IN THE COURT OF APPEAL OF NEW ZEALAND

CA191/2011
[2012] NZCA 545

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

CA202/2011

AND BETWEEN	FIRST NEW ZEALAND CAPITAL Appellant
AND	ERIC MESERVE HOUGHTON Respondent

CA203/2011

AND BETWEEN	FORSYTH BARR LIMITED Appellant
AND	ERIC MESERVE HOUGHTON First Respondent

AND	TIMOTHY ERNEST CORBETT SAUNDERS, SAMUEL JOHN MAGILL, JOHN MICHAEL FEENEY, CRAIG EDGEWORTH HORROCKS, PETER DAVID HUNTER, PETER THOMAS, JOAN WITHERS Second Respondents
AND	CREDIT SUISSE PRIVATE EQUITY INC Third Respondent
AND	CREDIT SUISSE FIRST BOSTON ASIAN MERCHANT PARTNERS LP Fourth Respondent
AND	FIRST NEW ZEALAND CAPITAL Fifth Respondent

CA204/2011

AND BETWEEN	CREDIT SUISSE PRIVATE EQUITY INC First Appellant
AND	CREDIT SUISSE FIRST BOSTON ASIAN MERCHANT PARTNERS Second Appellant
AND	ERIC MESERVE HOUGHTON First Respondent
AND	TIMOTHY ERNEST CORBETT SAUNDERS, SAMUEL JOHN MAGILL, JOHN MICHAEL FEENEY, CRAIG EDGEWORTH HORROCKS, PETER DAVID HUNTER, PETER THOMAS, JOAN WITHERS Second Respondents
AND	FIRST NEW ZEALAND CAPITAL LIMITED Third Respondent
AND	FORSYTH BARR LIMITED Fourth Respondent

	AND BETWEEN	TIMOTHY ERNEST CORBETT SAUNDERS, SAMUEL JOHN MAGILL, JOHN MICHAEL FEENEY, CRAIG EDGEWORTH HORROCKS, PETER DAVID HUNTER, PETER THOMAS, JOHN WITHERS Appellants
	AND	ERIC MESERVE HOUGHTON Respondent

Hearing: 15 and 16 August 2012

Court: O'Regan P, Randerson and Harrison JJ

Counsel: D J Cooper and C K Hatten for Appellants (CA191/2011)
D H McLellan for Appellant (CA202/2011)
A C Challis for Appellant (CA203/2011)
A S Olney and C J Curran for Appellants (CA204/2011)
A J Forbes QC and P A B Mills for Respondent Eric Houghton in all appeals

Judgment: 23 November 2012 at 11.30 am

JUDGMENT OF THE COURT

A **The appeal in CA191/2011 is dismissed. The appellants are to pay costs for a standard appeal on a band B basis and usual disbursements to the respondent E M Houghton only. We certify for two counsel.**

B **The appeal in CA202/2011 is dismissed. There will be no order as to costs.**

C **The appeal in CA203/2011 is dismissed. There will be no order as to costs.**

D **The appeal in CA204/2011 is dismissed. The appellant is to pay costs for a standard appeal on a band B basis and usual disbursements to the respondent E M Houghton only. We certify for two counsel.**

E **The appeal in CA1/2012 is dismissed. There will be no order as to costs.**

REASONS OF THE COURT

(Given by Harrison J)

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Introduction

[1] Feltex Carpets Ltd was floated on the New Zealand Stock Exchange in May and June 2004. A large of number of entities purchased the shares on public offer. The float raised more than $250 million. By December 2006 Feltex was in liquidation and all shareholders' funds were lost.

[2] Many investors who bought shares in the float, represented by the respondent in all five appeals, Eric Houghton, seek to recover their losses in a proceeding issued in the High Court against four separate categories of parties: they are Feltex's former directors, Messrs Timothy Saunders and others; the vendor of the shares, Credit Suisse First Boston Private Equity Inc (CSPE); the promoter, Credit Suisse First Boston Asian Merchant Partners LP; and the organising participant and joint lead managers of the share issue, First New Zealand Capital Ltd and Forsyth Barr Ltd. While some of these parties are cited as either appellants or nominally as respondents in these appeals, we shall refer to them collectively as the appellants throughout this judgment.

[3] Mr Houghton commenced the proceeding in early 2008 but is still some distance from trial. In the interim French J has delivered a series of interlocutory judgments.[1] In *Saunders v Houghton*[2] (*Saunders v Houghton (No 1)*) this Court dismissed appeals from one of those judgments except to strike out a claim for breach of fiduciary duty against all appellants. Among other things, this Court upheld Mr Houghton's entitlement to sue in a representative capacity for other Feltex shareholders and dismissed the appellants' challenge to the participation of a litigation funder, Joint Action Funding Ltd (JAFL). However, its decision was subject to satisfaction of certain conditions and the proceeding was remitted to the High Court to review an interim stay then in force.

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1 *Houghton v Saunders* (2008) 19 PRNZ 173 (7 October 2008); *Houghton v Saunders* (2009) 19 PRNZ 476 (24 July 2009); *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 19 May 2010; *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 26 May 2010; *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 9 March 2011; *Houghton v Saunders* (2011) 20 PRNZ 509 (8 June 2011); *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 30 November 2011; *Houghton v Saunders* [2012] NZHC 1828 (1 August 2012).

2 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331.

[4] Subsequently French J approved the existing representative order and a litigation funding proposal made by Mr Houghton. She lifted the interim stay, subject to satisfaction of certain conditions.[3] Based on information supplied confidentially by the funder, French J later approved Mr Houghton's actual litigation funding which had been arranged in accordance with his earlier proposal and in satisfaction of one of the existing conditions.[4] Both judgments are appealed.[5]

[5] The appeals fall into two distinct categories. In the first is the directors' challenge on behalf of all appellants to French J's approval of the representative order and the litigation funding proposal. In the second is CSPE's argument that the claims of most if not all represented parties are time-barred. Subsidiary arguments are raised by both groups.

[6] Before considering the two categories of appeals in the same sequence we shall summarise the relevant background circumstances. The judgments delivered by French J and this Court provide the necessary chronological reference. We will return in more detail to particular judgments when we address the discrete issues arising on the separate appeals.

Background

[7] At the time this proceeding was filed on 26 February 2008 Associate Judge Christiansen made a without notice order on Mr Houghton's application for directions (the representative order). The primary order was in the nature of a declaration that Mr Houghton sued as "... representative ... of all shareholders and former shareholders in ... [Feltex] ... who acquired and/or beneficially owned shares in Feltex between 4 June 2004 and 31 March 2005 or thereabouts ... and ... suffered loss on that investment"; and it materially provided that Mr Houghton represented all those shareholders "... unless they elect to opt-out of the proceedings by 4 pm on 11 April 2008". Details of the opt-out procedure were given. At that stage about

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3 *Houghton v Saunders*, 9 March 2011 and 8 June 2011 judgments, above n 1.
4 *Houghton v Saunders*, 30 November 2011 judgment, above n 1.
5 CA191/2011, CA202/2011, CA203/2011, CA204/2011, CA1/2012.

800 shareholders had signed a written consent to the proceeding being issued on their behalf.

[8] The appellants sought to review and rescind the representative order. French J determined that challenge in her 7 October 2008 judgment where she summarised the nature of Mr Houghton's claims and the relief sought in these terms:

> [16] The statement of claim identifies certain statements contained in the prospectus which it is alleged were misleading, and goes on to plead four causes of action:
>
> (i) Breach of s 9 of the Fair Trading Act 1986 as against all defendants.
>
> (ii) Breach of the Securities Act 1978 against the first defendant directors and the second defendant promoter.
>
> (iii) Tortious negligence against all defendants.
>
> (iv) Breach of fiduciary duty against all defendants.
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> During the course of the hearing, the plaintiffs indicated they propose amending the statement of claim so as to include an action for breach of statutory duty against all defendants and (possibly) an action in deceit, as well as extending the existing claim under the Securities Act so as to apply to all defendants.
>
> [17] In respect of each cause of action as currently pleaded, the named plaintiffs allege the breach of the relevant duty caused them loss and damage, being the purchase price paid for the shares. The prayer for relief is the same for each cause of action and seeks the following remedies — a declaration as to liability, an order there be an inquiry into the loss and/or damage suffered by the plaintiffs and those whom they represent, together with a claim for interest and costs.

[9] In her 7 October 2008 judgment French J materially held that:

(a) the representative order was not justified on the then current statement of claim, principally on the Fair Trading Act and Securities Act causes of action, because there was not a sufficient commonality of interest to satisfy the requirements of r 78 of the High Court Rules then in force (since replaced by r 4.24) but the appropriate course was to adjourn the proceeding to allow Mr Houghton to file an amended statement of claim;[6] and

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6 At [138].

(b) the opt-out procedure adopted in the representative order was inappropriate and should be replaced by an opt-in procedure.[7]

[10] In *Saunders v Houghton (No 1)* this Court upheld French J's finding that Mr Houghton was entitled to sue in a representative capacity. Mr Houghton did not appeal the Judge's direction that the opt-in procedure should be substituted for the opt-out procedure in the representative order.

[11] In her 8 June 2011 judgment, French J undertook the exercise directed by this Court in *Saunders v Houghton (No 1)* of reviewing the interim stay then in force. It is the 8 June 2011 judgment which is the focus of the directors' appeal and we shall return to its terms. However, for the purposes of providing a summary we record that the Judge:

(a) granted Mr Houghton's application to lift the interim stay then in force subject to Mr Houghton or (JAFL) making provision for security for costs of $200,000;[8]

(b) approved the representative order then in force;

(c) directed Tony Gavigan, JAFL's sole shareholder and director, to file and serve within 40 working days an affidavit advising what progress had been made in negotiations with prospective litigation funders (Mr Gavigan had confirmed that JAFL was not the intended funder, did not have a bank account or funds, and that JAFL was proposed to act as the mechanism through which funding was delivered by another entity);

(d) required the actual litigation funder arranged by JAFL on Mr Houghton's behalf 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 were not in any

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7 At [168].

8 The directors gave notice of an intention to appeal against this order but did not pursue it.

way prejudiced as a result of any arrangements which the actual funder may enter into with JAFL; and

(e) granted an application by all appellants to strike out Mr Houghton's existing second cause of action under the Fair Trading Act for wrongfully disguising the availability of another statutory remedy but dismissed applications to strike out another cause of action and for particularised allegations.

[12] In her 30 November 2011 judgment, French J outlined these material developments since 8 June 2011:

> [9] Mr Gavigan duly filed an affidavit, in which he deposed that JAFL had received a confidential conditional offer from a reputable international litigation funder to jointly fund the representative action, and that a funding agreement was expected to be concluded in the next few days and become unconditional before the end of May 2011.
>
> [10] The affidavit also stated that Mr Gavigan was required by the terms of the offer to keep confidential all aspects of the negotiation, including:
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> (a) the funding agreement actually concluded;
>
> (b) the steps in negotiations leading up to the making of the final agreements; and
>
> (c) the identity of the funder.
>
> [11] Since that affidavit was filed, JAFL has secured what is described as an investment agreement between it and an undisclosed London-based entity. The investment agreement has been concluded through Harbour Litigation Funding Limited. Harbour Litigation Funding Limited is also based in London, but is not itself the contracting party, only an associate.
>
> [12] As well as entering into an investment agreement with JAFL, the undisclosed London-based entity is said to have taken out an adverse costs insurance policy in relation to this proceeding. Under the policy, the undisclosed London-based entity is shown as the insurer, but the policy is also said to be endorsed in the interests of JAFL and the claimants.
>
> [13] By virtue of r 8.23 of the High Court Rules, a document mentioned in an affidavit must be produced for inspection unless the Court upholds a claim for confidentiality or privilege. Mr Gavigan's affidavit has triggered r 8.23, and accordingly the plaintiff has brought the present application.

[13] The directors sought disclosure of the investment agreement between JAFL and the actual funder, Harbour Litigation Investment Fund LP (HLIF), and after the

event adverse costs insurance policy arranged through HLIF together with documents disclosing the steps taken in negotiations leading up to the making of the agreements. In her 30 November 2011 judgment French J granted Mr Houghton's application for an order directing that these documents not be disclosed to the appellants. Instead, she directed Mr Houghton to produce to the Court for inspection the investment agreement and insurance policy together with (a) evidence of HLIF's standing to support a claim that it is a reputable entity; (b) a certificate that it had funds available to meet the costs of the litigation and pay any order for security for costs; and (c) relevant financial records including the funder's most recent audited financial statements. In a minute issued on 26 March 2012 the Judge expressed her satisfaction following inspection of the documents that they complied with her earlier directions. Her minute was effectively the final stage in the process of approving Mr Houghton's litigation funding arrangement.

[14] The directors appealed against French J's 30 November 2011 judgment. However, on 4 October 2012, following argument on the appeal in this Court, counsel reached agreement on terms of disclosure. As a result this appeal is no longer pursued but the issue of costs remains live.

[15] To complete the narrative, we record that on 1 August 2012 French J made orders directing a two-staged hearing of Mr Houghton's claim. At the first stage the Court will try issues common to Mr Houghton and the represented class. Judgment on these issues will bind all parties. The scope and effect of the second stage was left open for determination later.

Directors' appeal

(a) Approval of representative action: litigation funding arrangement

(i) Introduction

[16] The directors maintain their appeal against French J's approval in her 8 June 2011 judgment of the representative order then in place following her satisfaction with Mr Houghton's litigation funding proposal. The directors' decision not to

pursue their appeal against French J's subsequent confidentiality orders and her approval of the actual litigation funding arrangement may be thought to render this appeal superfluous. However, Mr Cooper submits that the appeal against the 8 June 2011 judgment must be determined given that the directors' challenges to the suitability and reliability of JAFL and Mr Gavigan remain. That is because, Mr Cooper says, those two entities retain effective control and management of the litigation.

(ii) High Court: 8 June 2011 judgment

[17] French J approached the question of approval of the representation order in accordance with this Court's direction in *Saunders v Houghton (No 1)*:

> [38] The Court of Appeal identified three conditions which it said must be satisfied before the interim stay could be lifted:
>
> [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);
> >
> > (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.

[18] Also of importance to French J's approach were this Court's statements in *Saunders v Houghton (No 1)* that:

> [79] We have concluded that, like the common law of Australia and that of Canada, the common law of New Zealand should refrain from condemning as tortious or otherwise unlawful maintenance and champerty where:
>
> (a) the court is satisfied there is an arguable case for rights that warrant vindicating;
>
> (b) there is no abuse of process; and
>
> (c) the proposal is approved by the court.
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> We have discussed the need for proper controls, appropriate to the nature of the case and the particular funder and funding terms proposed.
>
> ...
>
> [93] We agree that the interim stay should remain and that the representation order should not be overturned by this Court, but subject to the High Court's imposing suitable conditions. In relation to funding, the court would have to be satisfied, before lifting the interim stay (except perhaps to allow a new statement of claim to be filed) as to the conditions we have listed at [79] above. What course should be adopted in relation to the funding agreement is a facet of the application for permanent stay. Among the options is whether, as a condition of allowing the case to continue both in representative form and with a funder, there should be a change to either the funder, the funding agreement, or both. That cannot be determined in this Court where we are not seized of the issues. It must be determined in the High Court.
>
> [94] The representation order should be subject to its own distinct conditions (such as having the solicitor responsible for all communications). The funding arrangement will be subject to other conditions (some of which may overlap) but which may include the posting of security for costs and may require that the representation order is stayed until those funding conditions are met. One would not, however, discharge a representation order without giving the parties fair opportunity to resolve the funding arrangements.
>
> (citations omitted.)

[19] French J was satisfied with the form of Mr Houghton's funding agreement with JAFL; it had been amended following this Court's decision in *Saunders v*

Houghton (No 1) to impose additional controls on JAFL.[9] She was satisfied also that it generally complied with a list of eight guidelines which Mr Cooper had himself first suggested in the Court of Appeal and which the Judge found of considerable assistance.[10] She was, however, conscious of JAFL's then failure to arrange an actual funder and of the company's apparent lack of financial substance and Mr Gavigan's sole control.[11]

[20] French J noted the directors' submission that the absence of a funder was fatal to a stay being lifted.[12] She recited a catalogue of seven factors raised by the directors about Mr Gavigan's reliability.[13] She was satisfied that some of the criticism was well founded, particularly unacceptable delays in prosecuting the claim for which Mr Gavigan was responsible and his inappropriate conduct.[14] She was also conscious of the uncertainty about whether an actual funder would ever be found[15] and whether it was appropriate to maintain the stay until a funder was found.[16] However, after taking all relevant factors into account she decided that the preferable course was to lift the stay and allow the claim to continue pending the result of negotiations by Mr Houghton and JAFL with prospective funders.[17]

[21] French J recited that:

> [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.

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9 At [76]–[78].
10 At [74]–[75].
11 At [80].
12 At [81].
13 At [82].
14 At [83].
15 At [84].
16 At [85].
17 At [86].

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.

(iii) Appeal grounds

[22] In support of the directors' appeal Mr Cooper repeats the same litany of complaints against Mr Gavigan which he advanced before French J. In summary, he refers to the facts that JAFL is not an established, professional litigation funder of the type which has featured in the Australian cases but is instead a one man company with no assets formed by Mr Gavigan for the sole purpose of managing this litigation; the existing agreement gives JAFL and in effect Mr Gavigan significant control over the conduct of the litigation; JAFL did not have any funding for the litigation when approval was originally given; Mr Gavigan has made misleading statements to the group members about the litigation and about the appellants; JAFL and Mr Houghton have failed to comply with Court orders; and the lawyers acting for Mr Houghton are not fully independent of JAFL.

[23] In addition, having inspected the documents disclosed by Mr Houghton and JAFL, Mr Cooper says they confirm that management and control of the litigation will remain with JAFL and that HLIF does not intend and is not in a position to involve itself; and that questions remain about Mr Houghton's ability to meet any

adverse costs awards which has an impact on the importance and adequacy of security for costs.

(iv) Conclusion

[24] The directors' appeal against the 8 June 2011 judgment must fail on a number of grounds.

[25] First, this Court's directions in *Saunders v Houghton (No 1)* at [38], [79], [93] and [94] were expressed in wide discretionary terms. Approval of the funder and funding arrangement was one of the four essential conditions requiring satisfaction before it was appropriate to lift the interim stay.

[26] French J was not persuaded on 8 June 2011 that the second condition had then been satisfied. However, within her discretionary powers the Judge was prepared to extend the time for satisfaction subject to a condition that Mr Gavigan reported on progress within a fixed period. French J anticipated that the interim stay would be lifted unconditionally once a reputable and substantial funder was found. In *Saunders v Houghton (No 1)* this Court specifically left that option open to the Judge; its clear direction was that Mr Houghton should be given every possible opportunity to find a suitable litigation funder, whether it was JAFL or another party.

[27] French J was entitled, in our judgment, to give weight to Mr Gavigan's advice that he was then in promising negotiations with a London based funder; indeed, his expectations came to fruition within a few months with HLIF's emergence. It was also open to the Judge to conclude that Mr Houghton and the representees should not be prejudiced by any delay until an actual funder was found. Any countervailing prejudice to the appellants would be balanced by requiring Mr Houghton to provide security for costs of $200,000 – until that condition was satisfied, the stay would remain in place. The passage of time soon vindicated French J's judgment. We are not persuaded that she erred.

[28] Second, while Mr Houghton's funding agreement had been throughout with JAFL under Mr Gavigan's control, French J was properly concerned with the financial standing and repute of the ultimate funder. That entity was appropriately the focus of the Judge's enquiry. What was critical was securing Mr Houghton's access to justice through appropriate funding arrangements. That objective has now been satisfied. French J's approval of HLIF's financial standing and repute has secured the appellants' mirror interests. Her 8 June 2011 judgment must be seen in that context. And having read HLIF's published accounts for the year ended 31 December 2011 for ourselves, we endorse French J's conclusion.

[29] Third, one of the primary planks, if not the primary plank, of the directors' challenge to Mr Gavigan's participation has been his financial insufficiency; their objection was based upon the premise of his continued participation as the actual funder. That ground of challenge has now gone with HLIF's approval. The directors' appeal reduces accordingly to a complaint about the nature and extent of Mr Gavigan's involvement through JAFL – what Mr Cooper describes as the objectionable feature of Mr Gavigan's ongoing management and control of the proceeding.

[30] French J accepted some of the directors' criticisms of Mr Gavigan, as we do. But judicial events have largely overtaken this ground of complaint. Once a reputable funder was arranged, Mr Gavigan's principal role was relegated. His function became that of a litigation manager or agent for Mr Houghton and the representees and a conduit between them and HFL. The Judge's approval of what is effectively a litigation management agreement now has little relevance to the overriding issue of whether Mr Houghton has funds in place to conduct this expensive litigation and to meet any adverse costs in favour of the directors.

[31] In this respect, like French J, we have had the benefit of access to the litigation funding agreement between HLIF and JAFL. It complies with the United Kingdom Code of Conduct for Litigation Funders; it is a comprehensive instrument which carefully regulates the legal relationship. In particular we note:

(a) Mr Houghton, the represented class and JAFL are entitled to discontinue the proceeding against any party. However, if that step is taken contrary to the advice of the nominated legal representatives, including Mr Forbes QC, then it may have adverse costs consequences as between HLIF and JAFL.

(b) JAFL is also obliged to consult with and keep HLIF apprised of every step in the proceeding, including provision of monthly reports from Mr Forbes and other legal representatives on the progress of the litigation.

(c) HLIF is entitled to terminate for JAFL's fault by giving immediate notice. Alternatively it may terminate at its discretion on 14 days notice. However, dispute resolution provisions apply in both events.

[32] In argument Mr Cooper raised concerns about JAFL's termination rights under its separate agreement with Mr Houghton and the represented class. Presently JAFL is entitled to terminate at its sole discretion. To meet this concern Mr Forbes has undertaken to ensure that the agreement is amended so that the termination provisions accord with cl 9 of the United Kingdom Voluntary Code. And, of course, in the event of termination of either agreement, Mr Houghton's counsel will be conscious of their obligations to make immediate disclosure to the appellants and to the Court.

[33] While HLIF has made it clear that it does not intend to interfere with the day-to-day management of the litigation, we are satisfied that the requirement to report to the ultimate funder provides an additional assurance that the litigation will be responsibly conducted.

[34] Fourth, much of Mr Gavigan's alleged misconduct is of peripheral or marginal importance for the conduct of this proceeding. Arguably the most relevant deficiency – repeated non-compliance with timetabling directions and delays – should go now that HLIF has emerged and funding is arranged. Mr Gavigan's past

conduct is not such that it justifies a further stay of this proceeding. In our judgment French J did not err.

[35] We have also had access to HLIF's insurance arrangements which we are satisfied are sufficient to indemnify Mr Houghton against an adverse costs order. If concerns later arise in this respect, they can always be addressed by a further application for security for costs; the utility of this mechanism was expressly recognised in *Saunders v Houghton (No 1)*.[18] That remedy always remains available to the appellants if any issue arises about the adequacy of Mr Houghton's funding arrangements. And we endorse French J's satisfaction that Mr Houghton's engagement of Mr Forbes as leading counsel will ensure an acceptable degree of independence in the future conduct of this litigation. He must report to and advise Mr Houghton, JAFL and HLIF and has responsibilities to each.

[36] In summary, we are satisfied there are adequate funding arrangements in place for Mr Houghton and the represented class; the directors are adequately protected should a costs order be made in their favour; and that the litigation funding agreements do not constitute an abuse of process.

[37] This ground of appeal fails.

(b) Striking out: manipulation of reported earnings

[38] One director, Feltex's former chief executive officer Sam Magill, appeals against French J's refusal in her 8 June 2011 judgment to strike out a cause of action.

[39] Mr Houghton's amended statement of claim alleges that Feltex:

> ... 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.

[40] Mr Houghton alleges that Mr Magill himself engaged in this manipulative practice for some 12 months after the float; and that, as a result, he disguised the

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[18] At [35] and [36].

remedy which shareholders would otherwise have of avoiding the allotment of shares and so seeking a repayment of subscription.

[41] In *Saunders v Houghton (No 1)* this Court summarised the nature of the claim as follows:

> [52] The respondents have given notice of their desire to plead that after the float Feltex engaged in the deceptive practice of "channel stuffing", by which a supplier of goods sends to customers more product than usual and enters the transaction in its books as a sale, notwithstanding the likelihood that the customer will decline to accept the additional unordered stock. The respondents contend that the purpose of such conduct was to avoid the operation of s 37A of the Securities Act which requires repayment of moneys received as a result of a misleading prospectus but only if the necessary claim is made within twelve months after a certificate of the security had been sent to the subscriber. It is unclear from the pleadings whether, and, if so, how it is alleged that Credit Suisse MP, Credit Suisse PE, First New Zealand Capital and Forsyth Barr Ltd were involved, but Mr Eichelbaum says that this is asserted.

[42] This cause of action is based upon evidence of Feltex's practice of forward invoicing retailers, said to lead to a manipulation of earnings by shifting revenue from one accounting period to another. French J dismissed Mr Magill's application to strike it out. While expressing a view that the evidence in support was not strong, the Judge was satisfied that it provided a sufficient factual foundation for arguability involving as it does an element of deceit.[19]

[43] Mr Cooper challenges the Judge's conclusion. He says the only evidence produced to support this serious allegation is a handful of invoices issued to Feltex customers. All show a forward dated invoice date – that is, the invoice is dated on the first day of the month after the date on which the stock was ordered and supplied. Mr Cooper refers to affidavit evidence from Feltex's former chief financial officer asserting a legitimate reason for the practice. In essence, its purpose was to provide a customer with an extra month's credit given that the payment date runs from the invoice date. Additionally, the witness confirmed that revenue was always recorded in accordance with the relevant accounting standards so that it was recognised in the month when the invoice was issued and the carpet was dispatched. This process

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[19] At [70].

occurred automatically within Feltex's computerised accounting system and was not subject to manual intervention.

[44] Mr Cooper's argument reduces to a proposition that Mr Houghton has failed to plead with any particularity or produce evidence of the essential elements of his allegation as to, first, which earnings were manipulated by Feltex and in what respect, by how much and on what basis accounts were incorrect as a result; and, second, Mr Magill's involvement in or knowledge of the alleged manipulation. Mr Cooper's point is that the existence of a handful of customer invoices falls well short of the standard of specificity required for any pleading especially where it is one of dishonesty.

[45] We do not construe Mr Houghton's allegation as one of dishonesty. It is an assertion of misleading and deceptive conduct under ss 9 and 13 of the Fair Trading Act. While the stringent requirements imposed upon counsel when alleging dishonest conduct do not apply, an allegation of misleading and deceptive conduct is nevertheless serious and counsel assume a responsibility to satisfy themselves that a sufficient evidential basis exists for the pleading.

[46] We cannot discern any reason to interfere with French J's finding. She concluded that this cause of action passed the arguability threshold by a narrow margin. Mr Houghton is on notice that he has a significant hurdle to cross if he is to prove this claim. Whether he decides to maintain it is a decision to be taken in conjunction with his legal advisers. But for now this cause of action must remain.

[47] This ground of appeal is dismissed.

CSPE's appeal

(a) Limitation defence

(i) Introduction

[48] CSPE submits that the investors' claims are time-barred. New Zealand courts have not previously considered the applicability of the Limitation Act 1950 to a

representative claim. Commonwealth authority is in apparent conflict. An English decision, *Prudential Assurance Co Ltd v Newman Industries Ltd,*[20] holds that a representative order is ineffective to stop a limitation period from running, and Mr Olney urges us to follow it. Two Australian decisions, *Cameron v National Mutual Life Association of Australasia Ltd (No 2)*[21] and *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd,*[22] are to the contrary.

[49] In her 8 June 2011 judgment French J confronted the limitation issue directly. On the assumption that time started running for limitation purposes on 4 June 2004, the Judge found that Mr Houghton had filed his own proceeding well within time.[23] While acknowledging that the issue was not so clear cut for the qualifying or represented shareholders, the Judge found that time also ceased to run for them when the proceeding was filed.[24] Her reasons were stated succinctly as follows:

> [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:
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> [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 "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.
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> [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

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20 *Prudential Assurance Co Ltd v Newman Industries Ltd* [1979] 3 All ER 507 (Ch).

21 *Cameron v National Mutual Life Association of Australasia Ltd (No 2)* [1992] 1 Qd R 133 (QSC).

22 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, (2005) 63 NSWLR 203.

23 At [123].

24 At [128].

> case, the filing of the application for a representative order clearly put the defendants on notice as to the potential scope of the claim.

[50] French J concluded:

> [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.

[51] It is this conclusion which CSPE challenges on appeal. Mr Olney advises that by 4 June 2010, the nominated limitation expiry date, some 1,730 shareholders were listed as having complied with the opt-in procedure. By 23 February 2012 that list had grown to 2,852 shareholders, of which about 1,053 were new in the sense that they had opted-in after 4 June 2010.

[52] Mr Olney submits that French J erred because representees will only be bound by findings on common issues – in particular whether at the threshold stage of liability CSPE committed an actionable breach of duty – which will be made when the Court determines the representative claim. But, he submits, the representees must still bring their individual claims for relief within the relevant limitation period and prove in each case individually the subsequent steps in the chain of liability of reliance and loss. Alternatively, Mr Olney submits, if French J found correctly that Mr Houghton "brought" representative claims for all qualifying shareholders within the meaning of s 4(1) of the Limitation Act, they were only brought when each representee opted into the group before 4 June 2010.

(ii) Statutory instruments

[53] Our approach to CSPE's appeal will focus by reference to the facts and Mr Olney's submissions upon the conjunctive effect of the two statutory instruments – s 4 of the Limitation Act and r 4.24 of the High Court Rules – before testing our conclusion against the Commonwealth authorities.

[54] The Limitation Act, s 4(1) provides:

> **4 Limitation of actions of contract and tort, and certain other actions**
>
> (1) Except as otherwise provided in this Act or in subpart 3 of Part 2 of the Prisoners' and Victims' Claims Act 2005, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say,—
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> (a) actions founded on simple contract or on tort:
>
> (b) actions to enforce a recognisance:
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> (c) actions to enforce an award, where the submission is not by a deed:
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> (d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

[55] Rule 4.24 of the High Court Rules provides:

> **4.24 Persons having same interest**
>
> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—
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> (a) with the consent of the other persons who have the same interest; or
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> (b) as directed by the court on an application made by a party or intending party to the proceeding.

[56] Our starting point is our satisfaction that the phrase "... actions shall not be brought ..." where used in s 4(1) in this context means there is an absolute prohibition against filing a proceeding after the relevant limitation period has expired. Mr Olney does not dispute French J's finding that Mr Houghton's individual proceeding was brought within time on 26 February 2008. The question on CSPE's appeal is whether some or all of the other qualifying Feltex shareholders brought their own proceedings on that date or at the latest before 4 June 2010.

[57] When approaching this issue we note that in *Saunders v Houghton (No 1)* this Court:

> (a) Approved the representative order as varied by French J. It found that Mr Houghton was entitled to sue on behalf of and for the benefit of all Feltex shareholders who expressly opted into the proceeding within

the purview of r 4.24. Implicit in this finding was the recognition that all Feltex shareholders who subscribed on the initial offering had the same interest in the proceeding – that is, a shared interest deriving from ownership of an identical asset, carrying identical rights but differing only in amounts, in pursuing a claim against those allegedly responsible for destroying the value of the assets.[25] The limitation argument now raised was expressly left open for determination.

(b) Acknowledged the utility of a representative proceeding in enabling the representative to obtain what it called a declaration of liability on a common issue. It may be more accurately described as a declaration of a breach of duty, which is the primary remedy sought in each of the surviving causes of action. That is because liability is not determined until proof of the additional elements of causation or reliance and loss.[26] Subject to proving the threshold element of breach, the Court envisaged that individual claims would be identified and pursued at a second or subsequent stage of the liability inquiry.

[58] In confirmation of this Court's expectation in *Saunders v Houghton (No 1)* French J's minute dated 9 December 2011 identified counsel's consensus on a two-stage hearing process. At the first stage, Mr Houghton's own claim is to be tried in its entirety with a list of common issues on which findings would be binding between all members of the represented class and the appellants, giving rise to a *res judicata*. At the second stage, individual aspects of the claims of all other qualifying shareholders are to be considered by mechanisms yet to be determined.

[59] In this respect we note that the representative order was effective from the date on which it was made – that is, 26 February 2008. It did not impose any

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[25] Another group of shareholders who bought Feltex shares on the open market originally participated in this proceeding through a separately nominated representative, Darryl Jones. However, French J struck out their claims and discharged the representative order appointing Mr Jones; *Saunders v Houghton (No 1)*, above n 2, at [4]–[7].

[26] See the House of Lords' judgments on liability for nervous shock (*Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 (HL) and *Page v Smith* [1996] 1 AC 155 (HL)) emphasising the need for a link between a breach of duty and damage in order for a defendant to be liable for a breach of duty. The same point was made by Richardson J in *Williams v Attorney-General* [1990] 1 NZLR 646 (CA) at 679: "Proof of damage to the interests of the plaintiff is a crucial element in the cause of action".

limitation on the scope of representation; it was not restricted to the threshold element of breach of duty. It was extended expressly to representation of shareholders who suffered loss on their investments. Consistently with the terms of r 4.24, Mr Houghton was nominated as the plaintiff in his capacity as representative; no other parties were joined as plaintiffs.

[60] Nevertheless, by reference to the procedure agreed by counsel on 9 December 2011, Mr Olney contends that while the representative order makes the representees privy to a judgment for the purposes of establishing a *res judicata*, it does not make them parties to the proceeding. He says the facilitation of a wider *res judicata* is the only effect of a representative order. The essence of his argument is captured in this submission:

> ... a favourable judgment [on Mr Houghton's] claim will establish a legal platform on which the representees can rely for the pursuit of their individual claims for relief. However, they must still bring and prove their individual claims. None of the representees in this case have brought an individual claim, and any such claim would now be time-barred ... Moreover, it has always been apparent that each shareholder would have to establish for their own part such individual issues as reliance and loss. ...

[61] Essentially, Mr Olney submits that a representative order creates a *res judicata* on the common issue, but the order does not mean that the representees are "parties" to the representative proceeding or that the representees have had an action "brought" for the purposes of s 4 of the Limitation Act. Also he submits that French J's decision is wrong because it:

(a) Is tantamount to a judicially-sanctioned suspension of a statutory limitation period. Mr Olney describes it as a substantive law change beyond the Court's power to determine the mechanics of a representative proceeding.

(b) Has the potential for an injustice because, if limitation periods are suspended, a shareholder could opt-in to the representative proceeding and bank a favourable *res judicata* for use at any time in the future, raising the spectre of indefinite liability.

(c) Offends the three principal reasons for limitation periods – certainty for defendants, freshness of evidence for the Court, and ensuring diligence by the plaintiffs.

[62] Mr Olney's submission was silent on when the individual representees should have issued a separate proceeding in order to secure separate findings on reliance and loss. In argument he identified that date as either when Mr Houghton filed his proceeding or at latest on or before 4 June 2010.

[63] In our judgment Mr Olney's submission faces three principal objections. First, there is a practical objection. Acceptance of Mr Olney's submission would largely negate the purpose of r 4.24. If it were adopted in a case like this, where the threshold issue of breach had not been determined before expiry of the limitation period, multiple proceedings would be necessary. The statutory objective of securing a just, speedy and inexpensive determination of a proceeding would be nullified.[27] Potentially there would be 6,000 separate proceedings. Each party would be required to file separate statements of defence with the prospect of individual discovery and other interlocutory activity. In the event that the individual plaintiffs failed at the threshold stage and were unable to prove breach of duty, the exercise would be a major waste of time, resources and money. Arguably, also, it would be unmanageable.

[64] Significantly, Mr Olney accepts that a *res judicata* would arise on the threshold issue of breach. It is plain that determination of this issue will be the principal battleground at trial. Reliance is likely to be argued within relatively confined evidential parameters; and the measure of loss would be common to all shareholders – only its quantification would vary according to the number of shares held. Requiring each shareholder to file a separate proceeding to resolve these two consequential issues would be pointless.

[65] Second, there is a legal objection. Mr Olney's submission does not conform with the plain words and meaning of the statutory instruments. The central issue under s 4 is to determine when the action is "brought". The High Court Rules

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[27] High Court Rules, r 1.2.

determine when a proceeding is filed or brought and by whom. In this case, the order provided that Mr Houghton sued as representative "of all shareholders and former shareholders in Feltex ...". In terms of r 4.24, he was acting for and on behalf of the represented class. In terms of s 4, he "brought" the proceeding when he filed it not only for himself but for all within that class. Whether he was the only nominated plaintiff is irrelevant. We note, also, that in a representative proceeding all within the represented class are parties to it because they are bound by the result.[28]

[66] Third, there is a policy objection. When analysed, Mr Olney's argument reduces to a dispute about case management. Limitation provisions are designed to protect a party against stale claims or the risk of endless litigation. However, in this case CSPE knew from the date of service of the proceeding in early 2008 (well within the limitation period) that it faced potential claims by all Feltex shareholders. It was then able to identify its risk and potential exposure.

[67] Moreover, the statement of claim included five causes of action with fully particularised allegations giving rise to liability. The representative order gave notice of a potential aggregate liability equal to the full purchase price of the shares, about $250 million. The default opt-out mechanism introduced the possibility of reducing liability below that maximum. In other words, CSPE exposure could only diminish from that point.

[68] There is no practical difference from CSPE's perspective between parties who are (a) each nominated separately as plaintiffs in separate proceedings and (b) each identified at a later or contingent stage for the purpose of bringing specific claims on reliance and loss. The total number or pool of claimants remains the same. It is just that, on Mr Olney's approach, a less efficient method is adopted to reach the same end result.

[69] Mr Olney's rejoinder is that the representative order did not notify CSPE of anything that it did not already know – namely, that it could be potentially liable to any subscriber who suffered loss by any untrue statements in the prospectus; and that

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[28] *Moon v Atherton* [1972] 2 QB 435 (CA) at 441.

its potential liability would be clarified on the expiry of limitation period: what CSPE wanted to know, and the Limitation Act was designed to ensure that it knew, is the point in time at which it could close its book or cap potential liability to those subscribers.

[70] However, Mr Olney's rejoinder does not lead anywhere for these reasons:

(a) The representative order gave direct notice of the actuality or existence of a claim. It was the crystallisation of the risk assumed by CSPE when selling its shares in 2004.

(b) A share issuer's deemed knowledge that the Limitation Act will apply does not answer the question of whether a representative proceeding has been issued within time. The High Court Rules are also a critical factor.

(c) As noted, the primary purpose of the limitation provisions is to safeguard a defendant against the inevitable prejudice in preparing a defence to an ancient obligation.[29] The provisions were not enacted to enable a defendant to assess liability and close its books. Nor were they designed to provide an administrative mechanism for fixing a capital reserve against liability. In any event, CSPE is not prejudiced or disabled by the representative proceeding from forming its own assessment of liability to multiple claimants.

[71] We agree with Mr Olney that an opt-in or opt-out mechanism without a final date for either can create uncertainty. When varying the representative order on 7 October 2008 by substituting the opt-in for the opt-out procedure, French J gave qualifying shareholders until 19 December 2008 to advise the Court whether they consented to participating in the proceeding.[30]

[72] However, on the application of CSPE and others French J subsequently stayed the proceeding pending delivery of this Court's judgment on appeal in

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29 *W v Attorney-General* [1999] 2 NZLR 709 (CA) at [77].
30 At [224](b).

Saunders v Houghton (No 1). A new date has never been imposed, presumably because none of the parties has requested one. But that is a function of case management. The opt-in date is, as Mr Forbes points out, a condition of participation; it is not an essential term of the representative order.[31]

[73] Furthermore, in *Saunders v Houghton (No 1)*[32] this Court observed that, where adopted, the opt-in procedure protects members of the representative group against a limitation bar after their election to join in, and noted a concession to this effect by Mr Galbraith QC who then appeared as leading counsel for the directors.

[74] In summary, the policy objectives of the Limitation Act are satisfied. CSPE has always been able to identify its maximum risk and potential exposure and provide accordingly. Its ability to carry out that exercise is not affected by whether the proceeding is brought in a representative capacity or separately by all members of the represented class. The evidence remains fresh. The representees cannot sit on their rights: they must choose to opt-in by the new date set by the Court or continue to be subject to the usual limitation requirements.

[75] In our judgment the text, policy and practicalities of the relevant legislative instruments confirm that the statutory limitation period stops running for all represented persons when a representative order is made. A Judge granting a representative order should impose a final opt-in or opt-out date as part of normal case management procedures. By this means the purposes of the Limitation Act will continue to be met in the representative context. A represented person who opts-out or fails to opt-in by the stipulated date will then be subject to the limitation provisions in the normal way.

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31 This proceeding will continue to require close judicial management through to trial. The High Court will need to ensure that a substitute opt-in date is fixed and that Mr Forbes has met his undertaking (at [32] above).

32 At [12].

(iii) Commonwealth authorities

Prudential Assurance Co v Newman Industries

[76] The question then is whether the Commonwealth authorities mandate a different result. Mr Olney relies primarily on Vinelott J's decision in *Prudential*.[33] He describes it as establishing a settled proposition that where in a representative claim liability requires a staged determination time continues to run against representees until they each bring individual claims. Mr Olney's assertion that the decision has been "emphatically endorsed" by courts in other jurisdictions must be treated with caution. *Prudential* was endorsed by this Court in *Saunders v Houghton (No 1)* for its formulation of the pre-conditions for a representative claim – they are largely replicated in r 4.24. However, we are unaware of any authoritative endorsement of *Prudential* on the different point for which Mr Olney cites it as authority.

[77] In *Prudential*, Newman Industries proposed to acquire the assets of another company. A majority of Newman shareholders passed a resolution at a general meeting approving the transaction in July 1975. Prudential, a minority shareholder, opposed the resolution and in January 1976 issued a proceeding against Newman and two of its directors. Prudential separately alleged conspiracy and deceit, and sought rescission of the agreement or alternatively damages in lieu. Its claim was expressed to be "on behalf of [itself] and all the other shareholders of [Newman except for the two directors]".

[78] What is significant is the nature of the amendment sought in *Prudential*. Newman was sued for misrepresentation and deceit. Originally, Prudential claimed damages against the two directors for breach of duty and damages for conspiracy. As a result of an interlocutory ruling, Prudential applied to amend to claim, first, a declaration of entitlement to damages and, second, an award of damages against the two directors personally for conspiracy in a representative capacity on behalf of the Newman shareholders at the date of the resolution. Prudential's counsel conceded

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33 *Prudential Assurance Co Ltd v Newman Industries Ltd*, above n 20.

that while the pleading in its existing form was appropriate for a derivative action – that is by a minority shareholding claiming relief on Newman's behalf – an amendment was necessary to enable the claim for damages in a representative capacity. The directors opposed the amendment on a discretionary ground.

[79] Vinelott J expressed his rationale for allowing the amendment briefly as follows:[34]

> Counsel ... urged that the amendment should not be allowed, because if it were allowed the period of limitation available to the class represented would be enlarged from six to twelve years and possibly for longer if time stopped running from the date of the issue of the writ. In my judgment the answer to that question is that given by counsel for the plaintiff, namely that the Limitation Act 1939 will continue to operate in the same way as it would have operated if no order had been made in the representative action. Any member of the class will have to bring his own action to establish damage within six years from the date when the cause of action accrued. The only effect of an order in favour of the plaintiff in its representative capacity will be that the issues covered by that order will be res judicata.

[80] In *Prudential* the Court apparently assumed that the right to claim damages would be determined separately in the representative action before the damages claims. Indeed, Vinelott J observed that:[35]

> A person coming within that [represented] class will be entitled to rely on the declarations as res judicata, but will have to establish damage in a separate action.

[81] The Judge saw the issue narrowly. He treated the amendment not as adding a cause of action but as allowing a common element of the causes of action of all members of the class to be established in one representative action. He proceeded on the express premise that a court cannot in a representative action make an order for damages.

[82] However, it is difficult to follow Vinelott J's rationale for requiring each shareholder separately to prove loss if the elements of the tort of conspiracy are proved. If in the representative action it was proved that, first, the alleged conspirators intended to harm the class of representees and, second, that that class did in fact suffer harm (presumably through loss of value to their shares), there

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34 At 520.
35 At 521.

seems no point in requiring each representee to file a separate proceeding in order to seek damages. That is because in order to prove a conspiracy to harm a particular class of shareholders it is sufficient to show that the alleged conspirators intended to harm the class as a whole, rather than holding each individual shareholder in mind.[36]

[83] Presumably the harm suffered by each representee in *Prudential* would be the loss of value to their shares. The nature of the loss would be the same for each representative; the quantum of damages would vary accordingly to the number of shares held. Each shareholder would only need to produce a share certificate disclosing the number of shares held in order to prove loss. Nevertheless, Vinelott J's approach limited the representative action to the threshold stage of proving misconduct by the alleged conspirators, while requiring each class member to file a separate proceeding in order to prove loss. In our judgment that would be an unnecessarily complex way of resolving a representative action.

[84] Moreover Vinelott J's premise that damages are not available in a representative action is not the law in New Zealand. In *Saunders v Houghton (No 1)* this Court observed:

> [14] We endorse the statement by Barker J in *Taspac* at 446 that representative proceedings for damages are not foreclosed. Provided the foregoing conditions are met it is proper to claim a declaration of liability, thus establishing res judicata on the common issue, and permitting individual claims to establish individual damage to follow. The issues that are the subject of the proposed declaration would be identified either by explicit pleading or by application for determination of a specific issue. The more likely that their determination would be both practicable and resolve most or much of the proceeding, the more likely it is that the court would be minded to grant the declaration sought. As will appear, it became common ground in this case that the representative procedure is likely to be appropriate for determining whether the prospectus complied with the law.

[85] In our judgment *Prudential* does not represent good law on this limited point.[37] We add also that the case was decided before modern developments in case management techniques. Adoption of the *Prudential* approach would run counter to the objective of the High Court Rules: that is, to secure the just, speedy and inexpensive determination of any proceeding.

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36 J D Heydon *Economic Torts* (2nd ed, Sweet & Maxwell, Sydney, 1978) at 15; Stephen Todd *The Law of Torts in New Zealand* (5th ed, Thomson Reuters, Wellington, 2009) at 632.

37 See also *Saunders v Houghton (No 1)*, above n 2, at [12].

[86] It is questionable also whether *Prudential* correctly reflects current English law. Within two years of its delivery, Dillon J distinguished *Prudential* in *EMI Records Ltd v Riley*.[38] In the circumstances of that case Dillon J determined that it was appropriate that damages should be recoverable by the plaintiff in its representative capacity, observing that:

> ... it would be a wholly unnecessary complication of our procedure if the Court were to insist that for the purposes of the inquiry as to damages all members of the BPI must be joined as co-plaintiffs or, alternatively, all members except for EMI Records Ltd must issue separate writs and apply for them to be consolidated with the claim for damages of EMI Records Ltd.

Cameron v National Mutual Life Association

[87] The two Australian decisions support our approach. The first, *Cameron v National Mutual Life Association of Australasia Ltd (No 2)*,[39] was decided in the Supreme Court of Queensland. Owners of building units sued those who were allegedly responsible for the defective condition of the building. The 13 named plaintiffs sued in a representative capacity:

> ...on behalf of and for the benefit of themselves and the other proprietors of lots [in the building].

[88] Order 3, r 10, of the Rules of the Supreme Court (Qld) authorised persons having the same interest in the same subject matter to sue "on behalf of and for the benefit of all persons so interested". A Judge sitting alone gave leave for individuals who owned lots but were not named as plaintiffs to elect to be joined as plaintiffs in the action by giving written consent. The defendants appealed on the ground that joinder of the unnamed defendants would have been statute-barred by the Limitation of Actions Act 1974 (Qld) when the joinder order was made.

[89] In dismissing the appeal, McPherson SPJ identified the critical question as whether the unnamed parties had "brought" an action, not whether they were "parties" to the action. He accepted that a writ must name all the plaintiffs except where the legislation or rules require otherwise. In his judgment, the relevant rule permitted an action to be brought on behalf of unnamed plaintiffs even if they are not

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38 *EMI Records Ltd v Riley* [1981] 1 WLR 923 (Ch) at 926.

39 *Cameron v National Mutual Life Association of Australasia Ltd (No 2)*, above n 21.

named in the writ. In this respect, McPherson SPJ gave decisive reliance to the phrase "may sue ... on behalf ... of all persons so interested" (which is identical to the wording of r 4.24) which made no distinction between named and unnamed plaintiffs. Accordingly, the limitation period stopped running for both named and unnamed plaintiffs when the action was "brought" by the named plaintiffs on behalf of the unnamed plaintiffs.

[90] Ryan J dismissed the appeal on an alternative basis. Moynihan J agreed with McPherson SPJ.

Fostif Pty v Campbells Cash & Carry Pty

[91] *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*[40] was a decision of the Court of Appeal of New South Wales. Several sets of representative proceedings were brought by groups of licensed tobacco retailers, seeking to recover licensing fees paid before a licensing scheme was declared invalid. The proceedings were filed just before the end of the six year period in the Limitation Act 1969 (NSW). The summons referred to the plaintiffs claiming relief on behalf of themselves "and a class of unnamed persons" referred to. Members of the class of unnamed plaintiffs were required to sign and return an opt-in notice in order to participate in the proceedings. The defendants sought to strike out the claim as being time-barred for the unnamed parties.

[92] In delivering the leading judgment in *Fostif*, Mason P endorsed the approach adopted in *Cameron* of focusing on when the action was brought. He was satisfied that the limitation clock stopped for the whole group once the named plaintiffs issued a proceeding. The Judge noted:

> [44] ... Where [the representative rule] is properly engaged, the proceedings are [commenced in accordance with it]. In other words, the limitation clock stops for the whole group. This conclusion about the *Limitation Act* is consonant with the principle that represented persons are bound by the outcome of issues decided in the representative proceedings (see below). This conclusion does not prevent the defendant from raising as

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40 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*, above n 22.

> against the lead plaintiff (who was undoubtedly a party) and/or the persons represented any other available defence even if it not common to all.
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> (citations omitted.)

[93] The decisions on *Cameron* and *Fostif* were based upon analyses of statutory instruments analogous to s 4 of the Limitation Act and r 4.24. Both authorities support our conclusion that Mr Houghton brought an action for all qualifying Feltex shareholders when he filed this proceeding against the appellants in February 2008.

[94] We should add that there is a draft New Zealand Class Actions Bill (as at 14 November 2008) which has not yet been introduced to Parliament. The draft is the work of the Rules Committee of the High Court.[41] Relevantly, cl 14 addresses limitation periods and, in summary, it provides that the running of the limitation period applying to a class member is suspended when the class action is commenced. In an opt-out class action the limitation period begins to run again for the individual member's claim only if that member opts-out or the class action terminates without finally disposing of the class member's claim. In the case of an opt-in action, the limitation period begins to run again for the individual member's claim only if the member ceases to be a class member of the action or the class action terminates without finally disposing of the class member's claim. This provision, if enacted, would essentially codify for class actions the decisions in *Cameron* and *Fostif*.

[95] In addition, as Mr Forbes emphasises, the Bill anticipates that a class action can be brought as long as there is at least one substantial common issue of law or fact; allows for awards of damages to be made to the whole class or subclasses; and provides for the Court to direct how class members are to establish their entitlements and resolve any disputes. We note that the bill in its present form does not require individual class members to file separate proceedings for any non-common issues or claims for individual relief.

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41 See Rules Committee "Class Actions for New Zealand: A Second Consultation Paper" (October 2008).

(b) Standard of arguable case

(i) Introduction

[96] CSPE's second ground of appeal is that French J failed to apply the correct legal test when assessing the arguability of Mr Houghton's claim.

[97] In *Saunders v Houghton (No 1)* this Court required Mr Houghton to satisfy the High Court that he had an arguable case for rights which require vindication once he had filed a further amended statement of claim.[42] Determination of that requirement was one of the purposes for which the proceeding was remitted to the High Court. In passing this Court noted elements of the case which together with briefs of evidence already filed appeared to provide an underlying foundation for the claim. It was conscious also that no statements of defence had been filed and discovery had not been undertaken.

(ii) High Court: 8 June 2011 judgment

[98] In her 8 June 2011 judgment French J applied this Court's direction in *Saunders v Houghton (No 1)*. She was satisfied that the direction "... contemplated a broad brush impressionistic approach ..." rather than a detailed analysis of every pleaded allegation. In her words:

> [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.
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> ...
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> [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.

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42 *Saunders v Houghton (No 1)*, above n 2, at [79]–[82].

[99] The Judge undertook her analysis of the evidence available to support Mr Houghton's case with the benefit of further amended and refined statements of claim. As Mr Forbes points out, she had available some 17 affidavits filed by lay and expert witnesses on both sides. She dismissed some causes of action which she was satisfied were inarguable. But she was satisfied that the surviving causes of action met this Court's arguablity test.

(iii) Appeal grounds

[100] Mr Olney submits that French J applied the wrong test. He says that she should have gone further and required Mr Houghton to establish a strong prima facie case or good arguable case of the type adopted in search and freezing order applications respectively. He says the serious question or issue to be tried standard is insufficient. He says that what was required was a merits assessment which in the context of approving a funded representative action would apply a standard reflecting the potential for immense harm to defendants; respond to the incentives to engage in unmeritorious claims; counter balance the absence of protection against bringing unmeritorious claims which otherwise operate in normal litigation; and provide meaningful protection to defendants beyond that already available through summary judgment and strike out processes.

[101] Alternatively, Mr Olney submits, that even applying a lower standard the Judge erred. He characterises her conclusion as an acceptance of vague and hypothetical possibilities unsupported by admissible, credible evidence. He gives two examples in support – one relates to an assessment of Mr Houghton's allegation that the profitability of the accounts was inflated from March 2003 by unilateral rebate reductions; the other relates to an assessment of Mr Houghton's allegation that Feltex had conducted improper price setting processes.

(iv) Conclusion

[102] We can address Mr Olney's submission shortly. This Court's decision in *Saunders v Houghton (No 1)* was not appealed. French J was bound by it to apply the mandated arguability test and, as Mr Forbes points out, Mr Houghton presented

his evidence and argument accordingly. The Judge did not err by inquiring whether Mr Houghton had established an arguable case for rights that warrant vindication.

[103] In this respect French J noted that the test equated closely to the serious question to be tried test applied on applications for interim injunctions.[43] In summary, the common law recognises three gradations of standards within the interlocutory threshold test – first, at the lowest level, the arguable or serious issue standard; second, the good arguable case standard; and, third, the prima facie case.[44]

[104] It is to be assumed that this Court in *Saunders v Houghton (No 1)* deliberately adopted the lowest of these three threshold tests. Its approach is consistent with French J's[45] observation that in other jurisdictions having detailed class action rules it is unusual for the Court to undertake any preliminary assessment of the substantive merits. Moreover, the two higher threshold tests – of good arguable case and a prima facie case – have statutory recognition in New Zealand in the context of rights to assume jurisdiction against overseas entities.[46]

[105] We add our rejection of Mr Olney's subsidiary submission that the Judge erred in applying the arguability test. He relies on two examples. Having reviewed the detail of Mr Olney's argument against the Judge's findings in the relevant evidence, we are unable to discern an error. The Judge approached these issues in a broad brush, impressionistic way. She was entitled to conclude that there was an evidential basis for the allegations. She was not required to adopt what Mr Olney describes as a critical appraisal of the evidence. And, even if we had accepted Mr Olney's propositions, these two examples would have been insufficient to challenge French J's ultimate conclusion on arguability.

[106] This submission must fail.

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43 At [44].

44 *Seaconsar Far East Ltd v Bank Markazi* [1994] 1 AC 438 (HL) applied in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [40]–[42].

45 At [41].

46 High Court Rules, rr 6.27–6.29; discussed in *Wing Hung Printing Co Ltd*, above n 43.

Result

[107] The appeal in CA191/2011 is dismissed. The appellants are to pay costs for a standard appeal on a band B basis and usual disbursements to the respondent E M Houghton only. We certify for two counsel.

[108] The appeal in CA202/2011 is dismissed. This appeal essentially mirrored the directors' appeal in CA191/2011 and counsel for First New Zealand did not make substantive submissions or participate in the hearing other than to adopt Mr Cooper's arguments. There will be no order as to costs.

[109] The appeal in CA203/2011 is dismissed. For the same reason as for CA202/2011 there will be no order as to costs.

[110] The appeal in CA204/2011 is dismissed. The appellant is to pay costs for a standard appeal on a band B basis and usual disbursements to the respondent E M Houghton only. We certify for two counsel.

[111] The appeal in CA1/2012 is dismissed. The subject matter of the appeal has been settled by the parties since argument. There will be no order as to costs.

[112] We suggest that in future this judgment is cited as *Saunders v Houghton (No 2)* to avoid confusion with *Saunders v Houghton (No 1)*.

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