IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 117/2019
[2019] NZSC 148

BETWEEN	ERIC MESERVE HOUGHTON Applicant
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

Court:	Glazebrook, O'Regan and Williams JJ
Counsel:	C R Carruthers QC and P A B Mills for Applicant A R Galbraith QC, D J Cooper and M C Harris for First Respondents (other than Mr Magill and Ms Withers) T C Weston QC for Mr Magill B D Gray QC and A E Ferguson for Ms Withers J B M Smith QC, A S Olney and C J Curran for Second and Third Respondents
Judgment:	13 December 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs of $2,500 to the first respondents collectively and $2,500 to the second and third respondents collectively.

REASONS

Background

[1] The applicant, Mr Houghton, commenced proceedings against the respondents and others on a representative basis claiming for losses said to have been sustained as a result of untrue statements in an offer document relating to the initial public offering of shares in Feltex Carpets Ltd (Feltex). Mr Houghton and those in the class he represents were investors in Feltex shares. The proceeding was split, so that the question of liability was to be determined at a stage 1 trial, with a stage 2 trial taking place if necessary to determine issues of reliance and loss.

[2] Having failed to establish liability in the stage 1 trial in the High Court[1] and on appeal to the Court of Appeal,[2] Mr Houghton succeeded in part in this Court.[3] This Court found that the revenue forecast for the financial year ending 30 June 2004 (the FY04 revenue forecast) that appeared in the offer document was untrue at the time of the allotment of the shares offered for subscription.[4] However, the Court found that it had not been proved that the revenue projection for the financial year ending 30 June 2005 (the FY05 revenue projection) was an untrue statement.[5]

[3] The result of this Court's 2018 decision was that the stage 2 trial was necessary to determine whether the investors represented by Mr Houghton had suffered loss by reason of the untrue statement concerning the FY04 revenue forecast, and, if so, the quantum of such loss. Mr Houghton's claims were made under both the Securities Act 1978 and the Fair Trading Act 1986.

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1 *Houghton v Saunders* [2014] NZHC 2229, [2015] 2 NZLR 74 (Dobson J).
2 *Houghton v Saunders* [2016] NZCA 493, [2017] 2 NZLR 189.
3 *Houghton v Saunders* [2018] NZSC 74, [2019] 1 NZLR 1.
4 At [231].
5 At [266].

Proposed appeals

[4] The decisions against which Mr Houghton wishes to appeal are two interlocutory decisions relating to the stage 2 trial.

[5] The first concerns the admissibility of certain expert evidence that Mr Houghton wishes to adduce as to the quantum of loss suffered by investors. The High Court ruled this evidence inadmissible,[6] which was upheld by the Court of Appeal on appeal.[7]

[6] The second is a decision upholding a High Court judgment refusing to strike out the respondents' defence relying on s 63 of the Securities Act.[8]

Interlocutory matters

[7] These applications for leave relate to interlocutory matters. The Court must not give leave on an interlocutory application unless satisfied it is in the interests of justice for the Court to hear and determine the proposed appeal before the proceeding concerned is concluded.[9] Counsel for Mr Houghton accepted that the s 63 point would not meet this test on its own, since there would be no impediment to the matter being dealt with in an appeal after the second trial has taken place. But he argued that the test did apply to the expert evidence point and that, if leave were given on that point, then it would be in the interests of justice to deal with the s 63 point at the same time.

Expert evidence

[8] As mentioned earlier, this Court found that the FY04 revenue forecast was an untrue statement but that it had not been proved that the FY05 revenue projection was

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6 *Houghton v Saunders* [2019] NZHC 2007 (Dobson J) [HC decision] at [74] and [81].

7 *Houghton v Saunders* [2019] NZCA 491 (Result only); and *Houghton v Saunders* [2019] NZCA 506 (Brown, Simon France and Hinton JJ) [CA decision] at [42].

8 *Houghton v Saunders* [2019] NZCA 404 (French, Collins and Wild JJ) upholding *Houghton v Saunders* [2019] NZHC 1061 (Dobson J).

9 Supreme Court Act 2003, s 13(4); and Senior Courts Act 2016, s 74(4).

an untrue statement. As the Court's finding in relation to the FY05 revenue projection is important background to the present application, we set it out in full:

> [263] We accept that the FY05 sales revenue projection was not arrived at by adding a percentage increase to the FY04 forecast figure. In our view, however, this does not answer Mr Houghton's point, which is that it was unrealistic, in light of the history of the company and in particular the bad results in January, February, April and May, to consider that Feltex could achieve the level of sales projected for FY05.
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> [264] There are a number of points that support Mr Houghton's submission. The first is that Feltex's strategy had been to concentrate on margin rather than volume and in particular to concentrate on the middle and premium markets in residential. There does not appear to have been a decision to abandon this strategy. Rather, the increase in volume was projected to occur in those higher margin products and not in the mass market. This would make it harder to achieve the one percent increase in market share, which was measured by volume, because the mass market made up the greater proportion of the market. We also accept the submission that a 4.7 per cent increase in revenue was ambitious and that this was even more so after the results in April and May. We also note that the results in the first six months of FY05 would suggest in hindsight that the sales projection was in fact unrealistic.
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> [265] As pointed out in the Courts below, however, the evidence called by Mr Houghton did not challenge the reasons given for assuming an increase in revenue. We are thus not in a position to examine their validity or otherwise. While the sales revenue shortfall against projection began immediately in July and worsened over the next months, there are dangers in judging by hindsight. The due diligence committee and the directors did have information before them which suggested the market in FY05 would be buoyant.
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> [266] We are therefore not able to hold it proved that, at the time of the allocation of shares, the FY05 sales revenue projection was not reasonably assessed as within the range of possible outcomes and thus an untrue statement.
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> (footnotes omitted)

[9] The litigation funder associated with Mr Houghton commissioned a report from an economist, Greg Houston of Houston Kemp Economists, with a view to producing this in support of Mr Houghton's case as to quantum of loss. There were two reports, an initial report dated 19 July 2019 (initial report) and a supplementary report dated 5 August 2019 (supplementary report). The instruction to Mr Houston in respect of the initial report was as follows:

> Please provide an expert estimate as at 2 June 2004 as to whether and if so to what extent the Feltex IPO price would have been lower than the actual price at which shares were allotted to investors had Feltex announced that:
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> • in relation to its FY04 revenue forecast:

>the FY04 revenue forecast was no longer a probable outcome;

>the assumptions on which the FY04 revenue forecast were based were no longer reasonable;

>the sales revenue in January 2004, February 2004, April 2004 and May 2004 were bad; and

>total sales for FY04 year were likely to be between $7.5 million and $9 million below the forecast annual total;

- in relation to its FY05 revenue projection:

>it was unrealistic to consider that Feltex could achieve the level of sales projected for FY05;

>a 4.7 per cent increase for FY05 revenue was ambitious, and 'even more so' after the results in April 2004 and May 2004; and

>the FY05 sales revenue projection was reasonably within the range of possible outcomes.

[10] Mr Houston used the terms "FY04 revenue information" and "FY05 revenue information" to describe the content of the postulated corrective statements in relation to the FY04 revenue forecast and the FY05 revenue projection referred to in the instructions set out above. Section 5 of the initial report addressed the price effect of the FY04 revenue information, section 6 addressed the price effect of the FY05 revenue information and section 7 dealt with the total value of the FY04 revenue information and the FY05 revenue information.

[11] The respondents challenged the admissibility of section 6 and that part of section 7 of the initial report that addressed the FY05 revenue information. They also challenged the supplementary report, which addresses supplementary issues that also relate to the FY05 revenue information.

High Court

[12] In the High Court, Dobson J rejected Mr Houghton's argument that the aspects of Mr Houston's report addressing the FY05 revenue information was a component of calculating the impact of the FY04 revenue information by factoring in some knock-on effect on the market's assessment of other aspects of the offer document.[10] Rather, he

[10] HC decision, above n 6, at [71].

saw it as dealing with the separate impact on the market price of the Feltex shares arising from the market not knowing the FY05 revenue information.[11]

[13] Dobson J said the characteristics of the FY05 revenue projection cited in the instructions given to Mr Houston were drawn from [263] and [264] of this Court's judgment (reproduced above at [8])[12]. But he noted that all Courts, including this Court, had found that the FY05 revenue forecast did not contain an untrue statement.[13] He found that the challenged parts of the initial report were not relevant and failed to meet the test in s 25 of the Evidence Act 2006. They were not relevant because they related to the FY05 revenue projection, which had not been held to be an untrue statement. For this reason they also failed to meet s 25 in that they were not likely to be substantially helpful to the finder of fact in determining facts or an issue in the proceeding.[14] He also found that the supplementary report was based on a factual premise for which there was no relevant basis and was therefore also inadmissible.[15]

Court of Appeal

[14] The Court of Appeal noted that Mr Houston had stated his understanding of his instructions as follows in the initial report:[16]

> 136. The FY05 revenue information amounts to a disclosure that, although it was possible that Feltex could achieve its FY05 sales revenue projection, this was unrealistic, ambitious and 'even more so' after the sales results for April 2004 and May 2004. …
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> 137. I have been asked to estimate the price effect of the FY04 and FY05 revenue information, under the assumption that Feltex disclosed all of this information to the market on 2 June 2004. …

[15] This approach was said to be justified by this Court's comments at [263] and [264] of its judgment, but the Court of Appeal observed that it was "plain that the Supreme Court did not conclude that the FY05 sales revenue projection was unrealistic as at 2 June 2004".[17] It therefore upheld the High Court finding that section 6 of the

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11 At [71].
12 At [60].
13 At [68].
14 At [73]–[74].
15 At [80]–[81].
16 CA decision, above n 7, at [36].
17 At [40].

initial report and section 7 of that report (to the extent it addresses the FY05 revenue information) were inadmissible, as was the supplementary report.[18]

Analysis

[16] Mr Houghton argues that the question of admissibility of the relevant aspects of Mr Houston's evidence is a matter of general or public importance and general commercial significance. He says that is so because it involves consideration of the valuation principles which apply to loss in the circumstances to which s 56 of the Securities Act applies, and the consideration of the scope of the relevant evidence affecting share value having regard to the terms of the previous decision of this Court.

[17] We do not accept that either of these provides a sound basis for the grant of leave to appeal. Neither the High Court judgment nor the Court of Appeal judgment dealt with valuation principles. Rather, they dealt with the factual basis for the underlying premise of the evidence, namely that corrective information should have been published in the offer document in relation to the FY05 revenue projection. That is a matter specific to the present case and does not raise any more general point. We are not satisfied that a third consideration of this fact-specific issue is justified, at least not as an interlocutory appeal.

[18] We accept that, if the leave criteria had been met, it would have been appropriate to grant leave to appeal at the interlocutory stage. Having decided the leave criteria are not met, it is best if we express no view on the merits of the argument, given there is a possibility Mr Houghton may wish to pursue the point in an appeal following the stage two trial.

Section 63

[19] As already noted, the applicant accepted that leave for a pre-trial determination of the s 63 point would be justified only if leave were given on the expert evidence point. As that has not occurred, we will not say anything more about the s 63 point, given that it may come before us later on a post-trial appeal. However, we formally

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[18] At [42].

dismiss the application for leave in relation to that point on the basis that it is not necessary that it be dealt with before the stage two trial.

Disposition

[20] The application for leave to appeal is dismissed.

Costs

[21] The applicant must pay costs of $2,500 to the first respondents collectively and $2,500 to the second and third respondents collectively.

Solicitors:
Antony Hamel Lawyer, Dunedin for Applicant
Gilbert Walker, Auckland for First Respondents (other than Mr Magill and Ms Withers)
Wilson Harle, Auckland for Ms Withers
Russell McVeagh, Wellington for Second and Third Respondents