SUPREME COURT OF QUEENSLAND

CITATION:	*Central Queensland Mining Supplies Pty Ltd v Columbia Steel Casting Co Ltd* [2011] QSC 183
PARTIES:	**CENTRAL QUEENSLAND MINING SUPPLIES PTY LTD ACN 010 402 990** (plaintiff) v **COLUMBIA STEEL CASTING CO. INC** (defendant)
FILE NO:	1777 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	22 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	17 June 2011
JUDGE:	Applegarth J
ORDERS:	**1. By 18 July 2011 the parties are to provide to the Associate to Justice Applegarth and to the Commercial List Manager a Document Plan and proposed directions in relation to documents.** **2. The defendant's application is otherwise adjourned to a date to be fixed.** **3. Reserve costs.**
CATCHWORDS:	PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – DISCOVERY OF DOCUMENTS – ORDERS FOR FURTHER AND BETTER DISCOVERY – where parties undertaking disclosure process involving collation and analysis of a large volume of documents – where plaintiff disclosed documents processed from electronic database – where documents were initially selected on basis of identified persons and keyword searches – where searches produced large volume of documents and data – where defendant complains that the plaintiff's initial searches were too confined, resulting in under-disclosure of relevant documents – where plaintiff's solicitors identify documents that they consider are directly relevant – where defendant complains that too liberal a view was taken, resulting in over-disclosure of irrelevant documents – whether Court should order further

and better disclosure

Uniform Civil Procedure Rules 1999, r 5, r 211

Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants and Bars Pty Ltd [2001] 1 Qd R 276; [1999] QCA 276 cited
Peninsula Shipping Lines Pty Ltd v Adsteam Agency Pty Ltd [2008] QSC 317 cited
Robson v REB Engineering Pty Ltd [1997] 2 Qd R 102 cited

COUNSEL: D J S Jackson QC and D P de Jersey for the plaintiff/respondent
S S W Couper QC and N H Ferrett for the defendant/applicant

SOLICITORS: Clayton Utz for the plaintiff
Hopgood Ganim for the defendants

[1] The plaintiff ("CQMS") sues the defendant ("Columbia") for breach of an exclusive distributorship agreement that was made in 1986. This application relates to CQMS's compliance with its disclosure obligations. Columbia's application is essentially in two parts. The first, which I shall term the "under-disclosure complaint", is that CQMS, in its culling of a large electronic database of documents, limited the documents to those held by employees of CQMS who had contact with Columbia or dealings with dragline chain, and that the keyword searches of the database used only four search terms. The second complaint, which I shall term the "over-disclosure complaint", is that the lists of documents given by CQMS contain many documents that are not directly relevant to the issues, and that the volume of documents disclosed by CQMS shows that it has not acted appropriately in confining its disclosure only to directly relevant documents. Columbia's complaint is that it is being burdened with the task of sifting through a large number of irrelevant documents to find the relevant ones, thereby incurring costs that should have been borne by CQMS in compliance with its duty of disclosure. In short, Columbia complains that CQMS should not be able to "snow it with irrelevant documents and withhold relevant ones" because CQMS was not prepared to refine properly its process of document identification.

[2] Columbia also complains about the form in which documents were listed, particularly that a list provided on 23 March 2011 was not in the proper form, that disclosure has included blank documents, and that the descriptions given to a number of documents do not correspond with the documents.

[3] In response, CQMS submits that Columbia's application should be dismissed because:

(a) CQMS has provided disclosure in the form of lists provided for in the *Uniform Civil Procedure Rules* 1999 (*UCPR*);

(b) Columbia has not established that the procedure chosen by CQMS in relation to its disclosure has resulted in:

(i) directly relevant documents not being disclosed; or

(ii) irrelevant documents being disclosed, such as might warrant an order that CQMS re-do its disclosure by categories;

(c) Columbia and its advisors have known since August 2010 that CQMS's disclosure was likely to be voluminous, yet Columbia did not seek orders for disclosure by categories, and only after CQMS's disclosure is largely complete and a few days before the hearing of the application did Columbia propose that disclosure be conducted by categories.

[4] As to the under-disclosure complaint, CQMS's solicitors contend that it was appropriate to identify potentially disclosable documents by reference to employees of CQMS who had contact with Columbia or dealings with dragline chain, that Columbia has not established a basis to expand this range of document "custodians", and that the keyword searches used to identify documents that were potentially relevant were extremely broad. As to the over-disclosure complaint, CQMS submits that the factual issues in dispute are not narrow in compass, as demonstrated by the numerous categories recently formulated by Columbia and the terms of such categories, and that the process that was undertaken in identifying directly relevant documents was appropriate. Finally, CQMS submits that Columbia's complaint in relation to the form in which some of the disclosed documents were disclosed is more perceived than real.

Background

[5] CQMS supplies products used in mining, including dragline chain. Columbia, which is based in Oregon in the United States of America, manufactures and sells products for use in aggregate mining, metallic mining and surface coal mining. In 1986 CQMS and Columbia entered into an exclusive distributorship agreement, whereby CQMS would be Columbia's exclusive Australian distributor. CQMS was Columbia's exclusive Australian distributor pursuant to that agreement until 2009, when Columbia terminated the exclusivity of the agreement with immediate effect.

[6] The terms of the agreement are in dispute between the parties. Columbia pleads that CQMS agreed that it would resell any product from Columbia's product range for the purpose of resale in Australia, whereas CQMS contends that the subject matter of the agreement is dragline chain only. Columbia contends that the agreement was terminable at will by either party, whereas CQMS contends that Columbia was obliged to give it reasonable notice. Columbia contends that CQMS agreed that it would not compete against "any other Columbia distributor with similar distribution rights in another geographic territory in that other distributor's territory", whereas CQMS denies that such a term was implied and says that such a term would be prima facie void as an unreasonable restraint of trade.

[7] Columbia contends that CQMS was its fiduciary, whereas CQMS denies this and says that the agreement was a commercial supply chain arrangement. Columbia also contends that CQMS had access to information in respect of Columbia's products and production methods, and that this placed Columbia in a vulnerable position in relation to CQMS. CQMS denies that it had access to all of the information alleged because the subject matter of its agreement was limited to dragline chain.

[8] CQMS alleges that Columbia breached the agreement by terminating the exclusivity of the agreement without giving adequate notice. Columbia contends that CQMS repudiated the agreement and breached its fiduciary duties to Columbia by manufacturing and supplying dragline rigging to its Australian customers. CQMS admits it manufactured and supplied dragline rigging to its Australian customers, but denies that in so doing it repudiated the agreement, since the agreement was for the exclusive distribution of dragline chain only and because it was not Columbia's fiduciary.

[9] CQMS contends that it had to manufacture and supply dragline rigging to its customers in any event because Columbia's dragline rigging design was outdated and not accepted in the Australian market, and also because it was not price competitive.

[10] Columbia also contends that CQMS repudiated the agreement and breached its fiduciary duties by manufacturing and supplying chain end links to a number of its Australian customers. CQMS admits that it manufactured a limited range of chain end links that it supplied to customers in 2004, but contends that it did so because there were excessive delays in Columbia delivering orders for chain end links. CQMS also admits that it manufactured and supplied chain end links in 2006, but says that it notified Columbia of its activities. In any event, CQMS contends that there was no exclusive distributorship agreement in respect of chain end links because the agreement related to dragline chain only.

[11] Columbia contends that CQMS repudiated the agreement and breached its fiduciary duties by bidding against Columbia's exclusive distributorship for certain states in the USA. CQMS admits that it sold buckets and rigging to customers in the USA, but says that it notified Columbia of its activities. Columbia also complains about CQMS manufacturing dragline chain and offering it for sale in Australia. CQMS admits it developed the capacity to manufacture dragline chain from about December 2008, but says that none of the chain which it manufactured was offered for sale in Australia or elsewhere.

[12] Columbia also contends that CQMS repudiated the agreement by failing to pay invoices on time for a period of two years prior to termination of the agreement. CQMS contests these allegations, save for a short period in 2008 when it admits some payments were made late.

[13] This general identification of the issues that arise on the pleadings does not purport to identify every issue that is in dispute. For example, there are certain specific issues, such as Columbia's allegation that in 2007 and 2008 CQMS ceased to observe its obligations under the distribution agreement to use its best endeavours to promote Columbia aggregate and metallic mining products. CQMS denies this allegation and says that it used its best endeavours to promote those products. Some of these issues have been further defined by particulars.

[14] On one view of the pleadings, the real issues in dispute are relatively few in number and relate generally to whether the agreement for exclusive distribution related to dragline chain only, and certain identified aspects of CQMS's contractual performance. On a different view, there are many issues in dispute including the types of products that CQMS obtained from Columbia over the term of the distribution agreement, the products that were the subject of the exclusivity

arrangements, the terms upon which the parties dealt with each other from time to time, the extent to which the parties were in competition with each other, whether CQMS supplied end-users in Australia with products that competed with or were substitutable for Columbia products, and whether CQMS invested any significant money or effort in promoting Columbia's products.

[15] In correspondence between the parties' solicitors in April and May 2010, different contentions were made about the issues in dispute. For example, CQMS's solicitors, Clayton Utz, in a letter dated 29 April 2011, contended that documents which disclose or demonstrate the type of products that Columbia was supplying to CQMS, as well as documents which show the products sold by CQMS over the term of the distribution agreement, were directly relevant to allegations in issue in the pleadings. Hopgood Ganim, in response, complained about the large volume of documents that had been disclosed in respect of a case which contains "only limited factual controversies".

The issue

[16] The present kind of dispute over disclosure is common in litigation. Disputes of this kind may arise because the parties have genuine and reasonable differences of opinion about the issues that are truly in dispute. However, even when the real issues in dispute are agreed, views may legitimately differ about the types of documents that are "directly relevant" to an allegation in issue on the pleadings.[1] The direct relevance test under the Rules was intended to narrow the duty of disclosure. It is not sufficient that the document directly or indirectly allows a party to advance its case or damage the case of its opponent. The term "directly relevant" has been defined to mean "something which tends to prove or disprove the allegation in issue."[2] Even with the aid of judicial interpretation of the term "directly relevant", there often remains scope for legitimate argument about whether a particular document or category of document tends to prove or disprove an allegation and is therefore directly relevant.

[17] In circumstances in which courts remind parties and practitioners that they should "earnestly fulfill [sic] their obligations under the rules"[3] relating to disclosure, and there are serious sanctions for those who do not, it is unsurprising that many practitioners will err on the side of caution in deciding whether a document is "directly relevant". Often it is safer to include a document that is arguably directly relevant than to exclude it. Such a course avoids exposure to an accusation of having given inadequate disclosure and thereby having failed to meet an obligation under the Rules or a court order. However, such a practice has a number of vices. The inclusion of an excessive number of documents imposes unjustifiable costs on other parties and is inimical to the objective of civil procedure, namely "the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense."[4] It tends to delay proceedings, contrary to the implied undertaking given

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1 *UCPR*, r 211(1)(b).

2 *Robson v REB Engineering Pty Ltd* [1997] 2 Qd R 102 at 105; see also *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants and Bars Pty Ltd* [2001] 1 Qd R 276 at 282-283, [1999] QCA 276 at [7]-[8] and *Peninsula Shipping Lines Pty Ltd v Adsteam Agency Pty Ltd* [2008] QSC 317 at [41]-[43].

3 *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants and Bars Pty Ltd* [2001] 1 Qd R 276 at 283, [1999] QCA 276 at [8].

4 *UCPR*, r 5(1).

to the Court and to other parties to proceed in an expeditious way.[5] The "over-disclosure" of documents may save one party costs by shifting the burden and costs of document review to the other party.

[18] The practice of over-disclosure occurs in this jurisdiction, notwithstanding the adoption of the "direct relevance" test, and it occurs in other jurisdictions. Lord Justice Jackson's *Review of Civil Litigation Costs* found that parties in the United Kingdom who strictly complied with the test of "direct relevance" would disclose fewer documents, but incur higher costs, as the test requires lawyers to evaluate the relevance of disclosable documents. However, Lord Justice Jackson reported that, in practice, solicitors simply continued to disclose everything that might be relevant:

> "In other words, they continue to follow the old rules, thus saving costs (on their own side) but disclosing a greater quantity of documents than should be disclosed."[6]

[19] The potential for over-disclosure is increased in complex cases in which large volumes of documents are held by parties, often in electronic form. Even in cases in which the real issues in dispute are well-defined, modern practice often involves the initial collection and collation of a large volume of *potentially* relevant documents by persons who lack a proper knowledge of the case or the relevant issues that are involved in it. Documents that *may* be relevant are collected, and these include large volumes of documents that, upon analysis, prove to be completely irrelevant, let alone directly relevant, to allegations in issue. These observations are not a criticism of the parties in this case, or their legal advisers. Instead, they attempt to summarise how parties often approach the task of disclosure/discovery in commercial litigation.

[20] This Court, other courts and law reform commissions[7] seek to address the issue in a number of ways. The Better Resolution of Litigation Group convened by the Senior Judge Administrator of this Court has developed guidelines in relation to the use of documents in supervised cases. The Rules themselves provide for orders to be made for deferral of disclosure, for disclosure not to be provided, or for a party to be relieved to a specified extent of the duty of disclosure. Parties in supervised cases in this Court are encouraged to agree document plans.

[21] In this case the parties have not addressed until recently the need for specific directions limiting disclosure, save in respect of documents relating to quantum, being a matter addressed at a review on 8 March 2011. The Court has not made or been asked to make specific directions limiting disclosure under the Rules. The parties did not propose that disclosure be limited by reference to categories until Columbia advanced this suggestion in written submissions a few days before the hearing of the present application, leaving inadequate time for CQMS to respond to

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5 *UCPR*, r 5(3).

6 The Right Hon. Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009), 368; available online at http://www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf.

7 Most recently the Australian Law Reform Commission in *Managing Discovery: Discovery of Documents in Federal Courts* (ALRC Report 115, 25 May 2011); available online at: http://www.alrc.gov.au/publications/managing-discovery-discovery-documents-federal-courts-alrc-report-115.

the proposal and to consider its cost implications in terms of having to "re-do" disclosure in accordance with these categories.

[22] In retrospect, it would have been preferable for the parties to confer and agree about the extent of searches to be undertaken by them for the purpose of disclosure, before those searches were undertaken, and to refer any disagreement to the Court if they were unable to resolve any difference of substance. The parties now being in dispute about CQMS's compliance with its obligations of disclosure, it is necessary to determine whether it has complied with its disclosure obligations and, if I am persuaded that it has not, decide what directions are appropriate in the circumstances. The resolution of the present application will not resolve issues that need to be addressed about the use of documents during the further interlocutory stage of these proceedings and at any trial, if the matter does not resolve at mediation. Irrespective of the resolution of the present application, the parties and the Court will need to devise appropriate steps and practices for the efficient management, exchange and presentation of documents during the future phases of the proceeding.

The process undertaken by CQMS to identify relevant documents for the purpose of disclosure

[23] On 19 May 2010, orders were made for the proceeding to be placed on the Commercial List, for amended pleadings to be filed and served, and for the parties to complete disclosure by exchange of lists of documents by 28 July 2010. In an affidavit filed by leave before Justice Margaret Wilson on 4 August 2010, Ms Mitchell, a senior associate at Clayton Utz who has responsibility for the day to day carriage of the matter on behalf of CQMS under the supervision of Mr Collins, a partner of that firm, explained that a vast number of documents were required to be reviewed in order to amend the claim and the statement of claim. Ms Mitchell's August 2010 affidavit explained that on or around 1 June 2010, due to the sheer number of documents required to be reviewed, Ernst and Young were engaged by Clayton Utz to identify, preserve and process electronic information held by CQMS in relation to Columbia.

[24] The data processing exercise was completed on or around 15 June 2010 and resulted in 311.9GB of data being processed. Ms Mitchell deposed that, as at 3 August 2010, Ernst and Young estimated that it would take "between 74 and 743 review days to review 311.9GB of data". As a result, Clayton Utz instructed Ernst and Young to narrow the volume of data by undertaking a number of steps including de-duplicating data, limiting the custodians of the documents and undertaking a number of keyword searches. Ms Mitchell's August 2010 affidavit explained that the documents were then reviewed by a number of solicitors and paralegals at Clayton Utz to determine their relevance to these proceedings, and the exercise was completed on or around 25 June 2010. As Ms Mitchell explains in her affidavit filed on 9 June 2011, this review process was for the purpose of drafting an amended statement of claim, and her August 2010 affidavit did not outline the process which Clayton Utz undertook to comply with CQMS's obligation of disclosure. Nevertheless, her August 2010 affidavit informed Columbia and the Court of the large volume of documents being considered by CQMS and its advisers, and steps taken to narrow the volume of data, including limiting the custodians and keyword searches. Neither party sought specific orders in relation to limitations on disclosure.

[25] The proceedings continued with an application for security for costs being made. The parties' submissions included submissions about the extent of disclosure and its cost. Relevantly, for the purpose of its application for security for costs, Columbia submitted that "the meaning of the parties' interactions over some twenty-three years is in issue" and that the burden of disclosure would be substantial. It noted that, in a letter dated 26 July 2010, Clayton Utz denied that disclosure was likely to be burdensome and had asserted that "largely, what is at issue is the recent conduct of the parties, not the conduct of the parties over the past 20 or so years." In any event, for the purpose of its security for costs application, Columbia submitted that it apprehended that the burden of disclosure would be substantial and that there would be very great expense in the litigation. An order for security for costs was made on 12 October 2010. An amended defence was filed on 24 December 2010. On 8 March 2011 Columbia filed further and better particulars of its defence.

[26] The matter was reviewed by me on that day. The parties had agreed directions providing for the filing by CQMS of a further amended statement of claim by 15 March 2011, and for the parties to make disclosure by exchange of lists by 18 March 2011. Directions were made for pleadings to close by 14 April 2011. The following directions were also made:

> "6. By 15 April 2011 the plaintiff will provide to the defendant a list identifying the witnesses it proposes to call, together with a summary of the evidence to be given by each witness and a list of the documents proposed to be tendered through each witness and, save with the leave of the trial judge, the plaintiff may not lead evidence not disclosed in the summaries.
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> 7. By 27 May 2011 the defendant will provide to the plaintiff a list identifying the witnesses it proposes to call, together with a summary of the evidence to be given by each witness and a list of the documents proposed to be tendered through each witness and, save with the leave of the trial judge, the defendant may not lead evidence not disclosed in the summaries."

[27] The review addressed the issue of disclosure in relation to the damages claim and, in essence, the parties agreed that rather than disclose an enormous volume of documents relating to the issue of damages, Columbia would be given everything that CQMS's expert accounting witness had been given, and that if it wanted anything else the parties would deal with that co-operatively, rather than overload the disclosure process. Neither party sought a limitation on the extent of disclosure that was required to be given in relation to other issues.

[28] Mr Collins of Clayton Utz has explained in an affidavit of 9 June 2011 the process undertaken by his firm to identify relevant documents for the purposes of disclosure. Ms Mitchell has sworn an affidavit filed 9 June 2011 which deals with the same issue. She was directly involved in the supervision of eight solicitors at Clayton Utz who reviewed 22,776 documents for the purpose of determining whether:

(a) those documents were directly relevant to the issues in the proceeding;

(b) those documents were privileged; and/or

(c) those documents were confidential.

Those 22,776 documents were identified as a result of keyword searches undertaken by Ernst and Young at Mr Collins' instructions. By way of background, and at the risk of repetition, the process of collection and preservation of documents undertaken by Ernst and Young at Clayton Utz's request in 2010, and which resulted in the identification and preservation of 311.9GB of data involved the identification, preservation and processing of information held by employees of CQMS who had contact with Columbia or dealings with dragline chain. I shall set out a number of paragraphs of Mr Collins' affidavit that explain the process undertaken by Clayton Utz to identify relevant documents for the purpose of disclosure.

> "7. For the purposes of disclosure, in order to identify the documents which could potentially be relevant to the proceedings, I instructed Ernst & Young to undertake a number of key word searches. The terms used in the key word searches were extremely broad in order to identify all documents which were potentially relevant. The search terms used included:
>
> (a) Columbia; and/or
> (b) Hendrix; and/or
> (c) Chain; and/or
> (d) Links.
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> 8. The key word search undertaken by Ernst & Young returned 22,776 documents. These documents were then uploaded onto Clayton Utz' discovery database, referred to as Signature, for review. The 22,776 documents included not only single and host documents but also attachments. For instance, if an email had 4 attachments, the email and each attachment were described in the Signature database separately.
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> 9. For the purposes of complying with CQMS' duty of disclosure, the 22,776 documents were individually reviewed by solicitors at Clayton Utz. This task was undertaken by 8 solicitors at Clayton Utz (being, Simon Hardwick, Courtney Booth, Rachel Wright, Evan Manolis, Katie Wood, Michaela Lam, Catherine Brown and Alexander Harrington) to determine whether each document was directly relevant to an allegation in issue in these proceedings. The review took just over one month to complete.
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> 10. Additionally, I am informed by Simone Mitchell, a Senior Associate at Clayton Utz who primarily has day to day conduct of these proceedings under my supervision, and verily believe that she undertook spot checks on approximately 400 to 500 of the documents to ensure that the review had been conducted in accordance with the instructions given and that the documents had been designated either relevant, not relevant, confidential and/or privileged appropriately.

11. For the purposes of determining relevance, the pleadings were provided to each solicitor completing the review process. Apart from identifying documents relevant to the issues in the proceedings, the solicitors completing the review process were instructed particularly to identify documents which related to the following:

    (a) Documents that referred to or disclosed the terms of the Distribution Agreement, particularly payment terms, products subject of the Distribution Agreement and termination of the Distribution Agreement. Examples of relevant documents which were provided to the solicitors included:

        (i) invoices which set out terms of supply such as payment terms;

        (ii) memos of meetings between Columbia and CQMS which refer to the Distribution Agreement; and

        (iii) emails which discuss or describe the terms of the agreement, termination of the agreement or changes to payment terms.

    (b) Documents which relate to CQMS' research and development project for the manufacture of dragline chain or individual links. Examples of relevant documents which were provided to the solicitors included:

        (i) emails between CQMS employees regarding the research and development project;

        (ii) board minutes or memos which relate to the research and development project; and

        (iii) any reports which relate to the research and development project.

    (c) Documents which relate to the proposed acquisition of Hendrix, particularly documents which demonstrate the reasons for acquisition. Examples of relevant documents which were provided to the solicitors included:

        (i) emails relating to reasons for CQMS proposed acquisition of Hendrix;

        (ii) board minutes relating to the acquisition of Hendrix; and

        (iii) due diligence report(s) which outline the reasons for CQMS proposed acquisition of Hendrix.

12. During the review process in addition to identifying whether a document was directly relevant to an issue in dispute solicitors were also asked to identify whether each of the documents reviewed were privileged or confidential.

13. The review undertaken of the 22,776 documents uploaded into Signature identified:

    (a) 4,855 documents (including attachments) which were directly relevant to the issues in the proceeding; and

    (b) 1,012 documents (including attachments) which were directly relevant to the issues in the proceedings and which were privileged.

14. On 23 March 2011, pursuant to Order 2 of the Orders made in these proceedings on 8 March 2011, Clayton Utz served a List of Documents... on the Defendant by way of letter to its solicitors, Hopgood Ganim."

[29] Ms Mitchell confirms this process, and states that the spot checks that she undertook on approximately 400 to 500 of the documents took her two days and that, as a result of the review process, she was satisfied that the documents had been designated appropriately.

The form in which lists were provided

[30] Columbia complains that the list of documents provided on 23 March 2011 did not meet the requirements of Form 19 in that:

(a) it lacked at least one field required by the relevant form;

(b) the descriptions given were often unhelpful; and

(c) fields for the author of the document were sometimes left blank.

[31] Columbia's solicitor, Mr Prescott, also complains that a review of the documents revealed that the disclosure included disclosure of blank documents and that a number of the documents disclosed contained descriptions that did not correspond to the documents. For example, the actual dates of documents were not the same as the dates stated in the list. I shall not detail the various complaints concerning the deficiencies in the lists of documents that were provided. The essence of the complaints is that the form in which disclosure has been given by CQMS is deficient and that Columbia will be required to spend time and money in having its lawyers address these deficiencies.

[32] CQMS responds as follows:

"1. CQMS' first list of documents served on 23 March 2011 and it included for each document:

(a) a document ID number;

(b) a description of the document and whether it is a "single", "host" or "attachment" document;

(c) the name of the author of the document;

(d) the name of the author's organisation;

(e) the document date.

2. CQMS served an amended list of documents on 8 June 2011 including for each document:

(a) a document ID number;

(b) a description of the document and whether it is a "single", "host" or "attachment" document;

(c) the name of the author of the document;

(d) the document date;

(e) a description of the document type;

(f) the name of the person to whom the document is addressed;

(g) the name of the person to whom the document was copied (if any).

3. Fields (e), (f) and (g) were added to the list served 23 March 2011.

4. No order was made in this proceeding for electronic disclosure and the parties did not agree to conduct electronic disclosure. Columbia was only ever entitled to a list which provided the following description of the disclosed documents, as per UCPR Form 19:

(a) a description of the document;
(b) a description of who made the document;
(c) the date of the document.

Both lists served by CQMS provided that information and more.

5. Columbia's complaints that the descriptions of some of the disclosed documents are uninformative is more perceived than real, because:

(a) CQMS' first list of documents was provided to Columbia as an electronic list with hyperlinks which enabled Columbia and its advisors to click through to view each document on the list;

(b) the documents were also text searchable;

(c) therefore, if Columbia perceived the description of the document to be uninformative or deficient in some other respect, it could simply click the document in the list and bring up the actual document for inspection.

6. There is no substance to Columbia's complaints as to the form of CQMS' lists of documents."

[33] I consider that Columbia has raised legitimate complaints concerning the form in which lists were provided and that, depending upon the extent of costs incurred by Columbia in addressing misdescriptions and omissions, some order for costs is appropriate in relation to the form in which documents were disclosed by CQMS. It will also be necessary to require the parties to agree on document protocols in relation to the future exchange of documents, including the completion of appropriate fields and reliable dates. The main issues that prompted the present application, however, are Columbia's complaints of under-disclosure and over-disclosure.

Under-disclosure

[34] Strict compliance with the duty of disclosure contained in r 211 may require a party to review each potentially relevant document in its possession or under its control in order to determine whether or not it is directly relevant to an allegation in issue in the pleadings. It is unnecessary for the purpose of this application to dwell upon the extent of document review required by r 211, and the extent to which the Court, in considering applications for further disclosure or applications for relief from the duty of disclosure, should take account of principles of proportionality so as to ensure that disclosure and document management practices are proportionate, taking into account matters that include:

(a) the nature and complexity of the proceedings;

(b) the amount at stake or the relief sought;

(c) the real issues in dispute;

(d) the stage the proceedings have reached;

(e) the volume of potentially relevant documents;

(f) the ease with which documents may be retrieved or reviewed;

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

(h) the likely outcome or benefits to be derived by taking the proposed steps and the extent to which these are likely to have a significant impact on the outcome of the proceedings.

[35] The reason why it is unnecessary to define precisely the extent of CQMS's obligation to review documents in its possession is that Columbia does not suggest that CQMS was obliged to scrutinise every document in its possession or under its control that might be the subject of disclosure. Instead, Columbia's complaint is that CQMS "adopted the process of arbitrarily culling the database of documents to a more manageable level" before considering each remaining document and determining whether or not it had to be disclosed. Columbia submits that this culling process leaves the prospect that the majority of documents have not been properly considered as to whether or not they should be disclosed. Columbia's under-disclosure complaint in this regard focuses upon two aspects. Its first complaint is that the document collection process was limited to documents involving employees of CQMS who had contact with Columbia or dealings with dragline chain. Columbia questions why the custodians should be limited to this extent, and supplements this complaint by pointing out that the process of collating, preserving and processing documents did not permit the author of documents to be identified in all cases. The principal complaint is that additional custodians should have been included in the process. Columbia did not nominate who they should be, even by reference to their positions, and still does not do so.

[36] I am not persuaded that the limitation of the process to employees of CQMS who had contact with Columbia or dealings with dragline chain was unreasonable in the circumstances. Even with this limitation, the collating, preserving and processing exercise yielded 311.9GB of data that was estimated to take between 74 and 743 days to review. Including additional custodians would have made the volume of documents to be reviewed even larger. Ideally, before the process commenced, CQMS should have informed Columbia of the parameters of the searching that it proposed to undertake, and Columbia should have informed CQMS of the searches that it proposed to undertake. That would have enabled Columbia to suggest that the process be extended to additional custodians or classes of custodians. However, Columbia has not done so, even now, at least in a way that allows the Court to assess the utility, cost and consequences of increasing the initial volume of data to be culled.

[37] The keyword searches have not been shown to be inappropriate. Each search term was cumulative in the sense that the search did not only locate documents containing all four terms. For example, it was apt to find any document that contained the word "chain", not only documents that contained the words "Columbia" and "chain".

[38] CQMS's obligation to make disclosure was not subject to a specific document plan or qualified by an obligation to undertake a reasonable search. However, its obligation to the Court and to other parties to proceed in an expeditious way so as to facilitate the expeditious resolution of the real issues in the proceedings at a minimum of expense required it to consider appropriate search terms. Without being definitive, the factors relevant in deciding the reasonableness of a search include:

(a) the number of documents involved and their location;

(b) the nature and complexity of the proceedings;

(c) the ease and expense of retrieval of any particular document; and

(d) the significance of any document which is likely to be located during the search in the ultimate resolution of the case.

The keyword search undertaken by Ernst and Young on behalf of Clayton Utz returned 22,776 documents. If anything, the number of documents produced was excessive, not too few. Mr Collins says that the keyword searches were extremely broad in order to identify all documents which were potentially relevant. I am not persuaded by Columbia that the keyword searches were too narrow, or that the process undertaken by Columbia's legal advisers yielded too few documents, so as to make it appropriate to order CQMS to "re-do" its disclosure.

[39] Columbia does not propose that a new keyword search be undertaken with additional search terms. Instead, it proposes that:

1. a set of categories of documents likely to be relevant and thought necessary to Columbia's case be prescribed either by agreement or by order of the Court;

2. CQMS either:

   (a) demonstrate by evidence that the previously compiled database of documents, if properly interrogated, is likely to produce all or nearly all of the documents in each such category;

   (b) revisit the collation process using staff properly briefed so as to make it likely that documents will be described in a way that will ensure a high degree of confidence that proper interrogation of it will produce required documents;

3. CQMS disclose:

   (a) documents in each such class;

   (b) each document upon which it intends to rely at the trial (whether as a basis for expert evidence or in the course of "lay" evidence).

Columbia's submissions attach a suggested set of categories. However, the first time Columbia proposed disclosure by categories was in its outline of submissions served late on 14 June 2011. CQMS says that the proposal is inappropriate in circumstances in which its disclosure is largely complete and on the eve of its witness summaries being due for delivery. CQMS did not have a reasonable opportunity prior to the hearing to assess the costs or delay involved in undertaking disclosure in accordance with the proposed categories. It is inappropriate to order that further disclosure be undertaken by CQMS on the basis of newly-proposed categories without both evidence and submissions concerning the implications of making such an order in terms of its likely costs and delay.

[40] It is sufficient to conclude that I am not presently persuaded that CQMS should be required to embark upon the process of disclosure again on the grounds that CQMS adopted an arbitrary process in culling the database of documents by reference to identified persons or the keyword searches chosen by them. This is not to say that the process adopted by CQMS was apt to capture all potentially relevant documents. It is possible that documents authored or received by persons who had no contact with Columbia or dealings with dragline chain may be relevant to the issues. It may be that additional keyword searches would have caught additional, potentially relevant documents. However, I am not persuaded that I should exercise my discretion to order CQMS to make further disclosure at this stage on the basis of Columbia's under-disclosure complaint. Any legitimate complaint concerning under-disclosure is better addressed by more targeted orders directed at specifically requested documents or categories of documents, and by an informed assessment of whether the requested documents have a specific relevance to the case and materiality to its outcome, and the likely time, cost and inconvenience involved in locating, reviewing and disclosing the documents or categories of documents.

The over-disclosure complaint

[41] Different figures appear in the material concerning the number of documents (including attachments) which are said by CQMS to be directly relevant to the issues in the proceeding. Columbia submits that CQMS has disclosed some 2,477 documents as being relevant and not subject to a claim of privilege, and that many of the documents are "host documents" which carry attachments. It also contends that, despite the relationship spanning 25 years, there are virtually no documents before 2001 and more than 90 per cent of the documents disclosed relate to the period after 2 January 2008. In any event, its complaint of over-disclosure is that "an unnecessarily liberal approach has been taken with respect to the sub-set of documents properly considered for disclosure" and that it is faced with the prospect of committing lawyers to inspect a large volume of documents when there is a real concern that much of their effort and the costs associated with that review will be wasted.

[42] Columbia complains that whilst very early documents may have been destroyed under document destruction policies, it is not immediately apparent why over 90 per cent of the documents should concern the last two years of the relationship, and that the very high volume of documents in a case which has an apparently small number of factual controversies is indicative of over-disclosure.

[43] Understandably, Columbia has not undertaken a comprehensive review of the thousands of documents that have been disclosed by CQMS to date in order to prove the extent of CQMS's alleged over-disclosure. The point of the application is that it should not be required to review these thousands of documents at great expense. Instead, a brief review has been undertaken by the solicitors for Columbia and, according to Mr Prescott, the partner of Hopgood Ganim who has the carriage of the matter on behalf of Columbia, a number of the documents reviewed have been identified as irrelevant or incapable of being analysed so as to understand how they might be relevant. The following examples are given:

(1) Document ID ABC.001.029.0001 – an email dated 28 March 2009 referring to a quotation for a 3 inch dump chain (being the host document) and the

attachment disclosed (document ID ABC.001.029.0002), which is a blank piece of paper with a blue square on it;

(2) Document ID ABC.001.002.0242 – an email dated 23 October 2007 which is blank with a subject heading "Columbia warranty claim form 23-10-07.xlt" and the attachment disclosed (document ID ABC.001.002.0243), which is a warranty claim form which does not specifically identify any product the subject of a warranty;

(3) Document ID ABC.001.054.0001 – an email dated 18 February 2008 which refers to quote "A65598" for Columbia (without any reference to the type of product referred to) and the attachment disclosed (document ID ABC.001.054.0001), which contains a blank page with a logo for CQMS;

(4) Document ID ABC.001.001.0626 – which appears to be a request for a meeting entitled "Columbia price spreadsheet";

(5) Document ID ABC.003.074.1810 – an email dated 12 May 2009 which refers to a "forecast comparison" for CQMS and the attachment disclosed (ABC.003.074.1812), which contains a spreadsheet which is 1,632 pages long and is indecipherable on its face.

The documents in question are exhibited to Mr Prescott's sixth affidavit.

[44] Mr Collins justifies their inclusion as follows:

(1) The host document is relevant to the issues in these proceedings, particularly the type of products which were purchased from the Defendant and therefore were capable of being the subject of a Distribution Agreement, and the terms of that Distribution Agreement (that is, how the parties placed and fulfilled the orders). The attached document was unable to be retrieved from CQMS's email system and therefore presents as a blank document. The attached document has been disclosed as it forms part of the whole document, namely the email.

(2) Although the attached pro forma warranty claim does not specifically relate to a particular Columbia Steel product, it is clear on its face that it relates to Columbia Steel dragline chain only (for example, it requires information including chain serial number, position of link and a picture of the link which is broken). In circumstances where there is a dispute about the type of products subject of the Distribution Agreement, this documents is relevant to the issues in dispute.

(3) The quote prepared by Columbia is relevant to the issues in these proceedings as it relates to the type of products which were purchased from the Defendant and were therefore capable of being the subject of a Distribution Agreement. The attached document was unable to be retrieved from CQMS's email system and therefore presents as a blank document. The attached document has been disclosed as it forms part of the whole document, namely the email. Further, as the quote is a quote generated by the Defendant, Mr Collins would have thought that the Defendant could retrieve the original quote had it wished.

(4) The meeting request titled Columbia Price Spreadsheet is relevant to the issues in these proceedings, including whether CQMS continued to actively promote Columbia's dragline chain in 2009.

(5) The email dated 12 May 2009, which refers to a document titled "Forecast Comparisons", and its attachment, are relevant as they relate to the products CQMS was supplying to the market, the demand for those products and the potential future demand for those products.

I heard some oral argument on the issue of whether these documents are directly relevant to an issue in the proceedings. I shall address each document briefly in turn.

The first document

[45] The email of 28 March 2009 is simply a covering email which attached Columbia's quotation for dump chain. The fact that Columbia supplied dump chain to CQMS is not in issue. The fact that the document shows the type of products that were purchased from Columbia, and were "therefore capable of being subject of [the] Distribution Agreement", does not make the document "directly relevant". There is no issue in the case that Columbia supplied chain to CQMS. The issue is whether there was an exclusive distribution agreement in respect of all Columbia products. CQMS's case that the exclusive distribution agreement was confined to dragline chain is not proved or disproved by showing that Columbia offered to supply to CQMS the chain referred to in the email. Even if this document and hundreds of other documents like it tended to prove that the dealings between the parties were largely directed towards the supply of chain, it would not tend to prove or disprove whether the exclusivity arrangement was confined to chain.

[46] The inclusion of this document in CQMS's disclosure raises a reasonable concern that many other documents like it have been included in disclosure that are not directly relevant to an issue on the pleadings.

The second document

[47] Mr Collins says that the pro-forma warranty claim form relates to dragline chain. On that basis, he contends that the document is directly relevant to the proceedings in which there is a dispute about the type of products that were the subject of the distribution agreement. I do not agree. Even if it be assumed (and there is no evidence on this) that there was no similar pro-forma warranty claim form amongst the disclosed documents, I am not persuaded that this document is directly relevant to an issue in dispute on the pleadings. There is a dispute about the products that were the subject of exclusivity. The existence or non-existence of pro-forma warranty claim forms in relation to chains and other products does not tend to prove or disprove the allegation in issue.

The third document

[48] This is another email which attaches a quote from Columbia Steel. It is in the same category as the first document. It is not even apparent that the quote is in relation to chain. I am not persuaded that the document is directly relevant because it relates "to the type of products which were purchased from the Defendant and therefore

capable of being subject of [the] Distribution Agreement." Even if the attached document could be found, the email and the attachment to it simply prove negotiations for the supply of products. As with the first document, I am not persuaded that the document is directly relevant.

The fourth document

[49] This is an email dated 17 March 2009 about a request for a meeting. The subject of the email is Columbia's price spreadsheet. It is an internal email within CQMS, and anticipates a meeting in the boardroom. The document is said to be relevant to the issue of whether CQMS continued actively to promote Columbia's dragline chain in 2009. I am not persuaded that an email about a proposed meeting in relation to Columbia's price spreadsheet is directly relevant to that issue. Columbia's price spreadsheet may have been of interest to CQMS for a number of reasons. It is possible that the meeting was about the promotion of Columbia's products, but I am not in a position on the limited material before me to reach a conclusion as to whether this document is directly relevant. I am not persuaded that it is.

The fifth document

[50] The fifth document is an email dated 12 May 2009 which apparently attaches a document about forecast demand for products. The attached document contains a spreadsheet which is 1,632 pages long and, according to Mr Prescott, the spreadsheet is indecipherable on its face. Mr Collins contends that the email and attachment are relevant as they relate to the products CQMS was supplying to the market, the demand for those products and potential future demand for those products. The document may say something about changes in the market for various products. However, I am not satisfied that internal communications between employees of CQMS in relation to a wide variety of products is directly relevant to an issue that is in dispute on the pleadings.

[51] It might be said that the selection, on the basis of a limited review, of five documents that are not shown to be directly relevant proves very little, other than the existence of a legitimate concern by Columbia about over-disclosure. However, I consider that the limited review undertaken by Columbia's lawyers gives rise to a reasonable concern about the volume of irrelevant documents that have been disclosed and the cost of sifting through a large number of irrelevant documents to find the relevant ones.

What should be done to address the concern about over-disclosure?

[52] I am not presently persuaded that a broad order of the kind sought in the amended application, requiring CQMS to "disclose by list each document in its possession, custody or control, to which the duty of disclosure applies under Chapter 7 Part 1 of the *Uniform Civil Procedure Rules* 1999", is appropriate. It effectively requires CQMS to re-do disclosure without any direction as to the steps reasonably required of it to address the problem of over-disclosure.

[53] Absent evidence concerning the utility, cost and delay associated with ordering disclosure by reference to the categories attached in an appendix to Columbia's written submissions, I am not persuaded at this stage that such an order is appropriate.

[54] The problems that have emerged in relation to disclosure should be addressed as part of a more comprehensive plan for the efficient management, exchange and use of documents at all stages of this proceeding.

[55] Rather than prolong the disclosure phase of the proceedings, and delay compliance with orders which require the parties to provide witness summaries and a list of the documents proposed to be tendered through each witness, I consider that a more appropriate and efficient approach is one that starts with the documents that each party intends to rely upon at the trial, and supplements them with additional documents, either by agreement or by a party demonstrating that such additional documents should be disclosed and included in documents that are material to the resolution of the real issues at a minimum of expense.

[56] I will hear the parties as to the form of order that is appropriate. However, I am minded to make an order along the following lines:

> "1. By .....2011 the [plaintiff] shall submit to the [defendant] a list of the documents upon which it intends to rely at trial [in relation to the issue of .....].
>
> 2. By .....2011 the [defendant] may submit to the [plaintiff] a request to produce documents [in relation to the issue of .....] ("a Request to Produce").
>
> 3. A Request to Produce shall contain:
>
> (a) (i) a description of each requested document sufficient to identify it; or
>
> (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist; in the case of documents maintained in electronic form, the requesting party shall be required to identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner;
>
> (b) a statement as to how the documents requested are relevant to the case and material to its outcome; and
>
> (c) (i) a statement that the documents requested are not in the possession, custody or control of the requesting party or a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents; and
>
> (ii) a statement of the reasons why the requesting party assumes the documents requested are in the possession, custody or control of another party.

4. By ..... 2011 the [plaintiff] shall produce for inspection by the [defendant] the documents requested that are in its possession, custody or control as to which it makes no objection.

5. If the [the party to whom the Request to Produce is addressed] has an objection to some or all of the documents requested, it shall state the objection in writing to the [other party] by ..... 2011. The reasons for such objection may be a failure to satisfy the requirements of paragraph 3 herein or any of the following reasons:

   (a) lack of sufficient relevance to the case or materiality to its outcome;

   (b) the likely time, cost and inconvenience involved in locating, reviewing and disclosing the documents or classes of documents is disproportionate in the circumstances;

   (c) the relative importance of the issue to which the documents or classes of documents relate;

   (d) the probable effect on the outcome of the proceeding of disclosing or not disclosing the documents or classes of documents;

   (e) the loss or destruction of the document, with such loss or destruction to have been shown with reasonable likelihood to have occurred;

   (f) privilege;

   (g) the documents are not reasonably necessary to enable the Court to decide the issue to which the documents relate;

   (h) there is another reasonably simple and inexpensive way of proving the matter to which the documents relate, including an admission by the party making the objection and the terms of the proposed admission;

   (i) any other sufficient reason as to why the production of the documents is not required to facilitate the just and expeditious resolution of the real issues in the proceeding at a minimum of expense.

6. Upon the receipt of any such objection the parties shall consult with each other with a view to resolving the objection.

7. Either party may by ..... 2011 apply to the Court to rule on the objection and to make appropriate directions for:

   (a) the documents to be provided;

(b) the documents not to be provided;

(c) such further or other directions, including the making of admissions, the answering of interrogatories, oral examination of witnesses concerning documents and the provision of witness summaries, statement or affidavits, as are appropriate to facilitate the resolution of the issue to which the documents relate."

There would be similar orders for the defendant to list the documents upon which it intends to rely at trial, and scope for a Request to Produce by the plaintiff.

[57] I leave open the possibility of making a direction for further disclosure by reference to categories of documents, including some of the categories contained in the appendix to Columbia's submissions. However, before making any order for further disclosure by reference to categories, or any other order for further disclosure, the party seeking such an order will need to make out a case for it. The party against whom such an order is sought should be given adequate notice of it so as to enable a realistic estimate to be made of the likely costs of locating, assembling, reviewing and providing such additional documents. Depending upon the circumstances, it may be appropriate to direct that the costs associated with locating, assembling, reviewing and providing such additional documents be paid by the requesting party. However, if the request is a legitimate one, and arises because of a failure by a party to comply with orders that have been made in relation to disclosure or the unhelpful form in which disclosure has been given, then it would not be appropriate to make such a cost-shifting order.

Other directions

[58] I direct the parties to adopt a proportionate and efficient approach to the management of both paper and electronic documents in these proceedings.

[59] The parties are directed to develop a document plan that will ensure that documents are managed efficiently so as to minimise the costs incurred by the parties and the Court. If the parties are unable to agree a document plan after taking reasonable steps to resolve their differences, they may apply, on notice, for an appropriate order.

[60] Subject to agreement of the parties concerning document management protocols and spreadsheets for the exchange and disclosure of documents, the parties should make further disclosure, as required, in accordance with the alternative *UCPR* Form 19 and the Court's e-trial document management spreadsheet template.

[61] The parties are directed to consult the e-trials Registrar within 14 days concerning the viability of completing interlocutory steps in relation to documents, trial preparation and any trial by use of the Court's e-trial facilities.

[62] The parties are directed to agree procedures for the exchange of documents, and disclosure of documents in relation to quantum, including the documents briefed to the plaintiff's accounting expert.

[63] The parties are directed to agree on the preparation of a schedule, either in the form of the Court's e-trial document management spreadsheet or in some other agreed or approved form, which identifies those documents that the parties consider should be part of an agreed bundle for the early resolution of this matter at mediation. The intent of this direction is that the parties agree that only those documents that are likely to be beneficial in attempting to resolve this case and that will have a decisive effect upon the resolution of the matter will be included in the early resolution bundle. The parties are to nominate a maximum number of documents to be included by each of them in such a bundle.

[64] I direct that by Monday, 18 July 2011 the parties provide by email to my Associate and to the Commercial List Manager a document plan and proposed directions in relation to documents.

Conclusion

[65] I am not persuaded of the merit of Columbia's under-disclosure complaint. I am persuaded that Columbia has legitimate grounds to complain about over-disclosure by CQMS. The form in which CQMS provided some of its disclosure was unsatisfactory and occasioned unnecessary cost to Columbia.

[66] I am not prepared at this stage to make an order requiring CQMS to repeat or re-do disclosure by list or to give disclosure by reference to the set of categories attached to Columbia's submissions. Instead, I direct the parties to confer and agree, if possible, directions in relation to the management, exchange and disclosure of documents at all stages of this proceeding, and to submit a Document Plan and proposed directions in relation to documents by 18 July 2011. Subject to hearing from the parties I propose to make the other directions that I have identified.

[67] Columbia's application will be otherwise adjourned to a date to be fixed, with costs reserved.