IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-409-348
[2014] NZHC 423

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 INC (FORMERLY CREDIT SUISSE FIRST BOSTON PRIVATE EQUITY INC) Second Defendant
	CREDIT SUISSE FIRST BOSTON ASIAN MERCHANT PARTNERS LP Third Defendant
	FIRST NEW ZEALAND CAPITAL Fourth Defendant
	FORSYTH BARR LIMITED Fifth Defendant

Hearing:	4 March 2014
Counsel:	A J Forbes QC and P A B Mills for plaintiff A R Galbraith QC, D J Cooper and S V A East for first defendants J B M Smith QC, A S Olney and C J Curran for second and third defendants D H McLellan QC for fourth defendant A C Challis and H N McIntosh for fifth defendant
Judgment:	10 March 2014

RESERVED JUDGMENT OF DOBSON J

Contents

[1] This judgment deals with the defendants' pre-trial objections to admissibility of the plaintiff's evidence, and the plaintiff's application to amend the statement of claim.

[2] The defendants have sought a pre-trial determination on numerous objections to the admissibility of evidence proposed to be given on behalf of the plaintiff. With the exception of one brief (Mr Lim) the briefs for the relevant plaintiff witnesses were served between the end of November and early December 2013. The trial is scheduled to begin on 17 March 2014 so the parties require a prompt answer. The plaintiff's counsel indicated during the hearing that they may well pursue challenges to certain aspects of the evidence proposed on behalf of the defendants, and that is a matter that may need to be addressed prior to the calling of at least the majority of evidence for the plaintiff.

[3] A complication in dealing with the objections to admissibility now is that reply briefs on behalf of the plaintiff were due on 7 March 2014. In a number of respects the response to the defendants' criticisms included the prospect that features of the briefs potentially rendering them inadmissible could be cured by further evidence to be provided in reply briefs. That is hardly a conventional answer and the foreshadowed course is likely to be opposed. Reply briefs are intended to address matters in the defendants' briefs that could not reasonably be anticipated in the

plaintiff's original briefs, whereas the present objections raise points under the Evidence Act 2006 (the Act) that are unrelated to the content of the defendants' briefs. However, that is not a sufficient basis for rejecting the prospect of evidentiary objections being addressed, so the prospect lessens the ability to determine some objections at this stage.

[4] The plaintiff has not provided a complete set of briefs, nor a complete list of the witnesses to be called for the plaintiff. However, it is possible to deal with the present objections to admissibility within the context and content of each of those proposed witnesses in respect of whom objections have been raised.

Summary

[5] For the reasons set out below, I uphold the defendants' objections to admissibility of the following passages of the plaintiff's briefs that were challenged:

(a) ***Meredith*** – [74](c), [88](a).

(b) ***Harrison*** – [28.1] to [32] inclusive, and the last sentence of [73].

(c) ***Lim*** – the factual content as to Mr Lim's involvement at the time of the IPO is inadmissible, except to the extent that matters addressed are supported by the contemporaneous documents that would have been available to him or reflected his views at the time, and such documents are provided to defendants' solicitors one week before Mr Lim is to be called.

(d) ***Harper*** – the defendants' objection to the admissibility of the data he has produced is not upheld, but that is subject to Mr Harper fulfilling the additional obligations as described in [72] below, to confer with and assist the defendants' expert who it is proposed will address the same subject matter.

[6] In numerous respects, it has not been possible to make finite determinations on objections to admissibility because of contingencies that are still to evolve. The

rejection of the objections at this stage cannot constitute a final positive determination of admissibility. I will hear counsel on renewed objections when the whole context in which admissibility is to be determined is known.

[7] I appreciate that deferring final decisions defeats the objective of removing from consideration aspects of the evidence that the defendants consider, on tenable grounds, that they should not be obliged to respond to. At least in the context of this case and the range of objections advanced, a cautious approach needs to be adopted when pre-trial exclusion of evidence may ultimately lead to the risk that the plaintiff is deprived of the opportunity to present all the ultimately admissible evidence in support of the criticisms of the defendants' conduct.

Greg Meredith

[8] Mr Meredith is a chartered accountant in public practice in Australia. He was instructed by the solicitors for the plaintiff to consider and express an opinion on the specific criticisms of the prospectus that have been pleaded in the third amended statement of claim (3ASC).

[9] Mr Smith QC, for the second and third defendants, took the lead in advancing objections. He argued that some 62 paragraphs of Mr Meredith's brief are inadmissible as constituting argument or submission. A series of recent cases, all dealing with expert evidence offered by tax advisers as to how the law ought to be applied to transactions in issue, have recognised that what amounts to a substitute for legal submissions from counsel has no place in evidence.[1] In the most recent of those cases, the Supreme Court has observed that it is:[2]

> … undesirable and wasteful of time and effort of both parties when such material appears in expert briefs of evidence. The practice of including it should stop. If it persists, Courts should require amended briefs to be filed.

[10] That comment related to the duplication, in evidence from an accountant expert in tax matters, of what should be legal submissions heard from counsel.

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1 For example, *Commissioner of Inland Revenue v BNZ Investments Ltd* [2009] NZCA 47, (2009) 19 PRNZ 553; *Penny v Commissioner of Inland Revenue* [2011] NZSC 95, [2012] 1 NZLR 433.

2 *Penny v Commissioner of Inland Revenue* at [32].

[11] Many of the paragraphs in Mr Meredith's brief objected to on this ground express views as to why I should find parts of the prospectus to have been misleading. They proceed from an analysis of other documents which Mr Meredith treats as having a bearing on the accuracy of the relevant part of the prospectus. Mr Meredith's opinions all rely, at least implicitly, on the perspective he brings to the issues as an accountant. Although the fact that he is not expressing a view from the perspective of a lawyer, or as to how the law should apply to this case, does not of itself make out the admissibility of his opinion evidence, it does distinguish those opinions from the arguments that would appropriately be advanced by counsel.

[12] Unlike the legal analysis of tax consequences of transactions in *Penny*, I do not accept that the analysis and views expressed by Mr Meredith could be substituted for counsel's submissions. Although some of the paragraphs objected to were fairly described by Mr Smith as argumentative or cast as submissions, I am nevertheless satisfied that there is a meaningful prospect that the opinions expressed will be of substantial help in determining issues in the proceedings.[3] In the context of this objection, that more fundamental assessment has to take priority over whether the nature of the opinions expressed and the justification for them can be characterised as a submission, or argument in favour of the case of the party calling the witness.

[13] Accordingly, I am not prepared to uphold the objection to the parts of Mr Meredith's brief that are objected to as argument or submission.

[14] Objection was pursued in relation to a much smaller number of paragraphs on the ground that they contain hearsay. Paragraph [74] of the brief cites a KPMG report dated August 2002 in relation to Feltex's success in increasing prices and removing rebates, primarily in December 2001. Paragraph [74](c) cites a comment from an October 2006 newspaper article attributed to a carpet retailer (Mr Jim Smith) that Feltex had increased prices and reduced terms and conditions "dramatically" in the 18 months prior to the IPO. Mr Meredith could only be relying on these sources for the truth of their content and unless the original makers of the respective statements are also called, there would be no opportunity to test the accuracy of the sources that Mr Meredith has cited. In this immediate context, the

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3 Evidence Act 2006, s 25.

hearsay status of the first source would seem unlikely to qualify as a business record that might be admissible without it being adduced by the maker of the statement as a business record.[4] The second source is clearly hearsay, unless evidence is adduced from Mr Jim Smith.

[15] Mr Smith advanced a similar objection to the content of paragraph [88] of Mr Meredith's brief, in which he again cites the newspaper article that quotes the carpet retailer, Mr Jim Smith. That is hearsay and could not be relied on by Mr Meredith unless there is evidence from Mr Jim Smith as the person whose opinion was quoted. As matters stand, I uphold the objection in relation to the references in [74](c) and [88](a) attributed to Mr Jim Smith. If, by some means, first-hand evidence of Mr Jim Smith's opinions is able to be adduced, then the prospect of Mr Meredith relying on them in his analysis would become legitimate. I was not persuaded that there is such a realistic prospect at the moment, and therefore treat the reliance on Mr Jim Smith's opinions differently to the reliance on the KPMG report.[5]

[16] Paragraph [88] of the brief also cites from an affidavit previously sworn in the proceedings by Mr Terence Harrison. Objection to that as hearsay was taken on the basis that he is not to be called as a witness, but Mr Forbes indicated that Mr Harrison will indeed be called and that notice had been given to the defendants' solicitors of the intention to do so. In that event, it cannot be objectionable hearsay.

[17] Paragraph [88] also cites an August 2001 Feltex board pack. That constitutes a discovered Feltex document. I understand it will be included within the common bundle, in which case it would have provisional status at this stage. Mr Meredith should not be precluded from relying on it, but to the extent this and any other opinions proffered in his brief rely on Feltex documents, such reliance must be treated as provisional. I would find reliance on such document unjustified if the reliability or accuracy of the document is successfully challenged.

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4 Evidence Act 2006, s 19.

5 See [20] below.

[18] Reliance on the references in [88](b) and (c) should be recast in provisional terms, subject to the Court being satisfied of factual propositions derived from those sources.

[19] All of [132] to [137] of Mr Meredith's brief are objected to as hearsay, or being based on hearsay. Paragraph [134] has to be excluded from this challenge as it is merely a quotation from the prospectus. In [132] and [133], Mr Meredith cites from an affidavit of Mr Stephen Pearce that was sworn in support of the plaintiff's position at an earlier stage in the proceedings. Mr Pearce has apparently declined to complete a brief since completing that affidavit, and I was advised by Ms Mills that the defendants have been put on notice that the plaintiff intends to subpoena Mr Pearce, using the affidavit previously filed as his evidence-in-chief, on which he can be cross-examined. In that event, references in [132] and [133] are not hearsay, but rather Mr Meredith's reliance on them depends on the propositions cited from Mr Pearce being made out at trial.

[20] Paragraph [135] cites an opinion from the KPMG August 2002 report. That will be objectionable unless either the maker of the statement was called or I am persuaded that the document qualifies as a business record able to be adduced under s 19 of the Act. Because of those prospects, it is not appropriate to uphold the hearsay objections to references to the KPMG report in [74] and [135] of the brief at this stage.

[21] This analysis of the boundaries of legitimate reliance Mr Meredith can place on the sources he has cited would require him to recast the terms in which he expresses the opinions in [136] and [137], to acknowledge that the opinions are dependent on the propositions relied on being made out.

[22] A further ground of objection to the content of Mr Meredith's brief was that he has opined on matters outside the area of his expertise. That expertise relates to accounting matters covering valuation, solvency and the interpretation and presentation of financial statements. The defendants object to his opining on matters outside these areas. The challenge on this ground was advanced to [74](d) of the brief which specifies:

> A forecast model for Feltex (refer FB.02.1366) includes a settlement discount figure in FY04 but not in FY05 or beyond. In my view it is reasonable to infer that after FY04 Feltex were forecasting to reduce settlement discounts to nil. This does not appear to have been disclosed in the prospectus.

[23] It was argued for the defendants that the inference Mr Meredith is prepared to draw is a straight question of fact and does not rely on any relevant expertise. I am not persuaded that that is so because accounting experts are better equipped than lay people to infer reasons for differences between one year, and an equivalent model for the following years.

[24] In [102] of the brief, Mr Meredith acknowledges that he is able to analyse components of the prospectus to identify a form of loss in the second half of FY04. He qualifies that acknowledgement with the statement that, in his view, it is doubtful that a retail investor without accounting skills would have the required skills to calculate the implied loss. Mr Smith criticised that as an opinion falling outside Mr Meredith's expertise. I disagree. An accountant experienced in analysing the impact of content and omissions from a document such as a prospectus or a set of financial statements is potentially in a materially better qualified position to discern whether buried layers of knowledge requiring interpretive skills would be apparent to someone without the skills that that expert has.

[25] I acknowledge that some of the other opinions offered by Mr Meredith in the course of his analysis do go nearer the boundaries of subject matter that depend on his identified expertise. However, I am not persuaded that he is disqualified from offering those opinions, particularly when they are assessed in the context of the essence of his evidence, namely the respects in which he identifies what he considers to be the areas of misstatement or material omission from the prospectus.[6]

Susan Newberry

[26] The plaintiff proposes to call Professor Susan Newberry who is a professor of accounting at the University of Sydney. Her brief begins with considerations of

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[6] This form of objection was maintained in respect of [116]–[119], [127], [131], [132]–[137], [224]–[227], [266]–[271], [369]–[374], [391]–[397], [418]–[423], [426], [434] and [437]–[449] of the brief.

compliance with the Companies Act 1993 and Financial Reporting Act 1993 requirements, as well as requirements that are set out in the relevant financial reporting standards for prospective financial information. After that, Professor Newberry analyses the adequacy of statements in the prospectus about the trend in Australian sales. The defendants have objected to [50] to [55] in this part of her brief, contending that they comprise a submission. The same objection is made in respect of [66] (addressing changes in Feltex's invoicing system and consequences of it), [80] and [81] (Feltex adopting more aggressive selling practices, and the consequences of doing so), and [88] to [91] (other accounting consequences of forward dating invoices).

[27] Criticism can be made of the terms in which Professor Newberry has chosen to express her opinions. Of itself, however, that does not make it objectionable argument or submission. The subject matter remains within the area of her expertise and it does not amount to a substitute for counsel's analysis of either relevant law, or the facts. The objection on that ground cannot be sustained.

[28] A further and somewhat overlapping objection was that Professor Newberry improperly embarked upon speculation. For instance, she infers what Feltex intended by certain accounting practices, and that the board would have known that the sales reported for the final three months to 30 June 2004 were more like three and a half months' sales. The brief includes reasons for the conclusions the witness has come to and the analysis arises within the area of her expertise. There is therefore a basis for the level of knowledge she attributes to the directors so that it cannot be excluded as objectionable speculation. Certainly, attribution of motive in such a context is difficult to sustain, and unlikely to be substantially helpful to me. However, opinion evidence of that type is not present to an extent I consider to be objectionable, and I am not prepared to exclude it at this stage.

[29] Objection was also taken to reliance on hearsay material. Paragraph [58] relies on information or data extracted or reconstructed by Mr Harper from electronic records. I deal separately with the objection to Mr Harper's evidence, but in the present context I am not satisfied that Professor Newberry's reliance on data sourced from Mr Harper can be ruled inadmissible as hearsay, at least at this pre-trial stage.

[30] In [75] and [83], Professor Newberry's analysis relies on statements made by Messrs Pearce and Harrison. On the basis that both of them will be witnesses for the plaintiff, the objection that she could not rely on them cannot be sustained.

Terence Harrison

[31] Mr Harrison has more than 20 years' involvement in retailing carpet in New Zealand, and to a lesser extent in Australia. He remains the director of a carpet retailer that was a key customer of Feltex. In addition to providing some factual evidence, he applies his experience in the carpet industry to express opinions about the prospectus as not containing or conveying risks that he thinks Feltex was facing.

[32] The first defendants object to many of Mr Harrison's criticisms of Feltex as not corresponding with pleaded criticisms of the prospectus. By way of response, the plaintiff provided a schedule of the allegations in the 3ASC that are said to relate to the criticisms challenged for relevance. On many of the points, the relevance asserted is tangential. A range of issues remain open as to the weight that such opinions should be given, and the extent to which they can contribute to establishing the pleaded omissions. However, sufficient potential relevance is available to answer the challenge that the passages should be excluded for lack of relevance.

[33] The second defendants objected to the admissibility of significant parts of Mr Harrison's brief on grounds that opinions expressed go beyond Mr Harrison's field of expertise, that he engages in speculation, and that he relies on other sources that are themselves inadmissible as hearsay.

[34] I have considered all these criticisms in light of the plaintiff's response to them, arguing for the admissibility of all the challenged passages. The proposed evidence in [28.1] to the end of [32] of the brief analyses the perceived impact on Feltex's business in Australia of proposed reductions in tariff on imported carpets, as that prospect appeared at the time of the prospectus. Those paragraphs cite various sources commenting on the topic, leading to Mr Harrison drawing certain conclusions on the extent of the threat posed by tariff reductions to Feltex's Australian business, when compared with the acknowledgement of that risk as set out in the prospectus. Those conclusions do not draw on Mr Harrison's expertise as

a wholesale buyer (and seller at retail) of carpets in the New Zealand market. The paragraphs comprise an analysis of the apparent extent of difference between the risk that tariff reductions would pose for Feltex's business as described in other documents, when contrasted with the extent of that risk as acknowledged in the prospectus. Unlike the other analyses and conclusions addressed by Mr Harrison, there is no suggestion that his particular area of expertise was relied on to provide the analysis and conclusions. On this topic, I am satisfied that such evidence could never be substantially helpful. Those paragraphs are accordingly inadmissible and I uphold the objection to them.

[35] The last sentence of [73] of the brief states:

> I believe most strongly that if the independent directors had sought feedback from key retailers they would have realised that the prospectus was misleading, and that retailers considered Feltex to be materially inferior to Cavalier Carpets, Norman Ellison, and Godfrey Hirst.

[36] Although I am not prepared to uphold objections in relation to other parts of the brief where opinions are expressed at least in part in speculative terms, this opinion crosses that line. Expression of that opinion by Mr Harrison could never be substantially helpful to me. He has not laid any foundation, such as by the extent of his dealings on other matters with the independent directors, as a basis for opining on the extent to which he would have changed their views about the adequacy of the statements in the prospectus, had he told them of his own views about the relative merits of Feltex and its competitors.

[37] Accordingly, the last sentence in [73] is inadmissible.

[38] I have considered the objections to Mr Harrison's reliance on other sources that appear to be hearsay. In particular, he relies on a report prepared in relation to Feltex by KPMG ([21]), and draws on data from Cavalier, a competitor of Feltex ([35] and [36]). I am not satisfied that these objections based on Mr Harrison's reliance on hearsay sources can be determined against the plaintiff at this stage. There is a prospect that at least some of the documents in question might qualify for admission without being adduced by the makers of the statements as business records. The plaintiff's counsel did not exclude the prospect of obtaining leave to

call the makers of some such statements. Accordingly, the objection in relation to Mr Harrison's reliance on hearsay cannot be upheld at this stage. The plaintiff is on notice as to the difficulties that will ensue with such passages.

[39] For various reasons, I have come to the same conclusion in relation to the balance of the various grounds of objection that were argued in some detail in relation to much of the Harrison brief.

John Blakemore

[40] Dr Blakemore was retained as a consultant to Feltex, principally in Australia, between 1999 and 2003. His brief suggests he was retained for expertise in improving the efficiency of manufacturing businesses. He recommended radical changes for the manufacturing processes at Feltex, at the core of which was ceasing to manufacture stock in anticipation that there would be a demand for it, and instead operating the manufacturing businesses to respond promptly to demand for particular products as they were ordered.

[41] Dr Blakemore would say that he encountered significant resistance from senior management, particularly Mr Magill, that the innovations he recommended were only introduced in part, and that they were then abandoned after his services were dispensed with. A substantial part of his brief addresses the recommendations he made in a report that he provided to Mr Magill on terms that it was to be referred to the Feltex board in 2003.

[42] The second and third defendants object to substantial portions of his proposed evidence on the basis that its relevance depends on factual matters about the state of Feltex's business that Dr Blakemore cannot have known from personal first-hand experience. It follows that he has relied on others, with his sources being undefined, and the factual premises on which he expresses opinions are therefore hearsay.

[43] I am not satisfied that the terms of Dr Blakemore's brief do reflect a distance from the primary factual matters that he adverts to. I am certainly not prepared to uphold an objection that it renders his evidence inadmissible at this stage.

[44] The second and third defendants also criticised the brief as displaying a strength of antipathy towards at least some of the Feltex directors, and Mr Magill in particular, that was sufficient to disqualify Dr Blakemore as an expert able to discharge his obligations to the Court with requisite independence. That ground of objection can also not be made out. It will be a point validly raised in relation to the weight that might be given to any opinions that are important to the issues to be determined, but it cannot apply at a threshold level to exclude the expert's evidence prior to trial.

Peter Hall

[45] Mr Hall is the executive chairman of Hunter Hall International Limited (Hunter Hall), and chief investment officer of various of its entities that operate as investment funds on behalf of investors in them. Hunter Hall is another claimant in the larger proceedings. In July 2013, I dismissed an application that Hunter Hall's claim be added to Mr Houghton's for the purposes of being determined at the first stage of the trial.

[46] Mr Hall has completed a brief which describes the nature of Hunter Hall's business, the extent of his personal involvement in the decision to invest in the IPO, and the circumstances in which its entities that were shareholders in Feltex elected to opt in to the proceedings. Thereafter, Mr Hall identifies the misstatements or misleading omissions from the prospectus that are relevant to him as a sophisticated investor.

[47] The first defendants object to the brief on the basis that none of these matters can be relevant to the issues to be determined at the first stage of the trial, and on Mr Houghton's claim.

[48] The second and third defendants endorse that objection and add that, to the extent the brief addresses reliance by shareholders other than Mr Houghton on alleged misstatements or omissions in the prospectus, such evidence could not have any weight in determining reliance in the case of the present plaintiff. Because the circumstances of Mr Hall's entities are so distinct from those of Mr Houghton, it was

submitted that factors of concern to such a sophisticated investor must also be entirely irrelevant.

[49] Mr Forbes QC denied that there is any element in Mr Hall's evidence that is intended to make out Hunter Hall's discrete claim. Rather, if Mr Hall's analysis establishes that a sophisticated investor was materially misled by the prospectus, then it ought naturally to follow that a less skilled retail investor without the resources available to Mr Hall would also have been misled.

[50] Adducing evidence of this type from an investor whose claim is to be determined at a subsequent trial is not without its risks. However, those matters do not constitute a bar to its admissibility.

[51] I accept that much of the contextual background cannot be relevant for its own sake, but does enable an understanding of Mr Hall's evidence as to what he considered to constitute misleading content of the prospectus from the perspective of a sophisticated investor. On that issue, his evidence is admissible. The defendants' objection to it is accordingly rejected.

Arthur Lim

[52] Mr Lim is qualified as a chartered accountant and has relevant experience as an investment analyst and investment adviser. His brief was served very late and I have previously heard argument about the forms of prejudice claimed on behalf of the defendants on that account. On 29 January 2014, I gave leave for Mr Lim's brief to be served, on certain terms. The concerns which were raised for the defendants at that time still remain.

[53] At the time of the IPO, Mr Lim was with Macquarie Equities New Zealand Limited (Macquarie) as an investment director, and in that capacity he had relatively close involvement in the IPO. Although Macquarie was not identified as a sub-underwriter, that was effectively the firm's position because it took a firm allocation of shares to the value of $20 million in the IPO. Macquarie was not able to place all the shares it had committed to before the float closed, but sold the remainder as soon as the shares listed at a loss Mr Lim recalls at $590,000.

[54] Mr Lim's proposed evidence is a mixture of factual recollection of his involvement at the time, and the application of his expertise to comment on the content of the prospectus. So far as the first aspect of the proposed evidence is concerned, I indicated in my judgment of 29 January 2014 that its admissibility was conditional on the plaintiff's solicitors exhausting all reasonable efforts to obtain non-party discovery from Macquarie. Enquiries made of Macquarie have apparently drawn a response that they have no records of the company's involvement, and have only generic published Feltex documents. No formal steps have been taken on behalf of the plaintiff to test that response.

[55] The defendants submit that that position remains unsatisfactory. They would wish to cross-examine Mr Lim about the accuracy of his recollection of events surrounding the IPO, but cannot do so without checking his recollection against the contemporaneous documents that they would expect to have been maintained, and to be available to them. I accept that there is now insufficient time before commencement of the trial for further attempts to obtain documents from Macquarie, or to source, from other places, the sort of documents that would be relied on for the defendants in preparing cross-examination of Mr Lim.

[56] So far as factual aspects of Mr Lim's brief are concerned, the extent of that prejudice is compelling. It will be inadmissible except to the extent that the matters he addresses are supported by documents made available to solicitors for the defendants, at least a week before Mr Lim is called. If the position remains that no such documents are made available, then Mr Lim's evidence will be confined to the opinions he offers as to the content of the prospectus, analysed without his referring to the involvement he had at the time.

Alan Coleman

[57] Throughout the relevant period, Mr Coleman was a senior Australian civil servant managing the TCF Policy Group which monitored matters of interest to industries including the carpet industry. He has provided two briefs. His first brief includes relatively extensive background on the context in which reductions in the tariff imposed on carpet imported into Australia, and proposals to wind down

government incentive schemes for strategic investment in targeted industries (relevantly in this case, the carpet industry), were being considered. Mr Coleman has accessed a range of submissions and papers relevant to the work of the Australian Productivity Commission dealing with these matters.

[58] The second and third defendants have led objections to a number of the references Mr Coleman makes to submissions provided by both Feltex and its major competitor, Godfrey Hirst, as well as statistics drawn from records of the work undertaken for Australian government bodies in the relevant period. The objection is that the sources relied on are hearsay.

[59] The plaintiff opposes that objection on the grounds that Mr Coleman's personal involvement was at a sufficiently detailed level for him to be familiar with the sources, and that the sources cited by him would in any event qualify for admission without being adduced by the maker of the statements under ss 128 and 129 of the Act.

[60] Mr Coleman is relatively precise in cross-referencing his sources in footnotes to the briefs. In one respect I understood Ms Mills to acknowledge that the form in which Mr Coleman had accessed records ("Department of Industry, Trade Information System, Pes.Comm.") would not be accessible in the same way to the defendants' solicitors checking his sources. However, she advised that the same materials were able to be accessed by the public from a different Australian government electronic source.

[61] I am not prepared to uphold the hearsay objection in relation to the sources relied on by Mr Coleman at this stage. Given the context in which they are cited, together with Mr Coleman's apparently thorough familiarity with them and the nature of the sources as described in the brief, my provisional view is that there may be a tenable basis for Mr Coleman's reliance on them to be permissible by reliance on ss 128 and 129. A final decision on the admissibility of the passages of his evidence relying on such sources can be addressed when the evidence is given.

Brian Russell

[62] Mr Russell is qualified as an accountant, having originally been admitted as an Associate of the Australian Society of Accountants in 1975. He is also a Senior Fellow of the Financial Securities Institute of Australia. He practices in Sydney as a sharebroker. He has prepared a brief of evidence, opining as an expert on aspects of the prospectus which he considers would have, or were likely to have, misled potential investors.

[63] The defendants have objected to a number of the opinions expressed by Mr Russell on the basis that they are cast as a submission or purport to address the ultimate issue. I do not find the essence of the points made in Mr Russell's brief objectionable on this ground. To advance an analysis of the content of the prospectus from the perspective of a sharebroker requires an expert of that type to opine on whether relevant statements in, or omissions from, the prospectus are likely to mislead potential investors.

[64] Within that task, the terms in which the opinions are expressed cannot render them objectionable.

[65] Particular objection was taken to paragraph [40] of the brief, on the basis that it amounted to a submission as to what the law was or ought to be in applying a threshold for testing misleading content of documents such as a prospectus. I accept that, assessed on its literal terms, it can be criticised as such. It does have another purpose in the context of Mr Russell's analysis, namely to signal the standard by which he measures potentially misleading content. It will certainly not have any influence on my analysis of the legal question as to the standard to be applied in considering whether the content of the prospectus is misleading.

[66] Accordingly, I dismiss the objections to the content of this brief.

Andrew Harper

[67] Mr Harper is an IT consultant working in Melbourne. He has been retained on behalf of the plaintiff to electronically interrogate data acquired on behalf of the

plaintiff on a USB thumb drive that I understand to have been stored in a Global System Manager (GSM) software programme that Feltex had used.

[68] Substantial difficulties encountered by the defendants when the source data on the thumb drive was provided to them in its "raw" state as part of discovery have been the source of numerous submissions at prior interlocutory hearings. Each side has criticised the reasonableness of the conduct of the other in this regard.

[69] Defendants' counsel advise that an expert retained on their behalf (Mr Farley) has not been able to extract the identical data as it appears in the reports that Mr Harper has produced by interrogating the GSM data on the thumb drive. In those circumstances, the defendants object that the source data is hearsay and that, without evidence authenticating it (ideally adduced from a witness or witnesses responsible for its original creation), Mr Harper's work extracting reports from the raw data is inadmissible as it relies on that hearsay.

[70] Ms Mills' response was to the effect that inconsistencies in the reports produced on behalf of the defendants have been because they use a different software programme to extract the data. She was confident that the variances could readily be rationalised and explained by Mr Harper.

[71] The position is unsatisfactory, but the answer is not to uphold the objection that the data relied on by Mr Harper constitutes unacceptable hearsay.

[72] I direct that Mr Harper is to confer with Mr Farley in the week of 10-14 March 2014, to identify the reasons for the discrepancies that are of concern to the defendants. In discharge of his obligations as an independent expert assisting the Court, Mr Harper is to provide all reasonable assistance to Mr Farley to enable him to extract the same range of data, on the same basis, as Mr Harper has produced for the plaintiff.

Application to amend the statement of claim

[73] On 26 February 2014, the plaintiff made application for leave to further amend the third amended statement of claim in 12 respects. The amendments sought

numbered 1 to 8 inclusive, and 10, are relatively minor. For the most part, they seek to correct typographical or descriptive errors, or to focus particulars with greater precision. Those proposed amendments were not opposed and I grant leave for them to be made. A fourth amended statement of claim is to be filed forthwith, reflecting those changes.

[74] Amendment numbered 9 is more material, and was opposed. It would add a fresh allegation of an additional factual omission from the prospectus. It proposed a new paragraph 72(a) in the following terms:

> By omitting to disclose that Feltex had entered into a material contract in July 2002 (being a date in the two years preceding the issue of the prospectus on 5 May 2004) by engaging KPMG Corporate Recovery to undertake a review of the projected financial position of the group for the year ended 30 June 2003.

[75] Amendments numbered 11 and 12 would be consequential on the inclusion of this discrete criticism, by including the proposed new 72(a) among the grounds relied on for claiming misleading content of the prospectus, or misleading conduct by the defendants.

[76] It appears that this discrete criticism has arisen out of the analysis undertaken by Mr Meredith providing his opinion as to the accuracy of the prospectus. He treated the omission of any reference to the KPMG report as an "other matter" in the brief settled in late November 2013.

[77] Mr Forbes explained that the plaintiff wished to add a criticism of the fact that Feltex's bank had required KPMG to complete a report on the state of Feltex in July 2002. It would apparently be argued that potential investors would be likely to find it material that, two years before the IPO, Feltex's bank had been sufficiently concerned to take that step. In responding to the defendants' claims that it was far too late and caused too much prejudice to them in preparing their defences, Mr Forbes submitted that the potential merit of this additional criticism ought to determine the application. He suggested that if the criticism was found to have merit, then it would be unjust for the plaintiff not to be allowed to add it to the pleaded criticisms.

[78] I am not satisfied that the proposed addition reflects a compelling additional omission. It could reasonably be inferred that Feltex's bank required a report in mid 2002 because of relatively serious concerns at the company's state of financial health. However, two years later when the prospectus was issued, it appears that Feltex had the support of that same bank so there is no immediately apparent basis on which to infer that the concerns motivating the initiative two years previously still persisted in May 2004.

[79] Although the defendants have been on notice since November last year of Mr Meredith's opinion that the failure to mention the bank's requirement for a forensic accountant's report in 2002 was material, they could not be expected to have prepared a response to that when it was not a pleaded criticism. The defendants would therefore be left to re-brief all their witnesses who might address the point. It relates to events that occurred 12 years ago, in the context of a challenge to the prospectus that was issued 10 years ago. If the allegation were added to the statement of claim, the imposition on the defendants in adequately responding to it would risk compromising the quality of preparation of their defences to the existing claims.

[80] In the context of this trial and the delays in preparation for which the plaintiff has been responsible, I consider it would be contrary to the interests of justice to allow the amendment sought.

[81] The second and third defendants oppose this proposed amendment on the additional ground that it constituted a fresh cause of action which would be statute-barred.[7] To characterise their allegation as a new cause of action, it needs to be something that is essentially different from the existing pleading.

[82] If it had been necessary to determine this point, I would not have been persuaded that the proposed addition did constitute an essentially different allegation so as to have the status of a new cause of action.

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[7] Relying on High Court Rule 7.77(2) and the analysis of what constitutes a new cause of action in *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383 at [139]–[142].

Costs

[83] I will not separately address costs on these applications. They have arisen very shortly before trial and it is appropriate to defer a determination on them, pending the substantive outcome.

Dobson J

Solicitors:
Wilson McKay, Auckland for plaintiff
Bell Gully, Auckland for first to third-named and fifth to seventh-named first defendants
Clendons, Auckland for fourth-named first defendant
Russell McVeagh, Wellington for second and third defendants
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McElroys, Auckland for fifth defendant