

## Topic 10

### GATHERING EVIDENCE:

### PARTY-PARTY RULES:

#### Order 26 RSC Discovery

- What is a document?
  - O 26 r 1A RSC
  - Added in 1992 very broad and encompasses electronic document.
  - O 26 r 1B = redacted documents

The primary obligation - a discoverable document is every document

***“which [are] is or [have] has been in [his] the party’s possession, custody or power relating to any matter in question [therein] in the proceeding”.*** See O 26 r 1 RSC

#### ***‘Relating to any matter in question’***

##### **O 26 r 1**

What does this phrase mean?

- ***\*\*Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55***

***\*\*TEST*** that the court will look to see if discovery is adequate or further discovery is required... ***\*\*\****

*[A party’s obligation to give discovery extends to] - - every document [that] relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put the words “either directly or indirectly,” because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences - - -’* p 63 Brett LJ

#### ***‘possession, custody or power’***

##### **O 26 r 1**

What does this phrase mean?

- ***Swanston v Lishman (1881) 45 LT 360 & Lazarus v Mozley (1859) 1 LT 3.***
- ***Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627*** – southern Rhodesia pipeline case – Lord Diplock, defined what possession, custody or power mean, documents were with the subsidiary not the corporation at the top level therefore they didn’t have them physically. Came with the definition;  
***Presently enforceable legal right*** to obtain inspection of it from whoever actually holds it without obtaining the consent of another person.  
Without satisfying that criteria then it is not in the ‘possession, custody or power’. Its very inflexible application of the wording of the rule.
- ‘power’ is a question of fact, see ***Taylor v Santos Ltd (1998) 71 SASR 434.***
- ***Reed v Amaca Pty Ltd (formerly James Hardie and Coy Pty Ltd) [2010] WASC 14***
- ***Absolute Analogue Inc v Sundance Resources Ltd [2008] WASC 259 [considering the now repealed Order 29 r 2 RSC]*** = Court has power to direct a party to take steps to obtain access to and discover documents which are in the possession, custody or power of a 3<sup>rd</sup> party where there is a real likelihood that the party to the proceeding would be given access to the documents upon request