IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2008-409-348
[2020] NZHC 2030

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:	30 July 2020
Counsel:	C R Carruthers QC and P A B Mills for plaintiff D J Cooper for first defendants (except for separate representation noted below) C L Broad for Mr Horrocks B D Gray QC for Ms Withers J B M Smith QC and C J Curran for second and third defendants
Judgment:	11 August 2020

RESERVED JUDGMENT OF DOBSON J
[Application to stay effect of unless orders]

Contents

The more recent history

[1] In a judgment issued on 22 May 2020 (the May judgment), I declined the defendants' application to strike this proceeding out, and instead made unless orders in the following terms:[1]

> [92] There will accordingly be a striking out of the proceeding on 14 July 2020, unless, by 13 July 2020:
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> (a) security for costs for stage two in the sum of $1.65 million has been either lodged with the Registry of the Court or provided on other terms reasonably agreed to by the defendants and accepted by the Court by that date; and
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> (b) senior counsel for the claimants has confirmed that, in his opinion, the claimants are adequately resourced to prepare for and present all aspects of their stage two claims.

[2] This judgment needs to be read in light of the analysis of the position of the parties in the May judgment. Given the extent of matters traversed since the Supreme Court directed the proceeding back to the High Court for a stage two hearing, a fuller understanding may also require reference to earlier judgments.

[3] On 19 June 2020, a notice of appeal from the May judgment was filed in the Court of Appeal.

[4] On 7 July 2020, Mr Carruthers QC filed a memorandum, in his capacity as senior counsel for the plaintiff, advising that he would not be in a position to provide

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1 *Houghton v Saunders* [2020] NZHC 1088.

the confirmation required of him by 13 July 2020, pursuant to the terms of [92](b) of the May judgment. Mr Carruthers asked that I either grant an extension of time for compliance with the order in [92](b) of the May judgment, or a stay of the judgment pending appeal.

[5] On 8 July 2020, I issued a minute acknowledging Mr Carruthers' memorandum, observing that no formal application for a stay had been filed and indicated that if an application was to be pursued, it would need to be filed before 5.00 pm on 10 July 2020, citing the grounds and any evidence to be relied on in support of the application. In the event that such an application was filed, I directed that it would be determined on 30 July 2020.

The stay application

[6] An application for stay of the May judgment was filed on 10 July 2020, accompanied by an affidavit from Mr Gavigan, the alter ego of Joint Action Funding Limited (JAFL), the funder of the claimants' proceedings.

[7] I received written submissions from the plaintiff, and on behalf of the first and second and third defendants, all dated 28 July 2020, with the defendants' submissions having been settled without seeing the content of those filed for the plaintiff.

[8] The notice of appeal, the plaintiff's application for stay, Mr Gavigan's 10 July 2020 affidavit and the submissions for the plaintiff were all endorsed with the details of Mr Hamel as instructing solicitor, and Mr Carruthers and Ms Mills as counsel. The notice of appeal and the application for stay were, however, signed by Mr Houghton as appellant/plaintiff, and the written submissions made provision for his signature. It became apparent during the hearing that counsel's names have been used on those documents without their prior authority, and without their involvement in settling the terms of those documents.

[9] I record the provenance of the documents most directly relevant to the application as a partial explanation for Mr Carruthers advancing an argument at the hearing in support of a stay on a somewhat unconventional basis, and certainly not

consistently with the approach to a stay contemplated in the documents filed for the plaintiff.[2]

Stay under the Court of Appeal (Civil) Rules 2005

[10] The jurisdiction to grant a stay pending an appeal is derived from r 12(3) of the Court of Appeal (Civil) Rules 2005. The relevant provisions include:

> **12 Stay of proceedings and execution**
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> …
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> (3) Pending the determination of an application for leave to appeal or an appeal, the court appealed from or the Court may, on an interlocutory application,—
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> (a) order a stay of the proceeding in which the decision was given or a stay of the execution of the decision; or
>
> (b) grant any interim relief.
>
> (4) An order or a grant under subclause (3) may—
>
> (a) relate to execution of the whole or part of the decision or to a particular form of execution:
>
> (b) be subject to any conditions that the court appealed from or the Court thinks fit, including conditions relating to security for costs.
>
> (5) If the court appealed from refuses to make an order under subclause (3), the Court may, on an interlocutory application, make an order under that subclause.
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> …

[11] Considering such an application requires the Court to balance the rights of the party that has been successful to the fruits of that judgment against the need to preserve the appellant's position, given the prospect of the appeal succeeding.[3] The Court of Appeal has recently confirmed the factors that are to be taken into account, in the following terms:[4]

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2 I comment at [72] to [75] below on the irregularity of documents filed in counsel's names without their input into them.

3 For example, *Duncan v Osborne Builders Ltd* (1992) 6 PRNZ 85 (CA) at 87.

4 *Bathurst Resources Ltd v Buller Coal Ltd* [2020] NZCA 186 at [6]; adopting *Keung v GBI Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11]. See also Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [CR12.01].

(a) whether the appeal may be rendered nugatory by the lack of a stay;

(b) the bona fides of the applicant as to the prosecution of the appeal;

(c) whether the successful party may be injuriously affected by the stay;

(d) the effect on third parties;

(e) the novelty and importance of questions involved;

(f) the public interest in the proceeding;

(g) the apparent strength of the appeal;

(h) where a money judgment is appealed, whether the applicant proposes a condition that some or all of the judgment be paid or secured; and

(i) the overall balance of convenience.

[12] It is hardly surprising that Mr Carruthers did not advance the plaintiff's and claimants' case for a stay by reference to these conventional considerations. Generally, the primary consideration will be to ascertain whether the absence of a stay renders the rights of the appellant in the event of successful appeal to be nugatory. That is clearly not the case here. The argument on appeal will be that I was wrong to impose unless orders at all, or without allowing a longer period for the conditions in [92](a) and (b) of the May judgment to be fulfilled.

[13] During argument opposing the May 2020 strike out application, Mr Carruthers had submitted that the weight of the interests of some 3,600 claimants was greater than the defendants' interests in finality to such an extent that the claimants ought to have been afforded an open-ended period in which to arrange security for costs for the stage two hearing and procure sufficient resources to run that hearing. In his current argument for a stay, Mr Carruthers had reduced the time period sought to 30 September 2020.

[14] If, by the time the appeal is argued, the plaintiff and claimants are in a position to belatedly comply with the unless orders, then their argument will be that I ought reasonably to have afforded them whatever period of time has been required for them to do so. If any variant of this argument is successful in the Court of Appeal, the proceeding would be directed back to the High Court for the stage two hearing to be

undertaken. A stay is not necessary to preserve that prospect, which depends on the merits of the arguments advanced on appeal.

[15] As to the bona fides of the appellant in pursuing an appeal, the case for a stay pending appeal is enhanced if an appellant is pursuing the appeal promptly, or even as a matter of urgency.[5] The Court of Appeal will facilitate fast-tracked appeals in appropriate cases and the High Court is generally more favourably disposed to grant a stay if the appellant is demonstrating that everything possible is being done to limit the period during which the respondent to the appeal will be prevented from enjoying the fruits of the High Court judgment. In some cases, delay in prosecuting an appeal has been the decisive consideration in refusing a stay.[6]

[16] Here, nothing has been done. Apart from lodging the notice of appeal (which it now appears was undertaken without input from counsel in whose name it was filed), no steps have been taken to agree the necessary content of the case on appeal and no approach has been made to the Court of Appeal Registry for allocation of an early fixture. The only initiative has been a request to defer the obligation for paying the security for costs on the appeal that is required by the Court of Appeal Rules.

[17] Defendants' counsel made the point that the notice of appeal was filed on the 19th working day after the May judgment was delivered (20 working days being the time limit for filing an appeal), and the request to defer the obligation to pay security for costs was also raised with the Court of Appeal only on the day before the time limit for taking that step was to expire.

[18] Accordingly, on these factors of primary importance to the balancing of interests, the prospects for this application for a stay appear to be forlorn.

[19] More headway could be made on some of the other considerations involved in the balancing exercise. As to the injurious impact on the successful parties, a repeated refrain on behalf of the claimants, when seeking further time for various steps, is that the first defendant directors are indemnified and that therefore delay in resolution does

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5 See, for example, *Spackman v Queenstown Lakes District Council* [2007] NZCA 463 at [31].
6 At [33].

not affect them. The delay in reaching the point that should have been achieved by 13 July 2020 would be for little more than two months, if the plaintiff and claimants were able to comply with the unless orders by 30 September 2020. However, if that extent of further time was permitted and belated compliance with the unless orders was achieved, then the stage two hearing, for which the defendants have been ready for some time, would likely be a further year away. Certainly, Mr Carruthers accepted that substantially more time would be required than to meet the third fixture allocated for stage two in late October and November 2020.

[20] In evaluating the appropriate terms for the unless orders in the May judgment, I took into account the uncertainty for all defendants in having this matter hanging over them in relation to an alleged liability arising out of a 2004 prospectus. The defendants could not claim any new form of prejudice since then, but rather an incremental increase in the extent of prejudice they have previously complained about and which are validly recognised.

[21] This is not a case in which there are material impacts on third parties.

[22] The questions involved in the stage two hearing are relatively novel and can claim a material extent of importance. The more than 3,600 claimants have the benefit of a finding that the prospectus on which their subscriptions for shares was based contained an untrue statement. The materiality of that untrue statement in terms of the quantified liability for the defendants, which at its highest might extend to approximately $200 million, can claim material importance in considering whether further concessions in favour of the claimants are appropriate.

[23] All other things being equal, the continuation of this proceeding is arguably in the public interest. As has been argued for the claimants in various contexts, the claimants seek access to justice using a funded representative action, which the Court should facilitate through to final determination unless there are compelling reasons against doing so.

[24] Assessing the apparent strength of grounds for an appeal can be somewhat invidious for the judge whose judgment is to be challenged. Mr Carruthers did not

advance any submissions as to the grounds on which he would challenge the May judgment. Nothing in the matters traversed since that judgment has caused me to reconsider its merits, which I remain satisfied were virtually inevitable, and in any event well-justified. I accordingly do not rate any appeal that is pursued as having strong prospects of success, but acknowledge that the balancing of competing interests between the claimants and the defendants is a matter of judgement and that other views would be open.

[25] These considerations make the overall balance of convenience a matter for judgement. Notwithstanding the factors that might be raised for the claimants on considerations (c) to (i), the merits of the first two considerations (a) and (b), which appropriately take primacy, would weigh materially against the granting of any stay.

A different approach

[26] However, Mr Carruthers' submissions at the hearing were that I ought to exercise the jurisdiction under r 12(3) of the Court of Appeal Rules for a different purpose that required a weighing of the parties' competing interests from a different perspective.

[27] Mr Carruthers' proposal was that I should direct that no judgment was to be sealed that would reflect the outcome of non-compliance with the unless orders in the May judgment. Until that formal step occurred, Mr Carruthers submitted that I would retain jurisdiction to vary the terms of those orders. As I understood his propositions, I was being invited to vary the terms of those orders now so as to extend the period for fulfilment until 30 September 2020, or to suspend application of the unless orders on an open-ended basis to enable a subsequent review of the timing and extent of compliance, which he predicted would see compliance achieved by 30 September 2020.

[28] Mr Carruthers submitted that it was more appropriate for the trial judge who has had involvement in settling the terms for security for costs, and supervising the provision of security at stage one, to determine contested issues between the parties as to the adequacy of the form of security for costs that is now contemplated for stage two. By comparison, appellate judges coming to that task without the extent of

background in what has been a much protracted matter would be asked to deal with such issues without the advantage of the trial judge's view as between the competing positions of the parties on the adequacy of proposed terms for security.

[29] On this approach, the plaintiff and claimants would have a last, last opportunity to provide the financial commitments necessary for them to run the stage two hearing, presumably buoyed by the prospect that such a review would occur with satisfactory commitments having been made, notwithstanding that they were delayed by some two and a half more months.

[30] If I afforded the plaintiff and claimants a further opportunity, Mr Carruthers would see the notice of appeal being held in abeyance, to be used as a last resort if I made a final determination that security for costs and funding were not available on satisfactory terms within whatever further period of time (notionally until 30 September 2020) I was persuaded to be reasonable on such a reconsideration.

[31] Despite these propositions not having been signalled before the hearing, I heard from counsel for the defendants contesting the merits of them, including perceived deficiencies in the most recent proposition advanced by Mr Gavigan for provision of security for costs.

Status of unless orders

[32] The status of unless orders and the approach to any application for them to be revisited has been reviewed by the Court of Appeal in *SM v LFDB*.[7] In that hard-fought relationship property litigation, LFDB had repeatedly failed to pay costs ordered against him within time limits specified for him to do so. On the making of a second unless order, the High Court had warned LFDB that unless he complied by a given date, he would be debarred from taking further steps in the proceedings. LFDB unsuccessfully challenged the terms of that order and was unsuccessful in seeking an extension of the time within which to comply. LFDB subsequently paid the costs and then applied retrospectively for an extension of time to have complied with the

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7 *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494. Leave to appeal that judgment was initially given by the Supreme Court, but leave was revoked by the Court in a judgment dated 22 December 2014 (*LFDB v SM* [2014] NZSC 197).

relevant order. The High Court Judge relented on the ground that payment of the relevant costs order had changed the position sufficiently to warrant reconsideration.

[33] SM appealed against that decision. After a review of numerous English and Australian cases, the Court of Appeal identified principles that should apply where the Court is asked to reconsider unless orders:[8]

> [31] The principles are these:
>
> (a) As an unless order is an order of last resort, it is properly made only where there is a history of failure to comply with earlier orders.
>
> (b) An unless order should be clear as to its terms. That is, it should specify clearly what is to be done, by when and what is the sanction for non-compliance. That sanction should be proportionate to the default.
>
> (c) The sanction will apply without further order if the party in default does not comply with the order by the time specified. However, the party in default may seek relief by application to the Court.
>
> (d) Justice may require that the party in default be relieved of the consequences of the unless order where the Court is satisfied that the breach resulted from something for which that party should not be held responsible. The party should not assume that belated compliance will suffice.
>
> (e) Where the unless order has been deliberately breached – that is, flouted – it is difficult to conceive of any situation where the interests of justice would require granting the flouter relief from the sanction imposed, notwithstanding belated compliance with the order.
>
> (f) In deciding whether or not to excuse breach of an unless order the question for the Judge is: what does justice demand in the circumstances of this case? Considerations in answering that question include:
>
> (i) The public interest in ensuring that justice is administered without unnecessary delays and costs.
>
> (ii) The interests of the injured party, in particular in terms of delay and wasted cost.
>
> (iii) Any injustice to the defaulting party, although that consideration is likely to carry much less weight in the circumstances than considerations (i) and (ii).

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8 *SM v LFDB*, above n 7.

[34] On the facts in that case, the Court of Appeal allowed the appeal, thereby reinstating the terms of the unless order that had debarred LFDB from further participation in the proceedings.

[35] I would not be prepared, on the present application, to revisit the merits of the May judgment as matters were argued at that time. That judgment must stand for better or worse and it is for the Court of Appeal to consider my reasoning afresh, as it sees fit.

[36] Adapting the arguments Mr Carruthers advanced to the considerations suggested by the Court of Appeal in *SM* involves an assessment of the proposals that have been raised since the May judgment was issued: have new circumstances arisen that warrant variation of the orders then made?

The current proposal

[37] The latest initiative involves a freshly incorporated company, Stage Two Guarantee Limited (STGL), of which Mr Gavigan is one of three directors. STGL would provide a guarantee in favour of the defendants for the sum of $1.32 million in respect of adverse costs orders against the plaintiff or claimants. STGL does not purport to have any existing assets, but Mr Carruthers described the current proposal as one under which STGL would issue 10 parcels of 132,000 $1 shares, which are to be subscribed for by nine investors (one investor taking two parcels of 132,000 shares). Each shareholder would assume the obligation to make payments at $1 per share in the event of a call by the company, which would be made if and when an adverse costs order was made against the plaintiff or claimants, and in respect of which it is proposed they be indemnified by STGL.

[38] Documents provided informally to the Registry by Mr Gavigan on the day of hearing included the terms of a guarantee and indemnity in favour of the defendants by STGL, and the terms of a subscription agreement between STGL and each of the named investors in it.

[39] Mr Gavigan's 10 July 2020 affidavit stated that he had enquired and satisfied himself that each of the subscribers "have sufficient free assets in the NZ jurisdiction

to meet their [STGL] commitment". The unverified narrative accompanying the documents provided by Mr Gavigan on 30 July 2020 included advice that another director of STGL was receiving and holding the executed subscription agreements in escrow until all necessary steps to comply with the order in [92](a) of the May judgment have been completed.

[40] The sum that would be provided by way of guarantee from STGL totals $1,320,000, leaving a balance of $330,000. Mr Gavigan proposes that amount will be paid in cash from the crowd funding initiative that he has underway and which I was advised by Mr Carruthers had received commitments of $321,000 by the date of the hearing.

[41] The crowd funding and other (unspecified) further initiatives would be relied on to provide sufficient resources to fund stage two. Mr Carruthers indicated he hoped to be in a position by 30 September 2020 to certify the adequacy of those resources as required by [92](b) of the May judgment. With respect to Mr Carruthers, I am not entirely persuaded by his expression of confidence that the funding arrangements would be completed by 30 September 2020. Without evidence as to how a budget for doing so would be funded, it is tolerably clear that he would primarily be dependent on Mr Gavigan's efforts. The protracted sequence of unfulfilled assurances in Mr Gavigan's funding initiatives is summarised in the appendix to the May judgment, and the latest turn in the road, after Mr Gavigan described the crowd funding effort as the last opportunity for complying with the security for costs orders, does justify a measure of scepticism.

[42] Mr Carruthers adopted Mr Gavigan's criticisms of the defendants allegedly causing material delays in progressing the crowd funding offer. Mr Gavigan deposed that changes perceived as necessary to the terms of the crowd funding offer as a result of the concerns in the May judgment took until 24 June 2020 to be finalised and that the updated offer was reissued on that day. Mr Gavigan's 10 July 2020 affidavit inferred that the work in recasting the terms of the crowd funding offer was unreasonably protracted by a letter from Gilbert Walker, solicitors for all but two the first defendants, that caused the responsible principal at Collinson Crowd Funding, Mr Zhang, to be frightened. Mr Gavigan deposed that a direct flow-on effect of the

Gilbert Walker letter had been to cause the crowd funding offer to be frozen by Mr Zhang "as at 29 May 2020".

[43] Mr Carruthers in his submissions criticised the Gilbert Walker letter, and what he alluded to as "dialogue with the FMA", as "running interference" to disrupt the crowd funding offer. Arguably, such inference justified more time being given to Mr Gavigan to successfully complete the crowd funding offer.

[44] Mr Gavigan's affidavit also referred to concerns previously raised by him that progress with the crowd funding offer had been delayed by the disruption caused by the COVID-19 lockdown. Mr Gavigan opined that restrictions on the conduct of court hearings caused by the world-wide pandemic meant that in any event "no stage two trial would have been possible at any time in 2020".

[45] The culmination of all these explanations for failures to comply with the unless orders before now, and the substantial weight due to the interests of the more than 3,600 claimants, were relied on by Mr Carruthers to justify an extension of the period in which the unless orders could be satisfied.

Defendants' response to matters raised since the May judgment

[46] For the first defendants, Mr Cooper dismissed the latest proposal for security for costs as inadequate. It did not match the range of options contemplated previously by the Court. The recently proposed guarantor is a company apparently without assets, with the defendants having no control over the conduct of its business and, for example, no ability to prevent it passing into liquidation prior to any award of costs for the stage two hearing being made against the claimants.

[47] Further, whilst Mr Gavigan may personally be comfortable with the net worth of the individuals subscribing for shares, there has been no information enabling the defendants to satisfy themselves on that matter. Derivative litigation could well be required to procure a liquidator's initiative to pursue the shareholders on their subscription agreements when the trigger for a call under those agreements arose.

[48] Notwithstanding the length of the period during which the crowd funding offer had been in the market, it has still not generated enough even to make up the balance of the amount required for security for costs. Mr Gavigan's projections at the time of the May hearing were for contributions to the crowd funding offer of up to $2 million, whereas his aspirations were now scaled back to an amount in the range of $500,000. If $330,000 of that amount was committed to provide part of the security for costs, and if the reduced target of $500,000 was achieved (with no compelling evidence as to why a further $180,000 would be contributed when it has not been thus far), that would provide a budget for running the five week stage two hearing with two counsel and the need for experts, on a budget of $170,000.

[49] Mr Cooper submitted that, in essence, the steps taken to avoid the effect of the unless orders were too little and too late. He submitted that the claimants could have sought an extension of time for complying prior to the unless orders coming into effect, and indeed had such an application resolved before 13 July 2020. Instead, the application for stay was filed only on the last working day before the unless orders became operative and then only in response to my minute of 8 July 2020.

[50] Mr Cooper submitted that the terms and effect of the unless orders were that no further step was required to perfect them: they applied automatically to strike out the proceeding on 14 July 2020, given the non-compliance with both [92](a) and (b).

[51] Both Mr Cooper and Mr Smith QC rejected the criticism that the defendants had been "running interference" in the crowd funding offer. Mr Harris of Gilbert Walker, the solicitor on the record for all but two of the first defendant directors, completed a memorandum in response to the criticism of his firm by Mr Gavigan. His memorandum attached a copy of his firm's 26 May 2020 letter to Collinsons. That summarised the criticisms of the terms of the offer that had been advanced at the May hearing and which were reflected in the concerns identified in the May judgment. In addition, the letter went on to identify further aspects of the terms of the crowd funding offer which it was contended might be misleading.

[52] In a response dated 29 May 2020, Auckland solicitors for Collinsons robustly rejected the criticisms, describing the "unsubstantiated allegations" as "quite

inappropriate and potentially defamatory". The letter stated that Collinsons would not correspond with Gilbert Walker or the defendants further.

[53] Mr Harris's memorandum made the point that his firm's letter could not have been the cause of the original crowd funding offer being withdrawn when that occurred some days before his letter was written. The Gilbert Walker letter could certainly be seen as a somewhat overbearing warning shot across Collinsons' bows, and there is scope for the inference that the defendants' motive in doing so was to make it more difficult for JAFL and Collinsons to succeed with the crowd funding offer that was then underway.[9] However, the spirited response to it on behalf of Collinsons suggests that they were in no way deflected from their task by its content. Defendants' counsel denied that Gilbert Walker personnel had made any contact with the FMA about the crowd funding offer, and submitted that, in the absence of any evidence, the assertion should be ignored.

[54] In supporting the submissions made on behalf of other directors, Mr Gray QC submitted that the consent originally granted by the Court for the bringing of a representative action in circumstances such as the present was "an indulgence". I took Mr Gray to have adopted that characterisation of the process for obtaining consent from the approach of the Court of Appeal in its 2009 judgment in this litigation.[10]

[55] Arguably, because the claimants have enjoyed "the indulgence" of bringing their claim by means of a third party funded representative action, they should accept the disciplines required for timely compliance with obligations such as the provision of security for costs. Mr Gray's point was that the Court had granted numerous further indulgences to the claimants and reached the point in the May judgment where such indulgences would be stretched too far if the claimants did not comply by 13 July 2020.

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9 Mr Smith denied any such ulterior motive. He submitted that funds raised in the crowd funding offer were the most likely source of a payment of costs orders in favour of the defendants, and if such monies had been raised in reliance on a misrepresentation, then subscribers to the fund might have a claim for repayment, which prevailed over the defendants' entitlement to receive such monies.

10 *Saunders v Houghton* [2009] NZCA 610. See, for example, [36].

[56] Where the weight of numbers of claimants (3,600 in this case) can tip the scales in favour of claimants, and where such claims are pursued without the usual discipline of adverse costs orders for unsuccessful initiatives impacting on the claimants' own positions, the Court must manage such proceedings firmly to maintain the balance if it senses that the claims are not being prosecuted with integrity and timeliness. Arguably, that discipline is to be imposed as the price that claimants must pay for the privilege of using the procedure. On this submission, nothing had occurred since the merits were assessed in the May judgment to justify a variation of the requirements stipulated in the unless orders.

Analysis

[57] With respect to the way the Court of Appeal balanced the competing interests of the claimants and the defendants in this litigation in 2009, the Court's approach to supervision of funded class actions has evolved somewhat since then. Third party funded representative actions have a proper place in efficient civil dispute resolution. Properly used, they may be important in affording access to justice for those who would otherwise not be able to do so. Currently, there is no statutory authority for the procedure, and scant provision in the High Court Rules addressing the procedures that are to apply. Notwithstanding that, a settled practice has evolved in the decade since the Court of Appeal considered the original funding arrangements in this litigation.

[58] The Court is conscious of the different dynamics that apply, but can and should be prepared to manage such proceedings so as to keep the competing interests of the parties in an appropriate balance. Notwithstanding cautionary observations about the limits on the Court's role in doing so in *Waterhouse v Contractors Bonding Ltd*, such supervision is, with respect, both appropriate and necessary.[11] I am accordingly not prepared to revisit the merits of the present application for stay on the premise that the claimants obtained an indulgence from the Court for the original arrangements enabling their claims to be pursued by way a funded representative action.

[59] The qualification to the last observation is that this is not a classic class action because it is not brought on behalf of claimants for all of whom pursuit of their claims

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11 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [28].

would be uneconomic on their own. As I have observed previously, the claimants in this litigation include a number whose claims are for sufficient amounts, and whose apparent financial resources are sufficient for them to have pursued the claims in their own right, or at least as a small group. On two previous occasions when addressing the difficulties the current funder was having with providing security for costs, I explicitly recognised the prospect that a number of the larger claimants might facilitate the provision of security for costs where they fell outside the usual characteristic of modest claimants in a representative action.

[60] After the original deadline for provision of security for costs passed, my judgment of 15 August 2019 included an order that security for costs be provided by an alternative means, in the following terms:[12]

> …
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> *[2] If the security as contemplated is not provided by 16 August 2019, then by 23 August 2019 the following alternative to the security previously orders is to be provided. A number of the largest claimants, being between three and six of them at the claimants' option, are to provide security severally for the respective portion that each represents of the total of the claims of those contributing, for a total of $1.65 million. Such security is to be provided in cash or by way of bank bond.*
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> …

[61] I had canvassed that prospect with counsel during the hearing on 8 August 2019. On 9 August 2019, I issued a minute warning that I was minded to make an order for security to be provided by that alternative means. Before issuing the judgment, I received a memorandum from counsel for the claimants advising that they did not seek amendment to the proposed terms. Obviously, the order was not complied with.

[62] Then, on 28 February 2020, I convened a telephone conference to consider a sequence of developments beginning with Mr Carruthers filing a memorandum on 20 February 2020 without instructions from the plaintiff or claimants but in his capacity as an officer of the Court. That memorandum raised concerns about the ability of JAFL to obtain funds to pay the security for costs and pay the costs for

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12 *Houghton v Saunders* [2019] NZHC 2007 at [51].

running the stage two hearing. I issued a minute on 2 March 2020 giving JAFL and Mr Gavigan until 13 March 2020 to confirm that its funding obligations were in hand, and thereafter any or all claimants were given until 20 April 2020 to make alternative arrangements for provision of stage two security and the funding needed to pursue the stage two claims. That dialogue and the terms of my minute clearly contemplated that responsibilities for funding might be assumed by some of the larger claimants as addressed in my 15 August 2019 judgment.

[63] On 25 March 2020, I varied the terms of the 2 March 2020 directions, but still on terms affording alternative funders an opportunity to provide funding.

[64] Neither of those invitations were taken up so that the final deadline of 13 July 2020 passed without any such initiative. The latest proposal for security to be provided by a company able to make calls at a later point in time on nine shareholders reflects a belated contingent commitment by some of the larger claimants as I had previously contemplated.[13] The defendants submitted that it is far too late for the claimants to now be afforded an opportunity to belatedly comply by a mechanism that was suggested to them by the Court in August last year. There has been no explanation as to why the contingent commitments as now described by Mr Gavigan could not have been provided in compliance with the August 2019 order, or thereafter.

[65] I accept the defendants' point that the latest proposed form of security, if completed, would be of a lesser quality than was contemplated in the original order, and which Mr Gavigan indicated for some time would be provided. The prospect of ancillary litigation could not be eliminated, and I agree with Whata J in *White v James Hardie New Zealand* that such prospect is to be avoided.[14]

[66] A stay of application of the unless orders is sought on terms contemplating that an order for security for costs would hopefully be complied with some 15 months after it was first required. Preparation for a stage two hearing would then ensue with the prospect of that hearing, originally scheduled for 4 November 2019 and with

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13 The nine shareholders of STGL as advised by Mr Gavigan include some who are not claimants. One of them is Mr Houghton, whom the defendants point out is personally liable for adverse costs awards in any event.

14 *White v James Hardie New Zealand* [2019] NZHC 188, (2019) 24 PRNZ 493 at [15].

subsequent allocated fixtures in May and October 2020, being be able to proceed sometime after the middle of 2021. All that, in respect of an untrue statement found to be such by the Supreme Court in August 2018.

[67] There is some merit in Mr Cooper's submission that the initiatives taken on behalf of the claimants since the issue of the May judgment are too little and too late. At all stages since the proceeding was referred back to the High Court for determination of stage two, the plaintiff and claimants have used a range of stratagems to delay progress. They have failed to comply with timetabling directions, pursued interlocutory appeals to the Court of Appeal and an application for leave to appeal to the Supreme Court, and failed to be ready for two fixtures allocated for stage two hearings, notwithstanding an early indication from Mr Carruthers that the time allowed for the second of those fixtures in May 2020 was sufficient.

[68] Mr Gavigan has repeatedly complained that tactics deployed by the defendants have prevented the claimants getting access to justice. The defendants have complied with all timetable requirements and been ready for hearings, except where their performance has been dependent on a step required of the claimants which has not been taken.

[69] Mr Gavigan's assertion that COVID-19 restrictions would in any event have prevented the stage two hearing proceeding at any time this year is quite wrong. I have previously acknowledged the wishes of certain of the claimants who are resident overseas to travel to New Zealand to give their evidence, and also the logistical difficulties in the claimants' expert, Mr Houston, being practically unable to travel from Sydney. Such logistical considerations are now routinely being accommodated in proceedings before the Court and I am satisfied that the only reason the stage two hearing could not proceed on the scheduled commencement date of 27 October 2020 is the failure of the claimants to be ready for it.

Result

[70] In assessing what justice requires in light of the principles set out by the Court of Appeal in *SM*, I am not persuaded that the claimants are entitled to any relaxation

of the terms of the unless orders on the basis of developments since those orders were made in May 2020.

[71] Accordingly, the application for stay is dismissed. The automatic consequence of non-compliance with the unless orders, namely that the proceeding is struck out, remains in effect.

Documents not authorised by counsel

[72] At various points since the proceeding was referred back to the High Court to prepare for and determine stage two, the Court has received documents filed directly by Mr Gavigan on his own behalf and on behalf of JAFL. That has been tolerated because the defendants have sought to attribute liability for adverse costs orders on interlocutory rulings to them, giving Mr Gavigan and JAFL a distinct interest in their resolution.

[73] The practice has expanded to include documents presented for filing as if instructing solicitor and counsel retained have assumed responsibility for them, when it has transpired that has not been the case. Rule 5.36 of the High Court Rules sets out a solicitor's authority to file documents. Rule 5.37 provides that a solicitor by whom, or on whose behalf, a document is filed is to be treated as warranting to the Court and to all parties to the proceeding that he or she is authorised to file the document by the party on whose behalf the document purports to be filed. In *Hung v Tse*, Harrison J, referring to the observations of the Court of Appeal in *Harley v McDonald*, held that a solicitor plays an important part in the orderly conduct of litigation, being responsible to the Court for the due prosecution of the case and being obliged to apply their own mind to its viability.[15] His Honour stressed that going on the record "is not just a formality".[16]

[74] Counsel for the defendants have become more muted in their objection to the manner in which such documents have been filed. However, the point is validly made

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15 *Hung v Tse* HC Auckland CIV-2008-404-8568, 26 February 2009 at [13]. See also *Harley v McDonald* [1999] 3 NZLR 545 (CA) at [84] and *Tolstoy-Miloslavsky v Aldington* [1996] 2 All ER 556 (EWCA) at 571.

16 At [13].

on the documents filed in respect of the present application that, where an instructing solicitor and counsel are retained, opposing parties and the Court are entitled to expect that the content of all documents to which they have to respond have been vetted and approved (if not prepared) by counsel retained.

[75] The status of the proceeding as a funded class action does not alter the position on responsibility for the content of documents filed. Given the sequence of events on the present application there is no point in imposing any sanction, but the Court retains the power to reject such informal documents and, where instructing solicitors and counsel are retained, to require the documents filed in their names to be in terms approved by them before filing, and for which they assume responsibility.

Costs

[76] The defendants are entitled to costs on the current application. I will receive memoranda, limited to five pages.

Dobson J

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