

CONFIDENTIALITY ORDER: SEE PARA [51] .

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

**CIV-2016-404-002187
[2017] NZHC 177**

BETWEEN GOODMAN FIELDER CONSUMER
FOODS PTY LIMITED
Applicant

AND HEINZ WATTIE'S LIMITED
Respondent

Hearing: 10 February 2017

Appearances: J G Miles QC and J R Wach for Applicant
C Elliott QC for Respondent

Judgment: 16 February 2017

**JUDGMENT OF VENNING J
DISCOVERY APPLICATIONS**

This judgment was delivered by me on 16 February 2017 at 3.45 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: James & Wells, Auckland
Martelli McKegg, Auckland

Copy to: C Elliott QC, Auckland

Application for discovery

[1] The plaintiff (Goodman Fielder) seeks orders revoking the defendant's (Heinz Wattie's) trade mark for the word mark PRAISE in certain classes. The parties agree targeted discovery is appropriate but have been unable to agree on the nature and scope of such discovery. Both Goodman Fielder and Heinz Wattie's have made applications for discovery.

Context

[2] Although Goodman Fielder has its registered office in Australia it carries on the business of manufacturing, packing, distributing, marketing and selling food and related goods in New Zealand. It has registered and uses the PRAISE trade mark in Australia and has applied for registration of New Zealand trade marks 1043924 and 1043925 incorporating the word PRAISE.

[3] Heinz Wattie's is currently the owner of a New Zealand registered trade mark 801921 for the word mark PRAISE in two classes, 29 and 30.¹ Heinz Wattie's mark prevents registration of Goodman Fielder's mark in New Zealand.

[4] Goodman Fielder seeks revocation of Heinz Wattie's mark under s 66 of the Trade Marks Act 2002 (the Act). It says Heinz Wattie's has not put its PRAISE trade mark to genuine use in the course of trade in New Zealand for a continuous period of three years or more.

Goodman Fielder's argument on discovery

[5] Goodman Fielder accepts that Heinz Wattie's has used the PRAISE mark but says it has only done so on very limited occasions in the context of the relevant market, which it defines as the market for Fast Moving Consumer Goods (FMCG) in New Zealand. Mr Miles QC submitted Heinz Wattie's sporadic use of the mark

¹ Class 29 – Dairy products, eggs, milk and milk products; edible oils and fats; sweet spreads in this class; savoury spreads in this class; dips in this class; preserved, dried, cooked and frozen fruits and vegetables; snack foods in this class; prepared meals and constituents for meals. Class 30 – mayonnaise; salad dressings; sauces and condiments in this class, including cooking sauces, marinades and flavourings (other than essential oils) for adding to food; sweet spreads in this class; savoury spreads in this class; dips in this class; mustard; vinegar; salt; spices; seasonings; snack foods in this class; prepared meals and constituents for meals.

PRAISE in New Zealand was not genuine but was rather directed at blocking Goodman Fielder from bringing its PRAISE brand to New Zealand.

[6] Mr Miles submitted that the scope of the tailored discovery must be informed by the matters in issue in the proceedings. There were essentially only two issues – whether Goodman Fielder was an aggrieved person, which he submitted was not seriously arguable, and secondly, whether the limited use of the PRAISE mark by Heinz Wattie’s was genuine. This required Heinz Wattie’s to discover documents relevant to its use of the mark and also its use of two related trade marks for similar products, namely mayonnaise and dressing products. Goodman Fielder seeks discovery of the documents in accordance with schedule A attached to this judgment.

Heinz Wattie’s response

[7] Heinz Wattie’s accepts that the principal issue for determination is whether its use of the PRAISE trade mark was genuine and if not, whether the non-use (if any) was due to special circumstances.² While acknowledging the test for determining whether Goodman Fielder was an aggrieved person is not high, Heinz Wattie’s does not concede the point. Heinz Wattie’s seeks discovery of documents relevant to that issue.

[8] Mr Elliott QC also submitted that, as the ultimate test for determining whether Heinz Wattie’s use was genuine or not was an objective test, on the basis of equivalence Goodman Fielder should be required to discover documents relating to its use of the PRAISE trade mark in relation to “relevant comparator” products. The scope of discovery initially sought by Heinz Wattie’s is attached as schedule B to the judgment.

[9] In preparation for the hearing Mr Elliott sought to refine the discovery sought from Goodman Fielder. In a memorandum for the hearing he suggested that Goodman Fielder should discover:

- (a) documents relating to the plaintiff’s standing as an aggrieved person;

² In its statement of issues.

- (b) documents relating to the plaintiff's marketing and selling of relevant comparator food products³ in New Zealand and Australia including:
 - a. niche products and product sold or proposed to be sold through smaller retail outlets;
 - b. the plaintiff's sales of Relevant Comparator food products in order to either test a market or market segment, trade channel or with/for one or more customers or make a product viable or realistic in a particular market category or channel or with/for one or more customers.
- (c) documents relating to blocking strategies undertaken by the plaintiff in either Australia or New Zealand, including offering pallet deals to supermarkets, airing advertising campaigns for competing product, engaging in media warfare or taking action to deter or provoke a competitor reaction.

[10] Goodman Fielder concedes that documents in the first category should be discovered but objects to the second and third categories sought by Heinz Wattie's on the grounds they are not relevant to the issues in the proceeding.

[11] During the course of submissions Mr Elliott sought to redefine the categories of discovery further but maintained his submission that Goodman Fielder should discover documents relating to its use of the PRAISE brand.

The approach to discovery

[12] The concept of proportionality is central to tailored discovery.⁴ The scope of the discovery order will be informed by the relevance of the discovery sought to the issues in the case and, where relevant, the statutory framework.⁵

[13] In the recent case of *Chatfield & Co Ltd v Commissioner of Inland Revenue* the Court of Appeal discussed the approach to discovery following the amendment to

³ "Relevant comparator products" are products sold in Australia and New Zealand which provide a means whereby the nature and extent of the [Heinz Wattie's] use of the PRAISE trade mark can be assessed by the Court and which provide a yardstick whereby a reasonably objective assessment can be made.

⁴ High Court Rules 2016, r 8.9(a).

⁵ *Commerce Commission v Cathay Pacific Airways Ltd* [2012] NZHC 726; and *ASB Bank Ltd v Commissioner of Inland Revenue* [2014] NZHC 2184, (2014) 26 NZTC 21-098.

the discovery rules and confirmed relevance was still to be assessed by having regard to the pleadings.⁶

[21] Since 1 February 2012, the High Court Rules have provided for two kinds of discovery, namely “standard discovery” and “tailored discovery”. Standard discovery requires each party to disclose documents that are or have been in that party’s control and are documents on which the party relies, or adversely affect that party’s or another party’s case, or support another party’s case. The intention was to replace the previous rule with one that was narrower in scope. Formerly, under what was commonly known as the *Peruvian Guano* test, the obligation was to disclose documents that were or might be relevant to issues in the proceeding, or may lead to a train of inquiry. But the references in the new rule to the cases of the parties means that relevance will still be a hallmark of what has to be discovered. As with evidence, the relevance of a document for discovery purposes must be assessed having regard to the pleaded claim.

(footnotes omitted)

[14] Mr Elliott suggested that it may not be appropriate to apply the relevance criteria and general principles relating to tailored discovery to an application such as this, as applications for revocation are often made to the Patents Office. Discovery is not provided for in such applications.

[15] There is no principled reason why the established principles relating to discovery in High Court proceedings generally should not apply to applications of this nature brought in this Court. In *Royal New Zealand Yacht Squadron v Daks Simpson Group Plc* the Court rejected a submission that there should be a different approach to the standard of evidence before the Commissioner to that in the High Court, noting that it would be wrong for there to be different rules of evidence applying to the applications depending on whether the application was dealt with by the Court or the Assistant Commissioner.⁷ Similarly, the established principles relating to discovery should apply to applications under the Act made to this Court.

The issues

[16] Goodman Fielder says it is an aggrieved person, that it has standing to apply for revocation of Heinz Wattie’s PRAISE mark as an aggrieved person under s 65

⁶ *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZCA 614, (2016) 27 NZTC 22-084.

⁷ *Royal New Zealand Yacht Squadron v Daks Simpson Group Plc* [2002] NZAR 187 (HC).

and that its application is not vexatious. As noted, Heinz Wattie's formally puts Goodman Fielder's standing in issue.

[17] Goodman Fielder's substantive claim relies on s 66(1)(a) of the Act. The relevant provisions of s 66(1) are:

66 Grounds for revoking registration of trade mark

(1) The registration of a trade mark may be revoked on any of the following grounds:

(a) that at no time during a continuous period of 3 years or more was the trade mark put to genuine use in the course of trade in New Zealand, by the owner for the time being, in relation to goods or services in respect of which it is registered:

...

(1A) For the purposes of subsection (1)(a), **continuous period** means a period that commences from a date after the actual date of registration and continues uninterrupted up to the date 1 month before the application for revocation.

(2) However, despite subsection (1), a trade mark may not be revoked for its non-use if its non-use is due to special circumstances that are outside the control of the owner of the trade mark.

...

[18] Heinz Wattie's says its use of the PRAISE mark in New Zealand was genuine and, if not, the non-use (if any) was due to special circumstances.

[19] The relevant issues in the case are whether Goodman Fielder is an aggrieved person, whether Heinz Wattie's use of the mark in New Zealand has been genuine, and, if not, whether the non-use (if any) was due to special circumstances outside Heinz Wattie's control.

Onus of proof

[20] Section 67 provides for the onus of proof on an application for revocation under s 66(1)(a):

67 Onus of proof for revocation of registration of trade mark for non-use

If an owner or a licensee intends to oppose an application for the revocation of the registration of a trade mark under section 66(1)(a), the owner or the licensee must, within the period specified by the Commissioner or the court,—

- (a) provide proof of the use of the trade mark if the ground in section 66(1)(a) forms the basis for the application; or
- (b) raise the special circumstances that justify the non-use of the trade mark if section 66(2) applies.

[21] There is a difference between the parties as to the effect of s 67. Where, as here, there is a record of some, albeit limited, use of the mark by Heinz Wattie’s (which Goodman Fielder acknowledges) Mr Elliott submitted that the onus on Heinz Wattie’s to provide proof of use of the mark had been satisfied. He submitted the onus then shifted back to Goodman Fielder to prove that Heinz Wattie’s use was not genuine. Mr Elliott submitted that supported Heinz Wattie’s request for discovery of documents relating to Goodman Fielder’s marketing and sales of relevant comparator products.

[22] The texts in the area contain somewhat contradictory passages on this point. Mr Elliott relies on a comment in the text by Paul Sumpter *Trade Marks in Practice* where the author states:⁸

The procedure for a non use application is different (regs 96 –100) from the other grounds, because there is an initial onus on the owner to prove use.

[23] Mr Elliott submitted that reference to “initial onus” supported his proposition that all Heinz Wattie’s had to do was to establish any examples of use and the onus then reverted back to Goodman Fielder to prove the use was not genuine.

[24] Other authors appear to take a different view. In *Kerly’s Law of Trade Marks and Trade Names* the authors state:⁹

10-011 With one notable exception, if an application is made for a declaration of invalidity or for revocation, the onus lies on the

⁸ Paul Sumpter *Trade Marks in Practice* (3rd ed, LexisNexis, Wellington, 2015) at TMA66.3.

⁹ James Mellor and others *Kerly’s Law of Trade Marks and Trade Names* (15th ed, Sweet & Maxwell, London, 2011).

person making the attack to prove the grounds of invalidity and/or revocation relied upon to the normal civil standard of the balance of probabilities ...

10-012 The exception concerns alleged non-use. If any question arises in UK proceedings as to the use to which a UK registered trade mark has been put, it is for the proprietor to show what use has been made of the mark. Therefore, an application to revoke for non-use places the onus of proof on the proprietor to prove the use which has been made of the mark. *Equally, if the proprietor is not able to show genuine use*, the onus rests on him to show that there are proper reasons for the non-use.

(emphasis added)

[25] Mr Elliott also referred to the following passage from *James & Wells Intellectual Property Law in New Zealand*:¹⁰

If the application is based on one of the grounds of non-use set out in s 66(1)(a) or (b), the initial onus is on the trade mark owner or licensee to prove that the registered trade mark should not be revoked. Once use of the trade mark or special circumstances justifying non-use of the trade mark are established, the onus switches back to the person applying to revoke the registered trade mark to prove that the trade mark should be revoked on the relevant ground of non-use.

[26] However, later in the same text the authors state:¹¹

Where an application to revoke a registered trade mark is based on one of the grounds of non-use set out in s 66(1)(a) and (b) Trade Marks Act 2002, the trade mark owner or licensee bears the initial onus of establishing that the mark was put to *genuine use* on or in relation to some or all of the goods or services covered by the registration or that the use of the mark was not suspended (s 67).

(emphasis added)

[27] In Susy Frankel's *Intellectual Property in New Zealand* the author notes following the introduction of the 2002 Act:¹²

Under the 2002 Act, the onus is different. It requires the owner of a trade mark to show use.

¹⁰ Ian Finch (ed) *James & Wells Intellectual Property Law in New Zealand* (2nd ed, Thomson Brookers, Wellington, 2012) at 451.

¹¹ At 752.

¹² Susy Frankel *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2011) at 554.

When read in context the author appears to be equating use with genuine use. The passage follows reference to *Royal New Zealand Yacht Squadron v Daks Simpson Group Plc* where Ronald Young J held that under the former Act, once an applicant had established a prima facie case the Commissioner should then “... require the Respondent to show there was a bona fide use of the trade mark ...”.¹³ That suggests that even under the former Act the respondent had an onus to show bona fide or genuine use.

[28] Section 67 is directed at the ground for revocation of non-use under s 66(1)(a). The only ground for revocation under s 66(1)(a) is that the trade mark was not put to genuine use. In my view the onus placed on the respondent under s 67 is an onus to prove genuine use.

[29] However, it is unnecessary for this Court to make a definitive ruling on that at this stage of the proceeding, because whichever party has the onus of proof, the principal issue in this case is clearly whether Heinz Wattie’s use of the mark was genuine.

The test of genuine use

[30] Whether the use is genuine or not is essentially an objective test. In *Laboratoires Goëmer SA v La Mer Technology Inc* Mummery LJ in the UK Court of Appeal said:¹⁴

[34] There was some discussion at the hearing about the extent to which Goëmar was entitled to rely on its intention, purpose or motivation in the sales of the goods bearing the mark ... I do not find such factors of much assistance in deciding whether there has been genuine use. I do not understand the Court of Justice to hold that subjective factors of that kind are relevant to genuine use. What matters are the objective circumstances in which the goods bearing the mark came to be in the United Kingdom. ...

[31] However, in his text, Sumpter suggests the test for genuine use may comprise both objective and subjective assessments:¹⁵

¹³ *Royal New Zealand Yacht Squadron v Daks Simpson Group Plc*, above n 7, at [9].

¹⁴ *Laboratoires Goëmer SA v La Mer Technology Inc* [2005] EWCA Civ 978.

¹⁵ Sumpter, above n 8, at [TMA66.7].

No doubt the test for “genuine use” is largely objective but subjective aspects (objectively assessed) may arise in determining if use by an owner is a sham and intended only to preserve the mark or is for the purpose of genuine trade.

[32] On either approach, it is difficult to see what relevance Goodman Fielder’s use of its word mark may have to the issue of whether Heinz Wattie’s use was genuine in the sense discussed in Case C-40/01 *Ansul BV v Ajax Brandbeveiliging* and as summarised in *Pasticceria e Confetteria Sant Ambroeus SRL v G & D Restaurant Associates Ltd*.¹⁶ What is relevant is the circumstances surrounding Heinz Wattie’s use of the mark in New Zealand. Those circumstances do not involve consideration of Goodman Fielder’s business practices.

[33] Mr Elliott made the point it was important not to confuse onus and proof. He submitted all evidence of marketing, if relevant, would be discoverable not just Heinz Wattie’s marketing. I acknowledge the distinction between onus and proof, but on Mr Elliott’s argument third party discovery could be required from other competitors in the FMCG market. That cannot be seriously suggested to be appropriate. Goodman Fielder is in no different position to third party competitors, other than as a party to this litigation.

[34] Mr Elliott referred to the reference in *Laboratoires Goëmar SA’s Trade Mark (No 1)* by Jacob J to “similar entities” and two decisions of this Court which he suggested supported his argument.¹⁷

[35] The quotation Mr Elliott relied on from the judgment of Jacob J in *Laboratoires Goëmar SA’s Trade Mark (No 1)* case appears in a passage when the Judge was discussing the former legislation. But even if generally applicable to the test under the present Act the comparison of how similar entities go about marketing does not require discovery of Goodman Fielder’s documents relating to its marketing and sales. Evidence of how a similar entity might go about marketing can be given

¹⁶ Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, and *Pasticceria e Confetteria Sant Ambroeus SRL v G & D Restaurant Associates Ltd* [2010] RPC 28.

¹⁷ *Laboratoires Goëmar SA’s Trade Mark (No 1)* [2002] FSR 51 (Ch) at [27]; *Metalman New Zealand Limited v Scrapman BOP Ltd* [2014] NZHC 2028, [2014] NZAR 1393; and *Sambbasivam v Chetty* (2011) 94 IPR 214 (HC).

without requiring Goodman Fielder, just because it is a party to the proceeding, to disclose details of its marketing and trading data.

[36] In *Metalman New Zealand Limited v Scrapman BOP Ltd* Lang J referred to the ruling of the European Court of Justice in *Ansul*, particularly the passage that:¹⁸

- (c) When assessing whether there has been genuine use of the trade mark, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real. This may involve consideration of whether the use in question is warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark.
- (d) Assessing the circumstances of the case can include giving consideration to the nature of the goods or service at issue, the characteristics of the market concerned and the scale and frequency of use of the mark. Use of the mark does not always have to be quantitatively significant for it to be deemed genuine, as that depends on the characteristics and market of the goods or service in question.

(footnote omitted).

[37] In *Sambbasivam v Chetty & Ors* Dobson J stated:¹⁹

[46] I consider that the activity qualifies as genuine when such a small number of dealings might in other contexts not qualify as such, because of the nature of the goods in respect of which the mark is used. Two transactions in the space of the relevant 3-year period in other contexts such as, say, a high volume manufacturing business, might be so insignificant as to not justify a finding that the use is genuine. However, business on a very modest scale as an adjunct to a principal business in Mumbai and branches in South Africa, Malaysia, Singapore and Dubai may qualify as genuine without the same minimum level of activity that would be required in other contexts to establish its genuine character.

[38] With respect, however, the passages from the above cases simply reaffirm that whether the use of the mark by Heinz Wattie's is genuine is to be determined in context.

[39] The context can be provided by expert and experienced witnesses in this area. Context can be proved without discovery of Goodman Fielder's use of its mark. Whether Goodman Fielder's use was genuine or why or how it traded using its mark

¹⁸ *Metalman New Zealand Limited v Scrapman BOP Ltd*, above n 17, at [14], citing Case C-40/01 *Ansul BV v Ajax Brandbeveiliging*, above n 16.

¹⁹ *Sambbasivam v Chetty*, above n 17.

is not in issue. The patterns of trading by Goodman Fielder in the wide variety of products sought by Heinz Wattie's is not relevant to the principal issue in this proceeding.

[40] If the expert or other evidence called by Goodman Fielder relies on particular documentation of Goodman Fielders then the ongoing obligation to discover would apply and discovery may, at that stage, be required. At this stage of the proceedings, however, I reject the submission by Heinz Wattie's that discovery is required of Goodman Fielder's marketing and trading data. It is not relevant to the principal issue the Court has to rule on.

[41] With the exception of documents relevant to Goodman Fielder's standing, the documents sought by Heinz Wattie's from Goodman Fielder are not sufficiently relevant to the issue in the case to make them discoverable.

[42] By contrast the documents sought by Goodman Fielder are directly relevant to whether Heinz Wattie's use was genuine as opposed to token. Discovery is sought of documents dated from between 31 July 2011 to 31 August 2016 which make reference to the PRAISE trade mark brand or product. The evidence of Ms Ellerm, Goodman Fielder's manager of marketing, confirms that the FMCG market is challenging. She would expect internal and external correspondence, memoranda and meeting notes to accompany the high level of effort required to maximise the likelihood of a successful distribution and marketing programme. The defendant's expert, Mr Pretty, says that overall what Ms Ellerm says is reasonably accurate, although he takes issue with aspects of her evidence. For present purposes, those differences are not material.

[43] Next, Goodman Fielder seeks documents (not limited to the period 31 July 2011 to 31 August 2016) relating to any launch or relaunch by Heinz Wattie's of the PRAISE mayonnaise brand in New Zealand. The evidence discloses sporadic or clustered use of the mark in relation to such products since 2000. Each use is likely to have been commenced by a launch or relaunch. Ms Ellerm's evidence confirms that a launch or relaunch of a product is a critical phase in the lifespan of an FMCG. A number of documents would have been generated.

[44] Goodman Fielder also seeks documents relating to Heinz Wattie's PRAISE, Seriously Good and ETA Mayonnaise dressing products to enable comparison between the use made by Heinz Wattie's of the PRAISE mark and its comparable marks.

[45] Mr Elliott accepted a comparator of other Heinz Wattie's brands was relevant but submitted that it should be restricted to Seriously Good, rather than the ETA brand which involved very high volume sales. However, as Mr Miles submitted, in earlier proceedings in 2005 Mr Pretty deposed that:

The PRAISE product was replaced by the ETA rich and creamy brand of mayonnaise (albeit the products had exactly the same recipe).

There appears to be a relationship which supports the inclusion of documents relating to the ETA brand in the discovery exercise.

[46] Discovery of both Heinz Wattie's other relevant brands, Seriously Good and ETA will enable a comparison to be made between Heinz Wattie's use of the PRAISE trade mark and its use of other trade marks for comparable products. There may well be reasons for the different approaches but how Heinz Wattie's acted in relation to similar products is relevant to whether its use of this mark was genuine. The related financial documents will disclose the amount spent on promoting the brand and the returns. It will be probative of the nature and character of Heinz Wattie's use of the relevant mark.

Result

[47] Goodman Fielder is to discover all documents relevant to its pleading that it is an aggrieved person. Otherwise Heinz Wattie's application for discovery is dismissed.

[48] Heinz Wattie's is to discover the documents sought in the plaintiff's application and noted in Schedule A to this judgment.

[49] The parties are to comply with the discovery by filing and serving a sworn affidavit in accordance with r 8.15 within 20 working days and are to make the documents available for inspection in accordance with r 8.28.

Confidentiality

[50] Both parties accept that aspects of the documents will be confidential. Mr Elliott has proposed a confidentiality order which is not opposed.

[51] I make an order subject to any further order of the Court that the contents of any documents identified by the parties as confidential will be treated at all times as confidential. Access is restricted to the parties' lawyers, counsel and independent experts.

Costs

[52] Goodman Fielder has substantively succeeded on the applications. It is to have costs on both applications but allowance for only one half day and one counsel.

Venning J

SCHEDULE A

SCHEDULE

The plaintiff seeks discovery of any of the following documents in the possession, power or control of the defendant and dated from **between 31 July 2011 to 31 August 2016** (unless otherwise stated):

- (1) Any of the following which make reference to the PRAISE trade mark, brand or product:
 - (a) Emails and other correspondence (both internal to the defendant's business and exchanged with external parties);
 - (b) Internal memoranda or other documents, minutes, and meeting notes;
 - (c) Extracts from third party publications including trade magazines; and
 - (d) Documents (**not limited to those for the period 31 July 2011 to 31 August 2016**) relating to any launch or relaunch by the defendant of the PRAISE mayonnaise brand in New Zealand, including in respect of strategy, promotion, labelling, total spend on launch, getup, focus groups and marketing studies preceding launch, such documents to include (but not be limited to) those relating to:
 - (i) The apparent launch (or relaunch) of the PRAISE mayonnaise brand which preceded the group of sales of PRAISE branded product running from in or about the quarter to 15 October 2006;
 - (ii) The apparent relaunch of the PRAISE mayonnaise brand which preceded the group of sales of PRAISE branded product running from in or about the quarter to 6 October 2013;
 - (iii) The apparent relaunch of the PRAISE mayonnaise brand which preceded the group of sales of PRAISE branded product running from in or about April 2016.
- (2) All of the following which relate to the defendant's **PRAISE, SERIOUSLY GOOD** and **ETA mayonnaise and dressings products** to enable comparison between use made by the defendant of the PRAISE trade mark, and use made by the defendant of comparable trade marks:
 - (a) Documents discussing or disclosing brand strategy and performance including brand plans, category plans, category reviews and planogram reviews;

- (b) Inventory reports showing volumes of product warehoused at any point in time;
 - (c) Catalogues for retailers;
 - (d) Marketing material provided to the trade (including presentations, trade presenters, support plans); and
 - (e) Product formulation differentials.
- (3) Financial documents which relate to the defendant's **PRAISE, SERIOUSLY GOOD** and **ETA mayonnaise and dressings products** which illustrate the following (in order to enable comparison between use made by the defendant of the PRAISE trade mark, and use made by the defendant of its comparable trade marks):
- (a) Sales figures (in terms of both quantum and units);
 - (b) The relative contribution to the defendant's profit of each product; and
 - (c) Marketing expenditure.

SCHEDULE B

SCHEDULE 1

The defendant seeks discovery of any of the following documents in the possession, power or control of the plaintiff:

1. Documents relating to the plaintiff's standing as an aggrieved person.
2. Documents relating to the plaintiff's manufacturing, packaging, distributing, marketing and selling of Relevant Comparator¹ food products in New Zealand and Australia including through the grocery, route (including independent retail outlets) and foodservice channels.
3. Documents relating to the plaintiff's manufacturing, packaging, distributing, marketing and selling of Relevant Comparator food products in New Zealand and Australia including niche products and product sold or proposed to be sold through smaller retail outlets.
4. Documents relating to the plaintiff's production, distribution, advertising, promotion and other support in relation to Relevant Comparator food products in New Zealand and Australia in order to either test a market or market segment, trade channel or with/for one or more customers or make a product viable or realistic in a particular market category or channel or with/for one or more customers.
5. Documents relating to the plaintiff's "gate" process in relation to new or existing products.
6. Documents relating to assessment as to the viability of the plaintiff's honey mustard mayonnaise product.
7. Documents relating to blocking strategies undertaken by the plaintiff in either Australia or New Zealand, including offering pallet deals to supermarkets, airing advertising campaigns for a competing product, engaging in media warfare or taking action to deter or provoke a competitor reaction.

¹ "Relevant Comparator" products are products sold in Australia and New Zealand which provide a means whereby the nature and extent of the defendant's use of the Praise trade mark can be assessed by the Court and which provide a yardstick whereby a reasonably objective assessment can be made.