IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-409-348
[2013] NZHC 1824

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:	1-3 July 2013
Counsel:	A J Forbes QC and P A B Mills for plaintiff A R Galbraith QC and D J Cooper for first defendants, except Mr Magill T C Weston QC for Mr Magill A S Olney, D M Abricossow and C J Curran (3 July only) for second and third defendants D H McLellan QC for fourth defendant A C Challis for fifth defendant
Judgment:	19 July 2013
Reissued:	29 July 2013

RESERVED JUDGMENT OF DOBSON J

Contents

THE JUDGMENT ORIGINALLY ISSUED TO COUNSEL ONLY ON 19 JULY 2013 RAISED ISSUES ABOUT THE APPROPRIATE SCOPE OF ON-GOING CONFIDENTIALITY OF CERTAIN DETAILS. SUBSEQUENT TO RECEIPT OF MEMORANDA ON BEHALF OF THE PLAITNIFF AND THE FIRST DEFENDANTS , THE JUDGMENT WAS MADE AVAILABLE FOR DISTRIBUTION ON 29 JULY 2013. THE ONLY ALTERATION TO THE TEXT OF THE REASONING IS A GREATER LEVEL OF GENERALITY IN THE REFERENCES TO ENTITIES MENTIONED IN [113].

[1] On 1, 2 and 3 July 2013, I heard a sequence of arguments on interlocutory applications that were then outstanding. My decisions in respect of some of them inevitably have to be "work in progress" as the parties respond to the interim decisions I am able to make at this stage. Some of the issues argued have potential importance for the future of the proceedings, but answers are required promptly. I regret that other commitments have not allowed me to refine the reasons for my decisions more thoroughly. I am, however, entirely satisfied with those decisions and it is more important that the parties have the outcomes for their on-going preparations for trial.

[2] I confirm that further time will be available for advancing interlocutory issues on 6 August and 16 September 2013.

Summary

[3] The matters that were argued, and my decisions on them, are as follows:

(a) First, second and third defendants' applications for further and better discovery ([4]–[27]): the opt-in forms are to be discovered. The plaintiff is not required to pay for transforming electronically stored data into a form readable for the defendants' purposes. Guidelines are provided for ascertainment of dates from which, and circumstances in which, the plaintiff can claim privilege for certain documents.

(b) Privilege claims for advice to directors/Credit Suisse ([28]–[51]): joint interest privilege can be asserted by the directors and Credit Suisse entities. Credit Suisse entities cannot sustain that form of privilege in relation to some of the documents in the bundle it asked the Court to consider.

(c) Defendants' applications for further particulars of the statement of claim ([52]–[88]): I have provided provisional observations about the reasonable scope of the defendants' entitlement to further particulars, many of which Mr Forbes acknowledged would be provided. In anticipation of a definitive round of further argument on any remaining particulars sought on 6 August 2013, I have directed that all further particulars the plaintiff is prepared to provide are to be filed and served by ***5 pm*** on ***Monday, 29 July 2013***. Thereafter, the defendants are to provide appropriate summaries of, and reasons for, any further particulars still sought by ***5 pm*** on ***Friday, 2 August 2013***, with the plaintiff to reply with a concise summary of grounds for resisting remaining requests by ***3 pm*** on ***Monday, 5 August 2013***.

(d) Confidentiality orders in respect of the plaintiff's affidavit from Susan Dunn ([89]–[97]): I am not presently prepared to vary the constraint that has applied, but recognise circumstances in which that may be warranted.

(e) Security for costs ([98]–[130]): the defendants are entitled to additional security for $800,000 (making a total of $1 million) from

30 August 2013, with a further $1 million from 15 January 2014. I discuss alternatives for the mode in which security may be provided.

(f) Plaintiff's application to amend the scope of the first trial ([131]–[148]): the plaintiff is not entitled to advance the substantive claims of Hunter Hall at the first trial.

First to third defendants' applications for further and better discovery from the plaintiff

[4] Differences remained on the scope of the plaintiff's discovery obligation in relation to various categories of potentially relevant documents.

[5] *Opt-in forms*: The standard form document sent to all Feltex shareholders, and which was to be returned by them if they elected to opt in to the proceedings, was settled some time ago with the approval of French J. The period for all shareholders to commit to "opting in" has now closed, and the first, second and third defendants are concerned to have disclosure of all of the opt-in forms returned by shareholders. The forms are addressed both to those co-ordinating the action on behalf of the plaintiff, and to the Registrar of the High Court.

[6] The plaintiff resists disclosure of the forms as returned by individual shareholders. In his written submissions, Mr Forbes QC contended that the dominant purpose for the communication was a component of preparing for the proceeding and that privilege could therefore be claimed for them. That cannot be correct as, in the context of a representative action such as this, the act of "opting in" communicates a commitment to which the defendants are entitled to have access.

[7] Mr Forbes also argued that there could be no utility in solicitors for the defendants analysing the forms as returned, because they were riddled with inaccuracies and, in many cases, were incomplete. He urged that the defendants would be adequately and more reliably informed by the schedule compiled by solicitors for the plaintiff, which relied on the indication of commitment from the opt-in forms, but then corrected any errors in the details of the respective

shareholders' holdings in Feltex and completed other details that may not have been provided.

[8] For the second and third defendants, Mr Olney accepted the risk of inaccuracies, but maintained that the solicitors for the defendants are entitled to undertake their own audit of the details, as conveyed by shareholders in returning the forms, for the defendants' own purposes.

[9] Mr Forbes also objected to disclosing the forms where the shareholders have added comments about their views on the litigation, or made other observations analogous to those that might be made by a litigant joining proceedings, in seeking a response from legal advisers acting on the claim.

[10] I took Messrs Cooper (for the first defendants) and Olney (for the second and third defendants) to concede that any comments added by individual shareholders, which were accurately described as communications in relation to the provision of legal advice, could be redacted.

[11] I am satisfied that the opt-in forms are discoverable. Redactions may be made in appropriate cases, but only those which relate to the provision of legal advice, as would arise in a conventional relationship between a plaintiff and his, her or its legal advisers.

[12] Provision of the copies of the forms cannot claim priority and I direct that disclosure of them is to be made within eight weeks of delivery of this judgment.

[13] *Electronically stored data:* In November 2012, the plaintiff's legal team obtained an electronic record of a number of years' accounting data from Godfrey Hirst, the purchaser of the Feltex business. The data is stored using an SAP form of software that has created difficulties in retrieving the data. The plaintiff's stance in terms of providing the defendants with access to the data has changed since the plaintiff's advisers first acknowledged possession of the stored data. As I understood the explanations provided by Mr Forbes and Ms Mills, they have not transformed all of the electronically stored data into a readily readable form. Rather, they have

retained an IT expert who has enabled them to extract defined components of the data stored, on a specific topic-by-topic basis. That process of electronically interrogating the data does not simply reproduce the form in which it was stored, but requires analysis or collocation that reflects the work done in preparation for trial.

[14] Thus far, the plaintiff has provided copies of the data in the same form it was obtained from Godfrey Hirst, to solicitors for the defendants. However, the plaintiff has resisted any obligation to transform all of the data into a form that would be readily accessible by electronic means, for the benefit of the defendants. The defendants argue that the plaintiff's discovery obligation extends to them providing the data in a usable form.

[15] The plaintiff's solicitors have offered to make the expert retained by them available to solicitors for the defendants, to aid them in transforming the data stored in SAP form, into a form that is usable for the defendants' own purposes. The plaintiff insists that such assistance would necessarily be provided at the defendants' own cost.

[16] On the basis of the explanation I have been given as to the state in which the data was stored when received from Godfrey Hirst, and the IT processes required, I am satisfied that the steps taken on behalf of the plaintiff are sufficient to discharge his discovery obligation in this regard.

[17] Accordingly, at this stage the defendants will have to incur the cost of either the expert offered to them by the plaintiff's advisers, or retain their own, at their cost. If it subsequently transpires that my understanding of the nature and extent of transformation of data on behalf of the plaintiff is incorrect, and that the plaintiff did at some stage transform the data received from Godfrey Hirst into usable form, without any enhancement for the plaintiff's purposes, then the defendants may revisit the plaintiff's obligation to pay for the costs they will incur in transforming the data, in a usable form.

[18] *Other Joint Action Funding Limited (JAFL) documents:* Records of Mr Gavigan's investigations into matters likely to lead to claims of the type

advanced in these proceedings apparently date from August 2006. The defendants have sought access to all such documents but the plaintiff has thus far resisted discovery, contending that such documents are not relevant and/or that they are privileged. At the outset of the present hearing, Mr Forbes acknowledged that all documents obtained or created by Mr Gavigan from August 2006 onwards would be listed. These include documents in relation to separate proceedings brought under the Companies Act 1993, which sought to have Mr Gavigan appointed as a director of Feltex, and another set of proceedings in which the appointment of a liquidator for Feltex was sought.

[19] Accepting an obligation to list such documents, Mr Forbes argued that the plaintiff was still able to assert litigation privilege in relation to documents prepared for those other proceedings and, in some cases, solicitor/client privilege could be claimed. The basis for such claims is now to be spelt out in a list that itemises the dates and nature of such documents, and the ground on which privilege was asserted in relation to them.

[20] For the second and third defendants, Mr Olney did not accept that litigation privilege that arose whilst those other proceedings were current continued after they were brought to an end. He cited a decision of the Canadian Supreme Court in *Minister of Justice v Blank* on the distinction between legal professional privilege and litigation privilege. In that case, Fish J observed:[1]

> The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purposes – and therefore its justification. But to borrow a phrase, the litigation is not over until it's over: it cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

[21] I agree with the rationale explained in *Blank* for the distinction between the two forms of privilege. Conceptually, a privilege recognised because of the need for a "zone of privacy" while proceedings are on-going comes to an end when the proceedings do. However, that proposition must, in the interests of justice, be subject to an exception where there is a relevant connection between one set of

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1 *Minister of Justice v Blank* [2006] 2 SCR 319 at [34].

proceedings and another, whilst the other litigation continues. If the subject matter is sufficiently inter-related, the litigation strategy in one set of proceedings will have a bearing on the litigation strategy in the others. It would frustrate the purpose of litigation privilege if it was brought to an end when either of the proceedings terminated, thereby breaching the "zone of privacy" reasonably expected in the on-going proceedings. Case by case, and possibly document by document, analysis would be required to determine whether the rationale for litigation privilege in relation to a document in, say, the Companies Act proceedings should be respected because its content also has some relevance in the present proceedings.

[22] Mr Forbes argued that there will be documents produced in the course of the Companies Act proceedings to which litigation privilege should still pertain in the present proceedings because of the commonality of the parties, the subject matter and the solicitors involved. Those characteristics may not necessarily be sufficient to show that the parties remain locked in "what is essentially the same legal combat", to apply the concept used by Fish J.

[23] If necessary, I will hear further argument on the extent to which litigation privilege that was able to be asserted for documents in those other proceedings should enure for the purposes of the present proceedings on the grounds that they constitute "the same legal combat".

[24] Mr Olney raised a separate argument about the date from which the plaintiff could invoke litigation privilege in relation to documents created or obtained for the present proceedings. Mr Olney equated the test for invoking litigation privilege, namely that the document was made or prepared when litigation was reasonably apprehended, with the trigger for the running of time for the purposes of s 43(5) of the Fair Trading Act 1986. That starts from the date from which the likelihood of loss or damage was discovered or ought reasonably to have been discoverable. For the purposes of resisting the limitation period applying to its cause of action under the Fair Trading Act, the plaintiff has argued that the point of reasonable discoverability occurred in July 2007. If the two tests are the same, then Mr Olney's point is that litigation could not have been reasonably apprehended before the

likelihood of loss or damage was discovered, or became reasonably discoverable, so that litigation privilege could not be invoked until July 2007.

[25] Conceptually, a plaintiff may reasonably apprehend that he or she will pursue claims against directors and promoters for errors in a prospectus, before identifying the evidence on which the shareholder would rely to show that the prospectus had been materially misleading. In contrast, the cause of the likely loss, and its reasonable discoverability, might depend on disclosures after the issue of the prospectus that revealed the respects in which it was misleading at the time it was issued. Conceptually therefore, there is scope for Mr Forbes to argue that these two tests are made out at different points in time. However, the research for, and preparation of, the present case as outlined in the documents I was referred to, would suggest that in a practical sense there is little difference between the two.

[26] I was not taken to specific events that justified the respective dates in October 2006 and July 2007. As a matter of impression, it would seem difficult to justify a difference of up to 10 months between the two events. If the plaintiff maintains that particular circumstances justify a difference, then those should be spelt out in asserting the claim to privilege in sufficient detail to enable the defendants to consider and, if necessary, challenge them.

[27] I took Mr Forbes to accept that all records of Mr Gavigan's research, such as notes of exchange with Securities Commission personnel and emails of that type, would now be discovered.

First to third defendants' application to uphold privilege in legal advice

[28] The receivers' sale of the Feltex business to Godfrey Hirst included all of its business records. Those records included the legal advice provided to the company and the directors in relation to the public offer, and the offer documents. The plaintiff's advisers obtained access to all those documents from Godfrey Hirst, apparently some time in 2012, and have subsequently signalled their intention to treat them as documents available to them in the proceedings, by having Mr Gavigan include them in a further affidavit of documents.

[29] Thereafter, solicitors for the directors disputed the plaintiff's entitlement to rely on such documents in the proceedings, and the first to third defendants have made application seeking a direction as to whether the plaintiff can indeed make use of them in the proceedings.

[30] The directors and Credit Suisse advanced their claim to legal professional privilege in the documents in question on the basis that they had a joint interest with the company in the advice provided by legal advisers (Bell Gully in New Zealand and Herbert Geer & Rundle in Australia).

[31] The plaintiff disputes that the defendants are entitled to now assert legal professional privilege in the documents, on the basis that the plaintiff has obtained the documents legitimately from Godfrey Hirst. In respect of some documents at least, Mr Forbes argued that joint interest privilege could not be made out. Further, that if it had existed, then the waiver by those subsequently controlling the company prevented the directors or Credit Suisse thereafter asserting it. Alternatively, that the process by which Feltex's records had been sold to a new owner, and thereafter were available for use as the new owner saw fit, was known to any others who might have claimed a joint interest privilege in the documents. They must be deemed to have impliedly waived any separate privilege that they previously enjoyed.

[32] The concept of a joint interest in legally privileged communications is well settled.[2] A joint interest is most readily made out where more than one client jointly instruct legal advisers to provide them with the advice, and then receive it. That position was not contended for here. A joint interest in legal advice may also be established where the recipients have a joint interest in the subject matter of the communication at the time it comes into existence. Both the directors and the Credit Suisse entities relied on that form of joint interest in the communications with the New Zealand and Australian solicitors throughout the period that the initial public offering (IPO) was under consideration, and the offer documents were being prepared.

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[2] See, for example, Donald Mathieson (ed) *Cross on Evidence* (looseleaf ed, LexisNexis) at [EVA66.3], *GDF I LLP v Melview (Kawarau Falls Station) Investments Ltd (in receivership)* [2012] NZHC 1432.

[33] In terms of the context in which advice was being provided, that claim is a reasonable one. The provisions in the Securities Act 1978 creating liability for the content of offer documents puts the directors and promoters in similar positions, creating a common interest in receiving advice intended to ensure that the offer documents comply with the law, if for no other reason than to avoid the liability imposed on all of them if the documents do not comply. That situation was borne out by the terms of a number of the documents I was invited to consider. Therefore, the circumstances were such that a joint interest privilege could arise.

[34] I accept Mr Forbes' proposition that Godfrey Hirst's conduct in providing access to all the papers including legal communications constituted a waiver of the privilege that Feltex had enjoyed in those communications. The consequence is that those documents are legitimately in the possession of the plaintiff's legal advisers so that aspect of Credit Suisse's application requiring their return cannot be justified.

[35] The issue is whether other holders of legal professional privilege in the documents can resist their admissibility against them in the proceedings. Mr Forbes argued that the waiver by Feltex's receivers of any joint privilege others enjoyed in the documents thereafter prevented anyone else who previously enjoyed that privilege from asserting it. He cited the decision of Heath J in *Fullerton Smith v Fullerton Smith*, which included the observation:[3]

> In circumstances where a joint privilege is conferred, it may be waived by any one of those entitled to assert it against third parties.

[36] As authority for that proposition, the Judge referred in a footnote to s 66(1)(b) of the Evidence Act 2006, and the commentary on that section in *The Evidence Act 2006: Act and Analysis*.[4]

[37] Section 66(1)(b) confirms the entitlement of any person who shares a joint privilege with others in a privileged communication to have continuing access to the privileged material. The commentary the Judge cited addresses the situation where holders of a joint interest privilege have subsequently become adversaries, which

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3 *Fullerton-Smith v Fullerton-Smith* HC Hamilton CIV-2011-419-615, 26 August 2011.

4 Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at [EV66.03].

does not alter the entitlement of all holders of the joint privilege to continue having access to the documents. The additional point addressed in the commentary the Judge cited does not deal with one holder of a joint privilege being able to commit others to a waiver of that privilege.

[38] In the circumstances of the *Fullerton-Smith* decision, in which the question of joint interest privilege did not arise, I am inclined to interpret the Judge's observation relied on by Mr Forbes as recognising the ability of one holder of a joint interest privilege to waive privilege as against third parties without such waiver binding other persons who shared the privilege and might thereafter still wish to assert it. If, indeed, the Judge's observation intended to go further, then with great respect I would disagree with it.

[39] I also reject Mr Forbes' next contention, namely that inactivity by the first to third defendants in not taking any positive step to assert privilege throughout the sale by the receivers, and the subsequent dealings between Godfrey Hirst and the plaintiff's advisers, constitutes an implied waiver of their entitlement to assert privilege. That proposition is at its weakest in relation to the Credit Suisse entities which, after completion of the IPO transaction, had no on-going reason to monitor the conduct of business by Feltex. In those circumstances, it would be unrealistic to deprive them of the benefit of legal professional privilege that would otherwise enure, merely because of their inactivity.

[40] Further, if I am correct in my analysis that one holder of a joint privilege cannot waive it on behalf of other holders of that privilege without their positive concurrence, then the first to third defendants were entitled to be indifferent to what the company's successor did as a joint holder of that privilege. If the directors could only be held to have waived the privilege by a positive act on their own behalf, then they could remain indifferent to what the company did in relation to the privilege it enjoyed in the communications.

[41] It follows that the first to third defendants remain entitled to assert a joint interest privilege, and the question is the extent to which communications they claim as coming within this category, in fact do. I was provided with volumes of the

documents now discovered by the plaintiff, and in respect of which the first, and separately the second and third, defendants assert privilege. I have considered all of the documents.

[42] In terms of the bundle provided on behalf of the first defendants, I confirm the directors' entitlement to assert legal professional privilege in relation to the documents that were in tabs 2 to 8. I note that by the time of the hearing, the plaintiff conceded the privileged status of the documents at tabs 3 and 8. For the avoidance of doubt, the discovery numbers endorsed on the first page of the remaining documents were FEL.001.2856.0339, FEL.001.2445.0870, FEL.001.2856.0669, FEL.001.2856.0797 and FEL.001.2856.0245.

[43] As to the bundle of additional documents in which the second and third defendants assert privilege, it cannot be maintained for the single page email at tab 1 (18 March 2004, FEL.001.2428.0062) which simply comprises arrangements for a conference call between legal advisers and others involved.

[44] As to the document at tab 4 (FEL.001.0077.0313), whilst privilege is clearly available for the directors, there is nothing in the way it is addressed or its content that suggests that joint interest privilege arose for the Credit Suisse entities. I acknowledge that para 14 of it does refer to a shareholder resolution which would be necessary prior to the IPO and therefore involved the Credit Suisse entity that was then the company's sole shareholder, but that is insufficient to attribute a joint interest in the content of the advice to the second and third defendants.

[45] At tab 6, it is unclear who prepared a draft list of outstanding items as at 6 April 2004 (FEL.001.0009.0001). It may well have been prepared by solicitors, but even assuming it was, it does not reflect any request for, or provision of, legal advice. Privilege could not be claimed in a list of matters still outstanding at that time and allocation of responsibility for completing them.

[46] The document at tab 7, comprising a confidential draft of the investment statement and prospectus (FEL.001.0009.0001, from page 9) does not appear, considered in isolation, to reflect the input of any legal advice. Unless the particular

content of it, the significance of which was not drawn to my attention, reflects either a request for, or provision of, legal advice, I do not consider that the second and third defendants can claim a joint interest in legal professional privilege in respect of it.

[47] The same observations apply to the document at tab 8, which is from the same discovery document, pages 93 and following. Without additional context identifying proposed changes to the drafting as reflecting legal advice, this component of the draft might equally reflect directors' or promoters' own work. My same provisional conclusion applies.

[48] As to the documents under tab 9 (FEL.001.0035.0194 and following), privilege will attach for the second and third defendants to the extent that the changes to the draft resolution reflect suggestions made by Minter Ellison that was acting for the vendor. It is not apparent from the terms of the documents themselves what those changes were, and upholding privilege in the whole document on that basis potentially prevents the plaintiff using those parts of the document that reflect changes recommended by accountants, for which no privilege could be claimed. If the distinction can be drawn between the work of the two advisers in the draft resolutions, then the plaintiff would be entitled to use a partially redacted copy of the document that did not disclose changes as a consequence of legal advice, but did show the changes resulting from advice by Ernst & Young.

[49] The document under tab 11, minutes of a meeting on 19 March 2004, comprises for the most part a record of legal advice conveyed and discussed at the meeting. All those parts are appropriately the subject of joint interest privilege claimed by the second and third defendants. If the plaintiff considers that any of the additional content that does not reflect legal advice, or the discussion of it, is relevant to issues in the proceedings, then the plaintiff's solicitors may propose what would inevitably be a heavily redacted version excluding all references to legal advice, to enable reliance on the balance. I do not raise the prospect to encourage pursuit of that course.

[50] Those same observations apply in relation to the further minutes under tabs 11 to 18 inclusive.

[51] As to the action lists at tabs 19 to 22, the limited extent to which they reflect the scope of issues on which legal advice was sought appear to be entirely innocuous, and not reflective of the reasons why particular aspects of legal advice might be sought, or the terms in which it was provided. Because the action lists may have relevance for other purposes, I incline to the view that joint interest privilege should not be maintained in respect of them in their totality. They are documents the plaintiff might use, subject to a more specific objection raised on behalf of the second and third defendants if disclosure would reveal legal advice that might not be apparent simply from the terms of the lists themselves.

Defendants' application for further particulars of the statement of claim

[52] All defendants have made applications for orders that the plaintiff provide further particulars of the present (second amended) statement of claim (2ASC). Mr Forbes resisted argument on the defendants' applications, on the basis that the plaintiff was still considering the extent to which he could reasonably comply with the various requests, which might in due course obviate the need for any argument. Given the extent of preparation required before trial, defence counsel opposed any adjournment and sought rulings, albeit recognising that further argument on the adequacy of the pleading is likely to be necessary.

[53] There was discussion during the hearing of provision of the particulars the plaintiff is working on "by the end of July". However, for any remaining argument about the scope of particulars to be meaningful on 6 August 2013, the particulars presently contemplated on behalf of the plaintiff will need to be filed and served by 5pm on Monday, 29 July 2013.

[54] Little point will be served in requiring the defendants to file amended applications for further particulars. I direct that the extent of further particulars still sought, together with concise bullet points as to the justification for the remaining requests, should be addressed in memoranda to be filed and served by ***5 pm*** on ***Friday, 2 August 2013***. The plaintiff's solicitors should file and serve a concise summary of the grounds for resisting the remaining particulars that are sought by

3 pm on ***Monday, 5 August 2013***. Inevitably, strict compliance with these time limits is required.

[55] To the extent that the defendants still wish to pursue argument for additional particulars, it would be helpful to me if a summary of the position could be prepared in a form that can be added to the right-hand side of the A3 pages on which the summary of the first defendants' position was addressed at the last hearing, if that is feasible.

[56] I will summarily review the relative particularity of the pleadings in question, in light of the limited argument I heard. I will not set out the terms of the respective pleadings, so to be fully understood, my comments need to be read in conjunction with the 2ASC.

[57] Mr Galbraith advanced argument on behalf of the first defendants, in terms that mostly applied more generally to each of the other defendants.

[58] *Paragraphs 32.8 and 32.9:* The first cause of action in the 2ASC invokes ss 9 and 43 of the Fair Trading Act 1986. The plaintiff alleges that a wider range of activities than merely the issuance of the offer documents, including formulation of the plan pursuant to which the offer was made, the marketing of it and the issue of an allotment of shares, was misleading or deceptive conduct by the defendants in trade. Alternatively, that defendants aided, abetted, counselled or procured such conduct, or were directly or indirectly knowingly involved in, or a party to, such conduct.

[59] The defendants have sought particulars in relation to the prospect of ancillary liability, identifying who it is any particular defendant aided or abetted. Further, they seek particulars of the acts that comprised conduct of that type and the knowledge to be attributed to a particular defendant that he, she or it was knowingly concerned in such conduct.

[60] Mr Forbes' provisional response was that the plaintiff would expand as best he can on particular items of conduct by identified defendants that are alleged to be relevant. However, Mr Forbes alluded to an extent of generality that might depend

on some form of collective responsibility as between directors, and attribution of involvement by other defendants by virtue of their status as alleged promoters of the offer.

[61] The present pleading in paragraphs 32.8 and 32.9 is not adequately particularised. Whether generalised particulars are sufficient must await the provision of those particulars that the plaintiff is to provide.

[62] *Paragraph 33.2:* The plaintiff has agreed to provide particulars of the facts and/or circumstances on which the plaintiff relies for the allegation that it was "inappropriate" to imply in the prospectus that EBITDA[5] was a reliable measure of the financial performance of Feltex, and a basis for stated financial forecasts and projections. The request was reasonably made.

[63] *Paragraph 33.5:* This alleges, inter alia, that Feltex had not in fact been a successful or profitable company and that it did not have a good management team or a sustainable operating strategy. Other deficiencies are also alleged, and the defendants have sought more information on the respects in which Feltex had these deficiencies. Previously the plaintiff had resisted provision of such matters on the basis that relevant details would constitute evidence but Mr Forbes has acknowledged that particulars will be provided. The defendants are entitled to commit the plaintiff, as a matter of pleading, to at least the general terms in which he alleges the claimed deficiencies were manifested.

[64] *Paragraph 33.*6: This alleges that the price set for shares in the IPO of $1.70 did not fairly reflect factors which the plaintiff alleges were implied as influencing the price to be set. Particulars have been sought, with some provided and Mr Forbes assuring that more would be provided. The particulars thus far include references to documents, rather than the factual propositions pleaded in reliance on their content, and the latter detail is properly a matter of pleading.

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5 Earnings Before Interest, Taxes, Depreciation and Amortisation.

[65] *Paragraph 33.*8: The allegations include manipulation of the prior year's profit by cancelling or reducing retail customer rebates. Particulars have been sought and more are to be provided.

[66] *Paragraph 36:* Three sets of particulars are sought in relation to allegations of how commitments to purchase shares in the IPO were bolstered after an initial book build had "not attracted good support from a range of domestic and international institutions and primary market participants". The plaintiff has indicated that further particulars on each aspect identified on behalf of the defendants will be provided and an assessment of their adequacy awaits that occurring.

[67] *Paragraph 37.6*: This alleges awareness by the directors of weaknesses in Feltex's senior management, and in particular Mr Magill, the chief executive. Particulars have been sought and Mr Forbes indicated that they will be provided.

[68] *Paragraph 37.8*: This alleges that Feltex had manipulated its earnings by accounting for sales in earlier accounting periods than the period in which such sales ought properly to have been accounted for. The defendants have sought details of each specific sale in respect of which this practice was claimed, as well as the amount, the accounting periods in which these sales were accounted for, and the periods in which it is alleged that they ought to have been accounted for. Particulars have already been provided of the more general items, but the plaintiff resists an obligation to plead the individual sales. Mr Forbes described the plaintiff's case as depending on internal Feltex reports that reflect the accounting practice alleged, and denies any obligation for the plaintiff to go behind the statements which the plaintiff will attribute to Feltex management to establish details of how the allegedly misleading practice occurred.

[69] I do not accept that individual sales' details are necessary. In their absence, the plaintiff risks the relative credibility of its case potentially being weakened, but if the plaintiff elects to run its case on the basis of internal Feltex documents acknowledging the practice then, at least as a matter of pleading, the plaintiff is not reasonably required to go further.

[70] *Paragraph 39:* This alleges the nature of the losses suffered by individual shareholders for the purposes of the claim under the Fair Trading Act. The defendants have sought details of each shareholder claiming loss, including their names, the number of shares purchased in the IPO and the date and price achieved on any subsequent sales. The plaintiff resists setting out those details as a matter of pleading at the present stage of the proceedings, and instead argues that the summary drawn from all the opt-in forms, as corrected and expanded by the records reconstructed from Feltex's share registry, is both appropriate and sufficient. I accept the plaintiff's position and would not order particulars of the details sought under this paragraph for the first trial. That said, the detail is important for all parties and, beyond the pleading requirements, I expect the schedule described by Mr Forbes to be made available to the defendants in the near future.

[71] *Paragraph 40*: This alleges a continuation of the practice for manipulation of earnings that was addressed in paragraph 37.8 in relation to prior periods, for the 12 month period from the date of allotment of the Feltex shares in June 2004. Mr Forbes' response to a request for itemised particulars is the same as paragraph 37.8. For the same reasons as given in relation to that paragraph, I am not persuaded that any further particulars are required.

[72] *Paragraph 42*: This arises in an alternative cause of action under s 9 of the Fair Trading Act against Mr Magill. Certain particulars have already been provided, and Mr Forbes confirmed that the plaintiff will provide further particulars. A measure of uncertainty is caused by cross-referencing to other paragraphs when a simple transposing of earlier allegations complicates whether the allegations are against Mr Magill for a primary liability under the Fair Trading Act, or ancillary liability. Further consideration of the adequacy of the pleading needs to await the further particulars that Mr Forbes has described.

[73] In addition to supporting Mr Galbraith's analysis of the extent of further particulars sought on behalf of the first defendants, counsel for all other defendants each had additional concerns at lack of particularity.

[74] For Mr Magill, Mr Weston QC raised additional concerns about *paragraph 37.6*, instancing the reference by the plaintiff to a newspaper article reporting on an interview with the chairman of directors, Mr Saunders, as being inadequate to meaningfully plead the nature of Mr Magill's alleged deficiencies as chief executive, and the respects in which others had identified such weaknesses.

[75] Mr Forbes acknowledged that further particulars of that paragraph will be provided. The relevance of the plaintiff's pleading appears not to be the nature and extent of specific weaknesses of Mr Magill as a chief executive. Rather, the pleading relates to the awareness by others of the existence of such weaknesses, and the absence of any acknowledgement of those weaknesses in the prospectus. Arguably, such weaknesses were material information that ought to have been acknowledged, or reflected in the prospectus. I will revisit the need for particulars as to the respects in which Mr Magill was allegedly a weak manager, in light of the further round of particulars provided by the plaintiff.

[76] Mr Weston was also concerned at inadequate particularity in the second cause of action, which is pleaded just against Mr Magill. In a number of respects, it depends on cross-references to the form of practice that was pleaded in *paragraph 37.8*, and to the forms of breach of the Fair Trading Act that had been pleaded in *paragraphs 32.5 to 32.9*. Mr Weston sought a direction that, at least in these paragraphs, the shorthand manner of cross-referencing was inadequate because it did not reveal what would otherwise be potential inconsistencies in the factual allegations made.

[77] Within those particular paragraphs, I accept that the concern is well-justified, and reciting other allegations, with whatever amendments are considered appropriate, is justified at least in this pleading.

[78] For the second and third defendants, Mr Olney raised a concern at the plaintiff's reliance on comments made after the period in which the relevant conduct occurred, as the basis for allegations of a failure to disclose what the state of affairs had been at the relevant or initial time. Mr Olney was concerned that reliance on post facto commentary should not enable the plaintiff to sketch the alleged

deficiency relied upon, without establishing that it had in fact existed. Where the plaintiff's allegations relate to the state of Feltex's business when the offer documents were issued, then arguably the basis for fixing the defendants with an alleged awareness of those deficiencies at the time ought to be pleaded. An alternative would be that they are deficiencies that the defendants ought to have been aware of, but again a basis for that allegation would be required.

[79] I understand Mr Olney's evidentiary concern, but do not consider that reliance on an opinion or reconstruction of what had occurred after the event is necessarily inadequate in a sense that requires further particulars. The plaintiff may not seek to make out a particular material deficiency in relation to Feltex's business as it existed at or before the time of the prospectus, but instead rely on a commentary made a year or more later that recognises such a deficiency. In that event, the plaintiff's case risks being inadequate because the plaintiff cannot establish that the commentary is an accurate assessment of the state of Feltex a year previously.

[80] If, in these respects, the plaintiff is intending to support his case with matters that are contemporaneous with the deficiency alleged, then notice of the nature of those matters is required as a matter of pleading.

[81] In respect of some paragraphs, such as *paragraph 37*, Mr Olney anticipated that the extent of particulars Mr Forbes has intimated will be provided is still inadequate. The argument put the plaintiff's solicitors on notice as to the extent of the second and third defendants' expectations as to particulars, but no guidance can usefully be provided until those expectations are measured against the extent of particulars the plaintiff is intending to provide.

[82] For the fourth defendant, Mr McLellan QC raised additional concerns at inadequate pleadings in four areas. First, he submitted that greater particularity was required as to the basis on which the plaintiff alleges that First New Zealand Capital constituted a "promoter" for the purposes of the Securities Act. Secondly, particularity is required on the respects in which the fourth defendant undertook, as a principal, conduct that is alleged to be misleading or deceptive for the purposes of the Fair Trading Act cause of action. Thirdly, particulars of the conduct or

circumstances relied on to attribute liability to the fourth defendant as a party in the Fair Trading Act cause of action. Finally, the circumstances relied upon as giving rise to a tortious duty of care.

[83] *Paragraph 9:* The plaintiff has already provided particulars as to the grounds relied on in alleging that the fourth defendant was a promoter. Mr Forbes accepts that the form in which those particulars have been provided is inadequate, and also anticipates providing further clarification of the extent of circumstances that will be relied on.

[84] *Paragraph 19:* The plaintiff now accepts that the respects in which the fourth defendant "marketed" the Feltex share offer should be set out specifically in relation to that defendant. The fourth defendant's request appears reasonable in this respect.

[85] *Paragraph 32:* Mr McLellan has a similar concern to counsel for other defendants on the lack of particularity in allegations of primary responsibility for misleading and deceptive conduct, or circumstances in which secondary liability is alleged. Mr Forbes has indicated that the plaintiff will provide further particulars, but foreshadows keeping open the plaintiff's option to cite details he is not presently intending to commit to as a matter of pleading, in support of the concept of ancillary liability at trial. It seems likely that the defendants can pre-empt that by a requirement for particularity now, prior to preparation of briefs and detailed research in relation to the evidence.

[86] *Paragraph 49:* Thus far, the circumstances giving rise to the existence of a duty of care between individual shareholders/claimants and each of the defendants is alleged in unusually cursory terms. Where the existence of a duty of care in tort is denied by defendants, they and the Court ought to be provided with a reasonable degree of particularity as to the circumstances of the relationship between each plaintiff or group of plaintiffs who claim to be owed a duty by a defendant to conduct him or her or itself competently, and that defendant. I apprehend that after dialogue during the argument, Mr Forbes accepted the need for more detail as to the relevant indicia of the relationship between shareholders purchasing as a result of the

issue of the offer documents, and various of the defendants who played a part in the promotion and allotment of shares.

[87] *Paragraph 51:* This pleads the particulars of negligence on a global basis against all defendants. Mr McLellan takes the point that alleging particulars of negligence by way of cross-referencing to other criticisms that are made generally in respect of all defendants is inadequate to enable the fourth defendant to respond. I understand Mr Forbes acknowledges this and will reformulate the particulars of negligence, at least so far as the fourth defendant has requested this to occur.

[88] For the fifth defendant, Forsyth Barr Limited, Ms Challis adopted Mr McLellan's analysis of the present inadequacies and acknowledged similar concerns for Forsyth Barr.

Confidentiality order in respect of plaintiff's affidavit from Ms Dunn

[89] In the context of applications for further orders as to security for costs, an issue was raised as to the extent to which details of funding and insurance arrangements put in place by those backing the plaintiff's proceedings should remain confidential. The relevant affidavit was sworn on 4 October 2012 in London by Ms Dunn, a solicitor and the head of litigation funding for Harbour Litigation Funding Limited (HLFL), the adviser to the investment fund, Harbour Litigation Investment Fund LP (HLIF) that is funding the plaintiff's proceedings. The affidavit was filed in the Court of Appeal, after argument, but before resolution, of the second appeal pursued in that Court by some of the defendants.

[90] The appropriate extent of disclosure of funding and associated arrangements put in place by JAFL had been the subject of a decision by French J on 30 November 2011. As matters stood then, her Honour recognised the Court's responsibility in balancing the interests of a represented plaintiff, and defendants faced with claims that are sponsored by someone with no direct interest in the vindication of rights. A commercial motive for investing in the claims justified the Court being fully informed of the terms of funding arrangements and other components such as insurance policies. At the same time, French J acknowledged that certain commercially sensitive details were one of the unusual types of information where

the Court is justified in withholding the detail from the opposing parties. I concur with that approach.

[91] Since then, in the context of appeals to the Court of Appeal, the plaintiff has elected to provide further detail in Ms Dunn's affidavit. It is reasonable to infer that the interests supporting the plaintiff took that step in anticipation of continuation of the approach signalled by French J. However, that is not inconsistent with also recognising the defendants' legitimate interests, which may be impeded by non-disclosure as the proceedings progress, therefore justifying reconsideration of the scope of confidentiality constraints.

[92] The Court of Appeal dealt with the confidentiality of the Dunn affidavit by way of a minute dated 17 October 2012.

[93] Thus far, counsel for the defendants have had access to the text of Ms Dunn's affidavit, together with substantially redacted copies of the investment agreement between Mr Gavigan's entity, JAFL, and HLIF, as well as the after the event (ATE) insurance policy.

[94] Defendants' counsel opposed the on-going confidentiality that had thus far applied to the Dunn affidavit on the grounds that the terms of the order had prevented them taking full instructions from their clients. Further, that there did not appear to be any particular commercial sensitivity which justified the continuing constraint.

[95] I am not satisfied that the general nature of the arrangements put in place by those organising the proceedings in the name of the plaintiff can claim commercial sensitivity. Nor would any unwarranted tactical advantage accrue to the defendants, if the general nature of the arrangements was shared with them by their counsel. Further, it may be a matter of more general interest in the legal community to understand how the balance is struck between recognition of an entitlement to pursue a representative action, and protection of the position of defendants who are being pursued on such terms. I infer from the terms of decisions cited to me that such arrangements are now an established feature of class actions in other jurisdictions.

[96] However, the involvement of litigation funders, together with some form of ATE insurance, still appear relatively novel in New Zealand.[6] Those contractual arrangements are certainly relevant to my assessment of the requirement for security for costs, and the terms on which it might adequately be provided. Mr Forbes' arguments opposing provision of further security included the proposition that the ATE policy of itself provided sufficient security for the defendants so that nothing more was required. He argued that the Court should reject the further applications for security for costs in reliance on those arrangements, despite (on his argument) continuing suppression of all details of the terms on which those commercial arrangements were documented.

[97] A limited range of commercial details in the documents does have a measure of commercial sensitivity, and correspondingly cannot assume legitimate significance for the defendants. Where that line is to be drawn will depend on how the plaintiff responds to the alternatives for complying with additional obligations to provide security for costs. The present constraint on disclosure of the redacted form of the Dunn affidavit is to continue for the time being. If, however, the plaintiff wishes to explore the alternative modes of providing security for costs that I raise in [123] below, then that is likely to trigger a justification for at least partial disclosure of the redacted form of the Dunn affidavit to representatives of the defendants.

Security for costs

[98] In June 2011, French J ordered $200,000 in security for costs to be provided by the plaintiff or JAFL until the end of the discovery and inspection stage of the proceedings, excluding inspection of the documents of the qualifying shareholders (but including inspection of the defendants' documents or any documents held by non-parties).[7] That order was made before the present funding arrangements, including the ATE policy, were in place. All defendants have applied for further,

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6 See review in *Contractors Bonding Ltd v Waterhouse* [2012] NZCA 399 at [52], [56] on the broader issue of approval of litigation funding, the prevalence of which is noted as lagging behind other jurisdictions. The Supreme Court has given leave in that case on the issue of whether the Court of Appeal was correct in ordering disclosure of redacted terms of a litigation funding agreement: *Waterhouse v Contractors Bonding Ltd* [2012] NZSC 98.

7 *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 8 June 2011 at [221].

substantial, orders for security for costs in relation to subsequent steps in the preparation for trial, and the first trial.

[99] Mr Forbes raised, as a preliminary point opposing these applications, that an observation by the Court of Appeal had resolved the adequacy of security arrangements so that I did not have jurisdiction to entertain further applications.

[100] Mr Forbes relied on the comments in the second of the paragraphs quoted below, from the Court of Appeal's August 2012 decision:[8]

> [35] We have also had access to HLIF's insurance arrangements which we are satisfied are sufficient to indemnify Mr Houghton against an adverse costs order. If concerns later arise in this respect, they can always be addressed by a further application for security for costs; the utility of this mechanism was expressly recognised in *Saunders v Houghton (No 1)*. That remedy always remains available to the appellants if any issue arises about the adequacy of Mr Houghton's funding arrangements. And we endorse French J's satisfaction that Mr Houghton's engagement of Mr Forbes as leading counsel will ensure an acceptable degree of independence in the future conduct of this litigation. He must report to and advise Mr Houghton, JAFL and HLIF and has responsibilities to each.
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> [36] In summary, we are satisfied there are adequate funding arrangements in place for Mr Houghton and the represented class; the directors are adequately protected should a costs order be made in their favour; and that the litigation funding agreements do not constitute an abuse of process.

[101] Mr Forbes submitted that the observation that the directors are adequately protected, should a costs order be made in their favour, has determined security for costs on the basis that the insurance arrangements are sufficient. It appears that only the directors had their counsel address the issue of the adequacy of security for costs during the Court of Appeal hearing. The arrangements for funding the plaintiff's action and provision of funding for adverse costs liabilities had been progressed since the issue of security had been dealt with in the High Court.

[102] I agree with the defendant' arguments in opposition to this interpretation. It is most unlikely that the Court of Appeal would intend, by one summary observation in [36], to pre-empt all subsequent consideration by the trial Court of the adequacy and appropriateness of arrangements for security for costs, especially when it had not

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8 *Saunders v Houghton (No 2)* [2012] NZCA 545, [2013] 2 NZLR 652 at [35] and [36].

heard argument on behalf of the remaining defendants. It would be contrary to the Court's observation in the preceding paragraph to the effect that further applications for security for costs might be brought. The comment was made as part of the summary for rejecting one ground of the directors' appeal from the High Court's decision approving the form of representative action and litigation funding arrangement that had been put in place. In that different context, and in light of the acknowledgement in the preceding paragraph of the prospect of further applications for security for costs, I treat the particular observation relied on by Mr Forbes as meaning that the directors are (either presently or can be by further arrangements) adequately protected for costs orders in their favour.

[103] I accordingly consider that this Court does retain jurisdiction to consider further applications for security for costs, beyond the stage addressed by French J's earlier judgment.

[104] The approach to defendants' concerns to have security for costs in this litigation was addressed in the Court of Appeal's first decision. The situation is recognised as different from the usual criteria where a plaintiff's residence out of New Zealand, or impecuniosity leading to a likely failure to pay an adverse costs order are grounds for granting a measure of security in favour of defendants. In the generality of cases, the level of security ordered is fixed at an amount that would not preclude a plaintiff pursuing a claim with apparent merits. The Court of Appeal's first judgment recognised:[9]

> The making of orders for both representation and admission of a funder substantially alters the balance between plaintiffs and defendants. We consider that the change is so radical as to justify the High Court, in exercise of its inherent jurisdiction under s 16 of the Judicature Act 1908, to consider ordering security as a term of such orders, even where numerous natural persons are among the plaintiffs, as the price of the privilege to employ such a procedure. That is in order to protect defendant against the effect of a procedure which could otherwise be oppressive. The facts that the funder has no personal right at stake, that it takes part of the proceeds of any claim, and that it is motivated by the financial considerations that gave rise to the common law prohibition of champerty point to the need for the funder to provide security for costs in most cases. […]

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9 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [36].

[105] Counsel for the defendants submitted that that approach should continue to apply, relying in addition on authorities from other jurisdictions, in most, if not all of which there are specific procedural rules dealing with class actions.

[106] For the first defendants, Mr Cooper cited the approach adopted in the Court of Appeal of the Supreme Court of New South Wales in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd*.[10] Acknowledging that the specific procedural rules in relation to security for costs are different, he nonetheless considered the principle motivating a requirement for security for costs was an apt analogy. In *Green*, a liquidator of the company in question commenced proceedings against its former directors and officers, and also against the insurer of the directors. The claims involved allegations of trading whilst insolvent. Hodgson JA adopted the following approach:[11]

> However, in my opinion a court should be readier to order security for costs where the non-party who stands to benefit from the proceedings is not a person interested in having rights vindicated, as would be a shareholder or creditor of a plaintiff corporation, but rather is a person whose interest is solely to make a commercial profit from funding the litigation. … and in my opinion, courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails.

[107] I respectfully adopt the points made as influencing the exercise of the discretion as to whether security for costs is appropriate. Within the context of this case, I am satisfied that the defendants deserve to be adequately protected by a meaningful order for security for costs, against the contingency that they succeed and seek to enforce an award of costs.

[108] If this point was reached, Mr Forbes' next submission was that the ATE policy is sufficient in itself to address the defendants' concerns. He analysed the steps necessary for the defendants to enforce the policy as creating only "theoretical risks" that they might not readily be able to satisfy any costs order by payment out of the proceeds of the policy. Alternatively, that they could enforce Mr Houghton's entitlement to be indemnified by the litigation funder.

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10 *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148.
11 At [51].

[109] It appears that an aspect of class actions in other jurisdictions has been the evolution of ATE insurance as a component of litigation funding arrangements. In *Michael Phillips Architects Ltd v Riklin*, Akenhead J reviewed the considerations that have been undertaken in recent years as to whether an ATE policy is of itself sufficient to address a defendant's reasonable entitlement to security for costs.[12] That review began, in relation to this point, with the 2001 English Court of Appeal's decision in *Nasser v United Bank of Kuwait*, which is reported as including obiter remarks from Mance LJ to the following effect:[13]

> … The interesting possibility was raised before us that a claimant or appellant who has insured against liability for the defendants' costs in the event of the action or appeal failing might be able to rely on the existence of such insurance as sufficient security in itself. I comment on this possibility only to the extent of saying that I would think that defendants would, at the least, be entitled to some assurance as to the scope of the cover, that it was not liable to be avoided for misrepresentation or non-disclosure (it may be that such policies have anti-avoidance provisions) and that its proceeds cannot be diverted elsewhere. …

[110] Akenhead J also cited from the more recent Court of Appeal decision in *Belco Trading Co v Kondo* in which Longmore LJ had provided what were treated as useful insights into the approach to be adopted on a security for costs application when there is an ATE policy in place.[14] Those observations had included:[15]

> 5. It would, in my judgement, be most unjust to the defendants to prevent them from pointing out that the policy in fact gives them much less security than the traditional form of security for costs. If the judge had been informed of, or had foreseen, the problems that have arisen out of the terms of the ATE policy now that it has been acquired, he would almost certainly, in my view, not have given the claimants the option of providing security by reference to the ATE insurance in the first place.

[111] Having undertaken the review of other authorities on the point, Akenhead J distilled a number of points, "… as a matter of commercial common sense …" that included the following:[16]

> (b) It will be a rare case where the ATE insurance policy can provide as good security as a payment into court or a bank bond guarantee. That will be, amongst other reasons, because insurance policies are voidable by the

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12 *Michael Phillips Architects Ltd v Riklin* [2010] EWHC 834 (TCC).
13 *Nasser v United Bank of Kuwait* [2001] EWCA 556 at [60].
14 *Belco Trading Co v Kondo* [2008] EWCA Civ 2005.
15 At [5] (cited in *Michael Phillips Architects Ltd v Riklin* at [17]).
16 *Michael Phillips Architects Ltd v Riklin* at [18].

> insurers and subject to cancellation for many reasons, none of which are within the control or responsibility of the defendant, and because the promise to pay under the policy will be to the claimant.

[112] As well as citing these authorities, counsel for the defendants analysed numerous contractual gaps that they argued were present in this case and which were likely to prevent the defendants enforcing a costs award by claiming against the proceeds of the policy. At the least, these introduced risks that it would not be readily enforceable on their application.

[113] The insured and the insurer under the policy (HLIF) are both domiciled in different jurisdictions outside New Zealand. Mr Houghton is not specified as a beneficiary of the policy. In order to receive payment on account of his liability for an adverse costs award, he would be dependent upon enforcing a contractual commitment he has with JAFL, JAFL enforcing the terms of its agreement with the funder, and the funder enforcing its claim under the policy.

[114] The litigation funder has no presence in New Zealand and any claim under its funding agreement is to be enforced in the High Court of England and Wales. In turn, any dispute the funder has under the terms of the policy may need to be the subject of a United Kingdom arbitration.

[115] For the first defendants, Mr Cooper disputed that the policy in any event insures a relevant loss. The scope of the cover is for the Cayman Islands partnership that is funding the litigation and relates to any order as to legal costs which that entity (ie the insured) is ordered to pay. Mr Cooper's concern is that the terms of the policy are structured on the assumption that the insured will be the plaintiff whose adverse costs liability is being insured. However, that is not the position here and, on its literal terms, he suggested that it is arguable that the policy does not cover any liability because the funder (HLIF) is not a plaintiff.

[116] Mr Cooper also raised the concern that the policy might be cancelled by the insurer for any breach by the insured, and could also be cancelled if the insured does not continue to meet staged premium payments. The defendants have no control over the conduct of the funder in complying with its obligations as the insured, and

therefore would have no means of controlling the continuance of compliance by the insured with the terms of the policy, creating the risk that the insurer could cancel the policy.

[117] In addition, the chain of entities through which any claim under the policy would have to be enforced are not resident in New Zealand so that, given their domicile and the jurisdiction clauses in the relevant documents, any enforcement action would require commencement of proceedings outside New Zealand.

[118] In arguing that the difficulties claimed to arise for the defendants did not detract from the adequacy of security represented by the policy, Mr Forbes invited analogy with the approach adopted in a very recent English High Court decision in *Geophysical Service Centre Co v Dowell Schlumberger (ME) Inc*.[17] In that case, Stewart Smith J adopted the analysis of Akenhead J in *Riklin*, but distinguished the concerns on the circumstances of an ATE policy that had been taken out by the claimants in that case. The decision is one that turns on the terms of the particular policy and how readily it could be avoided. Although accepting there was a theoretical possibility of breach, on the terms of that policy the Judge was satisfied that the possibility was no more than theoretical. However the basis for that decision depended on the terms of the policy, and a contractual nexus with the claimant against whom security for costs was being sought, that is not the same as the present case. The features of concern to defendants in this case bring the ATE policy in question here onto the *Riklin* side of any line distinguishing that from the features of the arrangements in *Geophysical Service Centre*.

[119] For these reasons, I am satisfied that the mere existence of the policy on the terms that have been disclosed is not sufficient to constitute satisfactory security. I accept that the potential impediments to enforcement of the policy by the defendants create risks that are certainly more than "theoretical", and that, without more, the existence of the policy does not meet the reasonable entitlement of the defendants to security for costs.

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[17] *Geophysical Service Centre Co v Dowell Schlumberger (ME) Inc* [2013] EWHC 147 (TCC).

[120] As to the mode of security that would be adequate in the circumstances of this case, the defendants have not suggested any particular concerns about the solvency or adequacy of the adverse costs insurer, or indeed the financial capacity of the litigation funder. Their concerns were with the impediments to their ready enforcement of a claim to the proceeds of the policy.

[121] What I direct is that the plaintiff provide a form of security that is unconditionally enforceable on the making of demand by any one or more of the defendants to meet the extent of any costs order in favour of the defendants and against the plaintiff in this proceeding. The commitment has to be one which is enforceable in New Zealand.

[122] It seems likely that the simplest form of security would be for the litigation funder to procure a bank bond or guarantee, the cost of which would hopefully be minimised by the existence of some form of assignment of the funder's interest in the policy. However, from the perspective of the plaintiff and the litigation funder, having committed to the cost of the ATE policy, they may wish to minimise or avoid additional costs in supplementing the ATE policy with additional arrangements by way of such a guarantee or bond.

[123] An alternative might be a combination of commitments from the insurer and the funder that they both acknowledge the interest of the defendants in the proceeds of the policy, contingent only on the existence of a costs order in favour of the defendants made against the plaintiff. Such acknowledgements would have to be on terms that the insurer and the funder acknowledge the exclusive jurisdiction of the New Zealand High Court for resolution of any disputes in relation to the defendants' rights to the proceeds of the policy. In proposing this alternative, I am not suggesting any expectation that the funder and insurer ought to agree to them. It is a possible alternative that is entirely a matter for them.

[124] The defendants are not entitled to require provision of security in any form that will cost any more for the plaintiff and those funding the proceedings than is necessary to provide the level of security that I have described. I will hear counsel further if there is a dispute about the adequacy of the mode by which the plaintiff

proposes to satisfy these requirements. Arrangements for the security are to be in place by ***Friday, 16 August 2013***. If the second alternative I have raised is to be pursued, then it is likely to put into different focus the extent to which the funding and insurance arrangements would need to be disclosed to representatives of the defendants.

[125] As to quantum, the approach taken in other jurisdictions where claims are being pursued with assistance from a litigation funder tend to favour granting security for a substantial portion of likely scale costs in the event of a successful defence. Certainly, decisions in comparable situations are not cluttered by the balancing exercise between providing a meaningful level of security for defendants, and ensuring that the obligation on the plaintiff does not risk stifling the claims. I agree that, in general, security for costs provided by a funded claimant should tend towards relatively full security for defendants.

[126] In the present case, each of the defendants has projected the likely extent of scale costs they might be awarded if successful. Each has added to that a projection of the extent of disbursements likely to be incurred. Those combined projections for costs awards plus recoverable disbursements are as follows:

First defendants	$628,424
Second and third defendants	678,424
Fourth defendant	487,174
Fifth defendant	432,954
Total	**$2,226,976**

[127] The present round of initiatives to obtain increased security for costs appears to have been pursued before Mr Magill was separately represented. I will deal with security on the basis that his position is protected within an order in favour of the first defendants, but as the preparation for trial, and eventually trial, plays out, leave is reserved for Mr Weston to seek a division or variation for Mr Magill.

[128] Notwithstanding material differences in the extent of costs projected for different defendants, I propose grouping them more broadly for proportionate entitlement to the sums secured to meet any costs' entitlement. A minute dissection of potential burdens of their defences is neither possible nor warranted at this stage.

[129] I consider that the separate entitlements to security for costs should be as follows:

First defendants (30 per cent entitlement)	$600,000
Second and third defendants (30 per cent entitlement)	600,000
Fourth defendant (20 per cent entitlement)	400,000
Fifth defendant (20 per cent entitlement)	400,000
Total	**$2,000,000**

[130] The defendants already have the benefit of security for costs of $200,000 that has been lodged in cash. I direct that security is to top that amount up to $1,000,0000 by ***Friday, 30 August 2013***. The extent of security is to be increased from 15 January 2014 by a further $1,000,000, making a total available of $2,000,000.

Inclusion of claim for Hunter Hall

[131] In her judgment of 1 August 2012, French J directed a division of the issues to be resolved at the first trial from those that would be addressed at a second trial. At that stage, the Judge contemplated that the plaintiff's solicitors would identify subgroups of the opted in shareholders, defined by the circumstances of their reliance on the prospectus, or other relevant interaction with the defendants.

[132] The scope of issues to be determined at the first trial, reflecting an eventual consensus on the extent of common issues, took some time to be settled. Various aspects of the definition of issues appear to have been before her Honour from December 2011 until August 2012.

[133] In June this year, counsel for the plaintiff signalled that the plaintiff does not intend to identify such subgroups, ostensibly on the basis that differences in the circumstances of reliance ought not to be relevant to the claims for any of the opting in shareholders. Instead, they have sought consent to vary the scope of the first trial, to include within it the claims of an Australian institution, Hunter Hall, in respect of three funds managed by it, which appear in combination to have been the largest single subscriber for Feltex shares and therefore the largest of the claimants among the opted in shareholders.

[134] The feasibility of preparing for the fixture allocated in my minute of 19 March 2013 depended on the scope of issues that was treated at that stage as being settled. It has only been after that occurred that counsel for the plaintiff signalled the abandonment of the arrangement to identify subgroups of investors, for the purposes of organising the range of issues that might apply at a second trial.

[135] I acknowledge that French J had reserved the prospect for the plaintiff to apply to vary the definition of issues to be argued at the first trial. However, from the progression of her analysis on the scope of issues, it is not apparent that her Honour contemplated a change in the scope such as is now proposed, in introducing a second claimant whose entire claim would be determined at the first trial, along with Mr Houghton's. Rather, it was contemplated there might have been alterations to the scope of common issues, a determination of which would create a *res judicata*. Those variations would arise in the context of Mr Houghton's claim. I am not persuaded that the present initiative to add Hunter Hall's claim was the type of variation of issues for the first trial that the Judge contemplated.

[136] In advancing argument on the present application, Mr Forbes described the rationale for including Hunter Hall as aiming for a substantial judgment in terms of quantum from the first trial, if the claims were successful, rather than what is likely to be treated as a nominal judgment for Mr Houghton's modest level of loss. Defendants' counsel raised a concern that a second shareholder should not "queue jump" over all others, as it would create a risk that if a successful plaintiff at the first trial obtained a substantial judgment and enforced it, the solvency of the defendants would be affected. Thus, that plaintiff might achieve an advantage over remaining claimants. Mr Forbes deflected this concern by advising that an arrangement is in place for all opted in shareholders to participate equally in the net proceeds received at any stage, so that Hunter Hall would not be stealing a march on the remaining shareholders.

[137] Mr Forbes submitted that it was consistent with the arrangements for pursuit of a representative claim that a second shareholder's position be considered at the first trial, to broaden the basis for the Court's evaluation of the claims, and to have a broader basis for considering the common issues on which the first trial is intended

to provide *res judicata*. He firmly resisted the concept that to achieve such status, Hunter Hall ought to seek joinder as a plaintiff, and only participate if such an application was granted. Mr Forbes did not invoke any High Court rule as affording jurisdiction to make the order he sought, and rather urged that it was appropriate in exercise of the Court's inherent jurisdiction.

[138] Counsel for various of the defendants disputed that the Court could exercise inherent jurisdiction in this regard when to do so would arguably be contrary to other specific provisions in the rules.

[139] Mr Forbes did invite analogy with the draft provisions in the Class Actions Bill. In supervising a representative action, the Court endeavours to craft a procedure that optimises the prospects for fair trial, and balances the interests of all parties. That aim justifies a liberal approach to the scope of the Court's inherent jurisdiction (at least unless and until greater definition of the procedure is provided by class action rules). In each case, the Court will have to focus on the individual circumstances of all those involved in a representative action.

[140] In the context of this case, the proposal lacks proportionality and common sense. The proceedings involve a representative action that has been underway for more than five years, using a small individual shareholder with a $20,000 claim as the sole plaintiff. Now, some eight months out from trial, the proposal is that Mr Houghton should carry with him an institutional investor with claims apparently quantified at more than $17 million to claim judgment on that claim under the skirts of a small retail investor.

[141] There is also an inconsistency in Mr Forbes' argument that the Court should broaden the claims to include Hunter Hall, on a basis that Hunter Hall would not be subject to any of the usual disciplines that go with being a plaintiff in High Court proceedings, particularly liability for adverse costs awards. His insistence that Hunter Hall should not become liable for costs was at odds with his arguments opposing the need for any further security for costs, beyond the existence of the ATE policy. If Hunter Hall shared Mr Forbes' view that the ATE policy provided a complete answer in all circumstances to indemnify a plaintiff in the event of adverse

costs orders, then Hunter Hall ought logically to be indifferent to being treated as a plaintiff.

[142] Within the context of this case, the disproportionality of Mr Houghton carrying with him a significant institutional shareholder of Hunter Hall's scale would not be consistent with the manner in which representative actions should be managed. I would not permit Hunter Hall to pursue its substantive claim at the first trial unless it was joined as a plaintiff.

[143] As to whether it might now be appropriate to permit Hunter Hall to be joined as a plaintiff, assuming solicitors for the plaintiff opted for that alternative on the rejection of their primary application, the decision would rest on fair trial considerations. All defendants' counsel indicated they would oppose Hunter Hall's joinder as a plaintiff on the basis that it is too late, there is too much to do in a timetable in which there has already been slippage, and undue prejudice would be caused to the defendants if they had now to prepare a defence to Hunter Hall's separate claim.

[144] Weighing those concerns as best I can, I incline to the view that they were somewhat overstated, but certainly cannot be dismissed.

[145] I also acknowledge the potential advantages, in assessing the range of common issues to be determined, of having before the Court the circumstances of another shareholder, who might be seen at the opposite end of a continuum of shareholder circumstances from Mr Houghton, even if only as a matter of context. However, to that extent, there is no impediment to Mr Houghton calling evidence of a range of circumstances for other shareholders, to the extent those circumstances are relevant to a determination of the common issues, or indeed the individual issues raised by his claim.

[146] I accept the concerns raised for various of the defendants of the need for an adequate pleading of Hunter Hall's claim because the circumstances of its commitment to subscribe for shares (ie in an institutional book build) were different from Mr Houghton's. As an institutional investor, its own knowledge base, ability to

analyse statements made both in the offer documents and otherwise on behalf of the defendants renders its position as a claimant different in relevant respects from that of Mr Houghton. Once the terms of its pleading were resolved, there would also be a requirement for discovery. To the extent that Hunter Hall documents have been disclosed in relation to the prospect of evidence from a representative of the firm, Mr Olney submitted that the existing list of 29 documents for disclosure, only four of which were produced internally, appeared implausibly small for an investment on this scale by an institution.

[147] The defendants are not unrealistic in projecting the prospect of interrogatories. Counsel also foreshadowed likely arguments about the identity of the Hunter Hall companies or funds that were able, if at all, to make out claimed losses.

[148] For these reasons, if the present application were to be treated in the alternative as an application for joinder of Hunter Hall as a plaintiff, then I would not accede to it.

Costs

[149] I invite memoranda, but am content for costs issues to be deferred until after the further hearing on 6 August 2013.

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
Jones Fee, Auckland for fourth defendant
McElroys, Auckland for fifth defendant