IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-409-348
[2014] NZHC 21

BETWEEN	ERIC MESERVE HOUGHTON Plaintiff
AND	TIMOTHY ERNEST CORBETT SAUNDERS, SAMUEL JOHN MAGILL, JOHN MICHAEL FEENEY, CRAIG EDGEWORTH HORROCKS, PETER DAVID HUNTER, PETER THOMAS and JOAN WITHERS First Defendants
	CREDIT SUISSE PRIVATE EQUITY INC (FORMERLY CREDIT SUISSE FIRST BOSTON PRIVATE EQUITY INC) Second Defendant
	CREDIT SUISSE FIRST BOSTON ASIAN MERCHANT PARTNERS LP Third Defendant
	FIRST NEW ZEALAND CAPITAL Fourth Defendant
	FORSYTH BARR LIMITED Fifth Defendant

Teleconference:	28 January 2014
Counsel:	A J Forbes QC and P A B Mills for plaintiff D J Cooper and S V A East for first defendants, except Mr Magill and Mr Horrocks T C Weston QC for Mr Magill J A Carnie for Mr Horrocks J B M Smith QC, A S Olney and C J Curran for second and third defendants D H McLellan QC and J S Cooper and R M Stewart for fourth defendant A C Challis and D P Turnbull for fifth defendant
Judgment:	29 January 2014

RESERVED JUDGMENT OF DOBSON J
(Further interlocutories)

[1] I convened a hearing by way of telephone conference yesterday morning to address various interlocutory applications and concerns raised by way of memoranda.

[2] The topics addressed were:

- mode of provision of further security for costs;
- payment of interlocutory costs orders;
- leave for late filing of a plaintiff's expert brief;
- timetabling matters.

Defendants' application for "unless order" on plaintiff's non-compliance with order for security for costs

[3] Earlier orders for the provision on behalf of the plaintiff of further security for costs were to be complied with by 15 January 2014. On 21 January 2014, all defendants made application for an order requiring the plaintiff to give the further security of $1 million by 29 January 2014, in default of which they sought the dismissal of the proceedings. The application sought the same relief if outstanding interlocutory costs orders in favour of the defendants were not paid by the same date.

[4] At the time that application was filed the plaintiff had not complied with the previous Court order and had not made application for an extension of the time for complying with, or variation of, the order. The plaintiff's advisers had also not communicated with solicitors for any of the defendants about the non-compliance or any initiatives taken to comply with it. Since the application was filed, counsel for the plaintiff have filed two memoranda. The second (plaintiff's 27 January

memorandum) proposed that the order be complied with by the litigation funder, Harbour Litigation Investment Fund, LP (HLIF), lodging $1 million in the trust account of the solicitors for the plaintiff, Wilson McKay, to be separately held on interest-bearing deposit by that firm subject to an irrevocable undertaking to hold the funds in order to meet any costs order made in favour of the defendants and against the plaintiff in these proceedings.

[5] HLIF has previously given an unconditional undertaking to the Court and to the defendants to pay any adverse costs orders up to a maximum amount of NZ$1.8 million. The effect of the current proposal is that security in respect of the first $1 million of that undertaking would be provided by HLIF lodging $1 million with Wilson McKay, creating a fund for that sum within the jurisdiction that is accessible to the defendants. The plaintiff's 27 January memorandum also cited conditions upon which HLIF was prepared to lodge the money with Wilson McKay, including the circumstances in which the plaintiff and HLIF's obligations would terminate.

[6] Counsel for various of the defendants criticised this proposal as inexcusably late, and inadequate. It was argued that the more conventional course of lodging the amount of security for costs with the Court should be followed, when there was no practical difference from the plaintiff's and litigation funder's perspectives, given that the terms of the undertakings to be provided effectively put the money beyond their control in any event.

[7] Mr Forbes QC accepted that there was no practical difference in terms of loss of control over the money, but resisted a requirement that the fund be lodged with the Court because doing so would not materially improve the quality of security available to the defendants, and was likely to prejudice HLIF if the solicitors could place the money on deposit at a higher rate than the Registry would achieve. In addition, the arrangements reflected in the memorandum had been negotiated at some length, and he sought not to protract the process when any variation would require further negotiations. The last point is not deserving of weight in assessing the competing positions of the parties, but should not be overlooked in determining the practical course that resolves this discrete issue as efficiently as possible.

[8] I have directed that compliance with the current requirement for security for costs can be effected by the means proposed in the plaintiff's 27 January memorandum. Both the HLIF and the Wilson McKay undertakings, precisely in the terms described in that memorandum, are to be executed and filed, with executed copies served on the defendants' solicitors, by ***5pm*** this ***Friday***, ***31 January 2014***.

[9] Ms Mills was confident that these steps could be effected by then. In those circumstances, I am not persuaded that any form of "unless order" is warranted. If the steps required are not completed by the end of this week, then I would be inclined to re-open the extent of costs entitlement for the defendants, in having to monitor the plaintiff's performance on this discrete issue. The defendants are on notice as to the circumstances in which HLIF and the plaintiff stipulate for the termination of their undertakings.[1] That is, of course, subject to the prospect of directions from the Court to the contrary, depending on how the claim proceeds.

[10] The defendants sought indemnity costs on this application, criticising the conduct of the plaintiff as being inexcusable and a deliberate breach of earlier Court orders. For the second and third defendants, Mr Smith QC was highly critical of the relevant omissions, coming after what the second and third defendants have treated as earlier inadequacies in the conduct of the case for the plaintiff.

[11] Mr Forbes accepted that the plaintiff had been late in complying, but did not otherwise concede the basis for material criticism.

[12] The requirement for security for costs has been known for more than sufficient time to enable the plaintiff to comply in a timely manner. Whatever other pressures exist for those acting for the plaintiff, it is quite inadequate to allow the deadline for compliance with the order for security for costs to pass without any communication on the topic to either those acting for the defendants or to the Court. The issue has become a distraction for all involved when the timetable of other work required to prepare the case for trial is pressing. However, in the overall circumstances of this case, that is not sufficient to warrant indemnity costs. As noted

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1 Plaintiff's 27 January 2014 memorandum at [10].

above, if the provision of further security is not in place in all respects by the end of this week, I will revisit the justification for increased or indemnity costs.

[13] I raised with counsel for the various defendants an appropriate reflection of the contributions each had made on this application. I order costs against the plaintiff in favour of the first defendants in one sum of $2,900 (together with any disbursements incurred in filing the application), one sum of $2,600 for the second and third defendants and $650 each for the fourth and fifth defendants.

[14] I direct that these costs orders in favour of the respective defendants are to be added to and paid as a component of the payments I address in the next section of the judgment.

Liability to pay outstanding interlocutory costs orders

[15] A discrete component of the application on behalf of the defendants raised the plaintiff's non-payment of costs orders made against him in my judgment of 18 December 2013. The plaintiff's justification for non-payment is his claimed right to set off entitlements for costs and disbursements awarded to him by the Supreme Court, as well as costs and disbursements that are still to be sought for the High Court and Court of Appeal stages of the proceedings in respect of which the plaintiff has ultimately prevailed in the Supreme Court.

[16] Mr Forbes clarified that no such issue of set-off is asserted in relation to the fourth and fifth defendants, who were not involved in the issues pursued to the Supreme Court. I was assured by the plaintiff's counsel that payment of the costs ordered in favour of the fourth and fifth defendants is presently being processed, and that those amounts should be received by the fourth and fifth defendants within days.

[17] For the first defendants, Mr Cooper resisted recognition of a set-off. He submitted that it was not automatic, but a matter at the discretion of the Court depending on a range of circumstances. Further, that there was not complete identity between the defendants who had been unsuccessful in the Supreme Court, and those entitled to the benefit of costs orders I have made in favour of the first defendants.

Mr Cooper also resisted recognition of any set-off that anticipated costs orders yet to be made, or quantification of disbursements that have not yet been settled.

[18] As against the second and third defendants, to the extent that the plaintiff was required to make payments forthwith, Mr Forbes argued for a constraint requiring the monies to be held by their solicitors because of the absence of assets in New Zealand of those Credit Suisse entities, when the plaintiff anticipates that he will subsequently be entitled to costs orders against them that would offset the plaintiff's present liability for costs orders in their favour. I am not persuaded that any such constraint on the second and third defendants' application of amounts paid to them is warranted.

[19] I direct that the interlocutory costs orders I have made in favour of the defendants are to be paid forthwith by the plaintiff to the first, second and third defendants, except to the extent of a set-off that is appropriately recognised for existing, quantified costs orders against the first, second or third defendants. I acknowledge Mr Cooper's concern about a lack of identity between the group of directors liable for costs on their unsuccessful argument in the Court of Appeal, as contrasted with the larger group of directors entitled to the benefit of the costs orders I have made. Differentiation between directors, or dealing with the respective obligations and entitlements differently from the global basis I have directed, is not warranted as a matter of proportionality.

Plaintiff's application to serve an expert's brief of evidence out of time (Mr Lim)

[20] In December 2013, I granted the plaintiff an extension of time within which to file a further brief of evidence from an investor expert, up to 17 December 2013. No brief as contemplated by that extension was filed within the time allowed. Instead, on 6 January 2014, the plaintiff's solicitors served a brief of proposed evidence from Lim Hong Heng, who generally refers to himself and is referred to by others as Arthur Lim (Mr Lim). On the same day, counsel for the plaintiff applied informally by way of a memorandum for leave to adduce and rely on Mr Lim's evidence, notwithstanding the late service of his brief.

[21] The plaintiff's request was opposed by all defendants. Apart from the prejudice arising in a more general way from new opinion evidence served so close to the deadline for provision of defendants' briefs, counsel for the defendants were troubled by particular prejudice, given the inclusion in Mr Lim's brief of factual material. At the time of the Feltex IPO, Mr Lim was an investment director at Macquarie Equities New Zealand Limited (Macquarie). That entity became a co-manager of the public offer of Feltex shares that involved the firm assuming responsibility for $20 million worth of shares issued in the float.

[22] Until now, the plaintiff had not proposed any factual evidence from anyone involved in the Feltex IPO who was at Macquarie at the time. To the extent that Mr Lim draws on his recollection of his involvement in matters relating to the float, counsel for the defendants understandably wish to test the accuracy of such recollections by resort to Macquarie's records. They complain that it is now far too late to pursue an application for non-party discovery, have it resolved in the event that Macquarie opposes the provision of its documents, and, if access is gained, analyse the documents in time to have the defendants' witnesses address any material issues raised by them.

[23] Thus far, the plaintiff has also not had access to Macquarie's documents, although Ms Mills signalled likely reliance on Macquarie documents that have been obtained as part of Feltex's records that were made available to the plaintiff by the subsequent owner of the Feltex business.

[24] There is to be argument on challenges to the admissibility of proposed evidence in the week before trial, at a hearing I have allocated for 4 March 2014.[2] Earlier extensions of time for serving briefs of witnesses proposed for the plaintiff has been subject to reserving the defendants an entitlement to address any specific prejudice arising from the late service of briefs in the course of challenges to their admissibility. The same obviously applies to Mr Lim's proposed brief.

[25] A possible outcome is that the prejudice caused by the absence of adequate opportunity to test Mr Lim's recollection on factual matters against Macquarie's

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[2] See [33] to [34] below addressing timetabling for that hearing.

records of its involvement at the time could lead to the exclusion from his evidence of factual matters as to Macquarie's involvement. In that case, his brief would be confined to the provision of opinion evidence as to the inadequacies as he perceives them in the Feltex prospectus and statements issued in relation to it.

[26] I have directed that the plaintiff is to be responsible for pursuing all reasonable initiatives to procure non-party discovery of Macquarie's documents. In the first instance, the costs involved in pursuing any application that becomes necessary if Macquarie are not prepared to co-operate, and an undertaking to meet their costs in providing access to the relevant documents, will be borne by the plaintiff. I will not impose a time limit for those steps. Obviously the sooner the defendants' solicitors get access to any Macquarie records that become available, the stronger will be the argument that such access is adequate to address the forms of prejudice raised on behalf of the defendants.

[27] More generally, leave is granted to serve Mr Lim's brief out of time as it was on 6 January 2014, but such leave is without prejudice to any usual grounds for the defendants to challenge its admissibility, plus the entitlement of the defendants to raise particular prejudice arising from the lateness of notice of the content of that brief.

Plaintiff's nominations for the common bundle

[28] The memorandum of counsel for the second and third defendants dated 24 January 2014 raised a concern that the plaintiff appeared to have nominated a substantially more extensive number of documents for inclusion in the common bundle than appeared to the defendants' solicitors to be justified. The plaintiff's counsel had responded, acknowledging that the substantial number of documents were, at this stage at least, perceived as relevant to the plaintiff's case and that an exercise to reduce the number of documents could not realistically occur until the defendants' briefs have been assessed and the cross-examination of those witnesses prepared.

[29] Mr Olney acknowledged that he could do no more at this stage than flag the concern, and it is accordingly noted.

Access to GSM data

[30] The memorandum for the second and third defendants dated 24 January 2014 also raised a concern at difficulties being experienced by an expert retained on their behalf in accessing electronic data that the plaintiff had obtained from Godfrey Hirst, the subsequent owner of Feltex's business. Adequate access now seems to be underway, but the solicitors for the second and third defendants consider it materially more delayed than was necessary, had what they perceive to be the appropriate level of facilitation of access been provided earlier by the plaintiff.

[31] Ms Mills remains unrepentant on this issue, which has been the subject of exchanges of view previously. It is neither appropriate nor necessary to allocate responsibility for the delay and again is a matter that is noted lest it should subsequently assume relevance.

Potential length of hearing

[32] Counsel for the defendants were concerned to have learned from the Registry that it has scheduled the trial to be completed by Friday, 9 May 2014, when present estimates suggest that a further two, and potentially three, weeks beyond that date will be required. I have confirmed to counsel that the trial could run to 23 May 2014. If absolutely necessary, part of the week starting 26 May may also become available. If the hearing does run as long as that, then an inevitable consequence would be the delay in delivery of my judgment. I will request the Registry to allocate the period up to 23 May 2014 for the hearing, and request that counsel keep the likely length of hearing under review, and keep me appraised of their projections.

4 March 2014 hearing on challenges to the admissibility of evidence

[33] A final interlocutory hearing is scheduled for 4 March 2014 to determine challenges on behalf of the defendants to the admissibility of certain aspects of the evidence proposed to be adduced on behalf of the plaintiff. To prepare for that hearing, the following timetable is to apply:

(a) the extent of all challenges by defendants, and the grounds for challenge, are to be notified to the plaintiff's solicitors by ***10 February 2014***;

(b) the defendants' submissions in support of their challenges are to be filed and served by ***24 February 2014***;

(c) the plaintiff's submissions in response are to be filed and served by ***27 February 2014***.

[34] In addition, although it is not an absolute requirement, I have directed that the plaintiff's solicitors are to provide an indication to the defendants' solicitors by 4 March 2014 of the extent to which the plaintiff will be challenging the admissibility of evidence proposed to be adduced on behalf of the defendants.

Costs

[35] Except to the extent addressed in [13] above, there will be no costs orders on the remainder of matters dealt with in this judgment.

Dobson J

Solicitors:
Wilson McKay, Auckland for plaintiff
Bell Gully, Auckland for first defendants (except Mr Horrocks)
Clendons, Auckland for Mr Horrocks
Russell McVeagh, Wellington for second and third defendants
Jones Fee, Auckland for fourth defendant
McElroys, Auckland for fifth defendant