SUPREME COURT OF QUEENSLAND

CITATION:	*Golden Vision Gold Coast Pty Ltd v Orchid Avenue Pty Ltd & Anor* [2022] QSC 49
PARTIES:	**GOLDEN VISION GOLD COAST PTY LTD ACN 602 459 067** (plaintiff) **v** **ORCHID AVENUE PTY LTD ACN 118 752 346** (first defendant) **DENWOL GROUP PTY LTD ACN 000 357 657** (second defendant)
FILE NO/S:	1056 of 2020
DIVISION:	Trial division
PROCEEDING:	Application by plaintiff for further disclosure by defendants
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 April 2022
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2022
JUDGE:	Ryan J
ORDER:	**The parties are to confer and provide to my associate, by 4:00pm on 21 April 2022, a revised disclosure protocol and document management plan, and proposed directions in relation to the disclosure of documents, reflecting my reasons.** **The first and second defendants are to pay the plaintiff's costs of the application on the standard basis.**
CATCHWORDS:	PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – where plaintiff seeks an order for further disclosure from defendants – where defendants considered emails only (and no other documents) for the purposes of disclosure – where emails searched for "key words" as a first step in identifying those of direct relevance – where defendants selected key words without consulting plaintiff – where list of key words omitted some obvious "key" words or phrases – whether objectively likely that defendants had not complied with their duty of disclosure – whether further orders for disclosure ought to be made

PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – where plaintiff seeks an order for further disclosure from defendants – where defendants assert that plaintiff's requests are too broad and do not seek documents of direct relevance to an issue in the proceeding – whether further orders for disclosure ought to be made

COUNSEL: M May for the plaintiff
A Nicholas for the defendants

SOLICITORS: Cooper Grace Ward for the plaintiff
Clayton Utz for the defendants

OVERVIEW

Application

[1] The plaintiff applies for further disclosure from the first and second defendants, relying on rule 223(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR). Rule 223 states –

223 Court orders relating to disclosure

(1) The court may order a party to a proceeding to disclose to another party a document or class of documents by—

(a) delivering to the other party in accordance with this division a copy of the document, or of each document in the class; or

(b) producing for the inspection of the other party in accordance with this division the document, or each document in the class.

(2) The court may order a party to a proceeding (the ***first party***) to file and serve on another party an affidavit stating—

(a) that a specified document or class of documents does not exist or has never existed; or

(b) the circumstances in which a specified document or class of documents ceased to exist or passed out of the possession or control of the first party.

(3) The court may order that delivery, production or inspection of a document or class of documents for disclosure—

(a) be provided; or

(b) not be provided; or

(c) be deferred.

(4) An order mentioned in subrule (1) or (2) may be made only if—

(a) there are special circumstances and the interests of justice require it; or

(b) it appears there is an objective likelihood—

(i) the duty to disclose has not been complied with; or

(ii) a specified document or class of documents exists or existed and has passed out of the possession or control of a party.

(5) If, on an application for an order under this rule, objection is made to the disclosure of a document (whether on the ground of privilege or another ground), the court may inspect the document to decide the objection.

[2] I may only make such an order if I am persuaded of one of the two circumstances set out in 223(4). The plaintiff relies upon 223(4)(b), and contends that there is an objective likelihood that the defendants have not complied with their duty of disclosure. Before making orders for further disclosure, I must be more than just suspicious that disclosure has not been complete.

[3] The plaintiff says – in brief – that I would find an objective likelihood that the defendants have not complied with their duty of disclosure because –

(a) the *only* documents disclosed by the defendants were emails (and their attachments);

(b) the emails which were disclosed were identified by way of a software program, which (as a first step) "searched" a large pool of emails for those which included selected words and phrases to create a smaller set of emails for further consideration from a "directly relevant" perspective:[1] such an approach was inadequate, because the words and phrases selected would not have identified all potentially relevant emails;

and

(c) although a "disclosure letter" had been sent to the defendants by their solicitors, there was no evidence of any response to the letter by the person to whom it was sent, Ms Irvin, beyond her acknowledging its receipt.

[4] The defendants say that I would not find the relevant objective likelihood because the use of technology to assist disclosure was unsurprising; a detailed disclosure letter had been sent to Ms Irvin; and the senior solicitor for the defendants, Mr Timothy Charles Jones, swore on affidavit that the defendants' disclosure obligations had been met.

Factual context for application

[5] The plaintiff, Golden Vision, carries on business in the retail food industry. Its sole director is Mr David Wu. Mr Wu has been involved in the operation of Asian

[1] Also using software.

themed retail food precincts since 2014. The precincts operate under the name "8 Street". Mr Wu operates 8 Street precincts in Queensland and Victoria.

[6] The first defendant, Orchid Avenue, owns a shopping centre in Cavill Lane at Surfers Paradise, Gold Coast. It engaged the second defendant, Denwol, to manage and operate the centre.

[7] In August 2016, Mr Wu approached Ms Taylor (allegedly "of Denwol") to discuss the possibility of establishing an 8 Street precinct at Cavill Lane.

[8] According to the plaintiff, after Mr Wu's meeting with Ms Taylor, and during other meetings thereafter, it was agreed that Orchid Avenue would engage Golden Vision to set up and operate an 8 Street precinct at Cavill Lane, in time for the 2018 Commonwealth Games on the Gold Coast.

[9] The project experienced significant delays for various reasons and the precinct did not open in time for the Commonwealth Games. The defendants terminated Golden Vision's agreement – Golden Vision says invalidly.

[10] Golden Vision seeks almost $6 million in damages and compensation from the defendants. It asserts, *inter alia*, that: (a) the defendants made false or misleading representations to it; (b) certain conduct of the defendants meant that it was not able to effectively manage and operate the precinct (leading to the invalid termination of the agreement); and (c) it was not paid a letting agent's fee as agreed.

[11] In this application, Golden Vision is particularly concerned about documents relating to the alleged representations.

[12] Golden Vision alleges that the defendants' employees made representations to Mr Wu that the project would operate in a certain way including (but not only) that –

(a) Golden Vision would be paid a fee for its assistance in designing, and coordinating the establishment of, the precinct;

(b) Golden Vision would control the precinct and be the exclusive manager of it; and

(c) the precinct would operate exclusively as an 8 Street precinct.

[13] These and other related representations are called the "Establishment Representations" in the plaintiff's amended statement of claim.

[14] Golden Vision also alleges that representations were made by the defendants about feng shui issues at Cavill Lane. Those alleged representations included a representation that the defendants would fix the feng shui issues by removing a certain water feature; and by engaging, and acting on the advice of, a wind consultant about the best way to deal with high winds at the site.

[15] The plaintiff further alleges that representations were made to it about the opening date of the precinct, including a representation that it would be trading by 15 December 2017, in time for the 2018 Commonwealth Games.

[16] Golden Vision says these representations were misleading and deceptive, and its reliance on them caused loss.

[17] The defendants deny the representations and the plaintiff's reliance upon them. Also, according to the defendants, the project's delays arose because the plaintiff failed to do what it had agreed to do, that is, to oversee and supervise certain works. Although the first defendant issued various "Notices to Remedy Breach" to the plaintiff for its alleged failure to perform its obligations over the period from 29 May 2018 until 1 June 2018, the breaches were not remedied. For that reason, on 3 July 2018, the first defendant asserts that it validly terminated its agreement with the plaintiff.

Procedural history

[18] In this matter:

- The claim and statement of claim were filed on 30 January 2020.
- Further and better particulars of the statement of claim were filed on 10 March 2020.
- The defendants applied for security for costs on 20 March 2020.
- The notice of intention to defend, and the defence, were filed on 9 April 2020.
- An order for security for costs was made by Chief Justice Holmes on 30 April 2020.
- Security was provided on 12 May 2020.

Summary of outcome of application

[19] In summarising the outcome of this matter, I respectfully adopt the observations of Applegarth J in *Central Queensland Mining Supplies Pty Ltd v Columbia Steel Casting Co Ltd* [2011] QSC 183 at [22]: "… [I]t would have been preferable for the parties to confer and agree about the extent of searches to be undertaken by them for the purposes 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".

[20] Instead, before agreeing on a document management plan or conferring with the plaintiff about the extent of the searches they intended to undertake, the defendants' solicitors obtained from the defendants the only documents considered by them for the purposes of disclosure – namely 500,000 emails from certain accounts. Then the defendants' solicitors searched the emails (using software) for potentially relevant documents by using a set of key words they selected without consulting the plaintiff. The reduced set of 58,000 emails was then reviewed (using software) resulting in the manual review of 11,000 emails and the disclosure of 3,836, said to be directly relevant.

[21] Notwithstanding that effort, the plaintiff has established that there is an objective likelihood that the defendants have not complied with their duty of disclosure. First, the original pool of documents gathered in for the purposes of disclosure

consisted only of emails, when it is likely that documents of other kinds were generated for the purpose of the 8 Street project. And secondly, the approach taken by the defendants to culling irrelevant documents from the original pool – which relied on "key" words or phrases, selected unilaterally by the defendants – was likely to have excluded relevant documents from further consideration because of the words or phrases chosen.

[22] The plaintiff also sought orders for disclosure in relation to certain categories of documents. Broadly, I considered the plaintiff's requests to be reasonable ones designed to elicit directly relevant material.

[23] My formal orders require the parties to work together on appropriate document protocols and directions about disclosure.

[24] My reasons follow.

REASONS IN DETAIL

[25] Against the background of rule 5 of the *Uniform Civil Procedure Rules* 1999, Practice Direction 18 of 2019 (PD 18) required the parties to "confer and agree" on "a basic plan for the management of documents" which at least dealt with "a document management protocol" and the provision of documents. An agreed document management protocol was to be reached "as soon as reasonably possible after the filing and service of a claim, and prior to the filing of a notice of appearance and defence".

[26] Paragraph 9 of PD 18 "encouraged" the parties to consent to an order, pursuant to rule 224, that the parties be relieved, or relieved to a specified extent, of the duty of disclosure until further order.[2] PD 18 required the parties to focus, at an early stage, on undertaking reasonable searches with a view to locating and exchanging necessary documents. It required the parties to use technology where possible to achieve efficiency. It referred litigants to PD 10 of 2011 (PD 10) and provided an example document management plan. PD 10 provided further guidance about the use of technology for the efficient management of documents. PD 10 anticipated and expected the parties to work together, including in reaching agreement about the deployment of technology to aid disclosure.

[27] The example document management plan attached to PD 18 included paragraphs about "Reasonable Searches" which anticipated that the parties to litigation would agree to certain constraints on searches, obviously with a view to improving

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[2] **224 Relief from duty to disclose**

(1) The court may order a party be relieved, or relieved to a specified extent, of the duty of disclosure.

(2) Without limiting subrule (1), the court may, in deciding whether to make the order, have regard to the following—

(a) the likely time, cost and inconvenience involved in disclosing the documents or classes of documents compared with the amount involved in the proceeding;

(b) the relative importance of the question to which the documents or classes of documents relate;

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

(d) other relevant considerations.

efficiency and reducing costs. For litigants using technology to assist disclosure, such an agreement could include an agreement to searches within a certain date range or using certain search terms. However, as PD 18 explained, agreement about date ranges and search terms for the purposes of searching documents using technology "may not be necessary for an initial document plan but should be considered as soon as reasonably possible after pleadings close".

[28] This application may well have been avoided had the parties co-operated as expected by the relevant rules and practice directions. In this case, there was no agreement on a document management protocol *before* the filing of the notice of appearance and defence. The parties did not agree to an order relieving them (to any extent) of the duty of disclosure. Nor did they work *together* on search terms or otherwise to ensure a focused, efficient, and proportionate disclosure process.

The parties' document management plan

[29] The plaintiff proposed a document management plan to the defendants on **20 February 2020**. The plaintiff's proposed plan suggested that the parties would use an "agreed external provider" to manage electronic copies of documents.

[30] While the example document management plan attached to PD 18 anticipated that the parties would agree to certain limits on disclosure, the plaintiff's plan proposed none. Instead, it said (my emphasis) –

> **Scope of disclosure**
>
> 5 The parties agree to disclose to each other **every** document within their possession or under their control that is directly relevant to an allegation in issue in the pleadings, save as [for] those documents in relation to which privilege is validly claimed.
>
> 6 The parties agree that **no limitation** should be placed on the duty of disclosure imposed under Chapter 7, Part 1, Division 1 of the *Uniform Civil Procedure Rules* 1999 (Qld).

[31] Strict compliance with the duty of disclosure contained in chapter 7, and in particular, rule 211, may require a party to review each potentially relevant document in its possession or control to determine whether it is directly relevant to an allegation in issue in the pleadings.

[32] The defendants filed their defence on **9 April 2020**, having made no response to the first proposed plan – but, as it turns out, their solicitors having already obtained the only documents they obtained for the purposes of disclosure, namely, emails from certain email accounts.

[33] The plaintiff sent a slightly revised version of their plan to the defendants on **8 July 2020.** The defendants responded to this version of the plan, suggesting certain changes to it, to which the plaintiff agreed on **13 July 2020**.

[34] On **18 July 2020,** a copy of the agreed document management plan was sent to the Resolution Registrar. Importantly, the "Scope of Disclosure" paragraphs remained as above.

Issues in this application

[35] During its correspondence with the defendants about disclosure, the plaintiff prepared a table listing 52 *categories* of documents it asserted had not been disclosed by the defendants in accordance with their duty of disclosure.

[36] In broad terms, the defendants' position, in correspondence, in relation to each of those categories was either that: (a) the plaintiff sought documents which were not directly relevant to issues raised by the pleadings; (b) the request was impermissibly broad; or (c) they had produced everything directly relevant within the category.

[37] By the time of the hearing, the plaintiff was no longer pressing 19 of the categories.

[38] In their written submissions, prepared for this application, the parties revealed a different understanding of the issues about disclosure of the documents in the remaining 33 categories.

[39] From the plaintiff's perspective, based on the defendants' correspondence, in relation to 12 of the remaining categories, there was *no dispute about relevance*, the question was whether the defendants had discharged their duty of disclosure in respect of those categories (categories 1, 2, 18, 19, 20, 21, 22, 23, 24, 25, 51 and 52). The plaintiff's position was that there had not been a "proper search" for documents in those categories; but that if, after a proper search, no documents in those categories were found, then an affidavit to that effect was required.

[40] From the plaintiff's perspective, in relation to the remaining 21 categories (3 ,5, 6, 7, 9, 10, 11, 14, 15, 17, 26, 30, 31, 32, 33, 36, 37, 41, 43, 44 and 45), the question was whether that which was sought was directly relevant to an issue in the proceedings.

[41] From the defendant's perspective, by the time of the hearing of the application, in so far as the following categories were concerned, the question was <u>not</u> one of relevance: 1, 2, 7, 9, 11, 14, 15, 17 – 26, 30-32, 41, 43, 45, 51 and 52. The defendants asserted that they had disclosed all relevant documents in those categories.

[42] That left categories 3, 5, 6, 10, 33, 36 and 44 in relation to which the defendants submitted that –

(a) the documents were not directly relevant to the issues in dispute in the proceedings;

(b) the scope of the request was impermissibly broad; or

(c) no special circumstances existed to justify the relief sought, nor did the interests of justice require it.

[43] The matter proceeded on the issues as identified by the defendants.

[44] As to paragraphs (a) and (b) above, over the lunchtime adjournment of the hearing, the plaintiff refined its disclosure request in relation to the categories above (see exhibit 1). The defendants asked me to ignore that late attempt at recasting. The defendants noted that the application had not been amended and said that they had

not had time to look at the recast requests. They insisted that I ought to rule on the application as framed. I told the parties that I would try to balance the need for efficiency with the need for fairness in ruling on the application as framed. In my view, it would have been inefficient to ignore the recast attempts – which were, in any event, fairly limited.

Whether objective likelihood that defendants have not met their disclosure obligations

[45] In support of its application, the plaintiff emphasised the wording of the agreed document management plan – which required the parties to disclose *every* directly relevant document and by which the parties agreed that there was no limit on the duty of disclosure as imposed under Chapter 7. The plaintiff submitted, in effect, that the agreed plan required consideration *by a person* of *every* potentially relevant document, and that had not occurred and therefore (as I understood the plaintiff's point) it could not be said that disclosure as agreed had occurred.

[46] The civil justice process is designed to do real justice between the parties.[3] As the authors of *Zuckerman on Australian Civil Procedure* (2018), Butterworths, Australia explain,[4] the objective of disclosure is to afford litigants access to relevant documentary materials in the possession of their opponents, or in the hands of non-parties, to promote "equality of arms" and contribute to the "ascertainment of truth". Pre-trial disclosure increases the prospects of settlement because it enables litigants to make well-informed assessments of their chances of success in litigation.

[47] However, where the documentary pool is large, a point will be reached in the disclosure process beyond which the benefits of extra disclosure will be outweighed by the disadvantages of additional costs, and an increased risk of confusion. Also, an excess of documents may tend to complicate and confuse the issues and undermine the court's ability to do justice. Thus, in the context of disclosure, reforms have been introduced which focus on proportionality; the parties' co-operation in relation to the scope of disclosure and the methods by which relevant documents are to be identified; and the court's case management powers to limit disclosure. Jackson J discussed these reforms in the Queensland context in *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 276. As his Honour explained, the UCPR and its practice directions are designed to reduce the excessive cost and delay which might otherwise be occasioned by the disclosure process – including by encouraging a limit on the general obligation of disclosure and limiting the scope of disclosure to that which is proportionate.

[48] It is surprising that the parties here did not agree to *any limits* on disclosure, having regard to the issues and the volume of documents involved. On one view, the parties' agreed document management protocol was not consistent with the objectives of rule 5 or the theme of efficiency which runs through PD 18, if not contrary to the direction contained in paragraph 3 of it.

[49] Be all that as it may, although the plaintiff referred often to the fact that the parties had not agreed to limit their disclosure obligation, at least by the end of the hearing of the application, the plaintiff was *not* asking for orders which would require a

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3 *Davies v Eli Lilly* [1987] 1 WLR 428 at 431, per Lord Donaldson MR.

4 In Chapter 15.

person to review *every* potentially relevant document. The final form of the orders sought by the plaintiff recognised the benefit in the use of technology to achieve proportionate disclosure efficiently.

[50] Also, it is my view that, notwithstanding the parties' document management plan, the just and expeditious resolution of the real issues in dispute at a minimum of expense in this case requires the defendants to disclose those documents which it is able to identify and locate after *reasonable searches* and *reasonable inquiries*.[5] The fact that the parties did not agree, by their plan, to use Technology Assisted Review software (TAR) for the purposes of disclosure is, in my view, beside the point. The real question is whether the defendants have met their disclosure obligations, by the disclosure method they chose to use, bearing in mind the direction contained in PD 18 that practitioners and litigants adopt a proportionate and efficient approach to the management of both paper and electronic documents.

Whether Mr Jones ought to have been required for cross-examination

[51] The defendants' approach to disclosure is outlined in the affidavit of Mr Timothy Jones, the most senior solicitor with conduct of this matter for the defendants.

[52] His affidavit was sworn on **2 March 2022** and filed by leave at the hearing. He was not required by the plaintiff for cross-examination. The plaintiff's position was that the content of Mr Jones' affidavit strengthened its argument that it was objectively likely that the defendants had not complied with their duty of disclosure. The plaintiff had always believed as much, but Mr Jones' affidavit confirmed it.

[53] The defendants' counsel argued, in effect, that because the plaintiff challenged Mr Jones' assertion that adequate disclosure had been made, the plaintiff ought to have required him for cross-examination. As I understood counsel's position, she suggested that I ought not to determine the application unless or until Mr Jones was cross-examined.

[54] I proceeded on the basis that Mr Jones set out all matters relevant to the adequacy of the defendants' disclosure in his affidavit. He would have been aware, from the plaintiff's correspondence, of the nature of the challenge to the defendants' disclosure. It was not for the plaintiff to provide him with a further opportunity to respond to the challenge.

[55] Nevertheless, I considered whether Mr Jones should have been required for cross-examination to clear up an ambiguity in his evidence. He said, at paragraph 38 of his affidavit (my emphasis) –

> The [letter from the defendants' solicitors to the plaintiff's solicitors dated 1 February 2022] attached a schedule, marked "Attachment A" which contains responses to each of the 52 specific categories of disclosure sought by the Plaintiff (**Schedule**). **I confirm that the matters stated in the Schedule are true and correct according to my own knowledge**. I have also been informed as to the truth of the matters stated in the Schedule by Ms Irvin, and I verily believe Ms Irvin's instructions are true and correct. Without limiting the

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5 See *Central Queensland Mining Supplies Pty Ltd v Columbia Street Casting Ltd* [2010] QSC 183 at [38].

> foregoing, I am informed by Ms Irvin and I verily believe that for categories 1, 2, 7, 9, 11, 14, 15, 17-26, 30-32, 41, 43, 45, 51 and 52 of the Schedule, **all relevant documents in the possession or control of the Defendants have been disclosed**.

[56] The disclosure sought by the plaintiff was a request for documents *of various kinds* – including emails, memorandums, file notes, diary records, correspondence, minutes of meetings and other records of a similar nature – relating to certain issues raised in the pleadings. The defendant only searched through, and disclosed, documents in the form of emails and their attachments. The "matters stated" in response to the plaintiff's various disclosure requests were, often: "There are no further documents to produce in response to this request"; or: "All such Internal Records in the possession or control of the defendants have already been disclosed". It was not clear to me whether those statements were intended to convey: (a) that no documents of potential relevance *other than emails* existed; or (b) that there were no other relevant *emails*. Cross-examination *might* have cleared up that ambiguity. But one would have expected Mr Jones to have expressly met the accusation that disclosure was inadequate because it only involved emails if he could. I considered it appropriate, therefore, to determine the application even though Mr Jones was not cross-examined.

The defendants' approach to disclosure

Disclosure letter sent to defendants

[57] Mr Jones' affidavit reveals the following.

[58] On **17 August 2020**, the defendants' solicitors sent a "disclosure letter" to Ms Grace Irvin, the defendants' General Manager Commercial and Legal.

[59] Paragraph 1.1 of the letter implied that Ms Irvin was already aware of the defendants' duty of disclosure (although it mixed up the plaintiff and the second defendant).

[60] Paragraph 1.3 suggested that the primary purpose of the letter was to explain disclosure to Ms Irvin for the purposes of rule 226.

[61] The letter then outlined the content of the duty of disclosure.

[62] Although it was not always clear who (out of the defendants' solicitors and Ms Irvin) was to do any of the actions listed, the general effect of the letter was to impose upon Ms Irvin an obligation to act (see, for example, paragraph 2.10).

[63] The letter directed Ms Irvin to "carefully consider the list in Annexure A (which set out the matters in issue in the proceedings) in order to appropriately determine whether or not there are any documents in the Defendants' possession that may tend to prove or disprove each of those facts in issue and therefore be directly relevant" (paragraph 2.10).

[64] The letter required Ms Irvin, on behalf of the defendants, to make disclosure by way of providing a list of (directly relevant) documents, together with the copies of those documents, to the plaintiff, via the defendants' solicitors.

[65] Having said that – paragraph 4 of the letter was headed "When is disclosure required?". It explained that disclosure was required at certain times but did not expressly ask Ms Irvin to make disclosure by any particular date.

[66] Paragraph 6 dealt with experts' reports and invited Ms Irvin to give directly relevant experts' reports to the solicitors for their review, prior to any disclosure.

[67] Paragraph 9 invited Ms Irvin to contact the solicitors with any query she might have about the content of the letter or the defendants' obligations.

Response to disclosure letter

[68] There is no evidence before me about the way in which Ms Irvin went about looking for directly relevant documents *at any time*, nor *how, when or if* she provided any documents in response to the letter.

[69] Mr Jones' affidavit implies that Ms Irvin provided no response to the letter – beyond signing the copy of it so as to show the solicitors' compliance with rule 226. That may have been the extent of her response because the defendants' solicitors had *already* (a few months before) obtained documents from her, as explained below.

Other disclosure steps

[70] Mr Jones said that "[t]o enable a defence to be prepared *and to perform disclosure* and prepare witness statements" his firm obtained "from the defendants" electronic copies of the mailboxes of six named people (including Ms Irvin) who have some connection with the defendants. Mr Jones explained that the mailboxes were collected by the defendants and given to their solicitors as "portable storage table files" which meant that no limitations were applied by the defendants in terms of the date range of the emails or key words.

[71] Mr Jones did not say *when* the mailboxes were collected. As noted above, the defence was filed on 9 April 2020. It is reasonable to infer that the mailboxes were obtained before that time – that is, well before the disclosure letter was sent to Ms Irvin.

[72] Mr Jones did not explain why he obtained *only* email mailboxes from the defendant for the purposes of disclosure. He did not explain why he did not ask for documents of any other kind – such as hard copy documents, or SMS messages, or handwritten notes or documents stored electronically et cetera – before or after he sent the disclosure letter to Ms Irvin. There is no evidence from Ms Irvin (or from anyone else connected with the defendants) before me. It would be speculative of me to assume that the only potentially relevant and disclosable documents were emails, in the absence of evidence as to why that might be so.

[73] Mr Jones explained that there were 500,000 emails in the mailboxes. He called these emails the "Base Data Set". A "vast number" were unrelated to the proceedings. Thus, it was necessary to weed out irrelevant ones whilst ensuring that relevant ones were captured.

[74] Using technology (TAR), key word searches were conducted on the Base Data Set – resulting in a "Refined Data Set" of approximately 58,000 documents. The key words used for the search are set out in paragraph 17 of Mr Jones' affidavit. The Refined Data Set also included all emails sent to or from the sole director of the plaintiff, David Wu, from the mailbox david@goldenvision.com.au.

[75] There was no evidence before me about the way in which the key words were chosen, or by whom they were chosen, although I was told certain things from the bar table. The plaintiff had no input into the selection of the key words.

[76] I pause here to observe that PD 18 and PD 10 emphasise the need for liaison and co-operation in this context and that, in determining the key word searches unilaterally, the defendants took a risk that the court would find their search inadequate.

[77] Apart from explaining that the key words were not case sensitive, there was no other evidence before me about the scope of a search utilising a particular key word: such as, for example, whether it would capture a reference to a mis-spelt version of the key word; or the significance of inverted commas around phrases – although in the last instance, life experience would suggest that where a key "word" was a phrase in inverted commas, the search program would look only for that exact phrase.

[78] The defendants' choice of key words raised several obvious issues. For example, the venture at the heart of the proceedings was to be known as "8 Street" (that is, using the numeral). But, inexplicably, the emails were searched for the phrase "Eight Street" (no numeral). Life experience would suggest that a search for documents containing "Eight Street" would not detect documents containing "8 Street".

[79] An issue which arose between the parties concerned a feng shui problem about a water feature and high winds. The key word search included a search on "Feng shui". It also included a search on "Wind and Cavill", which *may* have only uncovered documents containing that exact phrase. The emails were not searched for the word "water" or at least the phrase "water feature".

[80] The 8 Street precinct was to operate at Cavill Lane, yet Cavill Lane was not a search term, nor was "Cavill" standing alone.

[81] Some of the key words (or phrases) included apostrophes. There was no evidence before me as to whether including the apostrophe in phrases like "Lessor's works" or "Lessee's Works" would catch phrases which omitted the apostrophe – but again, life experience would suggest that phrases without the apostrophe would not be caught by a search which included it.

[82] The Refined Data Set was reviewed to identify documents relevant to the issues in dispute in the proceedings. That review was conducted by junior solicitors, utilising TAR, under Mr Jones' supervision. The review by the junior solicitors was a manual review of some but not all of the documents in the Revised Data Set. The TAR selected, for priority review, those documents which were most likely to be relevant – by pushing them to the front of the "queue"; "learning" as it went about relevant attributes to look for in each document.

[83] Mr Jones explained that the review ceased once it was "evident" that the "vast majority" of documents had been reviewed "such that the time and cost of continuing the review would be disproportionate compared to the utility of doing so".

[84] The documents marked by the junior solicitors as relevant were then further reviewed by a Senior Associate (Ms Byram), under Mr Jones' supervision, for the purposes of identifying whether any document was the subject of a claim of privilege. Ms Byram also reviewed a sample of documents marked by junior solicitors as "not relevant" to ensure that documents were being marked correctly.

[85] In total, 11,000 individual documents were reviewed "as part of the multi-tiered review process" – of which 3,836 were identified as relevant for disclosure and not subject to a claim for privilege.

[86] Mr Jones explained that, in addition to relying upon his own experience, the disclosure team "liaised" with the FTS Team [Forensic Technology Services team] – a "specialist in-house group that has particular expertise in the management of documents and review processes and they have assisted and advised upon many disclosure exercises of this nature and for larger matters".

[87] Mr Jones said that he considered the steps outlined above "an appropriate, disciplined disclosure exercise". It cost the defendants $140,000 and included almost 350 hours of work. In his opinion, "undertaking further document review would be disproportionate and unreasonable having regard to the nature of the proceeding, the quantum in dispute, and the extent of the review which has already occurred".

[88] On **12 March 2021,** the defendants' solicitors served on the plaintiff's solicitors a list of documents and a USB containing copies of the documents in the list. The USB contained copies of the 3,836 documents (emails and attachments) identified by the review process outlined above. It is apparent from the list that the keyword search managed to collect documents which included words/phrases like "8Street" or "8 Street" or "Cavill Lane" or "Lessors work" (no apostrophe) or "Lesse Works" (mis-spelt) – probably because the document contained another key word.

[89] I note that, on its face, the list of documents included a wide variety of correspondence including (but not only) minutes of meeting; a memorandum of understanding; electrical and other drawings; a tenancy schedule; a draft tenancy contract; an agreement for lease; a deed of agreement for lease; leases, a legal advice report; a financial advice report; lessee's work schedules; a fit-out guide; a variety of construction/technical drawings, tenancy drawings and details (including fit outs and menus) for particular tenants; fee proposals; invoices; lessee and lessor work schedules; a social media calendar; handover certificates; sales orders; schematic designs; press releases; correspondence about Golden Vision's "roll" (sic); "Centre Rules"; handover updates; fire compliance certificates; service fees agreements; approvals for things like plumbing and drainage; progress claims and invoices; payment schedules; a variety of contracts including building and tenancy contracts; fit out variations; tax invoices; notices of default (sent to Mr Wu); a notice to terminate a trade mark licence, as well as letters and correspondence generally. I acknowledge that it is difficult to say much based on the titles of the emails and the descriptions of their attachments but it seemed to me that the

documents mostly concerned operational matters arising after the commencement of the project.

Plaintiff's response to disclosure by defendants

[90] Three affidavits of the plaintiff's solicitor, Miranda Klibbe, set out the plaintiff's response to the defendants' disclosure both prior to this application (that is, in correspondence); and in light of the information contained in Mr Jones' affidavit.

[91] Until Mr Jones affidavit was received by the plaintiff, the plaintiff did not know much about the way in which the defendants went about disclosure. In particular, the plaintiff did not know that the defendants had only been asked to supply certain email accounts to their solicitors. Nor, obviously, did the plaintiff know beforehand the key words used to cull the emails.

[92] Over the period between **12 March 2021** and **25 October 2021**, Ms Klibbe personally reviewed the documents disclosed by the defendants. Having conducted that review, she formed the view that disclosure had been inadequate. (I note that this was before she became aware of the details of the defendants' discovery process.)

[93] She observed that the disclosure included "almost no documents" in four categories which she called "Internal Records", "Contractor Records", "Counterparty Records" and "Report Records". Broadly, she defined those categories as follows –

- Internal Records – being records of internal communications between representatives within the [defendants'] organisation (including in-house counsel, officers, shareholders, employees and agents) including for example emails, memorandums, file notes, diary records, correspondence, minutes of meetings and other records of a similar nature.

- Contractor records – being records of communications (e.g. emails, memorandums, file notes, diary records, correspondence, minutes of meetings and other records of a similar nature) between the [defendants] and external consultants, contractors, external lawyers and advisors.

- Counterparty records – records of communications (e.g. emails, memorandums, file notes, diary records, correspondence, minutes of meetings and other records of a similar nature) between the [defendants] and counter parties in the day to day operation of the business, for example, builders.

- Report records – being reports, advices and other business records of a similar nature in respect of the [defendants'] business operations.

[94] In Ms Klibbe's opinion, it was unlikely that records in those four categories did not exist.

[95] On **25 October 2021**, Ms Klibbe sent a "rule 444 letter" to the defendants' solicitors. In it, Ms Klibbe contended that there must have been in existence, and in the defendants' possession and control, documents which fell within those four categories. She stated, at paragraph 4 of the letter, that the plaintiff required full

disclosure of relevant documents including those in the four categories nominated above. She outlined why she reasoned that documents from those four categories existed. Further, Ms Klibbe said she found, among the documents disclosed, little or no documents in the first three categories above. Nor had there been disclosed documents relating to the *establishment* of the 8 Street precinct nor documents relating to *advice* obtained by the defendants during the negotiations of leases, extensions of time for leases or changes in the project from an 8 Street to Cavill Lane. She said to the defendants' solicitors –

> Our client requires full disclosure by your clients of all documents in their possession or control directly relevant to the allegations in issue on the pleadings including in respect of the categories of documents mentioned above. While it seems inconceivable that such documents do not exist, if this is the defendants' position we will require an affidavit sworn by an appropriate representative to this effect in respect of each category set out below, confirming also that no such documents will be sought to be relied upon by the defendants at the trial of this action.

[96] Additionally, Ms Klibbe identified certain allegations in issue in relation to which she complained that there had not been full disclosure.[6] In respect of each of those issues, Ms Klibbe either nominated specific documents which she asked the defendants to disclose (such as employment agreements) or made a request for disclosure of documents by type – for example, Internal Records or Counterparty Records et cetera. She sought further disclosure from the defendants within 14 days (that is, by **8 November 2021**), and indicated that if further disclosure were not made, the plaintiff would file an application to the Supreme Court seeking orders for that further disclosure.

[97] On **9 November 2021,** the defendants replied to Mr Klibbe's letter, under rule 445. They said that they had given "careful consideration" to the plaintiff's "voluminous" complaints about their behaviour. They said that, in relation to the first issue identified by Ms Klibbe (the employment status of certain individuals) they were "*finalising their internal investigations* as to whether there are any documents in their possession or control which are required to be disclosed", but otherwise, their "present position", subject to "final checks" which were being "undertaken", was that no further disclosure was required.

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6 These issues included issues about –

- The employment status of certain individuals as asserted in the defence.
- The Establishment of '8 Street" at Cavill Lane (in the context of which it was alleged that the defendants had made representations about establishing the precinct and the plaintiff's "exclusivity" in relation to it).
- Feng Shui (and representations allegedly made about it).
- The opening date (and representations allegedly made about it).
- Best endeavours to complete Owner's works.
- Things done to allow performance of Manager's obligations.
- The project not operating as an 8 Street Precinct.
- The basis or reasonable grounds for Establishment Representations.
- The alleged breaches of Management Agreement.
- The basis or reasonable grounds for Feng Shui Representations.
- The basis or reasonable grounds for Opening Date Representations.

[98] The defendants said they "anticipated" that they would be in a position to provide a final response to Ms Klibbe's request for additional disclosure by 5pm on Tuesday, **16 November 2021**. They strengthened their position in paragraph 4 of their rule 445 letter, which stated (my emphasis) –

> The defendants *will* provide a fulsome response to the plaintiff's disclosure requests within a further 7 days …

[99] They added that any application for disclosure, prior to the plaintiff's receiving the defendants' response, would be "premature and productive of wasted time and expense".

[100] On **18 November 2021**, having heard nothing from the defendants, the plaintiff filed the present application. In support of the application, Ms Klibbe swore the first of her three affidavits on 18 November 2021. She attached as an exhibit to her affidavit a table (MEB-3, document 28 on the file) which set out the further disclosure required by the plaintiff. The table described 52 categories of documents – in almost all cases identified as belonging to the four categories listed above – linking each to certain paragraphs of the pleadings.

[101] The application sought orders that: (1) the defendants provide the disclosure requested "as per Annexure MEB-3"; (2) the defendants serve on the plaintiff an affidavit stating, for each category of document listed in Annexure MEB-3, that the specified category of document does not exist/has never existed; and (3) the defendants serve on the plaintiff an amended list of documents which particularises each document that is subject to privilege; and (4) such other orders as the Court considers appropriate. The application was listed for hearing on **7 December 2021**. (Ultimately, I was not required to consider any issues relating to privilege.)

[102] On **26 November 2021**, at a case flow review, the application was adjourned until **4 February 2022** at the defendants' request.

The defendants' response to the plaintiff's disclosure requests – 1 February 2022

[103] On **1 February 2022**, by letter, the defendants provided their "fulsome response" to the plaintiff's disclosure complaints and the application. Their position was that the plaintiff had made requests for documents which were irrelevant to the issues in dispute, or not in the defendants' possession or control, or which had already been disclosed. They invited the plaintiff to "reconsider its application by reference to the extent and scope of the material that has in fact been produced, as informed by the matters set out in this letter". They further informed the plaintiff that if it "nevertheless" pursued its application, then they would rely upon their letter of 1 February 2022 on the question of costs.

[104] Additionally, the defendants observed that there appeared to be no discernible difference between Ms Klibbe's "Contractor Records" and "Counterparty Records" as defined. Also, whether "Internal Records" or "Counterparty Records" were disclosed was *prima facie* completely irrelevant. The duty of disclosure imposed by rule 211 concerned documents which were directly relevant to an allegation in issue in the proceedings. It was "pointless" to state that certain records had not been

disclosed in the absence of a reference to the specific allegation to which they were said to be relevant.

[105] The defendants specifically challenged the "vague and unhelpful and factually incorrect" assertion that they had disclosed almost no Internal Records or Counterparty/Contractor records – pointing to 51 "internal" e-mail chains; and 1,141 emails in the nature of counterparty/contractor correspondence.

[106] The defendants complained that Ms Klibbe's letter of 25 October 2021 was not properly written "pursuant to rule 444" because the application in contemplation (under rule 223) was not an application mentioned in rule 443. That may be so, but for obvious reasons, the practice of the parties attempting to resolve a dispute via correspondence before making an application to the court is something to be encouraged. And the scheme contemplated by rules 444 and 445 is one which facilitates the efficient resolution (if possible) of disputes which might be dealt with by applications of many kinds, not only those mentioned in rule 443.

[107] The defendants complained about the "generality and overly expansive approach" taken by the plaintiff to the defendants' obligation of disclosure. Nevertheless, the defendants responded to Ms Klibbe's table of 52 categories in "Attachment A" to their letter and invited the plaintiff to reconsider its disclosure requests. They continued –

> … To the extent that your client has genuine concerns about specific aspects of our clients' disclosure, our clients are willing to engage with the plaintiff to consider a mutually satisfactory resolution. However, as presently framed, the plaintiff's requests are broad ranging, seek documents that do not relate to allegations in issue, and do not appropriately take account of the rigorous disclosure exercise already performed.

[108] To allow the plaintiff time to consider and respond to it, this application was adjourned by consent to **3 March 2022**.

The plaintiff's response to the defendants' letter of 1 February 2022

[109] On **21 February 2022**, the plaintiff replied to the defendants 1 February 2022 letter. Ms Klibbe opened her reply letter with the following –

> 1 We have now reviewed and considered the Attachment A to your letter dated 1 February 2022.
>
> 2 From this review we understand that the defendants are refusing the provide the additional disclosure on the basis of either:
>
> a. an assertion that the issues in dispute in the current pleadings do not cover the documents that our client has requested; or
>
> b. that all documents in the defendants' 'possession or control' have been disclosed and that there are no further documents in the defendants' 'possession or control'.

[110] Ms Klibbe went on to set out her response to the defendants' assertions in (a) and (b) above. As to (a), Ms Klibbe asserted that, in relation to 41 of the 52 categories (which she listed), the defendants had failed to adequately consider the nature of the case brought by the plaintiff and the issues which arose on the pleadings, and instead had construed the pleadings so narrowly, that almost none of the documents requested was relevant.

[111] She referred to the following statement by Daubney J in *Peninsula Shipping Lines Pty Ltd v Adsteam Agency Pty Ltd* [2008] QSC 317 at [43] about the way in which "direct relevance" is to be determined (emphasis by Ms Klibbe):

> Rather, as is stated in terms of the rule, the test is one of direct relevance to an allegation in issue in the pleadings. Whether or not a document is 'directly relevant' turns on whether or not the document tends to prove or disprove the truth of a particular allegation. All of that, however, serves to highlight the necessity to have primary regard to the pleadings for the purpose of ascertaining and identifying the 'allegations in issue' between the parties; that process necessarily informs the ambit of the disclosure obligation. **But the process is not, as the defendants have here submitted in effect, reduced merely to a microscopic examination of each factual averral in a pleading and of the response (if any) to each such factual averral in the relevant responsive pleading. Rather, the process of identifying the 'allegations in issue' must be undertaken with a view to implementing the purpose of the UCPR stated in r 5(1), namely to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.**

[112] Ms Klibbe annexed to her letter of 21 February 2022 the plaintiff's specific response to the matters raised by the defendants in their Attachment A.

[113] In relation to some of the 52 categories of documents, the plaintiff's Annexure A refined or recast some of its disclosure requests. I note, for example, request 3 (as changed by the plaintiff) –

> Internal Records from the defendants' various representatives (including directors, employees and agents) ~~regarding any intetrnal discussion (e.g. meeting minutes) by the defendants~~ about a proposal by David Wu to establish an 8 Street at Cavill Lane or <u>regarding</u> the ~~circumstances that led to the~~ decision to establish an 8 Street at Cavill Lane.

[114] There was also a refinement of the relevant paragraphs of the statement of claim and the defence to which the disclosure sought was said to apply.

[115] Ms Klibbe said that the plaintiff's response was made "[i]n an attempt to facilitate the resolution of this application without further expense". In total, 19 of the requests were recast. Also, having regard to the defendants' response to several of the disclosure requests, and the plaintiff's recasting of other requests, the plaintiff indicated that it would not press 15 categories.

Defendants' response to plaintiff's letter of 21 February 2022

[116] On **28 February 2022**, the defendants responded to Ms Klibbe's letter of 21 February 2022 and to her affidavit of 23 February 2022, which exhibited the plaintiff's response to Attachment A.

[117] The defendants noted the changes to the scope of certain of the disclosure categories.

[118] The defendants noted that the plaintiff continued to press for the disclosure of documents in 25 categories – even though they had been told by the defendants that there were no further relevant documents to produce in those categories. The defendants noted that the plaintiff had not pointed to any specific examples or reasons as to why the defendants' disclosure of documents in those categories was inadequate. The defendants were, therefore, "not in a position to provide further disclosure as sought by the plaintiff.

[119] The application then came on for hearing.

Plaintiff's complaint about the defendants' approach to disclosure in this application

[120] In Ms Klibbe's affidavit, filed by leave at the hearing, she said that it was not until she received Mr Jones' affidavit that she understood that the defendants used TAR to determine the *relevance* of documents. Until then, she believed the defendants had been engaged in a document-by-document review.

[121] She observed that Mr Jones' affidavit made no reference to any response to the letter sent to Ms Irvin on 17 August 2020. She assumed, on the basis of Mr Jones' affidavit, that the disclosure provided was derived mainly, if not wholly, from emails. She made the (common-sense) point that, because only emails were considered for the purposes of disclosure, other documents (which one would reasonably imagine would exist in a case like this) were not – such as physical documents, documents or electronic records saved as files or records in document management systems; photographs; handwritten notes, meeting minutes (not attached to emails) diary entries or notes; constructions plans, construction project material; communications by means other than emails (such as text messages) and any other material or document not attached to an email.

[122] She observed that, because of the process undertaken by the defendants, 89 per cent of the emails collected had been eliminated without review (software or human). In her opinion, the defendants had omitted obvious key words – which she listed at paragraph 24 of her affidavit as follows –

> (a) "8 Street" (a term that, I believe from the documents I have reviewed in the course of this proceeding, that was used more commonly than 'Eight Street');
>
> (b) GV (being an acronym of the plaintiff, Golden Vision);
>
> (c) David;
>
> (d) Altran (being the builder engaged by the defendants)

(e) Wind;

(f) "Water feature";

(g) "Completion date";

(h) "estimated completion";

(i) "extension of time"

(j) "Practical completion";

(k) "Chinese new year";

(l) "manager's obligations"; and

(m) "notice of termination".

[123] It followed, she submitted, that 89 per cent of the emails had been excluded from consideration for disclosure by way of a flawed process.

[124] She outlined other concerns she had about the approach taken by the defendants, and her experience of the use of TAR software. She offered the following opinion –

> Bearing in mind that the vast majority of the 489,000 documents that were discarded were not actually reviewed by a solicitor, I do not believe it is possible for anyone to reliably confirm that those documents are not relevant and subject to disclosure under the UCPR rules that apply to this claim.

[125] Obviously, the reference to the "UCPR rules that [applied] to this claim" was a reference back to the agreed document management plan which imposed no limit on the duty of disclosure and required disclosure of *every* directly relevant document.

[126] The submissions made to me at the hearing echoed Ms Klibbe's concerns. The plaintiff first complained that the Base Data Set, of about 500,000 *emails*, was too "narrow" a starting point because it only included emails and no other type of documents. Secondly, the plaintiff complained that the key words selected, to further refine the documents, were "deficient", noting that it had not been asked to provide input into the search terms.

[127] The plaintiff stated that the document management plan agreed to by the parties did not limit the disclosure obligation to accommodate the process of disclosure undertaken by the defendants, referring to paragraph 6. The plaintiff's position was that what had been done was *inconsistent* with paragraph 6 – because paragraph 6 required *persons* to review documents. However, as I mentioned above. it seemed to me that the plaintiff recognised the benefit of TAR and the amended draft order which the plaintiff proposed contemplated the use of TAR both in reducing the original pool of documents to those which were potentially relevant, and in reviewing documents to determine those which had to be disclosed.

Defendants' response to the plaintiff's complaints in this application

[128] In defending his approach to disclosure generally, Mr Jones observed, in his affidavit, that the defendants had produced a substantially larger number of documents than the plaintiff. I did not find that observation of much assistance in this application. Disclosure is, among other things, about reducing information

inequality by promoting an "all cards on the table approach".[7] It may well be that one party to litigation has more to disclose than another.

[129] Nor did I find Mr Jones' statement that the defendants had disclosed documents relating to issues in respect of which the plaintiff had performed no disclosure at all of much assistance in this application. I am not to approach the question of the adequacy of disclosure by way of a "tit-for-tat" approach.

[130] More specifically, as to Ms Klibbe's assertion that the defendants had disclosed "almost no documents" in the four categories – Internal, Contractor, Counterparty and Report Records – Mr Jones said he had "caused searches to be undertaken over the Defendants' disclosure documents by the Clayton Utz FTS team by reference to the document metadata (which enables, for example, the FTS team to ascertain how many emails have been sent between particular email domains)". As a result of those searches, and Mr Jones' "independent knowledge of the disclosure set", he said that Ms Klibbe's assertion that almost no documents in those categories had been disclosed to have been "incorrect". Of course, the disclosure set consisted of emails only. Whilst I accept that there were, for example, Internal Records among the emails, documents in the four categories, as defined by Ms Klibbe, included documents *other than emails*, such as memorandums, diary notes, correspondence et cetera, which (on the assumption that they existed) had not been considered for the purposes of disclosure. Also, the composition of the disclosure set itself was influenced by the choice of key word searches, about which I have concerns.

Discussion and conclusion

[131] In submissions about the outcome of this matter, the defendants' counsel asked me to rule on the contentious issues (about the scope of the plaintiff's disclosure request) and to adjourn the residual part of the application, essentially to allow the parties more time to work things out between themselves. While I do intend to give the parties work to do, I did not consider it efficient to adjourn even part of the matter. The parties have been engaged in correspondence about disclosure for months without resolution, and this application has been adjourned twice already.

[132] In *Gibson & Ors v The Minister for Finance, Natural Resources and the Arts &* Anor [2012] QSC 12 at [8] and [9], Henry J explained that, in deciding whether there is an objective likelihood that the duty to disclose has not been complied with, the criterion of direct relevance is likely to be determinative. Also, the rule under which this application is brought is to be applied in the context of rule 5, with the objective of avoiding undue delay, expense and technicality and facilitating the rule's purpose which is, in turn, to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. His Honour referred to the following observation of Pincus JA, in *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants and Bars Pty Ltd* [2001] 1 Qd R 276 at 283:

> If it appeared, for example, that an order for further disclosure would be likely to "facilitate the just and expeditious resolution of the real issues", that would enable and perhaps require the making of such an order.

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[7] See *Zuckerman* at 15.2 – 15.4.

[133] The just and expeditious resolution of the real issues in dispute is facilitated by an approach to disclosure which is designed to capture documents of direct relevance likely to assist in the determination of the issues – bearing in mind the need to take a proportionate approach in matters where documentation is voluminous.

[134] I appreciate that the parties expressly agreed to undertake disclosure without limits – but in this case, such an approach would be disproportionately costly and involve considerable delay. And, as I have observed, the orders ultimately sought by the plaintiff recognise that technology may be used to ensure an efficient approach to disclosure.

[135] Paragraph 38 of Mr Jones' affidavit contains his statement that he "verily believe[s]" that – at least in respect of 25 of the categories in respect of which further disclosure is sought – all relevant documents have been disclosed. My concern with that statement is that it is based on two assumptions, both of which raise issues. The first assumption is that the *only* potentially disclosable documents in this case are emails. The second assumption is that the key word searches have captured, if not all, then at least a proportionate amount, of the potentially relevant documents.

[136] As to the first of the assumptions: there was no evidence before me about Ms Irvin's response, in practical terms, to the disclosure letter; nor any other evidence as to how Ms Irvin (or anyone else), on behalf of the defendants, went about disclosure. In particular, there was no evidence before me to explain why the defendants restricted their disclosure to emails. Without knowing more about the types of documents which were created in the course of the 8 Street venture or the way in which the defendants managed the documents which concerned the 8 Street venture, I could not conclude that the defendants' restricting disclosure to emails was adequate.

[137] As to the second of the assumptions: I have considered Ms Klibbe's list of words/phrases which were not included in the defendants' key word search. I have compared her list to the defendants' list of key words. I have considered the pleadings and the matters in issue between the parties. I was not assisted, in this application, by any evidence about the reasoning behind the defendants' selection of key words. Nor was there any express reply to Ms Klibbe's contentions about "missing" key words. For example:

- I was not told why no search was done on "8 Street".
- I was not told why the phrase 'Wind and Cavill" was chosen as a key search phrase, given that that expression is not an obvious phrase with meaning in this context (although I acknowledge the relevance of the words as separate words).
- Having regard to the feng shui issues regarding a water feature and high winds, I was not told why there was no search on "wind" or "water" or "water feature".
- "Chinese New Year" was significant date – in that it was hoped that the precinct would be opened by that date – but I was not told why that phrase was not included as a key phrase.

[138] On the basis of the evidence before me, I am persuaded that the defendants took too narrow an approach to disclosure. That approach has created a disproportionate risk that relevant documents have been overlooked.

[139] Because only documents of one kind were considered, and because of the key words (unilaterally) selected and those omitted, it is objectively likely that the defendants have not complied with their duty of disclosure. I have reached that conclusion bearing in mind the need to ensure a proportionate amount of time and effort is spent on disclosure on the one hand; and the need to ensure, insofar as one reasonably can, that the parties and the court have access to documents likely to assist in the resolution of the issues on the other.

[140] Turning now to the plaintiff's specific requests for documents (set out in exhibit 1) –

(a) Categories 3, 5 and 6: The issues raised in paragraphs 9, 10 and 11 of the amended statement of claim and paragraph 11 of the amended defence are (broadly) whether Mr Wu was promised exclusivity in relation to 8 Street at the meeting at Garden City; the role Golden Vision would have in that precinct; and what it would be paid for its role.

The defendants denied that there was any discussion of a fee to Golden Vison for is assistance in designing and co-ordinating the establishment of the precinct. The defendants denied that there was any discussion about Golden Vision being the exclusive manager of the precinct.

The plaintiff sought a variety of records regarding Mr Wu's "proposal" to establish the 8 Street precinct, the actual establishment of the precinct; its feasibility, and the fees that would be paid to *Mr Wu* (not Golden Vision).

The defendants resisted the disclosure of the documents sought on a variety of grounds, including grounds which, in my view, focused too narrowly on the terms in which the request was expressed. For example, the defendants said there was no allegation in the amended statement of claim that Mr Wu made a "proposal" to establish an 8 Street precinct at Cavill Lane and the documents sought (Internal Records about discussions of Mr Wu's *proposal*) were therefore irrelevant.

It is true that there is no allegation in the amended statement of claim that Mr Wu "proposed" the establishment of an 8 Street precinct at Cavill Lane. But it is alleged that he met with Ms Taylor to *discuss the possibility* of establishing an 8 Street precinct at Cavill Lane; that he met later with others to *further discuss the possibility*; and that an agreement was reached. Describing the discussions from Mr Wu's end as his "proposal" was not unreasonable. Nor, in my view, could the defendants sensibly assert that they thought there was a meaningful distinction to be drawn between *discussions* about the establishment of the 8 Street precinct and a *proposal* to establish an 8 Street precinct.

The defendants acknowledge that the factual issues raised by these paragraphs include what was said at the meetings. The defendants say that internal documents regarding Mr Wu's proposal cannot prove or disprove whether the alleged oral exclusivity agreement was entered into. That is so – but internal documents about the proposal may *tend to prove or disprove*

whether the defendant was prepared to contemplate exclusivity (category 3); or offer Mr Wu a fee (category 5). And Contractor Records about the establishment of an 8 Street may *tend to prove* the role discussed for Golden Vision in the establishment of the precinct.

Similarly, the defendants took a narrow an approach in resisting the plaintiff's request for Internal Records from the defendants' various representatives regarding an analysis of the feasibility of the development for the defendant including the fees to be paid to Mr Wu. (For example, the defendants made the point that the fees were payable to Golden Vision.)

Although I consider the defendants' response to the plaintiff's requests in these three categories an unreasonably narrow one – I note that the plaintiff has further refined its requests and I would order further disclosure in the terms of the revised request.

(b) Category 10: Paragraph 15 of the amended statement of claim alleges that Mr Wu informed the defendants about feng shui issues and was told *inter alia* that they would be fixed including by the defendants engaging a wind consultant. Paragraph 15 of the amended defence denies that Mr Wu told the defendants about feng shui issues and denies *inter alia* that they represented to him that they would engage a wind consultant and implement the wind consultant's recommendations.

The plaintiff asked for "The defendants' Internal Records regarding the engagement of a wind consultant, including the approval of the relevant decision maker of the defendants to meet the costs associated by (sic) this".

The defendants resisted disclosure on the basis that they had already disclosed the wind consultants report and the question of who approved it or who would meet the costs of it are not in issue.

The facts in issue include whether certain representations about the defendants' attending to feng shui issues were made by the persons nominated in the particulars to paragraph 15 of the amended statement of claim. Documents about the defendants engaging a wind consultant and paying for it would *tend to prove or disprove* whether the consultant was engaged in pursuance of a representation made to Mr Wu (Golden Vision) at the meeting in January 2017 as alleged.

I would order further disclosure in terms of the further revised request, which simply corrects "by" to "with".

(c) Category 33 (the plaintiff did not press 36.): Paragraph 56 of the amended statement of claim alleges that on 19 June 2018, Mr Kopelowitz (for the defendants) held a meeting with the tenants of the proposed precinct and informed them that the precinct may no longer operate as an 8 Street and that it did not matter whether the precinct operated as an 8 Street precinct or not. The defendants did not admit those allegations because "having made reasonable inquiries" remained uncertain about whether they were true or false.

The plaintiff sought disclosure of "All Internal Records regarding any decision to no longer operate the precinct as an 8 Street".

The defendants resisted disclosure on the basis that the documents sought were irrelevant to whether Mr Kopelowitz made the alleged statements.

In my view, the existence of documents about the decision not to operate the precinct as an 8 Street (and in particular the date of those documents) would *tend to prove or disprove* the allegation that Mr Kopelowitz made the alleged statements at the alleged time by revealing whether it was a topic of discussion by the defendants before the meeting, if not the purpose of the meeting.

I would order disclosure in terms of the request (which was not revised at the hearing).

(d) Category 44: Paragraph 70 of the amended statement of claim alleged that the Establishment Representations were misleading or deceptive for various reasons. Paragraphs 70(b) and 70(c) of the amended defence asserted that the alleged Establishment Representations (which were denied) were superseded by entry into the Management Agreement and there was no basis for a finding that the alleged Establishment Representations were false.

The plaintiff sought "All Internal Records and Contractor Records regarding the development of and budgeting for the precinct – in relation to tenancy expenses and management fees".

The defendants resisted disclosure on the basis that it was alleged that the Establishment Representations were made on 15 September 2016. Documents which post-dated that date could have no bearing on whether they were false when they were made. Further the defendants resisted disclosure on the basis that development and budgeting matters were not in issue. And in any event, the documents sought were wholly disconnected from and irrelevant to the matters alleged at paragraph 70 of the amended statement of claim. Also, there was no temporal limit to the documents sought.

I could not see a link between the documents sought in the request as originally framed and the allegations made.

However, the plaintiff revised its request at the hearing. It now seeks "All Internal Records and Contractor Records regarding the development of and budgeting for the precinct – in relation to amounts payable to Golden Vision". The request in these terms relates to the assertion that – contrary to the representations made – Golden Vision was not paid a fee for its assistance in designing, coordinating and managing the establishment of an 8 Street precinct at Cavill Lane.

I would order further disclosure in terms of the revised request.

Final orders

[141] There is an objective likelihood that the defendants have not complied with their duty of disclosure. They have restricted their disclosure searches to emails and culled those emails using too limited a set of key search terms. The plaintiff has therefore established that further disclosure is necessary.

[142] The final form of the plaintiff's draft order does not promote efficient and proportionate disclosure insofar as it requires personal, document by document review. TAR, relying upon search terms *as agreed* between the parties, should be deployed to reduce the "Broad Set" to the "Narrow Set". And TAR should be used to assist a personal review of the documents in the Narrow Set. TAR should also be used, if possible, to eliminate from a second review the 11,000 which have already been reviewed. The proposed form of order is not appropriate.

[143] The parties are best placed to determine the way in which such further disclosure ought to occur. The defendants will know the sorts of documents generated over the life of the 8 Street venture and how those documents were managed. The parties are best placed to determine, collaboratively, appropriate key search terms. Given the likely size of the "starting" document pool, the use of TAR is necessary.

[144] During the hearing, both parties acknowledged their ability to work together including on a revised document management plan which would deal with search terms and the use of technology or the need for further affidavit material (see, for example, T 1-41 – 43).

[145] Accordingly, I will order that the parties confer and provide to my associate, by 4:00pm on 21 April 2022, a revised disclosure protocol and document management plan, and proposed directions in relation to the disclosure of documents, reflecting my reasons in this application.

[146] On the question of costs, the plaintiff has been generally successful. This application was necessary to bring the issues around disclosure to a head. I therefore order that the first and second defendants pay the plaintiffs costs of the application on the standard basis.