SUPREME COURT OF QUEENSLAND

CITATION:	*Parbery & Ors v QNI Metals Pty Ltd & Ors* [2019] QSC 48
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 by leave on 30 January 2019 (CFI 479) Application filed 1 February 2019 (CFI 482) Application filed 14 February 2019 (CFI 503)
DELIVERED ON:	11 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2019
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. Each of the applications is dismissed.** **2. The question of costs of each of the applications is reserved.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – DISCOVERY OF DOCUMENTS – NON-COMPLIANCE – where application to increase the scope of disclosure – where failure to disclose is self-induced – whether extension should be granted to facilitate increased scope of disclosure – where extension will adjourn the trial *Uniform Civil Procedure Rules* 1999 (Qld), r 5. *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, cited. *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management & Marketing Pty Ltd* (2013) 250 CLR 303, cited. *Kelly v Westpac Banking Corporation* [2014] NSWCA 348, cited. *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 276, cited. *Queensland Nickel Pty Ltd v Queensland Nickel Sales Pty Ltd & Ors* [2017] QSC 305, cited. *UBS AG v Tyne* [2018] HCA 45, cited.
COUNSEL:	G Gibson QC and C Curtis for the plaintiffs K Byrne for the first to third, fifth, seventh to eighteenth and twenty-second defendants Fourth defendant in person
SOLICITORS:	King & Wood Mallesons for the first and second plaintiffs HWL Ebsworth for the second and third plaintiffs Alexander Law and Robinson Nielsen for the first to third, fifth, seventh to eighteenth and twenty-second defendants

Jackson J

[1] These applications are interrelated and should be considered together. The defendants[1] apply for an order that increases the scope of disclosure by adding two categories of documents to the Document Plan ("second disclosure applications") and for directions which would permit them to have a period of many months, and a further period following that, for them to file and serve their affidavits of lay witnesses and experts' reports ("second extension of evidence applications").

[2] By their amended application, the represented defendants[2] apply to have the time for their affidavits and lay witnesses and the experts' reports extended to 2 August 2019. The fourth defendant applies that the time for his affidavits of lay witnesses and expert reports be extended to six weeks after the defendant's disclosure consultant provides all hard copy documents relevant to his defence, a time which was not identified with any precision. The fourth defendant relies on a report by the defendants' disclosure consultant suggesting that the time to carry out the tasks necessary to identify the further disclosure sought may extend as far as 31 October 2019.

[3] This is not the first occasion on which the defendants have applied for an extension of time within which to make disclosure and to file their affidavits and experts' reports. In *Parbery & Ors v QNI Metals Pty Ltd & Ors*,[3] I dealt with applications filed on 25 September 2018 and 17 October 2018 ("first disclosure applications") to vacate orders made by Bond J on 27 July 2018 and 3 August 2018 in relation to, inter alia, disclosure. The defendants also applied for orders to extend the time to file and serve their affidavits of lay witnesses and expert reports ("first extension of evidence applications").

[4] On 21 November 2018, I made orders that by 29 January 2019:

(a) the Defendants (other than the Sixth, Eighteenth and Nineteenth Defendant) must comply with order 10(a), and item 13 of schedule 2, of the orders dated 3 August 2018 (CFI 341) in respect of the categories of documents shown on Schedule A, being Exhibit 2 in this application;4

(b) in respect of the claim, the Defendants will file and serve any affidavits of the evidence-in-chief of witnesses to be called by the Defendants at trial and expert reports in relation to any expert evidence to be adduced by the Defendants at trial.5

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1 Namely the first to fifth, seventh to nineteenth and twenty-second defendants.

2 Namely the applying defendants other than the fourth defendant who is unrepresented.

3 [2018] QSC 276.

4 Paragraph 4 of the order.

5 By paragraph 8 of the case management timetable scheduled to the order.

[5] On 30 January 2019, an affidavit of the fourth defendant was filed. On 5 February 2019, an affidavit of Peter Dinoris, attaching an expert report, was filed. On 6 February 2019, an affidavit of the fourth defendant, and an affidavit of AG Sokolov were filed. These were the only affidavits and expert reports that appear to answer the requirements of the direction as to the defendants' filing of affidavits and expert reports for the trial.

Categories 2 and 4 of the Disclosure Plan

[6] On 3 August 2018, Bond J ordered the parties to conduct disclosure in accordance with the Disclosure Plan (and the list of categories for disclosure contained therein) and Document Management Protocol contained at pages 20 to 63 of exhibit LTH-2 to the affidavit of Mr Liam Thomas Hennessy (CFI 297).

[7] Also by that order, Bond J ordered that steps be taken in the proceeding, as identified in Schedule 2 to the order. Paragraph 13 of Schedule 2 to the order directed that the parties must complete disclosure pursuant to the Disclosure Plan (and the list of categories for disclosure contained therein) and the Document Management Protocol by 24 September 2018.

[8] The categories of documents to be disclosed were set out in Schedule A to the Disclosure Plan that formed exhibit LTH-2. Categories 2 and 4 of Schedule A were as follows:

Number	Category of documents to be disclosed	Date range	Custodian plaintiff	Custodian defendant
2	Documents referring to and/or evidencing the relationship between: a) QNI and QN Sales and QNIR and QNIM; b) QNI and the QN Business Property; and c) QNIR and QNIM and QN Business Property	1 July 2009 to current	N/A	Mr Palmer, Mr Mensink, QNI Sales, QNIR and QNIM
4	Documents referring to and/or evidencing the capacity in which QNI, QNIM and QNIR dealt with third	1 July 2009 to 18 January 2016	GPLs	QNIM, QNIR, Mr Palmer and Mr Mensink

	parties (including Mr Palmer)			

[9] When the first disclosure applications were heard, the plaintiffs had made disclosure in accordance with the Disclosure Plan, including categories 2 and 4. The variation of the orders for disclosure under the first disclosure applications concerned only the defendants' disclosure.

[10] My order made on 21 November 2018, that the defendants make disclosure of the categories of documents shown on Schedule A, being Exhibit 2 in the application, deleted categories 2 and 4 from the categories of documents to be disclosed by the defendants. And it extended the time for the defendants to make disclosure in the reduced categories on Exhibit 2 until 29 January 2019.

Pleadings

Current pleadings

[11] The further amended consolidated statement of claim filed on 30 November 2018 ("FACSOC") alleges in paragraphs 101 and 102 that over the period from 1 September 1992 until the appointment of the administrators in early 2016, QNI as part of acting as general manager of the joint venture for the benefit of the joint venturers from time to time, acted as a trustee of the joint venture property for the purpose of carrying on the joint venture for the joint venturers as the beneficiaries. Paragraphs 102A and 102B allege that the trust was express and that the intention to create the trust was manifested by the terms of the joint venture agreement and the conduct of QNI and the joint venturers over the relevant time period as particularised. Paragraph 102C alleges the terms of the trust and paragraph 104 alleges that QNI entered into contracts in its own name, but acting as trustee.

[12] Paragraphs 107 to 110 of the defence and counterclaim to the amended consolidated statement of claim filed on 21 December 2018 ("ACDC") deny those paragraphs of the statement of claim, in effect, and paragraph 109(b) expressly alleges that QNI entered into contracts as agent for and on behalf of and for the account of QNI and QNIM as disclosed principals or, alternatively, for them as undisclosed principals and thereby created privity of contract, to the exclusion of QNI, with the counter-parties to those contracts.

[13] The reply and answer, broadly speaking, joins issue with the defence on these questions, although paragraph 109 specifically denies the allegation that contracts were entered into as disclosed agent or as agent for undisclosed principal for the joint venturers as undisclosed principals or in circumstances where QNI was not liable upon the contracts.

Earlier pleadings

[14] The statement of claim filed on 30 June 2017 alleged:

(a) by paragraph 75, that between on or about 1 September 1992 to 30 January 1995, QNI, as part of acting as general manager of the joint venture for the benefit of the then joint

venturers (being QNIR and NRNQ), acted as a trustee of the joint venture property for the purpose of carrying on the joint venture, with QNIR and NRNQ as the beneficiaries;

(b) by paragraph 76, that for the period from on or about 31 January 1995, up to and including the appointment of the Administrators, QNI, as part of acting as general manager of the joint venture for the benefit of the joint venturers (being QNIR and QNIM), acted as a trustee of the joint venture property for the purpose of carrying on the joint venture, with the joint venturers as the beneficiaries;

(c) by paragraph 78, that as part of QNI acting as trustee pleaded in paragraphs 75 and 76, QNI entered into contracts in its own name, but held the benefit of those contracts as trustee for the joint venturers, including those contracts which gave rise to the liabilities set out in Schedule E to the statement of claim; and

(d) by paragraph 79, as part of it acting as trustee pleaded in paragraphs 75 and 76, QNI held all property generated from any of the contracts which gave rise to the liabilities set out in Schedule E to the statement of claim (including cash at bank) on trust for the joint venturers.

[15] The consolidated statement of claim filed on 19 December 2017 ("CSOC") alleged:

(a) by paragraph 101, that between on or about 1 September 1992 to 30 January 1995, QNI, as part of acting as general manager of the joint venture for the benefit of the then joint venturers (being QNIR and NRNQ), acted as a trustee of the joint venture property for the purpose of carrying on the joint venture, with QNIR and NRNQ as the beneficiaries;

(b) by paragraph 102, that for the period from on or about 31 January 1995, up to and including the appointment of the Administrators, QNI, as part of acting as general manager of the joint venture for the benefit of the joint venturers (being QNIR and QNIM), acted as a trustee of the joint venture property for the purpose of carrying on the joint venture, with the joint venturers as the beneficiaries;

(c) by paragraph 104, that as part of QNI acting as trustee pleaded in paragraphs 101 and 102, QNI entered into contracts in its own name, but held the benefit of those contracts as trustee for the joint venturers, including those contracts which gave rise to the liabilities set out in Schedule E to the consolidated statement of claim; and

(d) by paragraph 105, as part of it acting as trustee pleaded in paragraphs 101 and 102, QNI held all property generated from any of the contracts which gave rise to the liabilities set out in Schedule E to the consolidated statement of claim (including cash at bank) on trust for the joint venturers.

[16] The defence and counterclaim to the CSOC filed on 12 April 2018 ("CDC"):

(a) by paragraph 1B, alleged in defence to the entirety of the proceedings that QNI had no proprietary interest in any funds set out in the CSOC, all payments alleged in the CSOC were payments made at the direction of QNIM and QNIR, to whom all funds belonged, QNI acted as an agent only in accordance with clause 3.2 of the administration agreement in relation to those funds and QNI has no right to claim repayment of funds as an agent where those funds have been paid out at the direction of their principal;

(b) by paragraphs 107, 108, 110 and 111, denied paragraphs 101, 102, 104 and 105 of the CSOC.

[17] Accordingly, categories 2 and 4 of the categories of documents in Schedule A were relevant at the time when Bond J ordered disclosure on 3 August 2018 and may have disclosed documents that are directly relevant to the issues joined as to the basis on which QNI entered into relevant contracts.

Re-emergence of the substance of categories 2 and 4 in proposed categories 45 and 46

[18] A stark feature of the present applications is that from 21 November 2018, when the defendants agreed to the orders that relieved them from the duty to make disclosure in respect of categories 2 and 4, until early February 2019, the defendants did not raise any question as to their disclosure of documents within those categories of documents.

[19] By this application, the defendants apply to add two categories of documents ("additional categories of documents") for inclusion in the Disclosure Plan as follows:

Number	Category of documents to be disclosed	Date range	Custodian plaintiff	Custodian defendant
45	Documents which record or evidence the capacity in which QNI entered into contracts with third parties (including, without limitation, the third parties referred to in Schedule E to the further amended consolidated statement of claim filed 30 November 2018)	1 January 2009 to date	GPLs, QNI, SPLs	QNI Sales, QNII and QNIM
46	Any other documents which record or evidence the disclosure to third parties of that relationship of agent and principal between QNI on the one hand and QNIR and QNIM on the other hand	1 January 2009 to date	GPLs, QNI, SPLs	QNI Sales, QNII and QNIM

[20] The principal affidavit in support of the applications is made by the fourth defendant and is relied on both by him and the represented defendants. Summarising, he refers to three kinds of documents. First, he refers to notes of meetings that may have been made by staff members who attended meetings at the refinery with him. They are not included in the scope of proposed additional categories of documents for disclosure. In any event, the fourth defendant's contention is that such notes are relevant to the operations of the refinery and

the nature of the relationship between QNI, QNIM and QNIR and the capacity in which QNI entered into contracts with suppliers of the refinery. It is not clear to me how or why that would be so. However, the fourth defendant's contention is that it is important to him in the preparation of his defence that he have access to documents to refresh his memory regarding what was discussed at the meetings. That would be an impermissible use of the documents of other attendees at the meetings. There is no explanation as to why any relevant attendees cannot be asked whether they made any notes of meetings which deal with a suggested subject matter. No evidence is adduced of any enquiries or attempts made to gather relevant evidence as to the subject matter, if there is any, from those attendees at those meetings.

[21] Second, the fourth defendant contends that he does not have any documents which relate to the basis upon which QNI entered into the contracts with the suppliers referred to in Schedule E to the further amended consolidated statement of claim and the capacity in which it did so. No explanation is given as to why the defendants do not have any documents of that kind. There is only one document that has been exhibited to the affidavit material that shows QNI entering into a contract as a disclosed principal for the joint venturers,[6] and it predates the fourth defendant's involvement with the joint venture.

[22] Third, the fourth defendant refers to paragraphs 20 to 22 of his affidavit filed on 6 February 2019 (CFI 487) in support of his application to strike out paragraphs of the FACSOC. In those paragraphs, he expresses the opinion or states that to his knowledge QNI has never filed a document with a regulatory, statutory, or reporting authority to whom the existence of trust must be disclosed, in which it in fact did disclose itself to be a trustee, and has never signed a document or agreement in which it describes itself as trustee and has probably entered into agreements in which there are warranties that QNI is not acting as trustee.

[23] The fourth defendant says that it is vital that he be given every reasonable opportunity to identify documents which support his claims to the effect that no trust exists. If what the fourth defendant says is true, it seems most unlikely that there will be any documents that refer to any trust. In my view, it would be a mistake to postulate that a large range of documents that do not refer to any trust will be directly relevant to the allegations and issues under the relevant paragraphs of the pleadings.

[24] As the history of the pleadings set out previously discloses, these issues are not new. They have been live since before the original orders as to disclosure according to the Document Plan were made on 3 August 2018. Indeed, they have been live since the proceeding commenced on 30 June 2017.

[25] Yet, no explanation is offered by any of the defendants as to why up to this time no effort has been made to obtain documents in the additional categories of documents which the fourth defendant now says are vital.

[26] On the evidence, the first occasion this question was raised appears in a document annexed to a report exhibited to an affidavit of Monica Dunne filed on 6 February 2019 (CFI-494). Ms

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[6] Nickel Ore Stevedoring Services Contract between Northern Shipping and Stevedoring Pty Ltd and QNI dated 11 November 2008.

Dunne's report dated 5 February 2019 attaches a letter from Alexander Law to her dated 1 February 2019. That letter proposed the additional categories of documents for disclosure in the form now sought by the defendants' applications and requested her time estimate to make disclosure of the additional categories of documents by way of both electronic and hardcopy documents. Ms Dunne estimated that the time for the defendants to make disclosure of those categories was six months.

[27] A second affidavit of Ms Dunne, also filed on 6 February 2019 (CFI-492) annexes a second report, also dated 5 February 2019, this time prepared on the instructions of a letter from the fourth defendant dated 4 February 2019. For some reason, the fourth defendant's instructions to Ms Dunne were not confined to the proposed additional categories requested by Alexander Law. The fourth defendant instead instructed Ms Dunne that she was to have regard to his objective, to locate all electronic and hard copy documents which are potentially relevant to an issue in the proceedings relevant to him and to provide copies of all such documents to him so that he may prepare his defence to the claims brought against him.

[28] As part of the instructions, the fourth defendant questioned whether while undertaking the existing disclosure by the defendants Ms Dunne identified any documents that were relevant or potentially relevant to an issue in the proceeding including documents relevant to issues concerning him, which were not reviewed and processed or captured, including whether all of the abandoned categories of documents were captured and what types of non-category relevant documents she would expect might exist having regard to limitations in the existing categories. In other words, the fourth defendant appeared to ask Ms Dunne for legal advice as to what were the directly relevant documents in the proceeding, a matter upon which she is not qualified to express an opinion.

[29] In her second report, Ms Dunne opined that the requested searches would require (doing again) work that largely mirrors the processes already undertaken to date to meet the defendants' disclosure obligations in respect of the categories of documents included in the Disclosure Plan pursuant to my order of 21 November 2018, but the tasks will be undertaken on a larger scale.

[30] Not surprisingly, Ms Dunne says that her firm would require proper definition of the scope of the tasks and guidance from the legal team as to the documents and concepts involved. As to time, by paragraph 51 of the second report she estimated that for electronically stored information, four months of active legal review and analysis that depends on "conceptual analytics" would be required, and three months of active legal review and analysis otherwise. For hard copy documents, she estimated that six months would be required for the onsite review process and a further two to three months for pre-disclosure legal analysis and processing for protocol compliance.

[31] A third affidavit of Ms Dunne filed on 8 February 2019 (CFI-500) annexes a third report prepared on the instructions of the fourth defendant given by letter dated 7 February 2019 as to the tasks and timeframes set out in paragraph 51 of her second report, as just described, and seeking a program assuming that work via her firm commenced on 21 February 2019. Annexure B to the third report is a Gantt chart of the so called project program that would end on 31 October 2019, had the tasks been started on 21 February 2019.

[32] Finally, there is a further report by Ms Peterson, the disclosure consultant who made previous reports referred to in my reasons for judgment on the defendants' first disclosure applications. On this occasion, Ms Peterson received instructions from Alexander Law for the represented defendants dated 1 February 2019. The question she was asked was the same as that asked of Ms Dunne. Her estimate of the times required to complete the disclosure of the additional categories were more modest. She estimated two months for the electronically stored information that does not depend on conceptual analytics and two more months for electronically stored information that depends on conceptual analytics. She did not deal with hard copy documents as such, which are the subject of Ms Dunne's reports. I note that in paragraph 13(b) of her report, she offered certain views as to the existing disclosure under category 37 and as to what might be required by category 46. I do not give much weight to those view speculating, as Ms Peterson does, as to the circumstances under which reference to an agent and principal relationship might have occurred or might be referred to in some documents.

[33] This simplified summary of the circumstances of the second disclosure applications is enough to make three critical points. First, subject to one argument advanced by the fourth defendant, there is no explanation as to why it took the defendants until 1 February 2019, at the earliest, to question what might be involved in searching all of QNI's and the defendants' documents, including every document at the refinery, for possibly relevant documents in the two proposed additional categories of documents. Second, no explanation is offered for the circumstance that it took the defendants over 18 months since the commencement of the proceeding to start their enquiries or searches for any such documents. Third, there is no evidence as to the reasons for the defendants' agreement to the orders relieving them of the obligation to make disclosure of categories 2 and 4, if documents in those categories needed to be searched for and disclosed as is now contended.

[34] The fourth defendant seeks to justify the delay in bringing this application on the ground that the issue of whether QNI acted as a disclosed principal for the first and second defendants was only raised by paragraph 2A of the Defence to the Further Amended Consolidated Statement of Claim filed on 21 December 2018.

[35] He submits that:

> "The reasons for seeking orders that the existing disclosure categories be expanded to include the two new categories in paragraph 1 of the Application appear from the 'disclosed principal' amendments and from the matters set out in my affidavit sworn 29 January 2019.
>
> The 'disclosed principal' amendments are significant because they involve matters which were not in contemplation at the time when Bond J made an order that disclosure occur in accordance with a list of categories which did not include categories of documents recording or evidencing:
>
> (a) the capacity in which QNI entered into contracts with Suppliers (including the third party creditors referred to in Schedule E to the Further Amended Consolidated Statement of Claim); or
>
> (b) the disclosure to third parties of a relationship of agent and principal between QNI on the one hand and QNIM and QNIR on the other."

[36] There are two serious errors in that submission. First, the proposed additional categories are not precisely the same as category 2 and category 4 of the categories ordered to be disclosed under Bond J's order made on 3 August 2018, but in substance they cover the same ground. It must not be overlooked that the plaintiffs have made disclosure of category 2 and 4 documents in QNI's possession or power already.

[37] Second, it is untrue to say that the "disclosed principal" question or issue was not raised until the amendments made to the defence on 21 December 2018. Almost four months before Bond J's order for disclosure, paragraph 1B of the CDC alleged, in defence to the entirety of the proceeding, that QNI had no proprietary interest in any funds set out in the CSOC, all payments alleged in the CSOC were payments made at the direction of QNIM and QNIR, to whom all funds belonged and QNI acted as an agent only in accordance with clause 3.2 of the Administration Agreement in relation to those funds.

[38] As well, the relevance of the "disclosed principal" ground, in general, has been at the forefront of the defendants' awareness of possible defences from long before the filing of the CDC. A near identical question was tried between the parties in *Queensland Nickel Pty Ltd v Queensland Nickel Sales Pty Ltd & Ors*,[7] decided on 15 December 2017.

[39] I reject the fourth defendant's explanation.

The first disclosure applications

[40] The detailed circumstances of the first disclosure applications brought by the defendants are summarised in my reasons in *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 276. It is unnecessary to set them all out again here, but I take them into account in considering the circumstances of the present application. Some points should be mentioned.

[41] In paragraphs 25 to 31 of those reasons, I set out the circumstances in chronological order under which Bond J made orders in the nature of the case management timetable as to disclosure and the Disclosure Plan. As previously stated, the plaintiffs made disclosure in accordance with those orders. The defendants did not make any disclosure. Second, in paragraphs 33 to 49, I summarise the circumstances under which it appears that the defendants' first addressed the question of their disclosure starting on a date from mid-July through to filing of the first disclosure applications. Third, in paragraphs 50 through to 75, I set out some of the bases of the first disclosure applications, concluding in paragraph 74 that the defendants had singularly failed to comply with the case management timetable that directed them to give disclosure on or before 24 September 2018.

[42] The plaintiffs' written submissions on the second disclosure applications and the second extension of time applications detail the defendants' lack of cooperation with the directions made by Bond J as to the preparation of a draft Disclosure Plan and on the hearing of the application for the orders as to disclosure and filing of affidavits of lay witnesses and expert reports that led to Bond J's orders made on 3 August 2017. It is unnecessary to recount those details to decide these applications.

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[7] [2017] QSC 305, [24]-[31] and [39]-[47].

[43] Returning to my reasons on the first disclosure applications, in paragraphs 93 to 97, I dealt with some of the grounds relied upon in support of the first disclosure applications. In paragraph 98, I summarised the circumstances as follows:

> "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 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."

[44] As the description set out above of the circumstances under which the second disclosure applications are brought shows, those conclusions have not changed. The defendants rely on the fact that they have now completed disclosure in accordance with the order of 21 November 2018 in relation to the reduced categories of documents under that order. However, that does not speak to the fact that there is no explanation as to why the subject matter of the proposed additional categories of documents has not been raised until the beginning of February 2019.

[45] Another point made in paragraph 54 of the reasons for judgment on the first disclosure applications is as follows:

> "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."

[46] In bringing the present applications and in formulating the reports based on the instructions given to Ms Dunne and Ms Peterson for the purposes of these second disclosure applications, the defendants have ignored that finding. Although it was raised by me with them in submissions, none of them made any answer to the obvious inconsistency between the basis of the present applications and that finding.

[47] The proper approach to applications such as these was dealt with extensively in paragraphs 76 to 92 of my reasons for judgment on the first disclosure applications, including as follows:

> "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.
>
> 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."[8] (footnotes omitted)
>
> 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

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

> 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 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.'"[9]

[48] In the result, as already stated, on the hearing of the first disclosure applications I varied the orders made for the defendants' disclosure by reducing the categories and scope of the documents they were required to disclose and by extending the time for them to make disclosure. At the same time, on the first extension of evidence applications, I extended the time to file their affidavits of lay witnesses and experts.

[49] Further, on 21 December 2018, I ordered that the trial of the proceeding be adjourned to start on 15 July 2019, to best fit the estimated length of the trial (45 days) and the availability of the Judge arranged to hear the trial. Since that date, the court's business and lists have been arranged on the footing that the trial would start on that date. The previous date was 29 April 2019 and was set by Bond J's orders on 3 August 2018.

[50] Notwithstanding all that, the second disclosure applications are brought on the basis that if they are acceded to the trial will have to be adjourned again. The defendants offered no protection or condition of the proposed adjournment that would avoid prejudice to the plaintiffs that would be caused by the delay, when the plaintiffs have complied with the court's directions (or substantially so) at all times.

[51] Just as importantly, they offered nothing that would justify the further extension to them of the court's resources and the disruption to the court's and other litigants' business if the trial were to be further adjourned.

Defendants' arguments

[52] The represented defendants submit that for their existing disclosure, searches have been undertaken subject to limitations including:

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

(a) the inability to search a number of desktop PCs at the refinery which were powered down;

(b) reliance on advice from staff onsite as to document identification and the exclusion process without independent review of certain repositories;

(c) extensive reliance on sampling and characterisation of a sample of documents as opposed to a comprehensive review;

(d) the inability to access the office of one employee because of his sickness and unavailability; and

(e) the inability to search hard copy archived documents.

[53] Accordingly, the represented defendants submit that the court should accept that the period set for discovery by its orders of 21 November 2018 has proved to be too short. I reject that submission for two reasons. First, it makes no allowance for any of the time that was lost by the defendants' previous defaults. Second, it is not premised on a proportionate approach requiring reasonable steps to identify relevant documents, because it is premised on a comprehensive review of all the documents at the refinery, a stance which I have previously rejected as appropriate or reasonable.

[54] Specifically, Practice Direction 18 of 2018 provides that the just and expeditious resolution of the real issues dispute at a minimum of expense requires the efficient management of documents at all stages of litigation and directs practitioners and litigants to adopt a proportionate and efficient approach to the management of both paper and electronic documents at all stages of the litigation. Further, it provides that the incurring of unnecessary costs in searching for, reviewing and exchanging documents which are not directly relevant to the real issues in dispute of the proceeding is to be avoided and the parties must ensure that all steps in relation to documents are proportionate having regard to the real issues in dispute, the stage the proceeding has reached, the volume of potentially relevant documents and the ease with which they may be retrieved or reviewed, as well as the time and costs associated with proposed steps and the likely outcome and benefits to be derived by taking the proposed steps. None of this has been seriously addressed by the defendants, either expressly or by their proposed additional steps in order to carry out further disclosure.

[55] The represented defendants submit that the issue of the characterisation of the relationship between QNI and the first and second defendants is of central importance to the outcome of the proceeding and warrants additional time being allowed to thoroughly identify all relevant documents and evidence. Again, the submission is made without any recognition that the issue has always been a live one in the proceeding and that the only reason why any appropriate searches have not been carried out is because of the defendants' own default.

[56] The defendants submit that the existence of the relevant documents is not hypothetical, but as previously stated, only one document in hard copy form has been identified that records QNI entering into a contract as agent for and on behalf of the joint venture participants and that was before the fourth defendant's involvement in the joint venture. For reasons that are not explained, the defendants submit the court would accept that there is evidence to infer

further relevant documents may be identified at the refinery. On the contrary, the evidence proffered is sketchy at best.

[57] On the second extension of evidence applications, the represented defendants submit that a further six weeks is a reasonable period for the preparation of any further affidavit material after completion of the proposed further disclosure. The basis of that submission was not established by any evidence. No likely deponent who might give further evidence was identified. No reason to explain why six weeks might be required for the preparation of further affidavits, beyond those which can be prepared on the existing disclosed documents was given. No explanation was given of any of the efforts made so far to either identify relevant potential deponents or as to what evidence might be given by them on the existing disclosure.

[58] The fourth defendant referred in his written submissions to the document management guidelines set out in Practice Direction 11 of 2012, paragraphs 1 and 7.1. I have referred to some of those factors in relation to the requirements of Practice Direction 18 of 2018. In any event, the fourth defendant submits that the concept of reasonable searches and the principle of proportionality are consistent with the orders that the defendants seek for further searches and disclosure by them of the proposed additional categories of documents. He submits that what is proportionate requires consideration of the following factors:

(a) these are complex proceedings, meaning that extensive disclosure is a natural concomitant;

(b) the amounts claimed are very significant;

(c) the documents to which he requires access go to the real issues in dispute such as whether he was a shadow director;

(d) the proceedings have not yet reached the stage where the pleadings have closed;

(e) the volume of potentially relevant documents is enormous;

(f) the documents are capable of being retrieved and reviewed without undue difficulty if the time he seeks is allowed;

(g) the time and costs associated with the proposed steps can be justified;

(h) because the documents he seeks further time to disclose are directly relevant, the impact on the outcome of the proceedings may be very significant.

[59] Some of these points are unsupportable. In particular, at no point does the fourth defendant address the defendants' previous defaults in relation to disclosure and preparation of their case including affidavits of lay witnesses and expert reports. Second, the proposition that the pleadings have not yet closed illustrates another serious error made on the fourth defendant's part. Up to the time of the hearing of these applications, the fourth defendant had not filed and served a separate defence, which is necessary because he appears for himself and is not represented by the lawyers who appear for the represented defendants. However, the instructions given to the lawyers for those defendants and their defences are given by the fourth defendant, including those in relation to the times that have been limited for the defendants (including the fourth defendant) to both make disclosure and to file and serve any

affidavits of lay witnesses and expert reports. It is captious for the fourth defendant to describe the proceeding as having reached the stage where the pleadings have not yet closed. Lastly, I do not accept there is any real evidence that taking the proposed steps is likely to have a significant impact on the outcome of the proceedings. None of the evidence apart from non-expert opinion supports that view.

[60] Next, the fourth defendant makes detailed submissions as to his disadvantaged position as a self-represented litigant. I have previously remarked on more than one occasion that the fourth defendant's status as a self-represented litigant is not like self-represented litigants who can neither afford nor have the assistance of lawyers. The fourth defendant's self-representation is a matter of choice by him, because he wishes personally to be able to make whatever submission that seems to him to be appropriate. He is not in the position of a litigant who is entitled to assistance by the Court of an extensive or significant kind in order for him to have a fair and just trial. That point is illustrated, yet again, by the lengthy affidavits and submissions in writing by the fourth defendant for the purposes of this application that have clearly been prepared by an author or authors with relevant legal training and skills.

[61] Over and again and in his written submissions upon this application, the fourth defendant refuses to accept the procedural law reflected in the *Uniform Civil Procedure Rules* 1999 (Qld), in particular, r 5 and statements of principle made by the High Court in the relevant cases I have mentioned. The fourth defendant did not shrink from asserting that his application to extend the time and categories of documents for disclosure and to prepare further affidavits of lay witnesses and reports of experts were required by Article 14 of the *International Covenant on Civil and Political Rights* because of his right to a "fair hearing".

[62] In the same vein, the fourth defendant relied on *Kelly v Westpac Banking Corporation.*[10] That was a case in which a self-represented litigant needed more time to deal with issues of late disclosure of documents and new evidence by the opposite party bank within two weeks of the date for trial after repeated default by the bank in complying with earlier directions to provide any responsive evidence. The NSW Court of Appeal held that the trial judge's refusal to grant an adjournment to the self-represented litigant faced with those circumstances was a clear case of material error.[11]

[63] It is unnecessary to further specifically deal with the fourth defendant's submissions as to the state of current Australian procedural law. It is enough to say that, although he referred to my analysis of the principles in disposing of the first disclosure applications and the first extension of evidence applications,[12] the fourth defendant's submissions do not accept the requirements of modern procedural law in the context of a large commercial case being conducted on the commercial list in this Court.

Plaintiffs' arguments

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[10] [2014] NSWCA 348.

[11] [2014] NSWCA 348, [34] and [39]-[44].

[12] *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 276, [76]-[92].

[64] The plaintiffs' submissions covered many subject matters, not all of which need to be mentioned in these reasons.

[65] One point is that to the extent that the fourth defendant relied on his position as a self-represented litigant, he failed to recognise that the documents which he says the defendants should disclose are not in his personal possession or power, but are documents of the represented defendants.

[66] Second, the plaintiffs submit that the reports of Ms Dunne and Ms Peterson do not support the reasonableness of any long period to conduct searches for documents "potentially" relevant to the defendants' defences. The plaintiffs submit that the reports respond to proposals for apparently comprehensive searches of large volumes of documents on the footing that the consultants were not given instructions or information limiting or restricting the searches to those likely to be productive, and thereby "reasonable" or "proportionate". The plaintiffs submit that, as well, it is clear that so far Ms Dunne and Ms Peterson's firm has not been given instructions to start the work the defendants say is necessary and there is no explanation for why that has not already occurred.

[67] Third, the plaintiffs submit that the defendants' failure to provide any explanation for the delay must be viewed in a context where invariably an explanation for delay is called for.[13] That is to be added to the relevant discretionary considerations that include:

(a) any undue delay in making the applications;

(b) the extent of any waste of public resources;

(c) whether any explanation furnished for the delay is satisfactory; and

(d) whether any further delay would undermine confidence in the administration of civil justice.[14]

[68] Last, the plaintiffs submit that ultimately the proposition is whether a nine week trial that has been case managed for two years ought to be delisted to permit the defendants to pursue investigations that could have been conducted years previously and in relation to which there is no evidence that the further proposed steps are likely to result in any further relevant evidence becoming available.

Conclusion

[69] Most of the considerations discussed above point in the direction of refusing both the second disclosure applications and the second extension of evidence applications. When applications of these kinds are repeatedly made and based on similar material, or the same material, it serves little purpose to expand upon or discuss at length the relevant considerations in a repetitive way. To some extent, that has been unavoidable in these reasons.

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[13] *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 215 [102].

[14] *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 189 [24], 192 [30],194-195 [35] and 214 [102].

[70] Nevertheless, the clear conclusion that follows from the circumstances under which the applications have been made and the consequence that making the orders sought would have upon the progress of the proceeding, including the vacation of the dates for the trial is that the applications must be dismissed.