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Fairman v Jonelca Holdings Pty Ltd [2025] QSC 40 (7 February 2025)

Last Updated: 14 March 2025

SUPREME COURT OF QUEENSLAND

CITATION: *Fairman v Jonelca Holdings Pty Ltd* [\[2025\] QSC 40](#)

PARTIES: **MATTHEW MICHAEL FAIRMAN**

DARNA COURTNEY BIEGMANN

WAYNE GORDON MARKS

PAUL JOSEPH

NEVILLE JAMES WRIGHT

TRACEY KAREN THORNBURY

SIMON GENTRY ROBERTS

CATIONA ANN ROBERTS

MELANIE JANE THOMPSON

TIMOTHY NELSON

JOHN FIELD

NICOLA FIELD

SACHIN LALLOO

JOANNA SYKES

(applicants)

v

JONELCA HOLDINGS PTY LTD

VALHALLA GC PTY LTD

(respondents)

FILE NO/S: BS 16369/24

DIVISION: Trial Division

PROCEEDING: Application



ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 7 February 2025 (ex tempore)

DELIVERED AT: Brisbane

HEARING DATE: 7 February 2025

JUDGE: Treston J

- ORDER:
1. **The sealed envelope containing the confidential list filed pursuant to the order of Davis J made 19 December 2024 be opened and a copy provided by the respondents to the applicants by 13 February 2025.**
 2. Pursuant to  **rule 208D**  of the [Uniform Civil Procedure Rules 1999](#) (Qld), by 17 February 2025, the respondents disclose to the applicants in electronic form the documents specified in the confidential list.
 3. **The respondents have liberty to apply on 48 hours' notice regarding any deletions from the list or redactions to particular documents.**
 4. **The respondents pay the applicants' costs of the originating application. The respondent's costs of complying with the order are reserved.**

CATCHWORDS: PROCEDURE UNDER THE [UNIFORM CIVIL PROCEDURE RULES](#) – DISCOVERY OF DOCUMENTS – ORDERS FOR PRELIMINARY DISCLOSURE – where the applicants were parties to an “off the plan” series of purchase contracts for residential apartments in a development being undertaken by the respondents – where the application was brought on urgently due to the imminent expiration of the sunset date under the respective purchase contracts – where the applicants sought disclosure of documents to assist in deciding whether to commence proceedings against the respondents for a failure to complete the contracts due to delays in the construction of the development – whether the requirements of r 208D of the [Uniform Civil Procedure Rules 1999](#) (Qld) are satisfied such that the applicant is entitled to preliminary disclosure of the documents sought

[Uniform Civil Procedure Rules 1999](#) (Qld), rr 208B, 208D

Uniform Civil Procedures Rules 2005 (NSW), r 5.3

[Federal Court Rules 2011](#) (Cth), r 7.23

Explanatory Note, Uniform Civil Procedure (Preliminary Disclosure) Amendment [Rule 2021](#) (Qld)

Blue Dog Group Pty Ltd v Glaucus Research Group California LLC [2024] QSC 37

Curtis v Ramsay Builders Pty Ltd [2024] VSC 151

Evans Deakin Pty Ltd v Orekinetics Pty Ltd [2002] QSC 42; [2002] 2 Qd R 345

Hatfield v TCN Channel Nine Pty Ltd [2010] NSWCA 69;
(2010) 77 NSWLR 506

Norwich Pharmacal Co v Customs and Excise Comrs
[1973] UKHL 6; [1973] 3 WLR 164

O'Connor v O'Connor [2018] NSWCA 214

Optiver Australia Pty Ltd v Tibra Trading Pty Ltd [2008]
FCAFC 133; (2008) 169 FCR 435

Parr v Bavarian Steakhouse Pty Ltd [2000] QCA 429;
[2001] 2 Qd R 196

Re Pyne [1997] 1 Qd R 326

COUNSEL: D D Keane KC and M C Long for the applicants

N H Ferrett KC and A J Tindall for the respondents

SOLICITORS: HWL Ebsworth Lawyers for the applicants

OMB Solicitors for the respondents

- [1] This is an application for preliminary disclosure prior to the commencement of litigation brought pursuant to [rule 208D](#) of the [Uniform Civil Procedure Rules 1999](#) (Qld) (UCPR). The matter was heard today, and the court was advised there was some urgency in relation to the decision given that the sunset clause, to which I will refer shortly, under the contract between the parties has a date of 28 February 2025. Accordingly, there is some urgency to deal with the matter today notwithstanding as the parties quite properly observed, there is little authority in Queensland to guide me in relation to the application of the preliminary disclosure rules.
- [2] The factual background of the proceeding is broadly as follows. The applicants are parties to an “off the plan” series of purchase contracts for residential apartments in a development which is being undertaken by the respondents called “Boutique Chevron.” The sunset date under several of the applicants’ respective purchase contracts, being the date upon which either party may terminate the contract if the community titles scheme for the development is not registered is 28 February 2025.
- [3] The various applicants entered into “off the plan” purchase contracts starting in December 2020. The development is not complete. The applicants seek disclosure of a range of documents – the detail of which I will return to shortly – to enable them to consider whether they ought in their interests commence proceedings against the respondents for a failure to complete those contracts. There have been numerous delays in the construction of the building.
- [4] On 28 May 2024, correspondence to the applicants set out that:

“The main issue facing the project at the moment is construction cost escalations and the developer finding ways to absorb this financial burden. Specifically, the difficulty in obtaining the flow of funds from the bank to meet the monthly escalated payments required to keep the trades going at a sufficient pace. Due to the extreme cost overruns in the construction industry over recent years, the cost to build Boutique has surpassed the funding levels required when the initial loan agreements were put in place at the start of the project. This has meant significant funds have had to be provided personally by the developer to keep the momentum of the project. These funds have now been exhausted and the developer is required to seek additional funding from the bank. This procedure requires new valuations and QS reports to be carried out and undertaken to extend these bank facilities. All of these reports are currently in progress. Accordingly, the lack of activity on site is attributable to the time required in securing the necessary additional bank finance. We understand that once this has been completed they expect there to be a significant increase in visible activity on site. The advice received that this is likely to take place in June. Therefore, the new estimation for completion is late October.”

- [5] Subsequently, on 10 December 2024, Mr Fairman, one of the applicants, received an email update which indicated that finance had been obtained and work would be resumed. That update attributed delays and numerous challenges, including ongoing pressure from the current economic environment and difficulties faced in the construction industry. The correspondence went on to note that after tireless efforts, the respondent, however, had secured successfully the necessary funding to complete the project.
- [6] Mr Fairman, who is the lead applicant and himself a construction manager, adduces evidence in relation to the progress of the construction of the development generally, and of some of the lots within the development, and deposes to the cessation of work on the site since 20 December 2023 with no obvious or visible effort to resume that work. In late November 2023 through to mid-November 2024, Mr Fairman, on seven occasions, took drone footage of the building and deposes that the status of the internal works has remained largely unchanged.
- [7] In his evidence, Mr Fairman sets out that on the basis of the drone footage, he estimates one month of work remains to be completed. He refers to the internal finishes on unit 6, level 6, and he refers to photographs provided to him of another unit in October 2023 demonstrating that the apartments were substantially complete. He uses reference to some 90 per cent completed, and gives estimates of the time he considers it would take to fully complete the works, which he estimates in a matter of weeks. He gives similar evidence as to other aspects of the development project. Finally, he deposes on the basis of the drone footage of 3 January 2025 that the front and outside of the development appeared to be finished and the exterior work would have only taken some four or five weeks to complete. The evidence, therefore, suggests that there is only a small amount of the project to be actually completed.
- [8] Some of the procedural background which led to this application is important to set out and I extract the detail of it, in the interests of brevity, substantially from the applicants' submissions.
- [9] On 24 September 2024, the applicants' solicitors sent a letter to the respondents' solicitors requesting the respondents' cooperation in providing information and evidence about the cost increases and the delays that the respondents had asserted had occurred.
- [10] On 2 October 2024, the applicants sent a letter to the respondents' solicitors requesting specific documents, which the applicants' solicitors said they required in order to advise the buyers whether they may have a claim against, effectively, the respondents. On 24 October and again on 30 October, the respondents' solicitors provided some documents to the applicants' solicitors, which the applicants assert did not meet the description of the documents and categories which had been requested.
- [11] On 7 November 2024, the respondents via its solicitors provided a further response indicating that the construction contract and the quantities of those reports – all of which were described as confidential material – would be made available for inspection but the documents and the contents of them were not to be provided to the individual applicants as documents had been previously. Rather they would be kept confidential with the solicitors.
- [12] Some documents provided around mid-November 2024 were provided on that basis, and Mr Jenkins' solicitor deposes that he has reviewed that confidential material, and the most he can say about the view he has formed is that there is no evidence that the respondents have not delayed construction of the development, or that the respondents have taken reasonable steps to progress the development.
- [13] The somewhat double negative contained in Mr Jenkins' affidavit, that there is no evidence that the respondents have not delayed the construction, is not, I accept, the same as evidence that the respondents *have* delayed the construction. As such, an originating application was brought before this court to require the provision of documents so that the applicants might determine whether or not they wish to commence proceedings against the respondents.
- [14] On the morning of the return of that application, which came on for hearing before Justice Davis in December of 2024, the respondents' solicitors offered to provide some further material upon the applicants' solicitors, providing a similar undertaking to that provided in mid-November of the same year, as to confidentiality and non-disclosure. Effectively, that undertaking provided that the solicitors for the applicants should not provide a copy or share the documents or contents of them with clients or any third party, and only use such documents for the purpose of advising clients whether there is evidence of delay

by the seller, and for no other purpose, and to otherwise keep the contents of the documents confidential.

- [15] As to the relevant financial documents, the respondents offered to provide “relevant correspondence from financier concerning formal approval/rejection of funding”, but expressly identified that such correspondence would not include, “the actual loan agreements, mortgages, applications, et cetera, given the sensitivity of that material.” At the same time, the respondents’ solicitors also provided an electronic link to some further Gold Coast City Council approval documents. The matter came on for hearing before Justice Davis on 19 December 2024, and his Honour made the following orders:^[1]

“1. By 21 January 2025, the Respondents file an affidavit which attaches a confidential list which:

(a) identifies the documents in the possession of the Respondents falling within each of the categories of documents described in the Originating Application;

(b) specifies whether the documents have previously been produced;

(c) specifies whether pre-action disclosure of each category of document is resisted;

(d) where pre-action disclosure is resisted, specifies the reason.

2. The confidential list shall be annexed to the affidavit and sealed in an envelope which is not to be opened without order of the Court.

3. A copy of the affidavit, without the confidential list, is to be served on the Applicants by 4pm on 21 January 2025.”

- [16] In compliance with Justice Davis’ order, on 21 January 2025 the respondents filed the affidavit and the confidential list which they were required to do. The applicants now seek what is sometimes loosely described as pre-litigation disclosure, but which UCPR now calls “preliminary disclosure”. Until recently, Queensland unlike some interstate counterparts, did not have any specific procedure by which pre-litigation disclosure could be sought. Nevertheless, as a superior court with equitable jurisdiction, the Supreme Court has always had the power to determine an action before discovery in accordance with the *Norwich Pharmacal Principle*.^[2]
- [17] The UCPR however was amended in 2021 and r 208D was then introduced. The rule entitled “Orders for preliminary disclosure” provides:

208D Orders for preliminary disclosure

(1) The court may make an order under subrule (2) if it appears to the court that—

(a) an applicant may have a right to relief against a prospective defendant; and

(b) it is impracticable for the applicant to start a proceeding against the prospective defendant without reference to a document; and

(c) there is an objective likelihood that the prospective defendant has, or is likely to have, possession or control of the document; and

(d) inspection of the document would assist the applicant to make the decision to start the proceeding; and

(e) the interests of justice require the order to be made.

(2) The court may order that the prospective defendant—

(a) disclose the document to the applicant as directed by the order; or

(b) produce the document to the court as directed by the order.

(3) Unless the court orders otherwise—

(a) an application for an order under subrule (2) must be supported by an affidavit stating—

(i) the facts on which the applicant relies; and

(ii) the document in respect of which the order is sought; and

(b) a copy of the application and the supporting affidavit must be served personally on the prospective defendant.

(4) An application for an order under subrule (2) must be made—

(a) if it relates to an existing proceeding to which the applicant is a party—by application in the proceeding; or

(b) otherwise—by originating application.

- [18] The parties agree that in order for preliminary disclosure to be ordered, the applicants must satisfy each of the requirements set out in sub-rule 1(a) to (e). The respondents contend that the applicants have failed to demonstrate satisfaction of any of those five sub-paragraphs, although only one in fact would need to not be satisfied in order for the order to be denied. Conversely, the applicants' submissions proceed on the basis that each of the sub-paragraphs of r 208D(1) are in fact satisfied.
- [19] Preliminary disclosure rules have, however, existed in other States and federally for some time. The applicants submit that the court can gain assistance from the jurisprudence in those other jurisdictions as to the application of r 208D. The respondents caution against heavy reliance on the rules of other jurisdictions which are not in identical terms. The only occasion upon which this court seems to have considered the preliminary disclosure rules was in the decision of *Blue Dog Group Pty Ltd v Glaucus Research Group California LLC (Blue Dog's case)*.^[3]
- [20] That was a decision of then Justice Brown's in which her Honour compared the New South Wales equivalent of r 208D^[4] and observed that, to the extent that the New South Wales rule used similar terminology, the authorities with respect to its operation are of some assistance. Her Honour also observed at [32]:

“...in the LexisNexis commentary to the UCPR, there is some tension in the reference to “prospective defendant” and to the second and fourth conditions. The second and fourth conditions are premised on the absence of the document which makes it impracticable to commence the proceedings and that the document once discovered would assist the applicant to make a decision to start the proceeding. The commentary suggests that the tension should be resolved by construing the intention required for the purposes of r 208D to be a conditional intention which, in my view, is the proper construction of the rule in a way which accords with the wording of the rule and gives effect to all of the requirements in a harmonious way when read as a whole...”

(footnotes omitted)

- [21] Her Honour concluded that it was sufficient in that case that there was evidence that the applicant intended to commence a proceeding against a prospective defendant if firstly, they are permitted to inspect the document and secondly, the contents of the document are such that it was appropriate to commence the proceedings.
- [22] It is worth observing however, that *Blue Dog's case* which Justice Brown was considering, was a decision that was ultimately made under r 208C and not 208D. I therefore propose to deal with each sub-paragraph of r 208D relevant to the circumstances here before me, *seriatim*.
- [23] First, by operation of r 208D(1), the court may make an order under sub-rule (2) if it appears to the court that the applicant may have a “right to relief against a prospective defendant” under sub-paragraph (1)(a). The “right to relief” is not defined, though some of the provisions of the rule are in fact defined under r 208B, but the terminology “right to relief” can be given its normal and natural meaning.

- [24] The applicants contend that they may have a right to relief against the respondents for specific performance of the contract or, injunctions, restraining the respondents from terminating the contract upon the passing of the sunset dates if the respondents have not taken reasonable steps to complete the development. As well as a potential right to relief for breach of an implied term to complete the building, which term I should say the respondents quite fairly agreed can be applied into the contract, r 208B defines a “prospective defendant” within the meaning of r 208D in relation to an applicant, to mean a person against whom the applicant intends to start the proceeding.
- [25] It seems obvious enough to me that the respondents are “prospective defendant(s)” for the purposes of the rule. The respondents submit however, that the applicants have not demonstrated that it may have a right to relief against it. The respondents rely upon the statement of Justice Brown in *Blue Dog’s case* at [21] that:

“In order to establish that a party “may have a right to relief”, the applicant must set out sufficient facts to satisfy the Court that it at least appears that the applicant may have an entitlement to relief...it must be shown that the applicant has a genuine positively held intention to bring proceedings against the prospective defendant seeking relief but which may be conditional upon the applicant obtaining information as to the prospective defendant.”

- [26] The respondents accept that it is not necessary for the applicants to show a *prima facie* case or to have a pleaded case, but maintains that a mere assertion of a case, or in this case a mere assertion of a possible case, is insufficient. Rather, the respondents contend that the applicants must sufficiently show that there is a reasonable cause to believe that the applicants may have a right of action against the respondents resting on some legal ground, referring me to the decision of *Hatfield v TCN Channel Nine Pty Ltd*.^[5]
- [27] Whilst in my view the applicants somewhat struggled to articulate what the right to relief against the prospective defendant(s) might be, I conclude that the possible rights to relief which the applicants might have, include, but are not limited to, the claims for specific performance and injunctive relief referred to. I am therefore persuaded of the satisfaction of r 208D(1)(a) for the following reasons.
- [28] First, the use of the words “may have” a right to relief suggests to me, as was found by the Full Court in *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd*,^[6] that it is not incumbent upon an applicant to establish every element of a relevant cause of action, rather the applicant must demonstrate reasonable cause to believe that it has – or may have – the right to relief alleged. The court in that case, said that it was not necessary to examine all the various elements of the potential causes of action that is sought to be relied upon in order to determine whether there was reasonable cause to believe that each of the necessary elements exist. It seems to me that the applicants may well have a right to relief where the contract is not, it seems, completed on time and in breach of the implied obligation to do so.
- [29] Second, it seems to me that it is not necessary for the applicants to demonstrate each and every possible right to relief which it may have against a prospective defendant. The use of the singular, “a right to relief”, being all that is required to satisfy the sub-paragraph. Therefore, even if all of the possible causes of action were not established, at least, a singular right to relief can be established.
- [30] Third, I bear in mind that for the satisfaction of r 208D(1)(a), the court may make the order “if it appears to the court that...” In the New South Wales Court of Appeal case of *O’Connor v O’Connor*,^[7] the court concluded at [30] that it must be emphasised that there is no requirement that an applicant for preliminary discovery establish even a *prima facie* case for relief. Nor is it necessary that the applicant specify with precision the cause of action proposed. Although, it will be necessary in order to make it appear to the court that the applicant may be entitled to make a claim for relief that the applicant provides some particularisation of the nature of the relief in contemplation. That is so, not only to enable the court to form a view about whether the applicant may be entitled to make a claim for relief but also to enable the prospective defendant, if an order is made, to determine which if any documents are to be discovered.
- [31] As to r 208D(1)(b) that, “it is impracticable for the applicant to start a proceeding against the prospective defendant without reference to a document”, the applicants submit that it is impracticable to start a proceeding against the respondents without the documents

sought, because the evidence in the possession of the applicants, including as provided by the respondent, is insufficient to firstly, assess whether the respondents may have taken reasonable steps to complete the development and secondly, to consider and take advice on the legal position and determine whether to commence proceedings against the respondents.

- [32] Both parties accept that the phrase “impracticable for the applicant to start a proceeding” must be construed in the context of the rule as a whole and particularly, the applicants contend, in the context of r 208D(1)(d), which contemplates the applicants making a decision to start a proceeding. Such a decision, the applicants submit, includes the merits of a proposed proceeding and extends to defences in the quantum of the claim.
- [33] The word “impracticable” is not defined in the rule and does not appear in equivalent rules in either the Federal Court^[8] or, for example, the New South Wales rules. Under the New South Wales rules r 5.3(1)(a), the requirement is that it must appear to the court that the applicant “having made reasonable inquiries, is unable to obtain sufficient information to decide whether or not to commence proceedings against the prospective defendant”. The respondents submit that the New South Wales rules provide a much lower bar to pre-litigation disclosure.
- [34] The explanatory note to the introduction of the Queensland rule^[9] establishes that preliminary discovery is to provide a mechanism by which a prospective applicant can obtain relevant documents prior to the commencement of a substantive proceeding in order to assess the merits of the potential claim, or to identify the proper defendant. The explanatory note goes on to demonstrate that the rule is based on a similar procedure which exists at the Federal Court level.^[10] There is no reference in the explanatory memorandum to whether the rule was intended to be similar to that of New South Wales or elsewhere.
- [35] Nevertheless, although I accept the submission that the use of the word “impracticable” suggests a somewhat higher threshold than that which exists in the New South Wales rules, I am not convinced that the New South Wales rules provide such a low bar to pre-litigation disclosure that the authorities in relation to that rule are at least not instructive for this court.
- [36] The applicants refer to a decision of *Curtis v Ramsay Builders Pty Ltd*,^[11] in which Justice Garde describes by reference to Stroud’s Judicial Dictionary of Words and Phrases that the word “impracticable” is a protean word, which derives its meaning at least in part, from its context. However, his Honour went on to say:

“Notably ‘impracticality’ is described as a conception different from that of impossibility; the latter is absolute, the former introduces at all events some degree of reason and involves some regard for practice.”^[12]

- [37] In my view, it is sensible to approach the word “impracticable” in a similar manner to the way in which his Honour described the word “impracticality”. The word is not intended to mean impossible. If it did, the rule could easily have said that. The use of the word “impracticable” denotes, I find, concepts of disproportionate expenditure of time and resources. It invokes concepts of efficiency in proceedings which, of course, is consistent with the provisions of r 5 of the UCPR.
- [38] Whilst in the current circumstances, it would almost certainly not be impossible for the applicants to commence a proceeding against the respondents without the preliminary disclosure, it seems to me, it would be impracticable for them to do so. Without reference to, at least some and perhaps all of the documents they seek, because they would likely be, in some respects, making a series of assumptions for the purposes of starting the proceeding, which assumptions might later be demonstrated to be unsustainable and therefore, expensive mistakes.
- [39] In my view, such an interpretation satisfies that which the respondents contend ought to be the course that I adopt, and that is to play close attention to the text of the rule without ignoring the rule’s purpose.
- [40] Next as to r 208D(1)(c), this third criteria is that there be an objective likelihood that the prospective defendant has, or is likely to have, possession or control of the document. The respondents did not seriously contend that they did not have the documents which were

sought, in their possession, although, I accept they did not make any concession in relation to the question. Nevertheless, I am satisfied having regard to the respondents' compliance with the order of Justice Davis to file a confidential affidavit setting out a list of documents, that such documents are objectively likely to be in the prospective defendant(s)' possession.

- [41] As to the matters in r 208D(1)(d), being that the “inspection of the document would assist the applicant to make the decision to start the proceeding”. I accept the submission of the respondents that this fourth requirement is related to the requirement in r 208D(1)(b) that it would be impracticable for the applicants to commence the proceeding without reference to the documents.
- [42] I take sub-paragraph (d) merely to be a statutory acknowledgment of the fact that the documents must be relevant to the proceeding which the applicant would seek to commence, in the sense that the provision of the documents alone is of little assistance without the inspection and therefore some evaluative exercise in respect of them. I am content that r 208D(1)(d) is satisfied.
- [43] That leaves only consideration of r 208D(1)(e) being that, “the interests of justice require the order to be made.” In truth, this is a more difficult criteria than might be considered at first blush. The court here is balancing a range of factors including the significant imposition on the privacy of persons who do not wish to disclose documents, in particular, commercially sensitive documents.
- [44] Against that, is the obvious purpose of the rule – to provide an efficient and cost-effective procedure for the provision of such documents. Discretionary considerations, such as the interests of justice, are ones which necessarily are of wide ambit. That discretion ought not be limited by the imposition of conditions which are not found in the rule themselves. That was the approach adopted by Justice Chesterman, as his Honour then was, in *Evans Deakin Pty Ltd v Orekinetics Pty Ltd*.^[13]
- [45] There, his Honour was considering matters relevant to an injunction and the allied relief against a defendant to prevent alleged misuse of confidential information relating to the manufacture and sale of certain machinery. His Honour said that an order should not be made unless, on the material before the court, it is proper to do so; although, his Honour also expressed the view that it must be remembered that the rules exist to promote the efficient and economical conduct of litigation.
- [46] As such, in my view the proper application of the rule would require that, ordinarily, an order such as the one sought, ought to be made unless there is some countervailing circumstance to suggest that the interests of justice do not require the provision of the documents. In relation to that issue, the respondents pointed to the fact that they had previously provided an offer to the applicants to provide further documents on similar undertakings as to confidentiality which had been asked for before.
- [47] The detail of the offer made, and the documents to which the offer pertained, were contained in Exhibit 2. The documents which were offered included construction programs, structural drawings, a quantity surveyor's report of September and November 2024, some correspondence with financiers concerning formal approval or rejection of funding, and an update to buyers provided by Mr Julian Sutherland to those buyers dated 12 September 2024.
- [48] I was originally concerned that the offer of some further documents to be produced on an undertaking as to confidentiality (which undertaking I did not consider to be unreasonable) and the failure by the applicants to accept the offer, was a matter which went to both the consideration of the impracticability criteria as well as the interests of justice criteria.
- [49] However, whilst I have not needed to reach a particular view in relation to that last matter, it does strike me that it was an offer which, if accepted, might well have provided the applicants with yet another basis to assert that it had sought a variety of documents which had not been provided to it. The rejection of the opportunity to inspect them, seems to me, to be a calculated but risky one. Nevertheless, I have ultimately concluded that it is not a persuasive feature against the satisfaction of either sub-paragraph (b) or sub-paragraph (e).
- [50] Finally, in respect of the interests of justice criteria, it seems to me that the court rules have moved broadly in favour of an approach which was once described by the Queensland Court of Appeal as, “the cards must be on the table...face up.” I refer in this

regard to the decision of the Court of Appeal in *Parr v Bavarian Steakhouse Pty Ltd*.^[14] Whilst that statement was made in a completely different context of disclosure, it still has echoes in this place the court finds itself now, some 25 years later.

- [51] The interests of justice broadly favour a “cards on the table, face up” approach, although carefully balanced against the considerations of fishing expeditions, privacy and the protection of legitimate commercial interests, just to name a few. Nevertheless, in the circumstances of this case with the impending expiration of the sunset clause, there is some urgency in ensuring the matter is progressed fairly and expeditiously for the parties.
- [52] In circumstances where the applicants do not have, in the time available, a legitimate alternative means of obtaining the documents, and having regard to the possible expiration of the sunset clause pressing down upon them, the balance of the interests of justice favours in my view, the making of the order sought. It follows that the interests of justice test in sub-paragraph (e) is satisfied in the circumstances of this particular case.
- [53] That leaves only the question of the breadth of the order sought. The draft order provided to me, sets out a broad range of documents sought by the applicants. The orders sought are at first blush, wide-ranging. Should greater time have permitted, I may well have adopted the sort of approach that is sometimes adopted in judicial advice matters in trustee applications, whereby I would have excluded the applicants from the court and heard in detail from the respondents about each of the categories of documents. I could have done so by reference to, perhaps, opening the sealed envelope and examining the list contained in the envelope or, indeed, the documents themselves, inspecting them for the purpose of deciding whether they ought to be disclosed or parts of them redacted. But the short timeframe before the expiring of the sunset clause does not provide me with that luxury.
- [54] In the circumstances and in an attempt to do justice to both the parties, I propose that the draft order which has been handed up to me by the applicants should be amended to add in a new paragraph [3], to provide the respondents with liberty to apply on 48 hours’ notice to the applicants to bring the matter back before me in applications court in the next two weeks.
- [55] Should there be any particular documents or category of documents which the respondents seek expressly to exclude for reasons including but not limited to commercial confidentiality or otherwise. This would necessitate, I accept, further hearing of the matter, either with or without the presence of the applicants, but on notice to them. It might include an application to redact from documents, parts which the respondents would seek to not disclose.
- [56] Although, I give liberty to apply on 48 hours’ notice to bring the matter back on within the next two weeks, I stress the urgency of bringing the matter back before the court as quickly as possible, should any such documents require the court’s particular consideration. That liberty to apply, of course, is not intended as a means to circumvent the order, which I propose to make. It is merely made as a concession to the obvious urgency with which the proceeding has been brought, and in an attempt to nevertheless preserve the legitimate commercial sensitivities on the respondents’ side but not to either thwart the terms of the order or the spirit of it.

[1] Order dated 19 December 2024 of Davis J as amended by Order dated 21 January 2025 of Davis J.

[2] See *Re Pyne* [1997] 1 Qd R 326 citing *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] UKHL 6; [1973] 3 WLR 164.

[3] [2024] QSC 37.

[4] See *Uniform Civil Procedures Rules 2005* (NSW), r 5.3.

[5] [2010] NSWCA 69; (2010) 77 NSWLR 506 at [47] - [48].

[6] [2008] FCAFC 133; (2008) 169 FCR 435 at [48].

[7] [\[2018\] NSWCA 214](#).

[8] See [Federal Court Rules 2011](#) (Cth), r 7.23.

[9] Explanatory Note, Uniform Civil Procedure (Preliminary Disclosure) Amendment [Rule 2021](#) (Qld).

[10] *Ibid* at 1.

[11] [\[2024\] VSC 151](#) at [\[23\]](#).

[12] *Ibid* at [\[23\]](#) referring to *Jayne v National Coal Board* [\[1963\] 2 All ER 220](#) (Veale J).

[13] [\[2002\] QSC 42](#); [\[2002\] 2 Qd R 345](#) at 350.

[14] [\[2000\] QCA 429](#); [\[2001\] 2 Qd R 196](#) at [\[13\]](#).

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