

TO: The Registrar of the High Court at Wellington

AND TO: The plaintiff

This document notifies you that:

1. The defendants will at 10.00am on 11 May 2020 apply to the Court for an order that, unless the plaintiff is ready to proceed with the stage-two trial in compliance with all orders and directions made by the Court, the proceedings are dismissed and / or judgment is entered for the defendants (as appropriate) and the plaintiff pay the defendants' costs.
2. For the avoidance of doubt, the effect of the order sought by the defendants is permanently to dismiss this representative proceeding, including the claims of the claimants represented by the plaintiff, and / or to enter judgment for the defendants in relation to all such claims.
3. The grounds on which the order(s) is (are) sought are as follows:
 - (a) The stage two trial in this matter was scheduled to be heard over five weeks commencing on 4 November 2019. On 29 October 2019, the plaintiff applied to adjourn that trial. The plaintiff indicated to the Court that if the adjournment was not granted on the grounds sought (relating to the plaintiff's subsequently unsuccessful application for leave to appeal to the Supreme Court on an evidential issue), the claimants were not ready to advance their stage two claims. The stage two trial was adjourned¹ and a five week fixture was subsequently allocated to commence on 11 May 2020.
 - (b) The plaintiff and claimants should not be entitled to a further adjournment arising from their own failure to be ready to proceed in compliance with all orders and directions made by the Court.
 - (c) The plaintiff, his funder Joint Action Funding Limited ("**JAF**L") and its sole director Mr Gavigan, have since May 2019 maintained that unless Mr Houghton is indemnified for potential costs exposure this case will not proceed.² Such indemnification requires funding. The plaintiff, JAF L and Mr Gavigan have, on numerous occasions, informed this Court that a successful appeal to the Supreme Court to admit particular expert loss evidence earlier ruled inadmissible was crucial to securing funding.³ In particular:

¹ *Houghton v Saunders* [2019] NZHC 2906.

² See the Affidavit of Anthony John Gavigan concerning security for costs dated 11 September 2019 at [21], where Mr Gavigan confirms his May 2019 oral comment to the Court that "neither Mr Houghton nor JAF L would be in a position to proceed to a Stage 2 hearing until his Indemnity was arranged."

³ Affidavit of Eric Meserve Houghton in support of the plaintiff's application for adjournment of trial dated 29 October 2019 at [7]; Written submissions for plaintiff on application for adjournment of trial dated 31 October 2019 at [23]; Anthony Gavigan's Memorandum for Justice Dobson addressing a non-party issue dated 25 September 2019 at [12]; Affidavit of Anthony John Gavigan in support of the notice of opposition by non-parties dated 11

- (i) Mr Gavigan has said that a "worldwide search of adverse costs insurers, including searches by Crombie Lockwood in 2019, did establish that there is as yet no reliable insurer willing to insure Mr Houghton's stage two potential liabilities if the expert evidence and measurement of loss quantification is restricted to as low as seven or eight cents per Feltex share as at 2 June (excluding interest)."⁴
 - (ii) Mr Gavigan agreed that Dobson J was accurate in saying "Mr Houghton's stage two claim is unbankable and uninsurable at a diminution in value of only seven or eight cents per share".⁵
 - (iii) Following the Supreme Court judgment declining leave to appeal, a claim to seven or eight cents represents the full extent of the plaintiff's expert loss evidence.
- (d) In the absence of such funding, the plaintiff was forced to seek an adjournment of the stage two trial scheduled for November 2019.⁶ The application for leave to appeal to the Supreme Court on the admissibility of that evidence was declined by that Court.⁷
- (e) The plaintiff has had ample time to prepare for the stage two trial:
- (i) The stage two trial was directed by the Supreme Court in its judgment issued on 18 August 2018.⁸
 - (ii) By a joint memorandum of counsel dated 28 February 2019, the plaintiff consented to a timetable leading to the stage two trial commencing on 4 November 2019.
 - (iii) Those timetable steps were largely completed (albeit that the plaintiff was late to complete most steps) prior to 4 November 2019. The only outstanding steps were for the plaintiff to file expert evidence in reply (which was due by 4 October 2019) and opening submissions (which were due by 30 October 2019).
 - (iv) Following the adjournment of the November 2019 trial fixture, there is ample time for any remaining steps to be completed prior to 11 May 2020.
- (f) The plaintiff has had ample time to provide security for costs:

December 2019 at [19]; and Notice of opposition for costs against non-parties dated 11 December 2019 at [3.6].

⁴ Affidavit of Anthony John Gavigan in support of the notice of opposition by non-parties dated 11 December 2019 at [19].

⁵ Notice of opposition for costs against non-parties dated 11 December 2019 at [3.6].

⁶ *Houghton v Saunders* [2019] NZHC 2906.

⁷ *Houghton v Saunders* [2019] NZSC 148.

⁸ *Houghton v Saunders* [2018] NZSC 74.

- (i) Security for costs ought to have been in contemplation since the Supreme Court remitted this matter to the High Court on 15 August 2018.
 - (ii) On 22 February 2019, the defendants applied to the High Court for security for costs. On 14 June 2019, following a hearing on 30 May 2019, the Court ordered the plaintiff to provide security for costs for stage two of this proceeding in the sum of \$1.65 million by 12 July 2019. On 15 August 2019, the Court provided a new tiered approach to stage two security for costs with a final date for payment of 23 August 2019.
 - (iii) The plaintiff has had since at least 15 August 2019 to provide security for costs. By 11 May 2020, the plaintiff will have had 270 days, or approximately nine months, to provide security for costs.
- (g) The plaintiff has repeatedly ignored orders of this Court, by failing to:
- (i) provide security for costs;
 - (ii) comply with timetabling deadlines in respect of discovery and evidence;
 - (iii) pay costs orders in this Court, the Court of Appeal and the Supreme Court; and
 - (iv) ready himself for the stage two trial (which was to address all remaining common issues) scheduled for November 2019.
- (h) Ongoing prejudice is accruing to the defendants:
- (i) costs are being incurred;
 - (ii) the proceeding is hanging over the defendants;
 - (iii) the significant quantum of the plaintiff's claim, and ongoing potential interest accrual, impacts the commercial position of the defendants;
 - (iv) the reputation of the defendants is being impacted; and
 - (v) in light of the matters noted above,⁹ if the plaintiff is unable to proceed at the scheduled 11 May 2020 stage two trial the defendants would incur yet further and significant wasted costs in preparation for another aborted trial fixture.

⁹ See above at paragraph 3(a).

- (i) The effluxion of time since the events underlying this case, and the beginning of the proceeding, entails prejudice to both the defendants and the public interest:
- (i) the plaintiff's representative statement of claim contains allegations which stem from an IPO completed in 2004;
 - (ii) the proceeding was brought in 2008, and has previously been stayed (July 2009–June 2011); and
 - (iii) it is now almost 16 years since the represented claimants decided to invest in the Feltex IPO.

It is in this context that the Court has previously recognised the "greater than usual imperative in achieving finality" in this proceeding.¹⁰

- (j) Recognising that imperative, the Court envisaged that any judicial response to continued non-provision of security for costs would have to deliver finality and thus reserved leave to the defendants to "apply at short notice for a stay of the proceedings on whatever terms are contended as appropriate" in the event that security for costs was not provided by 23 August 2019.¹¹ The Court noted that:¹²

... given the length of the history of this matter and the extent of steps taken since the Supreme Court judgment in August 2018, once a stay is in contemplation, I am unlikely to be persuaded to grant a temporary stay on any open-ended basis.

- (k) It can be assumed that the represented claimants have been kept informed of relevant developments by their lawyers,¹³ their representative and their funder / manager of their claims, JAFL (and through JAFL, Mr Gavigan). The defendants' preference is that the stage two trial proceeds on 11 May 2020 as set down, to enable a final resolution of the claims currently before the Court. To ensure that the claimants are aware of the circumstances which may have lead the Court instead to dismiss the proceeding, and to provide the fullest final opportunity both to the plaintiff and the claimants to understand the full circumstances of this proceeding prior to any dismissal of their claims or judgment being entered for the defendants, the defendants propose that this application and any Minute or judgment issued by the Court in respect of it be sent by the plaintiff to all represented claimants.

¹⁰ *Houghton v Saunders* [2019] NZHC 2007 at [50].

¹¹ *Houghton v Saunders* [2019] NZHC 2007 at [83] and see [51] and [55]; and see Minute of Dobson J, 9 August 2019 at [1].

¹² *Houghton v Saunders* [2019] NZHC 2007 at [51(1)(5)]; and see Minute of Dobson J, 9 August 2019 at [1].

¹³ Pursuant to the JAFL Agreement, Recital F, cl 13.1, and Schedule 1 at cl 2.1, the lawyers are appointed to provide the represented claimants with the advice and other legal services reasonably necessary to prosecute the representative proceedings.

4. The application is made in reliance on *Saunders v Houghton (No 1)* [2009] NZCA 610, [2010] 3 NZLR 331; *Houghton v Saunders* (2011) 20 PRNZ 509 (HC); *Houghton v Saunders* [2019] NZHC 1362; *Houghton v Saunders* [2019] NZHC 2007; *Houghton v Saunders* [2019] NZHC 2318; *Houghton v Saunders* [2019] NZHC 2567; *Houghton v Saunders* [2019] NZHC 2906; Minute of Dobson J, 9 August 2019; *Houghton v Saunders* [2019] NZSC 148; *Jagwar Holdings Ltd v Fullers Corp Ltd* (1991) 4 PRNZ 577 (HC); *J & T Christie Ltd (in rec) v Westpac Merchant Finance Ltd* HC Dunedin CP128/91, 17 April 1997; *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53; *Reid v NZ Trotting Conference* [1984] 1 NZLR 8 (CA); *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL); Affidavit of Eric Meserve Houghton in support of the plaintiff's application for adjournment of trial dated 29 October 2019; Written submissions for plaintiff on application for adjournment of trial dated 31 October 2019; Anthony Gavigan's Memorandum for Justice Dobson addressing a non-party issue dated 25 September 2019; Affidavit of Anthony John Gavigan in support of the notice of opposition by non-parties dated 11 December 2019; High Court Rules 2016, rr 5.45, 7.48, 10.8, 15.1, 15.2; and the Court's inherent powers.

Dated 14 February 2020



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