

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV 2009-485-1855**

BETWEEN	AGROTAIN INTERNATIONAL LLC Plaintiff
AND	SUMMIT-QUINPHOS (NZ) LTD Second Plaintiff
AND	FERTILISER QUALITY COUNCIL INC First Defendant
AND	RAVENSDOWN FERTILISER CO- OPERATIVE LTD Second Defendant
AND	NEW ZEALAND FERTILISER MANUFACTURERS' RESEARCH ASSOCIATION Third Defendant

Hearing: 25 November 2009

Counsel: A W Johnson and A J Steele for the Plaintiff  
B A Scott and D R Kalderimis for the Second Defendant

Judgment: 17 December 2009

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**JUDGMENT OF MILLER J**

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[1] The plaintiffs moved for interim orders restraining publication of an expert report, commissioned by the first defendant and written by Dr Catherine Watson, that characterises as misleading the second plaintiff's claims about the performance of an agricultural fertiliser called SustaiN.

[2] The first and third defendants elected to abide. The second defendant, the major competitor of the second plaintiff, opposed.

[3] After the hearing and before the delivery of my reserved judgment the plaintiffs sought leave to discontinue, and accepted that the Watson report might be published in its entirety. They needed leave because certain undertakings had been given affecting the injunction application. Leave was opposed, the second defendant urging me to deliver a judgment on the merits.

[4] For the reasons that follow, the plaintiffs will have leave to discontinue, on payment of costs.

### **The protagonists**

[5] The first plaintiff is an American firm which makes a fertiliser enhancer called Agrotain. It is common ground that in certain conditions Agrotain reduces nitrogen loss from urea fertilisers and increases both dry matter yield and nitrogen uptake. The first plaintiff has licensed the second, Summit-Quinphos, to apply Agrotain to SustaiN, an urea fertiliser that it has marketed to New Zealand farmers for some years.

[6] Ravensdown is a major competitor of Summit-Quinphos and one of only two manufacturers of fertiliser in New Zealand. The other is Ballance Agri-Nutrients Ltd. Until July 2008 Ballance held 40% of the shares in Summit-Quinphos. Since that date Summit-Quinphos has been its wholly owned subsidiary.

[7] Ravensdown and Ballance are the only two members of the third defendant, which styles itself FertResearch. It is an industry body formed more than 60 years ago, and its purpose is said to be that of researching environmental issues associated with fertiliser, and lobbying and education for the greater good of the fertiliser industry.

[8] The first defendant, the Fertiliser Quality Council (**FQC**), is an incorporated society formed following deregulation of the industry in 1992. It was sponsored by Federated Farmers to ensure farmer confidence in fertiliser quality. It has established the “Fertmark” brand, which may be applied to products that have passed

a fertiliser quality assurance programme. Its constitution provides that it has the powers of a natural person.

[9] Members of the FQC include FertResearch, Federated Farmers, and Horticulture New Zealand. The FQC also has registered users, being those companies granted Fertmark certification. Ravensdown, Ballance, and Summit-Quinphos each have Fertmark certification for their respective products, including SustainN. As a registered user, each company is entitled to attend FQC meetings and has speaking rights.

[10] The FQC has an executive committee which grants Fertmark certification. Registered users to whom certification has been granted must comply with a code of practice, which includes operational rules and a code of conduct. The Fertmark code of practice has been approved under s 28 of the Agricultural Compounds and Veterinary Medicines Act 1997.

### **The code of practice**

[11] The code of practice provides, inter alia, for one registered user to lodge a complaint against another. The complaints procedures envisage that a complainant will seek to resolve its complaint with the respondent before making a formal approach to the Executive Committee. The complaint must identify the rules said to have been breached and advise measures taken to resolve the matter with the respondent. The Executive Director of the FQC must then call a mediation meeting. Should that fail, the case is to be presented “in confidence” for resolution by members of the executive committee. That committee must advise the parties of its decision together with any intention “with respect to publicity that it proposes to make”. This would be done if the committee considers “there has been a breach sufficiently serious to damage the integrity of Fertmark or mislead fertiliser users.” The offending member must be given an opportunity to respond to the proposed public statement. The offending member has the right to a rehearing by way of “appeal”. There is also provision for deregistration of the offending product.

## The narrative

[12] Summit-Quinphos has advertised SustaiN through a newsletter called FertScience, a SustaiN newsletter launched in June 2006 and of which three editions have been published, and brochures. These documents claim outstanding performance for SustaiN compared to standard urea fertilisers. For example, the June 2006 SustaiN newsletter discussed the results of three “long term” trials conducted at Maungaturoto, Te Awamutu, and Ashburton. These trials used control (untreated), urea-treated, and SustaiN-treated pasture, with two rates of application. The newsletter claimed that, on average, SustaiN had been shown to improve pasture response, when compared to standard urea, by 69%. The results were presented in tabular form:

- ✦ The results have been remarkably consistent across sites and throughout the year. On average, SustaiN has improved N responses by 69% compared to urea, with lower application rates (30kg N/ha) providing larger increases (92%) compared to higher application rates (60kg N/ha) which have provided increases of 40%. Only once out of the 48 urea vs SustaiN comparisons (at the same rate), has SustaiN not outperformed urea.

**Table 1: Average percent increase of SustaiN over Urea**

Treatment	30kg N/ha	60kg N/ha
<b>Ashburton</b>		
Application 1 (Summer)	64.1	22.8
Application 2 (Autumn)	25.7	39.8
Application 3 (Winter)	55.7	54.6
Application 4 (Spring)	30.1	13.1
Application 5 (Summer)	72.8	34.1
<b>Te Awamutu</b>		
Application 1 (Summer)	79.7	(1.7)
Application 2 (Autumn)	239.2	36.4
Application 3 (Winter)	55.4	53.6
Application 4 (Spring)	51.7	50.8
Application 5 (Summer)	98.9	34.5
Application 6 (Autumn)	250.0	31.7
<b>Maungaturoto</b>		
Application 1 (Winter)	36.5	18.1
Application 2 (Spring)	111.4	11.3
Application 3 (Summer)	95.2	34.9
Application 4 (Autumn)	300.9	105.3
FPA Southland (Autumn)	46.5	
FPA Taranaki (Spring)	49.6	
FPA Whangarei (Winter)	49.4	
<b>Lincoln</b>		
Application 1 (Winter)	86.2	
Application 2 (Spring)	76.1	
Application 3 (Summer)	65.9	
<b>Average % Increase</b>	<b>92.4</b>	<b>40.0</b>

Combined Average Percent Increase over Urea = 69.0%

[13] A SustaiN brochure dated 15 July 2006 led with the words “SustaiN. Trial-proven to improve nitrogen response by 50%”. The brochure stated that:

Latest long term trial results for SustaiN in granular form show that nitrogen responses were increased by an average of 68% when compared to ordinary urea, confirming its effectiveness across a wide range of climatic conditions.

Detailed pasture response trials throughout the country have been in progress since 2004, and were set up to improve the understanding of the seasonal and regional growth responses of SustaiN. The trials have continued to produce outstanding results for SustaiN, with 18 months of data from 7 different trial sites. Over the 52 individual applications, N responses achieved with SustaiN were on average 68% higher than those with urea applied at the same N rate.

[14] Ravensdown thought this promotional material misleading. It also believed that Summit-Quinphos's claims for SustaiN were inconsistent with those made by Agrotain International in overseas markets, which acknowledged for example that Agrotain does not prevent ammonia loss should there be substantial rain immediately after application. Ravensdown argues that products like Agrotain are of most value in hot dry climates, unlike New Zealand's.

[15] Ravensdown took these concerns up with Dr Jamie Blennerhassett, the technical services manager for Summit-Quinphos in New Zealand. He initially maintained that its promotional material was accurate and declined to provide Ravensdown with access to information about the trials it had undertaken.

[16] In October 2006 and April 2007 Summit-Quinphos circulated SustaiN newsletters outlining the results of trials comparing SustaiN to standard urea. The April 2007 newsletter, for example, published tables showing that SustaiN had improved nitrogen responses over standard urea by 35%, which was said to be lower than the 50% achieved in earlier trials because inefficiencies develop over repeated applications.

[17] It appears that Ravensdown and Ballance were both unhappy about the claims being made by Summit-Quinphos. Ravensdown and Ballance representatives discussed the issue at a meeting of FertResearch, which as noted does not include Summit-Quinphos among its members. There followed discussions between Ravensdown and Summit-Quinphos which led to an agreement that a review of research trials would be undertaken by a qualified researcher and the FQC should be informed of progress. The parties selected Dr Watson, who is based in Ireland, at the

suggestion of Summit-Quinphos. She is said to be pre-eminent in the development of urease nitrification inhibitors such as Agrotain.

[18] The parties agreed that the review would be co-ordinated by Kevin Geddes, executive director of the FQC. In an email of 11 November 2008 to the parties, Hilton Furness of FertResearch recorded that it had been agreed that all trial data be independently reviewed. He added:

To facilitate this, discussions have been held with Kevin Geddes, Executive Director of the Fertiliser Quality Council. Kevin has agreed to act as an independent co-ordinator of the review. Could you please forward your trial data (published and un-published) to Kevin with information on trial methodology and conditions, data evaluation and interpretation. Any additional data, such as volatilization and leaching losses, which will assist in interpreting and explaining trial results should also be sent to Kevin. Kevin will ensure the confidentiality of information received and liaise with the reviewer.

[19] Dr Blennerhassett responded on 14 November that “it would be good if we got a document drawn up that outlined the scope of the review and covered what is expected of the review and how it is going to work etc so that everyone is clear on what is going to happen.”

[20] That led to terms of reference being drawn up by Mr Furness. They were headed “Terms of reference for a review of New Zealand field trial results and subsequent media advertised claims for SustaiN-Urea comparisons”. Dr Watson was instructed:

- (1) To review trial results for SustaiN versus urea to establish whether claims being made about differences in performance of these products were justified and expressed in a manner consistent with trial results; and
- (2) To provide specific comment on, *inter alia*, whether media advertisements had been presented in a manner that clearly and unambiguously reflected scientific results.

[21] Dr Blennerhassett emailed the other parties on 4 December advising:

I'm happy with the TOR. Outside of the TOR though I think it would also be good to establish how the outcome of the review will be handed. We obviously have the most to gain or lose from this so some rules about [w]ho/how/what the info can be used for etc would be good.

That email appears to have met with no reply at that time.

[22] On 4 March 2009, Mr Geddes forwarded material provided by Summit-Quinphos and Ravensdown to Dr Watson. Ravensdown's material included a selection of Summit-Quinphos newsletters, including the Autumn 2005 edition of FertScience, but this was not sent to Mr Watson. It seems that Dr Blennerhassett provided Mr Geddes with no promotional material. He did provide a series of studies, including two published studies and nine in-house research reports. Some of the internal reports included trials the results of which appear to have been published in the promotional material referred to above; for example, they included trials at Maungaturoto.

[23] When sending material to Mr Geddes for transmission to Dr Watson, Dr Blennerhassett stated:

I would also appreciate it if you could please send through an outline of how the review process will take place [sic] and what the formal procedure is with how the FQC will handle it.

[24] That led to a same-day response from Mr Geddes stating that:

The process will be in accordance with the Fertmark Code of Conduct commencing at page 28 refer 1.6; page 29 5; The process is described in page 17 Complaints, although in this case the companies were agreed in a procedure but wish the Fertiliser Quality Council to resolve the matter.

As discussed, when a technical opinion is given FQC will discuss the matter privately with individual member companies before any resolution is determined.

The referenced parts of the code of practice (which incorporates the code of conduct and operational rules) include rule 1.6, which states that

This code will be administered by the Executive Committee. Complaints by one member against another for alleged breaches of this Code of Conduct will follow the Complaints Procedure outlined in the Fertmark Operational Rules.

and the process at page 17 of the code, which includes the complaints procedure.

[25] It will be seen that Mr Geddes proceeded on the basis that there was not a formal complaint, because the companies had agreed on a procedure, but the process would otherwise comply with the code of practice. As noted earlier, the code provides for publicity should the executive committee find a breach sufficiently serious to damage the integrity of Fertmark or mislead fertiliser users. This email met with no complaint from Dr Blennerhassett.

[26] Dr Watson reported on 6 May 2009. She examined the trial design and data provided by Summit-Quinphos. Her report quoted extensively from the studies. She concluded that the experimental design and statistical analysis of the trials was generally appropriate, although information about management of the trials was not always clear. In relation to data collection, management and interpretation, however, she stated:

There is a fundamental difference between the fertilizer companies in the way some of the results are expressed. Nitrogen response efficiency is calculated by subtracting the pasture DM yield of control from the fertilizer treatments and dividing by the amount of N applied. This is a well recognized way of expressing results. However, Summit Quinphos are exaggerating the effect of the Sustain products by expressing the results as the increase over urea at the same rate as a %. For example, cumulative DM yield after 5 applications in the Maungaturoto trials – it is stated '*Cumulative data after 5 applications indicated that Sustain Green and Yellow applied at the normal rate of application of 30 kg N/ha achieved not only the greatest yield increase over urea (83.7 and 88.2% respectively), but also the greatest response efficiencies 24.6 and 25.2 kg DM/kgN applied*'. This statement is misleading. In this example the DM yield due to urea at 30 kg N/ha increased from 14,233 (control) to 16,241 kg DM/ha which is a 14.1% increase. With Sustain Green at 30 kgN/ha the DM yield was 17,921 kg DM/ha which is a 25.9% increase in yield over the control. Therefore the % increase in yield by Sustain Green over urea was  $25.9 - 14.1\% = 11.8\%$  increase, which is significant at 5% level. It is misleading to express results as percentages of percentages and say that the increase over urea at the same rate is 83.7%.

[27] She added that terminology used in some of Summit-Quinphos' reports was ambiguous, giving the following example:

In another example, Nitrogen x Mo trial, Lincoln – Cumulative DM yield after 5 applications states '*These results showed that in Temuka free-draining soil at Lincoln, pasture yield can be increased by about 60 to 80% by using Sustain products instead of straight urea*'. In this case the

cumulative yield with urea was 16,363 kg/ha. A 60% increase in yield would be 29,453.4 kg/ha and an 80% increase in yield would be 29,453.4 kg/ha. The Sustain products significantly increased the yield over urea, but not by this amount. They are expressing the results as % change in N response over urea alone, taking the control into account (i.e. percentages of percentages), so this is misleading. In the discussion, they imply that there are differences between treatments, but in fact they are not significant e.g. cumulative DM yield after 5 applications there is no significant difference between Sustain Green and Yellow products.

[28] Under the heading “media advertisements”, she concluded:

The results of trials by all fertilizer companies show that Agrotain treated urea reduces NH<sub>3</sub> loss from urea... Results support previous findings in the UK that there is no additional benefit in increasing the rate of Agrotain above 1 1/t (250 ppm nBTPT w/w).

In my opinion Summit Quinphos are exaggerating the effect of their products by expressing results as percentages of percentages. Their manipulation of the data is misleading.

It is evident that Dr Watson was not commenting on any actual media statements in making these statements. She had not seen any. Rather, she was characterising the studies that she had reviewed and relating her conclusions to the terms of reference.

[29] On 14 May Mr Geddes wrote to Dr Blennerhassett stating that the executive committee had accepted the findings and considered there was a breach of the code of practice to be of sufficient seriousness to warrant a public statement to correct information to the market. He invited a response. There is nothing in the record to suggest that the executive committee had analysed Summit-Quinphos advertising in light of Dr Watson’s report, perhaps because the FQC has sought to avoid becoming involved in this litigation. The FQC has proposed both to issue a public statement and to make Dr Watson’s report available on its website.

[30] By email of 26 May, which was headed as an official response to the report, Dr Blennerhassett expressed deep disappointment and contended that the report was wrong and potentially libellous. It did not follow the terms of reference, and “negative and damning statements made in the report” about media advertising could not be supported as Dr Watson “was never provided any SQ media material”. He criticised Dr Watson’s interpretation of product comparisons, saying that it is correct practice in New Zealand for farmers and researchers alike to talk about nitrogen

fertiliser in “N response efficiency terms”. Dr Watson had criticised Summit-Quinphos based on “total yield”, but “whenever we have made public claims or statements about the performance of Sustain, we have always referred to it in relation to N response or N response efficiency”. He asked that Mr Geddes confirm the review was “invalid” because Dr Watson had not been presented with advertising material.

[31] In response to these criticisms, the FQC refrained from issuing a public statement for the time being. It is now common ground that agreement was reached with Summit-Quinphos in August to have Dr Watson update her report in light of Summit-Quinphos’ complaints.

[32] On 11 August 2009, Dr Blennerhassett sent Mr Geddes a document headed “Understanding Sustain claims” which outlined the Summit-Quinphos methodology and defended the use of N response as a measure of effectiveness. He provided an example which I will set out in paragraph [48] of this judgment.

[33] On 18 August Mr Geddes forwarded to Dr Watson the “official response” of 26 May, the Summit-Quinphos newsletters of 20 April 2007 and 13 June 2006, a recent report of trial work undertaken by the Northland Dairy Trust (which criticised Summit-Quinphos claims for Sustain), and “[t]he most recent SQ/Ballance promotion of Sustain”. He obtained the last of these documents from the Summit-Quinphos website. It is the brochure dated 15 July 2006. Summit-Quinphos has maintained throughout that Dr Watson was not given current advertising, and that the few errors she identifies are of historic significance only. Dr Watson was not given the document called “Understanding Sustain claims.”

[34] In an email of 20 August, Dr Blennerhassett asked that Mr Geddes explain to Dr Watson that much of the data supplied to her was “internal summary reports meant for SQ viewing only”. He added that the material contained the odd grammatical or labelling mistake which had led to her criticisms. It does not appear that this email was sent to Dr Watson.

[35] Dr Watson delivered her final report on 1 September. In her covering letter she referred to Dr Blennerhassett's criticisms and his emphasis on N response efficiency, saying:

He has totally misunderstood my comments. I am not saying that using this terminology is wrong, it is the way they have expressed differences in the N response using % difference values between treatments (which in many cases are not significant), in isolation of actual yields, that is misleading.

[36] Referring to the June 2006 newsletter, she stated that the newsletter did not give "any actual results, only a table of % increases over urea, including an overall average of 92.4% for the 30kgN/ha treatment." She criticised the averaging of percentages, saying that the average may be skewed by one or two very high results that are not in themselves significant and results in an apparent increase that is much greater than the increase based on yield. The report was amended, but the substance of her criticisms was not.

[37] De Watson did change her comments under the heading "media advertisements". They now read:

The results of trials by all fertilizer companies show that Agrotain treated urea reduces  $\text{NH}_3$  loss from urea and increases DM yield and N uptake. However, it will only be effective if conditions are conducive to  $\text{NH}_3$  loss from urea. Results support previous findings in the UK that there is no additional benefit in increasing the rate of Agrotain above 1 l/t (250 ppm nBTPT w/w).

Based on the information provided to me by Summit Quinphos, in my opinion they are exaggerating the effect of their products by:

- 1) quoting high % increases of Sustain over urea at the same rate when the differences in DM yield and N uptake are actually not significant.
- 2) presenting N response efficiency data that have not been shown to be statistically different and
- 3) using misleading terminology, in some cases.

[38] By email of 9 September, Mr Geddes advised that the executive committee thought it was now time to post the report on the FQC website. He attached a proposed press release summarising her report and including a hyperlink to the website.

## **The injunction application**

[39] The proceeding was commenced on 16 September with an ex parte application for injunction, brought by the first plaintiff alone. It alleged that publication would be an injurious falsehood and misleading conduct for purposes of the Fair Trading Act 1986. The claim pleaded that at no time has Summit-Quinphos made any public claim or released any public material in respect to the attributes of Sustain that were related to the comments in Dr Watson's report. It pleaded that it was FQC which decided that Dr Watson would be appointed. It pleaded the May report, and alleged that the percentage figures could not have misled the public since they were never released. No mention was made of the May report being revised following Mr Blennerhassett's criticisms. Undertakings as to damages were given.

[40] Gordon Welch, a manager for the first plaintiff, swore an affidavit on 17 September, making it clear that he based his statements about the FQC process on advice he had received from Dr Blennerhassett, who also swore an affidavit of the same date. Dr Blennerhassett characterised the Watson report as a document that would not be made public; rather, it would be a starting point for further discussions. All information provided was confidential. It was not part of a formal complaints process; Summit Quinphos had not received "any documentation whatsoever" that was consistent with the FQC complaint procedures. He mentioned the May and September reports, but did not explain that he had agreed to the report being revised in light of his criticisms.

[41] Clifford J declined the ex parte application, and directed that it be heard on notice. The defendants in due course gave undertakings that they would not publish the Watson report in the interim.

[42] Dr Blennerhassett swore a second affidavit on 28 September. In it he now sought to explain the email of 4 March, and stated that the 'Understanding Sustain Claims' document was for the FQC only, criticising Mr Geddes for sending it to Dr Watson. He sought to explain admittedly misleading statements in the June 2006 newsletter, emphasising that the newsletter in no way represented promotions of Sustain since then.

[43] Michael Manning of Ravensdown swore an affidavit on 20 October. He outlined the background to the Watson report at length and attached examples of Summit-Quinphos advertising which he characterised as misleading. He understood that scientific data would be confidential, but not the results; there would be no point in the review if that were so.

[44] Dr Blennerhassett swore a third affidavit on 29 October, in response to Mr Manning. He maintained that there had never been a formal complaints process, and said that he had never been aware that Mr Geddes intended to go back to Dr Watson until he received verbal confirmation of that around 19 or 20 August, although Mr Geddes had agreed with Mr Manning to do so by the end of July. He now said, remarkably, that the “official response” email of 26 May was never intended to be sent to Dr Watson but the ‘Understanding Sustain Claims’ document was. (It was by now apparent that the latter document had not in fact been sent.) He said that he had not realised Dr Watson would review the trial data against old advertising material, and emphasised that the materials provided to Dr Watson were over three years old and not representative of advertising since. He produced examples of the most recent advertising material.

[45] In a reply affidavit also sworn on 29 October, Mr Welch expressed concern that an adverse press release might affect Agrotain internationally, stating that Summit-Quinphos’ advertising claims about Sustain “are not in the manner in which we typically represent our products to producers.” In short, he was concerned that Dr Watson’s criticisms might be misinterpreted in overseas markets.

[46] The FQC had insisted on staying out of the fray but Mr Geddes eventually agreed, at Ravensdown’s request, to swear an affidavit. It was sworn on 19 November. He deposed that Mr Manning suggested Dr Watson be asked to revise her report in light of further submissions from the parties, that he put that suggestion to Dr Blennerhassett, and that Dr Blennerhassett agreed to it in, he thought, early August. Advertising material sent to Dr Watson and criticised as dated had been downloaded from the website of Summit-Quinphos, and he had accordingly assumed it was current. I record in passing that two other affidavits were filed to which I need not refer.

[47] Summit-Quinphos was added as a plaintiff in an amended statement of claim filed on 25 September. It pleaded a number of causes of action: injurious falsehood, misleading or deceptive conduct, breach of an obligation of confidence, and judicial review. In the end, the application for interim orders focused on the judicial review application. For its part, the second defendant admitted that the FQC is amenable to judicial review, perhaps perceiving that jurisdiction as more flexible than contract: see *Hopper v North Shore Aero Club Incorporated* [2007] NZAR 354.

### The hearing

[48] The hearing did not go well for the plaintiffs. At the outset, I invited counsel to take me through Dr Watson’s criticisms and Dr Blennerhassett’s responses so I could be sure I understood them. Mr Johnson did not take up that invitation. Mr Kalderimis did, by reference to Dr Blennerhassett’s criticisms of Dr Watson’s report and using the table he included to illustrate his methodology in the ‘Understanding Sustain claims’ document of 11 August. I now reproduce that table:

*Method 3:* If you use either N response or N response efficiency, there is only one method and it gives the same result for both measurements. It is calculated by taking the difference between the Sustain and the urea and dividing this by the urea which is then multiplied by 100 =  $(375 - 250)/250 * 100 = 50\%$  or  $(15 - 10)/10 * 100 = 50\%$

Table 1. Example of data from a theoretical N fertiliser trial with 25 kg N/ha applied where growth is measured over 28 days.

	Total growth (kg DM/ha)	N response (kg DM/ha)	Response efficiency (kg DM/kg N)
Control	1000		
Urea	1250	250	10
Sustain	1375	375	15
% difference between products	10% (method 1) 12.5% (method 2)	50% (method 3)	50% (method 3)

[49] The first three rows represent control, standard urea and SustaiN plots. The three columns record total growth, nitrogen response, and response efficiency. The fourth row shows the percentage difference between urea and SustaiN. It can be seen that SustaiN produced 125kg/ha more dry matter than urea. Using methods 1 and 2, this was an increase of 10% and 12.5% respectively. Method 1 takes the difference in yield between urea and SustaiN as a percentage of the total dry matter grown by urea. Method 2 takes the same figure as a percentage of the control yield.

[50] The percentage increase of 50% in the N response and response efficiency columns was achieved by using method 3, which is the Summit-Quinphos method. It involves taking the difference between urea and SustaiN (125kg/ha) as a percentage of the difference between the control and standard urea (250kg/ha).

[51] Method 3 is what Dr Watson described as a percentage of a percentage, apt to suggest that SustaiN produces dramatic improvements in yield over standard urea. The term 'percentage of a percentage' is arguably not entirely apt, although the Summit-Quinphos calculations can be presented in that way. (The percentage increase over control in the above example is 12.5% for urea and 37.5% for SustaiN, the difference between the two being 25%; and 12.5 is 50% of 25.) However, as Mr Kalderimis submitted, the term does convey the capacity of the methodology to mislead, when it is used not for scientific purposes but to persuade a lay reader that SustaiN produces much heavier yields than urea.

[52] The hypothetical example given by Dr Blennerhassett includes dry matter data, so the reader can easily see how much the actual gain was. However, Mr Kalderimis demonstrated that Summit-Quinphos often presents the 'percentage of a percentage' figure in isolation. For example, increased pasture response of up to 50% is headlined in what Dr Blennerhassett identified as a current advertisement. Nor do the advertisements to which my attention was drawn set the results of method 3 alongside those of methods 1 or 2.

[53] Further, the hypothetical example uses only one set of data. As Mr Kalderimis submitted, the advertising appears almost invariably to average

results over a number of trials. The average can be skewed by the presence of some very high results. It is not clear that all of these results are statistically significant. Dr Watson says that some of the more extreme examples are not. Dr Blennerhassett maintains they are, although he also concedes that the average of 92.4% highlighted in the June 2006 newsletter (at [12] above) was a mistake.

[54] Lastly and most importantly, Mr Kalderimis criticised the use of ‘N response’ or ‘response efficiency’ in a retail context. SustaiN is about 20% more costly than standard urea. What matters to farmers who are comparing the two is how much more yield they can expect for the extra price they pay. Counsel drew my attention to an exchange between Dr Blennerhassett and the organisers of the independent Northland Dairy Trust trial, recorded in The New Zealand Farmers Weekly of 13 July 2009. The organisers found no statistically significant difference between SustaiN and urea results, pointing out that there were only modest increases in dry matter. They concluded that it is the amount of urea applied that has the greatest impact on yield. Dr Blennerhassett responded:

Farmers need to take into account the longer term averages of results recorded by SustaiN in all trials and can be comforted to know that the product always performs well above its price premium.

[55] I found these submissions compelling. During Mr Johnson’s reply, which did not confront the issue directly, I expressed the view that the advertising is manifestly misleading. It is apt to lead farmers to believe that SustaiN reliably delivers dramatic increases – of 50% or more - over urea in pasture yield. While the trial data does point to material increases in yield in some cases, those increases do not correspond to the average percentages highlighted by Summit-Quinphos, and it is not self-evident that the increases in yield justify the extra cost of SustaiN.

[56] It also became apparent during the hearing that Summit-Quinphos has not changed its advertising significantly. Mr Johnson argued that certain ‘typographical’ errors in the June 2006 newsletter, in which N response was treated as synonymous with yield increases and N response figures were averaged, have been corrected in more recent advertising. However, Mr Scott correctly characterised the use of average ‘percentages of percentages’ in the advertising as endemic; indeed, Mr Johnson was forced to concede that Summit-Quinphos continues to use N response

data in that way. Summit-Quinphos no longer claims directly that ‘percentages of percentages’ represent improvements in yield, but it continues to convey that impression by highlighting the percentages and relating them to urea without explaining what “N response” or “pasture response” is. Further, it is not clear that none of the older material is still in use. For example, the brochure of 15 July 2006 is still current.

[57] Mr Scott further argued that the plaintiffs had misled the Court in their affidavits, particularly when seeking relief on an ex parte basis. He highlighted, for example, their failure to draw the Court’s attention to the 4 May email or the agreement that led to Dr Watson revising her report after further submissions. At the very least, this was inexcusably careless. A plaintiff seeking orders ex parte must make full and fair disclosure of material facts, and cannot plead ignorance of important matters if reasonable prior enquiry would have revealed them: *Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission* [1994] 1 Lloyds Rep. 45, 67. Mr Johnson’s explanation, that Agrotain was the only plaintiff at the time and had to move quickly, seems inadequate; Dr Blennerhassett swore an affidavit on 17 September, and some time passed before the plaintiffs conceded that he had agreed to the report being revised. Importantly so far as the interim relief application was concerned, the further material disclosed suggested that the process adopted by the FQC was both agreed and fair.

[58] I reserved judgment. While I had expressed a clear view about the advertising, I indicated that the confidentiality claims appeared to have merit and confirmed that I had not reached a final view on interim relief.

[59] On 26 November the application for leave to discontinue was filed. No explanation was given. It is a reasonable inference that the plaintiffs had realised they might win a skirmish over interim confidentiality of data only to lose the war over the quality of their advertising. In a teleconference on 30 November counsel agreed that a judgment should be delivered on the discontinuance application.

## **Discontinuance**

[60] The application was brought on the ground that a party generally has the right to discontinue at any time before final judgment is given. While an undertaking as to damages had been given, no interim orders had been made, and the defendants could simply be released from their undertakings not to publish the report. Costs sufficiently protect the defendants' interests.

[61] The second defendant contended that it was too late to discontinue as I had given a clear indication as to likely outcome; that it is an abuse to discontinue where the plaintiffs have already gained a substantial benefit (in the form of undertakings not to publish) and want to discontinue only to avoid an adverse finding; and that the judgment is still necessary where the plaintiffs have given undertakings as to damages. The second defendant asked for indemnity costs in any event.

[62] The rules provide that a plaintiff has the right to discontinue at any time before the giving of judgment. The right may be exercised orally at the hearing:

### **15.19 Right to discontinue proceeding**

- (1) At any time before the giving of judgment or a verdict, a plaintiff may discontinue a proceeding by—
  - (a) filing a notice of discontinuance and serving a copy of the notice on every other party to the proceeding; or
  - (b) orally advising the court at the hearing that the proceeding is discontinued.
- (2) A notice of discontinuance under subclause (1)(a) must be in form G 24.
- (3) This rule is subject to rule 15.20.

[63] Leave is required where r 15.20 applies:

### **15.20 Restrictions on right to discontinue proceeding**

- (1) A plaintiff may discontinue a proceeding only with the leave of the court if—
  - (a) the court—

- (i) has granted an interim injunction; or
  - (ii) made an interim order under rule 30.4; or
  - (iii) made an interim order under section 8 of the Judicature Amendment Act 1972; or
- (b) a party to the proceeding has given an undertaking to the court.
- (2) A plaintiff to whom an interim payment has been made, whether voluntarily or under an order made under rule 7.70 or 7.71, may discontinue the proceeding only with the written consent of the party by whom the payment was made or with the leave of the court.
- (3) A plaintiff may discontinue a proceeding in which there is more than 1 plaintiff only with the consent of every other plaintiff or with the leave of the court. If the plaintiff files a notice of discontinuance under rule 15.19(1)(a), the consent of every other plaintiff must be in writing.
- (4) If there is more than 1 defendant in a proceeding, a plaintiff may discontinue a proceeding against a particular defendant only with the consent of every other defendant or with the leave of the court. If the plaintiff files a notice of discontinuance under rule 15.19(1)(a), the consent of every other defendant must be in writing.

[64] The Court may set aside a discontinuance which is an abuse of process:

**15.21 Effect of discontinuance**

- (1) A proceeding ends against a defendant or defendants on—
- (a) the filing and service of a notice of discontinuance under rule 15.19(1)(a); or
  - (b) the giving of oral advice of the discontinuance at the hearing under rule 15.19(1)(b); or
  - (c) the making of an order under rule 15.20.
- (2) The discontinuance of a proceeding does not affect the determination of costs.
- (3) Rule 15.22 overrides this rule.

*The giving of judgment*

[65] Mr Scott argued that a plaintiff may not discontinue once the outcome is apparent, citing *Tranzequity Holdings Limited v Malley* (1990) 3 PRNZ 117 at 119:

It does seem to me ... to be a question of determining the point at which a Judge has commenced his judgment for this purpose. In that regard one of the objects behind the two decisions to which I have referred seems to be that a party who brings a claim to Court may at any time elect to be nonsuited before that party knows the expected result of his claim. Correspondingly once the Judge's view as to the likely result of the proceedings is known or might be inferred from the way in which judgment is being given it is too late to bail out, as it were.

[66] That principle seems to rest on the proposition that it is contrary to the normal rules of courtesy to interrupt the Judge during judgment and before a final determination is announced: *Foley v Bank of New Zealand* [1953] NZLR 303. In *Tranzequity*, Fisher J held that the principle extends to a case where the Judge had made it plain, immediately before judgment was given, what the result would be.

[67] I accept Mr Johnson's submission that discontinuance is not too late in this case, for several reasons. It will affect the entire proceeding, while the judgment addressed an interlocutory application in the proceeding. Judgment had not been commenced; on the contrary, it was reserved. And the fate of the application for interim orders had not been clearly indicated. While expressing a strong view about the advertising, I had indicated that the confidentiality argument appeared to have some merit.

#### *The undertakings*

[68] Although leave is required where undertakings have been given, the underlying policy of the rules is that the plaintiff cannot be compelled against his will to proceed to hearing and judgment: *O'Brien v NZ Social Credit Political League Inc (No 2)* [1984] 1 NZLR 68. There is nothing about the undertakings given in this case that could justify requiring the plaintiffs to continue. Their undertaking as to damages was confined to damages resulting from any interim order, but none was made. And the defendants may simply be released from their undertakings not to publish.

## *Abuse of process*

[69] Accordingly, the only ground on which discontinuance might be resisted is that it is an abuse of process. The Court may consider the circumstances in which the discontinuance was issued and what the plaintiff wants to achieve by it: *Sheltam Rail Co (Pty) Ltd v Mirado Holdings Ltd* [2009] 1 All ER 84 at [35]. There are few relevant examples.

[70] In New Zealand the inherent jurisdiction to restrain abuses of the Court's processes has traditionally been regarded as the only limit on a plaintiff's right to discontinue. Until recently a plaintiff could also elect nonsuit at trial. The history of the nonsuit rule was examined in *Tripp v Guest (Note)* [1984] 1 NZLR 74, 78, the Court of Appeal holding that the principle underlying the plaintiff's right to nonsuit was the absolute right of a plaintiff at common law to abandon his writ.

[71] In *O'Brien* the Court of Appeal held:

[Counsel] sought to invoke the inherent jurisdiction of the Court to set aside a discontinuance, even if in form it fully complies with the rules. We accept that such a jurisdiction exists in New Zealand; its existence in England is established by the decision of the House of Lords in *Castanho v Brown & Root (UK) Ltd* [1981] AC 557. But the actual facts of that case are remote from those of the present. In New Zealand the discontinuance rule, R 238, goes hand-in-hand with the nonsuit rule, R 272. The latter rule recognises that in New Zealand even at the trial the plaintiff remains dominus litis in the sense that he has a right to elect a nonsuit – a right no longer existing in England. A discussion of the New Zealand nonsuit rule will be found in *Tripp v Guest* [1984] 1 NZLR 74n.

Inherent in both rules is the principle that a plaintiff cannot be compelled against his will to proceed to a trial or to a judgment. If the plaintiff makes allegations in a statement of claim but, for one reason or another, finds it unnecessary or is unwilling to put them to proof, the defendant's remedy under the rules is costs.

[72] The nonsuit rule was abolished in 2003, which might suggest that the Court ought now to enjoy greater discretion to set aside a discontinuance. However, it appears that the Rules Committee sought only to simplify the Rules so that nonsuit was incorporated into discontinuance. In *Auckland Trotting Club (Inc) v Ralf Enterprises Limited* (2003) 16 PRNZ 710 Harrison J held at [7]:

The formal distinction between rights of discontinuance and non-suit was well recognised. A plaintiff who did not wish to proceed with a cause of action before trial simply discontinued; if he or she made that decision after the trial had commenced, a non-suit was appropriate, although in practice counsel and the Court frequently treated the party as discontinuing without the formality of applying for a non-suit. But there was no material difference between the two, either in legal substance or consequences (except costs). Doubtless this factor led to the Rules Committee's recent decision to abolish the discrete right of non-suit and bring it within the single umbrella of the rules on discontinuance. Indeed, the Committee's Consultation Paper dated 4 July 2002 explained its decision in these terms:

33. The new rules contain two important innovations. First, they remove the procedural differences in applying for non-suit or discontinuance. The Rules Committee's view is that there is no principled basis for retaining these two separate procedures. The term "discontinuance" replaces both.
34. Secondly, the rules impose some controls on a plaintiff's right to ask for a proceeding to be discontinued so as to guard against the abuse of the procedure.

[73] Accordingly, the High Court Rules still do not recognise that a defendant might acquire an independent right to judgment on the plaintiff's claim. For that reason, the Court has refused to inquire into which party was dominus litis: see *Clemance v Cleary* (1995) 9 PRNZ 194, *Chase Wellington Properties Ltd v Hughes* (1989) 3 PRNZ 121. The Court has recognised that discontinuance may be an abuse where resulting delay disadvantages the defendant, but that is not the same thing: *Davies v Christie* HC WN M 466-84 23 June 1987. Nor do the New Zealand rules recognise that there may be a public interest which justifies delivery of judgment. It seems to me that the Rules are deficient in these respects.

[74] The position differs in England, where the rules have long provided greater flexibility while still recognising that in the ordinary way a plaintiff cannot be required to continue that which it began. There the Courts have been reluctant to permit discontinuance where the defendant would be deprived of some advantage already gained in the litigation. In *Fox v Star Newspaper Company* [1898] QB 636, 639 Chitty LJ held that:

The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms.

[75] In *Jordan Grand Prix Ltd v Vodafone Group* [2003] 2 All ER 864 the plaintiff discontinued just before judgment, having prosecuted serious allegations against the defendant and its officers. Langley J held not only that abuse of process may justify setting aside a discontinuance but also, and independently, that the defendant might acquire a right to know the conclusions that the Court reached on the serious allegations against it, and that there might be a public interest in the Court's findings being made public. He acknowledged that in some cases the latter interest might give way to a countervailing public interest in settlement.

[76] Turning to this case, I am not persuaded that the proceeding was an abuse of process in itself, in that it was commenced for some improper or collateral purpose. Further, it was not without prospects of success, at least on an interim basis. The procedure adopted was designed to protect commercially sensitive information from disclosure, while the FQC proposed to publish not only a statement summarising Dr Watson's conclusions but also her report, which included some details of trials that may not have been made public previously.

[77] Nor was it an abuse to discontinue merely because the plaintiffs anticipated an adverse result, with attendant publicity. That must commonly be the cause of a late and unilateral discontinuance. Under the Rules the defendants were not entitled to insist on judgment on the ground that they had acquired an advantage. And although there is a public interest in having the Watson report published, that has been secured as a consequence of the discontinuance and the requirement for leave, which has resulted in this judgment. In short, I am not persuaded that discontinuance would be an abuse of process in this case.

## **Decision**

[78] The plaintiffs will have leave to discontinue, on payment of costs. I am not prepared to award indemnity costs, for the reasons given in *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 at [29]. In particular, I am not in a position to conclude in reliance on affidavit evidence alone that the plaintiffs' disregard of known facts was wilful. However, some uplift on 2B costs may be

warranted. Counsel must endeavour to reach agreement on costs. If they cannot, memoranda may be filed.

[79] The defendants' undertakings that the Watson report will not be published in the interim are discharged.

Miller J

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