to costs, if satisfactory arrangements were not able to be made relating to any appropriate reason why any such document should not be inspected, or to any limitation that should be imposed on who may inspect the document, or the degree to which it may be disclosed to Standard & Poor's or other persons for the purposes of these proceedings.

Consideration – party's obligation to give discovery in respect of issues not involving it

19 The second question is more complicated. It relates to the construction of r 20.14(2)(c) and (d) and whether the rule requires Swan, in preparing its list of documents, to review the vast array of material that it has from the Wingecarribee proceedings, with a view to seeing whether any of those documents support or adversely affect the cases of either of its co-applicants, Moree Plains or Baron-Hay.

20 Standard & Poor's argued that r 20.14(1) and (2) required Swan to discover all such documents. Standard & Poor's contended that Swan had to review all of the material in its possession, custody or power for the purpose of determining their relevance to issues that had nothing to do with the case it was bringing in these proceedings, but that may impact on either of its co-applicants' cases in these proceedings. Standard & Poor's argued that the obligation to give standard discovery of documents that are directly relevant "to the issues raised by the pleadings" in r 20.14(1)(a), as informed by r 20.14(2)(c) and (d), so required. Standard & Poor's contended that it was in the interests of justice that Swan be required, conformably with their posited construction of r 20.14(1)(a), that Swan conduct such a review, and that such a review would enable the proceedings to proceed efficiently, so that all relevant material in Swan's possession bearing on the cases brought by its co-applicants would be made available on discovery.

21 I reject that argument. In my opinion, the proper construction of r 20.14 is to require discovery of documents directly relevant to the issues only between the discovering party and the party or parties in the litigation, but not to those issues between the party seeking discovery and other parties in the litigation, with which the seeking party is in dispute. A party's obligation to give discovery concerns the resolution of the controversy in which he, she or it is engaged in the litigation and does not extend to other issues that are not between the discovering party and any of the other parties in the litigation. To require a discovering party to give discovery of documents that are directly relevant to issues raised by the

pleadings but that do not involve him, her or it, would impose a burden that, in my opinion, would be not conformable with the requirement of r 20.11. That is because such an extended obligation would not facilitate the just resolution of the proceeding so far as it concerned the discovering party and its opponent or opponents as quickly, inexpensively and efficiently as possible.

22 An obligation of the kind suggested by Standard & Poor's would require the discovering party to analyse and understand issues between other parties to the proceedings that are of no concern to the discovering party. Not only would that not be efficient, but it could be much more expensive for the discovering party to have to consider a wide range of material. In much litigation in today's society, huge amounts of documentation are produced and received electronically. If a party had to discover all such documentation in its control that related to issues not between the discovering party and his, her or its opponent(s) but between other parties regardless of its relevance to the issues in the discrete controversy involving the discovering party, that would be capable of occasioning delay, inconvenience and expense. Moreover, such an obligation would require the discovering party to make assessments of issues in the proceedings that had nothing to do with it and to form judgments about documents on pain of committing contempt if it failed to discover documents that were relevant to disputes that were not its concern. That would be unnecessarily burdensome.

23 Similar issues have arisen in relation to the administration of interrogatories, which were, historically, an aspect of bills of discovery in Chancery. Thus, in *Buxton & Lysaught Pty Ltd v Buxton* [1977] 1 NSWLR 285 at 287G-288A, Holland J applied earlier authorities and refused to allow interrogatories between co-defendants where no rights *inter se* the defendants were to be determined in the case. The burden which the obligation to give discovery and to answer interrogatories can impose has long been recognised by the law to be capable of being oppressive and unnecessary. In *Kennedy v Dodson* [1895] 1 Ch 334 at 339, Lord Herschell LC discussed a situation where a defendant had been asked to answer an interrogatory requiring him to list all the properties in which he and the bankrupt, prior to 1873, had been jointly interested, and to state the terms and conditions on which the properties had been purchased. There, his Lordship said:

> In order to answer that question he must rake up all these transactions – it may be for a period of twenty years before 1873. It is said that he may have diaries relating to these transactions. So much the worse for him. He will be a lucky man if he has destroyed them. Nothing shews better than this the wisdom of destroying books and papers relating to transactions which are done with. In my opinion, there has

> sometimes been great laxity in times past in allowing interrogatories. It is that system which has made the very name of law stink in the nostrils of many sensible men of business. They say they would rather pay a claim for which they are not legally responsible than take the trouble necessary to answer interrogatories of this description, which cause a vast amount of trouble and difficulty, unless they are clearly relevant to the issue.

24 I consider those observations to be equally apposite to the obligation to give discovery. That obligation is becoming more and more burdensome because of the greater retention of electronic versions of documents, notwithstanding the truncated obligation in respect of relevance intended to be imposed on a discovering party for which r 20.14 was, at least partly, introduced. The consequence of accepting Standard & Poor's argument, in effect, would be to enlist Swan in assisting Standard & Poor's in obtaining documents that may be relevant, not to the case between Swan and Standard & Poor's, but between Standard & Poor's and the other two applicants, where those matters do not involve the common issues of fact or law between the parties to these proceedings for which Swan must necessarily give discovery of all relevant documents. It would require Swan to give discovery of disparate documents not relevant to the case or issues between it and Standard & Poor's.

25 Where a person through no fault of his or her own gets mixed up in the tortious acts of others so as to facilitate the other's wrongdoing, that person may, although incurring no liability, come under a duty to assist the person who has been wronged by giving full information and disclosing the identity of the wrongdoers: *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 at 175B-C. There, Lord Reid said that justice requires that the person should co-operate in the righting of a wrong if he had unwittingly facilitated its perpetration.

26 However, that position is a far cry from imposing a compulsory obligation, under the Rules, to require a person to search documents in his, her or its control for the purpose of dealing with issues only in controversy between other parties in the litigation and that will not bear on the resolution of the issues in respect of which he, she or it seeks to have resolved as a party to the proceedings.

27 The logical extension of Standard & Poor's argument would be that, in most proceedings where there are multiple defendants or respondents and cross-defendants or cross-respondents, being parties that have different interests and issues between them and the discovering party, the latter would be obliged to look over his, her or its own documents, not in relation to the issues that were joined between the discovering party and his, her or its

opponent, but in relation to issues that had nothing to do with the relevant controversy for the resolution of which the Rules require discovery to be given.

28 In modern litigation, the Court is often confronted with multi-party issues in which one set of issues between particular parties has no real bearing on, or relationship with, issues between other parties in the same proceedings. The cost and burden imposed on the effective non-combatants, if they were obliged to go through their documents, the pleadings and other material identifying issues to determine whether a document or documents that the non-combatants might have could or would fall within their discovery obligations not relating to the controversy involving them, but controversies of others, would be contrary to the efficient, inexpensive and just determination of the proceedings.

29 For those reasons, I reject Standard & Poor's argument.

Conclusion

30 To the extent that Standard & Poor's wishes to obtain access to other documents that Swan may have that bear, or may bear, on the issues in the litigation between Standard & Poor's on the one hand and Moree Plains and Baron-Hay on the other, that are not common issues of fact or law with Swan, Standard & Poor's will need to take its own course in relation to seeking those documents by way of subpoena or notice to produce, having regard to the principles apposite to those processes.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 25 November 2014