

SUPREME COURT OF QUEENSLAND

CITATION: *Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 5)* [2020] QSC 36

PARTIES: **MURPHY OPERATOR PTY LTD**
ACN 088 269 596
(first plaintiff/first applicant)

TOBARI PTY LTD
ACN 010 172 237
(second plaintiff/second applicant)

SPW VENTURES PTY LTD
ACN 135 830 036
(third plaintiff/third applicant)

v

GLADSTONE PORTS CORPORATION LIMITED
ACN 131 965 896
(defendant)

STATE OF QUEENSLAND
(respondent)

FILE NO/S: SC No 7495 of 2017

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: 6 March 2020

DELIVERED AT: Rockhampton

HEARING DATE: 2 March 2020

JUDGE: Crow J

ORDER:

- 1. The stay arising from the objection to the notice of non-party disclosure is lifted.**
- 2. The notice of non-party disclosure is amended as follows:**
 - a. The relevant period for each of the requests for documents is amended to January 2005 to 30 September 2019.**
 - b. The nominated party, the State of Queensland Department of Agriculture and**

Fisheries is to produce the documents prior to 31 March 2020.

3. If the parties cannot agree as to costs, written submissions are to be filed 7 days hereof.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION OF DOCUMENTS – GENERAL MATTERS – DOCUMENTS IN POSSESSION OF NON-PARTY – where plaintiff served notice of non-party disclosure on the respondents – where the respondents filed objection to the notice – where application by plaintiff for lift of the stay imposed by objection – whether the scope of the notice was too broad – whether the production of the documents would be too onerous on non-party – whether requested documents where subject to confidentiality requirements

Fisheries Act 1994 (Qld) s 217B

Uniform Civil Procedure Rules 1999 (Qld) r 242, r 244, r 245, r 247

Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4) [2019] QSC 228

Naskam Security Services Pty Ltd v Adarm Security Pty Ltd & Ors [2000] QDC 441

Smith v O’Leary & Anor [2001] QDC 197

Westsand Pty Ltd v Johnson [1999] QSC 337

COUNSEL: L W L Armstrong QC, with M J May, for the applicants
S B Hooper for the defendant
S C Russell for the respondent

SOLICITORS: Clyde & Co for the applicants
King & Wood Mallesons for the defendant
Crown Law for the respondent

[1] A history of this matter is set out in my prior judgment, *Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4)* [2019] QSC 228.

[2] Rule 242 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) provides:

“242 Notice requiring non-party disclosure

(1) A party (the *applicant*) to a proceeding may by notice of non-party disclosure require a person who is not party to the proceeding (the *respondent*) to produce to the applicant, within 14 days after service of the notice on the respondent, a document—

(a) directly relevant to an allegation in issue in the proceeding; and

- (b) in the possession or under the control of the respondent; and
 - (c) that is a document the respondent could be required to produce at the trial of the matter.
- (2) The applicant may not require production of a document if there is available to the applicant another reasonably simple and inexpensive way of proving the matter sought to be proved by the document.
 - (3) The respondent must comply with the notice but not before the end of 7 days after service of the notice on the respondent.
 - (4) Disclosure under this part is not an ongoing duty.”

[3] On 25 November 2019 the applicants served a notice requiring non-party disclosure upon the State of Queensland Department of Agriculture and Fisheries (‘DAF’). The notice was in the proper form, and stated *inter alia*:

“The allegation in the pleadings to which the document(s) is/are relevant is as follows:

1. At paragraph 87 of the plaintiffs’ further amended statement of claim (**FASOC**) (a copy of which is enclosed), the plaintiffs allege that by reason of the defendant’s breach of duty, the escape of Bund Fill Discharge (defined at paragraph 23 of the FASOC) into the Affected Waters (defined at paragraph 3(a)(i) of the FASOC) caused:
 - (a) significantly elevated increased turbidity and total suspended solid concentrations;
 - (b) significantly elevated levels of contamination from bioavailable metals;
 - (c) significantly elevated levels of reactive dissolved metal ions due to the entry of ASS and PASS material;
 - (d) contained reduced amounts of oxygen; and/or
 - (e) toxic algae blooms,
 in Affected Waters (defined as the **Contamination Effects**).
2. The plaintiffs allege at paragraph 88 of the FASOC that from on or about 6 September 2011 to date, the Contamination Effects, among others:
 - (a) affected the ecology of Affected Waters;
 - (b) caused the deaths of or damage to the marine life, including the Commercial Species (defined at paragraph 3(a)(ii) of the FASOC), in Affected Waters;
 - (c) caused the volume of the Commercial Species caught in Affected Waters to be reduced, which in turn adversely

affected the catches of, and income of, the Commercial Fishing Group Members; and/or

- (d) caused a reduction in the quality of the Commercial Species caught in Affected Waters, which in turn adversely affected the catches of, and income of, the Commercial Fishing Group Members.
3. The plaintiffs allege at paragraph 89 of the FASOC that, but for the defendant's breach of duty:
- (a) there would have been additional or increased quantities of Commercial Species (including, but not limited to, additional or increased quantities of saleable scallop) inhabiting Affected Waters and available for harvesting, processing and sale; and
- (b) the first plaintiff and Commercial Fishing Group Members would have harvested additional or increased quantities of Commercial Species (including, but not limited to, additional or increased quantities of saleable scallop) from Affected Waters.
4. The plaintiffs allege at paragraph 91 of the FASOC that, in the premises in paragraphs 87 to 89, the defendant's breaches were a cause of loss and damage to the plaintiffs and each of the Group Members.
5. The defendant denies the allegations in the FASOC identified in items 1 to 4 above (paragraphs 215 and 216 of the defendant's defence, a copy of which is enclosed).

Schedule of documents

The following documents must be produced –

No.	Description
1.	<p>Queensland Commercial Fishing Tour Logbook (CV 05) data</p> <p>Daily records of catch and effort by fishing location for the period January 2005 to present, including any data subject to DAF's "<5 boat rule" or equivalent, and including the following fields:</p> <p>Logbook number, page number, vessel name, boat mark, licence number, skipper's name, name of the owner of the commercial fishing boat licence, month, year, day, trip start, boat daily activity code, fishing location, number of dories, number of people fishing, number of guests, gear type, and catch in kg (retained catch) and number per species.</p>
2.	<p>Aquarium Fish Fishery Logbook (AQ05) data</p> <p>Daily records of catch and effort by fishing location for the period January 2005 to present, including any data subject to DAF's "<5 boat rule" or equivalent, and including the following fields:</p> <p>Logbook number, page number, vessel name, boat mark, harvest licence number, fisher name, month, year, day, boat daily activity code, fishing</p>

	location – latitude or grid, fishing location – longitude or site, reef name or reef ID no, number of collectors, total collector hours combined, catch number by species, and weight by species (if available).
3.	<p>Queensland East Coast Tropical Rock Lobster Logbook (TR05) data</p> <p>Daily records of catch and effort by fishing location for the period January 2005 to present, including any data subject to DAF’s “<5 boat rule” or equivalent, and including the following fields:</p> <p>Vessel name, boat mark, logbook number, page number, licence number, licence holder’s name, trip depart date, trip depart port, landing date, port of landing, date, date, [sic] location (latitude and longitude), total catch of live lobster by dory, total catch of lobster tail by dory, fishing method (hookah and freediving), daily totals.</p>
4.	<p>Beachworm, Bloodworm and Yabby Logbook (WY02) data</p> <p>Daily records of catch and effort by fishing location for the period January 2005 to present, including any data subject to DAF’s “<5 boat rule” or equivalent, and including the following fields:</p> <p>Logbook number, page number, authority number, licence holder’s name, date, location (site name), effort (collection time – hours), number of beachworms, number of bloodworms, kg of bloodworms, number of yabbies.</p>
5.	<p>Broodstock and Culture Stock Collection Logbook (BR01) data</p> <p>Daily records of catch and effort by fishing location for the period January 2005 to present, including any data subject to DAF’s “<5 boat rule” or equivalent, and including the following fields:</p> <p>Logbook number, page number, general fisheries permit number, permit holder’s/nominee’s name, date, grid or latitude, site or longitude, collection method and weight and number of each species caught.</p>
6.	<p>Queensland East Coast Line Fin Fish Fisheries Logbook (LF07) data</p> <p>Daily records of catch and effort by fishing location for the period January 2005 to present, including any data subject to DAF’s “<5 boat rule” or equivalent, and including the following fields:</p> <p>Logbook number, page number, boat name, boat mark, commercial fisher’s licence number, commercial fisher’s name, departure date, date, boat activity code, grid or latitude, site or longitude, number of tenders used, number of crew fishing, number of lines used, gear type, species targeted, catch weight and number of each species by form, and catch converted to whole weight.</p>
7.	<p>Queensland Reef Line Multi-Hook Fin Fish Fishery Logbook (MH01) data</p> <p>Daily records of catch and effort by fishing location for the period January 2005 to present, including any data subject to DAF’s “<5 boat rule” or equivalent, and including the following fields:</p> <p>Logbook number, page number, boat name, boat mark, commercial fisher’s licence number, commercial fisher’s name, port departed, departure date, date, boat activity code, grid or latitude, site or longitude, number of lines used, total number of hooks, hook hours, catch weight and number of each species, and catch converted to whole weight for each species.</p>

8.	<p>Queensland East Coast Net and Crab Fishery Logbook (MC06) data</p> <p>Daily records of catch and effort by fishing location for the period January 2005 to present, including any data subject to DAF's "<5 boat rule" or equivalent, and including the following fields:</p> <p>Logbook number, page number, boat name, boat mark, commercial fisher's licence number, commercial fisher's name, date, boat activity code, grid or latitude, site or longitude, number of pots / dillies in crab fishery, total number of lifts in crab fishery, retained weight by species in crab fishery, mesh size in net fishery, total net length in net fishery, soak time in net fishery, catch weight by species and form, and catch converted to whole weight for each species.</p>
9.	<p>Spanner Crab Fishery Logbook (SC06) data</p> <p>Daily records of catch and effort by fishing location for the period January 2005 to present, including any data subject to DAF's "<5 boat rule" or equivalent, and including the following fields:</p> <p>Logbook number, page number, boat name, boat mark, commercial fisher's licence number, commercial fisher's name, date, grid or latitude, site or longitude, time first line set, time last line lifted, number of dillies, total dilly lifts, retained weight, and number of containers.</p>
10.	<p>Queensland East Coast Trawl Fishery Logbook (OT10) data</p> <p>Daily records of catch and effort by fishing location for the period January 2005 to present, including any data subject to DAF's "<5 boat rule" or equivalent, and including the following fields:</p> <p>Logbook number, page number, endorsement type, boat mark, commercial fisher's licence number, commercial fisher's name, date, boat activity code, grid or latitude, site or longitude, trawl gear code, time shot away, number of shots, total hours trawled, depth (m), catch weights and numbers by species, catch weight converted to whole weight for each species, and the trawl gear code descriptions.</p>
11.	<p>Stout Whiting Trawl Fishery (T4) Logbook (SW04) data</p> <p>Daily records of catch and effort by fishing location for the period January 2005 to present, including any data subject to DAF's "<5 boat rule" or equivalent, and including the following fields:</p> <p>Logbook number, page number, boat name, boat mark, commercial fisher's licence number, commercial fisher's name, date, start and finish latitude and longitude, site or longitude, time shot away, time retrieved, depth (f), number of 17kg boxes of stout whiting, retained catch weights by species, and the trawl gear code descriptions.</p>
12.	<p>Ownership data</p> <p>For each of the fisheries listed in items 1 to 11 of this Schedule, data listing the holders of all commercial fisher licence numbers and commercial fishing boat licence numbers."</p>

[4] Rule 245 of the UCPR provides:

“245 Objection to disclosure

- (1) The respondent, or a person who has been served with a notice of non-party disclosure under rule 244, may

object to the production of some or all of the documents mentioned in the notice within 7 days after its service or, with the court's leave, a later time.

- (2) Also, another person who would be affected by the notice and who has not been served may object to the production of some or all of the documents mentioned in the notice at any time with the court's leave.
- (3) The objection must—
 - (a) be written; and
 - (b) be served on the applicant; and
 - (c) if the person objecting (the *objector*) is not the respondent—be served on the respondent; and
 - (d) clearly state the reasons for the objection.
- (4) The reasons may include, but are not limited to, the following—
 - (a) if the objector is the respondent—the expense and inconvenience likely to be incurred by the respondent in complying with the notice;
 - (b) the lack of relevance to the proceeding of the documents mentioned in the notice;
 - (c) the lack of particularity with which the documents are described;
 - (d) a claim of privilege;
 - (e) the confidential nature of the documents or their contents;
 - (f) the effect disclosure would have on any person;
 - (g) if the objector was not served with the notice—the fact that the objector should have been served.”

[5] Although the notice of non-party disclosure was filed, it was not served as the plaintiffs apprehended they could not comply with r 244(1) UCPR, with there being potentially up to 5,000 fishermen and associated businesses which may have provided the information stored by the DAF. Accordingly, on 17 January 2020, the plaintiffs filed an application for substituted service of the notice. That application succeeded and orders were made for substituted service on 30 January 2020. On 2 February 2020, the notice of non-party disclosure was served upon the DAF. Given the breadth of discovery requested, on 7 February 2020, the DAF sent an email to the solicitors for the plaintiffs and the defendant requesting an extension of time until 25 February 2020 to serve any objection to the notice. The extensions was granted.

[6] On 25 February 2020, the DAF served the solicitors for the plaintiffs with notice of its objection and documents pursuant to r 245 UCPR. The notice of objection provided *inter alia*:¹

“The objection is made because:-

1. The Notice is too broad in scope to be directly relevant to the allegation in issue in the proceeding. In particular, the Notice is too broad insofar as it seeks:-
 - (a) Information for the period from 2005 to present;
 - (b) Information going outside the Affected Areas (as that term is defined in the Statement Claim); and
 - (c) Information for species beyond the Commercial Species (as defined in the Statement of Claim),
2. The time, expense and inconvenience that would be necessary for the Department to comply with the Notice is not justified by the relevance of the documents sought by the Notice to the matters in dispute; and
3. The Department is obliged by section 217B of the *Fisheries Act 1994* and the provisions of the *Information Privacy Act 2009* to keep the information which is the subject of the Notice confidential.”

[7] As a notice of objection had been served, there was an automatic stay of the notice of non-party discovery.²

[8] Rule 247 of the UCPR provides:

“247 Court’s decision about objection

- (1) Within 7 days after service of an objection under rule 245, the applicant may apply to the court for a decision about the objection.
- (2) The court may make any order it considers appropriate including, but not limited to an order—
 - (a) lifting the stay; or
 - (b) varying the notice of non-party disclosure; or
 - (c) setting aside the notice.
- (3) Unless the court otherwise orders, each party to an application to decide an objection must bear the party’s own costs of the application.
- (4) The court may make an order for subrule (3) if, having regard to the following, the court considers that the circumstances justify it—

¹ Exhibit JMC1 to the affidavit of James Malcolm Cooper filed 27 February 2020.

² *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) r 246.

- (a) the merit of the objector’s objections;
- (b) the public interest in the efficient and informed conduct of litigation;
- (c) the public interest in not discouraging objections in good faith by those not a party to the litigation.”

[9] On 27 February 2020, the plaintiffs made an application pursuant to r 247 UCPR to lift the stay arising from the objection to the notice of non-party disclosure. DAF’s notice of objection is conveniently set out in three paragraphs, with each paragraph addressing objections highlighted in r 245(4). Namely, objections regarding the relevance and lack of particularity;³ time, expense and convenience;⁴ and confidentiality.⁵

[10] Wilson J discussed the application of non-party discovery rules under the UCPR in *Westsand Pty Ltd v Johnson* [1999] QSC 337, where her Honour said:

“[7] The substantial objection to production of the documents was on the ground of relevance. Rule 242(1) provides:

‘A party (the “applicant”) to a proceeding may by notice of non-party disclosure require a person who is not party to the proceeding (the “respondent”) to produce to the applicant, within 14 days after service of the notice on the respondent, a document -

- (a) directly relevant to an allegation in issue in the pleadings; and
- (b) in the possession or under the control of the respondent; and
- (c) that is a document the respondent could be required to at the trial of the matter.’

The test is direct relevance, as it is in disclosure inter partes (r 211); i.e. whether a document would tend to prove or disprove an allegation in issue on the pleadings. This is in contrast to the train of inquiry test which applied in discovery inter partes until 1994: *The Campagnie Financiere et Commerciale Du Pacifique v The Peruvian Guano Co* (1882) QBD 55.

[8] By r 243(1)(b) -

‘(1) A notice of non-party disclosure must -

...

(b) state the allegation in issue in the pleadings about which the document sought is directly relevant.’

³ UCPR r 245(4) (b), r 245(4) (c).

⁴ UCPR r 245(4) (a).

⁵ UCPR r 245(4) (e).

This is a recognition that non-party disclosure is an imposition on a stranger to litigation. In the usual case the respondent will have no knowledge of the proceedings and will not have copies of the pleadings; it should not be expected to have to call for these and analyse them.

- [9] In the present case the following allegation is set out in the notice as being the one to which the documents are relevant:-

‘1. That the Plaintiff issued a "running sheet" to the Defendant on 5 June 1998 requiring the defendant to collect and carry cash from various clients in an unarmoured car which the Plaintiff knew, or ought to have known, would require the Defendant to carry cash exceeding \$75,000.00.’

(Paragraph 7(a) of the Amended Defence which is exhibit C to the affidavit of Delany filed on 14 October 1999.)

- [10] I accept the submissions of the respondent's solicitor that none of the documents described in the notice has direct relevance to this allegation.

- [11] The applicant's counsel submitted nevertheless that the documents were of direct relevance to a number of other allegations in the pleadings. It is the clear intent of rr. 242-249 to minimise the imposition of non-party disclosure on a stranger to litigation. Accordingly, a party in the position in which the present applicant finds himself ought not ordinarily to be allowed to seek to uphold the notice by assertion of direct relevance to other allegations in the pleadings. The circumstances of the present application are somewhat unusual. From correspondence in evidence it seems that the respondent has had solicitors acting for it in relation to non-party disclosure since at least June 1999; indeed it may even have been served with an earlier notice of non-party disclosure. Those solicitors are fully acquainted with the pleadings. It is the duty of the court to avoid undue delay, expense and technicality (r 5(3)). In the special circumstances of this application I am prepared to consider the other allegations to which the documents are submitted to be directly relevant.

[...]

- [14] One of the grounds upon which objection was taken was the confidential nature of the documents (r 245(4)(e)). In oral submissions the plaintiff's solicitor said:-

‘Any document that deals with arrangements regarding the collection of cash ought to be one which is not bandied around except where it's expressly required to be given to a party or to somebody with legitimate and reasonable reason to have a look at it.’

A party gaining access to a document pursuant to a notice of non-party disclosure is subject to an implied undertaking not to use it except for the purpose of the litigation. (Consider *Central Queensland Cement Pty Ltd v Hardy* [1989] 2 Qd R 509, a case concerned with discovery inter partes.) In the circumstances I would not refuse an order for production on the basis of a confidential nature of the contract.”

- [11] I have also gained assistance from the judgment of Dodds DCJ in *Naskam Security Services Pty Ltd v Adarm Security Pty Ltd & Ors* [2000] QDC 441 (“*Naskam Security*”). His Honour discussed the application of the UCPR and its relationship to the former regime for discovery of documents from non-parties as follows:

“[10] Whilst the description of the documents discloseable [sic] under UCPR both party and non-party appears narrower than under the superseded rules the limitations surrounding the duty as existed under the superseded rules, do not appear to have been enlarged.

- [11] The procedure is not available when its only purpose is a fishing expedition for documents which may have been in the possession of a person not a party to the action. Documents sought must be shown to probably be directly relevant to an allegation in issue on the pleadings. The discovery process is limited to the production of specific documents which would be the subject of a subpoena duces tecum at a trial and which are shown to be probably in the possession or control of the non-party. The onus of showing these things is that of the party seeking discovery: *Lebon v. Lake Placid Resort Pty Ltd* (1995) 1 QdR 24 and *Uthmann v. Ipswich City Council* (1998) 1 QdR 435.

[...]

- [20] I consider the present notice contains sufficient particularity about the documents to enable the respondent to identify what is sought. Documents of the nature of those sought will be relevant to the proceeding. As to the question of expense and inconvenience, the extent of the process will depend upon whether and to what extent the respondent has engaged in the activities the subject of the request for disclosure during the period. I do not consider the request for disclosure over the period I have referred to oppressive.

- [21] As to the matter of confidential information, the plaintiff offers to provide an undertaking in terms of that discussed by McPherson J in *Exparte Fielder Gillespie Limited* (1984) 2 QdR 339. I consider that sufficient.”

- [12] The reasons of Dodds DCJ in *Naskam Security* were cited with approval by McGill DCJ in *Smith v O'Leary & Anor* [2001] QDC 197, where His Honour explained:⁶

“[4] The Uniform Civil Procedure Rules introduced a different regime about non-party disclosure compared with the mechanism set out in O.40 r.38A-38F, under which a person served with a writ of non-party discovery had to comply with it or make the application set aside or have it varied: r.38C. This was seen as placing too much pressure on a person served with such a writ, so that under the Uniform Civil Procedure Rules the person served with the equivalent notice of non-party disclosure merely has to file a notice of objection, and it is then a matter for the party who issued the notice to make the application, if that party wants to pursue the matter. It was in this context that a rule that prima facie costs are to be borne by each party to that application can in my opinion be seen as a further safeguard to a person who has been served with a notice of non-party disclosure and is unhappy about it. The importance of such safeguards is that otherwise there is a serious risk that on occasions the non-party disclosure mechanism may be used in a way which is oppressive, and because of the recognition that people who are not parties to a dispute in court should not be inconvenienced by that dispute any more than is necessary.”

Lack of relevance and particularity

- [13] As noted above, paragraph 1 of the objection notice,⁷ makes the objection that the notice of non-party disclosure is too broad in scope to be directly relevant to the allegation in the proceeding. In support of this notion the objection notice specified three particular issues.
- [14] Firstly, that the notice is too broad in scope to be relevant, insofar as it seeks information within a period from 2005 until present. That is, it seeks detailed information for a period of approximately 6 years prior to the building of the bund until present. As a notice of non-party disclosure is not a continuing disclosure requirement,⁸ the notice must be interpreted as requiring discovery of the information over a period from 2005 through to the date of the filing of the notice, 25 November 2019. Relatively speaking, that is for a period of approximately 6 years prior to the building of the bund wall, to a period approximately 8 years after the building of the bund wall.
- [15] As set out in the notice of non-party discovery, the group plaintiffs allege losses from September 2011 to date. Accordingly, information from at least the construction of the bund wall in September 2011 to date are directly relevant to matters raised in the pleadings.

⁶ *Smith v O'Leary & Anor* [2001] QDC 197 at [4] (footnotes omitted).

⁷ See above at [6].

⁸ UCPR r 242(4).

- [16] Obtaining proof, even on the balance of probability, of what a fisherman would have caught had something not occurred, may be expected to be a controversial and difficult matter. In paragraphs 208 to 216 of the defence, Gladstone Ports Corporation (“GPC”) deny causation and loss. They further raise the positive case that prior to 16 June 2011, there were various species of fish that had been discovered within Port Curtis with rashes or conditions and that commercial fishermen had experienced reductions in catch rates for some species of fish.
- [17] In paragraphs 208 to 213, the defendants plead that due to above average rainfall in the areas of the Calliope and Boyne Rivers in November and December 2010, the Awoonga freshwater dam began to overflow for the first time in 8 years. This caused an unusually large influx of fresh water into Port Curtis, along with approximately 30,000 large barramundi being washed over from the Awoonga Dam into the Boyne River.
- [18] In further response to the allegations concerning causation and loss, the defendants rely upon a series of scientific studies, contained in Annexure A to the defence and referred to in paragraph 215(b)(iii) of the defence.⁹ Annexure A summarises 11 expert reports which have been commissioned on the topic in respect of analysis of the water quality and fish health in the Port Curtis area during the relevant period. These reports raise multiple potential stressors including, in the CSIRO report of March 2013 that “often the cause of environmental effects is a result of multiple stressors of which freshwater and associated turbidity would rank highly, along with the stormwater runoff of contaminants, licensed discharges, excessive fish stocks, food scarcity.”
- [19] In its case, the plaintiffs intend to call experts in the fields of:
- (a) construction and engineering;
 - (b) project management and environmental engineering;
 - (c) water quality and environmental science (including water and current movements);
 - (d) remote imaging;
 - (e) geochemistry and acid sulphate soils;
 - (f) marine science biology and eco-toxicology;
 - (g) life sciences marine ecology;
 - (h) fish population dynamics;
 - (i) marine science scallop biology; and
 - (j) marine science prawn biology.

Finally, there will be an assessment by a forensic accountant. There is a tiered structure to the expert’s evidence and inter-relation between the evidence.

- [20] Therefore, the delay in completion of any expert report has the potential for significant adverse effects upon the timeline for the conduct of this complex class-

⁹ Notice of Intention to Defend and Defence filed 7 September 2018.

action litigation. In particular, this may have an effect on the evidence of Dr Ian Knuckey, the fish population dynamics expert from Fishwell Consulting. The proposed questions show that in formulating their opinion on the catch per unit effort ('CPUE'), Dr Knuckey will rely upon the opinions reached by other experts as to the base discharge from the area of bund, the amount of dredge spoil expended in the bund area and the possible turbidity sources within the bund.

- [21] Plainly, the forensic accountant, the final tier expert in respect of proof of loss, cannot conclude his report until the specialist experts regarding sea and aquatic life, such as Dr Knuckey, have finalised their reports.
- [22] With respect to the issue of the period of sourcing of the information, that is from 2005 until 25 November 2019, as discussed above, the information from this period is relevant as to the proper assessment as to quantum on the pleadings as they stand. Given that environmental factors such as the discharge of excess freshwater from the Awoonga Dam are directly raised in the pleadings, it can never be a matter of simply comparing data from one or two financial years prior to September 2011 with post-September 2011 data. It is plain, and it is an issue joined upon the pleadings, that environmental factors must be taken into account in the proper assessment of causation and quantification of loss, if any.
- [23] Subject to the issue of the currency of the information contained in the DAF records, I conclude that in respect of the timeframes, a request for documentation from the period from 2005 until present is not too broad in scope, and the documents are directly relevant to the issues raised in the pleadings.
- [24] The final matter raised with respect to the period of information sought, is contained in paragraph 11 of the affidavit of Ashley Lawson, Fisheries Resource Officer employed by the DAF.¹⁰ Officer Lawson deposes that catch and effort data is entered into the logbook system database ('LBS') when time permits and that there is currently a three to four month backlog on the data entry. Given that Officer Lawson's affidavit was sworn on 28 February 2020, it can be concluded that the LBS has been entered up to approximately the end of October 2019. Furthermore, Officer Lawson's affidavit points out that the Fisheries data team are presently short staffed and are involved in a number of other important projects of State, so there may be some difficulty in bringing the LBS up to date. The applicants address this by seeking disclosure of documents until 30 September 2019, in lieu of the date implied by the notice of non-party disclosure (25 November 2019), so as to avoid creating additional data entry work prior to the Department meeting the disclosure required by the notice.
- [25] Paragraphs 1(b) and (c) of the objection also raise issues as to the scope and relevance of the notice. Namely, that information is sought regarding areas outside the "affected areas" as defined in paragraph 3(a)(i) of the Further Amended Statement of Claim¹¹('FASOC') and beyond the "commercial species" as defined in paragraph 3(a)(ii) of the FASOC. Commercial species is defined in the particulars to paragraph 3(a)(ii) of the FASOC as follows:¹²

¹⁰ Affidavit of Ashley Lawson filed 2 March 2020.

¹¹ Further Amended Statement of Claim filed 27 July 2018.

¹² Further Amended Statement of Claim filed 27 July 2018

“...The saleable Fish species included queenfish, barramundi, catfish, mudcrab, mullet, sole, blubber lip bream, herring, whiting, king salmon, trout, mackeral [sic], scallops, prawns and crabs (together and severally **Commercial Species**). Further particulars regarding all the species which formed part of the Commercial Species will be provided following completion of interlocutory processes and expert evidence.”

(Original emphasis.)

- [26] As can be seen from the notice of non-party disclosure set out above,¹³ the logbooks which are sought relate to records for the whole of Queensland and not just the affected area. The notices seek information which, *prima facie*, is not directly relevant to terms defined in the pleadings. It can be seen that a number of items¹⁴ in the notice appear to relate to species outside of those specifically included in the definition of commercial species, which it should be noted, is an inclusive not exclusive definition. The apparent broadness of the request for information is to be considered not only in relation to the breadth of the pleadings, but also the direct relevance of documents to proof of an issue raised in the pleadings.
- [27] Paragraphs 5 to 12 of the affidavit of James Malcolm Cooper,¹⁵ summarises the steps that have been taken to obtain information from the DAF and the difficulties with the information which has currently been obtained. As Mr Cooper points out, publically available information from DAF has been obtained, however, the information which is publically available is aggregated information. Under s 217B of the *Fisheries Act 1994 (Qld)*, it is an offence for a person to disclose confidential information obtained by the Department. Confidential information is defined to include information which could identify an individual or the likely commercial activities of that individual. It is for this reason, as is shown on the notice of non-party discovery, that the logbooks aggregate information on a minimum for no less than five boats. That is, the aggregate information prevents the identity of the individual fishing license operators so as to preserve their confidential information.
- [28] In earlier proceedings in this matter in November 2018 and March 2019, the plaintiffs issued subpoenas to the DAF to obtain information in respect of the DAF records. Observing the confidentiality requirements imposed upon the department and its officers pursuant to s 217B, the information that was produced pursuant to those two subpoenas were “aggregated in certain respects, in particular with respect to catch data for particular species aggregated by month”. The difficulty in providing aggregated information is that “it limits the extent of the analysis that can be done in respect of the data”.¹⁶
- [29] As Mr Cooper explains, the intent is to obtain data in its non-aggregated form so that the plaintiffs’ fish population dynamics expert, Dr Ian Knuckey can provide an expert opinion to assist in the calculation of the loss, if any, suffered by the plaintiffs. Mr Cooper’s firm, Clyde & Co has provided all of the publically

¹³ See paragraph [3].

¹⁴ In particular, documents relating to aquarium fish, tropical rock lobsters and beach worm, blood worm and yabbies.

¹⁵ Affidavit of James Malcolm Cooper filed 17 January 2020.

¹⁶ Affidavit of James Malcolm Cooper filed 17 January 2020.

available information and all of the subpoenaed information provided by the DAF in its aggregated form to Dr Knuckey. Dr Knuckey has examined that information and has advised Mr Cooper that due to the aggregated nature of the data provided:

- (a) he can only perform a limited type of analysis;
- (b) he cannot identify each plaintiffs' loss and a calculation of the plaintiff's quantum;
- (c) he cannot properly calculate CPUE either in kg/day or kg/hours trawled in the absence of an ability to match an individual's efforts with catch. This is relevant not only to the calculation of the losses post-construction of the bund, but also relevant to form a proper calculation "of fluctuating fish populations in the relevant waters in the periods since January 2005";¹⁷
- (d) he cannot provide a more precise opinion. Dr Knuckey wishes to be able to track an individual fisherman's catch and match it with the size of boat, nature of equipment and time of year fished, location of catch. This can only be achieved with high resolution data and not with aggregated data;
- (e) he requires data for areas beyond the defined affected waters as this would allow a reference point, against which the catch from affected waters may be compared to. It also allows calculations to assess the impact of any reduced catch in the affected areas on the total catch from all waters, and it enables an examination of potential displacement of fishing effort from affected areas to other fishing grounds;
- (f) he cannot provide an opinion which is robust from a statistical perspective. In order to quantify means and standard deviations Dr Knuckey requires individual data and not aggregate data;
- (g) he cannot accord for the possible effect of licence transfers. As an expert in fish population dynamics, Dr Knuckey is well aware of the frequent transfers of licenses between fishermen within the industry and in order to properly perform his calculations, Dr Knuckey prefers to match transfers of fishing licences to individuals. This enables a conducive analysis of the catch over longer periods of time, which Dr Knuckey concludes, will provide a better basis for estimation of fish population dynamics.

[30] In furtherance of its argument that it is oppressive to require non-party discovery in terms of the notice provided, the respondent criticises the lack of direct evidence from Dr Knuckey as to the need for the information that has been requested. Whilst it is true that Dr Knuckey did not give direct evidence and his concerns are raised through Mr Cooper's affidavit, it does not materially devalue the weight which can be placed upon the concerns raised by Dr Knuckey. The respondent further argues that the plaintiffs did not go so far as to complain that absent the further information being provided, that Dr Knuckey cannot provide an opinion. Whilst that submission is correct, the tests of relevance and oppression do not descend to an additional requirement that a document will only be discovered if it can be shown that absent its disclosure a plaintiff will fail to prove its case through the subsequent absence of sufficient expert evidence.

¹⁷ Affidavit of James Malcolm Cooper filed 17 January 2020.

- [31] The test remains one of direct relevance as set out in the UCPR. An assessment of whether or not production by way of non-party disclosure is oppressive must be assessed in a pragmatic way, with reference to the pleadings which have been filed and the evidence brought on application. The test cannot be whether it is impossible for a plaintiff to prove their case absent the information sought, but rather the inconvenience, expense and difficulty which is foisted upon a non-party respondent to provide the documentation sought, balanced against the likely detrimental effect of the absence of that documentation upon the plaintiff's ability to have a fair opportunity to prove their case.
- [32] The explanations provided by Dr Knuckey to Mr Cooper for the need for the more specific and non-aggregated data have a logical basis which explains the relevance of the disclosure of the information required, and in particular in respect of species not specifically defined as commercial species and from catches outside of the affected waters. This may further be seen to be relevant by the defence and in particular the allegations of environmental damage to Port Curtis caused by the abnormal excessive discharge of water and barramundi from the Awoonga Dam, which, *prima facie*, may have had an effect on Port Curtis, but are unlikely to have an effect in areas further afield, that is, outside the affected waters.
- [33] In summary, I conclude that the objection taken in paragraph 1 of the objection, namely that the notice was too broad in scope to be directly relevant to proceedings ought not to be accepted.

Expense and Inconvenience

- [34] In respect to the objection as to time, expense, and inconvenience occasioned upon the department to comply with the notice, the DAF rely upon the affidavit of Ashley Lawson, Fisheries Resource Officer, sworn on 28 February 2020, which relevantly provides in paragraphs 43 – 47 as follows:

“43. Prior to her departure, I was informed by the previous Fish Data coordinator (Dr Phillips) that the Department had already spent approximately 8 weeks collating data to respond to the first and the second subpoenas issued by the plaintiff. This time include time spent liaising with representatives from the plaintiff regarding the interpretation of the data that was provided in response to the subpoenas.

44. In addition to the time already spent responding to the first and second subpoenas, I am aware that the members of my team including myself, Dr Phillips (prior to her departure) and Mr Samuel Bilbie, the Digital Solutions Manager, have spent numerous hours considering the current Notice and the resources and method that would be required to respond to the Notice.

45. Based upon the time required from my team to respond to the plaintiffs' first and second subpoena requests, and taking into account the fact that the current Notice is broader in scope than either of those two requests, I have estimated (with input from my team members) that in order to respond to the Notice the

team would require at least 4 to 8 weeks of time for an employee allocating 30-50% of their time to the task.

46. In addition, the data team is already under resourced and under pressure as a result of Dr Phillips [sic] departure and it will continue to be short staffed until her role is filled. We currently have four people within the data team. The team is responsible for providing data to commercial fisheries, NGO's, scientists and to other government officers (both internally within the Department, and externally to other Departments) for the purposes of, amongst other things, stock assessments and modelling, compliance requirements, engaging with stakeholder and setting and monitoring quotas.
47. This estimate is very rough, and the time required to complete the task could be significantly longer than 4 to 8 weeks if an employee (such as myself) is not in a position to allocate time to the data request.”

- [35] A broad discretion is reposed in the court pursuant to r 247(2) UCPR to “make any order it considers appropriate” including lifting the stay, varying the notice or setting aside the notice. Whilst expense and inconvenience is a highly relevant matter,¹⁸ that matter cannot be weighed or assessed in the abstract. In the present case, the best estimate (which is acknowledged to be rough) is that it might take an employee (that is, one of the four people in the data team) somewhere between four to eight weeks, working somewhere between 30% to 50% of their time on the task. Whilst that involves a good deal of expense and inconvenience, that must be measured against the expense, inconvenience and prejudice to the three plaintiffs, and the 168 group members, all of which it must be inferred supplied information to the DAF, in failing to prove causation and quantum in their claim.
- [36] It may be inferred that if one employee was delegated the task and did not spend 50%, but rather 100% of their time to the task, then the task may possibly be completed within 2 weeks. Furthermore, as Mr Cooper’s affidavit filed 13 January 2020 shows, solicitors for the plaintiff have been in communication with DAF since 24 September 2019, providing a draft of the notice of non-party disclosure in order to allow the DAF an opportunity to ready themselves for the provision of the information and to make such objection as they saw fit. The cooperative approach of the solicitors for the plaintiffs and the departmental officers are shown in the correspondence set forth in in the affidavit of Mr Cooper.¹⁹
- [37] The correspondence shows that the solicitors for the plaintiffs have been patient in seeking the assistance of DAF officers in order to facilitate the orderly disclosure of what is acknowledged to be a large amount of information, and have given a courteous explanation as to why the information is required by the plaintiff’s fish population dynamics expert. In particular, the time estimate provided by the DAF for the provision of the information sought in the draft notice was said to be approximately 4 weeks.²⁰ That time estimate of 4 weeks sits more than comfortably within the estimates provided by Officer Lawson. Whilst I am conscious that the

¹⁸ UCPR r 245(4)(a).

¹⁹ Exhibit JMC-4 to the affidavit of James Malcolm Cooper filed 17 January 2020.

²⁰ Exhibit JMC-4 to the affidavit of James Malcolm Cooper filed 17 January 2020.

DAF have had a draft of the notice of non-party discovery since 24 September 2019, a period of more than four months, and that any further delay may have serious consequences for the delivery of the expert reports sought by the plaintiff, I consider it reasonable to allow the DAF until the end of this month to provide the information which is sought in the notice of non-party discovery.

Confidentiality

- [38] As to the third objection, confidentiality, that may be disposed of efficiently. Section 217B(2)(c) of the *Fisheries Act* 1994 (Qld) provides that it is not an offence to disclose confidential information that is “otherwise required or permitted by law”. The discovery of relevant documents pursuant to a properly formulated notice of non-party disclosure is a form of disclosure which is “otherwise required or permitted by law”. Disclosed documents are subject to the implied undertaking not to use the disclosed documents other than for the purposes of the proper conduct of the proceedings.²¹
- [39] The implied undertaking not to use the discovered documents except for the purpose of litigation applies in cases of non-party disclosure.²²
- [40] In the present case, as noted upon the record, the plaintiffs have offered an undertaking to only make the documents available to their lawyers, their experts, the court as well as the other parties’ counsel and solicitors. The objection therefore cannot be sustained in respect of the issue of disclosure of confidential information.

Conclusion

- [41] In conclusion, I consider it reasonable lift the stay arising from the objection and to vary the notice of non-party disclosure in two minor ways. Firstly, by altering the period in each of the requests for documents from January 2005 to present, to January 2005 to 30 September 2019. Secondly, by altering the obligation contained on page 5 Item A 2 to require the nominated party the State of Queensland DAF to produce the documents prior to 31 March 2020.
- [42] With respect to costs, if there cannot be agreement, the applicant plaintiffs, the defendant Gladstone Ports Corporation, and the respondent the State of Queensland are required to provide written submissions upon costs within seven days hereof.

²¹ *Harman v Home Department State Secretary* (1983) 1 AC 280.

²² *Westsand Pty Ltd v Johnson* [1999] QSC 337 at [14].