In The Court Of Appeal Of New Zealand

CA /2014

Between	**Eric Meserve Houghton**
	Appellant
And	**Timothy Ernest Corbett Saunders, Samuel John Magill, John Michael Feeney, Craig Edgeworth Horrocks, Peter David Hunter, Peter Thomas and Joan Withers**
	First respondent
And	**Credit Suisse Private Equity Inc.**
	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

NOTICE OF APPEAL

13 October 2014

Presented for filing:

Wilson McKay
P O Box 28347, Remuera, Auckland 1541
Telephone: (09) 520-4544
Facsimile (09) 524-0397
Solicitor Acting: **Roger Cann**
Email: rogercann@wilsonmckay.co.nz

Take notice that I, **Eric Meserve Houghton**, the appellant in the proceeding identified above, am appealing to the Court against the judgment of the Honourable Justice Dobson delivered in Wellington in proceeding Civ 2008 404 348 on 15 September 2014:

The grounds of the appellant's appeal are:

1. The Court below erred in its determination that the New Zealand securities legislation does not seek to limit the extent of risk to which investors may be exposed when making particular investments.

2. The Court below erred as to the application and interpretation of section 56 of the Securities Act 1978.

3. The Court below erred as to the application and interpretation of section 55 of the Securities Act 1978.

4. The Court below erred by importing into the concept of truth or untruth, the concept of materiality.

5. The Court below erred as to the application and interpretation of s38D of the Securities Act 1978.

6. The Court below erred as to the application and interpretation of s 63A of the Securities Act 1978 and s 5A of the Fair Trading Act 1986.

7. As a result of the error in respect of s63A of the Securities Act 1978 and s 5A of the Fair Trading Act 1986 the Court below failed to consider the appellant's first cause of action under the Fair Trading Act 1986.

8. The Court below erred in finding that the appellant has not made out any loss.

9. The Court below erred in finding that the measure for loss for civil liability under the Securities Act 1978 is restricted to the tort measure of loss.

10. The Court below erred as to the application and interpretation of s 2 of the Securities Act 1978 as that section defines "promoter".

11. The Court below erred in fact and law at paragraphs 421 and 422 of the judgment in determining that the appellant was obliged to disclose the translation of the GSM data into SQL format to the respondents.

12. As a consequence of the errors of law in the judgment, the determination of the Court below in respect of the factual issues is flawed.

13. In addition the Court below made errors in matters of fact that are not supported by the weight of the evidence.

Specific Grounds

14. As to the first ground of appeal:

14.1 Paragraph 56 the judgment records

"New Zealand securities legislation does not seek to limit the extent of risk to which investors may be exposed when making particular investments. Rather, the aim of the New Zealand securities legislation is to require adequate and accurate disclosure of matters relevant to the nature of the risks involved in an investment to enable potential investors to make fully informed decisions."

14.2 Paragraph 440 of the judgment states:

"...The aim of providing the fullest disclosure of business strategies in a prospectus has to be balanced against the concern not to unduly diminish the value of business strategies by providing disclosure for competitors."

14.3 Section 33 (1) of the Securities Act 1978 restricts the offer of securities to the public to offers that are made by an authorised advertisement that is an investment statement that complies with the Act and the regulations. The investment statement therefore has to comply with (inter alia) s38D of the Securities Act 1978.

14.4 The Court below erred in its approach to the interpretation of the Securities Act 1978 as recorded in paragraph 56 by limiting the obligation to disclose information in the investment statement to:

14.4.1 the matters relevant to the nature of the risks involved in an investment; and

14.4.2 include balancing the aim of providing the fullest disclosure of business strategies against the concern not to unduly diminish the value of business strategies by providing disclosure for competitors;

when

14.4.3 s 38D (a) of the Securities Act 1978 provides that the purpose of an investment statement is to provide certain key information that is likely to assist a prudent but non-expert person to decide whether or not to subscribe for securities; and

14.4.4 the long title of the Securities Act 1978 provides:

> "An Act ... to consolidate and to amend the law relating to the offering of securities to the public, and to extend the application thereof."

14.4.5 the object of the Securities Act 1978 is investor protection.

15. As to the second ground of appeal:

15.1 The test for civil liability under the Securities Act 1978 is provided for in s 56(1) of the Act.

15.2 In linking the test for liability to the subscriber's loss or damage, the Court below has erred in law.

15.3 The test under s 56 (1) is : does the registered prospectus contain any untrue statement? If it does, civil liability is established.

15.4 The issue of compensation for loss suffered by reason of the untrue statement is separate from the issue of liability and does not determine whether a statement in a prospectus is untrue.

15.5 In order to establish civil liability, s56 does not require the subscriber to have been misled by the untrue statement. It is sufficient for the purposes of s 56 to establish civil liability that the prospectus contains

an untrue statement and the subscriber purchased the shares on the faith of the prospectus.

15.6 The prospectus itself is a statement.

16. As to the third ground of appeal:

16.1 Section 55 (a) (i) is a deeming provision. It deems a statement that is true to be untrue if

15.1.1 it is misleading in the form or context in which it is included in the prospectus, or

15.2.2 it is misleading by the omission of a particular that is material to the statement in the form and context in which it is included.

16.2 A deeming provision can only deem a statement that is true to be untrue. A deeming provision cannot deem a statement that is untrue to be untrue (which would be a tautology).

16.3 The Court below erred in law as section 55 (a) does not limit the way in which it can be proved that the registered prospectus contains an untrue statement.

16.4 The Court below erred in constraining the interpretation of s 56 by reference to s 55(a). This is demonstrated in the following paragraphs of the judgment

[67] ... "Untruth" in the statutory sense is to be made out in respect of a statement included in a prospectus if that statement is misleading in the form and context in which it is included. The respondents argued that this required a plaintiff to identify a particular statement and establish that it is misleading in the form and context of its inclusion in the prospectus.

[68] In my view, the terms of the section contemplate that the assessment is to be undertaken on a statement by statement basis. However, if the context that renders any one or more statements misleading is reflected in numerous other passages in the prospectus, then a determination of whether the statement complained of is indeed misleading would require an assessment of the sense reasonably conveyed by the impugned statement, in whatever breadth of context is

relevant to its understanding.

[69] It follows that a statement that is criticised as being misleading cannot necessarily be confined to a single sentence or paragraph. The focus should be on the subject that is alleged to be misleading in the context in which that subject is addressed in the prospectus. I accept Mr Forbes' point on this, to the extent that the description of a particular topic in the prospectus (that is, the "context") may be set out at some length, and may not all be addressed at the same point in the document.

[70] However, I treat the statutory test as requiring a plaintiff to identify the passages from the prospectus that are alleged to address a material point in misleading terms. That is what the definition contemplates...

[73] Where allegations relate to omissions from a prospectus, the terms of s 55(a)(ii) require the identification of a particular statement within the prospectus that is rendered misleading by the omission of additional information which would be material to an understanding of that particular statement in the form and context in which the statement is included...

[74] The consequence of this structure is that a plaintiff cannot plead omissions in an abstract sense that the overall impression given by the prospectus is misleading because additional information ought to have been given. Rather, the plaintiff has to identify particular content, the sense of which is rendered misleading because of the absence of other relevant information, where the inclusion of that additional information would enable the reader to avoid being misled in respect of the point being addressed in the statement at issue.

[75] These provisions in the SA reflect a policy that the preparers of offer documents are to be held to account on a relatively specific basis, not at a level of abstraction that prejudices their ability to consider the criticism and respond to it. For instance, one of the more general criticisms here was that the prospectus overall gave an unjustifiably positive impression of Feltex's business and its prospects. Unless related to a specific statement or omission from an identified statement, such generalized criticisms are difficult to evaluate objectively.

[103] The plaintiff argued that a claimant did not have to establish reliance on the specific content of the prospectus that was found to be misleading. Rather, subscribing for securities "on the faith of" a prospectus contemplated no more than investing in the knowledge that a prospectus existed. This has been referred to as indirect reliance, or per se reliance on the existence of the prospectus. Alternatively, the plaintiff argued that it would be sufficient for a claimant to establish that they

relied on the prospectus as a whole.

[118] I consider that the legislative intention was to create liability in respect of misleading content or omissions where that content materially contributed to a claimant's decision to invest. The untrue statement or statements must be sufficiently material that, if corrected, it would then have been more likely than not that the investment would not have been made. That proposition assumes that the claimant makes out reliance on the prospectus in general, and that his or her assessment of the risks of investment would more likely than not have been reversed if the untrue statement or statements were corrected. It also involves rejection of the plaintiff's broader claim that indirect reliance, merely on the existence of a prospectus, would be sufficient.

17. As to the fourth ground of appeal

17.1 In paragraph 50 of the judgment the Court below held

"Although a number of the criticisms of the content of the prospectus had some justification, none of them made out material misleading content or omissions that would trigger liability on the test as I have applied it under the SA."

17.2 The Court below erred by importing the concept of materiality into the trigger for civil liability under s56 of the Securities Act 1978.

17.3 A statement is either true or untrue. If it is untrue, either *per se* or deemed to be untrue, whether it is material or not is irrelevant to the establishment of civil liability under s56 of the Act.

18. As to the fifth ground of appeal

18.1 s 38D (a) of the Securities Act 1978 provides that the purpose of an investment statement is to provide certain key information that is likely to assist a prudent but non-expert person to decide whether or not to subscribe for securities.

18.2 Accordingly the target audience is the "prudent but non-expert person" not the expert investor (prudent or otherwise) or the imprudent non-expert and the key information that must be supplied in the investment statement is to be aimed at the level of understanding of the prudent but non-expert investor.

18.3 Section 56 does not limit civil liability to prudent but non expert investors. The directors and promoters are liable to persons who subscribe on the faith of the prospectus, expert, imprudent or otherwise.

18.4 In paragraph 98 of the judgment the Court below sets out certain attributes of the prudent but non-expert investor and goes on at paragraph 99 to require the subscriber to seek clarification on the meaning of passages he or she does not understand.

18.5 The inquiry as to whether a true statement is deemed untrue by virtue of s55 of the Act, is whether a prudent but non-expert person would objectively be misled by:

18.5.1 the context and form in which the otherwise true statement is used; or

18.5.2 the omission of a particular that is material to the statement in the form and context in which it is included

not whether a prudent but non- expert person properly advised would objectively be misled as this would attribute to the non-expert person the attributes of the adviser.

18.6 By importing the obligation to seek clarification into the concept of the prudent but non-expert investor the Court below erred in its interpretation of s39D. The duty under that section is to provide key information that will assist the prudent but non-expert investor in making a decision whether or not to invest. The Act does not impose a duty on the prudent but non-expert investor to take advice.

18.7 The Court below further erred in paragraph 101 of the judgment by limiting the liability under s 56 to statements that would materially mislead a prudent non-expert investor when the liability under that section is to all who invest on the faith of a prospectus that contains an untrue statement. In this paragraph the Court below held:

"[101] I am satisfied that applying these attributes to the notional

investor does not protect those responsible for issuing prospectuses in a manner that undermines the statutory purpose of requiring adequate and accurate disclosure. The approach is positioned where the terms of the SA, in light of previous decisions about its application, draw the line. It involves a balance between, on the one hand, holding the issuer of a prospectus to account for content that would materially mislead prudent, non-expert readers of the prospectus, and, on the other hand, transforming the civil liability regime under the SA into a warranty enabling recovery of losses for investors who could subsequently claim they were misled, irrespective of the idiosyncrasies or inadequacies in their understanding of the document."

19. As to the sixth ground of appeal:

19.1 The Court below erred in holding at paragraph 624 of the judgment that no issue of retrospectivity arises in respect of section 63A of the Securities Act 1978 and section 5A of the Fair Trading Act 1986.

19.2 In making this determination the Court below failed to consider that the provisions of the Securities Act 1978, including section 56, were substantially amended and the powers of the Securities Commission substantially enlarged by the Securities Amendment Act 2006. Thus the conduct that is regulated by the Securities Act 1978 as amended by the Securities Amendment Act 2006 is different from the conduct that was regulated by the Securities Act 1978 prior to its amendment.

19.3 In order to avoid retrospective application of section 5A of the Fair Trading Act 1986, the words "the Securities Act 1978" and "that Act" must be read to mean the Securities Act 1978 as amended by the Securities Amendment Act 2006 and the Act as amended by the Securities Amendment Act 2006.

20. As to the eighth and ninth grounds of appeal:

20.1 Section 33 of the Securities Act 1978 prohibits the offering of securities to the public unless the offer is made in an investment statement that complies with the Act.

20.2 The consequence of section 33 is that the offer must (inter alia)

20.2.1 comply with s34 (1) (b) of the Act – in that the offer must refer to and give proper emphasis to adverse circumstances;

20.2.2 provide certain key information that would be likely to assist a prudent but non-expert person to decide whether or not to subscribe for securities – section 38D of the Act.

20.2.3 Not contain an untrue statement – s 56 (1) of the Act.

20.3 But for the making of an offer that failed to comply with the Securities Act 1978, the appellant would not have invested in Feltex and is entitled to a refund of his subscription in full, as claimed by him.

20.4 In deciding at para 703 of the judgment the Court below erred in equating the appellant's claim on quantum to be akin to a total failure of consideration.

20.5 At para 704 of the judgment the Court below erred by ascribing a value to the shares acquired by the appellant when:

20.5.1 evidence was not called by the respondents as to the value of the shares acquired by the appellant at or immediately prior to the date of allotment.

20.5.2 in relying on the pro forma balance sheet in financial statements in the prospectus, the Court below failed to consider the evidence of Mr. Meredith (a forensic accountancy expert for the appellant) that:

20.5.2.1 as at 31 December 2003 Feltex had negative net tangible assets of ($4,247,000); and

20.5.2.2 the implied forecast H2 FY04 net deficit was ($1,301,000)

and accordingly at or immediately prior to the date of allotment the Feltex's implied net tangible asset deficit was ($5,548,000)

before revaluation of assets and conversion of the bonds to equity pursuant to the prospectus.

20.5.3 in relying on the pro forma balance sheet in financial statements in the prospectus, the Court below failed to consider the evidence of Mr. Meredith and Professor Newberry (another forensic accountancy expert for the appellant) as to the value of Feltex's goodwill.

20.6 At para 705 of the judgment the Court below erred by imposing an obligation on the appellant to mitigate his loss when the Securities Act 1978 imposes no such obligation.

21. As to the 10th ground of appeal:

21.1 The Court below erred in fact and law finding that the third, fourth and fifth respondents were not promoters, as defined in section 2 of the Act.

21.2 The errors of law that apply to the third, fourth and fifth respondents are:

21.2.1 The Court below erred in the interpretation of the definition in s2 of "promoter" by wrongly extending the words "a person acting solely in his or her professional capacity" to include a body corporate [paragraph 593];

21.2.2 The Court below erred in the interpretation of the definition in s2 of 'promoter" to limit the natural meaning of the words "instrumental in the formulation of the plan" to require that the promoter to have a measure of control over decisions as to the form and terms on which the offer of securities is made [paragraph 580];

21.2.3 The Court below erred in the interpretation of the definition in s2 of "promoter" by failing to consider the long title of the Securities Act and thereby limiting the natural meaning of words in the definition.

21.3 The errors that apply to the third respondent are:

21.3.1 Having determined at para 580 that a promoter in the statutory sense has to have a measure of control over decisions as to the form and terms on which the offer of securities is made, the Court below failed to take into account that only the third respondent could:

21.3.1 agree to sell its shares in Feltex;

21.3.2 agree to the terms upon which and the price to be paid for its shares in Feltex;

21.3.3 that all steps taken by the second respondent were taken on behalf of the third respondent as the second respondent's agent.

21.4 The fact that the second respondent was a promoter does not limit the third respondent's liability as promoter either on the basis of normal principles as to principal and agent or by its own act of signing and approving the terms of the prospectus.

21.5 The Court below erred in fact:

21.5.1 by finding at paragraph 591 the fourth and fifth respondents acts of underwriting the priority offer to bondholders to swap their bonds for shares and each taking a firm allocation of $40 million worth of shares did not go beyond participation in professional capacity;

21.5.2 by failing to take into account the fourth and fifth respondents acts of underwriting the priority offer to bondholders to swap bonds for shares and each taking a firm allocation of $40 million worth of shares in the assessment of whether the fourth and fifth respondents came within the statutory definition of a promoter in that they were "instrumental in the formulation of the plan" and thereby a promoter.

21.5.3 by failing to accept that the fourth and fifth respondents acts of requiring the first respondents (except Ms Withers) and senior management to agree to a lock up of the some of the shares acquired by them through the equity incentive plan were acts that brought them within the statutory definition of a promoter.

22. As to the 11th ground of appeal

22.1 Except to the extent that the privilege was waived by the production of the reports generated by Mr Harper (an information technology expert witness for the appellant), the appellant maintains his claim to privilege under section 56(2)(d) of the Evidence Act 2006 in respect of the material compiled by the expert witness Mr Harper.

22.2 As recorded in the witness statements of Andrew Baker and Mark Walter, solicitors of Melbourne, the act of gaining access to the GSM data and subsequent translation by Mr Harper of the GSM data into SQL format was information compiled or prepared at the request of the appellant's legal advisers and was accordingly privileged under section 56(2)(d) of the Evidence Act 2006. The appellant had the right to refuse to disclose the material in the proceedings under section 53 of the Evidence Act 2006.

22.3 The Court below also further erred in finding at paragraph 421 of the judgment that the "the electronically useable form of the data in SQL format was provided to the plaintiff's advisers" when no such evidence was given.

23. As to the 12th and 13th grounds of appeal:

23.1 Errors of fact occasioned by an incorrect legal approach and against the weight of the evidence, not already addressed herein, are found in the following paragraphs:

Paragraph 2 - Feltex was a long established manufacturer of carpets when the evidence was that Feltex was incorporated in 1996 and

changed its management in 2000 when the company acquired Shaw Australia.

Paragraph 19 - The first respondent Mr Magill, in his capacity Chief Executive Officer of Feltex, was a member of the Due Diligence Committee when the uncontested evidence was that he was not a member of the Due Diligence Committee in any capacity.

Paragraph 50 – None of the criticisms of the content of the prospectus made out material misleading content or omissions that would trigger liability on the test under the Securities Act 1978 as the Court below has applied it.

Paragraph 54 – The appellant had not made out any recoverable loss.

Paragraph 88 – 91 - The investment decision in relation to Feltex shares was relatively more complex than that confronting potential investors in debt securities issued by finance companies...and that it was less likely that an investor in the Feltex IPO would have decided to subscribe for the shares without the benefit of any advice.

Paragraphs 164 to 192 – Undisclosed adverse trends in gross sale revenue and volume of sales

Paragraphs 193 to 194 – Undisclosed adverse trends in forecast result for six months to 30 June 2004

Paragraphs 197 to 228 – Significant risks arising from reduced tariffs and increased imports of carpet into Australia

Paragraphs 229 to 241 – Undisclosed adverse impact of a strengthening in the New Zealand dollar against the Australian dollar.

Paragraphs 242 to 254 – Unjustified claim as to the adoption of lean manufacturing techniques, specifically as it applied to New Zealand operations

Paragraphs 255 to 275 – Non-disclosure that the varying quality of Feltex's relationship with major customers

Paragraphs 276 to 279 - Carpet manufacturers have high break- even costs structures

Paragraphs 280 to 300 – Misleading or unreasonable assumptions in predicting future performance

Paragraphs 304 to 306 – Unjustified assumption that there would be no change in the level of imported carpet into Australia.

Paragraphs 311 to 323 - Unjustified assumption that Feltex's market share would grow by one per cent over the projected period.

Paragraphs 324 to 338 – Non-disclosure that the FY 2005 projection was not reasonably achievable

Paragraph 341 – No loss has been suffered by the plaintiff because sophisticated investors who set the price for Feltex shares were not misled by any misleading presentation of historical and prospective financial data

Paragraphs 342 to 371 – The "second bottom" line on page 85 of the prospectus not an untrue statement

Paragraphs 372 to 377 – Presentation of NPAT in the summary financials on pages 19 and 85 of the prospectus not an untrue statement

Paragraphs 378 to 390 – Inappropriate emphasis given to EBITDA in the prospectus not an untrue statement

Paragraphs 391 to 408 – Failure to disclose separately SIPS grants (Federal government grants) on page 85 of prospectus not an untrue statement.

Paragraphs 409 to 444 –Failure to disclose forward dating of sales invoices in the prospectus not an untrue statement.

Paragraphs 445 to 465 – Proposed dividend for FY 2004 not misleadingly presented

Paragraph 494 – No scope for finding that the notional investor would be materially misled as to the relative strength of the directors commitment by the description of their proposed share purchases

Paragraphs 518 to 539 - Failure to adequately take account of the unwarranted positive tone conveyed by prospectus when assessing the prospectus over all

Paragraphs 540 to 556 – the Due Diligence Defence reasonably available to defendants

Paragraphs 699 to 712 – Quantification of loss

Paragraphs 699 to 712 – Loss treated as a common issue at first stage trial.

Judgment Sought

24. The Appellant seeks a judgment from the Court

    24.1 Setting aside those parts of the judgment appealed from.

    24.2 Setting aside the order for costs in paragraph 713 of the judgment.

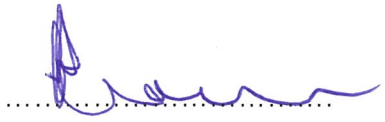
    24.3 Entering judgment for the appellant in the sum of $20,000.

    24.4 Awarding the appellant interest on the judgment sum at such rate and for such period as the Court deems just.

    24.5 Awarding the appellant costs on this appeal and in the High Court.

25. The appellant is not legally aided.

Dated 13 October 2014



Roger Cann

Solicitor for appellant

To The Registrar of the Court of Appeal of New Zealand

And to The Registrar of the High Court at Wellington

And to The respondents

This document is filed by Roger Cann, of Wilson McKay, solicitor for the appellant. The address for service is at Wilson McKay House, 1A St Vincent Avenue, Remuera Auckland 1050 (PO Box 28347 Remuera Auckland 1541 Phone 09 5204544, Fax 5240397, email RogerCann@wilsonmckay.co.nz