IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2008-409-348
[2019] NZHC 1061

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

Hearing:	8 May 2019
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 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 defendants
Judgment:	15 May 2019

RESERVED JUDGMENT OF DOBSON J
[Applications for strike-out, identification of claimants and discovery of funding documentation]

Strike-out application

[1] The defendants have pleaded, by way of an affirmative defence, an application for relief from any liability they are held to owe to claimants, pursuant to the provisions in s 63 of the Securities Act 1978 (the Act) as they applied at the time of the issue of the prospectus. By consent, or at least without any opposition, when I settled the scope of issues for the stage two hearing of the proceeding, I included as an issue:[1]

> The availability for any defendants of a defence under s 63 of the Securities Act.

[2] Since then, the plaintiff has applied for an order to strike out the defence that would rely on s 63 of the Act and the defence relying on an analogous approach under the Fair Trading Act 1986.

[3] The strike-out application relies on reasoning in the judgment of the Supreme Court in which it considered the potential availability to the defendants of a defence under s 56(3)(c) of the Act. That provided a defence to liability for an untrue statement in the prospectus in the following terms:

> **56 Which persons are liable for misstatements**
>
> …
>
> (3) No person shall be liable under subsection (1) of this section in respect of any untrue statement included in an advertisement or registered prospectus, as the case may be, if he or she proves that—
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> …
>
> (c) … as regards every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, he or she had reasonable grounds to believe and did, up to the time of the subscription for the securities, believe that the statement was true; or
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> …

[4] The Supreme Court ruled that this statutory defence would not be available to the defendants. The judgment included:[2]

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1 *Houghton v Saunders* [2019] NZHC 142 at [25].
2 *Houghton v Saunders* [2018] NZSC 74, [2019] 1 NZLR 1 at [291].

> … If the directors knew as at 2 June 2004 that the FY04 revenue forecast was no longer the most probable outcome based on the assumptions stated in the prospectus or that the assumptions were not reasonable assumptions, then they knew that the FY04 revenue forecast was a misleading statement, i.e. it was untrue. They cannot claim they had reasonable grounds for believing it was a true statement when they knew it was not. They may be able to establish that they believed it was untrue only to an immaterial extent, but s 56(3)(c) does not provide a defence in those circumstances as the Court of Appeal found.

[5] The plaintiff contended that there was no tenable basis for the defendants to bring themselves within the provision for relief in s 63 of the Act because, arguably, there must be parity of reasoning between the Supreme Court finding in relation to s 56(3) and the pre-requisites for the application of s 63 of the Act. Section 63 provides:

> **63 Power of court to grant relief in certain cases**
>
> (1) If in any proceedings against any person for negligence, default, breach of duty, or breach of trust in connection with—
>
> (a) an offer to the public or allotment of securities; or
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> (b) the distribution of a registered prospectus or advertisement; or
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> (c) the management of securities offered to the public; or
>
> (d) any matter related thereto—
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> it appears to the court hearing the case that the person is or may be liable in respect of the negligence, default, breach of duty, or breach of trust, but that he or she has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his or her appointment, he or she ought fairly to be excused for the negligence, default, breach of duty, or breach of trust, the court may relieve him or her either wholly or partly from his or her liability, on such terms as the court may think fit.
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> …

[6] Mr Carruthers QC submitted that there was no prospect of the defendants making out the necessary pre-requisite in s 63(1) that they had acted "reasonably" when the Supreme Court has found that they could not have had reasonable grounds for believing that the statement in respect of the 2004 financial year revenue forecast was a true statement when they knew that it was not. Describing it as a "matter of semantics", Mr Carruthers submitted that the absence of reasonable grounds for belief in the truth of a particular statement meant that the defendants could not make out, in

respect of their negligence, default, breach of duty or breach of trust, that they had acted reasonably.

[7] Mr Carruthers treated the requirement for "reasonable grounds to believe" in s 56, and for a person in breach of obligations contemplated by s 63 having to act "reasonably", as being the same. He was encouraged in this view by the following obiter observations in my stage one judgment:[3]

> [556] [Section 63] applies in broader circumstances than s 56(3). It can be invoked where liability is not pursuant to the statutory regime, and extends to the prospect of liability at common law for negligence or breach of trust. I did not hear argument on the scope of circumstances in which s 63 might avail a defendant when the due diligence defence could not be made out in relation to liability for an untrue statement in a prospectus. In cases such as the present, it seems likely that the same considerations would apply.
>
> [557] Given my provisional view that the defendants could bring themselves within the due diligence defence under s 56(3) of the SA, if the prospectus was found to contain untrue statements, then resort to s 63 would be unnecessary. If I were also held to be wrong on the availability of the due diligence defence, then I am not in a position to make findings of any distinguishable circumstances in which any of the defendants would nonetheless be entitled to some measure of relief under s 63. In those circumstances, the matter would need to be re-argued in light of the nature of the untrue statement, and the findings that lead to the rejection of the due diligence defence.

[8] Mr Carruthers took the last sentence of [556] to acknowledge that a finding on the absence of reasonable grounds for belief in the truth of a statement for the purposes of s 56(3)(c) would necessarily mean that such a person could not make out that they had acted reasonably in the sense required by s 63.

[9] An alternative ground for the application to strike out the foreshadowed reliance on s 63 was that the circumstances of liability made out against the defendants do not constitute a "default" as the term is used in s 63. Nor, arguably, could the basis of liability be characterised as negligence, breach of duty or breach of trust. In these circumstances, s 63 is not available to the defendants.

[10] A further alternative argument for the non-availability of s 63 was that s 56(3) constituted a specific provision in respect of untrue statements in prospectuses. This

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3 *Houghton v Saunders* [2014] NZHC 2229, [2015] 2 NZLR 74.

should be interpreted as prevailing to the exclusion of a more general prospect of relief from liability provided for in s 63, invoking the Latin maxim *generalias specialibus non derogant*.

[11] The strike-out application was opposed on numerous grounds. The primary point was that the claimed equivalence between reasonable grounds for belief in the truth of a statement found to be untrue, and the standard of the conduct relevant to liability having to be reasonable, was misconceived and could not apply. For a range of reasons, the defendants argued that there could be a finding that directors did not have reasonable grounds for belief in the truth of a statement, but they could still establish the relevant pre-requisite for the invocation of s 63 by making out that they had acted reasonably. The defendants denied that the particular passages in the Supreme Court judgment relied on by the plaintiff contemplated that the Court's finding on s 56(3) precluded resort to s 63. Indeed, the defendants cited other passages in the Supreme Court judgment that explicitly left open the defendants' entitlement to invoke s 63 as a matter to be determined at the substantive stage two hearing (the stage two hearing).

[12] Numerous other grounds were raised in support of the defendants' submissions that the plaintiff could not discharge the onus of establishing the high threshold that all prospects of invoking s 63 were clearly untenable so that the Court could be satisfied that the defence could not succeed.[4]

Relevant equivalence between ss 56(3)(c) and 63?

[13] It is at least arguable that different considerations would apply to determine whether a liable defendant had acted reasonably for the purposes of s 63, compared with the narrower focus required by s 56(3)(c) to determine whether a director had reasonable grounds to believe in the truth of a statement in a prospectus that has been found to be untrue. As analysed by Mr Gray QC, the two tests arise in different contexts, and are to be applied for different purposes.

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4 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

[14] Section 56 deals with circumstances where any person with responsibility for a statement believed by them to be true is facing liability for a finding that the statement was untrue. Resort to s 56(3)(c) to avoid liability would begin with subjective claims by those persons that they believed the statement to be true. The requirement for such a belief to be reasonable operates as a constraint on the scope of subjective beliefs that will qualify, because they are required to be objectively reasonable.

[15] In contrast, one constraint on an entitlement to relief under s 63 requires a finding that the person has acted reasonably. The person must also have acted honestly and the measure of relief must be assessed to be fair having regard to all the circumstances. Conceptually at least, a different perspective on reasonableness might apply in some cases. In the present case, for example, there is the prospect of a finding that a director had no reasonable grounds for believing a statement was true, but nonetheless was reasonable in not requiring correction of the statement because the director believed, on advice, that the extent of the untruth was immaterial. I express no view on the prospects for such an argument in this case, and cite the example only to demonstrate that resort to s 63 cannot be ruled out solely on the ground that there were no reasonable grounds for believing the relevant statement was true.

[16] As Mr Gray conceded, a prior finding that the person's claimed belief in the truth of a statement that has been found to be untrue was not reasonable will be one component in the assessment of the reasonableness of the person's overall conduct for the purposes of s 63. However, that finding cannot necessarily be determinative of whether the person has acted reasonably so as to qualify for that limb of the requirements in s 63.

[17] The structure of the relevant provisions in the Act contemplated a claimant establishing that a statement was untrue, with exemptions from the liability that would otherwise follow being recognised, inter alia, in s 56(3)(c). If a person's involvement in the preparation of an untrue statement did not exclude them from liability because of the so-called due diligence defence in s 56(3)(c), then the scope and consequences of their liability would be determined subject to the Court's residual discretion under s 63 to grant relief. That contemplates a broader inquiry under s 63 than would

generally be needed to decide whether an exemption from liability was available under s 56(3)(c).

[18] The defendants invited analogy with the analysis of the Court of Appeal in *Fleming v Securities Commission*.[5] In that litigation, investors in a failed debt security sought to pursue claims against a newspaper that had published advertisements for the offer of debt securities, and against the Securities Commission for failing to ensure that the issuer had complied with the Act. In a judgment on an unsuccessful appeal from orders striking out the claims as disclosing no reasonable cause of action, Richardson J undertook an analysis of the provisions for civil and criminal liability for mistakes in advertisements and registered prospectuses. In that somewhat different context, he observed:[6]

> In my view it is apparent from the statutory context that s 63 is directed to relief from the civil liability imposed or recognised in the preceding sections.

[19] Those comments treat s 63 as a provision that has potential application after civil liability has been made out. There would be no point in creating the discretion if the identical test was to apply to cases in which a director was not exempt from liability for untrue statements pursuant to s 56(3)(c).

[20] This sequential analysis answers one of Mr Carruthers' supplementary arguments, namely that the specific provision in s 56(3)(c) should be taken to apply exclusively to liability for untrue statements in prospectuses, thereby excluding the more general provision for relief from liability in the wider circumstances provided for in s 63. The statutory structure provides for both avenues of relief in varying circumstances, relevantly here to deal with liability arising for untrue statements in the prospectus.

[21] Mr Carruthers also submitted that s 63 should be excluded on the ground that "default", a relevant circumstance otherwise triggering liability, should be defined to exclude circumstances in which the directors have to assume responsibility for the conscious inclusion of an untrue statement in their prospectus. Mr Carruthers cited a

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5 *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA).
6 At 528.

definition from the Shorter Oxford English Dictionary to the effect that a default means:[7]

> ... failure to act; neglect; *spec.* in *Law*, failure to perform some legal requirement or obligation; …

Here, inclusion of the untrue statement was a positive step knowingly taken by the directors.

[22] The range of circumstances giving rise to liability, relief from which might be given under s 63, is cast is wide terms:

> … negligence, default, breach of duty, or breach of trust, …

[23] These concepts include forms of liability arising other than from breach of statutory obligations imposed under the Act. Given the clear intention to provide for the discretion in wide circumstances, it would be inconsistent to characterise the defendants' potential liability in this case as only able to qualify as a "default" on the directors' part. Arguably, claims like the present involve allegations of breach of duties arising under the Act to ensure the accuracy of the content of a prospectus. Even if "default" was the only circumstance specified in s 63 that might apply, I would not be persuaded that a dictionary definition of "default" necessarily applies to exclude such circumstances in which liability arises for an untrue statement in the prospectus.

[24] For the defendants, Mr Galbraith QC invited analogy with the consideration of the nature of an equivalent provision in the Australian Corporations Act 2001 (Cth), s 1318. In considering whether a similarly expressed discretion to relieve liability under that Act could apply to liabilities arising under an Income Tax Assessment Act, the nature of a provision akin to s 63 was described in the following terms:[8]

> … there is a consistent theme that the court should have power to relieve, in order that penal provisions or quasi penal provisions should not operate unfairly or harshly. Relief so extended does not strictly speaking exonerate the person in question by removing the breach; rather it operates as a dispensing power excusing the contravenor. "Exonerate" used in this s1318 context has therefore the sense of taking a burden from a person who has committed a breach. It does not mean that the breach is deemed never to have

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7 *Shorter Oxford English Dictionary* (3rd ed, 1967) Vol 1 at 505.

8 *Deputy Commissioner of Taxation v Dick* [2007] NSWCA 190, (2007) 242 ALR 152 at [78] per Santow JA.

> occurred. Rather the person concerned seeks to satisfy the court that "*having regard to all the circumstances of the case*" he or she "*ought fairly to be excused*" so as to receive dispensation.

[25] This distinct character of the discretion exemplifies the distinction to be drawn between the function of s 56 as establishing liability subject to exemptions, and, if liability is made out, the prospect of discretionary relief from that liability by application of s 63.

[26] Mr Galbraith also submitted that an analogous provision to s 63 has been recognised as a means of allocating liability as between various defendants. Section 63 permits relief of defendants "either wholly or partly". He cited the recognition by Rogers CJ of the New South Wales Supreme Court that an equivalent provision in the Australian Corporations Act:[9]

> [was] appropriate to operate as a provision for the proper allocation of fault. … The expression "having regard to all the circumstances of the case" in s 1318 is all-embracing and it is not clear to me what advantage to the proper administration of the law is to be had from denying full scope for its operation.

[27] If the prospect of allocating liability unequally as between defendants does arise, then I am not satisfied that the absence of resort to s 63 would preclude the Court achieving an appropriate outcome. Nonetheless, the prospect of its use in that event is a further pointer against summarily removing the prospect prior to hearing final arguments in light of all the evidence at stage two.

[28] The strike-out application was based solely on the proposition that the defendants could not make out that they had acted reasonably in light of the Supreme Court finding that they could not bring themselves within s 56(3)(c) of the Act. Mr Carruthers' written submissions acknowledged that the application did not advance the proposition that they could not make out that they had acted honestly, as is also required by s 63 of the Act. Nonetheless, the written submissions recorded that the directors deliberately allowing subscription for the shares to proceed, knowing that a statement about the revenue forecast was untrue, constituted an untrue statement in a context that "is difficult to reconcile with any concept of honesty".

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9 *AWA Ltd v Daniels* (1992) 7 ACSR 759 (NSWSC) at 856.

[29] In the amended pleading on which the plaintiff's claim went to trial at stage one, there was no allegation impugning the honesty of the directors. Given the importance of personal reputations, that omission assumed some significance for the defendants. At an advanced point during the stage one hearing, well after the defendants had settled the terms of their defence, committed to the terms of their evidence and, at least in some cases, been cross-examined on it, the plaintiff sought to raise, by way of further amendment to his pleading, allegations of lack of honesty on the part of some or all defendants. Given the irremediable prejudice to defendants, I declined leave.

[30] In the course of oral argument on the strike-out application, I outlined my recollection of these earlier events to Mr Carruthers, who had not been counsel for the plaintiff at the stage one hearing. As a result of our exchanges, Mr Carruthers did not speak to this aspect of his written submissions. I took him to be seeking to reserve the plaintiff's position that the claimants are not to be taken to accept, in positive terms, that a lack of pleading precluded them from arguing that the defendants had not acted honestly in the sense required by s 63 of the Act. The issue is irrelevant to resolution of the strike-out application.

Effect of the Supreme Court judgment

[31] The defendants submitted that the passages in the Supreme Court judgment relied on by the plaintiff to negate any prospect of the defendants establishing that they acted reasonably in the sense required by s 63 do not, in any event, bear that meaning. Arguably, those passages are to be considered in the context of all passages of the judgment relevant to the point.

[32] After noting my observations on the limited consideration of s 63(1) at the High Court stage,[10] the Supreme Court observed that s 63(1) was not referred to by the Court of Appeal. The Supreme Court noted my observation that the availability or otherwise of relief under s 63(1) would need to be reargued if liability was made out

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10 Quoted at [7] above.

and the defendants were unable to avail themselves of the due diligence defence under s 56(3)(c).[11]

[33] In a paragraph subsequent to the passage particularly relied on by Mr Carruthers, the Supreme Court observed that it had not heard argument on the application of s 63:[12]

> … and, if a decision needs to be made about its application, it will have to be made at the stage 2 hearing.

[34] In considering the prospect of an analogous approach under the Fair Trading Act to relieve the defendants of any liability under that Act, the Supreme Court observed:[13]

> … the matter may need closer consideration if any of the respondents are granted relief from liability under s 63(1) of the Securities Act. In that event, that respondent could argue that, having been excused from liability under the Securities Act, he or she should not be liable for the same conduct under the Fair Trading Act. In essence, that would be an argument that the court should refuse to make an order against that respondent under s 43 of the Fair Trading Act in the exercise of the discretion given to the court under that section. It is not possible for us to resolve whether such an argument should succeed without knowing the nature of the Securities Act liability and the reasons for the respondent being excused under s 63(1).

[35] The Supreme Court gave limited consideration to the scope of s 63 and its application in the present case. However, it is most unlikely that the Supreme Court intended to leave open the prospect of its application to this case, whilst at the same time intending that its finding that the defence under s 56(3)(c) was not available to any of the defendants necessarily precluded them from qualifying for relief under s 63.

[36] The defendants submitted that [292] of the Supreme Court judgment contemplated that the ability of the defendants to obtain relief under s 63 was necessarily to be determined at the substantive aspect of the stage two hearing. Mr Carruthers' rejoinder on this point was that the parties are already engaged in stage two, and the Court was not precluded from resolving the non-availability of s 63 relief

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11 *Houghton v Saunders*, above n 2, at [283].
12 At [292].
13 At [310].

as a preliminary issue if the plaintiff could discharge the onus of establishing it would be untenable to claim that it applied.

[37] Reviewing the Supreme Court's judgment as a whole, I incline to the view that it contemplates any application of s 63 would await the stage two hearing. However, if the plaintiff was in other respects able to discharge the onus for striking out I would not deny it that relief because of the terms in which the Supreme Court contemplated the stage two hearing would take place.

Procedural impediments

[38] The defendants submitted that the application to strike out the prospect of relief under s 63 could not be advanced because it was inconsistent with the plaintiff's consent to the issues for determination at the stage two hearing, as they were settled at the 7 February 2019 hearing. Mr Carruthers' rejoinder was to the effect that concurrence with the definition of issues did not preclude his bringing an interlocutory challenge to the tenability of one matter, if he could otherwise discharge the onus that application of s 63 was untenable. I accept Mr Carruthers' point that if he was otherwise entitled to an order excluding the prospect of invocation of s 63, then I should not deny him that relief at this stage because of his concurrence with the list of issues settled for determination at the stage two hearing.

[39] The defendants raised a further point as to whether they were required to have pleaded the intention to invoke s 63 in any event. Mr Galbraith submitted that it was deemed appropriate to signal that intention by pleading an affirmative defence, but on closer analysis an intention to seek relief under s 63 did not need to be pleaded at all. Given that the Court may resort to s 63 of its own initiative, Mr Carruthers conceded that it was not necessary for a defendant's intention to invoke the section to be specifically pleaded as an affirmative defence. Nonetheless, the substantive issue was whether the terms of the Supreme Court judgment tenably left open the prospect of the defendants, whether on their application or at the Court's own initiative, receiving any measure of relief under s 63.

[40] I agree with Mr Carruthers on this point. If the correct legal analysis resulted in s 63 not being available to any of the defendants because findings by the Supreme

Court precluded their being able to make out that they had acted reasonably, then it would be appropriate to exclude the prospect of argument on s 63 from the issues to be determined at the stage two hearing. The defendants could not reserve their entitlement to raise it merely because it was unnecessary for them to explicitly plead it as an affirmative defence.

Outcome

[41] Because the plaintiff cannot make out at this stage that resort to s 63 is untenable in all circumstances that may ensue, the application to strike out must be dismissed.

[42] The defendants sought to be heard on costs in the event that they successfully opposed the application. Given the scale of issues involved, I would prefer to acknowledge the defendants' presumptive entitlement to costs but to defer any quantification pending further developments, and possibly to await determination following the stage two hearing.

Discovery of funding and insurance documents

[43] Without quashing the award of costs I made in relation to the first stage of the proceedings, a separate Supreme Court judgment of 22 November 2018 directed that I should re-open the question of costs for stage one and to determine them afresh.[14] The plaintiff in effect seeks quashing of the previous costs outcome, disgorgement by the defendants of the amounts of costs I ordered the plaintiff to pay them, plus an order for costs in relation to stage one of the proceedings in the plaintiff's favour.

[44] Those applications are opposed by the defendants. They seek to preserve the prospect that the ultimate outcome may influence, in their favour, the appropriate final costs determination for stage one. In the event of an order for disgorgement of costs paid to them, then they would seek an order that the amount be paid into court, rather than being repaid to the plaintiff's solicitors.

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[14] *Houghton v Saunders* [2018] NZSC 112 at [20].

[45] The defendants have also applied for security for costs for stage two. Although agreement was apparently reached initially on the amount of security, the parties are now at odds on the appropriate level of security and consequently on the form in which it might satisfactorily be provided.

[46] In anticipation of a separate hearing on these costs issues set down for 30 May 2019, the defendants applied on 18 April 2019 for orders that the plaintiff produce four categories of documents considered relevant to the arguments on costs. These were:

> (i) documents relating to the rights of Harbour Litigation Investment Fund (and associated entities) and AmTrust in respect of any costs disgorged by the defendants;
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> (ii) the funding agreement and adverse costs insurance policy in relation to Stage One of this proceeding;
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> (iii) documents relating to the basis upon which Stage Two of this proceeding is funded and any insurance in place in relation to costs of Stage Two; and
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> (iv) any other documents not previously disclosed to the defendants recording the invoicing and payment of the premiums under the AmTrust ATE insurance policy which applied in relation to Stage One.

[47] The plaintiff resisted any such order, arguing that any further disclosure of funding and insurance arrangements is not relevant to outstanding costs issues. In response to questions from me about the plaintiff's and claimant groups' contractual obligations, Ms Mills confirmed that the claimants' interests have no obligation to account to either Harbour Litigation Investment Fund (as a funder of at least part of stage one) or AmTrust (the provider of an after-the-event (ATE) insurance policy covering adverse costs liabilities for stage one) until there was a substantive recovery of damages. This could only occur after the plaintiff has succeeded in a determination of quantum for any liability that is made out. The consequence of this position is that the plaintiff/claimant interests have no contractual obligation to account to either of those entities for any part of costs amounts reimbursed to the plaintiff, or out of any costs order made in the plaintiff's favour.

[48] Mr Olney, who spoke in support of the defendants' application, questioned this characterisation of the contractual arrangements. He contended that the plaintiff would have a liability to account to AmTrust, as provider of funds to meet costs orders against the plaintiff, for at least part of amounts reimbursed to the plaintiff by way of reversal of those original costs orders.

[49] Ms Mills stated that Mr Olney's understanding of the contractual position was wrong. She explained that contractual arrangements for funding and insurance were different for proceedings in the Court of Appeal and the Supreme Court, but provided an unequivocal assurance that her instructing solicitors' liabilities in respect of any recovery of High Court costs paid to the defendants were not affected in any way by those different arrangements for funding and insurance in the appellate courts.

[50] One concern motivating the defendants' application for discovery of the documents requested is to clarify whether amounts repaid by them might then be dissipated in discharge of contractual obligations to entities outside New Zealand. Ms Mills' unqualified answers addressed in part that concern. Ms Mills did acknowledge that her instructing solicitors would treat themselves as free to apply any amounts of costs reimbursed to meet the on-going costs of stage two of the litigation. She further confirmed that no contractual commitments have been entered into for funding of stage two, nor is there any ATE insurance policy to cover the prospect of adverse costs orders.

[51] In these circumstances, I declined to make the order for production of documents as sought in the defendants' application, and instead adjourned the application. I have indicated to counsel that costs issues to be argued on 30 May 2019 should be approached on the presumption that any amounts ordered to be reimbursed to the plaintiff by the defendants from amounts paid to the defendants in terms of my stage one costs orders were likely to be dissipated, at least to a material extent. I have invited the defendants to prepare their submissions in reliance on that presumption, without precluding the opportunity for the plaintiff to dissuade me that the presumption ought not to apply, in which event he will have the onus of establishing why a material risk of dissipation does not arise.

[52] The parties have agreed that submissions in support of the costs initiatives they have each pursued, namely for the plaintiff, his application for costs and disbursements, and for the defendants, their application for security for costs, are to be filed and served by ***15 May 2019***. The parties are to file and serve submissions in opposition to the respective applications by ***24 May 2019***.

[53] In the course of my exchanges with counsel on this application, Mr Cooper made the valid submission that the Court's expectations of disclosure of funding arrangements in representative actions, including the terms of insurance arrangements entered into for represented claimants, have moved on since I addressed the issue in interlocutory hearings for stage one. Mr Cooper suggested that the expectation is now that funded/insured representative plaintiffs will disclose to the Court and to the defendants' counsel the terms on which such contractual arrangements have been entered into.

[54] Given the point reached in exchanges with counsel, an order for production of the documents sought is not warranted at this time. However, if the plaintiff or claimant groups do enter into any contracts for funding of stage two, including any contracts of insurance for cost consequences of stage two, then the Court's responsibilities in on-going management of a representative action such as this will require copies of such contractual commitments to be conveyed to the Court.

[55] I direct that copies of all such concluded documents are to be filed on a confidential basis for my attention only, within five working days of completion of such contracts. I will not raise the content of such documents or direct any requirement that they be provided, in either redacted or unredacted form, to defendants' counsel without affording the plaintiff's counsel an opportunity to be heard on it.[15]

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[15] During the hearing, I asked Ms Mills to provide a further copy of the original contracts with third parties against the contingency that the copies previously provided may not have been returned to the Registry from offsite storage. Since the hearing, those documents have been received. They will be held on the same basis as described in [55].

Identifying claimants advancing their claims in stage two

[56] The plaintiff had previously identified subgroups of the represented claimants, and I have directed that the individuals whose claims are to be pursued in stage two should be specified so that discovery could proceed and the defendants could respond. By memorandum dated 29 April 2019, plaintiff's counsel advised that it was proposing to provide briefs for 52 claimants, 27 of whom would come from group A of the subgroups previously identified, five claimants from group B, 13 claimants from group C and seven claimants from group D. The memorandum attached a schedule with the name of the proposed claimants.[16]

[57] The plaintiff's proposal was that whilst briefs would be served for all 52, a subsequent election would be made on behalf of the plaintiff as to which of those claimants would be called as witnesses, recognising that the time allocated for the fixture would not allow all of them to be called.

[58] That indication drew opposition from the defendants. In a memorandum of counsel dated 3 May 2019, the defendants sought directions that by 17 May 2019 the plaintiff is to file and serve a memorandum identifying those claimants whom the plaintiff proposes to call as witnesses in stage two, on terms that the list provided by 17 May 2019 is to be determinative unless leave of the Court was obtained to advance the case of any other claimants.

[59] In terms of other timetabling, 17 May 2019 is the date for provision of discovery by those claimants whose claims are to be advanced at stage two.

[60] Reflecting on concerns raised by the defendants, Mr Carruthers accepted that the list of 52 claimants ought to be pruned and has accepted a direction that by 17 May 2019 he will provide a definitive list of the claimants who are to be witnesses in respect of their own claims at stage two. Mr Carruthers also accepted, somewhat reluctantly, the obligation to comply with the timetable requiring provision of discovery on their behalf by that date. He sought to reserve the prospect of applying for an extension of

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16 Some being corporate entities rather than identified individuals.

time to complete discovery in some cases, but I indicated that further time might not lightly be granted.

Dobson J

Solicitors:
Wilson McKay, Auckland for plaintiff
Gilbert Walker, Auckland for first defendants (other than Mr Horrocks and Ms Withers)
Wilson Harle, Auckland for Ms Withers
Clendons, Auckland for Mr Horrocks
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 T C Weston QC for first defendants (other than Mr Horrocks and Ms Withers)
B D Gray QC for Ms Withers
J B M Smith QC and A S Olney for second and third defendants