IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-001578
[2025] NZHC 1526

UNDER	Financial Markets Conduct Act 2013
BETWEEN	FINANCIAL MARKETS AUTHORITY Plaintiff
AND	BOOSTER INVESTMENT MANAGEMENT LIMITED First Defendant
	ALLEN SENG TONG YEO Second Defendant
	PAUL GERARD FOLEY Third Defendant
	BRENDON HUGH DOYLE Fourth Defendant
	DAVID IAN BEATTIE Fifth Defendant
	NICHOLAS JOHN CRAVEN Sixth Defendant

Hearing:	1 April 2025
Appearances:	J Carlyon, A D Luck and D Muratbegovic for Plaintiff S M Hunter KC, J E Standage and A J Horne for First Defendant D J Cooper KC, JE Standage and A J Horne for Second to Sixth Defendants
Judgment:	11 June 2025

JUDGMENT OF EDWARDS J

This judgment was delivered by me on 11 June 2025 at 3.30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

[1] The plaintiff, (FMA), brings proceedings against the first defendant, (BIML), and its current or former directors and senior managers in relation to investments it made into a related party, the Booster Tahi Limited Partnership (Tahi).

[2] The parties have substantially agreed the parameters of discovery orders, both in relation to discovery that the FMA seeks against the defendants, and that sought by the defendants against the FMA. This judgment determines the remaining issues in dispute.

The proceeding

[3] BIML is the manager of various investment schemes, including a Kiwisaver Scheme (together, the Schemes), and was responsible for the investment of Scheme funds. The second to sixth defendants are or were directors or senior managers of BIML, with responsibilities for managing BIML's investment process.

[4] The FMA's pleaded claims comprises 75 causes of action. The essence of the claim is summarised in its counsel's submissions:

> 1.6 The pleaded allegations relate to eighteen specific investment decisions and one decision to alter the methodology used to value an entity they had invested in (the **Decisions**). The Decisions were all specific investment decisions made in respect of the investment of Scheme funds into the Booster Tahi Limited Partnership (**Tahi**), which was a related party of BIML, for the purposes of Tahi then applying those funds to investments in unlisted entities which would later become the Booster Wine Group (**BWG**). In many instances, those unlisted entities were also related parties at the time the relevant decision was made.
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> 1.7 In short, the FMA says that, in its capacity as manager of the Booster Schemes, BIML advanced substantial sums of Scheme funds to Tahi for the purposes of Tahi investing in various wine entities, in circumstances where the processes set out in BIML's governing documents (s 143), the duties of a manager and its senior personnel (ss 143–145) and the related party transaction provisions of the FMCA (s 173) were not complied with.
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> 1.8 Over time, as the wine businesses began to struggle and further decisions were made to invest into Tahi, BIML's decision-making and adherence to its governing documents deteriorated, such that clear conflicts of interest were either ignored or disregarded, and large sums of Scheme funds were advanced to Tahi on short notice, with almost no due diligence, and in the face of clear red flags.

[5] The definitions referred to in the above paragraphs are adopted here. As noted, the FMA alleges that there were breaches of several sections of the Financial Markets Conduct Act 2013 (FMCA), namely:

(a) Section 143(1)(b) — to act in the best interests of Scheme participants.

(b) Section 143(2) — to carry out the functions of a manager in accordance with the governing document, the statement of investment policy and objectives, and all other issuer obligations.

(c) Section 144 — to act with the care, diligence and skill that a prudent person engaged in that profession would exercise in the same circumstances.

(d) Section 173 — a manager of a registered scheme must not enter into a transaction that provides for a related party benefit to be given, unless s 173(2) is complied with. In this case, compliance with subs (2) required a certificate from the manager that the transaction is on arm's-length terms pursuant to s 174(a).

[6] The FMA's pleaded claims against the second to sixth defendants allege that they used their positions contrary to s 145(b) of the FMCA. That subsection provides:

> **145 Duties of directors and senior managers of manager**
>
> A director or senior manager of a manager of a registered scheme—
>
> …
>
> (b) must not make improper use of the position as a director or senior manager of the manager to gain, directly or indirectly, an advantage for himself or herself or any other person or to cause detriment to the scheme participants.

[7] In defence of the claim, the defendants say that the 75 causes of action make the claim appear more complex than it really is. In essence, the defendants say that the Decisions were not transactions attracting the obligations of BIML under the

FMCA. Rather, the defendants say the transactions were allocations pursuant to a binding capital commitment by BIML to provide funds to Tahi. That commitment was the subject of a related party transaction certificate, and the defendants submit that no further supervision or inquiry into the nature of Tahi's investment by BIML or its directors and senior managers was required.

[8] The crux of the defence is summarised in the defendants' submissions as follows:

> (a) The obligations of a licensed fund manager (such as BIML) that invests assets into another fund (such as Tahi) relate only to the former's decision to make a capital commitment to the latter and monitoring that commitment. A licensed fund manager that invests in another fund is not entitled or obliged to consider and approve each 'downstream' investment made by the other fund.
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> (b) For the purposes of BIML's obligation to issue related party certificates in relation to its investments in Tahi, the "transactions" to which its obligations applied were its capital commitments of a proportion of the Scheme funds to Tahi under the Tahi Limited Partnership Agreement (**Tahi LP Agreement**). The defendants say that each "downstream" investment made by Tahi is not a "transaction" giving rise to a further obligation to issue a related party certificate.
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> (c) BIML acted in the best interests of Scheme investors when making and monitoring capital commitments in Tahi and it exercised "the care, diligence, and skill that a prudent manager of a registered scheme would exercise in the same circumstances".
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> (d) The second to sixth defendants did not act "improperly".

[9] One of the key issues at trial will be the nature of the relationship between BIML and Tahi in relation to the Decisions. This will involve the proper construction of the related party certificate given by BIML in relation to its investments into Tahi. As already noted, the defendants say that the certificate must be construed as relating to a capital commitment by BIML to Tahi. The FMA, on the other hand, says that each transaction was an investment of Scheme funds for the purposes of Tahi making further investments.

[10] The defendants also plead limitation defences to the first to twentieth causes of action in the statement of claim. The defendants say that those causes of action

are based on acts alleged to have occurred on or before 12 June 2018, being more than six years before the plaintiff's claim was filed on 12 June 2024.

[11] In response, the FMA has pleaded a late knowledge date of "no earlier than 16 July 2021". The parties are conferring about the exchange of particulars regarding this pleading. Documents relating to the FMA's knowledge for the purposes of these limitation defences is a category of documents sought by the defendants, as set out below.

The FMA's discovery application

[12] The parties agree that it is appropriate for the defendants to provide tailored discovery, and most of the 21 categories sought by the FMA have been agreed. By the time of the hearing, only categories 4(d)(ii) and (iii), and 11(r)(vi) remained in dispute. Each of these categories are taken in turn.

Category 4(d)(ii) and (iii)

[13] As sought by the FMA, category 4 provides:

> 4 All documents within the following categories:
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> (a) management agreements providing for the management of the Booster Scheme funds that made investments in Tahi;
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> (b) management agreements providing for the management of Tahi;
>
> (c) services agreements providing for the provision of services to the custodial companies of the Booster Schemes;
>
> (d) in relation to BIML, BFML and Tahi:
>
> (i) charters for Boards, Investment Committees and Audit Risk and Compliance Committees and including, for the avoidance of doubt, the Portfolio Management Committee, but not other sub-committees;
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> (ii) agenda, papers and supporting documentation for; and minutes reports and records of decisions of; all Board, Investment Committee, Advisory Committee and Audit Risk and Compliance Committee meetings (and including, for the avoidance of doubt,

the portfolio Management Committee, but not other sub-committees); and

(iii) conflicts of interest policies and registers.

[14] The defendants agree to provide discovery within sub-categories 4(a), (b), (c) and (d)(i). The dispute concerns sub-categories (d)(ii) and (iii), and whether the documents to be provided within these sub-categories is confined to the Decisions and entities referred to in the pleadings.

[15] The FMA says that any documents fitting the description of category 4(d) held by BIML, BFML or Tahi should be discovered, whether or not they relate to the Decisions or pleaded transactions.

[16] Ms Carlyon, for the FMA, submits that BIML's decision-making process is a key issue in the claim. She says that how decision-makers managed or oversaw investment activities more broadly provides relevant context for understanding the Decisions and how they were made. The FMA says this is of particular importance in this case because there is some indication that a different approach was taken to the governance of Tahi, than to other transactions and investments in entirely unrelated third parties. The extent to which decision-makers at BIML, BFML and Tahi departed from their typical decision-making processes in relation to Tahi or the Wine Entities will, in the FMA's submission, also be relevant in establishing the extent to which the alleged breaches were carried out knowingly. This is relevant to the allegations under ss 144(1), 145(b), 533 and to penalty more generally.

[17] The defendants maintain that only documents relating to Tahi and the Decisions should be included. I agree. It is axiomatic that relevance is to be determined by the pleadings. Documents which do not relate to BIML's decision-making in relation to the pleaded Decisions are not relevant. As counsel for the defendants submits, it is not BIML's decision-making in general which is at issue, but the decision-making in relation to the Decisions and entities referred to in the pleadings.

[18] Moreover, even if a comparison could be drawn between decision-making in relation to other transactions or investments (which the defendants dispute), I am not

persuaded such a comparison would be probative of the issues to be determined in this proceeding. A different approach to other transactions would say little about the process undertaken in relation to the Decisions in issue. Furthermore, given the defendants' indications as to likely volume of documents falling within this category, discovery of documents which do not relate to the pleaded Decisions or entities would be disproportionate in the circumstances.

[19] To the extent the FMA's application in relation to this category relates to Decisions or entities which do not fall within the pleaded claim, then the application is declined.

Category 11(r)(vi)

[20] Category 11 seeks discovery of documents relating to specific Decisions (for example, the decision to invest in Awatere River Wine Company Limited made on or about 30 March 2017). The documents sought relate to the Decisions listed in sub-paragraphs (a) to (r), and includes a list of documents falling within the category as particularised in (i)–(x). The dispute concerns sub-category (r)(vi) which provides:

> (vi) documents recording or referencing consideration of the overall financial performance of Tahi and/or the entities listed at 1(l) to (m) *including relative to the actual or anticipated performance of other investments made or contemplated*;
>
> (emphasis added)

[21] The dispute had narrowed by the time of the hearing, and centred on the italicised words in the paragraph above. The issue is the same as that raised with category 4(d)(ii) and (iii) above, in that it concerns the scope of the discovery sought.

[22] The FMA submits that a broad view of relativity should be taken so that this category would capture documents which, on a standalone basis, would reveal the actual performance of other Tahi investments compared to those which are at issue. The FMA says this is relevant to Tahi's overall financial performance.

[23] Discovery of standalone documents regarding the financial performance of Tahi investments which do not form part of the pleaded claim are not relevant to the issues in dispute. Even if relevant, discovery of these documents is likely to be disproportionate in the circumstances. For essentially the same reasons given in relation to category 4(d)(ii) and (iii) above, I consider category 11(r)(vi) should be confined to the first (un-italicised) part of the clause. Insofar as the application relates to the italicised portion of category 11(r)(vi), and extends to documents relating to Decisions or entities not in the pleaded claim, it is declined.

Defendants' application

[24] The defendants seek orders that the FMA provide standard discovery. In the alternative, if the Court orders tailored discovery, then the defendants seek discovery of five categories of documents which have not been agreed.

Standard or tailored discovery

[25] Rule 8.9(d) of the High Court Rules 2016 provides a presumption as to tailored discovery in cases where the total value of the sums in issue exceeds $2,500,000. That presumption is rebuttable where the interests of justice require standard discovery, rather than tailored discovery.[1]

[26] I agree with the FMA that the presumption applies in this case. The transactions at issue are well in excess of the $2,500,000 threshold, and the potential pecuniary penalties and compensatory orders may also exceed this sum. I do not consider the presumption can be rebutted, for the reasons outlined below. These same reasons mean that, whether or not the presumption applies, I consider the interests of justice favour tailored discovery in this case.

[27] The first factor favouring tailored discovery is the nature and scope of the claim. While the complexity of the proceeding is disputed by the defendants, on the face of the pleadings, the scope of the claim is significant. It involves multiple defendants and related entities, and substantial investments of Booster Scheme funds across a six-year period.

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1 High Court Rules 2016, r 8.9(d).

[28] Contrary to the defendants' submissions, the fact that there may be informational asymmetry is not a reason to order standard discovery in this case. Informational asymmetry will be present in many civil proceedings. Discovery orders are not about remedying that asymmetry, but are designed to ensure the disclosure of documents relevant to the proceeding.

[29] Finally, I agree with counsel for the FMA that it is preferable to set the parameters for the discovery process now, to avoid further arguments down the track which may cause delay or add to the parties' costs. If, after completion of the discovery process, there are concerns about relevant documents which have not been discovered, then the High Court Rules provide processes (such as further and better discovery applications) designed to address that issue.

[30] Accordingly, the application for a standard discovery order is declined. I now turn to consider the particular categories of documents in dispute.

Category 1

[31] Category 1 captures documents pertaining to BIML and relating to four sub-categories. The dispute centres on sub-category 1(a) which provides:

> Documents in the plaintiff's possession or control pertaining to the first defendant, BIML, relating to:
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> (a) the establishment, structure, management and purpose of Tahi (for the avoidance of doubt, including those documents pre-dating any investments at issue in the proceeding).

[32] This sub-category is said to be relevant to the defendants' limitation defence, and the FMA's knowledge about the way in which the investment relationship between BIML and Tahi was intended to work.

[33] It became apparent at the hearing that there was, in fact, little disagreement between the parties in relation to this category. The FMA accepts that documents relating to its knowledge of the fact that Tahi was going to be responsible for its own decision-making, and that the related parties certificate would be relied upon as sufficient for all advances to Tahi, are relevant. The FMA says it will discover

documents relating to the structure of Tahi which fall within the tailored discovery categories.

[34] For the sake of clarification, I consider this sub-category should remain as currently drafted and should be interpreted liberally. This will ensure that all documents relevant to FMA's knowledge of Tahi and its processes are captured, irrespective of whether they relate to the specific investments the subject of the claim. A single document may evidence a component of knowledge which, on its own, does not relate to the specific investments in issue, but, together with other documents show knowledge for the purposes of the Limitation Act defence. I also agree with the defendants that correspondence between the FMA and BIML in October 2017 regarding Tahi's fee structure falls within this sub-category and should be discovered.

[35] For completeness, I note that there was an issue around sub-category 1(c) which concerned documents evidencing communications between the FMA and the defendants. To the extent that this is still in dispute, I accept that the category is relevant and those documents must be discovered if they are in the possession of the FMA — even if they have and will be discovered by the defendants.

Category 3

[36] Category 3 relates to documents obtained by the FMA in the course of its investigation into other BIML entities — the Private Land and Property Fund (PLPF), and Private Land and Property Portfolio (PLPP).

[37] The dispute in relation to this category was resolved at the hearing. Counsel for the FMA indicated that these documents would be searched and discovered to the extent they fall within the other categories the subject of the tailored discovery order. As such, the description of documents clarifies the search parameters for the discovery, but does not need to be addressed as a separate and standalone category of documents.

Category 4

[38] The issue in dispute with this category centres on sub-category 4(b) by which the defendants seek discovery of documents prior to 16 July 2021 relating to:

> (b) relevant features of the establishment, structure, management and purpose of Tahi (for the avoidance of doubt, whether or not those documents relate to the investments identified in (a) above).

[39] There is a substantial overlap between categories 1 and 4 and the issue in dispute is the same. Accordingly, my decision in relation to category 1 and the scope of discovery to be provided applies equally here. For the avoidance of doubt, discovery will include the FMA's internal correspondence or documentation recording observations relevant to the establishment, structure, management and purpose of Tahi.

Category 5

[40] Category 5 provides:

> Documents in the plaintiff's possession or control relating to:
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> (a) industry conduct and practices of licensed investment managers who have made and/or are making investments in unlisted equities where relevant to their obligations under ss 143, 144, 173 and 174 of the FMCA;
>
> (b) documents relating to the plaintiff's discussions or assessment of the documents in (a) above or the conduct described in them.

[41] The defendants say the documents sought in this category are relevant to industry conduct and practices of licensed investment managers who have made and/or are making investments in unlisted equities which attract the obligations under ss 143, 144, 173 or 174 of the FMCA. The documents are sought on the basis that they will be of assistance to the Court and to the parties' experts in giving opinion evidence on the defendants' conduct.

[42] The application is supported by the affidavit of Mr Hardy. Mr Hardy is an independent specialist trustee who holds numerous qualifications and is experienced in the trustee field. In his affidavit, Mr Hardy opines on whether the documents

sought by the defendants under this category would be likely to assist an expert in giving an informed opinion on BIML's conduct in this case. He concludes that access to these documents would be helpful as it would allow an expert to reach a better-informed opinion which is likely to be of more assistance to the Court.

[43] The FMA opposes discovery under this category on the basis that the documents sought are not relevant because none of the pleaded statutory provisions require proof of whether the defendants' conduct is better or worse than any other market participant. Moreover, the FMA says that the value of expert evidence on these issues is that it comes from a person's own experience and expertise, rather than being based on discovery of documents.

[44] The FMA also opposes the admission of Mr Hardy's affidavit. It does so on the basis that the evidence is not substantially helpful; the affidavit has been filed at the last minute; and the FMA is prejudiced by that late filing.

[45] Starting with the issue of relevance, I accept that evidence relating to industry conduct and practice may be relevant to the determination of issues in the pleaded claim. There are three ways in which that evidence might be relevant.

[46] First, the evidence will be relevant to the alleged breach of s 144 of the FMCA, in which the FMA say that BIML failed to exercise the care, diligence, and skill that a prudent professional manager should have exercised when investing Scheme funds in Tahi. Evidence relating to industry practice may assist in deciding whether BIML met the threshold of a "prudent professional manager".

[47] Second, evidence of industry practice may also be relevant to the claim that the second to sixth defendants acted "improperly". For the purposes of this discovery application, I accept the defendants' submission that "improper" means conduct that is: [2]

> …a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of

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2 *Australian Securities and Investments Commission (ASIC) v Lewski* [2018] HCA 63 at [75], citing *R v Byrnes* (1995) 183 CLR 501; and *Angas Law Services Pty Ltd (In liq) v Carabelas* [2005] HCA 23, (2005) 226 CLR 507.

> the duties, powers and authority of the position in the circumstances of the case.

[48] Evidence of market practice may be relevant to the standards of conduct expected in these circumstances, and whether that threshold has been breached.

[49] Third, in the event the Court determines there is a breach, evidence of industry and market practice may also be relevant to penalty.

[50] There seems little dispute between the parties that expert evidence will be required on these issues. I accept that it is normal for expert evidence to be based on the expertise and experience of the expert giving that evidence. However, according to Mr Hardy, the documents sought by the defendants will inform that expert opinion and provide a greater level of assistance to the Court in assessing whether there has been a breach of relevant standards.

[51] The FMA has not had an opportunity to engage its own expert evidence to respond to Mr Hardy's affidavit. I accept their submission that they are prejudiced by the admission of this evidence. Another expert may take a different view as to whether access to these documents is required for an expert opinion to be expressed on the issues arising in this proceeding.

[52] This is important because issues of proportionality and commercial sensitivity arise in relation to this category of documents also. In an updating affidavit filed with the Court, Ms Gatland, the FMA's head of enforcement, says that there are likely to be more than 100,000 documents that would need to be reviewed if discovery of this category was ordered. In addition, the documents to be discovered belong to third parties and there may be issues of commercial sensitivity which will need to be addressed. Commercial sensitivity issues may also impact on the FMA's wider regulatory role. All these factors have an impact on whether discovery of the category 5 documents should be ordered, and if so, the process by which discovery should take place.

[53] Weighing all these factors in the balance, I consider time should be afforded to the FMA to engage an expert to respond to the affidavit of Mr Hardy. The experts

may be directed to caucus on the issue with a view to reaching a common position on whether access to these documents is necessary to form an expert opinion on matters in dispute. Further time will also allow the experts and counsel for the parties to consider measures to ensure that discovery remains proportionate, and commercial sensitivity is protected, and to make submissions on those issues if required. The application for discovery of this category of documents will be adjourned to allow this to occur.

Category 6

[54] Category 6 relates to complaints received by the plaintiff about the defendants or any of them on issues relevant to the proceeding, and includes three specific complaints identified in the category.

[55] The background to this category is a previous request by the defendants under the Official Information Act 1982 for disclosure of complaints received by the FMA about BIML or the other defendants. In responding to that request, the FMA confirmed that it had received eight complaints about the Booster group. Three were released. The remainder were withheld on the basis that they were protected disclosures or because, on initial inspection, they might be relevant to the current proceeding. The FMA provided a summary of the relevant complaints with identifying details withheld.

[56] In her first affidavit, Ms Gatland explained that the FMA team member who prepared the Official Information Act's response did not make a detailed assessment of relevance by reference to the pleadings. Upon further review, the FMA's position is that the three complaints are not relevant.

[57] There is no basis to go beyond the FMA's assessment which has been undertaken on the basis of the issues arising out of the pleadings. If these complaints contain information relevant to the categories of documents ordered to be disclosed, then the FMA will discover them accordingly. However, there is no reason to say that the complaints, as a standalone category of documents, are relevant to the issues in the proceeding.

[58] The application in relation to this category of documents is declined.

Result

[59] The plaintiff's application in relation to categories 4(d)(ii) and (iii) and 11(r)(vi) is dismissed.

[60] The defendants' application for standard discovery is dismissed. I order tailored discovery of categories 1 and 4 and dismiss the application relating to categories 3 and 6. The defendants' application in relation to category 5 is adjourned.

[61] Within 10 working days of this hearing, counsel shall file a joint memorandum (or separate memoranda if agreement cannot be reached):

(a) providing the draft form of discovery orders in accordance with the terms of this judgment; and

(b) addressing the matters set out in [53] of this judgment, including timetable directions for the filing and service of further expert evidence, caucusing, and the receipt of further submissions directed at proportionality and commercial sensitivity issues relating to category 5.

[62] If the parties cannot agree on the costs of this application, then a memorandum in support of costs shall be filed 10 working days after the hearing, with a memorandum in response filed five working days thereafter. Memoranda shall be no longer than three pages in length.

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Edwards J