IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2004-404-3903

BETWEEN	SIMUNOVICH FISHERIES LIMITED First Plaintiff
AND	PETER SIMUNOVICH Second Plaintiff
AND	VAUGHAN WILKINSON Third Plaintiff
AND	TELEVISION NEW ZEALAND LIMITED First Defendant
AND	WILSON AND HORTON LIMITED Second Defendant
AND	BARINE DEVELOPMENTS LIMITED Third Defendant
AND	NEIL PENWARDEN Fourth Defendant
AND	THOMAS NORMAN MUNRO NALDER Fifth Defendant

Hearing: 18 December 2006

Appearances: J G Miles QC, A Ivory and M Keall for the Plaintiffs
A R Galbraith QC, T J Walker and H Wild for the First Defendant
B D Gray QC, A L Ringwood and K A Newland for the Second Defendant
J R Billington QC and G Kayes for the Third and Fourth Defendants

Judgment: 3 August 2007

JUDGMENT (NO 6) OF ALLAN J
[Defendants' Applications for Further and Better Discovery by Plaintiffs]

This judgment was delivered by Justice Allan
on 3 August 2007 at 3:00 pm, pursuant to
r 540(4) of the High Court Rules.

Registrar/Deputy Registrar
Date:

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[1] In this proceeding the plaintiffs sue for defamation and malicious falsehood. They claim damages approaching $30 million. The background is briefly described in an earlier interlocutory judgment now reported as *Simunovich Fisheries Limited and Ors v Television NZ and Ors* [2005] 3 NZLR 134.

[2] Before the Court are three separate applications for orders for further and better discovery by the plaintiffs. The applications were filed in mid 2006 by the first defendant, the second defendant and the third and fourth defendants (jointly) respectively. At that time the plaintiffs had filed and served an interim list of documents and had indicated that further discovery would be made.

[3] On 13 October 2006 the plaintiffs filed a second list of documents. The defendants believe that the second list has done little to remedy the alleged deficiencies in the interim list and accordingly have pursued their applications.

[4] The second defendant's application is rather more extensive than that of the other defendants, but there is a significant degree of correspondence between the various applications. It is therefore convenient to consider the defendants' case for further discovery in the context of the second defendant's application. In doing so, all of the matters raised by the other two applications will also be resolved save for one separate issue raised by the first defendant to which I will separately refer at the appropriate point.

[5] Mr Galbraith QC and Mr Billington QC for the first and third – fourth defendants respectively each expressly supported that approach and endorsed the submissions made by Mr Gray on behalf of the second defendant.

[6] The second defendant seeks further and better discovery in respect of 30 separate categories of documents, each of which requires separate consideration. In some instances the plaintiffs accept the need for further discovery but for the most part the applications are resisted by the plaintiffs.

[7] In considering the 30 categories identified by the second defendant, it will be necessary for the Court to determine the proper scope of the plaintiffs' discovery. There is, however, a further question for resolution. It relates to the manner in which discovery ought to be made and the form in which documents ought to be produced by the plaintiffs.

[8] The first plaintiff has for many years (since at least 1995) maintained its financial and trading records in electronic form. Hard copy documents are used as source documents for the creation of electronic databases but are then effectively discarded, although they remain in existence and are stored at various locations. The defendants seek discovery of the hard copy documents as well as the contents of the first plaintiff's electronic databases. The plaintiffs say that the latter is sufficient. I deal with this aspect of the dispute in the course of my discussion of Category 1.

Legal principles

[9] There is no dispute as to the legal principles which underpin these applications. They are brought in reliance upon r 300 which provides:

> **300 Order for particular discovery against party after proceeding commenced**
>
> (1) If at any stage of the proceeding it appears to the Court from evidence or from the nature or circumstances of the case or from any document filed in the proceeding that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Court may order that party–
>
> (a) to file an affidavit stating–
>
> (i) whether the documents are or have been in the party's control; and
>
> (ii) if they have been, but are no longer, in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control and the person who now has control of them; and
>
> (b) to serve the affidavit on any other party.
>
> (2) The Court may not make an order under this rule unless satisfied that the order is necessary at the time when the order is made.

[10] Accordingly, in order to obtain an order for further and better discovery, an applicant must establish:

a) Grounds for belief that a party is or has been in possession of a document or class of document;

b) The document or class of document relates to any matter in question in the proceeding; and

c) That discovery is necessary at the time an order is made.

[11] The requirement that an applicant establish that there are grounds for belief that documents are of a stipulated character and have been held by a party from whom discovery is sought does not require the applicant to prove that such documents actually exist.

[12] But in any event the plaintiffs do not assert that the documents sought by the second defendant are not in their power or possession (at least for the most part). So the existence of disputed documents is not a matter of serious contention.

[13] The second requirement is that the documents concerned relate to a matter in question in the proceeding, in other words, the documents must be relevant.

[14] The classic test for relevance is that to be found in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 (CA) where at 63 Brett LJ said that a party's discovery obligations encompass:

> … every document that relates to matters in question in the action which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.
>
> I have put in the words "either directly or indirectly" because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of enquiry which may have either of those two consequences.

[15] See also the useful discussion which appears in the judgment of Tipping J in *M v L* [1999] 1 NZLR 747 at 750 (CA).

[16] Relevance is to be determined by reference to the matters in issue between the parties. Those matters must in turn be identified by reference to the pleadings: *NZ Rail Limited v Port Marlborough NZ Limited* [1993] 2 NZLR 641 at 644.

[17] The *Peruvian Guano* test applies to applications under r 300: *AMP Society v Architectural Windows Limited* [1986] 2 NZLR 190, 202. An order will be made only if the Court is satisfied that it is necessary at the time it is made: *Krone (NZ) Technique Limited v Connector Systems Limited* (1998) 2 PRNZ 627 (dealing with the former r 312 which is in all material respects identical to the present r 300(2)) where Eichelbaum J (as he then was) said at 635:

> In the context of r 312 "necessary" in my opinion is not used in an absolute sense, such as "essential". It should be interpreted as importing a notion of reasonableness, that is as meaning reasonably necessary.

[18] The onus of establishing that an order is necessary rests on the applicant: *T D Haulage Limited v NZ Railways Corporation* (1986) 1 PRNZ 668.

The pleadings

[19] It is convenient before discussing the competing contentions of the parties to summarise very briefly the pleadings, which are extensive and voluminous. It is necessary to touch upon the core allegations only.

[20] At all material times the plaintiffs played a prominent role in the New Zealand fishing industry. In particular, the first plaintiff maintained and operated an extensive fishing fleet.

[21] The plaintiffs allege that on 29 October 2002 the first defendant caused to be broadcast on TV One in a programme described as an "Assignment Special" certain material that was defamatory of the plaintiffs. It is alleged by the plaintiffs that portions of the programme meant and were understood to mean the following:

i) That the three plaintiffs in concert or each of them were guilty of longstanding corrupt actions with senior personnel at the Ministry of Agriculture and Fisheries/Ministry of Fisheries;

ii) The second and third plaintiffs were each or both of them corrupt and dishonest businessmen;

iii) In the alternative, there were serious grounds for believing that each or all of the three plaintiffs were guilty of longstanding corrupt actions with senior personnel at the Ministry of Agriculture and Fisheries/Ministry of Fisheries;

iv) In the alternative, there were serious grounds for believing that each of or both the second and third plaintiffs were corrupt and dishonest businessmen;

v) The three plaintiffs in concert or each of them committed or were responsible or were parties to serious criminal or fraudulent activities arising out of the plaintiffs' involvement in scampi fishing.

[22] The plaintiffs say that they are entitled to recover damages for defamation and/or malicious falsehood.

[23] Against the second defendants, the plaintiffs rely upon a series of articles appearing in the *New Zealand Herald* between May 2002 and February 2003 which the plaintiffs allege contain the same imputations as those pleaded against the first defendant.

[24] The plaintiffs claim that the third and fourth defendants were parties to the first defendant's *Assignment* programme by virtue of their supply of information to the first defendant and their co-operation in the making of the programme.

[25] The plaintiffs seek against all defendants general and punitive damages. The second and third plaintiffs seek against all defendants aggravated damages. The first

plaintiff seeks special damages against all defendants. Such damages are particularised in Schedule A to the second amended statement of claim. The particulars cover some 19 pages. The sum sought is $29,194,352.68. In summary, that claim is particularised as follows:

The costs of the two public Inquiries		2,297,459,68
Economic loss from concentrating on the Inquiries and not focusing on the business		
(a)	Loss of Hoki catch 2002/3	3,156,124.00
(b)	Inability to maximise quota portfolio 02/03	2,397,073.00
(c)	Inability to maximise quota portfolio 03/04	6,095,760.00
(d)	Inability to manage *Petersen* 2002/3	884,091.00
(e)	Use of *Ocean Dawn* for scampi 2003/4	3,827,752.00
(f)	Abandonment of Botany Downs store	716,959.00
(g)	Non-pursuit of tuna 2004	1,432,210.00
Decline in quality of catch in 2002/3		2,136,129.00
Smaller catch/lesser quality/higher cost 2003/4		6,250,795.00
Total		$29,194,352.68

[26] Mr Galbraith says that the amount claimed is unprecedented in defamation proceedings in this country and indeed (according to the plaintiffs' senior counsel, Mr Miles) in this part of the world. It swamps, he submits, any issue of reputation or loss alleged to have arisen from the various publications sued on. Mr Galbraith is undoubtedly correct when he submits that each head of special damage constitutes of itself a very significant claim for damages.

[27] In my opinion plaintiffs who mount claims of this character and magnitude must expect to be faced with demands for detailed and comprehensive discovery and indeed the plaintiffs accept their discovery obligations. There are, however, fundamental differences between the parties about the extent of those obligations. In

resolving them it is necessary to keep in mind the breadth of the *Peruvian Guano* relevance test as well as the provisions of r 300.

[28] In their statements of defence, the first to fourth defendants plead a number of defences including truth. Copious particulars are provided. It is unnecessary at this point to discuss the detail of those particulars beyond noting that the truth defences focus upon two broad issues, namely the relationship between the plaintiffs and the Ministry, and the legality of the plaintiffs' fishing activities.

The second defendant's application

[29] I turn to a consideration of the 30 separate categories in respect of which the second defendant seeks further and better discovery from the plaintiffs. Some contentious issues are common to a number of categories. I deal with them where they first arise.

Category 1

[30] *All documents recording or relating to the first plaintiff's fishing catches and catch history from 1990 until 1 October 2004 including but not limited to Catch Landing Returns, Quota Management Returns and other Returns and Reports, and any separate records that have at any time been made by or with the knowledge of any of the plaintiffs.*

[31] Mr Gray submits that liability, causation, quantum and mitigation are all key matters at issue in this proceeding. That is plainly correct.

[32] Mr Gray further argues that all documents which may assist the defendants to establish the following matters are relevant to the plaintiffs' special damages claims:

> (a) the extent of the first plaintiff's fishing activities for the period 2002 – 2004;
>
> (b) the extent of the first plaintiff's fishing activities for a sufficient period prior to the publications complained of to enable the second defendant's expert accountant to determine the amount of loss, if any, as a result of the publications complained of;

(c) the profitability of the first plaintiff's fishing activities for the period 2002 – 2004;

(d) the profitability of the first plaintiff's fishing activities for a sufficient period prior to the publications complained of to enable the second defendant's expert accountant to determine the amount of loss, if any, as a result of the publications complained of;

(e) the profitability of the first plaintiff's quota portfolio for the period 2002 – 2004;

(f) the profitability of the first plaintiff's quota portfolio for a sufficient period prior to the publications complained of to enable the second defendant's expert accountant to determine the amount of loss, if any, as a result of the publications complained of;

(g) the manner in which the business of the first plaintiff was operated during the period 2002 – 2004;

(h) any representations made to Sanford Limited regarding the value of the business of the first plaintiff;

(i) the reason(s) why scampi was not introduced to the Quota Management System in August 2002;

(j) the reason(s), if any, why the quality of the first plaintiff's catch declined in the 2002/2003 and 2003/2004 fishing years;

(k) any documents tending to establish the quality of the first plaintiff's catch for a sufficient period prior to the 2002/2003 and 2003/2004 fishing years to enable the second defendant's expert to determine the decline in quality, if any, and resulting loss, if any, following the publications complained of; and

(l) the plaintiffs' files in relation to the Primary Production Committee Inquiry and the State Services Commission Inquiry, to determine what participation in those Inquiries the plaintiffs actually had, what management resources were diverted, and why they could not be replaced on a temporary basis.

[33] Given the detail of the particulars of special damage pleaded by the plaintiffs, Mr Gray's submission is broadly correct. Some items on his list relate to other categories of discovery sought. I will return to them later in the judgment.

[34] In the meantime, it is to be noted that Mr Ivory accepts that the defendants must have access to the whole of the first plaintiff's electronic database for the period 1999 – 2004 inclusive. Indeed, such access has already been offered.

[35] As I understand it, the plaintiffs' claim to discovery of Category 1 documents back as far as 1990 stems from references at pp 40 and 41 of the second amended statement of claim (Schedule A) to historical lease performance per species during the 1993 to 2001 fishing years. Mr Ivory told the Court that the calculations carried out by the plaintiffs' forensic accountants (Mr McCullagh and his associates) which involved consideration of figures back to 1993 simply relied upon the plaintiffs' electronic records and did not involve recourse to underlying hard copy source documents. It is not disputed that the defendants' experts are entitled to the same material as has been seen by the plaintiffs' experts. The question is whether the defendants are entitled to go behind the electronic database and in so doing whether they are entitled to require the production of documents as far back as 1993 (or indeed 1990 as the defendants claim).

[36] In considering that question, it is appropriate in my view, as Mr Galbraith submits, to have regard to a number of factors identified in the affidavit of Mr Hagen, who is the forensic accountant instructed by the solicitors for the first and second defendants. These factors also relate to several other categories of discovery sought. Mr Hagen points out that:

a) Other than the costs and disbursements said to have been incurred in the two public inquiries, all of the special damages claimed are hypothetical and speculative as to both causation and manner of calculation.

b) In order to assess damages in a proper fashion, it is necessary to compare the trading of the first plaintiff post publication of the alleged defamatory material and the manner in which it is likely to have traded in the absence of such publications. In other words, it is necessary to compare what actually happened with a counterfactual position. An exercise of this sort can be conducted only by reference to the greater part (at least) of the first plaintiff's business records.

c) The plaintiffs appear not to have considered the relevance of causation in assessing the appropriate scope of discovery. Causation

issues are central to the special damages claim. The defendants are entitled to assess all possible causes of loss. That in turn requires a complete audit of the company's trading by reference to source documents and not merely the plaintiffs' own analyses. Mr McCullagh, in an affidavit filed in reply to the third affidavit of Mr Hagen, accepts that he was not required to consider causation issues. He simply took instructions to the effect that the losses had been caused by the publications and proceeded accordingly.

d) It is not sufficient for the plaintiffs simply to disclose to the defendants documents used in the assessment of damages made by the plaintiffs' experts. The defendants are entitled to conduct their own assessment and to require the discovery of all documents necessary to enable them to make that assessment. Mr Hagen says that this requires a complete audit of the first plaintiff's financial records.

e) By far the largest portion of the special damages claim ($18,509,969) hinges on the contention that the second and third plaintiffs, who comprise the senior management of the first plaintiff, were distracted from running and developing the business of the first plaintiff by reason of their preoccupation with the two public Inquiries. An analysis of that part of the claim, involving as it does a very large dollar figure, requires the closest analysis. It raises issues regarding the management of the business, the conduct of the Inquiries, the business activities of the first plaintiff before and after the Inquiries, and the plaintiffs' obligation to mitigate. Those issues are inextricably interwoven with the conduct of the first plaintiff's business on a day to day basis and so require the disclosure of the whole of the first plaintiff's business records.

[37] In my opinion the points made by Mr Hagen are soundly based. This is on any view large-scale litigation. These claims are mounted by well-resourced plaintiffs who have chosen to formulate their claim in a manner which raises a number of fundamental issues about the conduct of the first plaintiff's business over

a period of some years. That being so, a very wide range of documents must inevitably come within the settled test for relevance. Prima facie therefore the defendants are entitled to discovery of the documents sought in Category 1 for at least a portion of the period concerned.

[38] The plaintiffs, however, raise two further broad objections. First, they say that the applications are too broadly expressed and that they are not linked to specific allegations in the pleadings. In particular, it is claimed that they fail to identify particular documents or classes of document. In my view, this is an objection without substance. Rule 300 contemplates that applications will be made by reference to documents or groups of documents. In the present instance, these applications do sufficiently particularise the documents sought by reference to various descriptions of the class of documents sought. Moreover, there is, I think, force in the first defendant's argument to the effect that although in formal terms this is an application for particular discovery under r 300, it is in substance an application for further general discovery upon the grounds that the general discovery already made is inadequate.

[39] The second objection is that the extent of the discovery sought would be oppressive to the plaintiffs. There is little evidence to support this claim and limited attention was paid to it during the course of argument. It is, however, presumably linked to the plaintiffs' contention that the wholesale discovery of all hard copy documents would be logistically impracticable because the documents are stored at a variety of locations, and are disordered and/or interleaved with other materials. It is further claimed that the discovery of paper documents will not assist the defendants to understand the detail of the plaintiffs' claim for economic loss.

[40] Oppression is a ground for resisting discovery. Where it is alleged the Court must balance considerations of time and cost against the probative value of the documents sought: *Mao-Che v Armstrong Murray* (1992) 6 PRNZ 371 and the cases cited in that judgment.

[41] In the present instance the first plaintiff's fishing records lie at the heart of the litigation and in particular are central to the calculation of the plaintiffs' claim for

damages. That claim is extraordinarily large and is in some respects unconventional. The plaintiffs are well resourced. I do not think it is an answer to the defendants' claim for the discovery of paper documents to say that they are stored at several different locations and/or that they are not well ordered. It may well be that the plaintiffs will be obliged to retain a team of people to undertake the task of locating and assembling relevant documents but there is no suggestion that the whereabouts of those documents is not known; nor is it claimed that the task of assembling the documents would be impossible. The plaintiffs merely say that it would be "logistically impractical".

[42] In my view, given the magnitude of this claim, the manner in which it has been calculated and the financial resources available to the plaintiffs, it will not be oppressive if the plaintiffs are required to make discovery of at least some of the documents which underlie the electronic database maintained by the first plaintiff.

[43] I do not, however, think that it is necessary for the defendants to have documents as far back as 1990 in order to deal with issues of causation and the assessment of damages.

[44] Mr Hagen's evidence does not suggest that it is necessary for him to go back further than the 1999 financial year, at least in the first instance. Mr McCullagh's reliance on catch records back to 1993 was based upon the contents of the first plaintiff's electronic database. The plaintiffs say that they are willing to allow Mr Hagen the same access to that database as Mr McCullagh had. In the first instance that ought to be sufficient in respect of the benchmarking exercise conducted by Mr McCullagh which Mr Hagen will no doubt wish to replicate. However, in my opinion, the defendants are also entitled to discovery of all documents whether electronic or hard copy of the type described in Category 1 for the period commencing with the start of the first plaintiff's financial year which ended in 1999 and concluding on 1 October 2004.

[45] The defendants (but primarily the first, third and fourth defendants) also seek discovery of the documents described in the second defendant's Category 1 on an alternative ground. They say that Category 1 documents are relevant to the issues of

allegedly corrupt fishing and business practices conducted by the plaintiffs which underpin the truth defences pleaded by each defendant.

[46] As Mr Ivory argues, there are constraints upon the discovery rights of a defendant who has pleaded the defence of truth in defamation proceedings. A plaintiff is obliged to give discovery only in relation to matters alleged in the particulars of justification, because a defendant is not entitled to fish for some other defence among the plaintiffs' documents: see *Gatley on Libel and Slander* (10 ed), 2004, para 31.8 and *Wasan International Co Limited v Lee* HC AK CIV-2003-404-4113 26 May 2004 and the authorities there discussed.

[47] Even where, as here, the defendants have provided particulars of truth, they can obtain discovery only in respect of the matters alleged in those particulars: *Yorkshire Providence Life Assurance Co v Gilbert & Rivington* [1895] 2 QB 148. The defendants are not entitled to wholesale discovery of the first plaintiff's fishing records simply by virtue of having complied with their obligations to provide proper particulars in support of the defence of truth. They are, however, entitled to discovery of all documents relevant to the specific allegations pleaded as particulars. The first defendant's particulars are to be found in Schedule VII to its statement of defence to the plaintiffs' second amended statement of claim. Although I heard very little argument about the detail of the defendants' alleged entitlement to discovery under this head, it seems that in respect of Category 1, the first defendant is entitled to discovery of all documents (including hard copy documents) relevant to paras 2.1 – to 2.3 of Schedule V and paras 2 and 3 of Schedule VII of its amended statement of defence to the plaintiffs' second amended statement of claim. In the case of the second defendant, the relevant particulars are to be found in paras 1A – F of Schedule A to its amended statement of defence. In the case of the third and fourth defendants, the relevant particulars are to be found in para 87.1 of their amended statement of defence.

[48] The plaintiffs are to make discovery of all documents relevant to those pleaded particulars irrespective of the date upon which they were created. But the defendants are not entitled to trawl through the plaintiffs' filing records generally, in

the hope that they may discover further instances of illegal fishing of which they are presently unaware.

Category 2

[49] *All documents evidencing, recording or relating to sales of the first plaintiff's fishing catches from 1990 until 1 October 2004, including any separate records that have at any time been made by or with the knowledge of any of the plaintiffs.*

[50] The defendants say that this category of documents is relevant because it relates to the plaintiffs' claim for special damages. The plaintiffs oppose discovery of this category of documents on the ground that they are "too broad and diffuse and/or oppressive to discover". The plaintiffs will, however, disclose any relevant diary entries and sales records for the five years to 1 October 2004 but only by way of supervised audit to enable the defendants' experts to verify the accuracy of the electronic database. Mr Ivory did not enlarge upon what was meant by the term "too broad and diffuse". I would expect the plaintiffs to know what documents fall within this category. If doubts remain, the matter can be raised afresh.

[51] In my view, for the reasons given in respect of Category 1, it is proper to direct the plaintiffs to make discovery of all documents in this category (including hard copy documents) for the same period as in Category 1.

Category 3

[52] *The first plaintiff's financial statements and records from 1990 to October 2004 (to the extent that they are not already provided).*

[53] The plaintiffs say that the discovery sought in this category would be oppressive but are prepared to co-operate in a supervised audit as for Category 2 documents.

[54] For the reasons already given, the plaintiffs must give discovery of all documents within this category (including hard copy documents) for the same period as applies in respect of Categories 1 and 2. In giving that direction, I do not discount the possibility that the defendants' experts may find that, having examined the documents for the 1999 – 2004 period, it is necessary in some respects to go to

earlier documents. If that is so and the matter can not be resolved directly between the parties, then a further application can be made by way of memorandum.

Category 4

[55] *All documents evidencing fishing quota allocated, leased to or otherwise utilised by the first plaintiff in the 2002 – 2004 fishing years.*

[56] Discovery of documents in this category is not opposed by the plaintiffs, and there will be an order in favour of the defendants as sought.

Category 5

[57] *All communications and documents recording any communications between any of the plaintiffs and the Ministry of Agriculture and Fisheries/Ministry of Fisheries between 1990 and 1 October 2004.*

[58] The defendants say that such documents are relevant to aspects of the defence of truth pleaded by each of them. The plaintiffs resist discovery in this category on several grounds. First, they say that the documents are not relevant to a matter in issue in the proceeding because the respective statements of defence of the first to fourth defendants contain insufficient particulars of the allegations concerned. I do not agree. In my view, the particulars pleaded are quite sufficient to overcome the relevant hurdle discussed in cases such as *Wasan*, to which I have referred earlier. In other words, the discovery sought can not be characterised as mere "fishing", because the particulars provided are sufficient to support the discovery sought.

[59] The plaintiffs also oppose on the further grounds that the discovery sought is "too broad and diffuse and/or oppressive". This is the same ground as that rejected in respect of categories earlier discussed. It is in my view not reasonable to expect the defendants to describe the documents concerned with any greater particularity than has occurred. The oppression argument fails for the reasons already given.

[60] The plaintiffs further say that the communications in this category are publicly available, although the point was not referred to in argument or specifically

in the plaintiffs' synopsis of argument. The documents do not appear, simply on the basis of their description, to be of a public nature. No information has been provided as to the circumstances in which they might be publicly available, although I accept that some may have reached the public domain as a consequence of the various inquiries conducted into the fishing industry. Quite apart from that, of course, it is trite to say that in general the public availability of a document does not obviate the need of a party to discover those copies of the document held by that party in the course of giving discovery. Such copies may be fuller, annotated, ordered in a certain way or in certain respects more comprehensive than those otherwise available.

[61] In my view, the plaintiffs must make discovery of the documents sought in Category 5.

[62] It is, however, appropriate to mention specifically the first defendant's claim to discovery of documents relating to "decisions that favoured the first plaintiff over other fishers". The plaintiffs object to discovery of documents so described on the grounds that the selection process requires the exercise of a value judgment and places the plaintiffs in an embarrassing position. I think that the plaintiffs are right in that respect. However, the first defendant's request is in effect subsumed by the somewhat wider language of the second defendant's Category 5 and it is unnecessary to deal further with the point.

Category 6

[63] *All documents not already discovered in the plaintiffs' Interim List of documents relating to the Inquiry by the Primary Production Committee of the House of Representatives into management of the scampi fishery, including but not limited to any evidence, documents or submissions presented to that Inquiry*.

[64] In respect of this category, the plaintiffs say that:

a) The documents are publicly available and voluminous;

b) Many documents are irrelevant;

c) Discovery is oppressive.

[65] Mr Gray's synopsis of argument for the second defendant contains the following passage in support of the discovery sought in Category 6, which it is convenient to set out in full:

> In paragraph 44 of the second amended statement of claim the plaintiffs have pleaded that the second defendant published the words complained of "maliciously". Particulars of the alleged malice are set out in Schedule C of the second amended statement of claim. In paragraphs (vii) and (viii) of Schedule C the plaintiffs refer to the Primary Production Committee Inquiry, and in particular rely on an alleged failure by the second defendant to point to or produce evidence; on an alleged failure of the second defendant "to apologise or make any amends" following the report of the Primary Production Committee; and on various alleged findings of the Committee. In paragraph 24 of its statement of defence (which in relevant aspects refers back to paragraph 19) the second defendant denies that it published the words complained of maliciously, and (apart from admitting that it did not appear at the Inquiry, and did not apologise afterwards) denies the allegations in Schedule C (vii) & (viii) of the second amended statement of claim; and pleads that it published fair and accurate reports of the findings of the Committee.
>
> These pleadings put in issue the Inquiry, the evidence produced to the Inquiry in relation to the plaintiffs' conduct, submissions made at the Inquiry in relation to the plaintiffs' conduct, the findings of the Inquiry, and the facts, matters and evidence which formed the basis for those finding. Having chosen to plead and rely on alleged facts and matters arising from the Primary Production Committee Inquiry as evidence of "malice" on the part of the second defendant, the plaintiffs have made these documents relevant.
>
> Moreover, as the Inquiry was set up to inquire into matters which are closely aligned with the matters at issue in this proceeding, the evidence and submissions which were presented to the Inquiry in relation to the plaintiffs will clearly be relevant to the similar issues in this proceeding.

[66] In my opinion, relevance is plainly established. Mr Ivory indicated that the plaintiffs would make discovery of such material as was held by them. That indication must, in my view, meet the primary objectives of the defendants in respect of Category 6. There would, in my view, be an element of oppression in requiring the plaintiffs to list publicly available documents not in their possession when other avenues of inquiry would be likely to be open to the defendants.

[67] Accordingly, the plaintiffs are to give discovery of all documents falling within Category 6 that are in their possession or power.

Category 7

[68] *All documents not already discovered in the plaintiffs' Interim List of documents relating to the inquiry by the State Services Commissioner into management of the scampi fishery, including but not limited to any evidence, documents or submissions presented to that Inquiry.*

[69] The second defendant says that these documents are relevant in the same way as those sought in Category 6. Documents in both categories are vitally important, the defendants say, to an assessment of causation, because it will be critical for the defendants to gain a full and complete knowledge of the involvement of the second and third plaintiffs in each of the Inquiries, including the manner in which they participated, the evidence given, and the time attendance commitments of those plaintiffs.

[70] Although relevance and oppression issues were initially raised by the plaintiffs, it appears that the plaintiffs' chief concern now arises from the existence of confidentiality or secrecy orders imposed by the Commissioners of the State Services Commission in respect of documents produced or referred to in the course of that inquiry. I was not provided with a copy of the orders concerned, and argument as to the implications of the confidentiality/secrecy orders was limited. The orders can not have the effect of precluding the plaintiffs from making discovery in the ordinary way, that is, by listing the documents but claiming that they are unable to produce them for inspection by reason of the extant orders of the State Services Commission.

[71] The effect of the orders can be considered in the context of an application by the defendants for production of the documents concerned or in terms of a separate application made for the purpose of determining the rights of the parties in the context of the secrecy orders. I am not, however, prepared to deal with the impact of the orders without more information than is currently available. I simply observe

that any party to this proceeding who was not a party to the Inquiry is unlikely to have standing to apply to the Commission for a variation of the secrecy orders. The plaintiffs were parties and given their overall discovery obligations, it seems to me that it is incumbent upon them to approach the Commissioners in order to obtain the necessary dispensations. However, I make no express finding on the point, given the limited understanding I have of the matter.

Category 8

[72] *Any documents relating to proceedings CP20/97, CP327/97, CP357/97, CP21/98 and CP262/98 in the High Court of New Zealand, Wellington Registry, and CA 165/00 in the Court of Appeal*.

[73] The proceedings concerned were brought by fishing companies against the Ministry in relation to the conduct of the Ministry in respect of fishing quota issues involving inter alia the first plaintiff. The second defendant says that the proceedings are relevant to truth defences (relationship between the plaintiffs and the Ministry), to the common law qualified privilege defence (matters of public interest), to the honest opinion defence (matters which can be said to be general public knowledge) and to causation issues.

[74] Although this ground of discovery was opposed by the plaintiffs on the ground that the documents are only "marginally relevant", the plaintiffs are prepared to discover the pleadings, affidavits and bundles of documents in the proceedings concerned and indeed have already done so in respect of two of the proceedings. The description of the documents sought in this category is broad. It appears to refer to "any documents relating to [the proceedings]". That would presumably include all documents relating to the conduct of the proceedings and not just the documents filed in the proceedings.

[75] While the second and third plaintiffs claim to have been distracted by their participation in the two Inquiries, that allegation does not extend, as I understand it, to participation in the proceedings referred to in Category 8. There is insufficient

material before the Court to justify an order for discovery of anything more than the pleadings, affidavits and common bundles in each of the proceedings referred to.

Category 9

[76] *All documents relating to the work undertaken in respect of which the following costs are claimed in paragraph (v) of Schedule A of the second amended statement of claim:*

(a)	*Communications advice allegedly totalling:*	*$ 390,697.95*
(b)	*Private investigation costs allegedly totalling:*	*$ 52,107.50*

[77] The plaintiffs say that they are entitled to recover from the defendants sums paid to their public relations advisers and their private investigator respectively, who were engaged for the primary purpose of assisting them to participate in the Inquiries and to bring the present proceeding. They argue that the sums claimed are not in issue and that documents relating to the retention of these advisers are privileged.

[78] The existence of privilege does not absolve a party from giving discovery of protected documents. The documents concerned must be discovered in a further list of documents. If there is a legitimate claim to privilege then in the ordinary way the claim can be set out in the appropriate part of the list. Disputed questions of privilege can be resolved in the context of the claim then made.

Category 10

[79] *All documents relating to the first plaintiff's hoki fishing activities and catch history from inception up to and including the 2003/2004 fishing year including records of voyages and catches by vessel and area*.

[80] The second defendant says that these documents are relevant to the plaintiff's claim for special damages in respect of hoki. Although the plaintiffs formally oppose this aspect of the application, they are prepared to discover documents covering the years 1999 – 2004 inclusive. I am not certain whether, given that

indication, there remains an area of dispute. If there is, the matter may be raised by counsel by way of memorandum.

Category 11

[81] *The "Blue Book" referred to in Schedule A (vi)(a)(3) and (vi)(e)(f) of the second amended statement of claim for 2001 – 2004.*

[82] This aspect of the application is not opposed and the plaintiffs are directed to make discovery accordingly.

Category 12

[83] *The following documents referred to in and/or relevant to Schedule A (vi)(a) of the second amended statement of claim: any copies of the published industry data referred to in subparagraph (a)(3); the records of product conversions and prices obtained for each product grade referred to in subparagraph (a)(4); the records of sales revenue referred to in subparagraph (a)(5); the documents evidencing the WACC referred to in subparagraph (a)(6); and any other documents relevant to the calculations contained in Schedule A (vi)(a) of the second amended statement of claim.*

[84] The second defendant says that the documents sought in this category are relevant to calculations contained in Schedule A (vi)(a) of the second amended statement of claim. That appears to be correct. The plaintiffs formally oppose this aspect of the application but say that they will discover unprivileged documents to the extent that they have not already been discovered, but they say that source documents will not be disclosed except on the basis of a supervised audit because discovery and inspection would otherwise be oppressive.

[85] I have already dealt with and rejected the claim for oppression. The plaintiffs' preparedness to discover certain documents indicates, I assume, an acceptance that the documents as a class are relevant. Hard copy documents must be discovered along with electronic records and, of course, the plaintiffs' discovery

obligations include documents for which privilege is claimed. The defendants are entitled to discovery of the documents set out in Category 12.

Category 13

[86] *The following documents referred to in and/or relevant to Schedule A (vi)(b) of the second amended statement of claim: catch records per quota species during the 1993 – 2001 fishing years; the catch records per quota species for the 2002/03 fishing year; any copies of the published industry prices for the 2002/03 fishing year; the lease performance including revenue records per species during the 1993 – 2002 fishing years; the lease performance including revenue records per species for the 2002/03 fishing year; any copies of the published industry prices in respect of each species during the 2002/03 fishing year; any copies of the published industry prices for quota for each species during the 2002/03 fishing year; actual prices obtained by the first plaintiff for 2002/03 per species and any other documents relevant to the calculations contained in Schedule A (vi)(b) of the second amended statement of claim.*

[87] The second defendant says that this aspect of its application relates to Schedule A (vi)(b) of the second amended statement of claim. The position here is precisely the same as for Category 12 and the plaintiffs are directed to make discovery sought accordingly.

Category 14

[88] *The following documents referred to in and/or relevant to Schedule A (vi)(c) of the second amended statement of claim: catch records per quota species during the 1993 – 2002 fishing years; the catch records per quota species for the 2003/04 fishing year; any copies of the published industry prices for the 2003/04 fishing year; the lease performance including revenue records per species during the 1993 – 2002 fishing years; the lease performance including revenue records per species for the 2003/04 fishing year; any copies of the published industry prices in respect of each species during the 2003/04 fishing year; any copies of the published industry prices for quota for each species during the 2003/04 fishing year; actual*

prices obtained by the first plaintiff for 2003/04 per species and any other documents relevant to the calculations contained in Schedule A (vi)(c) of the second amended statement of claim.

[89] The second defendant says that these documents are relevant to the calculations contained in Schedule A (vi)(c) of the second amended statement of claim. Again the issues are the same as those in Category 12, and the plaintiffs are directed to make discovery accordingly.

Category 15

[90] *All documents relating to the operation of the fishing vessel Brac for the 2003/04 fishing year.*

[91] The second defendant says that these documents are relevant to Schedule A (vi)(c)5 and 7 of the plaintiffs' second amended statement of claim which comprises part of the calculation of special damages referring specifically to the vessel concerned. The plaintiffs say that the request is too broad and diffuse. Mr Ivory did not enlarge upon that claim in argument. I am unable to follow it. The documents sought are plainly relevant to aspects of the plaintiffs' claim for special damages. The plaintiffs are accordingly directed to give discovery of the documents sought in Category 15.

Category 16

[92] *All documents relating to the operation of the fishing vessel Petersen for the 2001 – 2004 fishing years including documents evidencing or relating to the costs of the Petersen for each voyage in the 2003/04 fishing year.*

[93] The second defendant says that the documents sought are relevant to aspects of the plaintiffs' claim for special damages but mainly those set out in paras (vi)(c)5 and 6, (vi)(d), and para (vii) on p 54 of Schedule A.

[94] The issues here are precisely the same as those which arise in respect of Category 15. The plaintiffs are accordingly directed to make discovery of the documents sought in Category 16.

Category 17

[95] *Any documents recording the first plaintiff's catches and sale prices of orange roughy and oreo in the 2003/04 fishing year; and any other documents relevant to the calculations contained in Schedule A (vi)(d) of the second amended statement of claim.*

[96] The second defendant says that these documents are relevant to the calculations contained in Schedule A (vi)(d) of the second amended statement of claim. The plaintiffs say that discovery would be oppressive but they are prepared to discover unprivileged documents to the extent that they have not already been discovered. Source documents will not, however, be disclosed except on the basis of a supervised audit.

[97] The plaintiffs are directed to make discovery as sought in Category 17. I have already dealt with the oppression point and I have likewise already observed that the plaintiffs discovery obligations include an obligation to list privileged documents. For completeness and to avoid any misunderstanding, discovery is to include source documents, including, as relevant, hard copy documents.

Category 18

[98] *All documents relating to the operation of the fishing vessel Ocean Dawn for the 2001 – 2004 fishing years*.

[99] The second defendant says that these documents are relevant to Schedule A, para (vi)(e), and para (vii) on p 54 of the second amended statement of claim. The plaintiffs say that this category is too broad and diffuse. In my opinion it is not. The class of documents sought is relevant to the claims for damages arising from the

allegation that it became necessary to use the vessel concerned for scampi fishing instead of hoki. The plaintiffs are directed to make discovery accordingly.

Category 19

[100] *The following documents referred to in and/or relevant to Schedule A (vi)(e) of the second amended statement of claim; catch records evidencing the hoki catch per day during the 2000/01, 2001/02 and 2002/03 fishing years; all records of product conversion ratios; all records of the volume of hoki sold and actual prices obtained for hoki in the 2003/04 fishing year; any copies of the published industry data referred to; and any other documents relevant to the calculations contained in Schedule A (vi)(e) of the second amended statement of claim.*

[101] The second defendant says that the documents sought are relevant to the calculations contained in Schedule A (vi)(e) of the second amended statement of claim. The plaintiffs' opposition is based upon the same grounds as those which I have rejected in respect of a number of earlier paragraphs, namely that the plaintiffs are bound to discover only unprivileged documents and that they are not bound to discover source documents except on the basis of a supervised audit.

[102] The defendants are entitled to discovery of the documents sought in Category 19.

Category 20

[103] *All documents not already discovered in the plaintiffs' Interim List of documents relating to the first plaintiff's proposed retail fish market at Botany Downs, including but not limited to the various documents referred to in Schedule A (vi)(f) of the second amended statement of claim, the diaries of the first defendant's management team including the second and third plaintiffs for 2002, 2003 and 2004 and any other documents relevant to the calculations contained in Schedule A (vi)(f) of the second amended statement of claim.*

[104] The second defendant says that these documents are relevant to the calculations contained in Schedule A (vi)(f) of the second amended statement of claim, which focuses upon the plaintiffs' claim that they were obliged to abandon a proposed retail fish market at Botany Downs by reason of the impugned publications of the defendants.

[105] The plaintiffs say that they will discover any relevant diary entries and any unprivileged documents not already discovered that are relevant to the special damages claim.

[106] I have already commented on more than one occasion upon the claimed reservation of privileged documents. The issue of privilege is irrelevant for present purpose. The plaintiffs appear to accept that documents in this category are relevant to their damages claim and they are accordingly directed to make discovery of documents in Category 20.

Category 21

[107] *All documents relating to the first plaintiff's engagement in the skipjack and yellowfin tuna high sea fishing activities from 1999 to 1 October 2004, the plaintiffs' records of catches of skipjack and yellowfin tuna for the years 1999 – 2004; any copies of records of industry catches of skipjack and yellowfin tuna for the years 1999 – 2004; all records of sales and prices obtained for skipjack and yellowfin tuna for the 2002/03 and 2003/04 fishing years; all documents evidencing or relating to the cost per voyage and the catch tonnage per voyage of the first plaintiff's skipjack and yellowfin tuna fishing vessels in the 2002/03 fishing year, and any other documents relevant to the calculations contained in Schedule A (vi)(g) of the second amended statement of claim.*

[108] These documents are sought by the second defendant upon the ground that they are relevant to the damages calculations contained in Schedule A (vi)(g) of the second amended statement of claim. The plaintiffs do not dispute relevance. Rather, they claim oppression and say that source documents will not be disclosed except on

the basis of a supervised audit. I have already rejected those arguments. The plaintiffs are directed to make discovery of the documents sought in Category 21.

Category 22

[109] *All documents evidencing or relating to the provisional catch history of "not less than 675,311 tonnes" or to the calculation of that figure in Schedule A (x)(a) of the second amended statement of claim.*

[110] Discovery in this category is not opposed by the plaintiffs, who are directed to make discovery accordingly.

Category 23

[111] *All documents evidencing or relating to the first plaintiff's scampi catch, conversion rates for scampi, sales and prices obtained for scampi for the 2001/02 and 2002/03 fishing years, and any other documents relevant to the calculations contained in Schedule A (x) of the second amended statement of claim.*

[112] The second defendant says that these documents are relevant to the calculations contained in Schedule A (x) of the second amended statement of claim. That is not disputed by the plaintiffs, who rely on the same grounds of opposition as raised in respect of Category 21. I have already rejected those grounds. The plaintiffs are accordingly directed to make discovery of the documents sought in Category 23.

Category 24

[113] *All documents relevant to the calculation of the contribution margins and the figure of "approximately 551,920 metric tonnes" referred to on p 53 of Schedule A of the second amended statement of claim; the quality of the scampi catch and the variable costs of scampi fishing in the 2003/04 fishing year; scampi conversion costs during the 2001/01 fishing year; prices and revenue obtained for each scampi product during the 2003/04 fishing year; all documents relevant to the running costs and operation of the "five scampi vessels" referred to in Schedule A (p 54, para vii*

and p 55, para viii of the second amended statement of claim); the actual costs incurred by the first plaintiff during the 2003/04 fishing year; and any other documents relevant to the calculations contained on pp 53-55 of Schedule A of the second amended statement of claim.

[114] The second defendant says that the documents sought under this category are relevant to the plaintiffs' special damages claims on pp 53-55 of Schedule A of the second amended statement of claim. The grounds of opposition are the same as those in respect of Category 23. I reject them for the reasons already given and direct the plaintiffs to make discovery of the documents falling within Category 24.

Category 25

[115] *Any documents relating to the introduction or possible introduction of scampi into the Quota Management System including any documents relating to the deliberations or decisions of the Ministry of Fisheries regarding that issue.*

[116] The second defendant says that documents in this category are relevant to the plaintiffs' claim for special damages in Schedule A of the second amended statement of claim and in particular paras (vii)-(x) thereof.

[117] In Schedule A para (x) of the second amended statement of claim, the first plaintiff makes claims for sums of $2,136,129.00 and $6,250,795.00, on the basis that "if scampi had been introduced into the QMS on 1 October 2003 the probable result would have been" that it would have made greater profits in the 2002/03 and 2003/04 fishing years.

[118] The plaintiffs raise a number of objections to discovery in this category. The first is against the second defendant. They say that the documents concerned are not sufficiently in issue by reason of the claimed inadequacy of the particulars contained in the second defendant's statement of defence. They do not, however, oppose discovery on the ground of relevance in respect of the first defendant's equivalent Category 15, which relates to the introduction of scampi to the Quota Management System and to the plaintiffs' claim that such introduction was deferred by reason of

the defendants' publications, with the result that scampi was introduced at a later point than would otherwise have been the case. The second defendant denies the allegation that the later introduction of scampi to the Quota Management System was the result of the defendants' publications. It does not plead detailed particulars but in my view is not obliged to do so where it is simply responding by way of denial to an allegation of the sort in issue here. The second defendant's pleading sufficiently puts in issue documents relating to the introduction or possible introduction of scampi which might shed light on the Ministry's reasons for the deferral. That ground of opposition for discovery accordingly fails.

[119] The plaintiffs also say that the category of documents sought is too broad and diffuse. I do not accept that argument. The class of documents concerned is perfectly adequately defined by the second defendant.

[120] The plaintiffs also rely on the oppression ground, which I have earlier rejected.

[121] Finally, they say that the documents concerned are publicly available, but no detail is provided in support of that contention and, as already observed, that ground would not ordinarily absolve a party from giving discovery of documents in its power, possession or control.

[122] The plaintiffs are accordingly directed to give discovery of the documents sought in Category 25.

Category 26

[123] *All documents relating to the sale of the fishing business of the first plaintiff to Sanford Limited referred to in Schedule A (vi) of the second amended statement of claim, including but not limited to the information memorandum, the sale contract, all documents made available on due diligence in respect of that sale, and all queries raised by or on behalf of Sanford Limited and responses given by or on behalf of the first plaintiff regarding the fishing business of the first plaintiff.*

[124] The plaintiffs opposed discovery in this category on the basis that the sale to Sanford was confined to the assets of the first plaintiff's business comprising principally the fishing vessels, their equipment and quota entitlements.

[125] Mr Ivory submits that the extent of the sustainable earnings derived from the business in the hands of the first plaintiff was not a matter of relevance to Sanford but that if any documents created in the course of the sale to Sanford dealt with issues of trading or profitability, then the plaintiffs will discover them.

[126] Mr Gray for the second defendant made detailed submissions in support of the claim for discovery in this category. He said that the documents sought were clearly relevant because:

a) They should indicate the financial and management position of the first plaintiff subsequent to the alleged defamation;

b) They should indicate how the business and its component parts were valued subsequent to the alleged defamation;

c) They should indicate the future outlook for the business;

d) They are likely to provide a comparison between the way in which the first plaintiff presented the state of its business to Sanford following the alleged defamation and the way in which the first plaintiff has presented the state of its business in its pleadings of alleged loss in this proceeding. That may provide a useful benchmark for assessing the credibility of the damages claim;

e) They would constitute a valuable cross-examination tool in relation to assumptions and claims made in respect of the plaintiffs' alleged losses. Such documents are relevant and discoverable: *Security Pacific Asia Limited v SBSA (NZ) Limited* (1993) 6 PRNZ 624 at 630.

f) They may be relevant to mitigation issues;

g) They are likely to include documents in which issues relevant to the first plaintiff's fishing activities, profitability and value are discussed.

[127] In my view, the documents sought in Category 26 are relevant and ought to be discovered. As Mr Galbraith submits, the sale of the assets to the Sanford is most unlikely to have been conducted at book value. The earning capacity of the assets transferred must have been of primary importance to the purchaser, especially given that quota passed with the other assets.

[128] Mr Gray's arguments for the second defendant are compelling. The plaintiffs are directed to make discovery of the documents falling within Category 26.

Category 27

[129] *All documents evidencing or relating to the alleged longstanding commercial rivalry between the first plaintiff and the third and fourth defendants and the alleged extensive and acrimonious litigation between them (referred to in Schedule C (ii) of the second amended statement of claim).*

[130] Discovery of documents falling within this category is not opposed, and the plaintiffs are directed to give discovery accordingly.

Category 28

[131] *All documents relating to the alleged "promotion" by the third and fourth defendants of affidavits so as to cause damage to the plaintiffs (referred to in Schedule C (iv) of the second amended statement of claim).*

[132] The second defendant says that these documents are relevant to the allegations contained in Schedule C (iv) of the second amended statement of claim.

[133] The plaintiffs resist discovery on the basis that the documents concerned ought to be available to the second defendant from the other defendants. That is not a proper objection. The documents held by the plaintiffs may not be identical to

those held by other parties. They may contain additions or alterations, or be different versions of the same basic document.

[134] In ordinary circumstances a party who is obliged to make discovery of a document is not entitled to resist discovery and production on the basis that the document may be obtained elsewhere.

[135] The plaintiffs are directed to make discovery of the documents set out in Category 28.

Category 29

[136] *Any documents evidencing the organisational structure of the first plaintiff and/or its fishing business, fishing operations, employees, vessels and/or available quota during the period 2000 – 2004.*

[137] Discovery of documents in this category is not opposed by the plaintiffs, although they say that there are few, if any, documents falling within this category.

[138] The plaintiffs are accordingly directed to give discovery of documents falling within this class.

Category 30

[139] *All Board papers, Board minutes and other minutes and records of management meetings of the first plaintiff during the period 1990 to 1 October 2004.*

[140] The second defendant says that the documents sought are relevant to the special damages claim set out in Schedule A, para (vi) (which alleges that the first plaintiff suffered losses through being obliged to concentrate on the Inquiries, rather than running the first plaintiff's existing business or further developing existing or new projects); and also the special damages claims contained in Schedule A para (x) on p 51 of the second amended statement of claim.

[141] The plaintiffs say that the discovery sought is too broad and diffuse. They also maintain the oppression argument which I have earlier rejected.

[142] In my view, although the defendants are entitled to some discovery under this head, the breadth of the claim in Category 30 is much too wide. In broad terms, the inquiries which occupied the time of the second and third plaintiff as outlined in Schedule A (vi) and (x) commenced in or about November 2002 and were concluded by May 2004. The defendants are entitled to the documents of the class sought in Category 30 for those years and for a reasonable prior period for comparison purposes, but records going back as far as 1990 can not be relevant.

[143] The plaintiffs are directed to make discovery of the documents falling within Category 30 for the period 1 January 1999 – 1 October 2004.

The supervised audit procedure

[144] It is appropriate to say something more about the plaintiffs' proposals for a supervised audit procedure which they contend would sufficiently discharge the greater part of the plaintiffs' discovery obligations. The proposals set out in Mr McCullagh's affidavit and further explained in Mr Ivory's submissions involve access by the defendants' accounting witnesses to the plaintiffs' electronic database under the supervision (at least in the first instance) of the plaintiffs' expert accountants and financial managers. Such supervision is necessary, at least in the first instance, the plaintiffs argued, in order that the defendants' experts could become familiar with the content and organisation of the first plaintiff's electronic records. Once that has been achieved then the defendants' experts may be provided with disks containing such relevant material as they require for their own purposes.

[145] Mr McCullagh says that the first plaintiff is a company which entered transactions as they occurred into the database and operated its financial affairs via the database, rather than by reference to paper records. There are no paper, cashbooks or ledgers, for example. But there is a wealth of data in the electronic discovery which if discovered in paper form would be unmanageable, in Mr McCullagh's opinion.

[146] Although the plaintiffs are of the view that access to the first plaintiff's electronic records ought to be sufficient for the defendants' purposes, they propose a random audit of paper documents underlying the information extracted from the electronic database. They say that any such random audit would need to be conducted by the parties' experts and the plaintiffs' staff as a combined exercise. The plaintiffs' proposal is that if, following a limited random audit, it was established the records contained within the electronic database were broadly accurate, then there ought to be no further resort to paper documents.

[147] I have already rejected that proposal, for the reasons given earlier in this judgment, but it is appropriate to record the general acceptability of co-operation between expert witnesses instructed for opposing parties. Co-operation between them is expressly mandated in the rules laid down for the carrying out of the role of an expert witness. It is inevitable, given the complexity of the first plaintiff's electronic database, that the defendants' experts will need a great deal of assistance in coming to grips with the organisation and content of that database. That assistance has already commenced. Mr Hagen has expressed some criticisms of the extent to which he has been afforded access to the material to date and as to the organisation and relevance of the material so far provided to him in disk form. Be that as it may, it is self-evidently appropriate that there be a continuing level of co-operation and consultation between the experts, particularly where, as here, there are some records which may not be supported by paper documents. However, as discussed earlier in the judgment, I do not think that the defendants ought to be compelled to accept what can be gleaned from the database as a sufficient compliance with the plaintiffs' discovery obligations. Nor do I think that the limited and supervised audit procedure proposed by the plaintiffs is an adequate solution in the context of this complex claim involving a very large and somewhat innovative claim for damages.

Plaintiffs' discovery to date

[148] As Mr Ivory pointed out, the plaintiffs have already discharged their discovery obligations to a significant degree. They have filed two lists of documents and have afforded the defendants' experts access to their electronic database. I have,

however, held that further discovery ought to be made. In giving the directions which appear in the course of my discussion of the various categories set out above, I have not thought it necessary to record the extent to which the plaintiffs have already made discovery in the category concerned. It goes without saying, however, that nothing in this judgment obliges the defendants to make discovery twice over.

Timing

[149] Nothing was said in argument about the time within which the plaintiffs ought to comply with the orders made in this judgment. That is not surprising, given that the nature and extent of those obligations will be unknown to the parties until delivery of the judgment itself. It may be that the parties can agree upon an appropriate timetable for further discovery and inspection but, as might well be the case given the history of the litigation, if agreement can not be reached, counsel may file memoranda setting out their proposals (and counter-proposals). At the conclusion of Judgment No 7, delivered contemporaneously with this judgment, I indicate that there will be a telephone conference at 9.00 am on Thursday, 23 August 2007. Issues arising in consequence of both judgments may be discussed at that time.

Confidentiality

[150] Mr Ivory reminded me in argument that confidentiality undertakings have been given by the defendants and their counsel and experts prior to their inspection of the plaintiffs' documents. Those undertakings are to apply also to documents discovered and produced in consequence of this judgment.

Costs

[151] The defendants have substantially succeeded in their applications and are accordingly entitled to costs. Counsel may file memoranda if they are unable to agree as to quantum.

C J Allan J