

MAY IT PLEASE THE COURT:

1. This memorandum addresses:
 - (a) the defendants' interlocutory application for dismissal of proceedings / entry of judgment should trial not proceed as planned on 11 May 2020; and
 - (b) pre-trial directions.
2. The defendants request an urgent judicial teleconference to address the matters raised in this memorandum, and to make the directions sought. The defendants have separately addressed the outstanding issue of costs arising from the adjournment of the November 2019 trial in their joint memoranda dated 27 and 29 January 2020.

Application for dismissal / entry of judgment

3. The defendants file this memorandum of counsel alongside their interlocutory application for dismissal of proceedings / entry of judgment in the event of plaintiff default in proceeding to trial on 11 May 2020. As both the grounds and need for the relief sought in that application will only crystallise (if at all) on 11 May 2020, the defendants propose that the application be heard on that day (if required).
4. 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.¹ 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.² In the absence of that evidence / funding, the plaintiff was forced to seek an adjournment of the stage two trial scheduled for November 2019.³ The application for leave to appeal to the Supreme Court on the admissibility of that evidence was declined by that Court on 13 December 2019.⁴
5. On 20 December 2019, the defendants jointly wrote to the plaintiff's solicitor and barrister (see **Annex A**). In that letter, the defendants expressed their concern that if adequate funding for the plaintiff is not secured, the defendants may incur significant costs and invest significant time preparing for the 11 May 2020

¹ 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."

² 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 of 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 December 2019 at [19]; and Notice of opposition for costs against non-parties dated 11 December 2019 at [3.6].

³ *Houghton v Saunders* [2019] NZHC 2906.

⁴ *Houghton v Saunders* [2019] NZSC 148.

hearing only for those costs and that time to be wasted in the event the plaintiff is unwilling or unable to proceed.

6. Additionally, the plaintiff's ongoing non-payment of costs ordered against him led the defendants to have real concerns as to the plaintiff's apparently precarious funding position and whether he will ever be in a position to meet his outstanding costs and security obligations to the defendants. Accordingly, the defendants requested that the plaintiff provide, by 20 January 2020, the following:
 - (a) security for costs in line with your Honour's judgment of 14 June 2019; and
 - (b) confirmation that the plaintiff is in a position to fund stage two of the proceeding through trial to judgment.
7. The plaintiff has not replied and has not provided security for costs nor confirmed he is in a position to fund stage two of the proceeding through trial to judgment.
8. The defendants are concerned that, just as occurred in relation to the 4 November 2019 trial, the plaintiff will not be in a position to proceed to trial on 11 May 2020. The defendants will apply for orders dismissing the proceeding or entering judgment in the event the plaintiff is not ready to proceed with the stage two trial in compliance with all orders and directions of the Court on 11 May 2020.
9. On 17 January 2020, Mr Gavigan filed submissions in relation to non-party costs which referred to and annexed a copy of an Updating Memorandum he had sent the previous week to all claimants who had supplied a valid email address. The defendants consider Mr Gavigan's Updating Memorandum to be misleading in material respects, including because it fails to disclose or address the difficulties encountered by JAFL in providing funding or security for the stage-two trial. **Schedule A** of this memorandum sets out the defendants' concerns.
10. 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. However, the defaults by the plaintiff and actions of JAFL may (if not remedied by the scheduled trial date) lead instead to a dismissal of the proceedings.
11. Against that background, the defendants wish to provide the fullest final opportunity to both the plaintiff and the claimants he represents to understand the full circumstances of this proceeding, and ensure that the claimants are aware of the defaults by the plaintiff and actions of JAFL which have led to the possibility that the Court may dismiss the proceeding.
12. Accordingly, the defendants seek directions now, or at the telephone conference, that the solicitors for the represented claimants are to:
 - (a) Within five working days, send to the represented claimants for whom they have contact details:
 - (i) a copy of the defendants' application;

- (ii) an explanatory note which identifies for the represented claimants the key features of the application and the issues it raises and invites any represented claimant to seek advice in relation to it;
 - (iii) a copy of any Minute or judgment issued by the Court in respect of that application; and
- (b) Within a further five working days, file and serve a memorandum confirming that this communication has been sent to the represented claimants.

Pre-trial directions

13. To ensure the stage two trial is ready to proceed on 11 May 2020 it is prudent now to re-set a timetable to that trial and provide for any other appropriate pre-trial directions.
14. On 28 February 2019, the parties agreed a joint timetable to the stage two trial then scheduled for November 2019.⁵ All timetabled steps (that were pursued) were completed before the adjournment of that trial other than the plaintiff serving briefs of evidence in reply and the plaintiff filing and serving opening submissions.
15. In addition to the directions ancillary to the application sought at paragraph 11 above, the defendants seek pre-trial directions as follows:
- (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;

⁵ Joint memorandum of counsel for all parties regarding timetable to trial dated 28 February 2019 at [2].

- (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.

Next steps

- 16. Counsel for the defendants can make themselves available for a teleconference at short notice.

Dated 14 February 2020



A R Galbraith QC | D J Cooper | M C Harris
Counsel for the first defendants
(other than Mr Magill and Ms Withers)



PP

T C Weston QC
Counsel for Mr Magill

B D Gray QC | A E Ferguson
Counsel for Ms Withers



J B M Smith QC | A S Olney | C J Curran
Counsel for the second and third defendants

- (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.

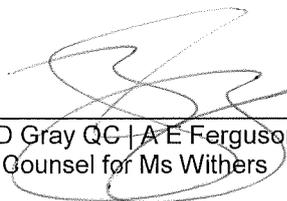
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SCHEDULE A

Mr Gavigan's Updating Memorandum dated 8 January 2020

1. On 17 January 2020, Mr Gavigan filed submissions in relation to non-party costs which referred to and annexed a copy of an Updating Memorandum he had sent the previous week to all claimants who had supplied an email address.⁶ Mr Gavigan has also made the Updating Memorandum available to claimants, upon request, through Twitter.⁷
2. The defendants consider Mr Gavigan's Updating Memorandum to be misleading in material respects.

Misleading description of developments since August 2018

3. The Updating Memorandum purports to update claimants on developments in the proceeding since the Supreme Court's judgment in August 2018.⁸ However, the Updating Memorandum omits to advise claimants of two of the key developments since August 2018, namely that: (i) JAFL and therefore the plaintiff have failed to provide security for costs as ordered by the Court thereby exposing the claim to the risk of dismissal; and (ii) JAFL has failed to provide or procure funding which caused the plaintiff to be unable to proceed with the stage two trial at the scheduled hearing in November 2019 and therefore led to the adjournment of the stage two trial to May 2020.⁹
4. Funding and security are matters of critical importance to the claimants and to the future of this proceeding. They represent the essence of JAFL's obligations to the claimants under the JAFL Agreement. It is highly misleading for Mr Gavigan to distribute an Updating Memorandum which purports to provide an update for claimants on developments since August 2018 but which omits any reference to JAFL's security and funding defaults.

The so-called "survey" of claimants is invalid and misleading

5. Mr Gavigan's submissions dated 17 January 2020 refer to the Updating Memorandum at [4.2]–[4.4], describing it as "a survey of all claimants". To the extent the Updating Memorandum is said to operate as a survey – or indeed as an invitation for the claimants to provide evidence – it is defective and improper because it encourages claimants to say they would have "reversed" their investment decision had they been told of facts found (according to Mr Gavigan) to be untrue. For example:

- a. Mr Gavigan's covering letter states:

... The steps you take now will help determine if you receive a full refund, or the lower *Measure of Loss* compensation.

⁶ At [4.2].

⁷ See **Annex B**.

⁸ See the first sentence of the covering letter and section B of the Memorandum entitled "What has happened since the Supreme Court Liability Decision in 2018".

⁹ *Houghton v Saunders* [2019] NZHC 2906 at [3], [4] and [42]. There is a single reference to the adjournment in the Appendix to the Updating Memorandum which simply states that the stage two trial "has been postponed until the middle of this year" but without any explanation as to the circumstances leading to the plaintiff being unready to proceed in November.

- b. Section C2 of the Updating Memorandum states:

Based on the above Supreme Court guidance, Houghton's lawyers advise that:

To obtain a full refund of your Feltex IPO subscription money you must now consider the circumstances of your own May 2004 investment then, if appropriate, establish in your own mind and in due course to the satisfaction of the Court that:

- (a) you invested on the faith of the Feltex prospectus and
- (b) you would have reversed your Feltex investment decision had there been a revelation [to you] of the true facts found by the Supreme Court and risks in Feltex's shares

- c. Section D of the Updating Memorandum sets out steps which the claimants are required to take to confirm that they would have reversed their investment decision and then states at paragraph [4]:

If you do not take these steps it is likely the level of compensation you may receive in due course will be the lower *Measure of Loss* (explained below in the Appendix) – rather than the full refund you may otherwise be entitled to.

6. This is a thinly disguised attempt to coach the claimants (each of whom is a potential witness) to give the answer that they would have "reversed" their investment decision. It invalidates any responses received to the so-called survey¹⁰ and is likely to contaminate any evidence subsequently given by those claimants at a later hearing.

Misleading statements as to the effect of the 2018 and 2019 Supreme Court judgments

7. The Updating Memorandum also provides inaccurate and therefore misleading advice as to the Supreme Court's judgment of 13 December 2019¹¹ dismissing the plaintiff's application for leave to appeal from the judgment of the Court of Appeal upholding your Honour's decision that parts of Mr Houston's evidence were inadmissible. Section C3 claims that "Houghton's Lawyers advise that the following paragraphs from [the 2018 Supreme Court decision] contain important findings of fact" and then goes on to quote in full paragraphs [263] and [264].
8. That statement is directly contrary to the findings of the Court of Appeal that those paragraphs were not "findings" but merely "observations made in the course of a discussion which led to the rejection of the appellant's claim that the FY05 revenue projection contained an untrue statement".¹²

¹⁰ The defendants do not, in any event, accept the relevance or admissibility of survey evidence of this type.

¹¹ *Houghton v Saunders* [2019] NZSC 148.

¹² *Houghton v Saunders* [2019] NZCA 506 at [39].

Misleading statements as to the plaintiff's expert evidence on loss

9. Following the resolution of the admissibility concerns raised by the defendants, the remaining parts of Mr Houston's evidence expressed an opinion that the untrue statement identified by the Supreme Court caused loss of 7-8 cents per share.¹³ Mr Houston's other evidence based on instructions to make different assumptions about other facts led to higher loss figures, but that evidence has been struck out as inadmissible.
10. Nonetheless, the Appendix to the Updating Memorandum includes the following advice to claimants:¹⁴

The description of the methodology applied by Greg Houston of HoustonKemp is necessarily technical. The bottom line is that the *Measure of Loss* is arguably somewhere in the range of 7 cents per share to \$1.36 per share.

- (1) Using a conservative Discounted Cash Flow (DCF) model and an Event Study model based on the negative market reaction to Feltex's 24 August 2004 NZX announcement Greg Houston assesses the required negative adjustment to the Feltex share value as at 2 June 2004 to be [at least] between 7 cents per share and 27 cents per share.

...

- (4) Greg Houston set out the negative price effect estimated using the FY05 revenue and price reaction relationship in a supplementary report at table 2.3, with an upper limit of \$1.36 when applying an abnormal price movement of \$0.06 per \$1 million reduction in FY05 revenue.

...

11. The Updating Memorandum fails to inform claimants that the evidence of Mr Houston in support of a loss figure above 7–8 cents per share has been found to be inadmissible.

¹³ Expert Report of Greg Houston dated 19 July 2019 at [181].

¹⁴ Under the heading "DCF and Event Study Indicative Values for *Measure of Loss*".

20 December 2019

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By email

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By email

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Dear Antony and Patricia

HOUGHTON V SAUNDERS CIV-2008-409-348 – SECURITY FOR COSTS

1. This letter concerns your client's ongoing non-provision of security for costs. We write on behalf of all defendants in the above proceeding.

The current position

2. The High Court ordered your client to provide security for costs for stage two on 14 June 2019. Security in the sum of \$2,580,000 was ordered in two parts, namely stage one security of \$930,000 and stage two security of \$1,650,000. Six months later, your client remains in default of providing that security.
3. As plaintiff, Mr Houghton is responsible for providing security for costs and for costs in the event of awards being made in the defendants' favour. We understand that Joint Action Funding Ltd ("**JAF**L") has been arranging insurance and/or an indemnity for Mr Houghton and that JAF L, through the JAF L agreement, also indemnifies all represented claimants. Mr Gavigan, as sole director of JAF L, has provided the Court with numerous updates about the plaintiff's funding position.¹
4. As we understand the position, for a stage two trial in this proceeding to be viable, JAF L must secure sufficient funding to:

(a) pay for stage two trial expenses, such as legal, travel and witness costs;²

(b) indemnify Mr Houghton from potential adverse costs exposure at stage two;³
and

¹ See Memorandum for plaintiff in response to minute (dated 9 August 2019) dated 13 August 2019 at [3]–[4]; Affidavit of Anthony John Gavigan concerning security for costs dated 11 September 2019 at [21]–[27]; Updating memorandum for Justice Dobson addressing a non-party issue, progress on security for costs & timetable issues dated 22 October 2019 at [19]–[29]; Affidavit of Anthony John Gavigan in support of the notice of opposition by non-parties dated 11 December 2019 at [19].

² Written submissions for plaintiff on application for adjournment of trial dated 31 October 2019 at [23].

³ Affidavit of Anthony John Gavigan concerning security for costs dated 11 September 2019 at [21].

Partners

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Stephen Rendall
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Nathaniel Walker
William Irving

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- (c) provide the defendants with the ordered security for costs.⁴
5. Your client and Mr Gavigan have explained that a successful appeal to the Supreme Court on Mr Houston's evidence was crucial for securing that funding:
- (a) Mr Houghton has said: "I am unable to proceed to the Stage 2 trial until these matters are resolved first [ie, the appeal on Houston's evidence]. The reason for this is that the quantum of the undisclosed loss of value in the Feltex shares as at 2 June 2004 would have been central to my decision. Further, it is an important consideration for the funders and the insurers to assess the risks of proceeding with the Stage 2 trial."⁵
- (b) Mr Houghton, through the submissions of counsel, has said: "One consequence [of the plaintiff's inability to put into place final arrangements for security for costs] has been that the plaintiff has been unable to access the balance of the costs (\$930,000) repayable to him by the defendants. The result has been that neither the plaintiff nor JAFL have been able to fund the case adequately. The consequence is that the ongoing costs for witnesses, particularly expert witnesses, the administrative cost associated with trial, and commitment to travel and accommodation costs or legal costs cannot be funded and paid until after the decision of the Supreme Court is available and can be considered. What would occur then, if the application for leave and the appeal itself is granted, is that funding being arranged for the Stage Two trial will fall into place."⁶
- (c) Mr Gavigan has said: "Unfortunately without the benefit of over half Mr [Houston's] independent valuation evidence I have been unable to secure the insurance protection of Mr Houghton that he requires. The matter is both circular and co-dependent."⁷
- (d) Mr Gavigan has also 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) [that is the figure following his Honour's inadmissibility ruling]. That situation will no doubt develop if the Supreme Court agrees to consider the issues."⁸
- (e) 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".⁹

⁴ *Houghton v Saunders* [2019] NZHC 1362.

⁵ Affidavit of Eric Meserve Houghton in support of the plaintiff's application for adjournment of trial dated 29 October 2019 at [7].

⁶ Written submissions for plaintiff on application for adjournment of trial dated 31 October 2019 at [23].

⁷ Anthony Gavigan's Memorandum for Justice Dobson addressing a non-party issue dated 25 September 2019 at [12].

⁸ Affidavit of Anthony John Gavigan in support of the notice of opposition by non-parties dated 11 December 2019 at [19].

⁹ Notice of opposition for costs against non-parties dated 11 December 2019 at [3.6].

(f) His Honour Dobson J recognised the plaintiff's position was: "an outcome from the Supreme Court (presumptively favourable) was a necessary prerequisite to completing adequate funding arrangements."¹⁰

6. Accordingly, on your client's and Mr Gavigan's explanation of the funding position, access to adequate funding to provide security for costs and take the matter to a viable stage two trial was conditional upon success in your client's proposed appeal against the Court of Appeal decision excluding Mr Houston's evidence. Indeed, in Mr Gavigan's recent opposition to a non-party costs order, proceeding further on the claim quantum disclosed by plaintiff's pre-appeal loss evidence was described as "irresponsible, and would indeed give class actions a bad name".¹¹
7. As you know, the Supreme Court dismissed your client's application for leave to appeal on 13 December 2019.¹²
8. The defendants are concerned about the risks they would face if the stage two trial proceeded without security for costs being paid. Similarly, if adequate funding for the plaintiff is not secured, the defendants may incur significant costs preparing for the May 2020 hearing only for those costs to be wasted in the event the plaintiff is unwilling or unable to proceed. That is what occurred in respect of the scheduled November 2019 stage two trial. The defendants are unaware of any developments in the plaintiff's funding position that give any confidence about the plaintiff's ability to fund the scheduled May 2020 stage two trial. Indeed, all indications from the plaintiff, JAFL and Mr Gavigan (as set out at [5] above) are to the effect that the stage two trial is not able to be funded given the dismissal of the plaintiff's application for leave to appeal to the Supreme Court.
9. The defendants' concerns are compounded by the current position in respect of outstanding costs awards. The parties had agreed Court of Appeal costs (for both CA290/2019 and CA437/2019) by 18 October 2019. However, your client has still not paid these costs. This is despite repeated requests for payment made in letters from Gilbert Walker (on behalf of all defendants) on the following dates: 30 October 2019, 12 November 2019, 5 December 2019 and 16 December 2019. Further, High Court costs in relation to interlocutory matters are also not yet settled (see the letter of Gilbert Walker to Antony Hamel dated 30 October 2019) and the Supreme Court's recent costs award is now also outstanding.

Source of security

10. Mr Gavigan has informed the Court and the defendants that he has been, for some time now, pursuing various sources of funds to provide security for costs and to fund stage two through until judgment.¹³ One source of funding that Mr Gavigan has been exploring was directly from represented claimants. Indeed, Mr Gavigan has previously suggested that there is a "strong level of support" from amongst claimants to support direct funding.¹⁴

¹⁰ Minute of Dobson J dated 5 November 2019 at [5].

¹¹ Notice of opposition for costs against non-parties dated 11 December 2019 at [3.7].

¹² *Houghton v Saunders* [2019] NZSC 148.

¹³ Affidavit of Anthony John Gavigan addressing the plaintiff's application for adjournment dated 23 October 2019 at Exhibit A [19]–[29].

¹⁴ Affidavit of Anthony John Gavigan addressing the plaintiff's application for adjournment dated 23 October 2019 at Exhibit A [29].

11. The defendants are not concerned with the particular source of the plaintiff's funding. They only require, consistently with his Honour's orders,¹⁵ that the quantum of security ordered be provided, and that the form of security meets their reasonable requirements.
12. However it is resolved, the current uncertainty in the plaintiff's funding position, and its implications for the defendants' own financial position, cannot continue. The ordered security for costs must be provided.
13. Given the lengthy delay since security for costs was ordered (14 June 2019), the defendants now request that your client provide the ordered security for costs by 20 January 2020. In addition, to avoid any repetition of the cost and delay involved in the November hearing adjourned on your client's late application, the defendants also request confirmation by that same date (20 January 2020) that the plaintiff is in a position to fund stage two of the proceeding through trial to judgment.
14. Should your client not be able to provide the ordered security and the requested assurance by 20 January 2020, the defendants reserve their rights to apply to the High Court for further orders. Due to the significant risk of further wasted or unrecoverable adverse costs to which the defendants would be exposed, we note that such orders are likely to include an order permanently staying or dismissing this proceeding.

Yours faithfully

RUSSELL McVEAGH



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¹⁵ *Houghton v Saunders* [2019] NZHC 1362 at [87]–[88].

