IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 135/2016
[2018] NZSC 112

BETWEEN	ERIC MESERVE HOUGHTON Appellant
AND	TIMOTHY ERNEST CORBETT SAUNDERS, SAMUEL JOHN MAGILL, JOHN MICHAEL FEENEY, CRAIG EDGEWORTH HORROCKS, PETER DAVID HUNTER, PETER THOMAS AND JOAN WITHERS First Respondents
	CREDIT SUISSE PRIVATE EQUITY INCORPORATED Second Respondent
	CREDIT SUISSE FIRST BOSTON ASIAN MERCHANT PARTNERS LP Third Respondent
	FIRST NZ CAPITAL Fourth Respondent
	FORSYTH BARR LIMITED Fifth Respondent

Court:	Elias CJ, Glazebrook, O'Regan, Arnold and Kós JJ
Counsel:	C R Carruthers QC and P A B Mills for Appellant A R Galbraith QC, T C Weston QC, D J Cooper and S V A East for First Respondents (other than Mr Horrocks) J A Carnie and G R Burgess for Mr Horrocks J B M Smith QC, A S Olney and C J Curran for Second and Third Respondents
Judgment:	22 November 2018

JUDGMENT OF THE COURT

A **The first to third respondents must pay the appellant costs of $30,000 plus usual disbursements.**

B **Costs in the High Court should be reconsidered by that Court in light of this Court's judgment in *Houghton v Saunders* [2018] NZSC 74 and this judgment.**

C **Costs in the Court of Appeal should be determined in light of this Court's judgment in *Houghton v Saunders* [2018] NZSC 74 and this judgment if the agreement between the parties as to costs in that Court expressly or impliedly allows for such a determination to occur.**

REASONS

Appeal allowed in part

[1] In a judgment delivered on 15 August 2018, we allowed in part an appeal by the appellant, Mr Houghton.[1] At issue were claims brought against the respondents for breaches of the Securities Act 1978 and the Fair Trading Act 1986 in relation to the initial public offering of shares in Feltex Carpets Ltd. In addition to the appellant's individual claims, the case comprised stage 1 of two stages of a representative action by a large number of investors in shares issued by Feltex.

Summary of conclusions

[2] This Court summarised its conclusions in relation to the first to third respondents as follows:

> [379] The appeal in relation to the first, second and third respondents is allowed to the limited extent described below.
>
> [380] The Court of Appeal's finding that the forecast of revenue for the financial year ended 30 June 2004 (the untrue statement) was, at the time of allotment of the shares offered for subscription in the Feltex prospectus, an untrue statement for the purposes of s 56 of the Securities Act 1978, is upheld.
>
> [381] The Court of Appeal's findings that the untrue statement did not give rise to liability under s 56 of the Securities Act 1978 and was not in breach of s 9 of the Fair Trading Act 1986 are set aside.

---

1 *Houghton v Saunders* [2018] NZSC 74, (2018) 15 TCLR 1 [*Houghton* (SC)]. We will use the same defined terms and abbreviations in this judgment as were used in that judgment.

> [382] We find that the untrue statement was in breach of s 9 of the Fair Trading Act 1986.
>
> [383] The questions of whether plaintiffs represented by the appellant:
>
> (i) invested on the faith of the prospectus in terms of s 56 of the Securities Act 1978 and, if so;
>
> (ii) suffered any loss by reason of the untrue statement in terms of s 56 of the Securities Act 1978 and, if so, the quantum of such loss; and
>
> (iii) are entitled to any remedy under the Fair Trading Act 1986
>
> are left for resolution at the stage 2 hearing.
>
> [384] In all other respects, the appeal in relation to the first to third respondents is dismissed.
>
> (footnote omitted)

Costs reserved

[3] The Court reserved the issue of costs, both in this Court and in the Courts below. It sought further submissions on costs, addressing whether costs should be decided now or deferred until after the stage 2 hearing, whether the awards of costs in the Court of Appeal and High Court should be quashed, and if so, whether those Courts should be asked to consider costs issues afresh in light of this Court's judgment, and issues of quantum of costs (if any) to be awarded in this Court.[2] The Court indicated its preliminary view that costs could be dealt with on the papers and asked for comments on that. All parties were content with costs being dealt with on that basis.

Settlement in relation to fourth and fifth respondents

[4] The Court has been informed by counsel that the appellant and the fourth and fifth respondents have reached agreement concerning costs – both in this Court and in the Courts below – and that no order is necessary in relation to them. We therefore address only the position of the first to third respondents, to whom we will refer from now on as "the respondents".

---

2 At [387].

Costs in this Court

[5] The appellant submitted that, because he had been substantially successful against the respondents in his own claim and, more importantly, in the context of the common issues for the stage 2 hearing, he should be entitled to recover costs as if he were the successful party in the appeal. He submitted that the appropriate rate for a three day appeal should be $75,000, but we accept the respondent's submission that such an award would be out of step with earlier costs decisions of this Court.[3]

[6] The appellant acknowledged he was not successful on some of the factual points raised in relation to untrue statements in the Feltex prospectus, but emphasised that those points were not the focus of the hearing. He submitted that he succeeded in relation to his "primary argument", namely, that the FY04 revenue forecast was an untrue statement and provides a potential basis for the respondents' liability at the stage 2 hearing. He acknowledged that his personal claim for loss under the Securities Act 1978 was unsuccessful but that the Court preserved the possibility of reopening that claim at the stage 2 hearing. He also pointed out that he succeeded in establishing potential liability under the Fair Trading Act 1986, both in his personal claim and for the represented claimants.

[7] The respondents' primary submission was that no costs award should be made. This was on the basis that the appellant has enjoyed only partial success in this Court. The respondents argued that most of the issues raised on appeal by the appellant were not properly advanced in this Court,[4] the appellant failed to demonstrate loss for the purposes of the Securities Act and his primary "but for" argument was rejected. They emphasised that no liability in damages has been established against the respondents in any cause of action.

[8] The respondents noted that the appellant's individual claim survives only in a very narrow sense. In particular, they said the appellant's Securities Act claim has failed, unless the High Court allows him to reopen it.

---

3 For example, in two recent appeals involving three day hearings, costs of $45,000 were awarded to the successful party: *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78; and *Trustpower Ltd v Commissioner of Inland Revenue* [2016] NZSC 91, [2017] 1 NZLR 155.

4 *Houghton* (SC), above n 1, at [143].

[9] The respondents therefore submitted that the Court was correct to describe the outcome of the appeal as "mixed".[5] In light of this, they argued that costs should lie where they fall.

[10] There is no dispute that the appellant's personal claim under the Securities Act failed,[6] though his personal Fair Trading Act claim remains live. On the other hand, the representative claim was successful in this Court on the question of whether there was potential liability for an untrue statement in the prospectus. Given this, we reject the respondents' submission that no award should be made. We also reject the proposition that the resolution of costs for the appeal to this Court should be deferred until after stage 2 of the case is resolved.

[11] We accept that many arguments made by the appellant on appeal were not properly founded on the facts or pleadings. We also agree with the respondents that the appellant's "but for" argument was a significant aspect of his case and of the representative claim and was rejected by this Court. On the other hand, the representative claim succeeded on a significant aspect of the case, the confirmation of the Court of Appeal's finding that the FY04 revenue forecast was an untrue statement and the setting aside of that Court's finding that no liability arose from that untrue statement under the Securities Act or the Fair Trading Act. Whether this Court's decision on that issue ultimately leads to a successful outcome for the representative class and if so, to what extent, cannot yet be determined. But a costs award is required to recognise that success in relation to the issues before this Court. We consider an award of $30,000 is appropriate.

Costs in the Courts below

[12] In the High Court, Dobson J issued a detailed costs judgment in which he ordered the appellants to pay the respondents costs and disbursements totalling $5,066,267.10.[7]

---

5 At [386].

6 Unless he is allowed to reopen it: *Houghton* (SC) at [279].

7 *Houghton v Saunders* [2015] NZHC 548 [High Court costs judgment]. The parties said that $27,434.16 was held in dispute but the disputed amount was later settled as part of the costs agreement negotiated between the parties in the Court of Appeal.

[13] In the Court of Appeal, the parties reached a negotiated outcome whereby the appellant paid costs and disbursements of $285,000, to be shared between all respondents (including the fourth and fifth respondents). So there was no order as to costs made by the Court of Appeal.

[14] The appellant submitted that the costs orders in the Courts below should be quashed and those amounts refunded with interest.[8] He argued that it would not be justified to wait until resolution of the stage 2 trial to determine costs in those Courts, given that costs were awarded against him on the stage 1 hearing. The appellant submitted costs in the Courts below should be considered afresh, and that in the normal course this would be done in the Courts below. He did not object to those costs being fixed in the Supreme Court, but submitted that the Court would need to seek further submissions before doing so.

[15] The respondents' position was that any reconsideration of costs at this stage would be premature because:

(a) Ultimate liability will not be determined until stage 2. The reality is that the claimants are only mid-trial in the resolution of their claims and must prove a number of significant issues, including causation and loss, before they will recover anything.

(b) Any reappraisal of costs would be provisional and risk further reversal.

(c) The appellant is not prejudiced by deferral and lacks a strong claim to a refund even if successful at stage 2.[9]

[16] The respondents also raised a concern arising from the appellant's advice, in his submission on costs, that the source of litigation funding for the representative claim is exhausted. They argued that, in the absence of support for the plaintiff group from a litigation funder, any reappraisal of costs now may permanently deny them

---

8 Relying on r 45 of the Supreme Court Rules 2004. However, as noted by the respondents, there was no Court of Appeal order which could be quashed. We are not aware of the terms of the agreement between the parties in relation to costs in the Court of Appeal.

9 The respondents noted Dobson J's criticisms of the appellant's approach to pleadings, evidence, and trial conduct: *Houghton v Saunders* [2014] NZHC 2229, [2015] 2 NZLR 74 at [42]–[46].

effective recovery of their defence costs. As an alternative, the respondents submitted that any repayment ordered should be paid to the Court pending the outcome of the stage 2 trial.

[17] In his reply submission, the appellant pointed out that the respondents had claimed an entitlement to costs when they were successful in relation to stage 1 issues in the Courts below. He argued there was no basis for dealing with the appellant on a different basis.

[18] We do not consider it appropriate for this Court to deal with the issues arising in relation to costs in the Court of Appeal and High Court. As the parties acknowledged, we would need further submissions to put us in a position to do this. Nor do we consider that this Court should decide whether any reassessment of costs in the Courts below should be deferred until after the stage 2 process is completed. We think it is more appropriate for the Courts to address the issues raised by the parties in light of the substantive appeal judgment and this judgment.

[19] In the case of the Court of Appeal, the Court will need to determine whether the agreement between the parties as to costs in that Court allows that Court to conduct what would be its first consideration of an appropriate costs award.

[20] We do not quash the award of costs in the High Court or make an order requiring repayment of the costs award made by that Court, as the appellant submitted we should. But we direct that the High Court should reopen the question of costs and determine that question afresh. The High Court can, if it considers it appropriate to do so, make an order requiring a refund of a portion of the costs paid by the appellant pursuant to the High Court costs judgment.

Result

[21] We award costs to the appellant of $30,000, plus usual disbursements.[10] We direct that costs in the High Court should be reconsidered by that Court in light of this Court's judgment in relation to the appeal and this judgment. We direct that the Court

---

[10] Supreme Court Rules 2004, r 44(5).

of Appeal should determine costs in that Court on the same basis if the agreement between the parties as to costs in the Court of Appeal expressly or impliedly allows for that possibility.

Solicitors:
Wilson McKay, Auckland for Appellant
Russell McVeagh, Wellington for First to Third Respondents