SUPREME COURT OF QUEENSLAND

CITATION: *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 276

PARTIES:

STEPHEN JAMES PARBERY AND MICHAEL ANDREW OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068
(first plaintiffs)

QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068
(second plaintiff)

JOHN RICHARD PARK, KELLY-ANNE LAVINA TRENFIELD & QUENTIN JAMES OLDE AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068
(third plaintiffs)

v

QNI METALS PTY LTD ACN 066 656 175
(first defendant)

QNI RESOURCES PTY LTD ACN 054 117 921
(second defendant)

QUEENSLAND NICKEL SALES PTY LTD ACN 009 872 566
(third defendant)

CLIVE FREDERICK PALMER
(fourth defendant)

CLIVE THEODORE MENSINK
(fifth defendant)

IAN MAURICE FERGUSON
(sixth defendant)

MINERALOGY PTY LTD ACN 010 582 680
(seventh defendant)

PALMER LEISURE AUSTRALIA PTY LTD ACN 152 386 617
(eighth defendant)

PALMER LEISURE COOLUM PTY LTD ACN 146 828 122
(ninth defendant)

FAIRWAY COAL PTY LTD ACN 127 220 642
(tenth defendant)

CART PROVIDER PTY LTD ACN 119 455 837
(eleventh defendant)

COEUR DE LION INVESTMENTS PTY LTD ACN 006 334 872
(twelfth defendant)

COEUR DE LION HOLDINGS PTY LTD ACN 003 209 934
(thirteenth defendant)

CLOSERIDGE PTY LTD ACN 010 560 157
(fourteenth defendant)

WARATAH COAL PTY LTD ACN 114 165 669
(fifteenth defendant)

CHINA FIRST PTY LTD ACN 135 588 411
(sixteenth defendant)

COLD MOUNTAIN STUD PTY LTD ACN 119 455 248
(seventeenth defendant)

EVGENIA BEDNOVA
(eighteenth defendant)

ALEXANDER GUEORGUIEV SOKOLOV
(nineteenth defendant)

ZHENGHONG ZHANG
(twentieth defendant)

SCI LE COEUR DE L'OCEAN
(twenty-first defendant)

DOMENIC MARTINO
(twenty-second defendant)

and

MARCUS WILLIAM AYRES
(first defendant added by counterclaim)

STEFAN DOPKING
(second defendant added by counterclaim)

FILE NO:	SC No 6593 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application filed 25 September 2018 (CFI 355) as amended on 9 November 2018 (CFI 434) and 21 November 2018 (CFI 444)
	Application filed 17 October 2018 (CFI 376) as amended
ORIGINATING COURT:	Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 21 November 2018

DELIVERED AT: Brisbane

HEARING DATE: 21 November 2018

JUDGE: Jackson J

ORDER: **Order as per draft.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – ADJOURNMENT – where application to adjourn trial due to failure to comply with order for disclosure – where failure self-induced – where possible to complete disclosure in sufficient time before trial – whether trial dates should be vacated

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – DISCOVERY OF DOCUMENTS – NON-COMPLIANCE – where application for extension of time to complete disclosure – where non-compliance is self-induced by applicants' failure to comply with earlier case management directions – whether extension should be granted

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – PARTICULAR CASES – UNREASONABLE CONDUCT OR DELINQUENCY RELATING TO PROCEEDINGS – where applications dismissed – where applications necessary due to failure to comply with orders – whether costs should be awarded on indemnity basis

Uniform Civil Procedure Rules 1999 (Qld) r 5, r 477

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175, cited
Attwells v Jackson Lalic Lawyers Pty Ltd (2016) 259 CLR 1, cited
Burns v Corbett (2018) 92 ALJR 423, cited
Central Queensland Mining Supplies Pty Ltd v Columbia Steel Casting Co Inc [2011] QSC 183, cited
Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co [1882] 11 QBD 55, cited
D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1 117-118, cited
Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49, cited
Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management & Marketing Pty Ltd (2013) 250 CLR

303, cited
Lanco Resources Australia Pty Ltd v Griffin Energy Group Pty Ltd [2016] WASC 322, cited
Malika Holdings Pty Ltd v Stretton (2001) 204 CLR 290, cited
McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors (No 1) (2016) 51 VR 421, cited
Mercieca v SPI Electricity Pty Ltd [2012] VSC 6, cited
Parbery & Ors v QNI Metals Pty Ltd & Ors [2018] QSC 240, related
Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146, cited
Reading Entertainment Australia Pty Ltd v Birch Carroll & Coyle Ltd [2002] FACFC 109, cited
Regal Life Insurance Ltd v Pacific Financial Resources Pty Ltd, unreported, Supreme Court of Victoria, Batt J, No 2145 of 1992, 16 November 1994, cited
Sali v SPC Ltd (1993) 116 ALR 625, cited
Smith & Anor v Gannawarra Shire Council (2002) 4 VR 344, cited
Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507, cited
UBS AG v Tyne [2018] HCA 45, cited
W Dazenko Structural & General Engineering Pty Ltd v Fraser Homes & Co Ltd, unreported, New South Wales Court of Appeal, Mahoney, Meagher and Handley JJA, No 751 of 1988, 5 October 1990, cited
Watford Petroleum Ltd v Interoil Trading SA [2003] EWCA Civ 1417, cited

COUNSEL: T Sullivan QC, with M Doyle, for the plaintiffs
K Byrne for the first to third, fifth, seventh to eighteenth and twenty-second defendants
E Robinson for the sixth and nineteenth defendants

SOLICITORS: King & Wood Mallesons for the first and second plaintiffs
HWL Ebsworth for the second and third plaintiffs
Alexander Law for the first to third, fifth, seventh to eighteenth and twenty-second defendants
Robinson Nielsen Legal for the sixth and nineteenth defendants

[1] **JACKSON J:** These applications by the defendants are to vacate orders made by Bond J on 27 July 2018 and 3 August 2018, and to replace them with directions as to the future conduct of the consolidated proceeding. First, the defendants apply to set aside the order that they complete disclosure by 24 September 2018. Second, they apply to set aside the order that they file and serve their affidavits and expert reports by 10 December 2018. Third, until those steps are complied with, it would make no sense to comply with other consequential steps in the existing program, and they apply to vary

those steps for finalising arrangements for the trial; and lastly, originally they applied to vacate the order that the consolidated proceeding is listed for trial, commencing on 29 April 2019 for 60 days, although by amendment made this morning, the defendants except for the fourth defendant have sought to delete that application.

[2] The sole ground of the applications is that the defendants have been unable to comply with the order for disclosure made on 3 August 2018. They contend they are unable to do better than to provide disclosure by the end of January 2019. The plaintiffs oppose the applications on what amounted to two grounds: first, that the defendants' inability or incapacity to comply with the existing orders was self-induced, and consequent upon a deliberate failure to comply with their obligations, both under r 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") and under orders of the court previously made in relation to disclosure; second, the plaintiffs point out respects in which the defendants' opinion evidence as to the time it will take to carry out disclosure should not be given too much weight because it is based on inadequate information or erroneous assumptions as to the tasks required.

[3] The plaintiffs submit that the trial and the consolidated proceeding can fairly continue in the face of the defendants' default in compliance with the orders of the court, by making an order that the defendants not be permitted to rely on any document at the trial which has not been disclosed to date without the court's leave first obtained.

Disclosure under the present rules and practice

[4] Under the *Judicature Acts* of 1873 and 1875 of England and Wales and the *Rules of the Supreme Court* 1883 of the same jurisdiction, that consolidated the rules of court to be applied in the then relatively new High Court of Justice, the equitable remedy of discovery became a general procedural right of parties to an action. Under the Queensland adaption of those rules in the *Rules of the Supreme Court* 1900 (Qld), no order of the court was required in an action for discovery. A party was obliged to make discovery of all documents in the party's possession or power relating to any matters in question in the action, and to produce for inspection the documents that were not privileged from production.[1]

[5] Relevance was measured by whether the document would set the opposite party on a train of inquiry into relevant evidence for the case.[2] A document did not have to be admissible to be discoverable.

[6] Disclosure, as it is now called under the UCPR, following the model of the change in terminology first adopted in the Civil Procedure Rules of England and Wales, or discovery, as it is still called in most Australian jurisdictions, became a challenge that required changes in court practice during the 1980s and 1990s. The problems were multifaceted, but they were manifested by the extent of the delay and the expense of complying with a party's obligation to give general discovery as a right to the opposite party of all relevant documents.

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1 Order 35 r 10.

2 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* [1882] 11 QBD 55, 63; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 80 [83].

[7] The underlying problem was the explosion in the number and volume of documents produced and retained in the modern age: first, because of the increasing production of documents using word processing computer programs and other forms of record keeping facilitated by computer databases, coupled with the availability of personal and other computing devices and platforms; second, because of the rise of the internet base means of communication with the ability to transmit documents electronically by email and otherwise; and third, the associated storage of documents in soft (or electronic) form and hard copy form.

[8] The Woolf Report in 1996 singled out discovery as a major contributor to excessive cost and delay.[3]

[9] The legislative and case management responses to these problems have been multifaceted also. One measure was to decrease what has to be disclosed under the general duty of disclosure or discovery by limiting the scope of what is relevant to what is now described in some places, including this State, as 'directly relevant'.[4]

[10] But limiting the duty of disclosure to what is directly relevant does not necessarily significantly decrease the work to be carried out by the disclosing or discovering party, who must search for and disclose or discover the documents, except by decreasing the volume of what is to be disclosed and produced at the end of the process. Principally, the effect of that measure is to decrease the work to be done by the party receiving disclosure or discovery and to reduce the number and volume of documents to be managed within the court's processes after disclosure or discovery.

[11] This was clearly not enough to respond to the challenges. Two other responses emerged in different jurisdictions. One was to remove the general right to disclosure or discovery so that discovery is required if and to the extent ordered by the court only. This is the procedural rule in New South Wales[5] and in the Federal Court of Australia.[6] And it is now generally encouraged in civil proceedings in this court by practice direction.[7]

[12] A second complementary way of achieving the same thing is for the court to relieve a party from the general obligation of disclosure or discovery under the rules of court and to substitute an order for the party to disclose classes or categories. An example of an early order of that kind is in *Reading Entertainment Australia Pty Ltd v Birch Carroll & Coyle Ltd*.[8]

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3 *Zuckerman on Civil Procedure: Principles of Practice*, (3 ed, 2013) at 720; Lord Woolf MR, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) ("Woolf Report") at 124-130.

4 *Uniform Civil Procedure Rules* 1999 (Qld), r 211(1)(b). The change was originally introduced in in 1996 by the *Rules of the Supreme Court* 1900 (Qld), order 35 r 4. For a recent statement of relevant principles as to the scope of directly relevant, see *Lanco Resources Australia Pty Ltd v Griffin Energy Group Pty Ltd* [2016] WASC 322, [15]-[21].

5 *Uniform Civil Procedure Rules* 2005 (NSW), Pt 38.

6 *Federal Court Rules* 2011 (Cth) r 20.12; Federal Court of Australia, Central Practice Note: National Court Framework and Case Management (CPN-1), paragraph 10.

7 Practice Direction 18 of 2018, paragraph 9.

8 [2002] FACFC 109.

[13] That disclosure is made of particular documents necessary for the fair trial of the proceeding, either under the rules of court[9] or a practice direction.[10]

[14] The second response is that the scope of disclosure is to be limited to what is proportionate to deciding the issues the subject matter of the controversy in the proceeding. A subset of the proportionate approach is to limit the extent of the searches to be carried out by a party in identifying the disclosable or discoverable documents to reasonable searches. What is proportionate is defined in one of this court's practice directions as follows:

> "7.1 The parties must ensure that all steps in relation to documents are proportionate having regard to:
> (a) the nature and complexity of the proceedings;
> (b) the amount at stake or the relief sought,
> (c) the real issues in dispute;
> (d) the stage the proceedings have reached;
> (e) the volume of potentially relevant documents;
> (f) the ease with which the documents may be retrieved or reviewed;
> (g) the time and costs associated with the proposed steps; and
> (h) the likely outcome or benefits to be derived by taking the proposed steps and the extent to which these are likely to have a significant impact on the outcome of the proceedings."[11]

[15] What are reasonable searches is also defined in that practice direction as follows:

> "8.1 In undertaking searches for documents, including for the purpose of making a disclosure pursuant to Chapter 7 of the *Uniform Civil Procedure Rules*, or in compliance with a direction of the Court in relation to documents, a party must undertake reasonable searches bearing in mind the principle of proportionality.
> …
> 8.4 The factors relevant in deciding the reasonableness of a search include the:
> (a) number of documents involved and their location;
> (b) nature and complexity of the proceedings;
> (c) ease and expense of retrieval of any particular document;
> (d) significance of any document, which is likely to be located during the search, in the ultimate resolution of the case."[12]

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9 *Uniform Civil Procedure Rules* 1999 (Qld), r 223(1).

10 Practice Direction 18 of 2018, paragraphs 3 to 10 and the example document plan in Practice Direction 11 of 2012, paragraph 19 and Attachment 1, including the Document Management Guidelines, paragraphs 1 to 8, 10 to 13, 15, and Appendices A to C. As well, see Practice Direction 10 of 2011, paragraphs 1 to 4.4 and UCPR Form 19.

11 Practice Direction 11 of 2012, paragraph 19 and Attachment 1, Document Management Guidelines, paragraph 7.1

12 Practice Direction 11 of 2012, paragraph 19 and Attachment 1, Document Management Guidelines, paragraphs 8.1 and 8.4.

[16] The flexibility of the modern approach to proportionate disclosure is important. For example, disclosure may be ordered to follow,[13] not precede,[14] the affidavits, witness statements, or summaries of evidence. That is done to reduce the scope of disclosure that is necessary.

[17] In the context of case management, these responses to the challenges of disclosure or discovery of both electronic and physical documents are managed every day by the now familiar means of the parties formulating, and the court ordering, disclosure or discovery to be made in accordance with a Document Plan.

[18] When the volume of electronic documents becomes overwhelming, target field searching based on criteria such as date, range, document name, author, sender, recipient, other names mentioned, or type of file or simple text searching, will still produce too many documents for physical review for disclosure or discovery. Recent developments in computer science described as technologically-assisted review, or TAR, are being employed to search volumes of data of that kind.[15]

[19] Even so, the particular challenges presented by searching among a huge volume of electronic documents are significant, and they have generated further significant developments based on computer science. Both lawyers and information technology experts are required to formulate appropriate search techniques of searchable data. Unless there is a clear identification of what the relevant categories of documents are, and a clear appreciation of the extent of the scope of the issues in the case upon which they might be disclosable or discoverable, the process is still likely to miscarry, as much by capturing too many documents as by too few.[16]

[20] The burden of carrying out searches that are neither reasonable nor productive is imposed. The costs and time of completing disclosure or discovery are not reduced to the extent that they should be.

The Document Plan in this case

[21] The present state of pleadings in this proceeding is as set out in my recent judgment in *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 240. The pleadings are lengthy, and in some respects, complex, but their length is greater than their complexity.

[22] On 30 June 2017, the statement of claim, which contained most of the relevant allegations now in issue, was filed, and it was served shortly thereafter.

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13 Supreme Court of New South Wales, Practice Note SC Eq 11, paragraph 4; cf *Lanco Resources Australia Pty Ltd v Griffin Energy Group Pty Ltd* [2016] WASC 322, [23].

14 The order in this court, "ordinarily", is for (initial) disclosure to precede affidavits, statements or summaries of evidence, for the reasons described in *Watford Petroleum Ltd v Interoil Trading SA* [2003] EWCA Civ 1417.

15 Supreme Court of Victoria, Practice Note SC Gen 5, paragraphs 8.7 to 9.9; *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors (No 1)* (2016) 51 VR 421, [18]-[31]; Downie and Blair, "Predictive Coding: Where Will It Fit in the Australian Litigation Landscape?" (2016) 28 *Australian Construction Law Bulletin* 226.

16 *Central Queensland Mining Supplies Pty Ltd v Columbia Steel Casting Co Inc* [2011] QSC 183, [19]-[20].

[23] On 19 December 2017, the consolidated statement of claim was filed.

[24] On 12 April 2018, the consolidated defence and counter-claim was filed.

[25] On 19 April 2018, Bond J made orders in the nature of case-management timetable as to disclosure as follows:

(a) by 4 pm on 25 May 2018, the QN parties must provide the defendants with a proposed list of categories of documents, a proposed document plan, and a proposed document management protocol;

(b) by 4 pm on 22 June 2018, the defendants must provide comments on the proposed list of categories of documents, proposed document plan, and a proposed document management protocol;

(c) by 4 pm on 29 June 2018, the parties are to meet to agree on the lists of categories of documents to be disclosed, the document plan, and a proposed document management protocol; and

(d) by 4pm on 6 July 2018, the parties must either notify the court of the terms of a proposed consent order, recording the terms of the agreement reached, or file an application seeking orders in respect of disputed aspects.

[26] On 25 May 2018, the plaintiffs provided the draft disclosure plan, a proposed document plan, and a proposed document management protocol to the defendants. On 22 June 2018, the defendants' solicitors stated that the defendants considered it premature to address disclosure and the proposed document management plan, in violation of Bond J's order of 19 April 2018.

[27] On 6 July 2018, the first and second plaintiffs applied for an order that the categories of documents, document plan, and document management protocol constitute the disclosure plan for the proceeding. On 24 July 2018, the parties met to discuss various matters, as required by Bond J's order of 19 April 2018. The defendants refused to provide any comments on the disclosure plan or the order for the disclosure plan proposed by the plaintiffs.

[28] On 27 July 2018, at a directions hearing before Bond J, the defendants declined to make any submission concerning the disclosure plan proposed by the plaintiffs. They sought an adjournment until 3 August 2018, so that they might respond to the disclosure plan. Bond J ordered that the plaintiffs' application for an order as to the disclosure plan be adjourned for hearing on 3 August 2018.

[29] On 1 August 2018, the plaintiffs' solicitors wrote to the defendants' solicitors, seeking the defendants' comments on the proposed list of categories contained in the disclosure plan. No response was received. On 3 August 2018, at the adjourned hearing before Bond J, counsel for the defendants said that he had instructions not to advance any submission in relation to the plaintiffs' application for an order for the disclosure plan.

Bond J ordered that the parties conduct disclosure in accordance with the plaintiffs' proposed disclosure plan and that:

(a) by 24 September 2018, the parties must complete disclosure, pursuant to the disclosure plan (and the list of categories for disclosure contained therein) of the document management protocol; and

(b) by 8 October 2018, the parties must file and serve any application for any order they seek in relation to deficiencies they contend exist in the other parties' disclosure.

[30] On 23 September 2018, the defendants' solicitors wrote to the plaintiffs' solicitors, stating that it was not possible for the defendants to complete disclosure before 25 January 2019 and that, in any case, disclosure was premature, again, in violation of Bond J's orders, now of 3 August 2018.

[31] On 24 September 2018, the plaintiffs completed disclosure in accordance with Bond J's order of 3 August 2018. The defendants did not make any disclosure. They still have not made any disclosure.

[32] On 25 September 2018 and 7 October 2018, the defendants filed the present applications.

[33] As originally filed, the defendants' applications stated that they would rely on five affidavits, two of which were to be sworn. The substance of the defendants' evidence at that stage may be summarised: first, the defendants did not adduce any evidence of whatever efforts they made to collect documents for the purposes of the consolidated proceeding or to prepare their case before 13 July 2018; second, it appears that after Bond J's order of 3 August 2018, the defendants' solicitors engaged a consultant to assist them in completing discovery and began to assemble material that could be provided to the consultant.

[34] On 4 September 2018, the defendants' solicitors wrote to the plaintiffs' solicitors, stating that their disclosure consultant opined that discovery of natively electronic documents would take approximately 4.5 months, and that the timeframe to complete discovery of hard copy documents was contingent on a scoping exercise not yet carried out, which itself would require four months. Accordingly, the defendants' solicitors proposed that the trial date set down for 29 April 2019 be vacated, along with nearly all of the directions as to the steps to be taken by the defendants under the existing orders as at that date.

[35] Two points about the contents of that letter should be made. First, the defendants appear to have had no appreciation whatsoever of their duty under UCPR r 5, in flagrantly violating Bond J's orders on the subject matter of disclosure up until that point, and then revealing for the first time the suggestion that disclosure by the defendants would take a period well in excess of four months, from 4 September 2018, apparently because no consideration had been given to the scope of disclosure or what would be required to complete it before then. Second, the letter bizarrely suggested that the case should be

removed from the commercial list because a trial in the commercial list should not exceed five days, in apparent ignorance of the amendments that have been made to the relevant practice direction to remove that limit on cases that will be entered on this list.[17]

[36] From a solicitor's affidavit, it appears that the first consideration given to undertaking electronic disclosure on the defendants' part took place on or about 12 July 2018, when the solicitor contacted and had a preliminary discussion with a consultant from an electronic disclosure specialist firm, who I will call the disclosure consultant.

[37] On 13 July 2018, the solicitor met with the disclosure consultant to speak about the then draft disclosure plan, the various locations of documents held by the defendants, and the services that the consultant's firm could offer. He informed the disclosure consultant that electronic documents held by the defendants were located within a central core server, consisting of 46 individual servers, including a document file server, four SAP servers, four database servers, and an email server.

[38] On 26 July 2018, the disclosure consultant informed the solicitor that she had engaged with other IT consultants engaged by the defendants to identify the type of electronic data held on servers by the defendants.

[39] On 30 July 2018, the solicitor spoke with an IT consultant for the defendants, who is unidentified, to identify the sources of electronic data relevant to the proceeding held by the defendants. The solicitor says that throughout August, he further engaged with IT consultants to narrow the scope of the documents to be identified. He says that the narrowing process was conducted with the assistance from the unidentified IT consultants.

[40] On 9 August 2018, the defendants' solicitors engaged the disclosure consultant's firm to assist the defendants to undertake and manage disclosure and to provide the report, which will be subsequently identified.

[41] On 13 August 2018, the solicitors caused an external hard drive, containing potentially discoverable documents, to be delivered to the disclosure consultant's firm.

[42] Also on 13 August 2018, the solicitor was advised by an unnamed IT consultant that copying of email servers would commence on 14 August 2018 and would take approximately two weeks.

[43] On 22 August 2018, the solicitor travelled to Townsville with a representative of the disclosure consultant's firm to inspect the refinery to identify electronic and hard copy documents.

[44] Also on 22 August 2018, the former financial controller of the QNI group provided to the solicitor an index, obtained from the refinery, reporting the contents and locations of hard copy documents. The index is in excess of 1000 pages but has not been exhibited.

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17 Practice Direction 3 of 2002, paragraph 7(a)(ii) and Practice Direction 17 of 2015

[45] On 31 August 2018, the solicitors for the defendants received, from an unnamed IT consultant, an external hard drive containing the email server data, obtained from the servers at the refinery.

[46] On 5 September 2018, the solicitor spoke with the fourth defendant about potential further locations of documents. The fourth defendant said that hard copy documents for the defendants were located either at the refinery or at the seventh defendant's office in Brisbane.

[47] On 21 September 2018, the solicitor was informed by the fourth defendant that hard copy documents at the refinery were being marshalled to a central location.

[48] Also on 21 September 2018, the disclosure consultant provided a report, and the solicitor's instructed the disclosure consultant's firm to process the electronic documents provided to them.

[49] On 24 September 2018, the defendants' solicitor served on the solicitors for the plaintiffs a letter on behalf of the eighteenth and nineteenth defendants:

(a) stating that the eighteenth defendant did not hold any documents responsive to the categories of disclosure, and

(b) making disclosure on behalf of the nineteenth defendant by providing a USB drive containing the documents held by him.

Disclosure consultant's 21 September 2018 report

[50] The defendants' disclosure consultant is a former lawyer who works in the application of technology to electronic disclosure or discovery. She has expressed a number of opinions in a report dated 21 September 2018, which is in evidence.

[51] The assumptions on which the opinions are based are not made explicit, or at least not largely made explicit; however, she was provided with a copy of the pleadings as at August 2018. The disclosure consultant was also provided with a copy of the disclosure plan. She was informed and assumed that the defendants' solicitors had undertaken a range of investigations to identify sources of potentially relevant hard copy and electronic documents, and that the following sources of documents are expected to include documents that would be disclosable, as set out in a table in her report, set out below.

Description	**Nature**	**Volume**
Documents held at QNI refinery	Hardcopy	Unknown but best current estimate, between 2 and 4 million documents
File server materials	Electronic	5.3TB
Outlook email containers 700-800.pst files	Electronic	1.5TB

SAP data	Electronic	Unknown

[52] One of the difficulties with the assumptions on which the opinions were based was that the disclosure consultant was informed that although the hard copy documents held at the refinery were likely to include documents that would be disclosable, the defendants' solicitors knew very little about the nature of the documents held at the site, apart from having located the index of the archived records.

[53] Apparently, to give some better understanding of what might be involved by way of hard copy documents, the disclosure consultant was informed by a representative of her firm who had attended the refinery that:

(a) the administrative buildings contained approximately 50 offices, 80 workstations, 4 compactus filing units, and hundreds of two- and four-drawer filing cabinets, as well as a large number of repositories of loose hard copy documents scattered throughout;

(b) several operational focus buildings contained at least one office per building;

(c) there is a large warehouse facility containing approximately 4725 boxes of archive documents; and

(d) there are several shipping containers that contain archived documents.

[54] By way of preliminary comment, I observe that no purpose is served by describing the full extent of the physical documents that might be held at the refinery. There is no question that most of those documents are not even potentially relevant, let alone directly relevant to any question in the proceeding. To start from the position that all the documents in the refinery might have to be processed for the purpose of carrying out reasonable searches in relation to the issues raised on the pleadings in the proceeding was a clear error, in my view.

[55] As to electronic documents, the disclosure consultant assumed, on the basis of information from the defendants' solicitors, that the sources of potentially disclosable electronic documents include the following:

(a) file server materials with an unprocessed volume of 5.3 terabytes that are likely to substantially fall within the primary response date range of 1 July 2009 to the present;

(b) seven to eight hundred PST files, being Outlook email containers, with an unprocessed volume of 1.5 terabytes; and

(c) an SAP ERP server, from which data is to be extracted by the defendants' personnel in accordance with the requirements of paragraph 17 of the Document Plan.

[56] The disclosure consultant set out the steps which she recommended for both electronically stored information and hard copy documents to be processed. The critical step in her recommendations is that a best practice approach would have the consolidated hard copy and electronically stored information analysed as a single collection. In my view, this is somewhat impractical and reflects a lack of awareness of the obligations of the defendants as disclosing parties under the rules of court, practice directions, and existing orders of the court, notwithstanding that she had been provided with copies of some of the information of that kind.

[57] The disclosure consultant's recommendation was for the combined hard copy and electronic stored information collection to be compiled and to be made the subject of conceptual analytics-based review as a singular exercise undertaken simultaneously. As I confirmed with counsel, I infer that conceptual analytics is a form of TAR.

[58] I reject this as a reasonable approach to be followed in this case, particularly having regard to the complete lack of identification of the likely scope of relevant documents in hard copy format and the disclosure consultant's inability to express a broad or realistic opinion as to the extent of the necessary collection and search process to be engaged in for hard copy documents.

[59] Alternatively, the disclosure consultant also expressed an opinion as to what may be done on a tranche-based approach before the application of her recommended conceptual analytics assisted review. As to that, she opined that the timeframe to complete a first tranche of the electronically-stored information was three to four months, although it was difficult for her to estimate a timeframe without having undertaken a conferral process with the defendants' solicitors to better understand the legal and factual issues, to review and analyse each category, and for each category, to determine the most effective analysis strategy to find responsive documents. Her understanding was further impaired by not having access to the processed electronic stored information and not knowing how many categories might depend on conceptual analytics.

[60] Although the disclosure consultant's report was dated 21 September 2018, it does not appear that she was then provided with copies of letters written by the solicitors for the plaintiffs to the solicitors for the defendants, dated 8 September 2018, 17 September 2018, and 20 September 2018, before finalising her report, dated 21 September 2018.

[61] Some important points were made in the plaintiffs' solicitors letter, dated 7 September 2018, that could affect the opinions expressed in the report. First, the point was made that the former financial controller of the QNI group of companies Mr Wolfe, had been able to use the defendants' records and rely on those records, probably the SAP databases, in relation to interlocutory proceedings, and that Mr Wolfe might have been able to provide details as to the extensive archiving process that he said he was involved with for the joint venturers. Second, the point was made that it does not seem the disclosure consultant's firm was instructed the joint venturers were not required to disclose any electronic records already provided, as set out in the Disclosure Plan, and that the plaintiffs' solicitors had offered to provide the electronic data that they had already obtained, which would cut the electronic volume down by approximately 2.65 terabytes.

[62] Further, by the plaintiffs' solicitor's letter dated 20 September 2018, the point was made that there are documents, apart form the refinery documents, which should have been able to be disclosed.

[63] On 2 October 2018, directions were made for the hearing of these applications on 26 October 2018. On 26 October 2018, the defendants applied for orders to adjourn that hearing so that the recusal applications they had brought could proceed first. In the result, these applications were set down for hearing on 9 November 2018.

[64] Also on 2 October 2018, the plaintiffs' solicitors wrote to the defendants' solicitors on the question of disclosure. They observed that up to that time, no suggestion had been made by the defendants as to ways to narrow the disclosure categories or obligations under the disclosure plan, and an invitation was extended for solutions which might minimise the burden on the defendants.

[65] As well, the plaintiffs' offer to provide an image of the data held by them to minimise the electronic data to be searched by the defendants was repeated and the plaintiffs' solicitors requested that the defendants prioritise disclosure of electronic data over hard copy documents, on the footing that the hard copy may have limited value. Finally, the plaintiffs' solicitors confirmed that they were content for the defendants to disclose in tranches as documents are reviewed.

[66] On 8 October 2018, I heard the parties' cross-applications to strike out parts of each other's pleading.

[67] On 22 October 2018, I decided those applications in *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 240. The orders that were made struck out parts of the amended consolidated statement of claim, and in effect, parts of the consolidated defence and counter-claim, leaving a reduced scope of issues to be decided at the trial.

9 November 2018 hearing

[68] On 9 November 2018, at the outset of the hearing of these applications, the plaintiffs sought to vary the schedule to the disclosure plan by reason of the reduced scope of the issues on the pleadings, so as to reduce the categories of documents that were disclosable.

[69] In response, the defendants applied for an adjournment to consider their positions and to obtain a further report from their disclosure consultant. I granted the adjournment, and the applications were adjourned to today. I also made an order on 9 November 2018 updating the scheduling of steps going forward in the proceeding from that day.

Disclosure consultant's 15 November 2018 report

[70] The defendants rely upon a further report by their disclosure consultant, dated 15 November 2018. She says that since her first report, she has met with the solicitors to review and analyse the categories of documents, and her firm has copied the file server

and Outlook container data, processed the data, begun application of exclusionary and inclusionary filters, and begun indexing, collection, and scanning of potentially relevant hard copy documents at the refinery.

[71] Her updated assessment is that:

(a) disclosure of the electronic document categories that do not depend on conceptual analytics will be complete by 31 December 2018;

(b) disclosure of the electronic document categories that depend on conceptual analytics will be complete by 31 January 2019; and

(c) disclosure of the hard copy documents will be complete by 31 January 2019.

[72] Those opinions are based on assumptions that she sets out. She states that in forming her opinion:

(a) she was not aware of what the GPL data, as it is called, of 2.65 terabytes (that is, the copy of the QNI data that the plaintiffs have said does not need to be disclosed by the defendants) is comprised;

(b) she cannot say how much exclusion of the GPL data from the data required to be processed by the defendants for the disclosure would have reduced the data copying and processing time; but

(c) she does not favour uploading and de-duplicating the GPL data because it may compromise the data analytics her firm proposes to apply to the defendants' electronic documents.

[73] The assumptions on which these opinions are based are not stated in any detail in the report or affidavit to which it is exhibited. The reasonableness of the disclosure consultant's opinions cannot be assessed.

Summary of position on defendants' disclosure and case management directions

[74] It follows that, in substance, the defendants have singularly failed to comply with the case management orders for them to give disclosure either on or before 24 September 2018 or since.

[75] The plaintiffs, since then, have filed and served their affidavits and expert reports for the trial, although some were late by up to 10 days.

Adjournment of the trial

[76] As previously stated, among other things, the defendants' applications were to vacate the dates for trial. The defendants, other than the fourth defendant, no longer apply for

such an order, but given the material that was read in support of the applications, and having regard to the defendants' failure to complete the interlocutory steps as directed for disclosure or to prepare their evidence, it is appropriate to say something in some detail about this question, against the possibility that it might be raised again in the future.

[77] In the case of a proceeding started by claim or ordered to be continued as if started by claim, the process of setting trial dates is regulated by Chapter 13 Part 2 of the UCPR, including by r 466, that a judge may set a date for the trial. That is the way in which an order is made for a trial to be heard in a case on the commercial list and was how the trial dates were set in the present case.

[78] The rules of court for the trial of a proceeding are contained in Chapter 13 Part 3 of the UCPR. Under UCPR r 477, the court may, at or before a trial, adjourn the trial. The discretionary power is given or conferred in unfettered terms, but is exercised under the UCPR, having regard to the overarching philosophy that informs the rules under r 5, including the purpose to facilitate the just and expeditious resolution of the real issues in a civil proceeding at a minimum of expense, the objective of avoiding undue delay, expense, and technicality and facilitating that purpose, having regard to the parties' implied undertakings to the court and the other parties, to proceed in an expeditious way.

[79] The case law also establishes important principles by way of guidance of the exercise of the discretionary power. They may be stated at various levels of abstraction. At the highest level, the parties to a proceeding are entitled to have their civil dispute or controversy quelled,[18] by a final judgment or order of the court given at the conclusion of the proceeding,[19] by a judge who is impartial and through a hearing process that constitutes a fair trial.[20] Whether the dates upon which a trial is set down to be heard should be vacated, thereby adjourning the trial, is a question to be answered having regard to those fundamental rights.

[80] Second, an important subsidiary principle is that it is important to the administration of justice that the parties to a civil dispute obtain an early credible trial date, if possible.[21] There are a number of reasons why. They include the prejudice suffered by a party entitled to succeed in being delayed, and that the delay of the court proceeding adds to the legal, other economic, and social costs of litigation.

[81] Modern procedural law has embraced the need to avoid delay and unnecessary costs and takes into account considerations that are not confined to the convenience or individual rights of the parties. These factors now appear in the statutory framework of many of the courts, and they directly affect the question whether a trial of a proceeding should be adjourned, either at or before the trial. It is appropriate to consider relevant case law, but the modern statutory context must be kept in mind as well.

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18 *Burns v Corbett* (2018) 92 ALJR 423, 432-433 [21].

19 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507, 516 [20]; *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 40 [109]-[110].

20 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 [28].

21 Schwarzer, "Case Management in the Federal Courts" (1996) 15 *Civil Justice Quarterly* 141 at 141-142.

[82] An uncontentious starting point of relevant case law is the confirmation in 1990 of the principle that, subject to appropriate limitations, an adjournment may be given as is necessary to enable a party to present its case to a court.[22] But, even so, an applicant is not likely to succeed in making an adjournment based on "problems … entirely of its own making or … due to default or neglect on the part of its solicitors."[23]

[83] Next, in 1993, the High Court took into account the importance of case management in relation to an application for an adjournment. The court recognised older cases that granted an adjournment that, if refused, would result in a serious injustice and held that an adjournment should only be refused if that is the only way that justice can be done to another party in the action.[24] But the court continued:

> "However, both propositions were formulated when court lists were not as congested as they are today and the concept of case management had not developed into the sophisticated art that it has now become."

[84] In that case, the court refused to adjourn the hearing of an appeal for two weeks, even though the refusal had the practical effect of terminating the proceeding altogether.[25]

[85] One recognised area of case management, perhaps the earliest in the Australian experience, consists of cases managed in a commercial list.[26]

[86] By 1994, although probably before then, an observer could see the court's lesser preparedness to grant an adjournment in a case managed on the commercial list. In the Supreme Court of Victoria, Batt J referred to cases that emphasised the more stringent approach taken in assessing whether an adjournment of a trial should be granted in a case managed in a commercial list.[27]

[87] In 1997, there was a brief swing back towards the other direction in dealing with adjournment and amendment of a case-managed proceeding, propelled by *Queensland v JL Holdings Pty Ltd*,[28] but that swing was firmly arrested in 2009 in *Aon Risk Services Australia Ltd v Australian National University*.[29]

[88] Although that case was concerned with the exercise of the discretionary power to permit amendment, very often a significant late amendment, if allowed, leads to adjournment of the trial. An important passage from that case is as follows:

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22 *W Dazenko Structural & General Engineering Pty Ltd v Fraser Homes & Co Ltd*, unreported, New South Wales Court of Appeal, Mahoney, Meagher and Handley JJA, No 751 of 1988, 5 October 1990 at 5.

23 *W Dazenko Structural & General Engineering Pty Ltd v Fraser Homes & Co Ltd*, unreported, New South Wales Court of Appeal, Mahoney, Meagher and Handley JJA, No 751 of 1988, 5 October 1990 at 12.

24 *Sali v SPC Ltd* (1993) 116 ALR 625, 628 and 629.

25 *Sali v SPC Ltd* (1993) 116 ALR 625, 631.

26 For example, *Commercial Causes Act* 1910 (Qld); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 117-118, [375].

27 *Regal Life Insurance Ltd v Pacific Financial Resources Pty Ltd*, unreported, Supreme Court of Victoria, Batt J, No 2145 of 1992, 16 November 1994 at 24-29.

28 (1997) 189 CLR 146; *Smith & Anor v Gannawarra Shire Council* (2002) 4 VR 344.

29 (2009) 239 CLR 175.

> "The purposes stated in r 21 reflect principles of case management by the courts. Such management is now an accepted aspect of the system of civil justice administered by courts in Australia. It was recognised some time ago, by courts here and elsewhere in the common law world, that a different approach was required to tackle the problems of delay and cost in the litigation process."

[89] In its report in 2000, "Managing Justice: a Review of the Federal Civil Justice System", the Australian Law Reform Commission noted that: "Over the last ten years Australian courts have become more active in monitoring and managing the conduct and progress of cases before them, from the time a matter is lodged to finalisation".

[90] The modern approach to the procedural question of adjournment of a trial in a case managed list has proceeded from there, including cases in which the party seeking an adjournment has delayed in compliance with trial preparation directions.[30]

[91] In 2018, the general trend continues in the same direction, as illustrated by a 2013 decision of the High Court, where this was said:

> "In *Aon Risk Services Australia Ltd v Australian National University*, it was pointed out that case management is an accepted aspect of the system of civil justice administered by the courts in Australia. It had been recognised some time ago by courts in the common law world that a different approach was required to tackle the problems of delay and cost in the litigation process. Speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants. The decision in *Aon Risk Services Australia Ltd v Australian National University* was concerned with the *Court Procedures Rules* 2006 (ACT) as they applied to amendments to pleadings. However, the decision confirmed as correct an approach to interlocutory proceedings which has regard to the wider objects of the administration of justice." (footnote omitted)[31]

[92] A very recent decision of the High Court further confirms the approach as follows:

> "The timely, cost effective and efficient conduct of modern civil litigation takes into account wider public interests than those of the parties to the dispute… As the joint reasons in *Aon Risk Services Australia Ltd v Australian National University* explain, the 'just resolution' of a dispute is to be understood in light of the purposes and objectives of provisions such as s 37M of the FCA. Integral to a 'just resolution' is the minimisation of delay and expense. These considerations inform the rejection in *Aon* of the claimed 'right' of a party to amend its pleading at a late stage in the litigation in order to raise an arguable claim. The point is made that a party

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30 For example, see *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 6.

31 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management & Marketing Pty Ltd* (2013) 250 CLR 303, 321-323 [51]-[57].

> has a right to bring proceedings but that choices are made respecting what claims are made and how they are framed. Their Honours speak of the just resolution of the dispute in terms of the parties having a sufficient *opportunity* to identify the issues that they seek to agitate. The respondent's argument in *Aon*, that the proposed amendment to raise the fresh claim was a necessary amendment to avoid multiple actions, did not avail…
>
> It is to hark back to a time before this Court's decisions in *Aon* and *Tomlinson* and the enactment of s 37M of the FCA to expect that the courts will indulge parties who engage in tactical manoeuvring that impedes the 'just, quick and efficient' resolution of litigation. To insist, for example, on 'inexcusable delay' as precondition of the exercise of the power to stay proceedings as an abuse of process is to fail to appreciate that any substantial delay is apt to occasion an increase in the cost of justice and a decrease in the quality of justice. And other litigants are left in the queue awaiting justice." (footnotes omitted)[32]

Grounds of the defendants' applications

[93] The defendants rely upon their inability to have completed disclosure as directed and ordered as the basis for the orders that they seek.

[94] They adduce no evidence as to how the delay and disclosure has prevented them from preparing their own case, except for an extraordinary affidavit by the fourth defendant, in which he swears that:

(a) the vast majority of documents potentially responsive to the categories set out in the disclosure plan are located and stored in the refinery;

(b) he is prejudiced by being required to provide "evidence for disclosure" (whatever that means), and many documents at the refinery will go to evidence that he needs to produce at the trial;

(c) the disclosure orders have been made prematurely and will result in enormous waste of time, money and effort;

(d) future changes in the categories will result in an extra cost up to $1 million and six to 12 months to redo the work of disclosure;

(e) pleadings are far from closed because he and the other defendants propose to make amendments and to appeal my orders of 22 October 2018; and

(f) the interests of the other defendants will be adversely affected if the first to third defendants do not disclose documents to them.

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32 *UBS AG v Tyne* [2018] HCA 45, [38]-[39] and [45].

[95] As to these points, I observe that the fourth defendant's affidavit is not responsive to the current Disclosure Plan schedule of categories, which reduce the categories of documents to be disclosed. Further, in my view:

(a) there is no basis in fact set out for why the vast majority of potentially relevant documents are at the refinery and not, for example, in the electronic documents that have already been copied and processed;

(b) disclosure is not the process by which a party prepares its own case, but that by which it discloses and provides copies of disclosed documents to the opposite parties on the issues joined between them. To the extent that the fourth defendant has not gathered documents that he wishes to deploy in his own case, he has made no explanation for the delay in doing so, beyond his assertion that the disclosure is premature;

(c) there is no basis for the assertion that the order for disclosure was premature, as the discussion as to the modern practice of disclosure set out previously shows;

(d) the defendants may apply to make amendments, and they may appeal my orders of 22 October 2018, but that is not basis to relieve them of the procedural orders that are currently in force or to delay the trial of the proceeding in advance of either a successful application for amendment or a successful appeal;

(e) there is no basis given for the assertions either that future changes in the categories of documents will result in the extra costs of $1 million or loss of six to 12 months to redo the work of disclosure; and

(f) there is no order that the first to third defendants disclose documents to the other defendants, and no such order has been sought. Although the duty to disclose is to disclose to each other party to the proceeding, it is only a duty to disclose a document that is directly relevant to an allegation in issue in the pleadings. There are no pleadings as between the defendants.

[96] The fourth defendant swears further that in his opinion:

(a) the order for disclosure in accordance with the document plan was unorthodox and gave priority to expediency and abbreviated time constraints at the expense of the "superior rights" of him to natural justice, a fair hearing and due process as required by law, the Australian Constitution and "international treaties" (which he does not identify);

(b) his personal rights to "fairness and proper time", particularly as a self-represented litigant, require that he has full benefit of disclosure and not be prejudiced "by an abbreviated timetable for which these proceedings are not suited";

(c) until "discovery" is complete, he is not able to file evidence;

(d) "the parties", presumably him and any defendant he controls, are not able to comply with the timetable;

(e) the timetable is "not consistent with Chapter 3 court";

(f) the matter should not be on the commercial list, as it is a complex matter;

(g) the maintenance of the current timetable will result in "constitutional challenges", which will mean the matter will not be resolved for many years; and

(h) it is in the interests of justice that "orthodox process and procures [sic] that have been tried and tested for over 100 years apply".

[97] As to those assertions, in my view:

(a) it is because of the assertions of procedural rights, contained in the fourth defendant's affidavit, that I have taken the time in these reasons to explain the modern procedural law as to disclosure and adjournment of trials;

(b) this is not the first time when the fourth defendant has sought to increase the procedural rights and leeway to be afforded to him on the basis that he is a self-represented litigant. I have previously explained that, in my view, he is no ordinary self-represented litigant. I have also sought to engage him fairly about that subject on a prior occasion. In effect, he explained that he wanted to self-represent himself but have lawyers represent the companies, for whom he instructs those lawyers, because he wanted to have his own say, as the lawyers could not be trusted to say what he told them to;

(c) there is no reason why this proceeding, which requires regular reviews and interlocutory hearings, should not be managed in the commercial list. In fact, the contrary is true. As to trial, the court's listing arrangements for the next year have been organised to accommodate this trial on a date which is just under 20 months from the commencement of the proceeding and that were set down almost nine months before the trial is due to start. These are not abbreviated times, on any view; and

(d) it would have been better if the fourth defendant's threats of appeals and constitutional challenges had not been made. They are irrelevant to the proper decision on the proper applications, except perhaps as demonstrating his determination not to comply with orders that he considers to be abbreviated in time. Whether he persists in that approach is a matter for him; however, his determined attitude may become relevant in making any order in disposing of these applications.

Disposition

[98] In deciding the present applications, important factors, in my view, are that:

(a) the defendants have not proved that they made a timeous plan or attempted to prepare their own case before the question of disclosure was first dealt with before Bond J on 19 April 2018;

(b) notwithstanding the directions made on 19 April 2018 towards the preparation of a Document Plan for disclosure, based on reasonable times and steps, the defendants steadfastly refused to engage in that process up to 3 August 2018, when Bond J made the orders for their disclosure by 24 September 2018;

(c) only in late July and August 2018 did the defendants first engage a consultant to do the work of assisting them in collecting, collating, and preparing their documents for disclosure;

(d) the defendants' abject failure to attempt to disclose in accordance with the procedural timetable for doing so is the cause of both their failure to comply with the disclosure order and any ability to do so within a reasonable time;

(e) even so, the defendants will have organised and be able to disclose their documents by end January 2019, on the basis of whatever arrangements they have now put in place; and

(f) although the defendants seek an indulgence by orders to vacate orders that they have not complied with and to rely upon opinions as to what they can achieve in preparing their cases going forward, they have not disclosed anything except the most limited information as to the extent of their preparations in the past and to date. There is no basis for an inference that the defendants' present non-compliance comes about after reasonable or conscientious efforts by them to comply with their overarching obligations under UCPR r 5.

[99] In my view, in substance, the applications should be dismissed. Instead, orders should be made in accordance with the revised steps contained in a draft order submitted by the plaintiffs, as I have amended it. That will give the defendants an opportunity, which is perhaps undeserved, to comply with extended times for directions that will still be concluded in good time to permit the trial to proceed as set down.

[100] The only outstanding matter that these reasons have not dealt with is a provision in the defendants' proposal as to the orders to be made that the defendants may file and serve any amended defence and counter-claim by 31 January 2019. I am not prepared to make such a direction at this stage.

[101] By the orders made already, the plaintiffs have prepared and served the draft of their proposed amendments to the statement of claim, following the orders I made on 22 October 2018. Any dispute about whether that pleading is to be filed as the statement of claim to go to trial is as yet not known; however, having regard to the scope of the draft pleading, which is exhibited to the affidavit filed in support of the application to make those amendments, they do not seem to me to be of any significant scope such as to warrant any great difficulty.

[102] The orders I made on 22 October 2018 provided for the defendants to file an amended defence and counter-claim in accordance with the draft which was annexed to those reasons. I see no reason to make a direction at this point whereby the defendants will have some further opportunity to further change their case by virtue of an amended defence and counter-claim that they will have until 31 January 2019 to file. No reason for such an extended period of time or what might warrant it was dealt with by any of the evidence on the hearing of the application before me. The only information that has been given is that the defendants are reviewing their pleading with a view to potentially limiting the issues that might go to trial.

[103] If so, that is a good thing, and no doubt, any amendments proposed that will do that will be likely to be successful. Nevertheless, in my view, the defendants should not have some form of unrestrained entitlement to file an amended defence and counter-claim at this point in the directions of the proceeding.

[104] The form of order, then, that I will make, is as per the draft except for the question of costs. I will hear the parties on the question of costs.

…

Costs

[105] The remaining question to be decided on the hearing of today's applications in relation to the defendants' applications in CFI 355 and CFI 376, filed on 25 September 2018 and 17 October 2018 respectively, is the question of costs of those applications.

[106] There is no dispute that the applicants in each application should be ordered to pay the respondent's costs. However, the respondents seek an order that the costs be assessed on the indemnity basis on the ground that the defendant applicants have been contumelious in their disregard of the court's orders.

[107] As set out in some of the findings I have made in the reasons for decision that I have just delivered, the applicant defendants submit that since 3 August 2018, when Bond J made an order for disclosure, they have attempted to comply with the orders reasonably, and therefore, the costs should only be ordered on the standard basis. Whether or not that statement be accepted, the fact remains, as indicated in the reasons that I have just given, the defendants were under both the overarching obligation under r 5, but more specifically and relevantly under the obligations that were created by Bond J's order of 19 April 2018 as to cooperative steps to be taken to settle the Disclosure Plan.

[108] The fact is the defendants outright refused to comply with those orders at any point up until the order for disclosure itself was ultimately made. In my view, that initial process of non-cooperation was significant in making these applications necessary and causing a significant loss of time and effort, both of the parties and the court in having to deal with them. In the circumstances, in my view, it is appropriate that in each case, the application should be at the cost of the applicant defendants and that the costs should be assessed on the indemnity basis.