IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2008-409-000348

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

Hearing: 8-11 November 2010
2-3 December 2010

Appearances: A J Forbes QC, J R Eichelbaum and P Mills for Plaintiff
A R Galbraith QC and D Cooper for First Defendants
A Olney and P Douglas for Second and Third Defendants
D H McLellan for Fourth Defendant
A Challis for Fifth Defendant

Judgment: 8 June 2011

RESERVED JUDGMENT OF HON JUSTICE FRENCH

Table of Contents

[1] Unfortunately, delivery of this judgment has been significantly delayed because of the Christchurch earthquake on 22 February 2011.

[2] Due to the exigencies of the situation, I issued an interim judgment (dated 9 March 2011)[1] stating the key rulings, but without giving any reasons.

[3] The reasons for those key rulings and other rulings now follow.

Introduction

[4] The plaintiff, Mr Houghton, is a former shareholder of the failed company Feltex Carpets Limited. He seeks to bring a representative proceeding on behalf of himself and approximately 1800 shareholders against the former Feltex directors and others associated with a public float share issue that took place in May/June 2004.

[5] The claim primarily centres on the prospectus which Mr Houghton alleges contained untrue and misleading statements.

[6] It is proposed that the costs of bringing the claim be funded by a commercial litigation funder.

[7] This decision concerns three inter-connected interlocutory applications:

[i] Mr Houghton's application to lift an interim stay of the proceeding, the stay having been imposed pending the hearing of an appeal brought by the defendants in the Court of Appeal.

[ii] Various applications by the defendants to strike out certain aspects of the amended statement of claim.

[iii] The defendants' applications for security of costs.

[8] The applications were made against the following procedural background.

---

[1] *Houghton v Saunders* HC Christchurch CIV-2008-409-000348, 9 March 2011, attached to this judgment as Appendix A.

[9] The original statement of claim was filed on 26 February 2008. At the same time, Mr Houghton filed an application for an order under r 78[2] seeking permission to sue in a representative capacity on behalf of other shareholders who met certain specified criteria. An Associate Judge granted the representative order on an opt-out basis, which meant that all qualifying shareholders would automatically become part of the proceeding unless they elected to opt-out by a nominated date.

[10] The defendants challenged the making of the representative order. They also applied for a stay of the proceedings on the grounds that the proposed funding arrangement was an abuse of process.

[11] In a judgment dated 7 October 2008,[3] I upheld the representative order subject to certain amendments, the most important of which was to replace the opt-out procedure with an opt-in procedure. The effect of the amendment was that qualifying shareholders could only become part of the proceeding by actively consenting to do so, rather than by default.

[12] Under the terms of the representative order, the qualifying shareholders on whose behalf Mr Houghton is currently permitted to sue are defined as those shareholders who purchased shares in Feltex in the public offering on 4 June 2004 and who suffered a loss on their investment. I pause here to interpolate that the date of 4 June 2004 is an error, and it should be 2 June 2004, 2 June 2004 being the date on which the shares at issue were allotted.

[13] In my judgment of 7 October 2008 I also held that the funding agreement, while champertous, did not amount to an abuse of process.

[14] The defendants appealed my decision to the Court of Appeal, and in July 2009 I granted an interim stay of the proceeding pending the outcome of the appeal.

[15] In its decision dated 18 December 2009,[4] the Court of Appeal struck out one of the causes of action but dismissed the appeal against the representation order, as

---

2 High Court Rules 1985. Superseded by r 4.24 High Court Rules 2008.
3 *Houghton v Saunders* [2009] NZCCLR 13.
4 *Saunders v Houghton* [2010] 3 NZLR 331.

well as the appeal against my decision declining to find an abuse of process. However, they also held that the interim stay I had imposed should continue pending the further order of the High Court. That was because Mr Houghton's counsel had proposed filing a draft amended statement of claim, and therefore the Court of Appeal considered that no decision whether to maintain the representation and uplift the stay could be made until that had been done.

[16] The Court of Appeal expressly contemplated that once the new draft pleading was tendered, this Court was to convene a hearing to review the case and make a decision whether to uplift the interim stay and if so on what conditions. The Court of Appeal decision identified a number of issues which the hearing should canvass.

[17] Unfortunately, Mr Houghton's counsel did not tender the draft amended statement of claim until May 2010. The delay was particularly unsatisfactory because of an argument that some of the claims may be statute-barred, or would become so by 2 June 2010.

[18] Due to the exigencies of the situation, it was agreed I should deal with the application for lifting the interim stay in two stages.

[19] The first stage, which is the subject of another judgment, dated 26 May 2010,[5] resulted in the interim stay being lifted for the limited purpose of allowing an amended statement of claim to be filed and an approved notice sent to all qualifying shareholders to give them an opportunity to be part of the proceeding before 2 June 2010.

[20] The second stage, which is the subject of this judgment, was to consider the balance of the issues identified by the Court of Appeal and determine whether the claim can proceed and if so on what terms. As the Court of Appeal put it, to make "a decision about the future of the litigation and the rules of the game from now on".[6]

---

5 *Houghton v Saunders (Reasons for Judgment)* HC Christchurch CIV-2008-409-000348, 26 May 2010.

6 At [111].

[21] Before turning to the various applications and the issues identified by the Court of Appeal, it is necessary for me to traverse the factual background to the claim.

Factual background

[22] Feltex was a well-known New Zealand carpet manufacturer.

[23] In 2004 the then owner of Feltex, the third defendant Credit Suisse MP, decided to sell its shares by way of a public offering. In conjunction with the sale, Feltex undertook a public float of $50m of new shares.

[24] As noted by the Court of Appeal,[7] the signatories of the prospectus and investment statement required by the Securities Act 1978 occupied four distinct roles: there were the directors of Feltex acting in that capacity, the vendor of the issued shares (Credit Suisse MP), the organising participants and joint lead managers of the share issue (Forsyth Barr and First New Zealand Capital) and the promoter (Credit Suisse PE Inc). They are the various defendants in this proceeding.

[25] The terms of the share offer involved an indicative price range, with the final share price eventually fixed at $1.70 per share following a book build process.

[26] The closing date for the public offer was 5 p.m., 21 May 2004, subscribers being required on that date to submit an irrevocable offer using a prescribed form. The final price was confirmed by public announcement on 24 May 2004.

[27] It was however possible to obtain shares after 24 May from brokers who had received an allocation. The closing date of the offer for applications pursuant to firm allocations was 12 noon, 2 June 2004.

[28] Shares were allotted no later than 2 June 2004.

---

7 At [2].

[29] The float is said to have raised more than $250m, the vendor Credit Suisse MP allegedly making a profit of some $182.2m. According to the plaintiff, the other defendants also obtained very significant personal benefits as a result of the float.

[30] Less than a year later, on 1 April 2005, Feltex announced a downgrading of the profit that had been forecast in the prospectus. Later in 2005 there was a further downgrade, the revised figures representing only 51 per cent of those forecast in the prospectus. In October 2005 the directors reported a loss of $400,000 for the second half of the financial year and a full year result of $11.8m, compared with the projected profit of $25.8m. By March 2006 the shares had declined to an approximate value of 60 cents each, and in September 2006 receivers were appointed. Trading in shares ceased, Feltex's assets were eventually sold and the company itself placed in liquidation on 13 December 2006. The shareholders' funds were entirely lost, with creditors owed some $30m to $40m.

[31] Following Feltex's collapse, a shareholders' action group was established which eventually led to the issuing of these proceedings.

[32] A key driving force behind the action group and the litigation is an Auckland merchant banker, Mr Tony Gavigan. In December 2007 Mr Gavigan incorporated a litigation funding company called Joint Action Funding Limited (JAFL). This followed an unsuccessful approach to a major Australian litigation funder, IMF Limited, to see if it would be interested in funding the claim.

[33] Mr Gavigan is the sole director of JAFL, and owns 90 per cent of the shares. The other 10 per cent is held by Benzian Trustees Limited. Mr Gavigan has granted an option to the plaintiff's junior counsel, Mr Eichelbaum, for 10 per cent of JAFL's shares.

[34] The amended statement of claim identifies certain statements or omissions in the prospectus which it is alleged were misleading, and goes on to plead five causes of action:

[i] Breach of s 9 of the Fair Trading Act 1986 as against all

defendants up to allotment of the shares.

[ii] Breach of s 9 of the Fair Trading Act as against the directors and the vendor Credit Suisse MP for wrongfully disguising the availability of the shareholders' statutory remedy under s 37A of the Securities Act.

[iii] Breach of s 9 of the Fair Trading Act against Feltex director and chief executive officer, Mr Magill, relating to alleged post-allotment "channel stuffing" and the timing of the April 2005 profit downgrade announcement.

[iv] Breach of s 56 of the Securities Act 1978 against all defendants.

[v] Tortious negligence against all defendants.

[35] The relief sought in each case is:

[i] A declaration of liability.

[ii] An order declaring that the shareholders' subscription for shares in Feltex is void.

[iii] An order for the refund to each qualifying shareholder of the purchase price of their shares.

[iv] Interest and costs.

Overview of relevant legal principles

The decision of the Court of Appeal

[36] My consideration of the various applications must of course be informed by the decision of the Court of Appeal.

[37] A recurring theme in that decision is the need to safeguard the position of the defendants. As the Court points out, a commercially-funded representative action involving very large numbers of claimants substantially alters the balance between plaintiffs and defendants and is potentially oppressive. It opens up, for example, the prospect of an unscrupulous funder orchestrating a class action on an unmeritorious basis with a view to extorting an unjustified settlement. As the Court also notes, the current High Court Rules do not contain any specific class action rules such as exist in other jurisdictions which reduce the disadvantages of such claims to defendants. Accordingly, in the absence of any rules, the Court should itself fashion the type of safeguards such rules might be expected to provide. In particular, the Court should ensure the funder is placed firmly under the control of the Court and is required to act responsibly.

[38] The Court of Appeal identified three conditions which it said must be satisfied before the interim stay could be lifted:[8]

> [i] The Court must be satisfied there is an arguable case for rights that warrant vindicating.
>
> [ii] There is no abuse of process.
>
> [iii] The funding proposal is approved by the Court.

[39] In addition to the need for close Court supervision, the Court of Appeal also saw security for costs as a critical safeguard, stating it may be desirable to view a security for costs order as part of a total package:

> [38] The judge must bring a critical and creative mind to bear on all aspects and implications of the initial representation decision. While the threshold for representation orders is low, when accompanied by an order admitting a funder it may prove desirable to view the total package of orders as a stool supported by four legs, each essential to its stability:
>
> (a) the order for representation (considered along with its funding element);

---

8 At [79].

(b) the court's approval of the funder and the funding arrangement;

(c) the application for security (which may include consideration of the final leg); and

(d) the provisional appraisal of the merits. An erroneous decision on any element may either wrongly exclude worthy plaintiffs from access to the court, or wrongly impose on defendants who have committed no fault such burden of costs and distraction from their other affairs so as to pressure them to yield to a baseless demand and settle.

Application to lift the interim stay

Is there an arguable case for rights that warrants vindication?

[40] At the hearing before me, there was debate as to exactly what the Court of Appeal meant by an "arguable case". All were agreed "arguable case" was a higher threshold than that required to survive a strike-out application, but not so high as to require Mr Houghton to establish a prima facie case. All were also agreed that it did necessitate some appraisal of the evidence.

[41] In other jurisdictions where there are detailed class action rules, it is unusual for the Court to undertake any preliminary assessment of the substantive merits. Counsel also informed me there is no such requirement in the draft class action rules being proposed for this country.

[42] The novelty of the requirement prompted Mr Forbes to submit that the Court of Appeal could not have intended to impose too high a threshold.

[43] I accept that submission, particularly having regard to the fact that no statements of defence to the amended statement of claim have yet been filed and no discovery has taken place. Of necessity, given the nature of the claim, much of the critical information is peculiarly within the knowledge and control of the defendants.

[44] In my view, an arguable case closely equates to the serious question to be tried test applied in interim injunction cases. I am also satisfied the Court of Appeal contemplated a broad brush impressionistic approach rather than a detailed analysis of each and every pleaded allegation.

[45] I have approached this task on the basis that it would be wrong for me at such an early stage to attempt to resolve genuinely disputed facts or disputed expert opinion, but that I should not regard as "arguable" any assertion that is without any evidential foundation or so inherently implausible as to defy belief.

[46] In contending there is an "arguable" case, Mr Forbes relied upon the following:

a) The suddenness of the collapse and the wide discrepancy between the forecasts in the prospectus and the actual results.

b) Affidavit evidence from two accounting experts opining that compliance with accounting standards is not conclusive, that Feltex never had any realistic prospect of making the profits forecast in the prospectus, that the prospectus did not present a true and fair view of Feltex's situation and prospects and was misleading. Both experts also identify specific aspects of the prospectus they consider to be misleading. These include the alleged non-disclosure of changes in accounting policy regarding sales figures, the treatment of government grants in the prospectus, assumptions relating to forecasts, the goodwill figure, the use of a second bottom line, and the treatment of contingent liabilities.

c) Affidavit evidence from two major carpet retailers regarding a sudden change to Feltex's invoicing practices and their concerns about those practices.

d) Evidence from one of those retailers alleging Feltex unilaterally reduced rebates paid to large Australian carpet groups in the period before the float, something that was not disclosed in the prospectus and which was likely to significantly damage relationships with key retailers and customers.

e) Affidavit evidence from a former consultant to Feltex disputing

claims made in the prospectus that Feltex had introduced lean manufacturing methods.

f) Copies of newspaper articles written in 2006 in which commentators expressed disquiet about the prospectus and the non-disclosure of what is alleged to have been a large overhang of unsold shares held by brokers.

g) Reported newspaper comments by the first defendant, Mr Saunders, which are arguably at odds with statements on the same topics in the prospectus regarding customer relationships and the calibre of Feltex management.

h) Copy of submissions made by Feltex to the Australian Productivity Commissioner regarding the likely impact that tariff reductions and increased imports would have on Feltex. There are inconsistencies between the submissions, which were made ten months before the float, and the assessment of risk in the prospectus.

i) Assertions by Mr Gavigan about the prospectus and conversations with industry players.

[47] Most of this evidence was strongly contested, the defendants adducing affidavit evidence in rebuttal from an eminent professor of accounting and financial management as well as evidence from Feltex's former chief financial officer and directors of First New Zealand Capital and Forsyth Barr. The director of First New Zealand Capital adamantly denies the existence of any large overhang of unsold shares, while the director of Forsyth Barr questions the credibility of a claim that Forsyth Barr had valued the Feltex shares at $1.30 per share.

[48] The defendants also objected to Mr Forbes' reliance on the newspaper articles pointing out that they were hearsay and mostly written before the Securities Commission report which found the prospectus was not misleading. The defendants

understandably seek to attach great weight to the Securities Commission report and the inquiry which preceded it.

[49] However, while the report is obviously very important, it is not of course binding on this Court. Its conclusions are disputed by the plaintiff's two accounting experts, while Mr Forbes also claims there were matters which the Commission did not take into account and which may well have made a difference. Whether that is correct must, in my view, await another day.

[50] Mr Galbraith urged me to place weight on a finding made by the District Court in a criminal prosecution to the effect that the Feltex directors were honest men.[9] However, I am not persuaded any significant weight can properly attach to that finding in determining whether the plaintiff has an arguable case. The finding was made in a different context and, apart from anything else, most of the claims pleaded in this proceeding are not dependent on proof of dishonesty.

[51] As regards the hearsay objection, the rules do expressly allow hearsay evidence to be adduced in interlocutory proceedings[10] and I am therefore prepared to take the newspaper articles into account, their hearsay nature going only to weight.

[52] As I have already mentioned, the fact that evidence is contested – for example the Chief Financial Officer denies there was any unilateral reduction of rebates – does not of itself mean the plaintiff does not have an arguable case. At this early stage I am simply unable to resolve those conflicts. Similarly, I am not in a position to reach definitive conclusions about arguments as to the legal effectiveness or otherwise of certain disclaimers and qualifications in the prospectus.

[53] At the hearing there was much debate regarding the strength of the plaintiff's allegations in relation to invoicing practices.

[54] As I have also already mentioned, the amended statement of claim makes an allegation of what is called "channel stuffing". Channel stuffing is a term usually

---

9 *Ministry of Economic Development v Feeney* DC Auckland CRI-2008-004-029199, 2 August 2010.

10 Rule 7.30.

used to refer to a deceptive practice whereby a supplier artificially inflates its sales figures by sending large volumes of unsolicited product to its customers and entering the transactions in its books as a sale, despite knowing it is likely the unordered goods will be returned.

[55] There is no evidence to suggest that Feltex ever engaged in such a practice. The plaintiff accordingly proposes to re-package this allegation as an allegation of manipulation of earnings and revenue recognition. The allegation is to be re-pleaded in these terms:[11]

> 37.8 By failing to disclose in the prospectus that Feltex had from on or about May 2003 engaged in the manipulation of its earnings by a practice by which Feltex accounted for sales in an earlier accounting period that properly should have been accounted for in a subsequent accounting period, with the result that the financial statements of Feltex for 2003 and 2004 were distorted by not giving a true and fair view of its financial position and performance...

[56] The pleading goes on to state that for the purposes of accessory liability under the Fair Trading Act, this allegation is only made against Mr Magill and not any of the other defendants. It also reserves the right to provide further particulars following discovery.

[57] The allegation of earnings manipulation is repeated for the purposes of the second and third causes of action. Both these causes of action concern events post-allotment. What is alleged is that the practice continued after 2 June 2004 in order to conceal income shortfalls and prevent alarm bells ringing.

[58] The evidence relied upon as rendering these allegations arguable is affidavit evidence from two former Feltex customers, both major carpet retailers.

[59] One, a Mr Pearce, contends that in May 2003 the end-of-month statement from Feltex suddenly, without any advance warning or agreement, started to include invoices dated the first day of the next calendar month, a practice which continued until December 2004. Mr Pearce further contends that many of these forward invoices related to carpet that was not actually delivered until part-way through the

---

[11] Second further memorandum of counsel for the plaintiff as to proposed amendments to amended statement of claim, 3 December 2010.

month of the invoice. For example, invoices dated 1 June 2003 were included on Feltex's May 2003 statement. The actual individual invoices were not received by Mr Pearce until 6 June, while the carpet itself arrived on 4 June in respect of one of the invoices, and 9 and 11 June in respect of the others. According to Mr Pearce, the standard delivery times would mean the carpet is likely to have been despatched from Feltex on 2, 7 and 9 June respectively. Yet the invoices are dated 1 June.

[60] If what Mr Pearce is saying is correct, it suggests at least some invoices may not have been issued on the date of despatch as claimed by Feltex.

[61] Mr Pearce's affidavit annexes copies of relevant invoices and monthly statements showing several instances of this practice.

[62] The other retailer, Mr Harrison, talks of experiencing forward invoicing in October, November and December 2004, accounting for 50 per cent of the total invoices for that quarter. Both Mr Pearce and Mr Harrison claim forward invoicing is not standard industry practice and is anomalous.

[63] In support of his claims, the plaintiff also adduced evidence of what counsel termed an $11m "blowout" in receivables (trade debtors) evident during the critical pre- and post-float period. The plaintiff contends this is consistent with what occurs when accounts are manipulated by bringing revenue forward.

[64] The allegations of channel stuffing are strongly denied by Feltex's Chief Financial Officer, Mr Tolan.

[65] While Mr Tolan does not dispute that forward invoicing did take place, he deposes that the purpose was simply to generate an extra month's credit for the customer. He also asserts that the practice made no difference to the date on which revenue was recognised (date of despatch) and could not have led to any distortions in the accounts.

[66] As for the receivables, Mr Tolan says the figures relied upon by the plaintiff are taken from an Australian subsidiary of Feltex Carpets Limited. The figures for

the Australian parent company show a less marked increase, while the New Zealand trade debtors figures over the period actually fell. Mr Tolan goes on to say that in any event it is usual for trade debtors figures to fluctuate from time-to-time, and it is not an indicator of channel stuffing.

[67] However, it is arguable that Mr Tolan's affidavits leave some unanswered questions. His description of Feltex's invoicing system does not fully account for the forward invoices and his affidavit is also silent, for example, as to whether this practice was suddenly introduced in May 2003 as Mr Pearce claims, and if so why the haste and why that particular time.

[68] Mr Galbraith submitted that regardless of the propriety or otherwise of this practice, it could not have had a significant effect on the accounts because at best for the plaintiff it could only have resulted in sales being recognised a month earlier than they would have been if the sales had been recognised on delivery, as the plaintiff contends should have happened. The sales were genuine sales. The carpet in question had been ordered.

[69] The plaintiff's position, however, is that revenue should only have been recognised on delivery, that the full effect of the forward invoicing practice on revenue recognition can only be established when discovery is completed and that only discovery will reveal which particular six-monthly accounting period benefited most from the overall manipulation of revenue recognition.

[70] My assessment at this very early stage is that the plaintiff's allegations about forward invoicing and revenue recognition are not strong. However, there is, in my assessment, a sufficient evidential foundation for it to be arguable and to satisfy the ethical duties of counsel pleading such an allegation involving, as it does, an element of deceit.

Conclusion on whether the plaintiff has an arguable case

[71] As a general comment, I agree that much of the plaintiff's evidence lacks precision. However, my overall impression is that it would be unjust to prevent the claim from continuing because I am satisfied there are serious questions to be tried.

[72] In coming to this conclusion I have not overlooked the arguments raised by First New Zealand Capital and Forsyth Barr about the weakness of the specific cases against them, in particular the lack of any evidence or particulars supporting the allegation they were "promoters".

[73] However, it is clear the Court of Appeal considered that at this stage it was arguable the two were promoters and that there was the necessary proximity. As noted at [87] of the decision, organising participants and joint lead managers are closely involved in the float and have a role of promotion.

Approval of the funding process

[74] At the Court of Appeal, counsel for the directors, Mr Cooper, provided the following list of suggested guidelines:

> **Court supervision of litigation funding arrangements**
>
> 1. The litigation funding agreement should be submitted to the Court for approval at the time when the litigation is commenced.
>
> 2. In approving the litigation funding agreement the Court may have regard to the identity of the litigation funder, including its qualifications and its prior conduct in litigation funding matters.
>
> 3. There should be a direct client-solicitor relationship between the members of the represented group and the lawyer acting in the litigation.
>
> 4. The lawyer acting in the litigation should be responsible for advising the named plaintiffs and members of the represented group about the merits of the case and all material developments in the case. That advice should be prepared and provided without interference by the litigation funder.
>
> 5. Any communications inviting people to join the represented group (i.e. "opt in" communications) should be submitted to the Court for approval before being distributed.
>
> 6. Any communications between the litigation funder and members of the represented group, or potential members of the represented group, should be balanced and accurate and should not include misleading or deceptive statements. Any material breach of this requirement should lead to disqualification of the litigation funder from continuing to fund the litigation, but should not preclude the plaintiffs or represented group from pursuing the claim (including with a different litigation funder).
>
> 7. The litigation funder, including the directors and employees of the litigation funder, should not provide expert evidence in the litigation. Expert witnesses should be instructed directly by the lawyers acting in the litigation

and the litigation funder should have no direct involvement in that process.

8. The litigation funder is to certify to the court that it has funding available to meet the costs of the litigation and to pay any order of security for costs made by the Court.

[75] While the Court of Appeal was unable to endorse the list – not having heard argument on the point – the judgment does say that the list identifies questions which warranted recording for future consideration.[12] I have found the list very helpful in my deliberations and note that it was not challenged by any party.

[76] The JAFL funding agreement with the qualifying shareholders is a standard form used by IMF Limited. As I have already mentioned, IMF is a major Australian litigation funder. The form has been before the High Court of Australia[13] and, as Mr Forbes points out, has not been the subject of any judicial criticism either from the High Court or the New South Wales Court of Appeal.

[77] Further, since the Court of Appeal delivered its decision in this case, the JAFL funding agreement has been amended to impose additional controls on JAFL. The amendments include changes to the composition of the shareholders' committee which is able to override JAFL's instructions to legal counsel, as well as amendments which enhance the role of the legal representatives who are, of course, officers of the Court. The new controls mean that the Committee, the solicitors and counsel will have a direct role in the advice given to and communications with the qualifying shareholders and as to publicity about the proceeding. In addition, since the Court of Appeal decision, I have ordered that any communications to prospective members of the class about the proceeding must first be approved by the plaintiff's legal representatives.

[78] The opt-in notice advised qualifying shareholders of these amendments and the possibility of further Court-ordered amendments.

[79] Having regard to the eight guidelines and the concerns identified by the Court of Appeal, I am satisfied the amended agreement as such is appropriate.

---

12 At [32].

13 *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 (HCA).

[80] However, while JAFL's agreement may be acceptable, at this stage JAFL is unable to certify to the Court that it has funding available to meet the costs of the litigation other than an amount of $250,000 for security for costs. In evidence, Mr Gavigan confirmed that in fact it is not intended JAFL be the actual funder. What is intended is that JAFL simply be the mechanism through which funding is delivered by some other entity. No firm arrangements with another entity for the full cost of the litigation have however yet been put in place, although Mr Gavigan stated he is currently in promising negotiation with solicitors in Melbourne, funders in London and a New Zealand-based insurer. JAFL itself does not have a bank account. It has no funds and its only asset is the contingent interest in this proceeding.

[81] The defendants submitted that in itself the absence of a funder was fatal to the stay being lifted. They contended the only funding arrangement in existence is hollow, and as a result I am simply not in a position to make the assessments required of me by the Court of Appeal. Two of the four legs of the stool are missing.

[82] All of the defendants also raised concerns about Mr Gavigan's reliability, painting him as something of a maverick and pointing to the following matters:

- Inconsistency between what he is saying now and previous statements which gave the impression JAFL was to be the funder and that it had the necessary money to hand.

- Misrepresentation of the findings of the Security Commission report to potential claimants.

- Extravagant and at times allegedly defamatory statements in some of his communications with shareholders.

- Allegedly misleading statements in an affidavit about a letter of credit.

- His actions in sending out an unapproved opt-in notice, in breach of a Court order.

- Repeated non-compliance with timetabling directions and delays.

- Evasiveness over a dispute with Mr Houghton's previous solicitors.

[83] Some of this criticism is well-founded. There have been unacceptable delays in prosecuting the claim, and at times Mr Gavigan has acted inappropriately and in a way that would not be expected of a responsible funder.

[84] Also of obvious concern is the uncertainty as to whether an actual funder will ever be found. While Mr Gavigan was confident of a successful conclusion to the current negotiations, that has to be weighed against the length of time that has already elapsed since the proceeding was first initiated, the unsuccessful approach to IMF Limited, and the fact the plaintiff's budget has apparently increased from $2.5m to $5m.

[85] All of these matters led me to consider whether the stay should be maintained until an actual funder was found.

[86] However, after very careful deliberations I decided the preferable course of action was to lift the stay and allow the claim to continue pending the outcome of the negotiations with prospective funders. That will mean Mr Gavigan having continued involvement.

[87] My reasons for coming to this conclusion were as follows:

a) The claim is arguable.

b) If the stay were to be maintained until an actual funder is put in place, that is likely to cause significant prejudice to the claimants. It will cause yet more delay and may also result in the loss of potentially crucial evidence. Important financial records are held by third parties, but the period for which these must be held was shortly to expire.

c) Any prejudice to the defendants in permitting the claim to continue in the meantime can be mitigated by an order for security for costs.

d) Concerns about the matter being left to drift can be met by a Court order requiring Mr Gavigan to report on progress within a specified timeframe.

e) It will be possible for the Court to ensure that, whatever the arrangements between JAFL and the actual funder may be, they do not impact adversely on the claimants' rights under the existing funding agreement. Therefore, contrary to a submission made by Mr Galbraith, there can be certainty the existing funding agreement will remain in place. My approval of that agreement is thus still meaningful notwithstanding the absence of an actual funder.

f) The actual funder can be subject to Court scrutiny, and in particular can be required to satisfy the Court it has the means to pay the full cost of litigation.

g) I am not persuaded Mr Gavigan's past indiscretions are such as to require his removal, especially given the controls now imposed by the recent amendments to the JAFL agreement. I am prepared to accept that his past indiscretions have been essentially due to an excess of enthusiasm rather than bad faith or any deliberate attempt to defy or mislead the Court.

[88] Another related issue raised by the defendants concerned the independence of the plaintiff's legal team, and in particular its independence from JAFL and Mr Gavigan, which in turn bears on the effectiveness of the new controls in the funding agreement. It was suggested the legal team was not truly independent because the instructing solicitor is not a Court lawyer, Mr Eichelbaum has shares in JAFL and Ms Mills is the partner of Mr Gavigan.

[89] In my view, however, none of the concerns raised would justify my refusing to lift the stay.

[90] The fact the instructing solicitor may not do Court work is in my view irrelevant. He is still an officer of the Court and so subject to all the usual ethical obligations.

[91] Further, oversight of the litigation (including the giving of advice and communications with shareholders) rests with senior counsel, Mr Forbes. Mr Forbes is a Queen's Counsel, and other than acting in this proceeding, has no connection whatsoever with either JAFL or Mr Gavigan. Mr Forbes also advised that he was not acting on a contingency basis, and confirmed he is personally aware of the nature of the information being sent to prospective funders. I note, too, that Mr Eichelbaum made full disclosure of his interest to claimants in the opt-in notice.

The representation order

[92] Credit Suisse opposes the continuation of the representation order on the grounds that the amended claims give rise to issues – reliance, causation and reasonable discoverability – that will require consideration of the individual circumstances of each shareholder. Accordingly, it is argued that the same interest requirement of the rule authorising representative orders[14] is not satisfied, and the claim should not be allowed to proceed on a representative basis.

[93] However, I am satisfied the Court of Appeal decision did not intend or contemplate the High Court revisiting issues of reliance or causation at this stage, and that any subsequent amendments to the statement of claim do not alter the position.

[94] I am also satisfied the representation order should be maintained in its present form. Because of the recent amendments to the JAFL agreement and the other directions I have either already made[15] or intend to make in this judgment, I consider there is no need for changes to the order itself or for it to be made subject to any conditions.

[95] The representation order is, however, to be kept under constant review.

---

14 Rule 4.24.

15 *Houghton v Saunders (Reasons for Judgment)*.

Strike out applications

[96] The amended statement of claim was filed on 26 May 2010. It introduced two new causes of action and pleaded new particulars in relation to existing causes of action.

[97] The defendants have variously applied to strike out the new causes of action and several of the new particulars.

[98] Under r 15.1 the Court may strike out all or part of a pleading where it discloses no reasonably arguable cause of action, is frivolous or vexatious or is otherwise an abuse of the process of the Court.

[99] The Court's approach to strike out applications on the basis of no reasonable cause of action is well settled:[16]

i) The Court will assume the facts pleaded are true.

ii) Before it may strike out a proceeding, the Court must be certain the cause of action is so clearly untenable it cannot succeed.

iii) The jurisdiction is to be exercised sparingly. Striking out is a draconian step.

iv) Particular care is required in areas where the law is confused or developing.

v) The jurisdiction is not ousted by the need to decide difficult questions of law requiring extensive argument.

vi) Where a defect in a pleading, challenged as disclosing no reasonably arguable cause of action, can be cured by amendment which the plaintiff is willing to make, the Court will almost always permit

---

16 See *Couch v Attorney-General* [2008] 3 NZLR 725 (SC) and *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA).

amendment rather than strike the pleading out.

vii) If a limitation issue is raised, the claim can only be struck out if there is no reasonable possibility the application was brought in time.

Limitation issues

[100] Several of the strike out applications rely on arguments that certain claims are statute-barred. For convenience, I have decided to address all the limitation points together in the one section of this judgment. The issues requiring determination are:

a) Which party bears the onus of proof?

b) Does s 43(5) of the Fair Trading Act require there to be reasonable discoverability of the causal link between loss and misleading conduct before time starts to run?

c) On the established facts, what is the latest possible date at which time started to run under the Fair Trading Act?

d) For the purposes of the negligence action, did time start running when the shares were subscribed or at some later date?

e) Did time stop running for all qualifying shareholders when Mr Houghton filed the proceedings or when they signed the opt-in notice?

Onus of proof

[101] Mr Olney submitted that because the plaintiff is seeking to amend his statement of claim to introduce new causes of action, it is the plaintiff that bears the onus of proving any new claims are within time. In support of that submission, he relied on the wording of r 7.77, which governs the filing of an amended pleading.

[102] However, until the case is set down, a plaintiff is entitled to amend their statement of claim as of right and does not require leave of the Court. Limitation is an affirmative defence.

[103] In my view, the usual position regarding onus must as a matter of principle still apply. That is to say, it is for the defendants to prove there is no reasonable possibility the claims are within time.[17]

Fair Trading Act

[104] Section 43(5) of the Fair Trading Act provides:

> An application under subsection (1) may be made at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

[105] Counsel disagreed as to exactly what it is that must be reasonably discoverable under the statutory formula.

[106] The defendants submit that the three-year time limit starts at the point in time at which:

a) Mr Houghton became aware it was more probable than not loss had occurred; or

b) a reasonable person in his situation would have known it was more probable than not that loss had occurred;

whichever is the earlier.

[107] There is evidence Mr Houghton quantified his loss in an October 2006 email. Further, Feltex was placed into liquidation in December 2006 and accordingly the defendants say that at the very latest the three years must have started to run then. That would mean any new Fair Trading Act causes of action introduced in the May 2010 amended statement of claim are well out of time.

---

[17] *Humphrey v Fairweather* [1993] 3 NZLR 91.

[108] However, I agree with Mr Forbes that it is not just the fact of loss that must be reasonably discoverable before time starts to run. There is an additional consideration, namely when did Mr Houghton (or a reasonable person) become aware of the probability of a link between his loss and the misleading conduct?

[109] This follows from the leading authority, *Commerce Commission v Carter Holt Harvey Ltd*,[18] where the Supreme Court stated:

> [31] ... As loss is not relevant for present purposes unless it was occasioned by a contravention of the Act, the words "as a result of a contravention of the Act" are necessarily implicit in this question. The same concept of probability should apply, for present purposes, to the applicant's awareness that loss has been occasioned by a contravention.
>
> ...
>
> [33] It is again appropriate to reflect in this assessment the purpose of the limitation provision and the need to reconcile the competing interests of applicants and defendants. The general approach taken to limitation issues suggests that when reasonable discoverability is a feature of the regime, the plaintiff should be aware not only of the facts or circumstances constituting the wrong, but also of the fact that some more than minimal loss or harm has resulted from the commission of the wrong. The definite article "the" in the expression "*the* loss or damage" was, we consider, incorporated into that expression more for linguistic reasons than as a signal that greater specificity was intended than would ordinarily be expected in a limitation context.

[110] In the context of this case, what that effectively means is the limitation clock only started ticking when Mr Houghton had knowledge (actual or constructive) of the fact statements in the prospectus were probably incorrect and misleading.

[111] This does not of course mean he is required to know the legal consequences of the false statements before time to starts to run. That is to say, it is not necessary for him to know the false statements amounted to a contravention of the Fair Trading Act.

---

[18] *Commerce Commission v Carter Holt Harvey Ltd* [2010] 1 NZLR 379.

Application of the reasonable discoverability test to the established facts

[112] The defendants argue that even if reasonable discoverability does require knowledge about the probability of false statements in the prospectus, the crucial date must still be December 2006. That is because of the following:

- During 2006 there were several newspaper articles which questioned the accuracy of the prospectus (articles which Mr Houghton himself relies on in support of his claim that the case is arguable).

- In August 2006 Mr Gavigan is recorded as having mentioned shareholder concerns that the prospectus was misleading. He set up a website at this time and was in email contact with over 100 shareholders, including Mr Houghton.

- In October 2006 Mr Houghton supported an application filed in the Auckland High Court to appoint Mr Gavigan as a director of Feltex, one of the stated purposes of the application being "to assist shareholders by facilitating claims re the IPO".

- In November 2006 a firm of solicitors wrote to shareholders inviting them to authorise it in respect of all matters relating to claims against the promoters. According to Mr Gavigan's own evidence, Mr Houghton was a prospective claimant from November 2006.

- In December 2006 Mr Gavigan wrote on his website that, "We will start by pursuing the main individual shareholder claims. Quite likely some under the Fair Trading Act."

[113] I have carefully considered all the uncontested evidence relied upon by the defendants. As will be readily apparent, their analysis has real force. However, after due reflection I have decided that I cannot be satisfied to the degree of certainty required that any May 2010 claim is definitely statute-barred under the Fair Trading Act.

[114] At this very early stage I consider it is still arguable that time did not start to run until July 2007, which is when shareholders were informed that expert reports had been obtained advising that certain statements in the prospectus were false and misleading. While I can be certain that Mr Houghton knew prior to July 2007 that the promises in the prospectus were not going to be achieved, knew he had suffered a loss and was aware of the possibility that statements in the prospectus may have been false at the time they were made, I cannot be certain that his state of awareness (or that of a reasonable person) in relation to the latter issue had reached the required "more probable than not" threshold.

[115] I stress that this analysis does not represent a final conclusion. It may change as more becomes known.

When did time start running for the purposes of the negligence claim?

[116] It was common ground that this case is governed by the 1950 Limitation Act, not the 2010 Limitation Act.

[117] It was also common ground the negligence claim in this case is not within any of the special categories identified in *Murray v Morel & Co Ltd.*[19]

[118] Accordingly, the test to be applied is not when was the loss reasonably discoverable, but rather when did loss occur?

[119] One approach might be to say that loss was only suffered by Mr Houghton when Feltex failed in 2006, because only then was his loss or the extent of it certain. Another approach, advocated by the defendants, is that loss occurred on 21 May 2004, being the closing date for subscriptions under the public offer.

[120] Mr Forbes contended that 21 May 2004 could not be the correct date because as at that date no concluded contract had come into existence. Moreover, shares were still available after that date through the firm allocations, while in the prospectus the issuers reserved the right to amend the closing dates.

---

[19] *Murray v Morel & Co Ltd* [2007] 3 NZLR 721.

[121] The statement of claim does not plead how Mr Houghton came to acquire his shares under the offer. If it was through a firm allocation, then the crucial date will be 2 June 2004. If not, then in my view time started to run on 21 May 2004. It is clear from the reasoning in decisions such as *Gilbert v Shanahan Partners*[20] that the fact Mr Houghton's offer may not have been accepted on 21 May is irrelevant. What matters is that it was an irrevocable offer and Mr Houghton was committed to the purchase, albeit subject to some contingencies. Similarly, the fact that as at 21 May 2004 there was no certainty as to how many shares he would be allocated cannot in my view prevent time from starting to run.

[122] This issue raises the possibility of some qualifying shareholders being in a different position for limitation purposes than Mr Houghton, depending on the method by which they came to acquire their shares. It is therefore something counsel will need to address. Mr Forbes accepted as a general principle that time must start to run for all qualifying shareholders at the same time as it started for Mr Houghton.

When does time stop running for the qualifying shareholders?

[123] As far as Mr Houghton himself is concerned, time obviously stopped running at the time the proceedings were filed in February 2008 – excluding, of course, the new causes of action filed in May 2010.

[124] The position is not quite so clear-cut as regards qualifying shareholders.

[125] In submissions, counsel identified various possibilities:

- The date the proceedings together with the application for a representative order were filed.
- The date the representative order was made by the Associate Judge.
- The date shareholders first signalled their willingness to be

[20] *Gilbert v Shanahan Partners* [1998] 3 NZLR 528.

part of the group. This would mean those who signed an authorisation form in 2007 authorising a firm of Christchurch solicitors to commence proceedings on their behalf may be in a different position to those who only became involved in 2010 following receipt of the Court-approved opt-in notice

- The date an opt-in list bearing their name was filed in Court, the lists being filed on 2, 3 and 4 June 2010.

[126] Unfortunately, the point has never before arisen for determination in New Zealand. Nor is it addressed in either the Limitation Act or the current High Court Rules.

[127] As counsel confirmed, there is also a paucity of authority in other jurisdictions. Mr Olney was however able to draw my attention to two Australian decisions,[21] as well as a very helpful article.[22]

[128] My ruling is that time stopped for all qualifying shareholders at the time the proceedings which included an application for a representative order were filed.

[129] I have come to that conclusion having regard to the Australian authorities, the nature of representative proceedings and the underlying policy and purposes of limitation periods. My reasoning is as follows:

[i] The rule which creates the right to bring representative proceeding states that a person may sue "on behalf of all persons" with the same interest in the subject matter of a proceeding.

[ii] It follows that if a proceeding is "on behalf" of the qualifying shareholders, then when the proceeding is filed the shareholders can properly be said at that time to have

---

21 *Cameron v National Mutual Life Association of Australasia Limited (No 2)* (1992) 1 Qd R 133; *Fostif Pty Ltd v Campbells Cash & Carry Pty Limited* [2005] NSWCA 83.

22 V Morabito, 'Statutory Limitation Periods and the Traditional Representative Action Procedure' (2005) 5 *Oxford U Commw. L.J.* 113.

"brought" an action in terms of the Limitation Act or to have "made" an application under the Fair Trading Act. This was the approach taken by McPherson SPJ in *Cameron*, and is an analysis I find persuasive.

[iii] While the order made by the Associate Judge may have been amended, it was not a nullity and was never rescinded. Accordingly, if the appropriate test is whether the representative rule has been properly engaged (as also suggested in the Australian cases), then that test is satisfied. Further, there has been no prejudice to the defendants. The subsequent amendments to the representative order have served to reduce the class, not enlarge it.

[iv] The underlying purpose of limitation periods is to protect defendants against the injustice of stale claims being fought many years after the events when records have been lost and memories dimmed. In this case, the filing of the application for a representative order clearly put the defendants on notice as to the potential scope of the claim.

[130] It follows that for limitation purposes the claims of the qualifying shareholders stand and fall with Mr Houghton. When the limitation clock stopped for him, it stopped for everyone else on whose behalf he sues. That accords with commonsense and the practicalities. It is, in my view, also just.

[131] I turn now to consider the specific claims which are the subject of the strike out applications.

Second cause of action – claim under the Fair Trading Act for wrongfully disguising the availability of remedy under s 37A of the Securities Act

[132] Section 37A of the Securities Act confers on subscribers the right to give notice avoiding the allotment of a security issued in breach of the section. Where

such notice is given, the subscriber is then entitled to a repayment of the subscriptions from the issuer.

[133] The relevant parts of s 37A provide:

> **37A Voidable irregular allotments**
>
> (1) No allotment of a security offered to the public for subscription shall be made if—
>
> ...
>
> (b) At the time of allotment, the investment statement or registered prospectus relating to the security is known by the issuer of the security, or any director of the issuer, to be false or misleading in a material particular by reason of failing to refer, or give proper emphasis, to adverse circumstances (whether or not the investment statement or registered prospectus became so false or misleading as a result of a change of circumstances occurring after the date of the investment statement or registered prospectus); or
>
> ...
>
> (3) An allotment made in contravention of this section is (whether or not the issuer is in liquidation) voidable at the instance of the subscriber by notice in writing to the issuer at any time within the prescribed period.
>
> (4) For the purpose of subsection (3) of this section, prescribed period means—
>
> (a) A period of one year after the security or a certificate of the security has been sent to the subscriber; or
>
> (b) A period of 6 months after the subscriber knows, or ought reasonably to know, that the allotment was made in contravention of the provisions of this section—
>
> whichever is the lesser.

[134] The amended statement of claim pleads that at the time of the allotment of the shares under the public offer, Feltex and Credit Suisse MP knew the prospectus was false and misleading in a material particular by reason of failing to refer or give proper emphasis to adverse circumstances. The pleading goes on to state that these omissions had the effect of disguising the availability to the qualifying shareholders of their statutory remedy under s 37A, and they thereby lost the opportunity to give notice avoiding the allotments and obtain a refund.

[135] Counsel for the directors and Credit Suisse MP submitted the cause of action should be struck out because:

a) The claim is inherently illogical and circular, involving as it does the proposition that the same conduct can both give rise to a remedy under s 37A and also conceal the existence of that remedy.

b) Section 37A has its own limitation regime. The s 37A time limits have expired and must prevail.

c) The claim is precluded by s 5A of the Fair Trading Act, which states:

> **5A No liability under Act if not liable under Securities Act 1978 or Securities Markets Act 1988**
>
> A court hearing a proceeding brought against a person under this Act must not find that person liable for conduct—
>
> (a) that is regulated by the Securities Act 1978 if that person would not be liable for that conduct under that Act:
>
> (b) that is regulated by the Securities Markets Act 1988 if that person would not be liable for that conduct under that Act.

d) The claim is in any event out of time under the Fair Trading Act.

e) The lack of any evidential foundation required for a pleading which is essentially one of deceit.

[136] At the hearing, Mr Forbes acknowledged that as currently pleaded the claim was circular and illogical. In order to overcome that difficulty, he tendered a draft re-pleading. The reformulation bases the claim on an implied duty on the part of the directors and Credit Suisse MP to disclose their knowledge of the false statements in the prospectus. It contains a further allegation that Feltex delayed the timing of the downgraded profit announcement.

[137] The draft pleading does not identify the source of the alleged implied duty of disclosure. Mr Forbes, however, submitted that the duty was impliedly derived from

the Securities Act itself. In support of that submission, he relied on the decision of *Henderson Global Funds v Securities Commission*.[23]

[138] However, *Henderson* does not address the issue and in my assessment does not support the existence of any such implied duty as alleged.

[139] Striking out is a draconian step, but I have come to a clear view that the second cause of action, even as re-pleaded, is untenable.

[140] The rights under s 37A can only arise in the first place if the issuer and its directors have knowledge of the falsity of certain statements in the prospectus. It follows that if non-disclosure of their knowledge were held to be capable of amounting to misleading conduct for the purposes of a Fair Trading Act claim, the express time limitation regime under s 37A would be rendered meaningless. That is a result which Parliament could never have intended – a conclusion I have reached independently of s 5A of the Fair Trading Act.

[141] In finding against the existence of any such duty as re-pleaded, I have not overlooked the decision of the Court of Appeal in *Commerce Commission v Telecom Mobile Ltd*,[24] another authority cited by Mr Forbes.

[142] That case involved s 6 of the Door to Door Sales Act 1967, which requires that agreements subject to the Act must contain a statement advising customers of their rights of cancellation. The Court of Appeal held that a direct marketing campaign conducted by Telecom was subject to the Act, and that Telecom's failure to advise potential customers of their rights under the Door to Door Sales Act constituted misleading conduct under the Fair Trading Act.

[143] Mr Forbes says this decision is an example of liability being imposed under the Fair Trading Act notwithstanding the existence of a specific enforcement regime under another statute.

---

23 *Henderson Global Funds v Securities Commission* [2009] NZCCLR 18 (HC).
24 *Commerce Commission v Telecom Mobile Ltd* [2004] 3 NZLR 667.

[144] In my view, however, there is a fundamental distinction between *Telecom* and the present case.

[145] Unlike the Securities Act, the Door to Door Sales Act expressly imposes a duty of disclosure. Further, under the Door to Door Sales Act, non-compliance with the relevant section simply results in the vendor being unable to enforce the credit agreement. Allowing a claim under the Fair Trading Act does not therefore directly contradict the specific statute in the way that it would in this case.

[146] As mentioned, in addition to relying on a duty of disclosure Mr Forbes' draft re-pleading involves a new allegation that Feltex delayed the timing of the downgraded profit announcement. This delay is said to have had the effect "both separately and in conjunction" with the breach of the alleged disclosure duty, of disguising the availability of the s 37A remedy.

[147] However, as a separate cause of action, this proposed claim about delay is also problematic. As at 2011, it must be out of time. It also suffers from a causal problem. The announcement was made in April 2005. The time under s 37A did not expire until June 2005. Therefore, even if Feltex did delay the announcement, that delay did not of itself prevent shareholders from being able to avail themselves of a remedy under s 37A.

[148] I am satisfied the second cause of action must be struck out and is not salvageable by any re-pleading. Because of the view I have taken, it is not necessary for me to consider all of the defendants' arguments.

Application to strike out third cause of action

[149] The third cause of action is also under the Fair Trading Act 1986. It is a claim against Mr Magill alone and relates to alleged misleading conduct said to have taken place after the date of allotment, ie after 2 June 2004.

[150] As currently pleaded, the claim is based on an allegation that channel stuffing continued after the date of allotment and, in conjunction with the timing of the April

2005 downgraded profit announcement, had the effect of disguising the availability of remedies under s 37A of the Securities Act.

[151] Unlike the second cause of action, the third cause of action does not rely on a breach of an alleged duty of disclosure.

[152] Nor is the timing of the 2005 downgraded profit announcement relied upon as a separate independent basis for the claim. The pleading says "in conjunction with".

[153] At the hearing, Mr Forbes tendered a draft re-pleading of the third cause of action:

> 43. Feltex engaged in the practice referred to in paragraph 37.8... over the 12 months period from the date of allotment of the Feltex shares on 2 June 2004.
>
> 44. This practice, in conjunction with the delayed timing of the downgraded profit announcement in the April 2005 NZX announcement referred to in paragraph 40..., had the effect of disguising the availability to the qualifying shareholders of their statutory remedy under the Act s37A.
>
> 45. In respect of the matters referred to in paragraph 43 - 44 above the first defendant Sam Magill engaged in conduct in breach of the FTA in the ways as are referred to in paragraphs 32.5 – 32.9 above. [NB – The plaintiff may provide further particulars as to this allegation and as to others of the first defendants or the third defendant who engaged in this conduct following discovery].
>
> 46. As a result of the matters referred to in paragraph 43 – 45 above each of the qualifying shareholders has suffered loss.
>
> **Particulars**
>
> 46.1 The loss of the opportunity to exercise their right under the Act s37A(3) to avoid the allotment of their shares and to obtain repayment of their subscriptions in full pursuant to s37A(7).
>
> 46.2 Interest on their subscriptions or equivalent compensation.

[154] The main changes effected by the draft are:

(a) References to the deceptive practice of channel stuffing have been removed.

(b) The period of time over which manipulation of earnings allegedly continued post-allotment is now more precisely defined as the 12-month period from 2 June 2004.

[155] Mr Magill's application to strike out the third cause of action is based on the following grounds:

(i) The allegation is one of deceit and the necessary specificity and evidential foundation required before such an allegation can be pleaded is lacking.

(ii) The claim is statute-barred.

(iii) The claim is precluded by s 5A of the Fair Trading Act and s 63A of the Securities Act:

> **5A No liability under Act if not liable under Securities Act 1978 or Securities Markets Act 1988**
>
> A court hearing a proceeding brought against a person under this Act must not find that person liable for conduct—
>
> (a) that is regulated by the Securities Act 1978 if that person would not be liable for that conduct under that Act:
>
> **63A No liability under Fair Trading Act 1986 if not liable under this Act**
>
> A court hearing a proceeding brought against a person under the Fair Trading Act 1986 must not find that person liable for conduct that is regulated by this Act if that person would not be liable for that conduct under this Act.

[156] For the reasons already traversed in connection with the application to lift the stay, I consider there is a sufficient evidential basis.

[157] I am also satisfied the claim is not statute-barred.

[158] As regards s 5A Fair Trading Act, there is an argument as to whether it can apply to a proceeding filed before it came into force.[25] Similarly, there is an argument over the interpretation of the transitional provisions under the Securities Act, which affects whether s 63A applies to this case.

[159] However, I am satisfied that even if the sections do apply, this claim is not within them. The "conduct" at issue is alleged post-allotment revenue manipulation and delaying an announcement. That is not conduct "regulated by the Securities Act".

[160] A further issue is whether any delay in announcing the profit downgrade could have deprived shareholders of their opportunity to exercise their s 37A rights when, as I pointed out earlier, the downgrade was announced before the shareholders' rights under s 37A had expired.

[161] However, the pleading is limited to the effect of the delay as being "in conjunction with" rather than on a stand-alone basis. Accordingly, the causal issue is not necessarily determinative.

[162] I am therefore not prepared to strike out the third cause of action subject to an amended pleading being filed as per the draft.

Negligence and loss of availability to exercise rights under s 37A

[163] The first amended statement of claim states:[26]

> 55. As a result of the negligence of each defendant the qualifying shareholders have suffered loss:
>
> **Particulars**
>
> ...
>
> 55.3 In respect of the matters referred to in paragraphs 39 - 40 above, the loss of the opportunity to exercise their rights under s37A to avoid the allotment of the shares and to obtain repayment of their subscriptions in full.

---

25 Section 5A came into force on 28 February 2008. This proceeding was filed on 26 February 2008.

26 First amended statement of claim, 21 May 2010.

[164] Credit Suisse MP, Credit Suisse PE Inc, Forsyth Barr and First New Zealand Capital seek to strike out this paragraph.

[165] Counsel for First New Zealand Capital, Mr McLellan, argues this amounts to an implicit allegation of a duty of care in tort to protect against the loss of an opportunity to make an application under s 37A, a duty of care which in Mr McLellan's submission does not exist as a matter of law.

[166] If a duty of care formulated in those terms is what is intended, I agree it is highly problematic for the same reasons which have persuaded me the second cause of action should be struck out.

[167] On anyone's view of it, the current pleading requires clarification. Because it is unclear exactly what is intended, I am also unsure what consequential effect my striking out of the second cause of action will have on clause 55.3. In those circumstances, I have decided that the fairest course of action is to allow Mr Forbes the opportunity to re-draft this clause, reserving the right for counsel for the relevant defendants to renew their application without the need to file any formal notice.

Conduct of the book build process – paragraphs 33.6 and 33.15 amended statement of claim

[168] The amended statement of claim contains a new allegation that the final price of $1.70 set for the shares did not fairly reflect the various factors which the prospectus said would be taken into account in setting the price.

[169] The allegation is currently relied upon as a particular to support the first cause of action under s 9 of the Fair Trading Act, with an indication it could, by further amendment, be added to the negligence cause of action. A pre-hearing suggestion that it might also be added to the second cause of action (concealment of a remedy under s 37A of the Securities Act) appears to have been abandoned.

[170] It was not disputed, at least for the purposes of a Fair Trading Act claim, that the new allegations about the conduct of the book build process are sufficiently different in kind to in effect amount to a separate and distinct claim.[27]

[171] This prompted the defendants to argue that any claims over the book build process were statute-barred.

[172] My ruling, for the reasons already discussed, is that:

a) The claim is not statute-barred under the Fair Trading Act.

b) A yet to be filed claim in negligence over the book build process would be statute-barred, time starting to run at the very latest on 2 June 2004, which is now more than six years ago.

[173] Limitation was not the only objection raised by the defendants.

[174] As Mr Forbes himself acknowledged, correctly analysed, the promise in the prospectus to conduct the book build process in a particular way is a statement of future intention, and a statement of future intention does not legally constitute a representation for the purposes of the Fair Trading Act. Thus, even if the plaintiff was able to establish that the directors and Credit Suisse MP had failed to follow the promised process, more would be required under the Fair Trading Act than just the breach of the promise.

[175] Mr Forbes submitted this was a salvageable pleading point, and during the hearing he tendered the following re-draft:[28]

> 33.6 In the statements referred to in paragraphs 18.8... and in 18.18 above... that the final price set for the shares would take into account the various factors stated at pages 28 and 121 of the prospectus respectively and would follow the book build process as stated in pages 28, 121 and 135 of the prospectus, when:

---

27 See the principles articulated in *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958.

28 Second further memorandum of counsel for the plaintiff as to proposed amendments to amended statement of claim, 3 December 2010.

(i) there was an implied representation by Feltex, Credit Suisse MP, First NZ Capital and Forsyth Barr in those statements that the stated intended future conduct as to the book build process and how the final price of the shares would be set would be adopted and that it would take into account the various factors referred to when those defendants had no proper or reasonable basis for that implied representation;...

[176] Mr Forbes explained the intention was to allege that either:

a) at the time the defendants promised to conduct the book build process in a particular way, they had no intention of honouring the promise, thereby misrepresenting the state of their mind; or

b) at the time they made the promise, they did genuinely hold the intention but had no reasonable basis for holding it.

[177] In response, Mr Olney argued the re-pleading should not be permitted because it involved an allegation of active deception for which there was no evidence. He further submitted the allegation was inherently implausible and hence unsustainable.

[178] There is however (contested) evidence that the promised book build process was not in fact followed. In those circumstances I cannot, especially at this early stage, completely discount the possibility of being able to draw plausible inferences about the intentions of the promisors.

[179] Subject to the statement of claim being amended, the applications seeking to strike out paragraphs 33.6 and 33.15 are therefore dismissed.

The May 2004 NZX announcement – paragraph 36 amended statement of claim

[180] As already mentioned, the amended statement of claim was filed on 26 May 2010.

[181] It contains a new allegation that a public announcement made by the directors on 24 May 2004 was misleading.

[182] The announcement in question was primarily an announcement notifying the final price for the shares under the IPO. It also contained statements about the market reaction to the share offer and the future prospects of Feltex. According to the plaintiff, the announcement contained false representations that the investment was sound and had been well received.

[183] The allegation is currently relied upon as a particular to support the first cause of action under s 9 of the Fair Trading Act, the cause of action in negligence and the cause of action under s 56 of the Securities Act 1978.

[184] At the hearing, Mr Forbes conceded the allegation should be deleted from the Securities Act cause of action because s 56 is concerned solely with statements in a prospectus and the 24 May 2004 announcement was obviously not a statement in the prospectus.

[185] The defendants contend the allegation should also be removed from the Fair Trading Act and negligence causes of action.

[186] They make that submission on the following grounds:

a) The allegation amounts to a fresh cause of action and is time-barred.

b) The announcement could not have been causative of any loss because shareholders were already committed to the purchase of the shares before the announcement was made.

c) In so far as the allegation is being pleaded as a breach of a duty to potential investors to protect them against the loss of an opportunity to exercise rights under s 37A of the Securities Act, it is untenable because no such duty of care exists.

[187] The submission that allegations about the announcement amount to a fresh cause of action is well-founded.

[188] It was not challenged by Mr Forbes. However, for the reasons already traversed, I am not persuaded the new claim is necessarily time-barred under the Fair Trading Act.

[189] There may, however, be an issue as to reliance and causation depending on whether Mr Houghton purchased his shares through the firm allocation or the public offer. If he purchased them by submitting an irrevocable offer on 21 May 2004 then a claim based on what happened on 24 May 2004 is plainly not tenable under either the Fair Trading Act or in negligence.

[190] Under the negligence head it would also, quite apart from issues of causation, be time-barred. As already discussed, the latest accrual date for any negligence action relating to shares obtained under the public offer (as defined in the prospectus) was 24 May 2004, which is more than six years before the amended statement of claim was filed on 26 May 2010.

[191] The applications to strike out paragraph 36 are dismissed, but leave is reserved to the applicants to renew the applications without the need for any formal application, in the event it transpires that Mr Houghton acquired his shares by public subscription on 21 May 2004.

[192] The application to strike out the cross-reference in paragraph 47 to paragraph 36 of the statement of claim relating to the Securities Act is granted by consent.

Application to strike out paragraph 52 of the negligence cause of action

[193] Forsyth Barr applies to strike out paragraph 52 of the amended statement of claim.[29]

[194] The paragraph reads:

> [52] In the circumstances each of the defendants assumed, or is to be deemed to have assumed, a responsibility to potential investors under the public offer, including the qualifying shareholders, and thereby owed to them a duty to take reasonable care:

---

29 First amended statement of claim, 21 May 2010.

52.1 In the formulation of the plan and programme pursuant to which the public offer was made;

52.2 In the preparation and content of the prospectus;

52.3 As to the accuracy of and there being a proper basis for the statements and the financial and other information contained in the prospectus;

52.4 Not to omit from or fail to disclose in the prospectus any information which was or was likely to be material to the public offer and the decision of potential investors, including the qualifying shareholders, as to the purchase of shares in Feltex, including any adverse trade, risk or other circumstances;

52.5 In the marketing of the public offer and of Feltex as an investment;

52.6 In fixing the final price of the shares;

52.7 In the issue and allotment of the shares under the public offer and the prospectus[.]

[195] The notice of application contends that paragraph 52 discloses no reasonable cause of action because Forsyth Barr did not owe qualifying shareholders a duty of care to protect them against the loss of an opportunity to exercise rights under s 37A of the Securities Act.

[196] However, that cannot be a reason for striking out paragraph 52 (although it might be a reason for striking out paragraph 55.3) because the duty of care pleaded at paragraph 52 is not expressed to be a duty about s 37A. The duty pleaded at paragraph 52 relates to a range of other matters.

[197] It emerged from Forsyth Barr's written submissions that the intention was to challenge the existence of any duty of care at all relating to the float and the prospectus. Forsyth Barr denies there was any special relationship between it and each shareholder such as is required in law to found a duty of care. It has sought particulars of the basis upon which the plaintiff says there was a special relationship. None has been forthcoming, and accordingly Ms Challis submitted the claim should be struck out.

[198] However, in my view such an argument is not sustainable in light of the Court of Appeal decision where it was said of Forsyth Barr and First New Zealand Capital:

> [87] ... the very narrow duty owed by auditors has nothing in common with the duty owed by those who are party to the issue of the prospectus. The vendor is selling its shares to the public. The directors are immediately responsible for knowing the financial position of the company and for approving the terms of the public float and the promoter is promoting it: both are identified in s 56 as subject to particular responsibility. The organising participants and joint lead managers are closely involved in the float. The position of each is very different from that of the auditor, who has no role of promotion.
>
> [88] ... while in this case the document received by investors was a combined investment statement/prospectus, so the prospectus required to be registered under the Securities Act was made available to every potential investor, that is no longer a requirement of the Securities Act, and the actual offer to invest can now be made in an investment statement, which refers to the registered prospectus but does not contain a copy of it. That may be significant in cases where an investor wishes to rely on an untruth in the prospectus but, because of the offer being made in the investment statement, cannot claim to have read the prospectus. It is unnecessary to consider whether the current practice, as a result of which investments are commonly made without reference to the single copy of the prospectus filed with the Companies Office, could cast fresh light on the position of auditors. But it may well be relevant to that of the appellants. We would expect that an analysis of their respective duties will establish that they differ markedly from that of auditors. But such analysis is better performed when the facts are known.

Application to strike out cross-references in paragraphs 47, 50 and 54 to paragraph 35

[199] Paragraph 35 of the amended statement of claim states:

> **Statements and information in the prospectus**
>
> 33. The statements and information contained in paragraph 18... were incorrect, likely to lead potential investors into error or mislead them and conveyed a misrepresentation:
>
> ...
>
> 35. By the general implied statement made by the fact of the prospectus and the public offer that Feltex had substance and that the indicative price range of its shares stated in the prospectus reflected their true and fair value, when that was not in fact the case and was not reasonably or prudently justified.

[200] Credit Suisse and First New Zealand Capital seek to strike out references to this allegation in the negligence and Securities Act claims. They do so on the following grounds:

(i) An implied statement by conduct does not amount to an untrue statement in a prospectus for the purposes of a claim under s 56 Securities Act (Credit Suisse).

(ii) The fact of a prospectus is not a statement included or contained in a prospectus for the purposes of a claim under s 56 (First New Zealand Capital).

(iii) Liability for negligent misstatement does not extend to statements of opinion (Credit Suisse).

(iv) No reasonably arguable duty of care was owed by First New Zealand Capital to potential investors to protect them against the loss of an opportunity to exercise rights under s 37A of the Securities Act.

[201] I do not accept those arguments.

[202] In my view, correctly analysed, the pleading in paragraph 35 is an allegation of an implied statement or representation derived from the prospectus and therefore contained in it. In the absence of any authority to the contrary, I am willing to accept that such an implied statement is arguably capable of qualifying as a "misstatement in a prospectus" under s 56.

[203] I also consider that as a matter of law, such an allegation is capable of founding liability in the tort of negligence. Classification as a statement of opinion would not preclude tortious liability. The tort has its genesis in a case which was all about the giving of advice, and reliance on that advice.[30]

---

[30] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

[204] As for the objection based on there being no duty of care to protect against the loss of rights under s 37A, that appears to be misconceived. My understanding of the statement of claim is that the loss of those rights is alleged to arise out of the matters referred to in paragraphs 39-40. It follows that paragraph 35 is not being relied upon for this purpose.

[205] The same point disposes of First New Zealand Capital's application to strike out references to paragraph 36 in the negligence claim.

Security for costs

[206] The defendants sought security for costs against both Mr Houghton and JAFL.

[207] In its decision, the Court of Appeal had this to say about security for costs:

> [35] Security for costs is often a vexed question. The principle of access to justice is no doubt why r 5.45 our High Court Rules does not empower orders for security against a natural person who is resident in New Zealand. Many, if not most, of the persons represented in this litigation are natural persons resident in New Zealand, although among them is an Australian trustee company in which a large number of investors are interested; it may be ordered to provide security under r 5.45(a)(ii). It is the risk of impecuniosity and failure to pay an adverse costs order that leads a court to order security where it has jurisdiction to do so. Yet a large security order may deter a plaintiff from pursuing a claim with merit. Further, as earlier noted, *Jeffery & Katauskas*[31] shows that the presence of a litigation funder can give rise to a range of judicial responses.
>
> [36] The making of orders for both representation and admission of a funder substantially alters the balance between plaintiffs and defendants. We consider that the change is so radical as to justify the High Court, in exercise of its inherent jurisdiction under s 16 of the Judicature Act 1908, to consider ordering security as a term of such orders, even where numerous natural persons are among the plaintiffs, as the price of the privilege to employ such a procedure. That is in order to protect defendant against the effect of a procedure which could otherwise be oppressive. The facts that the funder has no personal right at stake, that takes part of the proceeds of any claim, and that it is is motivated by the financial considerations that gave rise to the common law prohibition of champerty point to the need for the funder to provide security for costs in most cases. *Arkin v Borchard Lines Ltd (Nos 2 and 3)* [2005] 1 WLR 3055 (CA) applied to a litigation funder Lord Denning MR's dictum in *Hill v Archbold* [1968] 1 QB 686 (CA) that maintenance "is lawful, provided always that the one who supports the litigation if it fails, pays the costs of the other side". Where there is doubt about the bona fides

---

31 *Jeffery & Katauskas* [2009] HCA 43.

> of the funder or bad behaviour on the funder's part, the case for declining approval or ordering such security, perhaps on an indemnity basis, is strengthened. Where an application for approval of a funder is met by an application for security for costs the enquiry may include not only the funder's means but also whether it is of such standing that its decision to fund provides a worthwhile pointer to the merits of the case. We make no comment on the competing views in *Jeffery & Katauskas*, which turned on the terms of a costs rule which has no New Zealand equivalent. But the result, where the funder of a failed case escaped liability for costs, provides a cautionary example.
>
> [37] *McGechan on Procedure* records at HR5.45.03(2) that in considering applications for security the court will try as far as possible to assess the merits and prospects even though in a case of any complexity that will be no more than an impression. It must do its best with what is before it. Security for costs can be a matter for continuous review, with a staged process for reappraisal which might increase or reduce security as more is learned about the case. There is a sliding scale: a case with slight merits may warrant a substantial order for security at least for an initial stage and may extend to provide indemnity to the opposing party. An apparently strong case may warrant reduced or no security. There will be cases where an order under r 7.70 for interim payment by the defendant is justified.

[208] The Court's reference to invoking the inherent jurisdiction is arguably at odds with its previous decision in *Smith v Covington Spencer Limited*.[32] In *Smith* it was held the High Court probably has no inherent jurisdiction to order security for costs in proceedings in respect of plaintiffs who do not come within the terms of r 5.45.

[209] Mr Houghton does come within the terms of r 5.45 because he is the plaintiff and there is no reason to believe he has the necessary means personally to meet an order for costs. JAFL, however, is not a plaintiff, and so outside the rule. Accordingly, if an order is to be made against JAFL, it would have to be made under the inherent jurisdiction.

[210] I am satisfied that while the Court of Appeal did not mention its previous decision, I should follow the clear direction given in the passage quoted above and assume the inherent jurisdiction is available. Mr Forbes accepted that was a correct approach for me to take and at the hearing it became common ground that a staged order for security for costs should be made against either JAFL or Mr Houghton or both, the only issue being how much.

---

32 *Smith v Covington Spencer Limited* [2008] 1 NZLR 75.

[211] For completeness I should add that the passage from the Court of Appeal decision quoted above was also relied upon by Mr Cooper as indicating the possibility of a costs order being available against the qualifying shareholders. However, as noted in my May judgment,[33] it is of the essence of representative proceedings that the individual members of the representative class are not liable for any adverse costs. I am confident that if the Court of Appeal were intending to overturn such a fundamental and well-established principle, it would have said so unequivocally and given reasons.

[212] I have therefore proceeded on the basis that should the defendants ultimately win this case, the qualifying shareholders will not be personally liable to them for any costs award. Mr Houghton, as the named plaintiff, will be liable and he in turn requires indemnity from the funder.

[213] Turning then to the level of the security that should be ordered.

[214] There was a wide discrepancy between the amounts proposed by counsel. The amounts suggested ranged from $75,000 to $3m.

[215] While the Court has a wide discretion and the amount of security is not necessarily to be fixed by reference to likely costs awards, I have nevertheless found it helpful to consider what likely costs awards might be.

[216] Mr Cooper undertook a calculation of the likely scale costs up to the end of discovery and inspection. The calculation resulted in a figure of $812,430 which, multiplied by four (there being four separately represented defendant groups), comes to $3,249,720.

[217] By far the major component of these costs was the costs involved in inspecting the documents of each individual shareholder. The costs of this calculated on a category 2 basis and allowing a quarter-day per shareholder generated a figure of $720,000.

---

[33] *Houghton v Saunders (Reasons for Judgment)* at [43].

[218] For his part, Mr Forbes contended that the estimate of a quarter-day per shareholder for inspection of documents was excessive and that a more accurate figure would be in the vicinity of $133,440.

[219] Mr Forbes also submitted that the presence of a commercial funder actually confers a substantial advantage on the defendants than would otherwise apply in a standard proceeding. That is because the commercial funder is required to indemnify the named plaintiff, and accordingly the defendants are effectively covered for any costs award that may be made in their favour over and above the level of any security ordered.

[220] That of course is only true if the funder is a funder of substance with sufficient means. In this case, there is not yet a commercial funder in place and a possibility that none may be found, in which case the entire claim is likely to collapse. The defendants are therefore still exposed to risk if the security ordered is less than an adverse costs award.

[221] In all the circumstances, and having regard to the competing interests, the amount and strength of the claim, the nature of the proceeding and the likely costs payable, I have decided the most just outcome is to order security in the sum of $200,000 for the costs up to discovery and inspection, excluding inspection of the documents of the qualifying shareholders (but not excluding inspection of the defendants' documents or any documents held by non-parties). The proceeding is stayed pending provision of the security.

[222] Once discovery has been received from the shareholders, the scope of the inspection will be able to be more accurately assessed. By that stage it will also be known whether an actual funder has been found, which in turn is likely to impact significantly on the level of security for this next stage.

Ancillary rulings

[223] During the course of the hearing I was required to make a number of ancillary rulings. For completeness I now record these and the reasons.

Application for leave to cross-examine Mr Gavigan

[224] This application was granted by consent.

Late filing of affidavits

[225] Timetabling orders for the hearing included an order that the plaintiff was to file his affidavits on 20 August 2010, with any affidavits in reply by 27 October 2010.

[226] Following receipt of the defendants' affidavits, the plaintiff filed the following affidavits:

- Alan John Robb
- John Blakemore
- Stephen David Pearce

[227] The defendants objected to the admission of the affidavits of Dr Blakemore and Messrs Robb and Pearce on the grounds that the affidavits raised new matters to which the defendants had not had an opportunity to respond. Counsel submitted if the plaintiff wanted to rely on the new material then the defendants wanted an adjournment.

[228] After hearing argument, I ruled the evidence should be admitted and that we should proceed, but on the basis the defendants would have the right to adduce further evidence if they so wished.

[229] My reasons for so ruling were:

a) Concerns about late filing and prejudice to the defendants had to be tempered by reference to the context in which the affidavits were being tendered. The hearing was not a hearing as a result of which concluded findings of fact would be made. It was only an inquiry into whether the plaintiff had an arguable case.

b) Significant portions of the affidavits (with the exception of Dr Blackmore) did contain true reply evidence.

c) Any prejudice occasioned to the defendants could be met by reserving the right to them to adduce further evidence.

d) An adjournment of the entire four-day fixture was highly undesirable, there being no hearing time of that duration available in 2011.

Application for production of documents

[230] After hearing from counsel, I declined the defendants' application for an order that the plaintiff produce JAFL's financial statements and the written agreement between JAFL and a company relating to funding any security for costs award. My view was that production of those documents was not necessary or required to enable me to discharge the obligations imposed on me by the Court of Appeal, nor to protect the legitimate interests of the defendants.

Outcome of hearing

Application to lift interim stay and for security for costs

[231] The plaintiff's application to lift the interim stay is granted subject to the plaintiff or JAFL making provision for security for costs in the sum of $200,000. The stay remains in place unless and until the security is provided. The security is for costs up to discovery and inspection, excluding inspection of the documents of

the qualifying shareholders (but not excluding inspection of the defendants' documents or any documents held by non-parties).

[232] The representative order is to be maintained (save for an amendment correcting the date of allotment from 4 June to 2 June 2004).

[233] Within forty working days, Mr Gavigan is to file and serve an affidavit advising what progress has been made in the negotiations with prospective funders.

[234] The actual funder will be subject to the Court's supervisory jurisdiction, and in particular will be required to satisfy the Court that it is a funder of repute, that it has the means to pay the full costs of the litigation and that the existing rights of qualifying shareholders under the funding agreement with JAFL are not in any way prejudiced as a result of any arrangements the actual funder may enter into with JAFL.

Strike out applications

[235] For convenience, the outcome of the various applications are set out in the following table.

Applicant	Statement of claim	Outcome
Credit Suisse Directors	Second cause of action	Granted
Credit Suisse	Paragraph 33.6 and 33.15 (book build process)	Dismissed
All defendants	Paragraph 36 (24 May 2004 announcement)	Dismissed but leave reserved to renew applications should it be established Mr Houghton acquired his shares by submitting an irrevocable offer on 21 May 2004
Credit Suisse Directors	Paragraph 37.8 (channel stuffing)	Dismissed subject to plaintiff amending statement of claim
Mr Magill	Third cause of action	Dismissed
Credit Suisse First NZ Capital Forsyth Barr	Paragraph 55.3: negligence and loss of opportunity to claim under s 37A	Application dismissed but subject to plaintiff clarifying pleading and reserving right to applicants to renew application
First NZ Capital Directors Credit Suisse	Reference in paragraph 47 to paragraph 36 (24 May 2004 announcement pleaded for purposes of claim under s 56 Securities Act)	Granted by consent
Forsyth Barr	Paragraph 52	Dismissed
First NZ Capital	References in paragraphs 50 and 54 to paragraph 36 (24 May 2004 announcement pleaded for purposes of negligence action)	Dismissed but leave reserved to renew applications should it be established Mr Houghton acquired his shares by submitting an irrevocable offer on 21 May 2004
First NZ Capital Credit Suisse	Reference in paragraph 47 to paragraph 35 (implication arising from fact of prospectus pleaded for purposes of claim under s 56 Securities Act)	Dismissed
First NZ Capital Credit Suisse	Reference in paragraphs 50 and 54.1 to paragraph 35 (general implied statement made by fact of prospectus pleaded for purposes of negligence action)	Dismissed

Costs

[236] Because there have been mixed fortunes, my provisional view is that costs should lie where they fall. However, if any party wishes to apply for costs, I require an application to be filed and served within 15 working days, with any response to be filed and served within 10 working days thereafter.

Further directions

[237] There will be a conference call at ***9.30 a.m., 22 June 2011*** to set a timetable for the filing of the further amended statement of claim, statements of defence and discovery.

Solicitors:
Wilson McKay, Auckland
(Counsel: A J Forbes QC, Christchurch; J Eichelbaum, Auckland)
Bell Gully, Auckland
Clendons, Auckland
Russell McVeagh, Wellington
Jones Fee, Auckland
(Counsel: D McLellan, Auckland)
McElroys, Auckland

APPENDIX A

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2008-409-000348

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

Hearing: 8-11 November 2010
2-3 December 2010

Appearances: A J Forbes QC, J R Eichelbaum and P Mills for First Plaintiff
A R Galbraith QC and D Cooper for First Defendants
A Olney and P Douglas for Second and Third Defendants
D H McLellan for Fourth Defendant
A Challis for Fifth Defendant

Interim Judgment: 9 March 2011

INTERIM JUDGMENT OF HON JUSTICE FRENCH

---

[1] At the hearing, counsel for the plaintiff advised that crucial records held by non-parties were at risk of being destroyed after 31 March 2011.

[2] I had hoped to deliver my judgment before the end of February. Unfortunately, that has not proved possible as a result of the Christchurch earthquake.

[3] In view of the delay and the possible consequences of further delay, I have decided the most appropriate course of action is for me to issue an interim judgment now notifying the parties of the key decisions I have reached, with a full reasoned judgment to follow later.

[4] My key rulings are as follows:

(i) The plaintiff's application for an order lifting the interim stay is granted subject to the plaintiff or JAFL making provision for security for costs in the sum of $200,000. The stay remains in place unless and until the security is provided. The security is for costs up to discovery and inspection, excluding inspection of the documents of the qualifying shareholders (but not excluding inspection of the defendants' documents or any documents held by non-parties).

(ii) The representative order is approved.

(iii) Within forty working days, Mr Gavigan is to file and serve an affidavit advising what progress has been made in the negotiations with prospective funders.

(iv) The actual funder will be required to satisfy the Court that it has the means to pay the full costs of the litigation and that the existing rights of qualifying shareholders under the funding agreement with JAFL are not in any way prejudiced as a result

of any arrangements the actual funder may enter into with JAFL.

(v) The defendants' applications to strike out the second cause of action are granted.

Solicitors:
Wilson McKay, Auckland
(Counsel: A J Forbes QC, Christchurch; J Eichelbaum, Auckland)
Bell Gully, Auckland
Clendons, Auckland
Russell McVeagh, Wellington
Jones Fee, Auckland
(Counsel: D McLellan, Auckland)
McElroys, Auckland