

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

CIV-2008-409-348

BETWEEN

ERIC MESERVE HOUGHTON
Plaintiff

AND

TIMOTHY ERNEST CORBETT
SAUNDERS, SAMUEL JOHN MAGILL,
JOHN MICHAEL FEENEY, CRAIG
EDGEWORTH HORROCKS, PETER
DAVID HUNTER, PETER THOMAS and
JOAN WITHERS
First Defendants

CREDIT SUISSE PRIVATE EQUITY
INCORPORATED
Second Defendant

CREDIT SUISSE FIRST BOSTON ASIAN
MERCHANT PARTNERS LP
Third Defendant

Teleconference: 28 February 2020

Counsel: C R Carruthers QC and P A B Mills for plaintiff
A R Galbraith QC, D J Cooper and M C Harris for first defendants
(except for separate representation noted below)
T C Weston QC for Mr Magill
J A Carnie for Mr Horrocks
B D Gray QC for Ms Withers
J B M Smith QC, A S Olney and C J Curran for second and third
defendants

Minute: 2 March 2020

MINUTE OF DOBSON J

[1] I convened a telephone conference in this proceeding on the afternoon of 28 February 2020 in light of recent developments.

[2] On 14 February 2020, the defendants filed an application, which they contemplated would be considered by the Court on 11 May 2020, for dismissal of the proceeding or judgment in their favour in the event the plaintiff was not ready to proceed with the stage two hearing at that time. The application summarised the substantial history of failures on the plaintiff's behalf, including failures to provide security for costs when ordered, to comply with timetabling deadlines for discovery and provision of evidence, to pay costs orders and more generally to undertake preparations for the stage two hearing.

[3] The defendants claimed that the delays and any further deferral of the stage two hearing would cause substantial prejudice to them.

[4] On the same day, the defendants filed a memorandum seeking procedural directions intended to ensure that the stage two hearing would be ready to proceed on the adjourned fixture date of 11 May 2020.

[5] I scheduled a telephone conference with counsel for 21 February 2020, but on 20 February 2020 received a memorandum from Mr Carruthers QC which was filed without instructions from the plaintiff. Mr Carruthers took that step intending to invoke the Court's supervisory jurisdiction over class actions such as this proceeding. He raised a concern at the inability of Joint Action Funding Limited (JAFL) and its alter ego, Mr Gavigan, to provide the security for costs for stage two, as ordered against the plaintiff, and to provide the financial resources to run the stage two hearing. Mr Carruthers' concern was that the lack of performance in these respects put at risk the claims of the more than 3,600 claimants. Mr Carruthers was also concerned that communications by Mr Gavigan to the claimants had not stipulated the extent to which these failures had put their claims in jeopardy.

[6] Mr Carruthers supported a proposal, initially raised on behalf of the defendants, that their 14 February 2020 application and the memorandum in support should be sent to each of the claimants. In addition, Mr Carruthers proposed that JAFL/Mr Gavigan should have a very limited time within which to provide the security for costs and satisfy the Court that it had sufficient funds to resource stage two of the proceeding. In the event that those commitments were not honoured,

Mr Carruthers suggested that other claimants ought to be afforded an opportunity to make the necessary arrangements to fund security for costs for the stage two hearing and resource the legal representation on behalf of the claimants at it.

[7] I adjourned the telephone conference until 28 February 2020 over the defendants' objection that the matters raised in its 14 February 2020 documents ought still to be the subject of the scheduled telephone conference on 21 February 2020.

[8] In a further memorandum filed by Mr Carruthers on 27 February 2020, he reported that he had been unable to arrange a communication to all claimants because the current solicitor on the record for the plaintiff, Mr Hamel, does not have the mailing list and Mr Gavigan has resisted provision of it, ostensibly on the basis that "JAFL has and owns any lists". If indeed that obstructive attitude has been taken on a basis that Mr Gavigan perceives JAFL being able to retain property in a mailing list, then given the protracted history and the recent concerns at non-performance by JAFL of its funding obligations, such an attitude would be entirely inappropriate. For the avoidance of doubt, I direct that Mr Gavigan and JAFL are to comply with my direction that the current mailing list with all appropriate details that have been used most recently by Mr Gavigan in his communications with the claimants be provided to Mr Hamel and, if Mr Carruthers so requests, by Mr Hamel to any other agent acting on Mr Carruthers' behalf. Any non-compliance with this direction is liable to be considered as a possible contempt of court.

[9] The defendants sought orders on different terms from those suggested by Mr Carruthers. For the directors, Mr Galbraith QC proposed that a strictly limited time should be afforded to all and any of the claimants to put themselves into a position to provide the security for costs that has been ordered and arrange the resources to proceed with the stage two hearing. On this approach, either JAFL/Mr Gavigan or any other group of claimants could, before the deadline specified by the Court, demonstrate their commitment to funding by providing the security and an adequately verified assurance of resources to complete the stage two hearing.

[10] Mr Galbraith preferred not to afford Mr Gavigan any further time before enquiries were made as to the availability of alternative funding because, if no

claimant representatives were prepared to commit to funding stage two including provision of security for costs, then the future of the proceeding could be reviewed more promptly.

[11] Mr Weston QC was somewhat firmer, submitting that JAFL/Mr Gavigan has entirely “run out of rope”, and that the extent and length of defaults meant that that funder was not entitled to any further time at all. He urged that all claimants should be put on notice that there had to be confirmation of funding and provision of security by a certain, early, date.

[12] Mr Smith QC for the second and third defendants reinforced the points made, emphasising the extent of disadvantage for all defendants in having the matter continuing to hang over them in what is now extraordinarily protracted litigation.¹ Mr Smith pressed me to make the timetable orders proposed in the defendants’ 14 February 2020 memorandum so that any claimants considering funding the action would appreciate the imperative of orderly progress down to the 11 May 2020 fixture.

[13] Mr Gavigan had Mr Hamel attach to a memorandum, completed by Mr Hamel and dated 27 February 2020, an updating memorandum of his own. It made non-specific references to steps being taken with a possible Sydney-based after the event (ATE) insurer and some level of involvement by “a major Australasian-based law firm”. Apart from emphasising the importance of the claims by 3,600 shareholders, Mr Gavigan’s memorandum provided no specific assurances of the extent or timing of the availability of security for costs or funding for stage two.

[14] Prior to commencement of the telephone conference, I had the case officer check whether Mr Hamel wished to participate, contemplating that he would have instructions to speak for Mr Gavigan, given that Mr Gavigan’s memorandum was filed as an attachment to Mr Hamel’s own memorandum. Mr Hamel declined. The Registry received an email communication from Mr Gavigan advising that he would be available if the Court required his attendance. That was not appropriate.

¹ The Supreme Court judgment providing for a stage two hearing was released in August 2018. The prospectus in issue was published in 2004.

[15] At the outset of the telephone conference, Ms Mills clarified she was not authorised to speak for Mr Gavigan. I accept in the circumstances of his recent memoranda that Mr Carruthers could not appear for JAFL/Mr Gavigan.

[16] I do not under-estimate the importance to the defendants of working towards finality, if not achieving it, in this much protracted litigation. Nonetheless, I prefer the sequence of steps proposed by Mr Carruthers. That involves affording Mr Gavigan/JAFL a short period in which to confirm that it has security for costs and financial resources to fund the stage two hearing in hand. I intend giving that opportunity until **5.00 pm on 13 March 2020**. If adequate arrangements are made, I will expect independent verification of the commitments both to provision of security for costs and to funding, in unqualified terms.

[17] I am mindful that Mr Gavigan was not represented on the telephone conference. He can reasonably be expected to have put the prospects of procuring funding in the best light possible in his 27 February 2020 memorandum and, with respect to him, the initiatives described in it fall substantially short of any arrangements for confirmed funding. If Mr Gavigan has made concrete progress with only formalities to be completed within a short timeframe after 13 March 2020, then I may entertain an application on his behalf for a short extension of time. That is unlikely to be forthcoming unless funding arrangements are very much in hand.

[18] It will be over to other claimants to take whatever initiatives they consider appropriate in the period I have provided for JAFL/Mr Gavigan to perform the obligations under the funding agreement. The claimants more generally will have until **Monday, 20 April 2020** to make alternative arrangements for provision of stage two security and the funding needed to pursue the claimants' stage two claims. That time limit is imposed contemplating that initiatives by any interested claimants will not await the outcome of the time I am affording JAFL/Mr Gavigan.

[19] Given the times that I have allowed for these further initiatives for claimants to make funding arrangements, in the present circumstances there is little realistic prospect of the adjourned stage two fixture being ready to proceed on 11 May 2020. Any further adjournment, if granted, would clearly cause additional substantial

prejudice to the defendants. Their 14 February 2020 memorandum sought timetabling directions to ensure the stage two hearing would be ready on 11 May 2020, implicitly on the assumption that plaintiff's counsel were resourced to undertake the preparation. Had that been the case, I would likely have been persuaded that such orders, or minor variations to them, were warranted. For the record, they were:

- (a) the evidence already heard at the stage one trial remains evidence at the stage two trial;
- (b) no evidence can be given at the stage two trial other than that provided in briefs served before 4 November 2019 (with the exception of any expert reply briefs to the expert testimony of Grant Graham and Professor Lehn);
- (c) any interlocutory application by the plaintiff seeking leave to amend the evidential position confirmed at paragraphs 15(a)–15(b) above (or any other interlocutory application relevant to the stage two trial) must be filed and served by 6 March 2020, together with draft briefs containing any proposed new evidence to which the application(s) relate;
- (d) the plaintiff is to advise of any objections to the defendants' stage two briefs of evidence (Grant Graham and Professor Lehn) by 6 March 2020;
- (e) the plaintiff is to serve any reply briefs of evidence that remain outstanding, strictly limited to reply to the defendants' two stage two expert witnesses (Grant Graham and Professor Lehn), by 20 March 2020;
- (f) the plaintiff is to file and serve his opening submissions by 6 May 2020; and
- (g) the Common Bundle filed and served by the defendants on 23 October 2019 and updated on 1 November 2019 is the Common Bundle for the May 2020 trial.

[20] As Mr Carruthers submitted, there is no point in making such orders when it is plain that the plaintiff is not resourced to have the claimants perform their obligations under such a timetable. The terms sought give an indication of how the Court might otherwise have supervised the pre-trial stages.

[21] The defendants' 14 February 2020 memorandum also raised a concern that the claimants may not be adequately informed of the present position with the litigation, and in particular, from the defendants' perspective, the risk that they were not aware of the prospect of the defendants mounting a successful argument for striking out the

proceeding if there was continued non-performance of the funding obligations on JAFL/Mr Gavigan. The defendants sought orders that I address these issues and that my directions include one requiring the terms of any minute or judgment issued to be conveyed to all the claimants.

[22] That aligns with the position now taken by Mr Carruthers. I direct that copies of the defendants' 14 February 2020 documents, plus the memoranda filed by Mr Carruthers and of this minute should be included in the first communication made with claimants, whether that be by Mr Hamel or by an agent on Mr Carruthers' behalf.

[23] As matters presently stand, I anticipate that the defendants' application for dismissal of the proceeding or for judgment to be entered in their favour will be called on 11 May 2020. The terms on which it is to be dealt with will depend on developments.

[24] In affording further time to JAFL/Mr Gavigan and/or to other claimants to resource the stage two hearing, which I have done over the defendants' objection, I should not be taken as necessarily accepting that the recent developments justify a further adjournment of the hearing from the fixture presently scheduled for 11 May 2020. I have made these orders to meet the immediate exigencies of the predicament of the claimants, as identified by Mr Carruthers. I do not intend that the orders on those terms preclude the defendants from arguing that no further adjournment from the scheduled May fixture date can be justified.

[25] In his 27 February 2020 memorandum, Mr Hamel raised concerns on behalf of elderly claimants at the additional pressures that would be imposed on them should they be required to travel to Wellington to give their evidence if, by the fixture date in May 2020, serious health concerns on account of the Coronavirus are present in New Zealand. Mr Hamel submitted that this would be an undue pressure and proposed that, instead, the Court convene a sequence of hearings in Dunedin, Christchurch and Auckland in addition to the scheduled hearing in Wellington. Drawing on the contingencies Mr Hamel has in place for the management of his own practice, he submitted the Court's responsibility required contingencies of this type to be put in place.

[26] During the telephone conference, Ms Mills forcefully advanced the concerns raised by Mr Hamel.

[27] I am mindful of the pressures likely to be attendant on any significant outbreak of the Coronavirus in New Zealand. I apprehend that government departments, including the Ministry of Justice, are working on contingency plans to address the health risks raised by interactions, such as the requirement to attend court as witnesses. It is, however, entirely premature to take any of the steps proposed by Mr Hamel. The impact of any outbreak of the virus in New Zealand as it is or is likely to affect the hearing, whenever that may be, is to be assessed on objective evidence, including that from health experts, when the extent of actual concern is known.

[28] Given the level of Mr Hamel's concerns, I am confident that he will keep the issue before me.

Summary

[29] I make the following orders:

- (a) Mr Gavigan is forthwith to make the current mailing list available to Mr Hamel, who is to use it to convey communications to all claimants on that mailing list. If so requested by Mr Carruthers, Mr Hamel is also to provide that mailing list to any agent of Mr Carruthers intending to convey communications to claimants on his behalf. (See [8] above.)
- (b) JAFL/Mr Gavigan will have until **5.00 pm on 13 March 2020** to confirm that security for costs in favour of the defendants and sufficient financial resources to fund the claimants' stage two claims are in hand on committed terms. (See [16] and [17] above.)
- (c) Other claimants will have until **5.00 pm on Monday, 20 April 2020** to confirm alternative arrangements for the provision of stage two security and the funding needed to pursue the claimants' stage two claims. (See [18] above.)

- (d) Either Mr Hamel or an agent for Mr Carruthers is forthwith to convey to all claimants copies of the defendants' 14 February 2020 documents, the memoranda filed by Mr Carruthers since then and a copy of this minute.

[30] I have declined to make the timetable orders sought by the defendants to have stage two ready for hearing by 11 May 2020, but acknowledge that the terms of orders sought by them as recorded at [19] above would have been appropriate, had the plaintiff been adequately resourced at this time.

Dobson J

Solicitors:

Antony Hamel, Dunedin for plaintiff

Gilbert Walker, Auckland for first defendants (other than Mr Horrocks and Ms Withers)

Clendons, Auckland for Mr Horrocks

Wilson Harle, Auckland for Ms Withers

Russell McVeagh, Wellington for second and third defendants

Counsel:

C R Carruthers QC and P A B Mills for plaintiff

A R Galbraith QC and D J Cooper for first defendants (other than Mr Magill, Mr Horrocks and Ms Withers)

T C Weston QC for Mr Magill

B D Gray QC for Ms Withers

J B M Smith QC and A S Olney for second and third defendants