IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-3903

BETWEEN	SIMUNOVICH FISHERIES LTD 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: 23 May 2006

Appearances: M Keall for plaintiffs
H Wild for first defendant
B D Gray and T C Goatley for second defendant
J Billington QC for third and fourth defendants
No appearance for fifth defendant

Judgment: 1 June 2006

JUDGMENT OF ALLAN J (No.4) (CONFIDENTIALITY)

In accordance with r 540(4) I direct that the Registrar endorse this judgment with the delivery time of 3.30 pm on Thursday 1 June 2006.

Solicitors:
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[1] The first plaintiff was formerly a major participant in the scampi fishing industry in this country. The second and third plaintiffs are associated with the first plaintiff.

[2] The plaintiffs allege that the first defendant (in a television programme) and the second defendant (in its daily newspaper the NZ Herald) each published material defamatory of the plaintiffs in respect of their involvement in the industry. There is also a claim based upon malicious falsehood. As presently constituted, the plaintiffs' claim, is for damages in excess of $29 million. The bulk of that sum is made up of special damages arising from losses claimed to have arisen in respect of the first plaintiff's business, as the direct result of the publications complained of.

[3] A number of interlocutory issues have arisen in the proceeding. Some have been determined by this Court; others remain to be heard. One particular issue requires urgent resolution now. It concerns the plaintiffs' claim, in the course of making discovery, to confidentiality for certain documents appearing in the plaintiffs' discovery list.

[4] The second defendant, with the support of the first, third and fourth defendants, disputes the entitlement of the plaintiffs to limit the extent to which the documents concerned may be inspected by those associated with the proceeding.

The background to the application

[5] The application has its genesis in a regrettably long and detailed exchange of correspondence between solicitors and counsel for the parties. At some stages it appears that the plaintiffs on the one hand, and one or more of the defendants on the other, may have been close to reaching an accommodation on the point, but agreement has ultimately proved to be elusive.

[6] The application is that of the second defendant which applies under r 307 for orders that the plaintiffs' claims of confidentiality made in their interim list of

documents of 24 March 2005, be set aside or modified, and that the second defendant be permitted to inspect and copy the documents concerned. The application has the support of the first, third and fourth defendants.

[7] For the first defendant, Ms Wild advised the Court that, although at one time the first defendant had been close to agreement as to the form of an appropriate undertaking which would govern the basis upon which the plaintiffs' documents might be inspected, final agreement has not been achieved. She supported the second defendant's challenge to the plaintiffs' confidentiality claims.

[8] For the third and fourth defendants, Mr Billington QC likewise supported the second defendant. Some time ago, Mr Kayes, junior counsel for the third and fourth defendants, did sign a form of undertaking (in a form which appears to be somewhat inapt), and was in consequence permitted to inspect the documents in dispute. But he has not been able, by reason of the terms of that undertaking, to provide the documents either to Mr Billington or to the third and fourth defendants themselves, and to all intents and purposes the first, third and fourth defendants are in the same position as the second defendant. No expert appointed by the defendants, nor any officer of the first or second defendants, has yet seen the documents in dispute.

[9] In summary, the plaintiffs' position is that there are some documents, all of them going to the quantum of the plaintiffs' claim for special damages, which remain highly confidential because of their commercial sensitivity, and which ought not to be disclosed (at least in the first instance) otherwise than to solicitors and counsel for the defendants, and then only upon execution of an appropriate undertaking. The plaintiffs also accept that upon giving a suitable undertaking, certain experts may also have access to the documents, but the plaintiffs reserve the right to review the suitability of certain expert witnesses because, in the fishing industry, truly independent experts are few and far between. That is an issue which does not directly arise for present purposes, but it may be necessary to address it in light of the issues dealt with in this judgment at some point in the future.

[10] The plaintiffs also object to the production of confidential documents to the defendants themselves (or in the case of the first and second defendants to any

officer of that party). The plaintiffs say it ought to be sufficient that solicitors and counsel and appropriate experts have access.

[11] In this judgment, I deal with the question of access by solicitors and counsel and by officers of the first and second defendants, but the question of the extent, if any, to which the third and fourth defendants themselves ought to have access, is one which I reserve for later argument. Mr Billington has indicated that his clients will be applying for further and better discovery when further outstanding matters are argued on 27 and 28 July 2006. The third and fourth defendants remain heavily involved in the fishing industry, so particularly acute issues may arise in the context of a claim that commercially sensitive documents of a competitor ought to be made available to them.

The law

[12] Rule 307 provides:

> **307 Challenge to privilege or confidentiality claim**
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> (1) If a party challenges a claim to privilege or confidentiality made in an affidavit of documents, the party may apply to the Court for an order setting aside or modifying the claim.
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> (2) In considering the application, the Court may require the document under review to be produced to the Court and inspect it for the purpose of deciding the validity of the claim.
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> (3) The Court may—
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> (a) set aside the claim to privilege or confidentiality; or
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> (b) modify the claim to privilege or confidentiality; or
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> (c) dismiss the application; or
>
> (d) make any other order with respect to the document under review that the Court thinks fit.

[13] At pp 25 and 30 of the plaintiffs' interim list of documents, claims to privilege are made in the following terms:

> THE PLAINTIFFS OBJECT to production of the documents listed in s 9 of this list upon the grounds they comprise commercially sensitive information. The plaintiffs will produce copies only as directed by the Court.
>
> THE PLAINTIFFS OBJECT to production of the documents listed in s 10 of this list upon the grounds they comprise commercially sensitive information. The plaintiffs will produce copies only as directed by the Court.

[14] Rule 297(2) requires a party which claims confidentiality for a document, to state, in its affidavit of documents, the restrictions proposed to apply in order to protect that confidentiality. Rule 298(1)(c) requires a party giving discovery for which confidentiality is claimed, to provide a statement as to the nature and extent of that confidentiality.

[15] During the hearing I expressed the view that the plaintiffs had not sufficiently advised the Court and the defendants of the basis upon which confidentiality was claimed, and directed the plaintiffs to file a more comprehensive statement of the grounds which were claimed to underpin its claim. That was duly done. I consider below the confidentiality claims as now articulated.

[16] The principles which apply at the interface of discovery obligations and confidentiality entitlements are well established, and not materially in dispute. A convenient and oft cited summary appears in the judgment of the Court of Appeal in *Port Nelson Ltd v Commerce Commission* (1994) 7 PRNZ 344, 347:

> The ability of each party to a proceeding to inspect the documents of the other, except for documents which are privileged, is important in enabling the proceeding to be brought to a just conclusion. It avoids parties being taken by surprise. It enables legal advisers to better assess the likely outcome of trial, and to concentrate on what will ultimately prove to be the real issues. In this way it can save cost. Sometimes, however, relevant documents which are not privileged may be commercially sensitive. Examples would be documents showing the detailed costings of products or services which are provided in a competitive market, the marketing plans for a proposed new product, or a patent specification during the period before the application has been accepted and made available for inspection. In some cases it may be sufficient protection that "a party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action and for no other purpose": *Riddick v Thames Board Mills Ltd* [1977] QB 881, 896; [1977] 3 All ER 677, 688 per Lord Denning MR. Use for some collateral or ulterior purpose is a contempt of Court: *Church of Scientology of California v Dept of Health and Social Security* [1979] 3 All ER 97, 116, per Templeman LJ. That sanction continues to apply to copies of documents obtained through discovery even after the document has been produced and read in open Court: *Home Office v Harman* [1983] 1 AC 280;

> [1982] 1 All ER 532. In other cases, the Courts have directed that particular documents are to be shown only to nominated persons, typically solicitors, counsel, and expert witnesses. Power to limit access in this way arises from the inherent jurisdiction of the Court to prevent the abuse of its process: *Church of Scientology of California v Dept of Health and Social Security* [1979] 3 All ER 97 (CA). Orders limiting the persons to be allowed access to discovered documents have been made in many cases in the High Court, and a recent example in this Court is *NZ Railways Corp v Auckland Regional Council* (1990) 3 PRNZ 332.

[17] Further guidance is provided in that judgment to both the Court and the parties as to the manner in which disputes over confidentiality ought to be resolved in practice:

> We have not looked at the individual documents. We agree in broad terms with the Judge's approach in the above passages. Relevant documents should generally be made available for inspection. The fact that they are regarded as being confidential, and would not be made available were it not for the requirements of the litigation, is immaterial. An order for non-disclosure can only be made when the Court is satisfied in terms of r 312 that such an order is "necessary". It must be either apparent from the document in question or shown by other evidence that disclosure would be likely to prejudice the party in some significant way. Even the possibility of prejudice may be sufficient, but that will depend on the seriousness of the possible prejudice and on the significance of the document to the issues in the proceeding, and the extent to which limited disclosure may enable the concerns of both parties to be accommodated.
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> It follows that the documents must be approached on a one by one basis. This is the responsibility of counsel. In the vast majority of cases counsel should be able to agree whether or not a document is such as to require special protection, bearing in mind the restrictions on the use of discovered documents which apply in any event. Where there is some genuine point of difference which warrants referral to the Court, then the Judge can decide. Such referrals should be rare where experienced counsel are involved.

[18] At common law, there is an implied undertaking that a party receiving discovery will make use of the documents concerned only for the purposes of the proceeding, and for no other purpose. A breach of that undertaking may amount to a contempt of Court. But the implied undertaking will, at times, be insufficient to confer adequate protection. It binds only those who are aware that the relevant documents were obtained on discovery: *The Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] 1 All ER 41. Moreover, the implied undertaking will expire when discovered documents are referred to in open Court, subject to any continuing order of the Court: *Wilson v White* (2005) 17 PRNZ 537 (CA).

[19] So the technique of requiring express undertakings in an appropriate case represents a useful method of ensuring on the one hand that there is appropriate disclosure for the purposes of the proceeding, and on the other protecting commercial confidentiality so far as that is possible.

[20] It will be a rare case in which the Court declines altogether to permit documents to be made available to a party (as distinct from that party's solicitor and counsel), at least in proceedings which are truly adversarial. In *Minister of Foreign Affairs v Benipal* [1984] 1 NZLR 758, the Court of Appeal considered an immigration case, in which in the context of an application for judicial review, the High Court had declined to make available to the Minister certain confidential documents upon which the plaintiff heavily relied. At p.767 Richardson J described the underlying principle in the following way:

> There is nothing I can discern in either the Immigration Act 1964 or the Judicature Amendment Act 1972 which suggests a duty on the part of the High Court in this case to protect the interests of other persons so as to override the right of a party to know the case he has to meet and to deny him the opportunity of challenging it by calling evidence and by cross-examination. And the opportunity which the order gives to counsel to inspect the document - without disclosure to their clients - is not an acceptable alternative. That course could be appropriate only if jurisdiction distinctly existed to withhold the document from the party himself. It would be appropriate then in order to ameliorate the encroachment by reason of necessity on the application of natural justice in those proceedings. It is a second best and inadequate at that. For how can counsel be expected to conduct a case where he is dealing with his client across an information barrier and where he is deprived of the opportunity to test the secret information by the standard forensic methods of cross-examination and the adducing of further evidence.

[21] But it will on occasion be appropriate, for example, where the parties are trade competitors, to withhold truly sensitive documents from a party.

The documents

[22] The dispute centres on two classes of documents, grouped respectively in parts 9 and 10 of the plaintiffs' list of documents. Part 9 concerns invoices paid by the plaintiffs in respect of legal services rendered necessary by reason of widespread publicity affecting the plaintiffs' role in the scampi fishing industry, and its

consequent participation in litigation and various public inquiries. Those legal costs form part of the plaintiffs' claim for special damages. But it is difficult to discern a basis upon which confidentiality can properly be claimed for these documents. They deal with no current liability of the plaintiffs, and indeed, appear to contain nothing which could be said to be truly confidential.

[23] I indicated as much to Mr Keall at the hearing of the application and invited him to amplify the plaintiffs' part 9 claims in a memorandum which I asked him to file and serve, following the hearing. That memorandum was duly filed. In it, Mr Keall advised the Court that the plaintiffs' claim to confidentiality in respect of part 9 documents is not now pursued. That is a sensible approach and it is accordingly unnecessary to say anything further about part 9.

[24] The memorandum also deals with the confidentiality claims which arise out of part 10 of the plaintiffs' list. The issues here are rather more complex. The plaintiffs are no longer involved in the fishing industry. With effect from 1 October 2004, the first plaintiff sold the whole of its business to Sanford Limited. As part of the agreement the purchaser is entitled to possession and control of the whole of the first plaintiff's business records. Certain of those records remain in the physical possession of the first plaintiff, but there is evidence to the effect that Sanford Limited is entitled to call for them as and when it wishes. The agreement between the first plaintiff and Sanford Limited imposes confidentiality obligations upon the first plaintiff designed to protect as commercially sensitive, all of the documents and information held by the plaintiffs, and relevant to the business purchased by Sanford Limited.

[25] Accordingly, the plaintiffs claim that not only are they entitled to preservation, so far as is possible, of the confidentiality of private business information in their own right, but that they are bound by virtue of their obligations to Sanford Limited, to take such steps as they can to preserve the value of that information to Sanford.

[26] Against that background, I turn to the detail of the plaintiffs' claims to confidentiality which arise from part 10 of the plaintiffs' list. Part 10 consists of a

schedule running to some five pages. It lists 97 documents or classes of document. Confidentiality claims are now (post-hearing) abandoned in respect of some 61 of these documents. That leaves 36 documents in contention. Confidentiality claims are maintained for them on six separate grounds; for the most part only one ground is advanced for each document, but there are one or two instances where multiple grounds are relied upon.

[27] In his memorandum of 26 May 2006, counsel for the plaintiffs has enlarged upon the detail of the confidentiality claims (at my request following claims by counsel for the defendants that hitherto the plaintiffs had failed adequately to particularise the basis for their confidentiality claims). The plaintiffs' six confidentiality categories are as follows:

> C1: Fishing information including catch data comprising amounts, dates, locations and species in relation to individual shots, trips, fishing years or vessels together with ancillary information including operational costs and requirements ('Catch Data'). This information was sold by Simunovich to Sanford on 1 October 2004. This information reveals, or tends to reveal, the patterns of sustainability in the various fisheries, the productive capacity of particular areas of the fishery, the periods and times of greatest productivity and so on and has continuing direct relevance to the development of successful practices and strategies in the contemporary scampi fishery. The information is therefore of considerable commercial value to Sanford and its competitors and is commercially sensitive. Simunovich owes a contractual duty of confidentiality to Sanford not to disclose these documents to third parties.
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> C2: Fishing information including catch rates per species and catch rates per vessel and ancillary information including operational costs and requirements ('Catch Rates'). This information was sold by Simunovich to Sanford on 1 October 2004. This information reveals or tends to reveal the performance and capabilities of individual vessels sold to Sanford on 1 October 2004 together with the patterns of sustainability in the various fishers, the productive capacity of particular areas in the fishery, the periods and times of greatest productivity and so on and has continuing direct relevance to the development of successful practices and strategies in the contemporary scampi fishery. The information is therefore of considerable commercial value to Sanford and its competitors and is commercially sensitive. Simunovich owes a contractual duty of confidentiality to Sanford not to disclose these documents to third parties.
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> C3: Sales and marketing data including seasonal totals and analysis ('Sales and Marketing Data') relating to the operation of the scampi fishing fleet, quota and associated fishing assets ('the Fishing

Assets') sold to Sanford on 1 October 2004. This information was sold by Simunovich to Sanford on 1 October 2004 and includes pricing, marketing and sales information in relation to high value export markets. This information also tends to disclose Sanford's current pricing, markets and sales in relation to its contemporary scampi fishing operations in that the Fishing Assets were integrated with Sanford's scampi fishing operations. The information is therefore of considerable commercial value to Sanford and its export competitors and is commercially sensitive. Simunovich owes a contractual duty of confidentiality to Sanford not to disclose these documents to third parties.

C4: Financial records, accounts projections and/or analysis relating to the operation of the Fishing Assets sold to Sanford on 1 October 2004. This information discloses or tends to disclose Sanford's current operating expenses in relation to its scampi fishing operations in that the Fishing Assets were integrated with Sanford's scampi fishing operations. The information is therefore of considerable commercial value to Sanford and its competitors and is commercially sensitive. Simunovich owes a contractual duty of confidentiality to Sanford not to disclose these documents to third parties.

C5: Documents relating to Simunovich ventures which were unable to proceed because of the diversion of time and resources into the Primary Production Select Committee and State Services Commission Inquiries. This information was sold by Simunovich to Sanford on 1 October 2004. This information is commercially sensitive in that it is commercially valuable to Sanford who are entitled to proceed with those ventures. Simunovich owes a contractual duty of confidentiality to Sanford not to disclose these documents to third parties.

C6: Confidentiality communications (either internal or with interested parties) disclosing or annexing information in any one of the previous categories with the relevant previous category or categories in parentheses, eg: C6 (C5). This information was sold by Simunovich to Sanford on 1 October 2004. This information is commercially sensitive in that it is commercially valuable to Sanford and its competitors and Simunovich owes a contractual duty of confidentiality to Sanford not to disclose these documents to third parties.

[28] The schedule stipulates which of these confidentiality grounds is said to apply in the case of each document. Although only brief descriptions of the documents are provided, it is possible in most cases to discern from those descriptions, the nature and scope of the information they disclose. For example, there are documents containing hoki and scampi sales data, documents described as comprising "Quota Asset portfolio" which include details of claimed losses in respect of a particular fishing vessel, documents constituting financial statements for various financial years, schedules of costs, and so forth.

[29] Mr Gray submitted much of the material concerned must now be regarded as largely historical and of limited, if any, commercial significance in a wider sense. In other words, while of general commercial interest, disclosure of these documents would not confer any significant benefit on trade competitors.

[30] In answer to that, Mr Keall referred me to an affidavit sworn by the fourth defendant in other proceedings in the Wellington Registry of this Court. Mr Penwarden's affidavit is dated 14 November 2005. In it he makes a claim that fishing records and related documents were confidential for the purposes of that litigation in this way:

> 10. This is all by way of saying that the fund of information United/Goodship are seeking is not bare historical material – from it can be derived much of the knowledge and expertise that Barine has built up since it began its operations, about patterns of sustainability in the various fisheries, the productive capacity of particular areas in the fisheries, the periods and times of greatest productivity, and so on.
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> 11. That fund of information is of great commercial importance to Barine. I expect the same could be said for most scampi fishers. The scampi fishery in New Zealand is not large, but scampi is a valuable commercial species – particularly in the export market. Despite the introduction of scampi into the Quota Management System last year and the introduction of permanent fixed quotas there remains a great degree of competition for large undamaged product, which fetches high prices overseas.
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> 12. Obviously old fishing records, in isolation, are less sensitive than more recent ones. But for Barine, even the information in the old returns has taken on a heightened sensitivity since the introduction of scampi into the QMS. Barine's fishing entitlements decreased substantially as a result of the move into the QMS. The quota it has been assigned is only about 60% of what it was catching under the pre-QMS regime. In order to sustain a viable operation now, we have to lease ACE each year, at considerable cost. Every bit of information that we have gathered is now important in allowing us to maximise the value of what we still have.

[31] That evidence has the ring of truth about it. Fishing records in the wider sense must have an inherent value for the sorts of reasons Mr Penwarden explains, especially when placed within the context of this country's intensely competitive fishing industry.

[32] Although I have not seen the documents themselves, I am satisfied that the explanations provided by the plaintiffs in counsels' recent memorandum, and the brief document descriptions contained in the schedule to that memorandum, are sufficient to establish confidentiality to the point where it is appropriate to limit access to the documents concerned. Even though the plaintiffs have now sold their business to Sanford, they have by contract assumed confidentiality obligations to Sanford. Moreover, the interests of Sanford in their own right are entitled to appropriate protection. That protection should take the usual form of written undertakings.

[33] I deal first with the position of the second defendant. It is represented by very experienced and able counsel, and by a highly reputable firm of solicitors. Nevertheless I consider it appropriate to require that both counsel and solicitors execute undertakings in respect of the confidential documents, before those documents are produced for inspection. The form of the undertaking is to be agreed by the parties. Likewise, any accounting expert instructed by the second defendant is to execute an appropriate form of undertaking.

[34] Given the size and scope of this claim, it is imperative that a representative of the second defendant itself have access to the documents under consideration. The second defendant is not a trade competitor of the plaintiffs or of Sanford and it is not suggested that the plaintiffs will suffer any direct prejudice, simply by reason of the production of the documents to an officer of the second defendant. The plaintiffs do, however, claim that the contents of the confidential documents ought not to be disclosed to any person who has not signed an undertaking. I consider there is force in that submission. The undertakings should include a specific undertaking not to disclose the contents of the confidential documents to any person who has not himself or herself, signed an undertaking. If difficulties arise in respect of the form of any one or more of the undertakings concerned, then application may be made to the Court to resolve the question.

[35] While the issue of confidentiality has arisen in a formal sense in the context of the position of the second defendant, it is plain that all parties wish to resolve the matter. Ms Wild aligned her client's position with that of the second defendant.

[36] In those circumstances I make a similar order in respect of the first defendant, namely that production of confidential documents is to be made to solicitors, counsel, expert accounting witnesses and a nominated representative of the first defendant on the footing that each signs an appropriate form of undertaking, and that any difficulties in that regard may be referred to the Court.

[37] The position of the third and fourth defendants is different. They were formerly trade competitors of the plaintiffs. They continue to be competitors of Sanford. Mr Keall outlined his reasons for his client's misgivings over the production of any confidential documents to the third and fourth defendants.

[38] The question of production to them is stood over for further argument (if necessary) on 27 and 28 July, at which time, as I understand it, there will be an application by those parties for further and better discovery by the plaintiffs.

[39] In the meantime, counsel and solicitors for the third and fourth defendants, and any expert accounting witness instructed by them, may have access to the confidential documents, upon the same terms as I have outlined in respect of the first and second defendant. Again, the form of undertaking may be referred to the Court in case of difficulty. I note that, he having executed a formal undertaking, Mr Kayes has already inspected the documents concerned.

[40] The fifth defendant was not represented at the hearing of the application, and as I understand it no issue currently arises between the plaintiffs and the fifth defendant in respect of access to the confidential documents.

[41] I reserve leave to all parties to apply generally. It is possible that further questions may arise as to the confidential status of these documents once counsel have had an opportunity of inspecting them.

[42] In *Shuttle Petroleum Distribution Limited v Caltex New Zealand Limited* HC WN CIV 2002-485-826 3 August 2005 the Court directed the solicitors for the parties receiving confidential disclosure to maintain a register recording the number of documents in circulation at any given time, and the persons who had access to

them. Given the relatively limited number of confidential documents, and the legitimate concerns of the plaintiffs, I think that such a requirement is appropriate here, because while not imposing a great burden on the solicitors concerned it will assist in ensuring that the disclosure of confidential material is kept under close scrutiny. Registers are to be maintained accordingly.

Costs

[43] I have upheld the plaintiffs' claims to confidentiality in respect of some only of the documents for which confidentiality was initially claimed. Costs are formally reserved, but I observe that the plaintiffs on the one hand, and the second defendant on the other, have each succeeded to some degree in respect of the issues arising on the second defendant's application. While I have upheld, at least for the time being, the plaintiffs' claim to confidentiality for certain documents, the plaintiffs have, following the hearing and in consequence of issues raised in argument, voluntarily abandoned their confidentiality claims for the majority of the documents in dispute. That circumstance will be relevant to the ultimate fixing of costs on the application.

C J Allan J