IN THE SUPREME COURT OF NEW ZEALAND SC 135/2016

BETWEEN **ERIC MESERVE HOUGHTON**
Appellant

AND **TIMOTHY ERNEST CORBETT SAUNDERS**
SAMUEL JOHN MAGILL
JOHN MICHAEL FEENEY
CRAIG EDGEWORTH HORROCKS
PETER DAVID HUNTER
PETER THOMAS
JOAN WITHERS
First Respondents

CREDIT SUISSE PRIVATE EQUITY INC
Second Respondent

CREDIT SUISSE FIRST BOSTON ASIAN MERCHANT PARTNERS LP
Third Respondent

FIRST NEW ZEALAND CAPITAL
Fourth Respondent

FORSYTH BARR LIMITED
Fifth Respondent

Hearing: 5 April 2017

Coram:	Elias CJ Arnold J O'Regan J
Appearances:	P A B Mills and G R Abdale-Weir for the Appellant D J Cooper and S V A East for the First Respondents J B M Smith QC and A S Olney for the Second and Third Respondents D H McLellan QC and J S Cooper for the Fourth Respondent D P Turnbull for the Fifth Respondent

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CIVIL APPEAL

MS MILLS:

May it please Your Honours I appear with my learned friend junior Mr Abdale-Weir.

ELIAS CJ:

Thank you Ms Mills, Mr Abdale-Weir.

MR COOPER:

May it please Your Honours Cooper with Ms East for the first respondents.

ELIAS CJ:

Yes Mr Cooper, Ms East.

MR SMITH:

May it please Your Honours Smith with Mr Olney for the second and third respondents.

ELIAS CJ:

Thank you Mr Smith and Mr Olney.

MR McLELLAN QC:

If the Court pleases McLellan and Ms Cooper for the fourth respondent.

ELIAS CJ:

Thank you Mr McLellan and Ms Cooper.

MR TURNBULL:

If the Court pleases Turnbull for the fifth respondent.

ELIAS CJ:

Thank you Mr Turnbull. Yes Ms Mills. Well in accordance with the minute that's been issued, we're expecting you to conclude your submissions in 30 minutes and then I understand that other counsel will have worked out how they're to allocate the time that's available to the respondents, is that right?

MR COOPER:

It is Your Honour, we've done it by topic rather than time but we've allocated between ourselves.

ELIAS CJ:

Good, excellent. Yes Ms Mills, and bearing in mind we're not trying to engage with the merits here, we want to know why we should grant leave or refuse leave.

MS MILLS:

As Your Honour pleases. The appellant seeks leave to appeal to this Court for himself and on behalf of the qualifying shareholders. The appellant's case is that Feltex prospectus contained an untrue statement both at the date of registration as well as at the date of allotment. The untrue statement is the forecast sales revenue found at pages 82, 81, 82 and 85 of the prospectus. At page 81 the prospectus discloses that the sales forecast for the second half of the year was $159,100 million. Actual sales from 1 January to 31 March were $70,108 million and these are included in those sales. The forecast for the offer period was just under $89 million. The budget for the same period to

31 March however was $256,777 million. Actual sales were $239,581which was 95% of the budget. The forecast and the budget for the offer period was substantially the same and this was acknowledged by the CFO Mr Tolan in cross-examination. The directors were aware of the problems with the forecasting sales and that's recorded in page 89 of the judgment. And given the failure to meet the budget to 31 March where only 93% of the budgeted sales were achieved, the continuing failure to meet the April 4 forecast which only achieved 81% of sales should have been a matter of serious concern to the directors. It demonstrated a clear inability of the management to adequately forecast sales. As recorded in the group operating report for April 2004 there is no doubt that we got the calendarisation of the month wrong compared to last year with Easter, ANZAC Day and school holidays. That inability to adequately forecast sales continued throughout the forecasting projection period and ultimately the company collapsed due to lack of sales and the inability to achieve figures that were hopes rather than reality. The basis for the appellant's case that the forecast sales revenue was an untrue statement at the date of registration is set out in the written submission. In essence the argument is that the statement was untrue because the word untrue should be given its natural meaning as well as its extended meaning given by section 55 of the Securities Act 1978 and the prospective financial information on page 85 of the prospectus was an untrue statement because it was an opinion which did not contain material information or the special trade factors and risks that are required by the Securities regulations schedule at clause 9. And the prospectus failed to disclose that the risk that the sales forecast might not be met had actually already eventuated and that the risk had arrived.

The statement in the prospectus could not be a true statement at the date of the registration as the revenue generated in April 2004 was only 81% of the forecast for that month.

ELIAS CJ:

Ms Mills I'm reluctant to interrupt you but you're really engaging with the merits of the appeal if leave is granted. I think we understand the allegations

and the contentions of the parties. You really need to concentrate on why we should be granting leave in the case, given the concurrent findings of fact in the lower Courts and the other matters that have been raised including the changes in legislation and matters which might or which the respondents indicate, mean that it's not a matter of public importance for us to give leave.

MS MILLS:

Yes Your Honour. If I could turn to section 33 of the Securities Act Ma'am the – irrespective of whether the statement was untrue at the date of registration or became untrue during May 2004 the offer continued to be made until 2 June 2004 and accordingly section 33 of the Act applies. The offer was prohibited unless the registered prospectus complied with the Act and the regulations. The statement is untrue because it was misleading in the form and context in which it was included and disclosure of the underlying adverse events and trends in the business and eventuality of the matters stated to be, that were stated to be only risks were not disclosed. It is also untrue because it was a wrong statement.

Section 33(1) provides that the offer, no security should be offered to the public for subscription by or on behalf of an issuer unless the offer is made or accompanied by a recent prospectus that complies with this Act and regulations. Now implicit in section 33 is the concept that a registered prospectus may not comply with the Act.

ARNOLD J:

Just repeat that, what did you say then?

MS MILLS:

Implicit within section 33 is the concept that a registered prospectus may not comply with the Act and regulations.

ARNOLD J:

I see.

MS MILLS:

What I'm arguing is that the registrar of course will register the prospectus but if he has no knowledge of those material factors which the appellants submit should have been disclosed, then of course the prospectus is registered but it doesn't comply with the Act. So arguably a registered prospectus can make an untrue statement and still comply with the Act but only if that statement was not misleading. An untrue statement breaches clause 9 of the schedule to the Securities Regulations if it does not provide the required material information and –

ELIAS CJ:

Sorry, what are you referring to there?

MS MILLS:

I'm referring to clause 9 of the Securities Regulations, Schedule 1.

ELIAS CJ:

Yes.

MS MILLS:

If it does not provide the required material information and a of all special trade factors and risks that are not likely to be known or anticipated by the general public. The material information it is submitted that should have been included is the failure to meet budget, the failure to meet the forecast for April and May, and it was unlikely, or that it was unlikely to meet the forecast and the respondents were aware that Feltex would not meet the guidance given and expectations created at pages 81, 82 and 85 of the prospectus and in respect of the financial year '04.

The only disclosed risk was that the sales would continue to fall, which they did, and that bringing forward sales from the financial year 2005 and 2004 by offering extended credit sales would undermine the ongoing performance of the business in 2005, which it did.

I turn then to the structure of section 56 of the Securities Act and address the issues of reliance. The appellant's argument is that on a proper construction of section 56 reliance is limited to investing on the faith of the registered prospectus, that is the claimants in making an investment decision are entitled to rely on the fact that the registered prospectus complies with the Act and the regulations and that they have the necessary information to make the decision to invest. This interpretation of section 56 fits with the reality of how investors make their investment decision. As Lord Halsbury stated in *Arnison v Smith* (1875) 41 Ch D 348 a person reading a prospectus looks at it as a whole. He thinks the undertaking is a fine commercial speculation. He sees good name attached to it. He observes other points which he thinks –

ELIAS CJ:

Is this submission directed at saying that the Court of Appeal and the High Court were wrong and to say that you cannot find a statement in a prospectus as a whole. Is that what this submission is directed at?

MS MILLS:

The submission is directed at what is the reliance that's required for this particular –

ELIAS CJ:

Well what's the error in the Court of Appeal hearing that this is addressed to. I think it is that it was said that you cannot, that you have to identify a discrete –

MS MILLS:

Untrue statement.

ELIAS CJ:

Untrue statement. That's what this submission is directed at is it?

MS MILLS:

No, it's directed at what is the reliance that is required by the shareholders.

ELIAS CJ:

I see, the on the faith of.

MS MILLS:

On the faith of the prospectus.

ELIAS CJ:

Yes, yes.

MS MILLS:

So that a shareholder invests on the faith that the prospectus complies with the Act and makes all the proper disclosure that's required to be made. They don't actually specifically invest on the specific statement.

ELIAS CJ:

On the fact of the registered prospectus?

MS MILLS:

On the fact of the registered prospectus.

ELIAS CJ:

Yes.

MS MILLS:

Because as Lord Halsbury states they don't look at anything apart from the whole prospectus and think it's a good investment and so the submission is that investing on the face of the prospectus is trusting in the truth of the prospectus as a whole document and subscribing in reliance on the fact that the prospectus is compliant. And this is supported by the decision of His Honour Justice Richardson in –

ELIAS CJ:

But again you're not trying to convince us of this at the moment, you're simply trying to identify a matter that's arguable and that warrants a decision of this Court –

MS MILLS:

Yes Ma'am.

ELIAS CJ:

– so if you could try and identify for me what the points are that you say we should give leave on and why they are matters of public importance that should be considered by the Court, that would be, that would be particularly helpful.

MS MILLS:

The problem facing the appellant and the qualifying shareholder is that the stage 1 trial dealt solely with Mr Houghton's claim and his case was advanced on the basis of a but for argument as to loss and on the basis that indirect reliance or direct reliance was not required. The defendants advanced their case on the basis that actual reliance was required. Agreed and as directed by Her Honour Justice French, reliance, causation and loss were not common issues and so are not binding on the qualifying shareholders, the claimants. The loss and of course the High Court made no finding as to loss because they, because His Honour found that there was no untrue statement; that not that there was one, no untrue statement that would not have caused loss but that there wasn't an untrue statement in the prospectus. The Court of Appeal of course have found that there is an untrue statement but have then introduced a new concept which is a reverse reliance based on the notion that only a notional investor test applies, an objective test applies to reliance. My argument is that that test cannot be binding on the evidence, on the common, on the qualifying shareholders because in fact their case was never advanced on the same basis as Mr Houghton's case. So –

ELIAS CJ:

Are you making a more general submission that Mr Houghton's case too should not have been subject to that test or are you simply saying that the other, that the shareholders in part 2 of the litigation?

MS MILLS:

What I'm saying is that the Court of Appeal was incorrect in rejecting the but for argument as to causation and that Mr Houghton should have been entitled to have gone forward with his argument as to loss.

ELIAS CJ:

Yes.

MS MILLS:

And in respect of the qualifying shareholders it goes further than that and says if Your Honours were to find that there was that but for causation is not the way to go, then they're still entitled to argue their tortious liability as to loss, because they – each group of shareholders will be in a different category from another. We will have shareholders who've not invested at all, that someone else has invested using their managed portfolio. Their managed portfolio compliance is with Forsyth Barr or that some will have spoken to brokers and brokers will have recommended and given them advice and they will have relied on that advice and so it's all the different categories of shareholders need to dealt with at the stage 2 trial, that is why we say leave should be granted and if Your Honours were to find that the but for test does not apply. Because the case was put forward on the basis that this is a stage 1 trial of Mr Houghton's claim and that is, the common issues that were identified in the list which is in the bundle before Your Honours and it's that, those are the common issues, those are the ones that bind the shareholders and the Court of – what I'm saying is the Court of Appeal went beyond their remit in finding that the common issues, finding that the shareholders had no claim because they had not suffered a loss, when that was never a matter that was put before the Court at the first hearing.

So in terms of reliance we're submitting that the but for test applies because of rule, because of section 33, not because of section 34 and 37 of the Act which is the two sections that the Court of Appeal relied upon to say that there was, that but for did not work. But the point of section 33 is that the offer may not be made and that offer was still extant as at the date of allotment so it was

a prohibited offer according to the arguments that are put forward by the appellant and but for the making of that offer these people would not have suffered the loss so that is the causation argument.

O'REGAN J:
Is that based on the Court of Appeal's finding that the forecast sales figure was, as I understand it they were saying it was accurate when the prospectus was filed but it became inaccurate by the time of the allotment, is that, have I understood that correctly?

MS MILLS:
My understanding of the Court of Appeal judgment is that there is no specific finding that it was accurate at the date of registration.

O'REGAN J:
Well they changed the judgment didn't they?

MS MILLS:
They did change the judgment but they did not – if you go to the judgment the finding is that – there's a finding that the directors were aware of the sales problems as at April – as at the date of registration. So they knew from –

O'REGAN J:
So does your application for leave require – if we give leave you'd be asking us to reverse the Court of Appeal finding that it only became inaccurate at allotment?

MS MILLS:
No, what I'd be arguing is that it's an untrue statement as at the date of registration because it failed to comply with the Act and the regulations and while the directors may have had an opinion that this was a, that sales would be made up in May, the failure to actually comply with the Act and provide the material information about the problems with the budget and the forecast and

the fact that the budget and the forecast were substantially the same, that on that basis that it was an untrue statement as at the date of registration.

ELIAS CJ:

Well isn't your real quarrel with what the Court of Appeal did in this area with its requirement of materiality?

MS MILLS:

Yes it is.

ELIAS CJ:

Yes.

MS MILLS:

Yes the argument put forward for the appellant is that there is no requirement for the untrue statement to be material or to affect the decision to invest. The issue once you have an untrue statement within the prospectus is what is the quantification of the loss that flows from the untrue statement.

ELIAS CJ:

Yes. Well and although people are talking the language of causation there are a number of linkages that are required by this legislation, the first being whether on the faith of introduces some notion of reliance, the question of whether an untrue statement must be material to the investment which is also a causative query, and then there's the quantification of loss assessment which I think on your argument isn't actually reached here.

MS MILLS:

That's correct.

ELIAS CJ:

In which the "but for" analysis that you had urged for is directed at. Whereas it's being used in terms of the linkage at an earlier stage, on the liability stage I suppose rather than the quantification of loss stage.

MS MILLS:

Well the appellant's submission is that the plain words of the statute should be given their plain and ordinary meaning.

ELIAS CJ:

Yes, I see.

MS MILLS:

And this Court has certainly found that in terms of section 33 and the *Hickman v Turner and Waverley Ltd* [2012] NZSC 72, [2013] 1 NZLR 741 decision Your Honours and there is no reason why the plain and ordinary words of this statute in relation to section 33 and 55 and 56 should be given a gloss or an additional factor. There's no need for it because the concept of this statute is that registration gives people comfort that they can rely on that particular document, that it contains –

O'REGAN J:

I think we know what the argument is. I guess in the remaining time what we need to know is why we should give it leave to be aired given the changes in the legislation and the argument that it wouldn't make any difference.

MS MILLS:

Well in terms of the grounds for leave, I would submit that in fact the obligations under the Financial Markets Conduct Act 2013 are substantially similar to the structure of the Securities Act. The extent of the obligations on issuers and vendors to provide prospective investors information is of importance to the entire investment community, and while it's become the norm since 1983 that prospective financial information would be provided, both the Securities Act and its regulatory regime, and the new financial markets regime, caution against this practice should its intention be of the effect to mislead. What is required is that a statement of cash flows, in an IPO, a statement of cash flows is provided to show the public where their money is going to be used. To go beyond that and predict the future of, a

future with prospective financial information puts a large onus on the issuer to be meticulous, not deceptive, and to be forthcoming. While the security –

ELIAS CJ:
So you have made the submission that in your written submissions that the new legislation doesn't change matters but you haven't really expanded on that to –

MS MILLS:
I was about to turn to that Ma'am.

ELIAS CJ:
Thank you.

MS MILLS:
I was going to direct Your Honours to section 101 of the Financial Markets Conduct Act which, subsection (2), which provides a contravention of a listed provision may give rise to civil liability, and subsection (3)(g) makes a contravention of section 82 of the Act false, which relates to false or misleading statements, omissions and new matters requiring disclosure, actionable. Section 82 of the Act relevantly provides that an offeror must not offer, or continue to offer, financial products if there is a statement in the PDS that is false or misleading or is likely to mislead, or an omission from a PDS of information that is required to be contained in a PDS. What is materially adverse is form the investor's point of view section 82(2) and (3) provide for the purposes of this section a statement about a future matter including the doing of or refusing to do an act must be taken to be misleading if the person making the statement does not have reasonable grounds for making it.

The provisions of the Financial Markets Conduct Act are very similar in purpose and effect to sections 56 and 55 of the Securities Act, in my submission, which make untrue statements in a prospectus including statements that are deemed to be untrue under section 55 actionable by an investor. Statements about future earnings, including projections as to future

earnings, will almost certainly turn out to have been wrong and as such to have been untrue and false or misleading. Whilst civil liability can attach to an issue of the making of untrue, false or misleading statements, issuers of prospectuses or product disclosure statements must be very careful about making any statements at all about prospective financial matters in their offer documents. While the PFI expressly permitted for inclusion under the 2013 Act an equities security in an IPO is a little wider in scope than that expressly permitted under the, and for inclusion in a prospectus under the Securities Act. The statutory scheme remains essentially the same. And I refer, I see I've made up, I've lost my – gone past my 30 minutes.

ELIAS CJ:

Well complete this because I do, I would be assisted if you would explain why the Financial Markets Conduct Act doesn't render this analysis, the analysis that the Court of Appeal undertook moot.

MS MILLS:

Well one needs to look at table 1 in relation to the Financial Markets Conduct Act and it sets out there within table 1 the matters that are required to be disclosed and then similarly for table 3 which deals with the, with clause 38(2) of section 3 –

ELIAS CJ:

Sorry what are you referring to in table 1?

MS MILLS:

Sorry, table 1 is within, is clause 35 of schedule 3 of the regs, Financial Market Conduct regs, it sets –

ELIAS CJ:

Right, clause?

MS MILLS:

35.

ELIAS CJ:

Right.

MS MILLS:

In short table 1 can include prospective financial information for the forward looking statements but in doing so it is subject to clause 39 of the schedule and I'm submitting that the reg table 1 which in the Financial Market Conduct regs is doing the same job as regulation 9 of the Securities Act regulations. It sets out the information that is required. And similarly in respect of table 3 which is clause 38 of the regulations, the focus there is on metrics which is cash flow based and so –

O'REGAN J:

Yes but I think what we're focusing on here is the legislative scheme for liability rather than the details of the registration requirements, the offer document requirements.

MS MILLS:

Yes, what I'm submitting is that the test in relation regarding the inclusion of prospective financial information in a product disclosure statement is whether the, is substantially the same as the regs, as the regs under the Securities Act and so a decision on the basis of this case would be instructive in when one is looking at the interpretation of the regulations and the Act itself under the new Act because they are substantially the same and –

ELIAS CJ:

Well they cover the same general ground.

MS MILLS:

They cover the same general ground.

ELIAS CJ:

But they are expressed in different language and as you've said there's a concept of, I didn't quite follow it, but there's a concept of materiality in the

Financial Markets Conduct Act which doesn't appear in the Securities Act, is that right?

MS MILLS:
No I don't think that's, I don't think that's what I said.

ELIAS CJ:
I'm sorry then I misunderstood what you said.

MS MILLS:
What I'm saying is that the requirements under the Financial Market Conduct regulations are substantially the same as the requirements under the Securities regulations that while the language is different, the same obligations exist and so for this Court to issue a decision based on the interpretation of –

O'REGAN J:
But we're not being asked to make a decision about that, what we're looking at is the liability regime in the legislation itself. Is your argument that it's so similar that a decision in relation to liability under section 56 will be a precedent for cases in relation to liability under product disclosure statements?

MS MILLS:
And instructive, yes. Yes it is, that is my submission.

ELIAS CJ:
Well I don't think we're in the business of being instructive, we'd have to be convinced that it's worthwhile making any statement on it and that it's relevant but you're inviting us to compare the provisions and you say that they are comparable so that a determination on the basis of the Securities Act in this case will be relevant to the administration of the Financial Markets Conduct Act?

MS MILLS:

The Financial Markets Conduct Act specifically allows for prospective financial information to be included in a product disclosure statement. That however is not compulsory and the, importantly it's, importantly if it's likely to be misleading then the issuer can decline to make such a statement and to give a statement as to its reason why and it's that argument that's being forward by the appellants as it's substantially the same in relation to the Securities Act. There is no obligation to include prospective financial information in an IPO, the obligation in an IPO is to include the cash flow statements. That same obligation occurs within the financial markets regime so if you include PFI in a prospectus you must be very, very careful about the nature of the information that you provide, the disclosures that you make and the assessment of the risks because the party who is involved in making the investment decision has nothing else to look at apart from that prospectus or product disclosure statement. They are entirely reliant on the issuer being forthcoming and open about these matters and when you have, as we say, a substantial problem with your sales revenue which is one of the marketing terms that were done, that there should have been better disclosure.

ARNOLD J:

I wanted to just clarify another issue just so that I can understand what your position is. In the High Court you had a Fair Trading Act 1986 claim –

MS MILLS:

Yes.

ARNOLD J:

– and the Judge ruled that it couldn't stand with the Security Act –

MS MILLS:

That's correct.

ARNOLD J:

– a majority in the Court of Appeal took a different view and said if, a Fair Trading Act was available but on the basis of the '04 financial year, the misleading forecast, the misleading statement, it wasn't material. What I wanted to know was, was it argued in the High Court that the misleading course of conduct was issuing the prospectus with the various unsatisfactory elements that the High Court Judge accepted it had; adding to that of course the misleading statement that the Court of Appeal found. In other words was the focus of the argument under the Fair Trading Act on individual misleading statements or was it on the conduct of issuing this prospectus in the form that it was?

MS MILLS:

The argument advanced by my learned friend at the High Court was that that the prospectus as a whole was a misleading statement and that the prospectus contained misleading statements within it and the major focus of the argument was on the prospectus financial information for both 2004 and 2005. Their statement of claim has specific pleadings as to what was misleading. The only one which has been found to be misleading was the financial –

ARNOLD J:

Yes I understand that and that's the basis on which the Court of Appeal dealt with it. But you haven't made anything of this in your application for leave or in your submissions, so that does mean you don't wish to pursue that broader argument about the Fair Trading Act claim?

MS MILLS:

No, certainly it is my submission Sir. The submission that is made is that the Fair Trading Act, it's – the Fair Trading Act claim should be heard at a stage 2 trial, that there are findings of an, of misleading conduct and that the claimants themselves should be entitled to have their stage to a trial. That is certainly –

ELIAS CJ:

But what about the stage 1 appeal that's before us. Are you maintaining –

ARNOLD J:

Exactly, that's –

ELIAS CJ:

– in that, in this appeal?

MS MILLS:

Maintaining that?

ELIAS CJ:

That we should be looking at the Fair Trading Act?

MS MILLS:

Yes, to the extent that there are no findings of, in the High Court as to the Fair Trading Act because it's just dismissed and in the Court of Appeal there is the finding that there is misleading conduct but once again we have the problem that causation and loss are not common issues so there is no finding that is binding on the stage 2.

ARNOLD J:

I guess my point is that the misleading conduct that the majority of the Court of Appeal focused on is that single misleading statement. There seems to be no analysis or reference to an alternative argument that the misleading conduct was the issuing of the prospectus in the form that it was more broadly. And what I want to know is does that mean, if that argument was advanced at trial, is it – do you no longer seek to advance it in this Court?

MS MILLS:

Certainly we will seek to advance it in this Court, yes.

ELIAS CJ:

Well have you though, I mean I haven't picked it up from your submissions, perhaps you could just refer – tell us where you refer to it.

MS MILLS:

If I could just have a moment.

ELIAS CJ:

What would you be seeking in this Court, you'd be seeking a determination, would you, that the Fair Trading Act analysis should have been, should have gone ahead –

MS MILLS:

Yes.

ELIAS CJ:

– and should have been heard in the High Court?

MS MILLS:

That's correct. And findings made in respect of the Fair Trading Act.

ELIAS CJ:

So do you cover it in your written submissions because I've missed it if you have?

MS MILLS:

I thought I had but if I haven't then –

ELIAS CJ:

All right, well we'll come back to it –

O'REGAN J:

She could come back to it in reply.

ELIAS CJ:

– in reply if need be.

MS MILLS:

Thank you.

ELIAS CJ:

Thank you.

MS MILLS:

Does Your Honour have any more questions?

ELIAS CJ:

No thank you, Ms Mills. Yes Mr Cooper, you're being thematic did you say, what's your theme?

MR COOPER:

Your Honours I was going to start with the key point about causation and the but for argument. Address firstly a couple of preliminary points as to why in my submission it doesn't qualify for leave and then come back to the substance of the but for test which is advanced.

The two preliminary points, firstly this. Given the concurrent findings of the Courts below that any inaccuracy in the prospectus was immaterial, then whatever interpretation the Court adopts at section 56 ultimately it must lead to no different result. 56 is about a payment of compensation for loss.

ELIAS CJ:

But isn't that the issue that would be advanced if we give leave, whether the approach to materiality was in accordance with the Act because if it wasn't then you can't really rely on concurrent findings of facts can you?

MR COOPER:

Yes, Your Honour put to my learned friend the proposition that these concepts come up at different points in the process on the faith of, by reason of and then at the stage of measuring loss –

ELIAS CJ:

Yes.

MR COOPER:

– and there may be an argument as to at which point in those three stages materiality matters. I suppose the point I'm making now is –

ELIAS CJ:

Yes.

MR COOPER:

– that it must matter at one of the three stages.

ELIAS CJ:

Well I would accept that, I would have thought that it definitely arises when you're assessing loss although there may be an issue as to what the focus of materiality is at that point and whether the statutory scheme is that in the absence of some other cause of the loss there is sufficient connection established, it's sufficiently material?

MR COOPER:

If however the finding of immateriality –

ELIAS CJ:

Yes.

MR COOPER:

– that the current findings limit materiality are that the, well indeed my submissions that they are, that the investment decisions would be no different had a different forecast been given, so the criticism was that the company

achieved only 97.7% of its revenue rather than a 100 even though it exceeded –

ELIAS CJ:
Yes.

MR COOPER:
– the profit. The submission is that would not make any difference to an investment decision because it doesn't affect the value of the shares which is the reasoning in the High Court and accepted in the Court of Appeal –

ELIAS CJ:
Yes, I – yes.

MR COOPER:
– then ultimately –

ELIAS CJ:
I accept that that's right but my question is should the question whether they were right in taking that approach to materiality at the beginning, as it were, whether that is right because I suppose it's arguable that the concept here is something much, the linkage is a much weaker connection.

MR COOPER:
I understand that point Your Honour and I was going to come back to –

ELIAS CJ:
Yes, that's fine.

MR COOPER:
– that, my preliminary point though was that if immateriality will ultimately mean that at one of the stages of the enquiry there can be no compensation because, either because we don't get past 56 or because if we do there's no loss, then ultimately it can make no difference to the outcome of the claims.

ELIAS CJ:

Yes except loss hasn't really been looked at and if you take the view which I would have thought was open to be argued, that in the statutory scheme you're looking for almost other explanations of loss, that's the causal link that is required and therefore it is more of a but for analysis, then that would affect whether you could do that in a pre-emptory way would be a question?

MR COOPER:

Yes perhaps I'll come back to that aspect when I get to –

ELIAS CJ:

Yes thank you.

MR COOPER:

– the scheme. The second preliminary point was really the question of whether any of this matters in the sense of the criteria for leave, given the current legislative regime –

ELIAS CJ:

Yes.

MR COOPER:

– I wanted to run through the relevant provisions of that if I may?

ELIAS CJ:

Yes thank you.

MR COOPER:

So the, we have extracts from the current legislation, the Financial Markets Conduct Act in what is volume 3 of the respondents' documents under tab 11. These are only extracts but if I, the full Act is very long, but if I may start at section 82 which Your Honours will find if we use the page numbering at page 79. My learned friend referred to this, so this is her prohibition on false or misleading statements and the relevant ones I wanted to take

Your Honours to is 82(1)(a) which is refers to a misleading statement, or a statement that's likely to mislead in a document. From current purposes (a)(1), (2), (3) are the same but then there's an additional requirement in (b), the matter referred to in paragraph (a) is materially adverse from a point of view of an investor.

ELIAS CJ:
Sorry where's that?

MR COOPER:
82(1)(b) Your Honour.

ELIAS CJ:
(b) I see, yes thank you.

MR COOPER:
So the point that the applicant seeks to pursue by appeal is whether there is a materiality element at this stage of the enquiry, the equivalent of 56 and that is no longer a live issue under this legislation because it's expressing indeed what the, I suppose the legislation does is enact a regime which is the same as how the Court of Appeal interpreted 56 but that issue of interpretation no longer arises because it is expressed.

There is a definition of materiality, not of the phrase "materially adverse" but it may be interesting to look at, nonetheless, which is section 59 back a couple of pages in the extract at page 70. What's been defined there is the phrase "material information" which is slightly different than the materially adverse but perhaps would guide the meaning of materially adverse and it's the same type of materiality again as the Court of Appeal adopted. But once again when it comes to be interpreted in this legislation it will be in the context where Parliament has addressed the meaning of the concept.

In terms of compensation for a breach of section 82 one then turns to section 494 which is at page 261 of that extract.

ELIAS CJ:

Sorry what page?

MR COOPER:

261. And this is just establishing, when a compensation order can be made, "Where there's a contravention of the civil liability provision; and a person has suffered or likely to suffer loss of damage because of the contravention." 491(b), now to understand the meaning of that, one goes to 496 over the page where a person is suffering loss or damage in a case of defective disclosure and this is a deeming provision 492, if a person acquires financial products where there's been a contravention of 82, so that is the materially adverse misleading statement and 496(2)(b) the product had declined in value. Then 496(3), "The person is treating as having suffered loss or damage because of the contravention unless it is proved," otherwise so a rebuttable presumption that any decline in value arises from a materially adverse misleading statement. The issues of interpretation that arose in this case simply don't arise under that regime.

ELIAS CJ:

No but they're not – yes but, but that is in part because this regime deals with the issues, it's not that it casts doubt on or supports without more the interpretation in the Court of Appeal, does it?

MR COOPER:

No I agree with it entirely Your Honour but my point is rather that interpretation of the Securities Act is not going to be of benefit when in subsequent cases parties come to apply this legislation which is the relevant criteria for leave.

So if I could come back and briefly deal with the substance of the but for test, if nonetheless I've just submitted to Your Honours leave is granted, why the but for test in my submission couldn't succeed.

ELIAS CJ:

Sorry just on public interest, is there – I can't remember if there's an indication of the number of affected people in this case?

MR COOPER:

There is in the appellant's submission a number of opted in shareholders, I can't recall the number but it's somewhere between –

ARNOLD J:

About 3600 and something.

MR COOPER:

It's certainly in the 3000s. Our submission on that Your Honour is that they are not, the public interest concept as applied at this Court and leave hearings before, has been not on the parties to the proceeding or the people directly affected by the Court's finding of a proceeding but rather on the public generally and we do address that in our written submission with a citation to that authority. Perhaps I'll, someone else will find the reference for me and I'll come back to –

ELIAS CJ:

No, I do recall – you referred to one of our leave decisions I think.

MR COOPER:

Yes, it's in paragraph 32 of our written submissions Your Honour.

ELIAS CJ:

Right, thank you.

MR COOPER:

In relation to but for, we rely in essence on the word, not the words of section 56 and they have been debated in the submissions and the arguments in that are really encapsulated in the reasoning of the Court of Appeal which we submit is correct but perhaps there's not much more to say

on that. That will obviously be an issue if the appeal is granted. I don't want to tend to argue the merits of it but except perhaps to add one other concept. Obviously the argument, the reasoning of the Court of Appeal turns on the words "by reason of" connecting the loss to the untrue statement and we say that is an important connection. We say also that's consistent with the use of the word "compensation" earlier in the section, that to compensate, the language of compensation is about making amends for an injury caused by a wrong. The but for analysis for which the applicant contends is really one which leads to a remedy, effectively repayment in the entirety of the subscription, unconnected to the wrong, that is the untrue statement which is in this case an immaterial untrue statement given the concurrent findings.

As to the scheme of the Act, I did want to run through sections 33 and 37 because I think that they lie at the heart of the applicant's analysis. The Act, the Securities Act is at volume 3, tab 9 of the respondents' bundle and if I can just start at section 33 because this is the one my learned friend relied on. It's page 56 of the legislation. What 33 has is a prohibition on offering securities to the subscription, it doesn't deal there with allotment and it's the section which requires there to be a prospectus and for the prospectus to comply with the Act. We then go forward to 37 which is the provision dealing with when an allotment of security is void. It provides – it's dealing with the allotment points, so whereas 33 is a prohibition on offering at the start of the process, 37 goes to the end of the process at allotment. And it says, "No allotment of a security is to be made unless at the time of the subscription for the security there was a prospectus." So, and it's a breach of 37 which leads to the consequent 37(1) which leads to the consequences in 37(4), (5) and (6) which is the *Hickman* case, that if you offer the security and you have no prospectus then the subscriptions are repayable. That's the void part of the Act.

The other concept that that Act has is one voidable allotments and we can see the start of that at section 34. "No registered prospectus shall be distributed," so this again looking at the start of the process rather than the allotment, "by or on behalf of an issuer," and (b) is, 34(1)(b) is the relevant one for our

purpose, “If it is false or misleading in a material particular by reason of failing to refer, or give proper emphasis, to adverse circumstances.” And then the equivalent of 34 at the point of allotment is found in 37(a) and to get to 37(a) you need to go forward some way to page 73 and it provides, “No allotment of a,” sorry – the allotment point of a security offered for subscription shall be made earlier than 37A(1)(b) mirrors the wording that we saw earlier in 34(1)(b). And if that occurs then the consequences are found over the page on page 75, 37A(3), it’s voidable by notice from the subscribers, so not void now but void when the notice is given. The notice has to be given within the prescribed period which we see in 37A(4), one year or six months or one year, depending on other circumstances and then in 37A(6) and (7), once a notice is given then there’s a repayment obligation for the subscriptions and if it doesn’t occur from the issuer then other parties, including the directors, become liable for it.

So there’s a distinction in this part of the Act between allotting a security with no prospectus at all, in which case as in *Hickman* money is repayable. Allotting with a materially misleading statement known to the directors to be materially misleading and a notice given and then repayment. That’s the context in part 2 of the Act which then, in which we then should read 56 and 55 and 56 which is dealing with a different issue, that is compensation for loss caused by an untrue statement. If the applicant’s interpretation of 56 were correct that any misstatement leads to a refund of subscriptions without considering materiality or reliance or loss, then the voidable regime under 37A would serve no possible purpose. Why add requirements that there’d be material, if the untrue statement be material that the directors know of it and that the subscriber given a notice within a prescribed period, if you can automatically get there anyway on a but for approach to section 56. That’s why we say that the scheme of the Act when seeing 56 in that context in part 2 of the Act suggests that the interpretation of the Courts below is correct. Namely that whereas 37 and 37A provide for a refund of subscriptions for a void or voidable allotment 56 was concerned with compensation for loss actually caused by an untrue statement.

ELIAS CJ:

Sorry but you don't have to have had any loss in the case of the repayment provisions, is that right?

MR COOPER:

Yes Your Honour, indeed if the security had not declined in value at all one could still –

ELIAS CJ:

Yes, exactly.

MR COOPER:

Yes so they are provisions which don't look to the effect of the untrue statement, they simply look to – well in the voidable aspect they are triggered by a material untrue statement but they are not concerned with the effect of that on the value of the security. They provide automatic consequences if the circumstances described in 37 and 37A exist.

ELIAS CJ:

I'm just querying I suppose the extent to which that context precludes a more generous interpretation of sections 56 and 57.

MR COOPER:

55 and 56.

ELIAS CJ:

55 and 56 yes.

MR COOPER:

In my submission Your Honour it suggest that 55 and 56 are concerned with compensation awards that –

ELIAS CJ:

Well they'd have to show loss –

MR COOPER:

Yes.

ELIAS CJ:

– and there's no doubt about loss here. Anyway I understand that, the argument you make.

MR COOPER:

Thank you Your Honour. Probably I've taken as much of the allotted time for the respondents as I need to, unless there's questions on that part of our submissions I –

ELIAS CJ:

No.

MR COOPER:

– that's all we had to say.

ELIAS CJ:

Who's next, you are Mr Smith?

MR SMITH QC:

Yes if the Court pleases, having heard what Mr Cooper has said and the only matter which I wanted to address in addition to that and albeit very briefly is the question of the represented persons and the issue of whether or not reliance was the common issue between all of the members of the represented class and the defendants or not. Now in essence what happened in the proceedings to date is that in the High Court the plaintiff of course lost in toto and then in the Court of Appeal managed to obtain a finding that the FY04 forecast was an untrue statement, but he nevertheless failed on appeals. The Court of Appeal held that the statement was immaterial. It's not the purpose of my submissions now to get into what is material and immaterial because that's already been canvassed and is canvassed in our submissions. But on that basis the applicant now effectively on behalf of other members of

the represented class says that while that might have disposed of Mr Houghton's claim, it doesn't dispose of the claims of the other represented shareholders, and they say that's because reliance wasn't a common issue to be determined between the represented claimants and the defendants at trial or appeal. So that is why, at least as I apprehend it, the appellant, or applicant, seeks an order under clause 6, or paragraph 6.3 of its notice of application for leave to appeal, directing, in other words asking the Supreme Court to direct a stage 2 trial for the represented shareholders in respect of the Securities Act and Fair Trading Act claims. So what the plaintiff, or applicant has in mind is that by virtue of such a direction they would have the remainder of the class go back to the High Court and seek to prove their claims presumably only in respect of, or potentially only in respect of the untrue statement, and each of them would be envisaged to give evidence, either –

ELIAS CJ:
And also the Fair Trading Act argument apparently.

MR SMITH QC:
They would argue under both sets of legislation, yes, that's right.

ELIAS CJ:
Yes, that's true.

MR SMITH QC:
I assume so. For the purposes of the argument I'm making now I'll just assume that, and presumably what they would be envisaging is that one by one, or presumably in blocks if they could be classed into sub-blocks, they would give evidence of actual or subjective reliance on in particular not just the prospectus, not just the FY04 forecast, but a particular line in the FY04 forecast, namely the forecast sales, and one would expect them to say, well I read this and here's my copy of the prospectus, I underlined it and underscored it and that, in contradiction to other things, was an operative cause of my decision to invest or not as the case may be. Now we say that

the applicant for leave oughtn't to be able to proceed in this Court on that kind of basis for three reasons and the first, and least complicated, and perhaps clearest, is that essentially the applicant is restricted to seeking leave to appeal and conduct appeal which overturns a judgment of the Court of Appeal. It can't seek a procedural direction as to whether and how to go about a further attempt or assault on the ramparts in the High Court. Certainly with or without such a direction it can attempt to go to the High Court re-enliven these proceedings from that point of view but it's not open to the applicant to ask for some form of advisory assistance from the Supreme Court. They have to make what they will of the Court of Appeal judgment, unless they're seeking to overturn it. If they're overturning it, well and good. So for that reason alone the entire issue about the represented class of persons isn't, in my submission, something which is apt for leave.

The second point, and which I'm a little reluctant –

ARNOLD J:
Just on that point, the Court of Appeal did say at 33 of its judgment that unless Mr Houghton was successful on appeal, there will be no need for the second stage of the hearing. So in the face of that how could you go back to the High Court and ask it to conduct one?

MR SMITH QC:
It's an observation rather than a finding that the entire matter can't proceed. That's all it is.

ELIAS CJ:
Well you wouldn't object to an observation by this Court that they can go back to the High Court?

MR SMITH QC:
Well, and when they did it would be dealt with there. The other difficulty that faces the applicant for leave is that it may well have been that the question of reliance wasn't a common issue but when it came to the Court of Appeal what

happened was that it was decided not on the basis of the evidence which was adduced, in fact there was no evidence of reliance from the particular claimant, Mr Houghton, on that part but rather appropriately on an objective test and that is the second reason why it becomes impossible or at least almost impossible for anything further to be done in the High Court. I can simply take –

ELIAS CJ:
Would people be precluded from arguing a subjective reliance?

MR SMITH QC:
Yes they would be.

ELIAS CJ:
On the basis of the determination in the Court of Appeal and the High Court that it is objective?

MR SMITH QC:
Unless they could have overturned, unless they could overturn it, that is to say they'd have to either overturn the Court of Appeal's decision which is not the point of this discussion at the moment, it's a question of procedural question or alternatively they would have to go back to the High Court, be faced with the Court of Appeal's decision they'd have to go to the Court of Appeal and presumably bring the same issue before a full Court and then proceed from there. The reasoning becomes – and why I'm saying this is because while the issue wasn't a common issue so far as other represented class members by virtue of agreement back in 2012 and August 2012, it became a common issue by virtue of the nature of the finding. Because if, and I just simply take you to a handful of paragraphs in the Court of Appeal judgment which in my submission make that quite clear. If you go to –

ELIAS CJ:
When you say in August 2012, was that under the directions given by Justice French?

MR SMITH QC:
Justice French, yes.

ELIAS CJ:
Yes.

MR SMITH QC:
That's right. So that's the agreement part of it but if time moves –

ELIAS CJ:
And does that, I can't, I didn't look at it with that in mind which I should have, but does that specifically reserve reliance?

MR SMITH QC:
No, it simply states what are the common issues by virtue, by agreement, by virtue of going through the pleadings and setting out those which are and amongst those omitted I think is paragraph 22 of the fourth amended statement of claim or what became that, which is the question of reliance. So looking at the document is not particularly helpful I found but that's the summary of its effect.

So, however the part that we're on now and really the answer very quickly by looking through the Court of Appeal judgment, if you go for example to paragraph 66 where Justice Winkelmann says in the second line, "How does the plaintiff go about satisfying this element of the section 56 cause of action," it mentions what has happened in the High Court and then, "But again how does the plaintiff do that? There are valid objections to resting this assessment upon the evidence of the plaintiff as to what it would have done. It's an easy thing for a plaintiff with the hindsight knowledge that the investment was bad, to characterise the untrue statement as decisive in their decision to invest. Such evidence would be difficult for the defendant to test if measured on its own, difficult for a Court to assess," so that the Court was very much alive to Monday morning wisdom, as Courts typically are in prospectus cases. And so in order to satisfy herself as to the correct

approach to deal with that sort of conundrum Her Honour went to then, to *Broome v Speak* [1903] 1 Ch 586 (Ch) which was referred to in paragraph 67 and sets out the relevant part and if you go to four lines down the quotation which appears over the page. "It is so difficult to say exactly what a few years ago you would have done under different circumstances that I should regard that evidence as of very little value. Be the man, the most honest man possible, it's so easy to be wise after the event that it is difficult for any man to say what he would have done under the circumstances that did not arise."

ELIAS CJ:

Was this, I haven't gone back to look at *Broome v Speak* –

MR SMITH QC:

This is *Broome v Speak*, yes.

ELIAS CJ:

– but is that negligence claim?

MR SMITH QC:

I think that is the, it might have been the director liability case, under the director liability legislation in England as it was at the time, as was *Arnison v Smith* (1889) 41 Ch D 365 (CA), which is the next case.

ELIAS CJ:

Yes.

MR SMITH QC:

So in any event the test would be the same. Then if we go to 69 Her Honour said the proper approach is this. "It is a question of fact whether an investor suffered loss by reason of an untrue statement." And then down, "There may be evidence that satisfies the Court that a particular investor was not affected in their investment decision by the untruth, for example," and just pausing there, it is perfectly possible, though one couldn't imagine it from a plaintiff themselves, that they would credibly give evidence to say that they weren't

affected in their decision-making by a particular statement. The question is whether they can possibly be heard to say that they were affected by such a statement as a matter of subjective contention. So she goes on to deal with this. "If the investor knew the true position but proceeded to invest." But if there is no such evidence the question is then what do you do. And she says, "In reading a view as to whether the plaintiff's investment decision was affected by the untrue statement, the Court must ask itself whether the notional investor would have invested if they had known the true position. The materiality of the statement is obviously critical at this point. This test includes both subjective and objective elements. The Court asks first if the notional investor's investment decision was more likely than not to have been influenced by the untrue statement. If the answer is yes, the element is made out unless the evidence establishes that the particular investor did not rely upon…"

So so far both in *Broome v Speak* and also in Justice Winkelmann's decision in the Court of Appeal, the relevance of the evidence that you may give as an investor, and its admissibility, is confined to saying that you were not influenced should you unusually say that. But apart from that the analysis is an objective as opposed to a subjective one and you examine what, as a matter of objective analysis, the notional prudent investor would make of the statement concerned, in order to establish the likelihood or otherwise of its having been relied upon, quite irrespective of what protestations may be made on an individual of subjective basis, and that's the effect of what the Court of Appeal has said.

And I simply add that if you then go on to paragraph 70 that view if supported amply in *Arnison* where Lord Halsbury said, "It was said, and I think justly, by Sir G Jessel in *Smith v Chadwick*, that if the Court sees on the face of the statement that it is of such a nature as would induce," they're saying as a matter of objectivity, "A person to enter into the contract, or would tend to induce him to do so," so again use of the word "tend" and its relative connotation of objectivity, "Or that it would be a part of the inducement to enter into the contract, the inference," again objective, "Is if he entered into the

contract, that he acted on the inducement so held out, unless it is shown that he knew the facts." Now if we just get to the word "unless" because at that point the excerpt tips over into a consideration of what can be taken into account on a subjective basis, and it goes on to say that on a subjective basis the only thing that can be taken into account is subjective evidence that there was no reliance. "Unless, it says, "It is shown that he knew the facts," and proceeded, "Or that he avowedly did not rely on the statement whether he knew the facts or not."

ELIAS CJ:

Yes, I am being reminded that this is really the merits and we have actually read the Court of Appeal judgment too. What's the leave point?

MR SMITH QC:

The leave point is that irrespective of the representation, represented person issue, this is a matter which has been objectively decided in the Court of Appeal. So if anybody proceeds in the High Court on this issue, they, and seeks to give evidence that they themselves were motivated by the financial projections, for example, in relation to sales, that evidence on the face of it is either inadmissible or alternatively of so little weight as to be likely to be disregarded, and so, and that is a matter of objective finding, and as an objective finding in the Court of Appeal, that takes the place and supersedes the absence or presence of any agreement as to common issues. In other words this issue has been decided between all the members of the represented class and the defendants. Not by agreement but by virtue of the fact that it is, the test is objective and it has been decided objectively. So –

ELIAS CJ:

Well if then it is arguable that the test as applied –

MR SMITH QC:

Is wrong.

ELIAS CJ:

– by the Court of Appeal is wrong –

MR SMITH QC:

That's a different issue.

ELIAS CJ:

– that's a fairly powerful circumstance to grant leave.

MR SMITH QC:

That's an entirely different issue and that's one –

ELIAS CJ:

Yes.

MR SMITH QC:

– we just dealt with in our submission, that relates to the whole question of but for, reliance, materiality, causation and so on but if the only issue is whether the Court should be considering giving some form of direction, the plaintiffs can go back to the High Court then for the reasons that I've put forward, that oughtn't to be allowed. I might also add that it's not a leave question, but with careful consideration in a particular case as to what was agreed for the common issue is unlikely to be a matter of general public importance which is the third reason that I wanted to put forward as well. So unless I can help you further with that, that is all that I had wanted to say, other than relying generally on our joint submissions.

ELIAS CJ:

Yes thank you Mr Smith. Now Mr McLellan.

MR McLELLAN QC:

I can and indeed must be brief; my submissions are also made on behalf of Mr Turnbull's client the fifth respondent.

ELIAS CJ:

Thank you.

MR McLELLAN QC:

The issue that I'm addressing is simply the promoter point as it affects the joint lead managers or JLMs. The question on which leave is sought is posed as clarification as to whether the JLMs come within the professional advisor exception that is subsection (c) in the definition of "promoter" in the Securities Act and I make two broad submissions in support of our proposition that that question doesn't meet the leave criteria. The first is that while there is a legal interpretation question and first on which the Court of Appeal, the majority of the Court of Appeal differed from the High Court on ultimately, that issue is a factual question. The second point that I wish to is in relation to the repeal of the promoter provision which while my learned friend for the applicant says that there are similarities between the Securities Act and the Financial Markets Conduct Act, there is in my submission absolutely no similarity whatsoever on the particular point that I'm addressing.

So coming to the first point which is that the issue before the High Court and the Court of Appeal was essentially factual, I won't take you to the judgments in the High Court and the Court of Appeal but the references in the High Court are from paragraphs 574 to about 581 in which the High Court addressed the competing assertions as to the facts and what could be drawn from them in relation to the question of whether the JLMs were promoters. Such matters as, for example, the advice and conduct that the JLMs gave, the fact that the JLMs were in receipt of an indemnity from the issuer, the description of the JLMs as such in the prospectus, the fact that they were named many times in the prospectus and looking at it from the competing point of view of the JLMs they submitted, for example, that their role was essentially advisory and that while they gave advice sometimes their recommendations were not accepted, suggesting a lack of instrumentality in the offer. The Court of Appeal and the main paragraph here on the professional advisor point is paragraph 272 of the judgment. In the both Courts the JLMs relied on a 19th century decision which is cited in that section of the judgment called the *Re Great Wheal Polgooth*

Co Ltd (1883) 53 LJ Ch 42 (Ch) which concerned a solicitor who had given advice in an offer and the Court of Appeal distinguished the position of the JLMs from that of a solicitor and went through a number of factors such as the fees that were received, the fact that there was a success fee, what the Court of Appeal described as a partial underwrite of the bond allocation in the offer, and the fact that the JLMs took a firm allocation of shares in the offer. Those were factors that the Court of Appeal thought distinguished the position of the JLMs from that of a solicitor, but ultimately of course the Court of Appeal said that the because the professional advisor issue would not be dispositive of the appeal it did not make a determination on that ultimate issue. But the point of my submissions on this is that the analysis of it either in the High Court or Court of Appeal, or ultimately in this Court if leave was to be granted, is essentially factual and is not precedent setting.

ELIAS CJ:

But it's identification of the facts that do bear on the determination, presumably, that is the point. Whether those are determinative. Not the actual findings of fact.

MR McLELLAN QC:

There was no essential dispute about the facts. It was the interpretation that was put on them as to whether –

ELIAS CJ:

Yes.

MR McLELLAN QC:

– as a result of that evidence the JLMs could be characterised as firstly a promoter and then secondly in the alternative whether they came within the professional advisory exception.

O'REGAN J:

Presumably if leave were given on the substantive points, there would then be a live issue about the position of promoters. Both whether these people are

promoters and also whether they're entitled to the professional advisory exemption.

MR McLELLAN QC:
Yes, if leave is granted on the pull of the section 56 issue then at the moment the JLMs are held to be promoters and so I –

O'REGAN J:
So the Court would have to resolve that position wouldn't it?

MR McLELLAN QC:
So I would wish to challenge that finding and also the issue of the professional advisor exception would need to be determined because the Court of Appeal decided it didn't need to.

O'REGAN J:
Thank you.

MR McLELLAN QC:
But as was recognised by both the High Court and the Court of Appeal, because of the repeal of the Securities Act, and the enactment of the FMCA, there was little precedent value in the promoter issue. For example at 579 of the High Court's decision the plaintiff acknowledged that applying the definition of "promoter" that the plaintiff was putting forward to the roles of the JLMs, might take the broking community by surprise, but any precedent effect is minimised by the pending, the then pending changes to the FMCA and of course the Court of Appeal in the paragraph in which they decided not to determine the professional advisor point said something very similar.

And that takes me to the next point, and I don't need to spend much time on this because Mr Cooper has already taken you to the provisions in the FMCA, but the key provisions, looking at it from a slightly different perspective for my client, is again section 82 and the penalty provisions in section 495, but starting firstly with the transitional provisions which are in Schedule 4 to the

FMCA, the relevant parts of the Act came into force on the 1st of December 2014 and there is a one year or two year period in which, for example, an issuer could choose to register a prospectus under the Securities Act so that period, at its latest, ended on 1 December 2016. So as we've set out in our written submissions the window of opportunity for there being a claim under the Securities Act to emerge is very small, particularly against the background, again as I've said in the written submissions, the *Feltex* case it appears is the only case to have dealt with the definitional issue under the, in relation to promoters. So again there is essentially no likelihood of a decision of this Court having any precedent effect.

But coming back briefly to the FMCA provisions. Section 82, which Mr Cooper took you to, provides for liability on the part of an issuer, in the case of false or misleading statements and the under section 533 and 534. Firstly 534, "Directors have automatic liability," as you've already heard, "In the event of there being a false or misleading statement under section 82." And then under 533, this is essentially the party provision provides for any, "A person who is involved in a contravention who has aided, abetted et cetera, a contravention," is also liable. The core of the submission I make here is that contrary to the Securities Act to which to the extent that it made promoters liable, that was based on the capacity in which a person acted with respect to an order whereas the emphasis of the regime under the FMCA is very strongly on a conduct and in relation to parties, their knowledge of the conduct. So it doesn't seek to impose liability based on a role or capacity but on what a party actually did and it is unlimited as to which persons can be held liable for a contravention or participating in a contravention.

So finally the, one of the questions that you posed in the Court's minute was, what effect would the appeal have? It would of course only, this part of the proposed appeal would only have any substantive effect if there was a finding in favour of the applicant on the section 56 point. Unless I help assist, those are my submissions.

ELIAS CJ:

Thank you very much Mr McLellan. So Mr Turnbull that completes the respondents, yes. None of the respondents' counsel addressed the point that was raised from the Bench about the Fair Trading Act. Is there anything that you want to say about that?

MR SMITH QC:

Do you mind if we talk across you for a moment?

ELIAS CJ:

Yes.

MR COOPER:

Your Honours may I respond briefly on that point? As I understood the question, it was whether the case pursued in the High Court for the applicant was more generally one that issuing of the prospectus generally was misleading conduct rather than a case based on the specific untrue statements and the way that the Securities Act claim was pursued?

ARNOLD J:

Yes, because as I understood it there was this argument that the prospectus as a whole was an untrue statement which was protected. But because of the reference to conduct in the Fair Trading Act you can effectively make the same sort of argument, presuming there's a factual basis there under the conduct heading.

MR COOPER:

And perhaps I can respond to that by going to the pleading which was the plaintiff's pleading as current at the time of the trial, before the amended statement of claim which is in volume 1 of our respondents' bundle of authorities and the pleading, the scheme of the pleading can be seen, really one starts at paragraph, sorry page 124 of the bundle numbering where there's a heading "the prospectus" and then there's over the page at 18, paragraph 18 the prospectus contained the statements set out at 18, they're

the specific statements in the prospectus which if one goes to schedule 1, which is at page 193, what the claim did was to actually underline each of those statements in the prospectus said to be untrue. And then to see how that translates into the allegations of untruth, if one goes to paragraph 33 of the statement of claim at page 131 and perhaps we actually start at the top of that page. You'll see this is the pleading under the Fair Trading Act which was the first cause of action and the principal claim relied on it at trial. And you'll see 33(1) the statements and information contained in paragraphs 18 and 19 were incorrect, so for the reasons that were then set out over a number of paragraphs that follow. And then the relief sought under the Fair Trading Act claim is then found at page 172. And so the claim as advanced at the trial was under the Fair Trading Act and under the Securities Act, one of them alleging very precisely indeed by underlining them, the whole series of untrue statements and then saying that they were misleading. When one gets to the Securities Act pleading it's only a page and a bit because it simply refers back to what comes before it.

ARNOLD J:

Thank you.

ELIAS CJ:

Yes thank you. Yes Ms Mills, do you want to be heard in reply?

MS MILLS:

If I could address you on the point just made by my learned friend about there being specific statements in the statement of claim that were relied upon as being misleading under the Fair Trading Act, my friend has not addressed the issue at paragraph 52 of the fourth amended statement of claim, that potential investors were likely to be misled by the general implied statement made by the fact of the prospectus.

O'REGAN J:

Sorry which paragraph of the claim is it?

MS MILLS:

Paragraph 52 of the amended statement of claim, it's at page 156 of volume 3 of the bundle. So there's a specific pleading as to general reliance on the fact of the prospectus. Now that determination was not made by the High Court as to whether or not a prospectus can be misleading as a statement under the Fair Trading Act as its whole, so there was no point, no ability to appeal that decision because the High Court found that the Fair Trading Act did not apply and did not consider any of the Fair Trading Act matters. However the Court of Appeal went on to say that the only misleading statement was the financial information which is the FYO4 prospectus financial information found at pages 81, 82 and 85 of the prospectus; but did not consider the general claim that the prospectus itself was misleading as a whole and didn't, because there was no consideration of the Fair Trading Act as it applied to the prospectus as a whole. So in terms of what the appellants or the applicant is seeking is a determination that to the extent that the prospectus can be misleading as a whole under the Fair Trading Act should be heard by this Court, and that in the event that it is found that the prospectus cannot be misleading as a whole, that they still have causation and loss to deal with under the Fair Trading Act on the stage 2 trial.

So in respect of the submissions that I've filed, I've addressed the problems that are faced by the determination in the High Court which was upheld on appeal that section, that the Fair Trading Act did not apply because it leaves us in a hiatus position where there are no determinations under the Fair Trading Act by the High Court. There is a determination about the prospective financial information being misleading under the Fair Trading Act but the Court goes on to say that the, that because Mr Houghton has not established loss or causation that there is no claim for the remaining shareholders. The point that I wish to make in this regard is that the, because the Houghton case was pleaded and presented on the basis of a Fair Trading Act claim, it's principally a Fair Trading Act claim, and that the scope of the trial was limited to Mr Houghton's own claim in respect of causation and loss under the Fair Trading Act, the determination by the Court of Appeal to say that it, that there can be no Fair Trading Act, there can be no stage 2 trial

must be wrong in fact and in law because there is no evidence before the Court upon which they could actually address that. The evidence adduced by the respondents was specifically related to Mr Houghton's loss and the evidence brought by Mr Houghton was that it was a but for loss situation.

So when we move onto the next stage and say well there has to be a tortious examination of what the loss is, then it is open to the shareholders to say, I'm entitled to give evidence as to that would the Cornell evidence and the Cameron evidence and in particular they'll be looking at financial, at challenging the efficient market theory as being appropriate for a way of assessing loss in an IPO and under the Fair Trading Act and it's proposed that further evidence would be called by an economist, a Mr Houston who has given evidence at the High Court in relation to the costs argument as to at what the loss would actually be on a general basis as well as well as a specific basis. So in answer to the question, does the appellant, applicant seek to argue that the prospectus was misleading under the Fair Trading Act as a whole document, yes it does. But of course but of course there is no such finding at either the High Court or the Court of Appeal of that fact so it would be an issue that would have to be addressed. Does that make sense Your Honours?

ELIAS CJ:
Yes I understand that.

MS MILLS:
Thank you. In respect to my friend's argument that the claim is that there's a specific regime under the Securities Act in respect of sections 34, 37 and 37A, I refer Your Honours back to section 33 which is the primary provision which is that you cannot make an offer of securities unless the prospectus is registered and compliant with the Act and the regulations and that is the primary fundamental point made by the appellants that this prospectus does not satisfy section 33. The offer should never have been made and that offer was all the way through, open all the way through until 2 June 2004 which is the

date of bringing down due diligence and by that day, by that date it was clearly an untrue –

O'REGAN J:

But the finding of the Court of Appeal was that it did comply at the time of registration, didn't it?

MS MILLS:

Well the finding is, there's no specific finding that it complied. The specific finding is that the directors were aware of the problem but were entitled to rely upon management's advice.

O'REGAN J:

So you challenge the factual finding do you?

MS MILLS:

Yes I do. Because there was no consideration by the Court of Appeal or by the High Court of the failure in respect of the budget. The budget was 93% of their sales, the actual sales to 31st March 2000 and –

ELIAS CJ:

But I think that's getting in more detail than we need for our purposes. You're saying that the finding or their acceptance that the directors knew was sufficient?

MS MILLS:

I'm challenging that finding because the CFO and the CEO knew that the sales in April had not been met. They had daily sales reports, they knew at the date of registration –

ELIAS CJ:

I see.

MS MILLS:

– that the April sales hadn't been met and that the budget had not been met to 31 March 2004. So that's the challenge.

In respect of the arguments put forward by my friend Mr Smith, I repeat the submissions that I have made about evidence and the entitlement for these shareholders to adduce their own evidence as to loss and that their own evidence as to causation and reliance because the process of the trial was such that the finding by the Court of Appeal is only based on the evidence that was adduced at the trial and there's nothing to prevent these shareholders coming back to the Court and saying, we challenge the evidence of Mr Cornell because we were not actually at the trial giving our evidence and that was never to be a common issue. So in terms of procedural fairness, it would be unfair to deny these shareholders the chance to have their day in Court and to be heard. There are 3600 and I think 90 shareholders, all of whom, most of whom lost their entire investment in this particular float, all of whom are aggrieved and there's been significant coverage through the press as to the interest in this case. There is general public interest in the outcome of this case and on that ground alone, I submit leave should be granted. Those are my submissions.

ELIAS CJ:

Yes, thank you Ms Mills. We'll take time to consider our decision in this matter, thank you. Thank you counsel for your help.

COURT ADJOURNS: 12.48 PM