IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-1312
[2020] NZHC 2062

BETWEEN	JOHN DOUGLAS SELLMAN First Plaintiff
	BOYD ANTHONY SWINBURN Second Plaintiff
	SHANE KAWENATA FREDERICK BRADBROOK Third Plaintiff
AND	CAMERON JOHN SLATER First Defendant

Cont'd …/2

Hearing: 17 July 2020

Appearances: D M Salmon and J P Cundy for the plaintiffs
C J Slater in person
E J Grove for the second and third defendants
W Akel and J Baigent for the fourth and fifth defendants

Date of judgment: 14 August 2020

JUDGMENT NO 9 OF PALMER J (Corrected)

This judgment was delivered by me on Friday 14 August 2020 at 1.30pm.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Counsel/Solicitors:
D M Salmon, Barrister, Auckland
William Akel, Barrister, Auckland
Lee Salmon Long, Auckland
Shanahans Law Ltd, New Lynn, Auckland
Chris Patterson Barrister Ltd, Auckland
Andrew Walter Graham & Co, Auckland
Simpson Grierson, Auckland
Official Assignee, Wellington

CARRICK DOUGLAS MONTROSE GRAHAM
Second Defendant

FACILITATE COMMUNICATIONS LIMITED
Third Defendant

KATHERINE RICH
Fourth Defendant

NEW ZEALAND FOOD AND GROCERY COUNCIL INC
Fifth Defendant

Summary

[1] The plaintiffs sue the defendants for defamation, with a trial set down for four weeks from Monday 15 February 2021. On 17 July 2020, an oral examination of Mr Cameron Slater and Mr Carrick Graham was conducted before me. I also heard argument on two applications for discovery. I order Mr Graham and his company Facilitate Communications Ltd (FCL) to provide the further discovery sought by the plaintiffs, which was already encompassed in previous discovery orders.

[2] Plaintiffs in defamation are entitled to know the precise nature of a defence of truth raised against them in sufficient detail so they can meet it, whether it is raised by the author of an allegedly defamatory statement or by a non-author such as a publisher or procurer of the statement. Defendants pleading the defence of truth are required to plead particulars which are capable of proving the truth of the allegedly defamatory meanings. That puts incentives on all participants in a potentially defamatory publication to take reasonable care to avoid unlawful defamation. Mr Graham and FCL cannot seek discovery in order to fish for particulars they do not have. I decline to order the wide-ranging discovery orders they seek, other than that which the plaintiffs have offered to provide and one additional category which is related to particulars provided. That must be provided forthwith, if it has not been already.

Oral examination

[3] Rule 8.42(b) of the High Court Rules 2016 (the Rules) provides that, if a party fails to answer an interrogatory sufficiently, a Judge may order the party to attend to be orally examined. In *Sellman v Slater (No 6),* on 23 November 2018, I ordered the oral examination of Mr Cameron Slater and Mr Carrick Graham.[1] I stated:

> [60] I have examined Mr Slater's and Mr Graham's answers to interrogatories. I am concerned their statements that Whaleoil did not publish blogposts for reward are not consistent with the evidence to which the plaintiffs point, which suggests that was done in specific instances. They are inconsistent with reasonable inferences from the emails obtained by the plaintiffs. And they are inconsistent with Mr Graham belatedly accepting he did do so in respect of blog posts about Mr Clague once evidence of that was adduced. I am also concerned a number of other aspects of the interrogatories may not have been properly responded to, regarding: who was the author of the blog posts; the

[1] *Sellman v Slater (No 6)* [2018] NZHC 3057 at [61] and [66](e).

> involvement of each of the defendants in their preparation; downloading of blog posts; authorship of the comments; and payments received. I consider Mr Slater and Mr Graham have made insufficient answer to the interrogatories.
>
> [61] I consider the most efficient means to elicit answers to the plaintiffs' questions is for Mr Slater and Mr Graham to attend Court for up to one day to be orally examined. I am satisfied that is likely to be more effective than going through what may be several more unproductive rounds of exchanges of correspondence or waiting for trial. Oral examination should occur after the discovery ordered above has been provided. The questions they are to be asked are to be related to the responses to the interrogatories, or discovery provided since the original interrogatories, and relevant to the issues at trial.

[4] The examination was delayed for various reasons, as explained in minutes and a judgment issued on 17 July 2019.[2] It was held on 17 July 2020.

[5] There is little New Zealand authority about the conduct of an oral examination.[3] In nineteenth century England, *Litchfield v Jones* held that the scope of an examination is limited to obtaining a proper answer to interrogatories.[4] But the order for oral examination here stated the questions "are to be related to the responses to the interrogatories, or discovery provided since the original interrogatories, and relevant to the issues at trial".[5] I reminded counsel of that by minute beforehand and at the examination.[6]

[6] The oral examination was conducted in open court before me by way of cross-examination by counsel for the plaintiffs, Mr Salmon. At Mr Salmon's suggestion, I inquired whether Mr Slater's former counsel, Mr Brian Henry, would be available to assist, as he was present at court, but he advised he was not. However, he did advise that Mr Slater's focus was likely to dissipate after an hour or so, given his medical condition. The examination did not take much longer than that. I did not discern that Mr Slater was impaired in answering questions. At one point, he was offered a break but he declined.

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2 *Sellman v Slater (No 8)* [2019] NZHC 1666; *Sellman v Slater* HC Auckland CIV-2016-404-1312, 2 April 2019 (Minute No 15); *Sellman v Slater* HC Auckland CIV-2016-404-1312 17 April 2019 (Minute No 16).

3 *Hawkins v Ayers* (1995) 9 PRNZ 138 (HC).

4 *Litchfield v Jones* (1885) 54 LJ Ch 207.

5 *Sellman v Slater (No 6),* above n 1, at [61].

6 *Sellman v Slater* HC Auckland CIV-2016-404-1312, 13 July 2020, (Minute No 24) at [6].

[7] Because Mr Slater was representing himself, I invited Mr Grove to raise objections if he considered that questions should be objected to. Mr Grove asked if Mr Akel, counsel for the fourth and fifth defendants, could assist him in this. Mr Salmon objected to Mr Akel objecting, since his clients were potentially the subject of some of Mr Slater's answers. That did not prevent Mr Akel from seeking to be heard on a couple of occasions. I dealt with objections as they arose. But this does not prevent the trial judge from considering further objections to the admissibility of answers in the context of the trial, for example on the grounds of relevance to the issues as they then appear to be.

[8] During his oral examination, Mr Graham undertook to provide discovery of relevant information which:

(a) he is able to access from email accounts he now realises were his, after attempting to obtain their passwords;

(b) arises from Voyager's response to his earlier request for information; and

(c) derives from his ongoing requests under the Official Information Act 1982 and Privacy Act 1993.

Issue 1: Must Mr Graham discover more invoices?

[9] During the course of the oral examination of Mr Graham, a question arose as to whether Mr Graham is required to discover invoices which he does not consider relevant to the issues at trial but which the plaintiffs do consider relevant. The invoices were sent by him and/or FCL to other clients in the food, alcohol or sugar industries. Mr Graham and FCL discovered the invoices they sent to Mrs Rich and FGC but not those they sent to other clients. Paragraph [22] of the Statement of Claim pleads that Mr Graham and FCL were paid by the other defendants "and/or other parties not yet known" to publish blogging material and conduct campaigns. Mr Graham and FCL deny this allegation in their statement of defence.

Relevant law of discovery

[10] In *Sellman v Slater (No 6)*, I outlined the nature of these proceedings and the requirement that documents sought under an application for particular discovery must be relevant to the issues in the proceeding.[7] In summary, under r 8.19, where 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", a Judge may order that party:

> (a) to file an affidavit stating:
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> (i) whether the documents are in that party's control; and
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> (ii) if they have been but are no longer in the party's control, that party's best knowledge and belief as to when they ceased to be in the party's control and who now has control of them; and
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> (b) if they are in the person's control, to make the documents available for inspection under r 8.27.

[11] The threshold for "grounds for believing" is lower than the balance of probabilities.[8] The party seeking discovery has to establish the existing affidavit is incomplete and a four-stage approach is convenient.[9]

Submissions

[12] Mr Salmon, for the plaintiffs, submits that if the allegation that the parties were paid is true, it is relevant to damages and to the defence of honest opinion. He submits that who is paying for defamatory statements is also relevant to the defence of honest opinion. For example, it might make a difference if it were big tobacco companies rather than an independent bystander. If Mr Graham seeks confidentiality over client details so there is no wider publication of who paid for the statements, Mr Salmon would recommend to his clients that be accommodated. He submits the discovery required does not affect all of Mr Graham's and FCL's clients, only those involved in

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7 *Sellman v Slater (No 6)*, above n 1, at [2]-[15] and [24]-[25].
8 *Lighter Quey Residents' Society Inc v Waterfront Properties (2009) Ltd* [2017] NZHC 818 at [16].
9 At [16].

campaigns against public health researchers. He submits what is requested is ordinary discovery based on the pleadings and is unlikely to concern a large volume of documents. He says the key is the identification of who else might have information if Mr Graham and FCL do not. He submits there is no evidential basis to suggest the plaintiffs would not treat the information appropriately.

[13] Mr Grove submits the discovery sought is for some unspecified period, would require searching through invoices to all clients and would include a wide amount of irrelevant material. He submits only relevant documents should be caught by discovery. He complains that the plaintiffs' use of material obtained from Rawshark does not inspire confidence that they would not breach confidentiality and suggests the Court or a Registrar should sort through the documents.

Decision on further discovery by Mr Graham and FCL

[14] In *Sellman v Slater (No 6)*, I held there were grounds for believing Mr Graham and FCL had not discovered documents relating to "invoices and details of services they provided to clients that were relevant to the plaintiffs".[10] I stated:

> [32] Particular discovery will have to comply fully with the requirements of r 8.16. I also consider that the details of the services, including terms of services, provided by Mr Slater, Mr Graham and FCL that relate to the subjects of the relevant blog posts and comments are discoverable. If these defendants undertook to provide services to clients that were generically expressed but potentially encompassed attacks on the plaintiffs by blogpost and comment, that is potentially relevant to their defences and damages and must be disclosed.
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> [33] However, I am concerned the discovery orders the plaintiffs seek are too broadly framed and may capture information not relevant to the proceeding. I make a somewhat narrower set of orders relating to Mr Slater, Mr Graham and FCL, as set out at the end of this judgment. In particular, I do not consider that all research or advocacy regarding regulation of the alcohol, food and beverage and tobacco industries are necessarily relevant to issues in this defamation case. Such material must only be disclosed if relevant.

[15] I ordered:[11]

> (b) Mr Slater, Mr Graham and FCL will provide further particular discovery to the plaintiffs and other defendants, within 15 working days of this judgment, of:

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10 *Sellman v Slater (No 6),* above n 1, at [31](d).
11 At [66].

(i) documents passing between them, and between them and third parties including any of NZFGC's members, relating to:

…

(2) publication of the blog posts, comments or other material on Whale Oil that are the subject of this proceeding and/or that concern the plaintiffs;

(3) the services provided by Mr Slater, SMC, Mr Graham or FCL (including invoices for the services), including in relation to the alcohol, food and beverage or tobacco industries, which relate to the subjects of the blog posts or comments that are the subject of this proceeding;

[16] I consider these orders, especially that in (b)(i)(3) above, encompass the invoices in dispute here. These documents should already have been discovered. They are likely to be relevant, for the reasons Mr Salmon gives. They may be important to the case, though they may prove not to be. Mr Graham appears to acknowledge they may exist. I cannot see any basis to suggest discovery would be disproportionate. I order the discovery sought. As usual, the information disclosed as a result may only be used by the plaintiffs for the purposes of this proceeding, not any wider or other purpose. I expect their counsel to explain that clearly to the plaintiffs. I am confident the plaintiffs will abide by that. If Mr Graham and FCL request the plaintiffs give an undertaking of confidentiality, I expect the plaintiffs will provide one. I do not see any reason justifying restriction of the material to counsel.

Issue 2: Must the plaintiffs provide further discovery?

[17] Mr Graham and FCL also apply for particular discovery from the plaintiffs. The application was not dealt with in *Sellman v Slater (No 6)* because it was agreed that it would be revisited after repleading.[12] The application now pursued seeks discovery of:

(a) records relating to any funding and/or remuneration sought by and/or paid to the plaintiffs or any organisation of which they were a part, directly or indirectly from any government source, from 2000 onwards;

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12 At [64].

(b) records, including audits, investigations, outcomes, financial statements and/or accounts relating to use of the above funds, including those prepared by third parties for the purpose of audit or investigation, from 2000 onwards;

(c) all research papers, publications, media articles and/or presentation papers and the like by Dr Sellman from 2000 onwards; and

(d) any disciplinary records, complaints or criminal records relating to Mr Bradbrook from 2000 onwards that relate to any use of government funding.

Relevant law of the need for particulars

[18] In *Sellman v Slater (No 6)*, I considered an application for further discovery by Mrs Rich and the New Zealand Food and Grocery Council (NZFGC).[13] I noted the warning of May LJ in *Burstein v Times Newspapers* that "[i]t will, generally speaking, normally be both unfair and irrelevant if a claimant complaining of a specific defamatory publication is subjected to a roving inquiry into aspects of his or her life unconnected with the subject matter of the defamatory publication."[14] I stated:

> [52] Here, the allegedly defamatory statements are directed at the plaintiffs and their positions on matters of public policy relating to the regulation of alcohol, tobacco, sugar and fat. If any of the plaintiffs' conduct directly and causally provoked the statements, documents about that would be discoverable, should have been discovered and still should be if they have not. And specific funding of the plaintiffs that is the subject of specific allegedly defamatory statements may also need to be discovered as relevant to defences. As Mr Salmon noted at hearing, the plaintiffs will have to review that in relation to the repleaded defences of Mr Graham and FCL. The same may be true for the other defendants.
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> [53] But Mrs Rich and the NZFGC seek discovery of information that go a long way further than that. I do not consider the public and academic profiles, publications, media and social media comments of the plaintiffs are so clearly relevant to the subject matter of the statements that there would be real risk of a decision-maker assessing damages on a false basis if they did not know of them. An order of the type sought would fall into the roving inquiry into aspects of the plaintiffs' lives, unconnected with the subject matter of these specific allegedly defamatory statements, against which Lord Justice May warns. I decline the application.

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13 *Sellman v Slater (No 6)*, above n 1, at [41]-[53].

14 *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 (EWCA) at [40].

[19] Those conclusions are relevant here. But much of the dispute between the parties about this centres on whether the defendants have a duty to provide particulars that support the defence of truth. Under s 8 of the Act, the defence of truth succeeds if the sting of imputations in a defamatory statement, or the publication taken as a whole, is true or not materially different from the truth.

[20] In *Low Volume Vehicle Technical Association v Brett* the Court of Appeal emphasised that "proper pleadings are of foremost importance in defamation proceedings" in order to "identify the contest fairly", and that "properly drawn and particularised pleadings" are "an essential road map for the Court and for the parties".[15] That means affirmative defences need to be properly pleaded, in order that the plaintiff is told what the defendant is coming to court to prove.[16] The Court of Appeal quoted its judgment in *Manukau Golf Club v Shoye Venture Ltd* that said "[o]nly if such affirmative defences are pleaded can they be defined, answered and properly analysed".[17]

[21] Section 38 of the Defamation Act 1992 (the Act) provides:

> **38 Particulars in defence of truth**
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> In any proceedings for defamation, where the defendant alleges that, in so far as the matter that is the subject of the proceedings consists of statements of fact, it is true in substance and in fact, and, so far as it consists of an expression of opinion, it is honest opinion, the defendant shall give particulars specifying—
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> (a) the statements that the defendant alleges are statements of fact; and
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> (b) the facts and circumstances on which the defendant relies in support of the allegation that those statements are true.

[22] In *APN New Zealand Ltd v Simunovich Fisheries Ltd* the Supreme Court held that s 38 "should be construed as applying only to a 'rolled up' plea in support of a defence of honest opinion and not to a defence of truth".[18] But it said nothing of substance turned on that because "[p]articulars must, in any event be provided in

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15 *Low Volume Vehicle Technical Association v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 at [62]-[63].

16 At [65]

17 At [66] citing *Manukau Golf Club v Shoye Venture Ltd* [2012] NZCA 154, (2012) 21 PRNZ 235 at [22].

18 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [39].

support of the defence of truth because they are required at common law even though the section does not apply".[19]

[23] The judgment of *Ashcroft v Foley,* by the Court of Appeal of England and Wales, is cited by the leading English text of *Gatley on Libel and Slander* for the need for a defendant to provide particulars in pleading in England and Wales the defence of justification (now called truth in New Zealand).[20] In *Ashcroft v Foley*, the three defendants were the author of an article, the editor of the newspaper which published it and the publisher. The Court did not distinguish between the level of particularisation required of the defendants, including when it held:[21]

> Particulars provided in support of a plea of justification must be both sufficient and pleaded with proper particularity. The former requirement is met if the (properly pleaded) particulars are capable of proving the truth of the defamatory meaning sought to be justified. The latter requirement is a factor to be judged not by the number of particulars provided, but by the pleading of a succinct and clear summary of the essential (and relevant) facts relied on, enabling a claimant to know the precise nature of the case against him, and providing him with sufficient detail so he can meet it.

Submissions

[24] Mr Grove says that the position of Mr Graham and FCL is that they did not author the allegedly defamatory statements. He submits that the Supreme Court in *Simunovich* clarified that s 38 of the Act applies to the defence of honest opinion, not truth.[22] And he submits no court has examined the need for particulars to be provided by a non-author at common law. He submits it makes sense for Mr Graham and FCL to have greater leeway in getting discovery of reasonable categories of documents for that reason because they do not have the supporting facts to hand that the author will. Mr Grove submits they do not insist on the time limit for discovery extending to 2000 which might be shorter. He submits the time period could be for a reasonably representative period of time, at least up to the date of the blog posts. But he submits:

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19 At [40], citing *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA).

20 *Ashcroft v Foley* [2012] EWCA Civ 423, [2012] EMLR 25, cited by Alaistair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [27.11] [*Gatley on Libel and Slander*].

21 At [49].

22 *APN New Zealand Ltd v Simunovich Fisheries Ltd,* above n 18.

(a) The three plaintiffs plead they were defamed by allegations that they received or misused public funds and Mr Graham and FCL have pleaded the defence of truth. Therefore, he submits how much public funding was sought will be relevant, as will what they did with it.

(b) A representative sample of Dr Sellman's work is requested because there is a specific defamatory allegation in the 14th cause of action that his research had no scientific basis and was not supported by evidence, to which Mr Graham and FCL have pleaded the defence of truth.

(c) One allegedly defamatory statement was that Mr Bradbrook lied to the Ministry of Health, misused funds and involves particulars regarding a disciplinary process. There is a particularised pleading at paragraph [24](d) of the third statement of defence regarding reasons the Ministry of Health cut funding of Te Reo Mārama.

[25] Mr Cundy, for the plaintiffs, submits s 38 of the Act imposes an absolute obligation on anyone who pleads a defence of truth to provide particulars, including particulars of specific instances of misconduct relied upon to justify an allegedly defamatory statement. He relies on *Simunovich* and *Wasan International Co Ltd v Lee*.[23] Otherwise, he submits, the trial becomes a roving inquiry into the plaintiffs' lives. He submits:

(a) The application for records of funding or remuneration sought or paid is too broad, disproportionate and in the nature of a fishing expedition. However, Mr Bradbrook and Dr Swinburn are prepared to discover any documents sought that are relevant to specific allegations made against him.

(b) Mr Bradbrook and Dr Swinburn are prepared to discover any audit, investigation or outcome reports relating to the use of government funds that the defendants plead in their particulars are discoverable.

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[23] *APN New Zealand Ltd v Simunovich Fisheries Ltd,* above n 18, at [39].

But that does not extend to all the accounting and financial records sought.

(c) Dr Sellman is prepared to discover public statements he has made about alcohol being similar to other drugs, which was a pleaded particular. But he is not required to discover everything he has ever written.

(d) Mr Graham does not allege there were disciplinary proceedings, complaints or criminal proceedings against Mr Bradbrook, as opposed to Te Reo Mārama, and there is no evidence that is the case. So there is no basis for an order for discovery.

Decision on further discovery by the plaintiffs

[26] As Mr Grove submits, the Supreme Court in *Simunovich* does say that s 38 means that only a rolled-up defence of truth and honest opinion requires particulars. But it also says the common law requires the particulars to be pleaded by a defendant in support of a defence of truth, anyway. Mr Grove cannot point me to any authority excepting from that rule defendants who were not the authors of the allegedly defamatory statement. The requirement for particulars in the common law of England and Wales, stated by the Court of Appeal in *Ashcroft v Foley*, makes no such distinction.

[27] I do not consider the policy rationale proposed by Mr Grove for such an exception is justified. Plaintiffs in defamation are entitled to know the precise nature of a defence of truth raised against them in sufficient detail so they can meet it, whether it is raised by the author of an allegedly defamatory statement or by a non-author such as a publisher or procurer of the statement. Defendants pleading the defence of truth are required to plead particulars which are capable of proving the truth of the allegedly defamatory meanings. That puts incentives on all participants in a potentially defamatory publication to take reasonable care to avoid unlawful defamation. Mr Graham and FCL cannot seek discovery in order to fish for particulars they do not have. With one exception, I decline to order the wide-ranging discovery orders they seek.

[28] Where Mr Graham and FCL have pleaded a defence of truth with sufficient particularity, the plaintiffs will need to provide discovery in respect of those particulars. That is achieved by the discovery the plaintiffs have offered to provide, as I have recorded above. As I stated at the end of the hearing, there was no reason that discovery could not have been made already or in a reasonable period after the end of the period. If that discovery has not been provided yet, it must be completed forthwith. In addition, I order Mr Bradbrook to discover information relevant to any disciplinary process and/or investigations by or on behalf of the Ministry of Health into Te Reo Mārama in which he had a role. Mr Graham and FCL did provide particulars regarding that and the response that they involved Te Reo Mārama rather than Mr Bradbrook is not sufficient. I do not order further discovery by the plaintiffs otherwise.

Result

[29] I grant the plaintiffs' application for further discovery against Mr Graham and FCL. I decline Mr Graham's and FCL's application for discovery against the plaintiffs, other than the discovery the plaintiffs have offered to provide and one additional category as noted above, which must be provided forthwith if that has not already occurred.

[30] I would expect to award to the plaintiffs costs for the first application and 80 per cent of the costs of the second application, on a 2B basis. If, despite that indication, there is disagreement about costs, I grant leave to the parties to file memorandum within 10 working days. But if little of substance is raised, I would consider awarding costs on the costs' memoranda as well.

Palmer J