IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 6/2021
[2021] NZSC 38

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 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:	6 May 2021

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 a total of $2,500 to the second and third respondents.

REASONS

[1] The applicant, Mr Houghton, represents about 3,600 claimants in this proceeding. The claimants invested in shares in Feltex Carpets Ltd (Feltex) pursuant to a prospectus issued in May 2004. They claim that they suffered loss as a result of reliance on statements in the prospectus relating to the Feltex shares.

[2] The proceeding was to be heard in two stages, the first stage being limited to a determination of whether any breach of the Securities Act 1978 or the Fair Trading Act 1986 had occurred. It was anticipated that if any breach was established, then the second stage trial would deal with issues of reliance and quantum of loss in respect of each claimant.

[3] Both the High Court[1] and the Court of Appeal[2] determined that the claim failed at stage one. However, the applicant's appeal to this Court was partially successful.[3] This Court found that the prospectus contained an untrue statement for the purposes of s 56 of the Securities Act and that this untrue statement amounted to misleading conduct in breach of s 9 of the Fair Trading Act. It referred the claim back to the High Court for a stage two trial to determine whether investors suffered loss by reason of the untrue statement and whether they were entitled to any remedy under the Fair Trading Act.

[4] The applicant was required to provide security for costs in relation to the stage two trial, which was set down for a five-week hearing scheduled to commence in November 2019. The High Court ordered that security in the sum of $1.65 million was to be provided by 12 July 2019.[4]

[5] The required security was not provided by 12 July 2019 and the November 2019 fixture, together with a subsequent fixture, had to be vacated. The respondents

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1 *Houghton v Saunders* [2014] NZHC 2229, [2015] 2 NZLR 74.
2 *Houghton v Saunders* [2016] NZCA 493, [2017] 2 NZLR 189.
3 *Houghton v Saunders* [2018] NZSC 74, [2019] 1 NZLR 1.
4 *Houghton v Saunders* [2019] NZHC 1362 at [90].

therefore applied to the High Court to strike out the claim. On 22 May 2020, the High Court ordered that the proceedings be struck out with effect from 14 July 2020 unless, by 13 July 2020, security was provided and senior counsel for the applicant confirmed that the claimants were adequately resourced to prepare for and present all aspects of their stage two claims.[5]

[6] Mr Houghton appealed to the Court of Appeal against the "unless order" made by the High Court. This appeal failed.[6] Although the appeal was against the High Court's unless order, the Court of Appeal noted that the applicant did not address the appropriateness of that order, but rather proposed an alternative method of providing security for costs and funding the stage two trial.[7]

[7] The Court of Appeal referred to this alternative proposal as the October 2020 proposal.[8] The Court granted the applicant leave to file further submissions setting out details of the October 2020 proposal, but the applicant instead put forward a different proposal involving a bank bond.[9] Yet another proposal involving an undertaking to be signed by the applicant's solicitor was put forward on 13 November 2020.[10] We will call this the November 2020 proposal. However, the Court was not satisfied that the November 2020 proposal was satisfactory.[11]

[8] The Court then considered whether the applicant's non-compliance with the unless order should be excused. It was of the view that an application for relief from the consequences of failure to comply with the unless order should have been made in the High Court.[12] But it decided to determine the matter itself, in light of indications from counsel for all parties that they wanted that to occur. The Court said it was difficult to identify any proper basis on which the failure to comply with the unless order could be excused, or on which relief from the consequences of non-compliance

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5 *Houghton v Saunders* [2020] NZHC 1088 at [92] (Dobson J) [HC judgment]. An appendix to the High Court judgment sets out in tabular form the numerous attempts made to provide security for costs for the stage two hearing between February 2019 and May 2020.

6 *Houghton v Saunders* [2020] NZCA 638 (Brown, Collins and Goddard JJ) [CA judgment].

7 At [9]. The Court of Appeal recorded at [45]–[47] the steps taken in relation to security for costs after the High Court judgment was issued.

8 At [9].

9 At [10].

10 At [10].

11 At [75].

12 At [82].

could be granted.[13] The Court concluded that the applicant's request that non-compliance with the unless order be excused failed "by a wide margin".[14]

[9] The application for leave to appeal to this Court is advanced on the basis that three issues require determination. The applicant relies on all three of the leave criteria set out in the Senior Courts Act 2016.[15]

[10] The first (and primary) issue is:

> In what circumstances should relief be granted where there has been default in complying with an order for security for costs and an unless order but where the order for security for costs can be complied with subsequent to default (as in the present case)[?]

[11] We see two problems with this issue being the subject of a further appeal.

[12] The first is that there is no real dispute as to the appropriate test, which was set out by the Court of Appeal in *SM v LFDB*.[16] Neither party took issue with that test in the Court of Appeal or takes issue with it now. In light of that, we do not see any proper basis to give leave on that issue.

[13] We accept that this Court held in *LFDB v SM* that the issue of what sanctions should be set in unless orders and imposed on their breach and the circumstances in which relief from those sanctions might be granted were matters of public importance.[17] We do not, however, believe that this is an appropriate case for the consideration of those issues. There is no real dispute in this case about whether the unless orders should have been made (we note that this was not pursued, or at least not pursued with any vigour, in the Court of Appeal). And the issue of relief from sanctions of the breach of the unless order raises the fact-specific inquiry to which we refer below.

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13 At [87].
14 At [90].
15 Senior Courts Act 2016, s 74(2)(a)–(c).
16 *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494.
17 *LFDB v SM* [2014] NZSC 197, (2014) 22 PRNZ 262. The Court had earlier granted leave to appeal (*LFDB v SM* [2014] NZSC 131) but revoked the grant of leave after a further default by the party against whom the unless order had been made.

[14] The second problem is that the applicant's proposed ground of appeal arises only if, as the applicant asserts, the order for security for costs can be complied with subsequent to default. That assertion must be considered against the Court of Appeal's finding that the November 2020 proposal (the most recent of the various proposals for compliance with the security for costs order and the unless order) was unsatisfactory in a number of respects and therefore did not meet the requirement of the security for costs order. In effect, this Court would be drawn into an intensely fact-specific review of the Court of Appeal's assessment. We do not think this is desirable, nor do we think that an argument that the Court of Appeal was wrong in its assessment has sufficient prospects of success to justify a further appeal.

[15] The second issue identified by the applicant is:

> What are the circumstances in which a representative or class action should be struck out for non-compliance with an unless order where the Court sanctioned arrangements involve funding by a litigation funder but where the consequence of breach of the unless order prejudices the representative or class leader appellant and in the present case 3,639 claimants[?]

[16] Again, this issue truly arises only if the November 2020 proposal meets the requirements of the original order for security for costs. As just noted, the Court of Appeal found it did not and we do not consider that it is appropriate for a re-litigation of that assessment to occur on a further appeal.

[17] The third issue is whether a substantial miscarriage of justice may occur because, unless the appeal is heard, the class represented by the applicant will be deprived of their opportunity to pursue the benefits of the findings of the Supreme Court in the stage two trial.[18]

[18] In *Junior Farms Ltd v Hampton Securities Ltd (in liq)*, this Court indicated that the substantial miscarriage of justice ground has limited scope in civil cases.[19] Leave will be given on this ground only in a rare case of a sufficiently apparent error of such a substantial character that it would be repugnant to justice to allow it to go uncorrected. We are not satisfied that any such error has arisen in the present case.

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[18] Senior Courts Act 2016, s 74(2)(b).

[19] *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 396 at [4]–[5].

Considerations of the justice of the case must take into account the interests of all of the parties, not just the applicant for leave. In that respect, we note the Court of Appeal's assessment that it is contrary to the public interest to permit the proceeding to continue. This is because it would absorb the resources of the courts to the detriment of other litigants for a further (potentially lengthy) period. It would also cause prejudice to the respondents if the proceeding were revived with a result that it would continue into a thirteenth year.[20]

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

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

Solicitors:
Antony Hamel Lawyer, Dunedin for Applicant
Gilbert Walker, Auckland for First Respondents
Russell McVeagh, Wellington for Second and Third Respondents

[20] CA judgment, above n 6, at [89].