

## FELTEX CLAIM

### IMPORTANT AND URGENT NOTICE

This notice relates to the court proceeding CIV 2008-409-348 : Houghton v Saunders & Others (Christchurch High Court) in relation to Feltex Carpets Limited (in liquidation) ("Feltex") shares subscribed for in the public offer dated 5 May 2004 ("the public offer") and allotted on 2 June 2004 ("the allotment") and which were listed on the NZX under stock code FTX.

This notice is an important document. You should read it carefully and seek legal advice in relation to its contents, especially if there is anything which you do not understand or are unclear about.

#### The court proceeding

1. On 26 February 2008 a representative court proceeding ("the court proceeding") was filed in the High Court at Christchurch pursuant to the High Court Rules 4.24 against T E C Saunders and the other directors of Feltex named in the Feltex prospectus for the public offer, Credit Suisse Private Equity Inc (the promoter), Credit Suisse First Boston Asian Merchant Partners LP (the vendor of Feltex shares and an issuer) and First NZ Capital Limited and Forsyth Barr Limited (the organising participants and the joint lead managers) ("the defendants").
2. The court proceeding is now brought by Eric Houghton, as the sole plaintiff. The claims in the proceeding are made by him as the representative of all qualifying shareholders (as defined below). The High Court has yet to finally determine whether and on what terms the plaintiff can pursue the court proceeding as the representative of the qualifying shareholders (as defined in para 13 below).
3. The first amended statement of claim now filed in the court proceeding dated 21 May 2010 has five causes of action variously alleging that all or some of the defendants (in summary):
  - breached the Fair Trading Act 1986 s9 in the way the public offer was made, both prior to and after the allotment, and as to the contents of the prospectus, by engaging, in trade, in misleading and deceptive conduct or conduct likely to do so or that they were a party to or involved in such conduct in terms of s43(1)
  - are liable to pay compensation to the qualifying shareholders under the Securities Act 1978 s56 by reason of the prospectus containing statements deemed to be untrue
  - are liable to repay the purchase price (subscriptions) paid for the shares by the qualifying shareholders by reason of the loss of the opportunity to avoid the allotments of their shares in terms of the Securities Act s37A.
  - were negligent in the way the public offer was made and as to the contents of the prospectus.
4. In summary, a declaration is sought from the court as to each defendant's liability under each cause of action. Damages or compensation and other relief are sought for the losses claimed to have been suffered by the qualifying shareholders arising from the purchase by and issue to them of Feltex shares pursuant to the public offer. Specifically, the recovery of the full price paid by each qualifying shareholder for their shares, together with interest or equivalent compensation, is sought.
5. The defendants have filed statements of defence to the plaintiff's original statement of claim in which they deny any liability under the Fair Trading Act, the Securities Act or otherwise. The statements of defence include a defence that the Feltex prospectus was not misleading. The defendants have not yet had an opportunity to file statements of defence in response to the first amended statement of claim but they intend to do so.
6. On 7 October 2008 the High Court (in summary):
  - made orders which granted applications by the defendants to strike out two causes of action by a second plaintiff, Darryl Jones, who was then to represent Feltex shareholders who purchased shares in the market subsequent to the public offer. Mr Jones and these



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shareholders will no longer be parties to the court proceeding. Strike out applications by the defendants in respect of the claims by Mr Houghton, who was then the first plaintiff, were dismissed

- made an amended representation order whereby qualifying shareholders must “opt in” to the court proceeding by electing to be represented by the plaintiff. This order amended an earlier representation order made by the High Court on 26 February 2008 which provided for an “opt out” procedure. This earlier order had approved the Joint Action Funding Limited Agreement (“the JAFI Agreement”) which is **enclosed** with this notice as the basis on which qualifying shareholders would be represented and funded in the court proceeding. (This is subject to any further orders of the court, as referred to in para 21 below).
  - made an order requiring the plaintiff’s statement of claim to be amended in two respects and an amended statement of claim filed
  - rejected a claim by the defendants that the plaintiff’s proposed funding arrangements were in breach of the law
  - deferred for later consideration applications by the defendants for security for costs and further particulars of the claims made against them.
7. On 24 July 2009 the High Court further ordered that the court proceeding be stayed in the interim pending the outcome of an appeal by the defendants against the orders made on 7 October 2008.
  8. On 18 December 2009 the Court of Appeal (in summary):
    - dismissed the defendants’ appeal against the representation order made and against a permanent stay of the court proceeding not having been ordered by the High Court
    - allowed the defendants’ appeal against the refusal of the High Court to strike out a cause of action alleging a breach of fiduciary duty. This particular claim is now struck out
    - ordered that the interim stay ordered by the High Court on 24 July 2009 should continue until further order of that court
  9. The Court of Appeal’s decision also gave some guideline comments on (in summary) the appropriate procedure that should be adopted under the representation order, as to the criteria to be applied when determining the basis on which a representative proceeding funded by a commercial funder should be allowed, as to the High Court’s on-going supervision of the representation and funding arrangements in the court proceeding and the extent of the reliance on the prospectus required to be established by qualifying shareholders.
  10. The High Court has yet to determine a number of issues which arise from the Court of Appeal’s decision. The defendants may claim that the court proceeding should not be allowed to continue at all or that the representation and funding arrangements should not be allowed to stand or should be amended or that there are causes of action that are statute-barred or should be struck out on other grounds. As stated, the defendants have also made applications for security for costs and for further particulars of the causes of action.
  11. On 19 May 2010 the High Court made an order lifting the interim stay order (see para 7 above) to enable the first amended statement of claim to be filed and this notice and the **enclosed** consent form to be sent to all potential qualifying shareholders.

#### **Legal representation**

12. Wilson McKay (Roger Cann), solicitors, Auckland are now the solicitors acting for the plaintiff and the qualifying shareholders. Austin Forbes QC, Christchurch and John Eichelbaum, Auckland are retained as senior and junior counsel respectively.

### Who are “qualifying shareholders”?

13. You are a qualifying shareholder if:

- you, or your agent or nominee acting for you, purchased shares in Feltex in the public offer made in May 2004, either for cash or by converting Feltex bonds; and
- you suffered loss by subscribing for Feltex shares in the public offer in reliance on the prospectus in any way or resulting in any way from the alleged conduct of the defendants set out in paragraph 3 above; and
- you agree to become a qualifying shareholder in terms of this notice and the JAFL Agreement (as amended in this notice see para 20 below) and subject to any further court orders (see para 21 below).

### Litigation funding arrangements

14. Joint Action Funding Limited (“JAFL”) is the company set up by Tony Gavigan for the purpose of pursuing the court proceeding. It is 90% owned by him. JAFL has to date arranged funding for the proceeding considered by it, as advised, to be sufficient to meet the likely amount of any orders for security for costs made in favour of the defendants against the plaintiff at the point where the further matters referred to in para 21 below are determined by the High Court.

15. JAFL is currently negotiating with New Zealand and overseas commercial litigation providers to put in place one or more further funding agreement(s) to meet:

- all current and future legal costs in respect of the court proceeding. Any such agreement(s) will be consistent with the terms of this notice, the JAFL Agreement (as amended) and will be in compliance with any further orders of the court. Such agreement(s) will be referred to the plaintiff’s solicitors and counsel for confirmation in this regard
- any adverse costs award(s) in favour of the defendants that are liable to be made if the court proceeding is unsuccessful
- any further orders for security for costs that may be made in favour of the defendants in the court proceeding

Qualifying shareholders who opt in will be advised as to the outcome of these funding negotiations.

### Liability for legal costs

16. Qualifying shareholders who elect to opt in to the court proceeding and elect to be represented by the plaintiff will assume no personal liability for the plaintiff’s costs of the proceeding. Qualifying shareholders who act properly and in accordance with this notice, the JAFL Agreement (as amended) and any court orders will not have any liability for any award of costs in favour of the defendants if the claim is unsuccessful. The liability of the qualifying shareholders for the plaintiff’s costs of the proceeding will be on a success fee basis only (or, more fully described, a banded, deferred, non-recourse fee basis). This means that no liability for such costs by the qualifying shareholders will arise except from the amount recovered if the court proceeding is successful. Specifically, their liability will be paid from each qualifying shareholder’s share of the Resolution Sum (as defined in the JAFL Agreement) and otherwise as provided for in that agreement. If the court proceeding results in a successful judgment in favour of the qualifying shareholders or a successful negotiated settlement then the fees and other charges provided for in the JAFL Agreement will be deducted from each qualifying shareholder’s share of the amount recovered. The bands of the deferred success fees are between 30% and 38% of the amount recovered, plus GST. As well, JAFL’s costs and disbursements, including a project management fee of 25% of the total estimated costs and disbursements in the Project Budget and Time Line (as defined in the JAFL Agreement) will be deducted. If interest or equivalent compensation is recovered as part of the Resolution Sum then this will effectively be available to reduce, possibly considerably, the impact of JAFL’s fees on the amount available for the



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full recovery of the price paid by qualifying shareholders for their shares. Full details of the costs and funding arrangements are contained in the JAFL Agreement.

17. In turn the qualifying shareholders must agree to enter into and comply with the terms of this notice and the JAFL Agreement (as amended) or as amended by any further court order. This notice and the JAFL Agreement have been approved by the High Court, subject to these amendments and subject to any further orders that the court may make. As is provided for in the JAFL Agreement cl 6, qualifying shareholders must also:
  - agree to keep and preserve all documents in their possession or control relating to their investment in Feltex or any claim they have or may have against the defendants and to provide these to the plaintiff's solicitors or counsel upon request
  - agree to make discovery of relevant documents as may be ordered by the court
  - if required, agree to give evidence in support of their own claim
18. Only Feltex shareholders who qualify and elect to opt in to the court proceeding and become qualifying shareholders represented by the plaintiff and who agree to be bound by the terms of this notice and the JAFL Agreement (as amended) will be entitled to receive any benefit from the proceeding.
19. Without creating any legal obligation to do so and at its sole discretion, JAFL intends to refund to qualifying shareholders amounts previously paid by them for initial legal and communication costs, so that all qualifying shareholders are then in the same position in regard to costs.

#### **Amendments to the JAFL Agreement**

20. Amendments to the JAFL Agreement which have been approved by the High Court are:
  - in clause 1.1, in the definition of "Joint Action" the reference to "rule 78" of the High Court Rules is now to "rule 4.24"
  - In clause 1.1 the definition of "Lawyers" now means Wilson McKay, 1A St Vincent Avenue, Remuera, Auckland 1050; P O Box 28347, Remuera, Auckland 1541; ph (09) 520-4544; fax (09) 524-0397; email: [lawyers@wilsonmckay.co.nz](mailto:lawyers@wilsonmckay.co.nz) or any other solicitors appointed in their place. This amendment also applies to Schedule 1 as the party described as "the Lawyers"
  - Clause 11 now has added to it:
 

*"11.3. Any decision under this clause by JAFL shall only be taken after consultation with the Committee and after taking legal advice from the Lawyers or counsel, provided that JAFL may, as well, take legal advice from any other source as it may decide".*
  - Clause 13.3 now has added to it:
 

*"13.3A. The Committee or the Lawyers or counsel may require that any legal advice or other communication with the Qualifying Shareholders as to any matter in the court proceeding or any other relevant matter shall be provided as they may stipulate, free of any input or interference by JAFL but after such consultation with JAFL as they consider to be appropriate;*

*13.3B. JAFL and the Committee shall first refer any proposed communication by either of them with the Qualifying Shareholders as to any matter in the court proceeding or any other relevant matter to the Lawyers or counsel for their advice or comments.*

*13.3C. The Committee shall be kept informed by JAFL and consulted as to all material or relevant matters relating to the court proceeding. The Lawyers or counsel may require JAFL to inform or consult with the Committee on any particular matter or may do so directly with the Committee themselves.*

*13.3D. The plaintiff, or his nominee, shall be a member of the Committee. One member shall be nominated by JAFIL and one by the Lawyers and counsel”.*

- Clause 23.1 (b) is deleted

#### **Further amendments to the representation and funding arrangements**

21. As stated, various issues arising from the Court of Appeal’s decision have still to be determined by the High Court (see para 10 above). There will be a hearing as a result of which the High Court may then, or at any time in the course of the court proceeding, make further orders which will amend the representation and funding arrangements. If so, the qualifying shareholders who have elected to opt in to the court proceeding will be advised of these amendments. If at any stage in the proceeding these are considered by the court to reasonably give rise to an entitlement to review their continued involvement in the court proceeding then they will be given the opportunity to withdraw from it, which would mean they would then have no entitlement to any benefit from the claim.

#### **What qualifying shareholders need to do now**

22. It is important that qualifying shareholders who wish to elect to opt in to the court proceeding and be represented by the plaintiff do so as soon as possible, because it may be claimed by the defendants that all or some of the causes of action referred to above will become statute-barred as from 2 June 2010, being the date which is six years from the date of allotment of the Feltex shares. The defendants have claimed that all or some qualifying shareholders’ claims under the Fair Trading Act are or may be already statute-barred. Any defences that the claims are or may soon become statute-barred will be disputed by the plaintiff, in accordance with legal advice received. Instructions for the return of the consent form are given in it.

#### **Consent form**

23. If you meet the definition of a “qualifying shareholder” (see para 13 above) and wish to participate in the court proceeding you need to complete the consent form enclosed with this notice so that it is returned by 31 May 2010. The signed consent form must be posted but should also be faxed or emailed (with your signature scanned), if possible. Consent forms of qualifying shareholders can be received after this date but they may face a defence that their claims are statute-barred as from 2 June 2010. This requirement to complete the consent form applies to all qualifying shareholders, irrespective of whether they have previously signed an authority, consent or other form or letter agreeing to be represented in the court proceeding. This form replaces any such previous documents, except as may be necessary to preserve any rights, including as to any defence that a claim is statute-barred. This notice, the JAFIL Agreement (as amended) and the consent form are the only basis on which qualifying shareholders can join in the court proceeding and the only basis on which the legal costs can be paid. By signing the consent form qualifying shareholders agree to be bound by the terms of this notice and, as well, the JAFIL Agreement (as amended). As stated, there may be further amendments to the representation and funding arrangements made by the High Court.
24. If you do nothing you will not be able to participate in the court proceeding and the claim against the defendants, represented by the plaintiff.
25. The names and Feltex CRN numbers (if available) of qualifying shareholders who have elected to opt in to the proceeding will be filed by Wilson McKay immediately after the consent forms have been checked and processed by JAFIL.

#### **Any questions?**

26. If you are unsure as to whether you meet the definition of a qualifying shareholder or if you have any questions or are unsure about anything else or require any further advice or information regarding any matter arising from this notice or in respect of the court proceeding then you should seek independent legal advice. Any further specific information required (other than legal advice) can be obtained from Mr Gavigan, the principal of JAFIL. His contact details are provided in clause 22.2 of the JAFIL Agreement.



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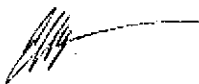
### Other matters

27. The committee to be appointed under the JAFL Agreement will be able to override any instructions given by JAFL to the solicitors or counsel. This is provided for in the JAFL Agreement cl 13.3.
28. Subject to any further court orders, Qualifying shareholders will be able to communicate on any matter relating to the court proceeding with any of the following:
  - Mr Gavigan
  - the plaintiff (Mr Houghton) or the other two members of the committee appointed under the JAFL Agreement. Mr Houghton can be contacted at email: [feltexplaintiff@gmail.com](mailto:feltexplaintiff@gmail.com) Contact details for the other two committee members will be provided when they have been appointed.
  - Mr Cann, Wilson McKay (see para 20 above)
29. Mr Eichelbaum (junior counsel for the plaintiff) discloses that he has an option to acquire 10% of the shares in JAFL.
30. The following documents are available to read and downloaded from **this** website: <http://www.ftxit.com>:
  - this notice
  - the consent form
  - the Feltex prospectus
  - the JAFL Agreement
  - the High Court's (French J) judgments dated 7 October 2008 and 24 July 2009
  - the Court of Appeal's judgment dated 18 December 2009.

Apart from any other persons who may be able to assist you, your lawyer will be able to download any of these documents for you, advise you as to them and, if appropriate, post and fax or email the enclosed consent form back.
31. There is also a link to the <http://www.ftxit.com> website on the NZX website: <http://www.nzx.com> - stock code FTX stating that these documents are available there.

**Dated:** 21 May 2010

Eric Houghton (the plaintiff)




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(E M Houghton)

Joint Action Funding Limited




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(A J Gavigan)