IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2008-409-348
[2020] NZHC 1088

BETWEEN	ERIC MESERVE HOUGHTON Plaintiff
AND	TIMOTHY ERNEST CORBETT SAUNDERS, SAMUEL JOHN MAGILL, JOHN MICHAEL FEENEY, CRAIG EDGEWORTH HORROCKS, PETER DAVID HUNTER, PETER THOMAS and JOAN WITHERS First Defendants
	CREDIT SUISSE PRIVATE EQUITY INCORPORATED Second Defendant
	CREDIT SUISSE FIRST BOSTON ASIAN MERCHANT PARTNERS LP Third Defendant

Hearing:	11 May 2020
Counsel:	C R Carruthers QC and P A B Mills for plaintiff (via VMR) A R Galbraith QC, D J Cooper, S T Coupe and M C Harris for first defendants (except for separate representation noted below) (via VMR) T C Weston QC for Mr Magill (via telephone) C L Broad for Mr Horrocks (via telephone) B D Gray QC and A E Ferguson for Ms Withers (via VMR) J B M Smith QC, A S Olney and C J Curran for second and third defendants
Judgment:	22 May 2020

RESERVED JUDGMENT OF DOBSON J
[Application for strike out]

Contents

Background to the strike out application

[1] This litigation relates to the prospectus issued for shares in Feltex Carpets Limited (Feltex) in May 2004. The proceeding was commenced in 2008. It was brought as a funded class action on behalf of some 3,600 subscribers for Feltex shares. High Court and Court of Appeal decisions rejected claims that a large number of elements of the prospectus were untrue in terms of the then Securities Act 1978, or misleading in terms of the Fair Trading Act 1986.[1]

[2] In August 2018, the Supreme Court held that the prospectus contained an untrue statement.[2] The Supreme Court also found that the untrue statement constituted misleading conduct, for which liability arose under s 9 of the Fair Trading Act. The Supreme Court referred the matter back to the High Court for determination of whether the untrue statement caused loss (the stage two claims).

[3] The untrue statement arose because directors and promoters elected to maintain a forecast for Feltex's revenue for its 2004 financial year (FY04) when, by the time subscribers were to make their commitments to purchase shares, the directors were on notice that there was no longer a reasonable basis for assuming that forecast would be achieved.

[4] The Supreme Court judgment contemplated two possible modes of quantifying loss arising from an untrue statement in a prospectus. The parties have taken different views on the application of those modes of quantifying loss in this case. Those were

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1 *Houghton v Saunders* [2014] NZHC 2229, [2015] 2 NZLR 74; *Houghton v Saunders* [2016] NZCA 493, [2017] 2 NZLR 189.

2 *Houghton v Saunders* [2018] NZSC 74, [2019] 1 NZLR 1.

considered in my initial judgment after the proceeding was referred back to the High Court.[3] In broad terms, those alternatives contemplate either:

(a) claims for the difference in value between the shares as issued in reliance on the content of the prospectus, and what would have been fair value for those shares had the untrue statement not been included in it (the difference in value measure); or

(b) claims that, had the untrue statement been revealed at the time shareholders subscribed for their shares, they would have reversed their decision and elected not to invest at all; on this basis shareholders' loss would be the difference between the subscription price they paid and any amount subsequently realised on the sale of their shares (the reversal of investment decision measure).

In many cases, subscribers retained some or all of their shares until they became worthless when Feltex was placed in liquidation.

[5] Claimants whose cases are being prepared for hearing in stage two intend to pursue claims on the larger, reversal of investment decision measure, relying on the difference in value measure as a fall-back alternative.[4]

[6] The defendants have indicated that they will challenge claims by individual shareholders that they would not have invested at all if the untrue statement had been revealed to them at the point in time they committed to the purchase. On the fall-back basis for the claims, the defendants will argue that the untrue statement did not reduce the fair value of the shares, or not to the extent claimed. In the event that loss is made out, the defendants will seek exemption from liability on the basis that they conducted themselves with reasonable diligence, notwithstanding the finding that no reasonable basis remained for them to leave the revenue forecast unaltered in the prospectus.

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3 *Houghton v Saunders* [2019] NZHC 142 at [9]–[11].

4 At stage one of the proceeding, Mr Houghton was the representative plaintiff. Stage two of the proceeding involves claimants other than Mr Houghton, and since my stage two interlocutory judgment on 15 August 2019, Mr Houghton and the stage two claimants have been referred to as "the claimants": *Houghton v Saunders* [2019] NZHC 2007 at [2].

[7] As a funded class action, it has been accepted since commencement of the proceedings in 2008 that the defendants are entitled to security for costs. For stage two of the proceeding, the claimants initially accepted in late March 2019 that they should pay $800,000 as security against the prospect of an adverse costs award arising out of the stage two hearing. The defendants sought a greater sum to include substantial disbursements that they projected would be incurred. I made an order on 14 June 2019 that security was to be provided in the sum of $1.65 million,[5] and was to be paid by 12 July 2019 ahead of the five week stage two hearing that was then scheduled to commence on 4 November 2019.[6]

[8] Since the security for costs order was made, there have been a number of assurances as to compliance with it, none of which have been fulfilled. I will set out in an appendix to this judgment a summary of such assurances, and the periodic reports of progress ostensibly being made to arrange the security for costs. The pattern is sufficient to justify a healthy level of scepticism that Joint Action Funding Limited (JAFL) can perform its obligations as funder to arrange security for costs and to fund pursuit of the stage two claims. The defendants complain that Mr Anthony Gavigan, the major shareholder and sole director of JAFL, has proposed new initiatives for funding the claims shortly before each occasion on which the lack of progress is to be considered by the Court, on terms where the success of that new initiative will not be known until after the pending court hearing.

[9] On 4 November 2019, which was to have been the first day of the five week stage two hearing, I heard a contested application on behalf of the claimants for adjournment of that fixture. The ground relied on was that the claimants had sought leave to further appeal to the Supreme Court from a Court of Appeal decision,[7] which upheld my interlocutory judgment that excluded part of the evidence of the claimants' economic expert, Mr Greg Houston.[8] The defendants wanted the stage two hearing to

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5 *Houghton v Saunders* [2019] NZHC 1362 at [90].

6 The arithmetic on appropriate levels of security for costs was complicated somewhat by the extent to which I ordered the defendants to disgorge costs paid to them by the plaintiff for their successful defence of stage one in the High Court, and the proportionate positive award of costs made in favour of the plaintiff for the extent to which he is now to be treated as having succeeded in stage one. The quantification of those costs entitlements was inevitably provisional, given the prospect that they will need to be revisited depending on the outcome at stage two.

7 *Houghton v Saunders* [2019] NZCA 506.

8 *Houghton v Saunders*, above n 4.

proceed, notwithstanding the absence of security for costs. On 13 December 2019, the Supreme Court declined leave.[9]

[10] In the course of argument at the 4 November 2019 hearing, Mr Carruthers QC acknowledged that the claimants could not proceed with the stage two hearing at that time as they had not undertaken the preparation for it in the absence of resources to do so. In those circumstances, I was forced to grant the adjournment although not on the ground that had been relied on by the claimants.[10] The adjournment was granted subject to the defendants being awarded wasted costs for their preparation. Those were subsequently quantified at $110,000 for all the first defendants, and $100,000 for the second and third defendants, plus disbursements.[11]

[11] On 5 November 2019, I advised the parties of the availability of an alternative five week fixture commencing on 11 May 2020. Claimants' counsel accepted on 16 December 2019 that the May 2020 fixture would be "entirely appropriate". On 20 December 2019, the defendants' solicitors put those acting for the claimants on notice that if there was not compliance with orders to enable the stage two hearing to be prepared, including provision of security for costs, then an application would be made for permanent stay or dismissal of the proceeding. Such an application was made on 14 February 2020.

[12] On 20 February 2020, Mr Carruthers filed a memorandum in his capacity as an officer of the Court, explicitly without instructions from, or the authority of, the claimants. That memorandum conveyed Mr Carruthers' concern at the inability of JAFL to obtain funds to pay security for costs or to pay the costs associated with running the litigation, and that such inability was putting at risk the claims of more than 3,600 claimants without their knowledge that their claims were in jeopardy. Mr Carruthers supported the proposal that had been advanced on behalf of the defendants that their application to strike out the proceeding and the memorandum of counsel filed in support of it should be provided to each of the claimants involved in the litigation. Mr Carruthers' memorandum proposed that JAFL be given a limited

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9 *Houghton v Saunders* [2019] NZSC 148.
10 *Houghton v Saunders* [2019] NZHC 2906.
11 *Houghton v Saunders* [2020] NZHC 265 at [26].

time in which to comply with the requirement for provision of security for costs and to satisfy the Court that sufficient funds were secured to fund the on-going litigation. If JAFL did not perform, he sought a period of time for claimants generally to have the opportunity to arrange funding to pursue the litigation, and to settle a committee to manage that.

[13] Following a telephone conference with counsel on 28 February 2020, I issued a minute on 2 March 2020 directing that Mr Gavigan/JAFL would have until 13 March 2020 to confirm that it had security for costs and financial resources to fund the stage two hearing in hand. Thereafter, any or all claimants were given until 20 April 2020 to make alternative arrangements for provision of stage two security and the funding needed to pursue the stage two claims.

[14] On 13 March 2020, Mr Gavigan filed an application for an extension of time within which JAFL could confirm security for costs and funding for stage two, together with an affidavit in support. Both documents were filed and served directly by him. On 25 March 2020, I issued a further minute deferring consideration of JAFL's request for an extension of time. I indicated that if JAFL considered it worthwhile, it could continue with attempts to procure security for costs and funding for stage two until 20 April 2020, the date by which other claimants had to make alternative funding arrangements. The entitlement to the extension of time JAFL had requested was to be addressed at the hearing of the defendants' application for strike out on 11 May 2020.

[15] On 26 February 2020, Mr Gavigan had registered a new company, JAFL Litigation Funding Partners Limited (JAFL Funding Partners), which was intended as the vehicle for raising funds to pursue the stage two claims. On 1 May 2020, JAFL Funding Partners launched an offer for five million new ordinary shares, using Collinson Crowd Funding Limited (Collinsons) as the platform manager for a crowd funding offer for the first two million of those shares. Collinsons is licensed by the Financial Markets Authority (FMA) to provide equity crowd funding services. Its managing director, Laker Zhang, has deposed that Collinsons has expertise in raising funds for business ventures by crowd funding means. The offer is to close on 29 May 2020, subject to the prospect of its closing date being extended. In an updating

affidavit as at Sunday, 10 May 2020, Mr Gavigan deposed that $161,000 had been received from investors in response to the crowd funding offer. That constitutes 32 per cent of the minimum target of $500,000 and a more modest portion of the $2 million crowd funding target.

[16] Mr Gavigan has made numerous references in his various documents to the greater time taken to progress the funding arrangements because of the COVID-19 lockdown. He seeks more time than might otherwise be considered reasonable to take account of the greater time taken to progress matters because of those restrictions.

Grounds for strike out/dismissal

[17] In bringing the strike out application, the defendants principally relied on rr 7.48 and 15.2 of the High Court Rules 2016. Rule 7.48 empowers the Court to make any order that the Judge thinks just, including that pleadings of a party in default can be struck out in whole or in part, or that the proceeding be stayed where the party in default has failed to comply with an interlocutory order. Rule 15.2 provides for dismissal for want of prosecution where a plaintiff has failed to prosecute all or part of the proceeding to trial and judgment.

[18] The application also relied on r 10.8, which empowers the Court to dismiss a proceeding where a defendant appears for a hearing but the plaintiff does not. I am not satisfied that is an apt provision to deal with the circumstances that have developed, and could not add anything to the merits of the positions contended for the defendants in reliance on the other rules.

[19] The criteria for granting such orders, which have the effect of bringing a proceeding to an end without a determination of its substantive merits, require individual assessment in each case of the competing positions of the parties. That consequence means that the test for obtaining such an order is a stringent one. Whilst the general approach adopted in other cases is instructive, the weighing of competing positions is very much specific to each case.

[20] In an oral judgment often cited for its description of the nature of the strike out jurisdiction, Thorp J in *Jagwar Holdings Ltd v Fullers Corporation Ltd* described the

Court's discretion to dismiss proceedings for failure to comply with an order for security for costs as one that has long been accepted. He observed:[12]

> … the authorities also establish that such a course will not be taken unless the circumstances of the case make it appropriate to do so, and that the dismissal of proceedings for failure to comply with an order of the Court where the applicant to strike out cannot make out the more general ground of failure to prosecute with due diligence is only appropriate if the failure to comply with the order is "intentional and contumelious" *Birkett v James* [1978] AC 296 per Lord Diplock at 321.

[21] In *Jagwar*, Thorp J made an order dismissing the plaintiff's action unless the order for security for costs was complied with some two months after delivery of the decision.

[22] In *Smith v Antons Trawling Co Ltd*, Fisher J specified a list of considerations that he treated as relevant in assessing the default, acknowledging that the list was not comprehensive:[13]

> [a] Its duration.
>
> [b] Its impact upon the progress of the proceedings as a whole.
>
> [c] Whether there appears to be any excuse or explanation.
>
> [d] Whether it continued after reasonable opportunities and reminders, particularly where the Court has already made a fresh order, or given a warning, due to earlier non-compliance.
>
> [e] Whether it has substantially prejudiced the innocent party, whether procedurally or due to some wider impact upon the innocent party's interests and affairs.
>
> [f] Whether there is any realistic expectation that it will be rectified following further opportunity for compliance.

[23] The essence of the position adopted for the defendants was that for proceedings that were already stale and much protracted, the failure to comply with an order for security for costs for a period of some 330 days by the date of argument was inordinate, inexcusable, and amounted to contumelious disregard for the order requiring security to be paid. Counsel for the defendants referred to numerous sequential proposals

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12 *Jagwar Holdings Ltd v Fullers Corporation Ltd* (1991) 4 PRNZ 577 (HC) at 578.

13 *Smith v Antons Trawling Company Ltd* HC Auckland CL 40/98, 24 March 2000 at [4]. In that case, there had been non-compliance with an order for security for costs, plus orders requiring an amended statement of claim and discovery.

described by Mr Gavigan on behalf of JAFL as the intended source of security for costs and funding for stage two, all of which failed to enable the claimants to comply.[14] The delay was so long that two five week fixtures allocated for the stage two hearing have had to be abandoned, somewhat more than four months and 11 months after compliance with the order was required.

[24] Further, that the most recent crowd funding initiative, which Mr Gavigan has described as the only remaining funding option, was misleading in material respects in describing the prospects of a return to investors in the offer, and the likely award to claimants following the stage two hearing, and as to the true state of the proceeding. The Court has a supervisory role in monitoring the terms on which funding arrangements are agreed for such representative or class actions. Accordingly, the defendants submitted that the Court should be concerned that belated attempts to provide security for costs and funding for stage two had to depend on an offer to invest in a funding vehicle that was being made to claimants and other potential investors in materially misleading terms. Defendants' counsel submitted that the claims would have to succeed for awards in excess of $37.5 million before claimants would see any return and that the prospects for investors in the crowd funding offer to share in JAFL's returns from the venture were unclear.[15]

Claimants' opposition to strike out

[25] In written submissions, counsel for the claimants did not attempt to justify the need for further time to be given to arrange security for costs and funding for stage two, but merely set out the steps that were being taken. Implicitly at least, counsel relied on the importance of achieving an outcome for some 3,600 claimants as a sufficient ground for dismissing the defendants' application and affording further time

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14 See the summary in the appendix to this judgment.

15 The offer document states that the total compensation sought is over $200 million and it includes an example of how various interested parties would become entitled to payment assuming $100 million compensation is awarded to the claimants. Applying the amounts in that example in light of the terms of the JAFL agreement appeared to contemplate that JAFL would be paid a management fee of 25 per cent of all costs incurred in pursuing the proceeding and, assuming total costs of $30 million, JAFL's management fee would be $7.5 million. JAFL is also entitled to a profit share of 38 per cent of the net amount after payment of costs, which, on the $100 million example, would amount to $26.6 million.

for the claimants to provide security for costs and to arrange sufficient funding to pursue the stage two hearing.

[26] A number of affidavits were filed shortly before the hearing in support of the claimants' opposition to the defendants' strike out application. Sir Paul Collins completed an affidavit in his capacity as a director of Cohiba Traders Limited, which has assumed responsibility for a previous investment in Feltex shares made in the name of Port Stafford Limited. Sir Paul deposes that the total loss suffered by Port Stafford was some $666,000. Via corporate entities with which he is associated, Sir Paul has been a supporter of the claimants' proceedings, including financial support for the appeal to the Supreme Court. He deposes that he has "… been kept closely in the loop by Mr Gavigan on all material claimant committee initiatives and the decisions ever since". Applying his experience as a company director and, inter alia, as a director of Brierley Investments Limited and its chief executive from 1985 to 1998, Sir Paul states his view as to the relevance of the untrue statement and that, had he known of the company's revenue performance, he would not have invested. Sir Paul supports the crowd funding initiative as the only realistic option available to Feltex claimants as a group.

[27] Mr Wayne Anderson, a company director of Auckland, has completed an affidavit in his capacity as a director of Fore Golfers Limited (FGL), which has been a financial supporter of the proceeding. The position of FGL is acknowledged in the terms of the crowd funding offer as a funder entitled to reimbursement out of any proceeds received for claimants. Mr Anderson confirms:

> I have drawn down and advanced to JAFL a substantial part of the FGL funds committed and will complete the full balance when the stage two hearing trial commences.

Mr Anderson does not provide any detail as to the amounts previously advanced to help fund the proceeding, or the extent of the "full balance" payable when the stage two hearing commences.

[28] A further affidavit opposing the strike out application was filed by Mr Anthony Walshe, a New Zealand-born and educated dentist now living permanently in England. Mr Walshe deposes that he has lost his entire investment of $40,500 in Feltex. He has

been a financial supporter of the claimant group for some time. He attended the Supreme Court hearing and is another of the claimants whose individual claims are to be determined at stage two. Mr Walshe expresses support for the crowd funding offer and supports an adjournment to enable the funding contemplated by the offer to be arranged. Mr Walshe also expresses a preference to give his evidence in person in the High Court, raising the prospect that his claim ought not to be heard until it is practical for him to fly to New Zealand for the stage two hearing.

[29] The claimants also filed an affidavit from Mr Greg Houston, the Sydney-based economist who gave evidence for the plaintiff at stage one and who has been retained to give evidence for the claimants at stage two. His report on loss completed in July 2019 opined that the inclusion of the untrue statement about the 2004 revenue forecast caused the Feltex share price to be inflated by seven to eight cents, depending on whether the revenue shortfall was $7.5 million or $9 million. In my 15 August 2019 judgment,[16] I ruled as inadmissible a further section of that report which opined on the price impact of a variance in the 2005 revenue projection, which had been found by the Supreme Court not to constitute an untrue statement. My inadmissibility ruling on that part of Mr Houston's July 2019 report was upheld by the Court of Appeal and the Supreme Court declined leave for a further challenge to it.[17]

[30] In a short affidavit affirmed on 7 May 2020, Mr Houston deposes that he has been instructed to revise his July 2019 report. On the basis of a revenue shortfall of $9 million as at 2 June 2004 for the fourth quarter of FY04, he will opine as follows:[18]

> a. The Measurement of Loss as defined by the Supreme Court decision [2018] NZSC 74 likely falls in the range of 13cps to 34cps, excluding interest since 2004.
>
> b. The upper bound Measurement of Loss is 53cps, excluding interest since 2004.
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> c. These conclusions indicate that the Feltex Carpets Limited shares allotted at $1.70 per share as at 2 June 2004 were worth between $1.17 and $1.57.

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16 *Houghton v Saunders*, above n 4, at [56]–[81].
17 *Houghton v Saunders*, above n 7; *Houghton v Saunders*, above n 9.
18 Affidavit of Gregory John Houston, 7 May 2020, at [4].

[31] Defendants' counsel objected to the admissibility of Mr Houston's affidavit. They submitted that leave would be needed for him to adduce additional evidence beyond the July 2019 report, which had been served as the brief of his evidence and the admissibility of which had been subject to argument. They also submitted that there was nothing in the Supreme Court's decision declining leave to appeal which could be relied upon to justify adopting a different factual basis for an analysis of loss from that relied on by Mr Houston in the July 2019 report.

[32] For the first defendants, Mr Cooper calculated that a loss of 53 cents per share was the minimum level of damages that would be required to provide any return to those investing in the crowd funding offer.[19] He invited me to infer that Mr Houston had recognised that as the "upper bound" of loss to give some credibility to the basis on which investment was invited in the crowd funding offer. Mr Carruthers responded on the last point, denying that Mr Houston had been advised of the calculations Mr Cooper cited, and submitting that Mr Houston had recognised 53 cents per share as an upper bound measurement of loss as a result of his own analysis and not because those instructing him had advised him of that as the extent of loss needed before claimants could expect a return.

[33] It is understandable that the claimants would seek to have the difference in value measure of loss quantified at more than the range of seven to eight cents calculated by Mr Houston in his 2019 report. In Mr Gavigan's 11 December 2019 notice of opposition to the defendants' application for an order that he be rendered liable for costs ordered against the claimants, he stated that the stage two claim "… is unbankable and uninsurable at a diminution in value of only seven or eight cents per share". For it to be a meaningful fall-back alternative to the reversal of investment decision measure of loss, the difference in value measure would need to exceed several multiples of eight cents per share before the claimants themselves would receive anything (assuming the priority entitlements to others provided for in the JAFL funding agreement are applied).

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[19] The offer document projects that $30 million will have been spent on the proceeding, and JAFL's management fee at 25 per cent takes that to $37.5 million, which equates to damages at 53 cents per share.

[34] In oral submissions opposing the defendants' application, Mr Carruthers submitted that a serious injustice would result if the proceeding was not permitted to continue. In terms of the public interest, he submitted that the overwhelming feature was affording access to justice. The Supreme Court's judgment was a significant acknowledgement of an untrue statement and positive findings on other elements required to be made out by the claimants in their cause of action under the Securities Act. Mr Carruthers characterised the remaining issues for determination at stage two as very limited, focusing essentially on quantification of loss, whether the defence under s 63 of the Securities Act should avail the defendants and whether, given the liability finding of breach of the Fair Trading Act, a different extent of recovery should apply under that cause of action.

[35] Mr Carruthers submitted that the current situation had arisen because of the unavailability of further funding from the original funder contracted by JAFL and the limits on JAFL's own resources. He submitted that to deny whatever extension of time is required would deny access to justice. He emphasised the imbalance of the relative strength of positions of the defendants, who enjoyed the weight of substantial resources from their indemnifiers, when compared with the limits on the resources available to JAFL. Mr Carruthers submitted that there would be greater prejudice to approximately 3,600 claimants if their claims were not heard on quantification of loss than any incremental prejudice to the defendants from a further delay.

[36] Mr Carruthers did not put any limit on the time he considered should reasonably be given to JAFL to complete attempts to raise funds. Counsel were advised some time ago that if the 11 May 2020 fixture did not proceed, then the only available five week period in which the High Court could accommodate the hearing during the remainder of 2020 is the period beginning 31 August 2020. Mr Carruthers considered it quite unlikely that the claimants could be ready for the stage two hearing by that date. Given the consequence that the extension of time he was seeking appeared likely to require the hearing to be deferred until 2021, Mr Carruthers' response was that if that was required, then so be it.

[37] There are potential issues on the identity of interests as between the claimants and the funder. The claimants have not made any application for extension of time in

which to comply with their obligations to provide security for costs. Mr Carruthers acknowledged (when pressed by me) that the claimants would seek to adopt the application for extension made irregularly on behalf of JAFL by Mr Gavigan.

The crowd funding offer

[38] On behalf of all defendants, Mr Cooper made submissions in some detail about the terms of the crowd funding offer. I gave directions in the week before the hearing that I would not hear from Mr Gavigan purporting to speak on behalf of JAFL, but that JAFL could be separately represented by counsel if it considered that appropriate. JAFL was not represented, nor had any opportunity been extended to Collinsons for them to respond to criticisms of the offer document.

[39] Mr Carruthers did not engage on much of the detail of the criticisms advanced by Mr Cooper. He did submit that the offer had been supervised by Collinsons, which is licensed to conduct crowd funding offers of this type. He invited me to infer from the terms of affidavit evidence that the content of the offer document had been approved by the FMA. I do not take the parts of evidence he referred me to in support of this submission to justify the offer, and I have analysed the document on the basis that, whilst the involvement of a company licensed to manage such offers is made out, the offer document is not one that required the approval of the FMA, nor am I satisfied that such approval has been sought in this case.

[40] The defendants' submissions about the crowd funding offer may assume relevance for two separate reasons. First, that the existence of the crowd funding offer arguably provides inadequate reason for granting the claimants any further time to provide security for costs and to arrange the funding to complete the stage two hearing. Arguably, from the defendants' perspective, the crowd funding offer is sufficiently unattractive because of the limited prospects of a return on investment that its existence does not warrant a further adjournment of the proceeding to see if it could raise the necessary funding.

[41] Even if the crowd funding offer was subscribed for the full $2 million sought, the defendants argued that would be inadequate to both provide the security for costs and to adequately fund pursuit of the claimants' stage two claims. Additional funding

is to be sought up to another $3 million from wholesale and other investors. However, on the defendants' analysis, that would involve canvassing among potential investors who had previously rejected the opportunity so that, without commitments, it was unrealistic to count on further funding from such vaguely described sources.

[42] The second reason for analysing the terms of the offer was to draw the Court's attention to aspects of it which the defendants contend are materially misleading. The Court's role in supervising the terms on which funded representative actions proceed includes assessment of the reasonableness of the terms of contractual arrangements between third party funders and the class of represented claimants. Although the offer is not limited to claimants, they appear to be targeted as potentially motivated to invest. Mr Cooper characterised JAFL as the third party funder that had promoted the representative action in return for a management fee plus a substantial percentage of any recoveries where it has defaulted on its contractual obligations to the claimants to fund the proceeding. It is now asking the claimants to subscribe for shares in an associated entity that Mr Gavigan sees as the last option for pursuing stage two to endeavour to provide a return to JAFL out of the claimants' proceeds.

[43] The summary of the offer on page one of the document begins with a robustly worded warning in standard terms required by the law.[20] Those statements include:

> Equity crowd funding is risky. … Investment in these types of businesses is very speculative and carries high risks.
>
> You may lose your entire investment, and must be in a position to bear this risk without undue hardship.
>
> …
>
> … you may not be given all the information usually required. You will also have fewer other legal protections for this investment.
>
> Ask questions, read all information given carefully, and seek independent financial advice before committing yourself.

[44] Collinsons also make available a separate disclosure statement defining the terms on which they provide the crowd funding service. In addition to repeating the

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[20] Financial Markets Conduct Regulations 2014, reg 196.

statutorily required warnings, some of which are cited in the previous paragraph, the disclosure statement advises that Collinsons:

- do not verify the information the offeror company provides through the service;

- make no representation in relation to and do not warrant the accuracy or completeness of the information or whether it complies with the law; and

- make no representation as to the commercial viability or other prospects for the offeror company.

[45] The offer document makes no reference to the claimants being in breach of a court order for payment of security for costs of $1.65 million for stage two since 12 July 2019. Nor is there any reference to the following matters relevant to an assessment of the prospects of success:

- that the stage two trial scheduled for November 2019 had to be adjourned because security had not been provided and the claimants' counsel were not resourced to prepare and present their claims;

- that the claimants were facing a strike out application set down for 11 May 2020, which would otherwise have been the start of a second scheduled five week hearing of the stage two claims;

- that in February 2020, senior counsel for the claimants had conveyed concerns, as an officer of the Court, at the inability of JAFL to arrange security for costs and the funding needed for the stage two trial, inviting the Court to provide an opportunity for other claimants to provide those resources;

- that a court order in early March 2020 had given JAFL until 13 March 2020 to confirm that it had security for costs and the resources to fund the stage two hearing in hand, and that that latest deadline had not been met but

instead Mr Gavigan had sought an extension to that deadline which was yet to be considered by the Court.

[46] Instead of being on notice of those potential impediments to the stage two hearing occurring, the offer states that the claim "is now scheduled to proceed to the compensation stage (Stage Two) once all funding and security for costs arrangements are in place".[21]

[47] JAFL Funding Partners' first investment is described at page 2 of the offer document as being:

> … the acquisition of the right to receive six million dollars ($6,000,000) of accrued success fee entitlements in the Feltex litigation from [JAFL].

[48] Mr Cooper raised a concern that the description of success fee entitlements as being "accrued" is likely to mislead when that word generally connotes an existing entitlement whereas JAFL's interest in any success fee is entirely contingent on damages being awarded and received. Taken on its own, that description of the interest to be acquired risks distracting readers of the offer document from an assessment of relatively how likely it is that damages will be paid by the defendants in a sum triggering the contractual entitlement for JAFL to receive $6 million. Further, it assumes that there would be no challenge to JAFL's entitlement to be paid such sums, despite its non-performance of its obligations under the contract.

[49] The current arrangements in place are for up to 15 of the claimants' individual claims to be determined at stage two. That point is not clarified in the offer document, which talks in terms of maximum claims of $200 million. That amount appears to assume complete success on the larger measure of loss for all of the approximately 3,600 claimants. Claimants' advisers might reasonably hope that the outcome in relation to 15 claimants would provide a sufficient precedent for settlement of claims for all or a substantial majority of the other claimants. However, they are on notice that, thus far at least, the defendants intend to challenge individual claimants' claims where they are brought on the reversal of investment decision basis, so readers of the

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[21] Offer document at 3.

offer document may possibly be misled if they take from it that complete success in stage two automatically leads to a judgment for $200 million.[22]

[50] The crowd funding offer is for the issue of two million $1 shares, $2 million being the maximum amount permitted to be raised by this means in any one 12 month period.[23] The further three million shares in JAFL Funding Partners that are on offer are to be offered to "wholesale and other exempt investors as defined in the Financial Markets Conduct Act 2013".[24] In the detailed terms of the offer, this separate tranche of three million shares is described as being "reserved for" such wholesale investors. The offer document does not identify any such wholesale or other investors, or describe any level of commitment from such investors. In Mr Gavigan's 10 May 2020 affidavit, he deposes that in crowd funding offers, the larger investors wait to see what support the crowd give the offer before they engage, and only invest right at the end once allotment is certain. Mr Gavigan does acknowledge that this is the opposite of the practice that applies for public offerings pursuant to prospectuses where the norm is for the promoters to procure substantial commitments such as in a wholesale book build at the outset. However, if the larger investors do wait until allotment is certain, then it leaves retail investors with a greater level of uncertainty as to whether the offeror's target level of investment will be achieved.

[51] Mr Gavigan's 10 May 2020 affidavit was completed after service of the defendants' submissions, which include Mr Cooper's analysis that the crowd funding offer does not seek sufficient funds to allow the claim to proceed. Mr Gavigan deposes that the funders have available $375,000 from sources other than subscriptions to the crowd funding offer. It is not clear whether that amount, which appears to come partly from FGL and partly from another entity that was a partial funder of the Supreme Court appeal, includes amounts from wholesale investors that Mr Gavigan hopes will add to subscriptions to the crowd funding offer. When added to the $161,000 subscribed for in the crowd funding offer at the date of hearing, the existing total is

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22 The same prospect that individual claimants would be required to give evidence on the measure of their loss is not likely to arise if loss is assessed on the difference in value measure, which can be objectively ascertained and does not depend on each claimant's subjective reaction to disclosure of the untrue statement.

23 Financial Markets Conduct Regulations 2014, sch 8, cl 7.

24 Offer document at 2.

some $536,000 and Mr Gavigan deposes to a belief that he could raise a minimum of another $339,000 by the end of June.

[52] Mr Cooper questioned whether any belief by Mr Gavigan should be relied on, given the extent of previous proposals in which he has expressed confidence, all of which have come to nothing. In particular, Mr Gavigan expressed confidence in obtaining after the event (ATE) insurance cover for the $1.65 million in security for costs for a premium of $330,000, which Mr Cooper pointed out was very much less as a percentage of cover than the actual cost of ATE insurance procured for stage one. Insurance cover at that level would not address the risk that Mr Houghton could be exposed to liability for an adverse costs award in excess of $1.65 million.

Concerns about the crowd funding offer

[53] It is neither feasible nor necessary to attempt a projection of the amount that JAFL would need in order to provide security for costs and to adequately resource pursuit of the stage two claims. I accept the defendants' submission that there is a risk of the crowd funding offer producing subscriptions in excess of the minimum of $500,000, but then raising an overall amount including contributions from wholesale and other investors that is insufficient to pay security for costs and to adequately resource completion of stage two for the claimants.[25] Once it is successful to the minimum extent, Collinsons are entitled to their fee of five per cent of the amount raised in the crowd funding offer.[26]

[54] I also accept that there are grounds for the defendants' criticisms that the terms of the crowd funding offer are likely to mislead potential investors as to the extent of the risks involved, and the extent to which any prospects of recovery to investors in the crowd funding offer are relegated behind other interests with prior claims. Some of those interests are not quantified in the offer document, or are expressed in terms making it difficult for readers of the offer document to quantify the extent of such claims.

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25 The terms of the offer state that the minimum is $500,000. However, Collinsons' disclosure statement specifies that offer will be unsuccessful if 90 per cent of the minimum funding target is not met, that is $450,000 (at page 4).

26 Collinsons' disclosure statement at 5.

[55] However, the defendants' strike out application is not the forum in which to make any determinations on the standard of accuracy reasonably required of such crowd funding documents, given the informality and lack of more stringent requirements that the law contemplates should be permitted in them. Readers of the offer document are confronted with strongly worded warnings, as summarised at [43] above. Mr Gavigan elected for JAFL (and presumptively JAFL Funding Partners) not to be represented at the hearing, so criticisms of the quality of information provided have largely gone unanswered. Similarly, Collinsons have had no opportunity to respond in respect of the limited responsibilities that they are required to assume under law and as specified in their disclosure statement.

[56] There are some grounds for concern at the potentially misleading content of the crowd funding offer document. I readily acknowledge the prospect that some of the concerns I have listed in [38] to [52] above may be overstated or misconceived. However, they raise possible concerns for the interests of claimants who are among the recipients of the offer. I accordingly direct that JAFL is to arrange for a copy of this judgment to be provided to all claimants to whom the offer document has been sent, by the same means as transmission of the original offer, and to make a copy of the judgment available by electronic means to all others who may have access to the offer document. JAFL will of course be entitled to add to such communication any factually accurate comments on, or corrections of, the defendants' criticisms that I have considered in this judgment.

[57] A great deal has occurred since the JAFL agreement with claimants was concluded in 2008. Since then, it has taken complex hearings in three courts to achieve partial vindication in a ruling that the 2004 prospectus contained an untrue statement. In the absence of specific rules of court providing for the conduct of representative or class actions where they are funded by third parties, the courts have since 2008 developed practices defining with greater focus the permissible range of terms between third party funders and claimants. These included procedural directions intended to prevent funders exerting control over the conduct of such litigation in their own interests.

[58] It is now 12 years since the Court's initial scrutiny of the JAFL agreement and 10 years since amendments to it were approved by the High Court.[27] If the crowd funding initiative is successful, a subset of the claimants will acquire interests in the funder's entitlement to a portion of the proceeds after the discharge of prior liabilities. The terms on which that occurs are a legitimate interest for the Court in supervising a funded class action, and that interest does extend to the terms on which claimants are offered investment in such funding entities. Conceptually at least, the interests of claimants who subscribe for an interest in the funder may diverge from the interests of those who do not.

Reasonable duration for the crowd funding offer

[59] Subject to compliance with the directions in [56] above, I consider that the crowd funding offer and any other support for a larger offer of shares by JAFL Funding Partners should be allowed to run their course, at least to 30 June 2020, being the maximum expiry date contemplated by Messrs Gavigan and Zhang at the time of the 11 May 2020 hearing. That is identified in the offer document as the date to which the deadline for acceptance of the offer might be extended.[28]

[60] Since the hearing, Mr Gavigan has filed another updating affidavit completed on 15 May 2020 in which he foreshadows a longer extension of the crowd funding offer until 31 July 2020. By joint memorandum dated 19 May 2020, counsel for all the defendants opposed the admission of that affidavit, requesting that I not read it nor consider it as evidence in the proceeding. Generally, leave would be required for a party to rely on evidence intended to address issues that have already been the subject of argument. Such leave is likely to be granted only on terms affording opposing parties an opportunity to comment on new matters raised. As is apparent from the appendix to the judgment, Mr Gavigan's practice of taking such initiatives makes the task for defendants' counsel more difficult than it would be if the claimants complied with the court rules.

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27 *Houghton v Saunders* (2008) 19 PRNZ 173 (HC); *Houghton v Saunders* [2012] NZHC 1828.
28 Offer document at 2.

[61] Nonetheless, given the point that has been reached with the proceeding, and the relevance of the period during which the crowd funding offer is to remain open, it would be artificial to ignore Mr Gavigan's subsequent affidavit of 15 May 2020. If I ignored it, that would invite an application for recall, given the terms on which I intend to deal with the strike out application.

[62] The reason cited by Mr Gavigan for needing a further month's extension is the enactment of the COVID-19 Public Health Response Act 2020, which Mr Gavigan treats as precluding investor presentations to any more than 10 people (implicitly during the present level 2 restrictions). Mr Gavigan deposes as to his intention to hold investor presentations which, given the presence of three hosts including himself, limits the potential investors to seven attendees at a time. He complains that restriction, of which he was unaware at the time of the hearing on 11 May 2020, will extend the time reasonably taken to canvass for investments.

[63] Mr Gavigan's previous affidavits made no reference to in-person meetings with potential investors in the crowd funding offer. His 10 May 2020 affidavit does refer to "… wholesale investment meetings and presentations to take place if and when level 2 allows", but the various forms of communication described in relation to the crowd funding offer appear to focus on numerous means other than convening meetings.

[64] I am not satisfied that the level of restrictions as Mr Gavigan perceives them are sufficient to extend what I consider to be the reasonable period in which he and JAFL should be given to complete their last option to secure funding. There was considerable slippage in having the crowd funding offer issued. Something of that type was mooted from late 2019, and the commencement of the offer slipped from the week of 30 March 2020, to the week of 20 April 2020, and then the offer opened on 1 May 2020.

Analysis on strike out

[65] I am not persuaded that the prospect of the crowd funding offer remaining open beyond 30 June 2020 should alter the terms of the orders I intend making in determining the defendants' strike out application. I consider sufficient time will have

elapsed within a fortnight after the extended closing date of 30 June 2020 for the funder and the claimants to have exhausted their reasonable attempts to comply with the order for security for costs and secure adequate funding for stage two.

[66] I am also not persuaded that the weight of numbers of the claimants whose interests are at stake, or the relative importance of determining their entitlement to damages, can justify allowing the claim to continue on an open-ended basis.

[67] In weighing the competing positions of the parties, including the interests of the funder, I have had regard both generally to Mr Gavigan's concerns about delay in progressing matters to the point they have reached (said to justify an open-ended extension of time), and his more specific concerns conveyed in his 15 May 2020 affidavit as justification for a further month's extension to the period during which the crowd funding offer remains open.

[68] I accept that allowances should be made for what has been a period of unprecedented disruption to dealings between New Zealanders. However, there must also be a limit to that allowance. I observe from other litigation being managed by the Court that progress with preparation of proceedings has occurred and, in financial markets, initiatives such as listed company capital raisings have continued. I consider that all the circumstances of the crowd funding offer, which originally opened for one month and is due to be extended to two months, cannot justify a further extension of the time for performance of obligations in this proceeding because of the constraints on dealings between the offeror and potential investors caused by the COVID-19 restrictions.

[69] If this was a claim brought by an individual plaintiff or plaintiffs who were self-funded, I am satisfied that the material breaches of court orders would have justified its dismissal before now. I am mindful of the caution Mr Weston QC has voiced more than once that the Court should not allow the status of a claim as a representative or class action to excuse repeated and prolonged delays on the part of the claimants that would otherwise not be tolerated. To do so allows such indulgences to become an oppression on defendants.[29] At a much earlier stage of this proceeding,

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[29] *Houghton v Saunders*, above n 10, at [34]–[36].

the Court of Appeal recognised the importance of orders for security for costs as a counter to the prospects of such oppression.[30]

[70] Mr Carruthers' reliance on the important principle of access to justice cannot be assessed solely from the perspective of the claimants seeking to have their day in court. A balanced assessment requires consideration also of the interests of the other affected parties to the litigation, and the interests of the Court in serving the wider public interest.

[71] In all the requests for the claimants to be given more time, there is no acknowledgement of the prejudice that granting such requests causes to the individual defendants. In addition to the financial risk of liability substantially in excess of their insurance cover hanging over them,[31] there is also the concern for their personal reputations. The Supreme Court finding indicates an error or mistake on their parts in allowing the 2004 revenue forecast to remain unaltered in the prospectus. Mr Gavigan has signalled the prospect of impugning their honesty in allowing that to occur.[32] Quantification of the cost of their mistake will be highly important to the public's perception of their conduct. They wish to argue that the mistake cost investors either nothing or a modest amount. The public would perceive the seriousness of the mistake quite differently if it is ruled to have cost shareholders seven or eight cents per share, rather than if it is held to be a $200 million mistake. That is a significant issue that has been hanging over the directors since the Supreme Court judgment in August 2018. Their interest in finality cannot be brushed aside as the claimants seek to do.

[72] Nor has there been any acknowledgement of the disruption to the business of the Court caused by the on-going sequence of delays in performance on behalf of the claimants. On two occasions, the Court has accorded priority to allocating five week fixtures for the stage two hearing. In doing so, the Court had to relegate the interests of litigants in other cases who are awaiting hearings. On both occasions in November

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30 *Saunders v Houghton (No 1)* [2009] NZCA 610, [2010] 3 NZLR 331 at [36].

31 Mr Carruthers' response to this concern for the directors was that any judgment for amounts beyond their insurance cover could be sought from the second and third defendants. However, there may be questions as to the level of comfort directors can take from that prospect where those other defendants appear unlikely to have substantial assets in the jurisdiction, and may appear more difficult to extract payment from than they will be.

32 Suggestions of dishonest conduct by the directors were expressly disavowed at stage one.

2019 and May 2020, the Court had to keep the capacity to conduct the hearing available until the dates the scheduled hearings were to commence. That leaves the Court and parties in other litigation with insufficient time to arrange for most other hearings to take place at short notice. The consequence is that a substantial part of the combined length of 10 weeks of hearing time is lost. The Court does have its own interest in efficient management of the proceeding so as to optimise what is a finite resource. Access to justice must also have regard to the entitlement to access to justice for all those other litigants whose cases have been impacted by non-performance of the claimants' cases.[33]

[73] Another aspect of the prejudice suffered by the defendants from repeated delays in progressing stage two is that their advisers are having to respond at each stage when the balance between the parties ought to be reflected in the comfort of security for costs being lodged, when it has not been. The structural arrangements contemplated by the Court of Appeal would have the defendants responding throughout with some measure of comfort for a contribution to any costs entitlement they eventually make out, from a fund secured for that purpose. This litigation has required a significant number of hearings and telephone conferences throughout stage two, without that assurance being in place. The extent to which the defendants can complain of this is lessened by the retention of $930,000 that would otherwise have passed to the plaintiff on the provisional revisiting of stage one costs,[34] but a point will be reached where that is insufficient to provide any assurance of payment for costs awards that might be made in their favour.

[74] There is some merit in the point made by Mr Smith QC for the second and third defendants that the importance of access to justice for the claimants is diluted somewhat by the arithmetic. Access to justice for the claimants would only be achieved after (on the defendants' calculations on the $100 million example) the significant amount of some $37.5 million had been allocated to reimburse costs incurred and to pay JAFL and other funders whose claims take priority over the claimants' entitlement to receive damages awarded to them. From the defendants' perspective, if further time is allowed to the claimants, it is far more for Mr Gavigan

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33 Compare *NZ Iron Sands Holdings Ltd v Toward Industries Ltd* [2019] NZHC 2516 at [13].
34 *Houghton v Saunders*, above n 5, at [90].

and other funders' benefits than for the claimants, when sums of up to the first $37.5 million in damages ordered against the defendants would go to strangers to the claims.

[75] The implicit premise of Mr Carruthers' submissions urging that access to justice considerations require an open-ended period of time in which funders could get their house in order was that the claimants themselves are blameless, and are deserving of having their claims determined. That premise had been underscored by Mr Carruthers' concern expressed in his 20 February 2020 memorandum that the funder's conduct was putting their claims at risk "…without their knowledge that their claims are in jeopardy".

[76] In his separate submissions for Ms Withers, Mr Gray QC rejected any such premise. He submitted that by the terms of the original JAFL agreement, and more particularly by the way they have permitted the case to be conducted since the Supreme Court decision in August 2018, the claimants have tied their future interests in their claims to the funder and are to be identified with the failings that have now given the defendants grounds to seek dismissal of the proceeding.

[77] In an individual sense, no blame can be attributed to any of the claimants for the sequence of failings by the funder. However, it would be inappropriate to assess their entitlement to their day in court, ignoring the adverse impacts on the litigation of the funder's non-performance. There are two factors that reinforce the appropriateness of that approach. First, the claimants include entities of financial substance, whose individual claims are large enough to justify their funding stage two, if they believe in the validity of those claims. A specific opportunity to demonstrate commitment to the proceeding arose in August 2019 when I directed an alternative means for the provision of security on a several basis by some of the largest claimants, and that order was not complied with. A further opportunity for some of the claimants to arrange funding for stage two was afforded in my minute of 2 March 2020, which provided for a period during which funding independently of JAFL could be arranged. Nothing came of that.

[78] The second reason for assessing the claimants' interests in light of the conduct of the funder is that they appear committed to continuing with the stage two proceeding, notwithstanding that it will be conducted on terms that provide reimbursement and reward to the funders for very significant sums out of any damages award received.

[79] I acknowledge Mr Walshe's wish that the hearing not occur until it is possible for him to attend to give his evidence as a claimant in person. With respect, I am not in a position to defer setting a date for the stage two hearing until there is confirmation of his ability to travel from the United Kingdom to New Zealand. Mr Walshe should know that hearing the evidence of witnesses from a distance by audio-visual connections of various sorts is entirely routine and I have no concerns that Mr Walshe's claim will be prejudiced in any way by the need for him to provide evidence from a distance, should the stage two hearing occur when travel to New Zealand is not feasible.

Outcome

[80] I am satisfied that the defendants are entitled to an order striking out the proceeding, both under r 7.48 and under r 15.2. The former rule recognises the Court's jurisdiction to strike out either the whole or part of a pleading or to stay a proceeding where a party is in default of an interlocutory order. The default focused upon in this argument was the failure to provide security for costs. I am satisfied that failure is now inexcusable, and most certainly will be by the date for compliance with the unless orders I make below. Given the terms of the funding arrangements, and to a lesser extent the refusal by claimants with both substantial claims and substantial resources to facilitate funding, I also find the failure to be intentional in the requisite sense.

[81] Rule 15.2 gives the Court the power to dismiss a proceeding for want of prosecution. Given that the November 2019 and May 2020 fixtures were both accepted on behalf of the claimants, only for the claimants' case not to be ready on both occasions, dismissal for want of prosecution will become appropriate if the claimants do not evidence by their counsel's acknowledgement that they will be ready to proceed at the third allocated date advised below, having also removed the

impediment of the absence of security for costs that has been ordered against them. The focus has understandably been on the failure to provide security for costs, but there were also numerous instances of non-compliance with timetabling requirements to have the case prepared for the November 2019 hearing, and since then a refusal by counsel to engage at all on a timetable to be ready for the May 2020 hearing.

[82] I accordingly order that the proceeding is to be struck out on 14 July 2020, unless before that date (that is, by Monday, 13 July 2020 at the latest):

(a) the claimants have provided security for costs in respect of the stage two hearing in the amount of $1.65 million, either in cash or on terms reasonably agreed to by the defendants and accepted by the Court by that date; and

(b) senior counsel for the claimants has filed a memorandum confirming that, in counsel's opinion, the claimants are adequately resourced to prepare and present their stage two claims.

[83] The second requirement in [82](b) is not one routinely imposed, but I am more than satisfied that it is justified and appropriate in the present circumstances. If by 13 July 2020 the claimants have arranged satisfactory security for costs in terms of the order I have previously imposed, but are still to arrange the resources to fund the completion of preparation for stage two and its presentation in court, then the defendants and the Court face a risk of a continuation of the predicament confronting the Court on 4 November 2019. If the defendants are to be denied a striking out of the much-delayed claims, then they (and the Court) are entitled to know before committing to another round of pre-stage two hearing preparation that indeed it will run. Given the Court's supervisory responsibilities for funded class actions, this component of the "unless" orders is accordingly appropriate.

[84] I have set the date for compliance with my June 2019 order for security for costs at one year and one day after it was due to be performed. By comparison with other cases where the length of delays in complying with orders for security for costs

have been considered, this is very generous and should not be seen as a benchmark for other litigation in which the issue arises.[35]

[85] Assuming the unless orders are complied with, counsel will be expected to confer promptly after 13 July 2020 to settle a timetable for the steps necessary to have the stage two hearing prepared for trial. The position with the availability of a courtroom large enough to accommodate the hearing at the Wellington High Court remains as I indicated to counsel before the last hearing, in that the period reserved for a possible fixture commencing on 31 August 2020 is the only period currently available.

[86] However, I will arrange for a venue to be available for a hearing of up to six weeks starting **Tuesday, 27 October 2020**. The parties will be expected to have the stage two claims ready for hearing in the period of 15 weeks between 13 July and 27 October 2020. Although there may have been an element of overstatement in Mr Carruthers' submission that the issues left for determination at stage two are "very limited", I consider the 15 week period ought reasonably to be sufficient, given the extent of preparation that has previously occurred. I contemplate it will be sufficient for defendants' counsel to avoid any substantial work in the meantime on a contingency basis that the stage two hearing might proceed towards the end of October 2020.

[87] I have provisionally allowed for six weeks in light of Mr Carruthers' comment that concerns may arise at the adequacy of the five weeks that was agreed for the fixtures allocated for November 2019 and May 2020. In doing so, I do not seek to encourage an expansion of issues, but rather to ensure that the planning does as much as possible to accommodate what the claimants might reasonably wish to pursue within their claims.

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[35] Compare *Jagwar Holdings Ltd v Fullers Corporation Ltd*, above n 12. Security for costs was to have been provided by 12 July 1991. On 5 September 1991 the Court ordered dismissal for non-compliance unless security was provided by 1 December 1991. In *Smith v Antons Trawling Co Ltd*, above n 13, there had been default in compliance with the order for some two months, and the unless order was to apply if not complied with in a further two months.

[88] As matters stand, the venue will need to be somewhere in Wellington other than in the High Court. If concerns remain at that time about the safety of travel, then I will entertain proposals for witnesses to give their evidence remotely. If the situation changes in relation to the availability of courtrooms in the Wellington High Court in the last quarter of 2020, I will ask the Registry to give priority to enabling the hearing to occur here.

[89] I also contemplate that an interlocutory hearing is likely to be required relatively soon after confirmation that the stage two hearing is to proceed.

[90] I defer consideration of costs issues on the defendants' application until it is known whether the unless orders are complied with.

Summary

[91] I accept that a case has been made out for striking out this proceeding. Given the length of its history and the number of interests affected by its determination, that is a regrettable outcome. However, in balancing the competing interests of justice as reflected for claimants and defendants, it is an outcome I am satisfied is warranted, subject to affording the claimants and their funder one last opportunity to perform.

[92] There will accordingly be a striking out of the proceeding on 14 July 2020, unless, by 13 July 2020:

(a) security for costs for stage two in the sum of $1.65 million has been either lodged with the Registry of the Court or provided on other terms reasonably agreed to by the defendants and accepted by the Court by that date; and

(b) senior counsel for the claimants has confirmed that, in his opinion, the claimants are adequately resourced to prepare for and present all aspects of their stage two claims.

[93] I direct that JAFL Funding Partners is forthwith to make a copy of this judgment available to all those to whom the crowd funding offer has been made, on the terms in [56] above.

Dobson J

Solicitors:
Antony Hamel, Dunedin for plaintiff
Gilbert Walker, Auckland for first defendants (other than Mr Horrocks and Ms Withers)
Wilson Harle, Auckland for Ms Withers
Clendons, Auckland for Mr Horrocks
Russell McVeagh, Wellington for second and third defendants

Counsel:
C R Carruthers QC and P A B Mills for plaintiff
A R Galbraith QC and D J Cooper for first defendants (other than Mr Magill, Mr Horrocks and Ms Withers)
T C Weston QC for Mr Magill
B D Gray QC for Ms Withers
J B M Smith QC and A S Olney for second and third defendants

Appendix

Attempts to provide security for costs for stage two hearing

Date	Action
22 February 2019	Defendants applied for security for costs for stage two.
29 March 2019	Plaintiff's notice of opposition to the application, not opposing an order but proposing quantum of $800,000 to be payable by a mixture of cash and insurance.
14 June 2019	Plaintiff ordered to provide $1.65 million in security for stage two by 12 July 2019. Security to be either by cash or, by agreement between the parties, by a bond or bank guarantee.
19-28 June 2019	Plaintiff filed memoranda seeking variation to orders for sequence of disgorgement of stage one costs, and extent of positive costs entitlements to be paid to the plaintiff. Requests not granted.
11 July 2019	Plaintiff's memorandum seeking extension of time for provision of security until 16 August 2019. Plaintiff's counsel advised that negotiations were underway with Crombie Lockwood, the New Zealand subsidiary of London Underwriters, and of their intention to provide security by way of a bond backed by irrevocable insurance, consistently with that provided for stage one. That memorandum attached a letter from Crombie Lockwood to Mr Gavigan describing the preliminary stage of the work that firm was undertaking. It did not provide any basis for an assurance that security arrangements would be concluded by 16 August 2019.
15 July 2019	After repeated requests on behalf of the plaintiff, I varied my 14 June 2019 judgment and directed the defendants were to pay to the plaintiff's solicitors some $302,000 arising from the revisiting of stage one cost entitlements.
8 August 2019	Hearing to address the plaintiff's non-compliance with security for costs order, given the stage two fixture was, at that time, allocated for five weeks from 4 November 2019.
9 August 2019	I issued a minute extending time for provision of security for costs by the plaintiff until 16 August 2019. If security not provided by that deadline, I proposed making an alternative order that between three and six of the largest claimants were to provide security severally for the respective portion that the claim of each represented of the total of $1.65 million. If that alternative proposal applied, there was also to be a guarantee by Mr Gavigan in favour of the defendants of performance of the security obligations, payable on default by any of the claimants of their several contributions. I invited comment on the terms of orders to that effect.
13 August 2019	Memorandum from plaintiff's counsel advising they had no comment on the terms of the orders proposed in my 9 August 2019 minute. "As far as the plaintiff is concerned they will achieve their intended effect … the plaintiff intends to provide security in terms of [the original order] … by 16 August 2019."
15 August 2019	Judgment on interlocutory issues, including confirmation of the foreshadowed orders on security for costs. See *Houghton v Saunders* [2019] NZHC 2007 at [41]–[55]. In the event that security for costs was not provided either as previously contemplated by 16 August 2019, or by the alternative means by 23 August 2019, the defendants would be at liberty to apply for a stay.
23 August 2019	Latest deadline for provision of security for costs by alternative means passes without compliance or explanation.

Date	Action
11 September 2019	Affidavit sworn by Mr Gavigan advising that Mr Houghton now had sufficient assets to meet an order for stage two costs up to $1.65 million, but recognising Mr Houghton's wish not to be exposed personally. Mr Gavigan expounded his views on the merits of the claimants' position, and the imperative from his perspective that their claims should be determined. He advised that negotiations were "now well advanced" to provide security and that he expected "an Amtrust-led solution as provided previously, with an Asia Pacific re-insurance aspect identified as a result of Crombie Lockwood/A J Gallagher's sourcing, will be available soon". He noted that a solution on security for costs would be conditional on resolution of "outstanding appeals". (The Court of Appeal's judgment dismissing the claimants' appeal from my 1 August 2019 judgment excluding parts of Mr Houston's brief was issued on 18 October 2019. The application for leave to appeal to the Supreme Court was dismissed on 13 December 2019.)
9 October 2019	I issued a judgment on the defendants' applications for stage two interlocutory costs, including conditional orders that on default by the claimants, the costs could be personally enforced against Mr Gavigan: *Houghton v Saunders* [2019] NZHC 2567.
22 October 2019	Mr Gavigan filed in person, and independently of solicitors and counsel, an updating memorandum addressing, inter alia, progress on security for costs. He advised that Mr Houghton and JAFL expected to be in a position "soon" to provide security for costs. His advice included: 27. The key NZ based principals involved in providing Mr Houghton with a Security Bond have agreed to meet to confirm the indicative terms of the security arrangement while in Tokyo over the next two weeks at the Rugby World Cup. … 28. It is JAFL's intention to provide a draft of the form of the Security Bond to the defendants as soon as it is agreed on the Claimant group side, to avoid any hold ups on that front. 29. A third option is the most time intensive. It involves detailed reporting to the 3,639 claimants and their supporters, and again inviting them to assist financially as many did at the outset in 2006 and 2007, and at the Supreme Court level in 2017. A strong initial level of support has already been indicated from amongst the leading Claimant witnesses, making this more retail and time intensive option viable, as a partial or entire back-up solution.
29 October 2019	Four working days before commencement of the five week fixture for stage two, the claimants applied for an adjournment. Submissions in support of the application stated that because of certain commercial and financial risks, the claimants, JAFL and the claimant committee had not been able to put in place final arrangements for security for costs.
4 November 2019	Defendants opposed adjournment of the stage two hearing, on terms they would prefer it to proceed without security for costs rather than have it deferred where no clear assurance that security for costs would be provided. Adjournment granted: *Houghton v Saunders* [2019] NZHC 2906.
20 December 2019	Defendants put claimants on notice that if security for costs not provided by 20 January 2020, they would apply for a permanent stay or dismissal of the proceeding.
14 February 2020	Defendants' application for strike out if security for costs for stage two and confirmation of claimants' readiness to proceed at 11 May 2020 fixture not confirmed.
20 February 2020	Mr Carruthers QC filed memorandum raising concerns that JAFL's inability to arrange security for costs and funding of stage two was putting the claimants' claims at risk. (See [12] of present judgment.]

Date	Action
27 February 2020	Further updating memorandum filed directly by Mr Gavigan referred to progress being achieved "on a number of fronts". Reference was made to a Sydney-based ATE insurer, which preferred a closer involvement by a major Australasian legal firm with significant class action experience and resources, and advice that JAFL had retained such a firm, and advised of an agreement with Collinsons to lead a crowd funding offer.
27 February 2020	Further memorandum from Mr Carruthers advising that he had been unable to arrange a communication to all claimants because the solicitor on the record for the claimants, Mr Hamel, did not have a list of addresses and Mr Gavigan had resisted provision of it, ostensibly on the basis that "JAFL has and owned any lists".
2 March 2020	Minute affording JAFL until 5pm on 13 March 2020 to confirm security for costs, and sufficient funding to run the stage two proceeding. (See [13] and [14] of present judgment.] My minute directed that obstruction by Mr Gavigan of communications with claimants by others authorised by the Court to do so was to cease and that any current mailing list that was being used by Mr Gavigan and JAFL ought to be provided to Mr Hamel and, if Mr Carruthers so requested, by Mr Hamel to any other agent acting on Mr Carruthers' behalf.
13 March 2020	Mr Gavigan made direct application for extension of time within which JAFL could provide security for costs and funding for stage two. Mr Gavigan's affidavit in support of the application referred to close involvement by Melbourne solicitors Slater & Gordon. A letter from that firm attached to the affidavit suggested that its possible retention on behalf of the funder was by no means assured.
20 April 2020	Further updating memorandum filed directly by Mr Gavigan advising that JAFL Funding Partners had received indicative support from claimants "offering hundreds of thousands of dollars" to support the crowd funding offer.
30 April 2020	Further updating affidavit from Mr Gavigan deposed that support for the offer "now exceeds $250,000 based on emails, text messages and phone calls" and Mr Gavigan's expectation that $500,000 would be reached by about the middle of May 2020, with the amount raised by the crowd funding offer expected to exceed $1 million by the beginning of the last week in May 2020.
1 May 2020	The crowd funding offer opened. $161,000 received by 10 May 2020.