IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA322/2020
CA502/2020
[2020] NZCA 638

BETWEEN	ERIC MESERVE HOUGHTON Appellant
AND	TIMOTHY ERNEST CORBETT SAUNDERS, SAMUEL JOHN MAGILL, JOHN MICHAEL FEENEY, CRAIG EDGEWORTH HORROCKS, PETER DAVID HUNTER, PETER THOMAS and JOAN WITHERS First Respondents
AND	CREDIT SUISSE PRIVATE EQUITY INCORPORATED Second Respondent
AND	CREDIT SUISSE FIRST BOSTON ASIAN MERCHANT PARTNERS LP Third Respondent

Hearing:	15 October 2020
Court:	Brown, Collins and Goddard JJ
Counsel:	C R Carruthers QC and P A B Mills for Appellant D J Cooper, S T Coupe and M C Harris for First Respondents (except for separate representation noted below) T C Weston QC for Mr Magill C L Broad for Mr Horrocks B D Gray QC and A E Ferguson for Ms Withers J B M Smith QC and A S Olney for Second and Third Respondents
Judgment:	11 December 2020 at 11.00 am

JUDGMENT OF THE COURT

A **The appeal from the judgment in *Houghton v Saunders* [2020] NZHC 1088 is dismissed.**

B **The appeal from the judgment in *Houghton v Saunders* [2020] NZHC 2030 is dismissed.**

C **The appellant must pay one set of costs for a standard appeal on a band A basis to the first respondents, and one set of costs for a standard appeal on a band A basis to the second and third respondents collectively, in each case with usual disbursements. We certify for second counsel in respect of each of the two sets of costs.**

Table of contents

REASONS OF THE COURT

(Given by Goddard J)

Introduction and summary

The issues before the Court

[1] In 2008 the appellant, Mr Houghton, brought a claim on behalf of some 3,600 claimants in relation to a prospectus issued in May 2004 for shares in Feltex Carpets Ltd (Feltex). The claim was brought as a funded class action, on an "opt-in" basis.[1]

[2] A trial of "stage one" of the claim took place in the High Court in 2014. The claim failed.[2] An appeal to this Court was dismissed in 2016.[3] But in 2018 an appeal to the Supreme Court succeeded in part.[4] The Supreme Court held that the Feltex prospectus contained an untrue statement for the purposes of s 56 of the Securities Act 1978.[5] The Supreme Court also found that the untrue statement amounted to misleading conduct in breach of s 9 of the Fair Trading Act 1986 (FTA).[6] The Supreme Court referred the claim back to the High Court for determination of whether investors suffered loss by reason of the untrue statement, and whether investors were entitled to any remedy under the FTA ("stage two" of the proceedings).[7]

[3] It has throughout been common ground that because the High Court proceeding is a funded class action the defendants in that proceeding, including the respondents,[8] are entitled to security for costs. On 14 June 2019 the High Court made an order requiring security for costs for stage two in the sum of $1.65 million.

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1 At stage one of the proceeding, Mr Houghton was the representative plaintiff. Stage two of the proceeding involves claimants other than Mr Houghton, and since the High Court's stage two interlocutory judgment on 15 August 2019, Mr Houghton and the stage two claimants have been referred to as "the claimants": *Houghton v Saunders* [2019] NZHC 2007 [Stage two interlocutory judgment] at [2].

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

3 *Houghton v Saunders* [2016] NZCA 493, [2017] 2 NZLR 189.

4 *Houghton v Saunders* [2018] NZSC 74, [2019] 1 NZLR 1 [Supreme Court judgment].

5 At [231].

6 At [318].

7 At [275]–[279], [325], [371] and [376].

8 The respondents are the remaining defendants, following the Supreme Court appeal.

That security was to be provided by 12 July 2019, ahead of the five-week stage two hearing that was then scheduled to commence on 4 November 2019.[9]

[4] The claimants failed to provide the security for costs required by the High Court. The November 2019 fixture, and a subsequent fixture, were vacated. By May 2020 security for costs still had not been provided. On 22 May 2020 the High Court made an "unless" order striking out the proceedings with effect from 14 July 2020 unless, by 13 July 2020: [10]

(a) security for costs for stage two in the sum of $1.65 million was either lodged with the Registry of the Court or provided on other terms reasonably agreed to by the respondents and accepted by the Court by that date; and

(b) senior counsel for the claimants confirmed that, in his opinion, the claimants were adequately resourced to prepare for and present all aspects of their stage two claims.

[5] On 19 June 2020 a notice of appeal from the May 2020 judgment was filed in this Court.

[6] On 10 July 2020 an application for stay of the May 2020 judgment pending appeal was filed in the High Court. That application was heard on 30 July 2020. On 11 August 2020 the High Court delivered a judgment dismissing the stay application.[11]

[7] The claimants then filed an appeal to this Court from the August 2020 judgment.

[8] The Court thus has two appeals before it — one from the May 2020 judgment and one from the August 2020 judgment. But the second of these appeals is moot, as

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9 *Houghton v Saunders* [2019] NZHC 1362 at [90].
10 *Houghton v Saunders* [2020] NZHC 1088 [May 2020 judgment] at [92].
11 *Houghton v Saunders* [2020] NZHC 2030 [August 2020 judgment].

Mr Carruthers QC, counsel for the appellant, accepted at the hearing before us.[12] This Court has now heard the substantive appeal from the May 2020 judgment. Nothing turns on whether the May 2020 judgment was stayed in the period from the August 2020 judgment to the date of this decision. We therefore focus on the appeal from the May 2020 judgment.

[9] The notice of appeal from the May 2020 judgment sets out grounds on which the claimants said that an unless order should not have been made, or should have been made with a cut-off date of 30 September 2020 rather than 13 July 2020. However the written submissions filed by the claimants in this Court did not address the appropriateness of the High Court making the unless orders set out in the May 2020 judgment. Rather, the brief submissions filed by the claimants set out yet another new proposal for provision of security for costs and funding for the stage two claims (the October 2020 proposal). This proposal was supported by evidence from Mr Houghton that was filed and served two days before the hearing of the appeal. The submissions and supporting evidence did not provide sufficient information to enable this Court to fully understand and evaluate the October 2020 proposal.

[10] We granted the claimants leave to file further submissions setting out the details of that proposal, with supporting evidence. However instead of providing further information about the October 2020 proposal, on 30 October 2020 the claimants put forward a different proposal involving a bank bond. Then on 13 November 2020, in response to concerns the respondents expressed about the terms of that proposal, the claimants put forward yet another proposal involving an undertaking to be signed by the claimants' solicitor, and asked for more time to put that proposal in place.

[11] On 27 November 2020 we were advised that the undertaking will be signed "in a timely way". The respondents had identified a number of respects in which the undertaking and accompanying documents were unsatisfactory. Their concerns are well-founded, and their objection to security for costs being provided in this manner is reasonable. But the claimants have not sought to address those concerns. The end

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12 We discuss this below at [79]–[81].

result is that some six weeks after the appeal was heard, no reasonably acceptable form of security is in place. The claimants remain in default in providing the security ordered in June 2019.

Summary

[12] The claimants have not shown that the High Court Judge was wrong to make the unless orders set out in the May 2020 judgment. Indeed, they did not engage with the merits of that decision in their submissions to us. No basis has been identified on which an appeal from that decision should be allowed, and the orders made set aside.

[13] Nor has it been shown that the interests of justice require that the claimants be excused from the consequences of non-compliance with the unless orders. The non-compliance did not result from something for which they should not be held responsible: the claimants have had every opportunity to comply, but have failed to do so over an extended period. Indeed the non-compliance still has not been remedied: this is not a case like *SM v LFDB* where the question was whether, after a party belatedly complies with an unless order, that party should be granted relief from the consequences of its failure to comply by the relevant deadline.[13] The public interest in ensuring that justice is administered without unnecessary delays and costs, and the respondents' interest in having the claims against them determined in a timely and fair manner, weigh heavily against excusing the claimants' lengthy, and continuing, failure to comply with the orders made by the High Court.

[14] The appeal is therefore dismissed.

Background to the strike-out application

[15] We begin by setting out the background to the May 2020 judgment, drawing on the detailed account provided by the Judge in that judgment.

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[13] *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494. Leave to appeal that judgment was initially granted by the Supreme Court in *LFDB v SM* [2014] NZSC 131, but leave was revoked by that Court in a judgment dated 22 December 2014: *LFDB v SM* [2014] NZSC 197.

The proceeding

[16] As noted above, the proceeding was commenced in 2008. It was brought by Mr Houghton as a funded class action on behalf of some 3,600 subscribers for Feltex shares. The claim failed in the High Court and Court of Appeal. In August 2018 an appeal to the Supreme Court was successful in part. The Supreme Court held that the prospectus contained an untrue statement for the purposes of s 56 of the Securities Act. That statement also amounted to misleading conduct in breach of the FTA. The Supreme Court referred the matter back to the High Court for determination of certain questions including reliance/causation and loss.[14]

[17] The untrue statement in the prospectus was a forecast of Feltex's revenue for the 2004 financial year (FY04). The statement was untrue because the directors and promoters elected to maintain the forecast even though, by the time of allotment of the shares, the directors were on notice that there was no longer a reasonable basis for assuming that the forecast would be achieved.

[18] The Supreme Court judgment contemplated two possible methods of quantifying the loss resulting from an untrue statement in a prospectus.[15] The parties have different views on which method of quantifying loss should be used in this case.[16] In broad terms, the two methods contemplate either: [17]

(a) claims for the difference in value between the shares as issued in reliance on the content of the prospectus including the untrue statement, and the fair value of those shares if the untrue statement not been included in the prospectus (the difference in value measure); or

(b) claims that, had the untrue statement been corrected before the shares were issued, the claimants would have reversed their decision and elected not to invest at all. On this basis the claimants' loss would be the difference between the subscription price they paid and any amount

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14 Supreme Court judgment, above n 4.
15 At [86], [134]–[136] and [275]–[277].
16 *Houghton v Saunders* [2019] NZHC 142.
17 At [10]–[11].

> subsequently realised on the sale of their shares (the reversal of investment decision measure). In many cases, claimants retained some or all of their shares until they became worthless when Feltex was placed in liquidation: those claimants say they are entitled to recover the whole of the amounts they invested.

[19] Claimants whose cases are being prepared for hearing in stage two intend to pursue their claims on the reversal of investment decision measure, relying on the difference in value measure as a fall-back alternative.

[20] The respondents have indicated that they will challenge claims by individual shareholders that they would not have invested at all if the untrue statement had been revealed to them before the point in time at which they committed to the purchase. On the fall-back basis for the claims, the respondents will argue that the untrue statement did not reduce the fair value of the shares, or not to the extent claimed. In the event that loss is made out, the respondents will seek exemption from liability on the basis that they conducted themselves with reasonable diligence, notwithstanding the Supreme Court finding that no reasonable basis remained for them to leave the revenue forecast unaltered in the prospectus.

Security for costs

[21] The claimants initially accepted in late March 2019 that they should pay $800,000 as security against the prospect of an adverse costs award in relation to the stage two hearing. The respondents sought a greater sum to cover substantial disbursements that they projected would be incurred. The High Court made an order on 14 June 2019 that security was to be provided in the sum of $1.65 million,[18] which was to be paid by 12 July 2019, just under four months ahead of the five-week stage two hearing that was then scheduled to commence on 4 November 2019.

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[18] *Houghton v Saunders*, above n 9, at [90].

Failure to pay security for costs and to prepare for stage two

[22] After the security for costs order was made the claimants gave a number of assurances about compliance with that order, none of which was fulfilled. The High Court Judge set out in an appendix to the May 2020 judgment a summary of those assurances and the periodic reports of progress ostensibly being made to arrange the security for costs. The Judge considered that the pattern of unfulfilled assurances justified a healthy level of scepticism that Joint Action Funding Ltd (JAFL) could perform its obligations as funder to arrange security for costs and to fund pursuit of the stage two claims. The Judge recorded the respondents' complaint that Mr Anthony Gavigan, the major shareholder and sole director of JAFL, had proposed new initiatives for funding the claims shortly before each occasion on which the lack of progress was to be considered by the Court, on terms that meant the success of that new initiative would not be known until after the pending court hearing.[19] We interpolate that this pattern has continued before this Court, with a new proposal advanced at the hearing of the appeal and two further proposals after the hearing.

[23] On 4 November 2019, which was to have been the first day of the five-week stage two hearing, the Judge heard a contested application by the claimants for adjournment of that fixture.[20] The ground relied on was that the claimants had sought leave to appeal to the Supreme Court from a Court of Appeal decision[21] which upheld an interlocutory judgment of the High Court excluding part of the evidence of the claimants' economic expert, Mr Greg Houston.[22] The respondents wanted the stage two hearing to proceed, notwithstanding the absence of security for costs. On 13 December 2019, the Supreme Court declined leave.[23]

[24] In the course of argument at the 4 November 2019 hearing Mr Carruthers acknowledged that the claimants could not proceed with the stage two hearing at that time as they had not undertaken the necessary preparation for it, in the absence of resources to do so. In those circumstances the Judge considered he was forced to grant

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19 May 2020 judgment, above n 10, at [8].
20 *Houghton v Saunders* [2019] NZHC 2906 [High Court adjournment judgment].
21 *Houghton v Saunders* [2019] NZCA 506.
22 Stage two interlocutory judgment, above n 1.
23 *Houghton v Saunders* [2019] NZSC 148.

the adjournment, albeit not on the ground that had been relied on by the claimants.[24] The adjournment was granted subject to the defendants being awarded wasted costs for their preparation.[25] The Judge made the following observation:[26]

> During the course of stage two of the proceedings, the plaintiff/claimants have accumulated an impressive record of non-compliance with timetabling directions, as well as failures to comply with the original terms of my directions as to security for costs, and their own subsequent assurances of progress on that matter. The proceedings stayed on track for the stage two hearing, at least in part because of the defendants' preparedness to tolerate those aspects of non-compliance, and in particular to press on with the hearing despite not having the comfort of security for costs that had been ordered in their favour.

[25] On 5 November 2019 the High Court advised the parties of the availability of an alternative five-week fixture commencing on 11 May 2020. Counsel for the claimants accepted on 16 December 2019 that the May 2020 fixture would be "entirely appropriate". On 20 December 2019, the respondents' solicitors put the claimants on notice that if they failed to comply with the orders made to enable the stage two hearing to proceed, including provision of security for costs, an application would be made for a permanent stay or dismissal of the proceeding. That application was made on 14 February 2020.

[26] On 20 February 2020 Mr Carruthers filed a memorandum in the High Court in his capacity as an officer of the Court, explicitly without instructions from, or the authority of, the claimants. That memorandum conveyed Mr Carruthers' concern at the inability of JAFL to obtain funds to pay security for costs or to pay the costs associated with running the litigation, and his concern that this inability was putting at risk the claims of more than 3,600 claimants who did not know that their claims were in jeopardy. Mr Carruthers supported the proposal that had been advanced on behalf of the defendants that their application to strike out the proceeding and the memorandum of counsel filed in support of it should be provided to each of the claimants involved in the litigation. Mr Carruthers' memorandum proposed that JAFL be given a limited time in which to comply with the requirement for provision of

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24 High Court adjournment judgment, above n 20, at [4].

25 At [44]–[45]. Those were subsequently quantified at $110,000 for all the first defendants, and $100,000 for the second and third defendants, plus disbursements: *Houghton v Saunders* [2020] NZHC 265 at [26]–[27].

26 High Court adjournment judgment, above n 20, at [24].

security for costs and to satisfy the Court that sufficient funds were secured to fund the on-going litigation. If JAFL did not perform, he sought a period of time for claimants generally to have the opportunity to arrange funding to pursue the litigation, and to settle a committee to manage that.

[27] Following a telephone conference with counsel on 28 February 2020, the Judge issued a minute on 2 March 2020 directing that Mr Gavigan/JAFL would have until 13 March 2020 to confirm that Mr Gavigan/JAFL had security for costs and financial resources in hand to fund the stage two hearing.[27] 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.

[28] On 13 March 2020, Mr Gavigan filed an application for an extension of time within which JAFL could confirm security for costs and funding for stage two, together with an affidavit in support. On 25 March 2020, the Judge issued a further minute deferring consideration of JAFL's request for an extension of time.[28] The Judge indicated that if JAFL considered it worthwhile, it could continue with attempts to procure security for costs and funding for stage two until 20 April 2020, the date by which other claimants had to make alternative funding arrangements. JAFL's request for a further extension of time would be addressed at the hearing of the respondents' application for strike-out on 11 May 2020.

[29] In early 2020 Mr Gavigan registered a new company, JAFL Litigation Funding Partners Ltd (JAFL Funding Partners), which he intended to be the vehicle for raising funds for the stage two hearing. On 1 May 2020, JAFL Funding Partners launched an offer for five million new ordinary shares, using Collinson Crowdfunding Ltd (Collinson) as the platform manager for a crowdfunding offer for the first two million of those shares. Collinson is licensed by the Financial Markets Authority to provide equity crowdfunding services. The offer was to close on 29 May 2020, subject to the prospect of its closing date being extended. In an updating affidavit as at 10 May 2020, Mr Gavigan deposed that $161,000 had been received from investors in

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27 *Houghton v Saunders* HC Wellington CIV-2008-409-348, 2 March 2020.
28 *Houghton v Saunders* HC Wellington CIV-2008-409-348, 25 March 2020.

response to the crowdfunding offer. That represented 32 per cent of the minimum target of $500,000 for the crowdfunding offer.

The May 2020 judgment

[30] The respondents' application to strike out the proceeding was made in reliance on rr 7.48 and 15.2 of the High Court Rules 2016. Rule 7.48 provides that where a party fails to comply with an interlocutory order the judge may make any order that the judge thinks just, including that pleadings of a party in default be struck out in whole or in part, or that the proceeding be stayed. Rule 15.2 provides that where a plaintiff has failed to prosecute all or part of a proceeding to trial, the proceeding may be dismissed for want of prosecution.[29]

[31] The Judge referred to the test for striking out proceedings for failure to comply with an order for security for costs set out in *Jagwar Holdings Ltd v Fullers Corp Ltd*:[30]

> … the authorities also establish that such a course will not be taken unless the circumstances of the case make it appropriate to do so, and that the dismissal of proceedings for failure to comply with an order of the Court where the applicant to strike out cannot make out the more general ground for failure to prosecute with due diligence is only appropriate if the failure to comply with the order is "intentional and contumelious": *Birkett v James* [1978] AC 297 per Lord Diplock at p 321.

[32] The Judge also referred to the list of considerations identified by Fisher J in *Smith v Antons Trawling Co Ltd* as relevant when assessing the implications of a default in complying with an interlocutory order: [31]

[a] Its duration.

[b] Its impact upon the progress of the proceedings as a whole.

[c] Whether there appears to be any excuse or explanation.

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29 The application also relied on r 10.8 of the High Court Rules 2016, but the Judge considered that was not an apt provision to deal with the circumstances that had developed, and added nothing to the merits of the application: May 2020 judgment, above n 10, at [18].

30 *Jagwar Holdings Ltd v Fullers Corp Ltd* (1991) 4 PRNZ 577 (HC) at 578.

31 *Smith v Antons Trawling Co Ltd* HC Auckland CL 40/98, 24 March 2000 at [4]. In that case, there had been non-compliance with an order for security for costs, plus orders requiring an amended statement of claim and particular discovery.

[d] Whether it continued after reasonable opportunities and reminders, particularly where the Court has already made a fresh order, or given a warning, due to earlier non-compliance.

[e] Whether it has substantially prejudiced the innocent party, whether procedurally or due to some wider impact upon the innocent party's interests and affairs.

[f] Whether there is any realistic expectation that it will be rectified following further opportunity for compliance.

[33] The respondents argued that in the context of proceedings that were already stale and much protracted, the failure to comply with an order for security for costs for a period of some 330 days was inordinate, inexcusable, and amounted to contumelious disregard for the order requiring security to be paid. The delay had been so long that two five-week fixtures allocated for the stage two hearing had been abandoned. The respondents also argued that the most recent attempt to comply with the order, through a crowdfunding initiative, was misleading in material respects.

[34] Mr Carruthers responded by identifying the steps that were being taken to arrange security for costs and funding for stage two. He submitted that the importance of achieving a substantive outcome for some 3,600 claimants was a sufficient ground for dismissing the application and affording further time for the claimants to provide security for costs and arrange funding. He argued that an indefinite time should be allowed to enable the necessary funds to be obtained.

[35] The Judge accepted the respondents' submission that there was a risk that the crowdfunding offer would fail to raise a sufficient amount to pay security for costs and adequately resource the claimants for completion of stage two.[32] The Judge also accepted that there were grounds for the respondents' criticisms that the terms of the crowdfunding offer were likely to mislead potential investors about the extent of risks involved, and the extent to which any prospects of recovery to investors in the crowdfunding offer would be relegated behind other interests with prior claims.[33] However in the context of the strike-out application, it was not necessary for the Court to make any determinations in relation to the standard of accuracy required of

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32 May 2020 judgment, above n 10, at [53].
33 At [54].

crowdfunding documents.[34] In order to address concerns about the potentially misleading content of the crowdfunding offer document, the Judge directed that JAFL arrange for a copy of the May 2020 judgment to be provided to all claimants to whom the offer document had been sent.[35]

[36] The Judge considered that the crowdfunding offer, and any other offer of shares by JAFL Funding Partners, should be able to run their course at least to 30 June 2020. That was the expiry date contemplated by Mr Gavigan and Collinson at the time of the 11 May 2020 hearing.[36] After the hearing Mr Gavigan filed another updating affidavit foreshadowing a longer extension of the crowdfunding offer until 31 July 2020. Admission of that affidavit was opposed by the respondents. The Judge considered the affidavit, but concluded that the difficulties identified by Mr Gavigan, in particular in relation to COVID-19, were not sufficient to extend the reasonable period that should be allowed to complete the "last option to secure funding".[37]

[37] The Judge was not persuaded that the number of claimants whose interests were at stake, or the relative importance of determining their entitlement to damages, could justify allowing their claim to continue on an open-ended basis. Weighing the competing positions of all parties and making allowances for a period of unprecedented disruption caused by COVID-19, the Judge considered that there must be a limit to those allowances.[38]

[38] The Judge considered that the important principle of access to justice:[39]

> … cannot be assessed solely from the perspective of the claimants seeking to have their day in court. A balanced assessment requires consideration also of the interests of the other affected parties to the litigation, and the interests of the Court in serving the wider public interest.

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34 At [55].
35 At [56] and [93].
36 At [59].
37 At [64].
38 At [66]–[69].
39 At [70].

[39] The Judge noted the prejudice to the individual defendants caused by granting multiple requests for deferral of the obligation to provide security for costs, and the disruption to the business of the Court caused by the on-going sequence of delays and performance on behalf of the claimants.[40]

[40] The Judge also expressed the view that there was some merit in the argument advanced on behalf of the second and third respondents that the importance of access to justice for the claimants was diluted somewhat by the arithmetic in this case. The claimants would only recover compensation after meeting very substantial claims by funders and others to meet costs already incurred. Any further extension would initially benefit Mr Gavigan and other funders, rather than the claimants.[41]

[41] Although no blame could be attributed to any of the claimants for the sequence of failings by the funder, it would be inappropriate to assess their entitlement to their day in court ignoring the adverse impacts on the litigation of the funders' non-performance. The claimants included entities of financial substance whose individual claims were large enough to justify their funding stage two, if they believed in the validity of those claims. The claimants appeared to be committed to continuing with the stage two proceeding notwithstanding that it would be conducted on terms that provided reimbursement and reward to the funders for very significant sums out of any damages award received.[42]

[42] The Judge was satisfied that a strike-out order should be made:

> [80] I am satisfied that the defendants are entitled to an order striking out the proceeding, both under r 7.48 and under r 15.2. The former rule recognises the Court's jurisdiction to strike out either the whole or part of a pleading or to stay a proceeding where a party is in default of an interlocutory order. The default focused upon in this argument was the failure to provide security for costs. I am satisfied that failure is now inexcusable, and most certainly will be by the date for compliance with the unless orders I make below. Given the terms of the funding arrangements, and to a lesser extent the refusal by claimants with both substantial claims and substantial resources to facilitate funding, I also find the failure to be intentional in the requisite sense.

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40 At [71]–[72].
41 At [74].
42 At [77]–[78].

> [81] Rule 15.2 gives the Court the power to dismiss a proceeding for want of prosecution. Given that the November 2019 and May 2020 fixtures were both accepted on behalf of the claimants, only for the claimants' case not to be ready on both occasions, dismissal for want of prosecution will become appropriate if the claimants do not evidence by their counsel's acknowledgement that they will be ready to proceed at the third allocated date advised below, having also removed the impediment of the absence of security for costs that has been ordered against them. The focus has understandably been on the failure to provide security for costs, but there were also numerous instances of non-compliance with timetabling requirements to have the case prepared for the November 2019 hearing, and since then a refusal by counsel to engage at all on a timetable to be ready for the May 2020 hearing.

[43] The Judge therefore made the orders set out at [4] above.

[44] The Judge directed that if the unless orders were complied with, counsel should confer promptly after 13 July 2020 to settle a timetable for the steps necessary to have the stage two claims prepared for trial. The Judge indicated that he would arrange for a venue to be available for a hearing of up to six weeks starting on 27 October 2020.[43]

Events following the May 2020 judgment

[45] As noted above, on 19 June 2020 a notice of appeal from the May 2020 judgment was filed in this Court.

[46] On 7 July 2020 Mr Carruthers filed a memorandum in the High Court, in his capacity as senior counsel for the plaintiff, advising that he would not be in a position to provide the confirmation required of him by 13 July 2020, pursuant to the terms of para (b) of the orders made in the May 2020 judgment (as set out at [4] above). Mr Carruthers asked that the High Court either grant an extension of time for compliance with that order, or a stay of the judgment pending appeal.

[47] On 8 July 2020 the Judge issued a minute acknowledging Mr Carruthers' memorandum, observing that no formal application for a stay had been filed, and indicating that if an application was to be pursued it would need to be filed before 5.00 pm on 10 July 2020. In the event that such an application was filed, the Judge directed that it would be determined on 30 July 2020.[44]

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43 At [85]–[86].
44 *Houghton v Saunders* HC Wellington CIV-2008-409-348, 8 July 2020.

The August 2020 judgment

[48] As noted above, an application for stay of the May 2020 judgment was filed on 10 July 2020. The application was made under r 12(3) of the Court of Appeal (Civil) Rules 2005. As relevant, r 12 provides:

> **12 Stay of proceedings and execution**
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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,—
>
> (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.
>
> …

[49] The Judge noted that a r 12 application requires the court to balance the rights of the party that had been successful to the fruits of that judgment against the need to preserve the appellant's position, given the prospect of the appeal succeeding.[45] The Judge set out the following factors which this Court has identified as relevant:[46]

> (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;

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45 August 2020 judgment, above n 11, at [11].

46 At [11], citing *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZCA 186 at [6], adopting *Keung v GBR 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].

(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.

[50] The Judge recorded that Mr Carruthers did not advance the case for a stay by reference to these conventional considerations. Rather, Mr Carruthers submitted that the weight of the interests of some 3,600 claimants was greater than the respondents' interest in finality. In May 2020 he had argued that the claimants ought to be 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 seeking a stay, Mr Carruthers did not contend for an open-ended period. Rather, he submitted that further time should be allowed until 30 September 2020.[47]

[51] The Judge began by considering factors (a) and (b) in the list set out at [49] above. As the Judge noted, a stay was not necessary to preserve the prospect of the claimants successfully arguing on appeal that the unless orders should not have been made. The claimants had not taken any steps to pursue the appeal promptly: no steps had been taken to settle the case on appeal, or to seek allocation of an early fixture. Accordingly, the Judge said, "on these factors of primary importance to the balancing of interests, the prospects for this application for a stay appear to be forlorn".[48]

[52] The Judge considered that although there were matters that could be raised for the claimants on factors (c) to (i) in that list, the merits of the first two considerations, which take primacy, weighed materially against the grant of any stay.[49]

[53] At the hearing of the stay application Mr Carruthers suggested, as an alternative to granting a stay, that the Judge should direct that no judgment was to

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47 August 2020 judgment, above n 11, at [12]–[13].
48 At [18].
49 At [25].

be sealed that would reflect the outcome of non-compliance with the unless orders. On that basis, Mr Carruthers submitted, the Judge would retain jurisdiction to vary the terms of those orders and should do so 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.[50]

[54] The Judge referred to the decision of this Court in *SM v LFDB* in relation to the circumstances in which a party might be relieved of the consequences of failure to comply with an unless order.[51] This Court identified the following principles:[52]

> (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.

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50 At [27].
51 *SM v LFDB*, above n 13.
52 At [31].

(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).

[55] In light of those principles the Judge considered whether new circumstances had arisen that warranted variation of the orders he made in May 2020.[53] In particular, he considered the relevance of a further funding initiative put forward by Mr Gavigan involving a freshly incorporated company called Stage Two Guarantee Ltd (STGL), which would provide a guarantee in favour of the defendants for the sum of $1.32 million in respect of adverse costs orders against the claimants.[54]

[56] The Judge was not persuaded that the claimants were entitled to any relaxation of the terms of the unless orders on the basis of developments since those orders were made in May 2020. Accordingly, the application for a stay was dismissed. As the Judge noted, the automatic consequence of non-compliance with the unless orders, namely that the proceeding was struck out, remained in effect.[55]

Claimants' submissions on appeal

[57] The written submissions of Mr Carruthers on behalf of the appellant, Mr Houghton, and the other claimants did not address the question of whether the Judge erred in making the unless orders in the May 2020 judgment. Nor did the submissions engage with the merits of the High Court decision declining a stay in the August 2020 judgment. Rather, the submissions advised the Court that there had been a "significant development" since the delivery of the August 2020 judgment. The representative plaintiff, Mr Houghton, would make his assets available to meet any costs order resulting from the stage two hearing. Details were provided of the assets supporting the proposal, and its relationship to the crowdfunding proposal put to the High Court. The Court was advised that Mr Houghton's solicitor would verify that the condition of the unless order in relation to adequate funding for stage two was met.

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53 August 2020 judgment, above n 11, at [36].
54 At [37].
55 At [70]–[71].

[58] Mr Carruthers submitted that the Court should excuse non-compliance with the order for security for costs and other orders made by the High Court on the basis that the claimants can now satisfy the order for security for costs by means of the new proposal. The significant difference from the position before the High Court, he said, was that Mr Houghton was now prepared to make his personal assets available to meet any award of costs in respect of stage two. So the respondents can look to a plaintiff present in the jurisdiction with sufficient assets to meet any award of costs that might be made. Where any costs award that might ultimately be made in favour of a defendant can be enforced against such a plaintiff, Mr Carruthers said, security for costs will not normally be required. So this new approach should be seen as providing an acceptable level of protection for the respondents.

[59] Mr Carruthers emphasised paragraph (f) of the approach adopted by this Court in *SM v LFDB*, set out at [54] above.[56] He submitted that the interests of justice are a crucial consideration in these appeals. The situation which has arisen is not, he said, the fault or responsibility of the 3,639 claimants. They are contractually bound to JAFL, which is responsible for funding the litigation but has failed to do so. The claimants' success before the Supreme Court provides a compelling reason to allow the claimants to pursue their claims even though this will involve allowing further time for that purpose. To deny the claimants the opportunity to pursue their soundly based claim, Mr Carruthers submitted, is to deny them access to justice.

[60] Mr Carruthers added that another relevant factor is the imbalance of resources. He submitted that the respondents have a superior financial position and are using it in an attempt to defeat the claim.

[61] In response to questions from the Court about the absence of the confirmation required by para (b) of the orders set out at [4] above that the claimants have funding available to meet their costs of pursuing stage two, Mr Carruthers provided a brief affidavit from his instructing solicitor sworn the day before the hearing of the appeal stating that the claimants "are adequately resourced to prepare for and present all aspects of their stage two claims". However that affidavit provided no information

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[56] *SM v LFDB*, above n 13, at [31].

about the nature and source of this funding, and in response to questions from the Court, Mr Carruthers said he needed more time to provide details and supporting evidence.

[62] Mr Carruthers also sought more time to provide information responding to questions from the Court about the October 2020 proposal, and about the relationship between the proposed funding and the security for costs arrangements. The various memoranda received after the hearing are described at [69]–[75] below.

[63] Mr Carruthers did not initially address the merits of the May 2020 judgment in his oral submissions. As noted above, that topic had not been addressed in his written submissions. In response to questions from the Court, Mr Carruthers said that because circumstances had changed, he did not need to argue this. But he went on to say that he did not resile from the argument that the unless orders should not have been made, on the grounds set out in the notice of appeal: more time should have been allowed to provide security for costs. That argument was still live in the event that the Court was not minded to excuse non-compliance with those orders on the basis that circumstances had changed. Although Mr Carruthers did not abandon this argument, he did not make any submissions in support of it, apart from referring to the notice of appeal. Nor did he identify an alternative date by which security for costs should have been required before the unless orders were triggered, despite the failure of the claimants to provide security for costs by the date of 30 September 2020 proposed in the notice of appeal.

[64] In response to questions from the Court, Mr Carruthers was inclined to accept that the High Court decision on whether to make an unless order involved the exercise of a discretion. He confirmed that he was advancing his (contingent) challenge to the May 2020 judgment on the basis that the decision was plainly wrong.[57]

Respondents' submissions on appeal

[65] The respondents began by emphasising the nature of the appeal. There had been no appeal from the decision setting security for costs at $1.65 million.

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[57] Relying on *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

Accordingly, it was not open to the claimants to argue that security for costs was not required. The unless order was made under rr 7.48 and 15.2 of the High Court Rules; each, the respondents submitted, involves a double discretion as to (i) whether to make an order, and (ii) the form of any order. Accordingly, the respondents said, the appeal could succeed only if the claimants satisfied one of the grounds of appeal in relation to discretionary decisions identified in the Supreme Court's decision in *Kacem v Bashir*.[58] The ground relied on by the claimants was that the decision was plainly wrong. But the claimants' written submissions did not address that issue at all. Nor had it been addressed in oral submissions, apart from reference back to the notice of appeal.

[66] The respondents also emphasised that this was not a case where there had been belated compliance with an unless order. The claimants still had not complied with the order. The October 2020 proposal was problematic in a number of respects, which the respondents analysed in some detail. It did not provide an adequate form of security for the respondents' stage two costs.

[67] The May 2020 judgment correctly identified the need to reach a "balanced assessment" that weighed the interests of the claimants together with the interests of the other affected parties to the litigation, and the interests of the court in serving the wider public interest.[59] The orders made reflected that balanced assessment. No basis had been identified on which those orders should be disturbed.

[68] Finally, the respondents submitted that the principal beneficiaries of any further indulgence would be the funders of the claim, rather than the claimants themselves. The funders have a prior claim to something in excess of $36 million of any recoveries, before claimants are paid. The respondents submitted that recovery at that level is unlikely. The Judge was right to accept their submission that this factor undermines the claimants' argument that a further indulgence is required to protect the claimants' interests as established by the Supreme Court judgment.[60]

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58 *Kacem v Bashir*, above n 57.
59 At [70].
60 May 2020 judgment, above n 10, at [74]: see [40] above.

Developments after the hearing

[69] As noted above, at the hearing of this appeal Mr Carruthers sought more time to provide supporting information about the new proposal outlined in his submissions. We granted leave to provide that information, and supporting evidence, by 30 October 2020.[61] On 30 October 2020 Mr Carruthers filed a memorandum of counsel which provided the confirmation in relation to the claimants' funding for stage two that was required by para (b) of the orders set out at [4] above. But instead of providing further information about the proposal advanced at the hearing, the memorandum put forward a new proposal under which a bank bond would be provided to the respondents by way of security. A draft bond was attached, the form of which the Court was asked to approve. The Court was advised that the application for the bond was being processed by the bank from which the bond had been sought.

[70] The respondents submitted that this response fell outside the terms of the leave granted to the claimants, and this Court should disregard it and proceed to decide the appeal. However we considered that if an acceptable bond could be provided, that would be relevant to the determination of the appeal. We therefore allowed the claimants further time, until 13 November 2020, to put in place a complete and unconditional bond.[62] The claimants were encouraged to seek comment from the respondents in relation to the form of the proposed bond, to ensure that (as required by the High Court orders) it would be capable of being agreed to by them and accepted by the Court.

[71] Mr Carruthers then filed a memorandum dated 13 November 2020 advising the Court that in light of the response received from the respondents in relation to the form of the bond, an alternative arrangement was being put in place which would involve security for costs being provided by means of an undertaking given by the appellant's solicitor, Mr Hamel. A draft undertaking was attached to the memorandum. The draft undertaking referred to Mr Hamel holding "in cash or by way of securities the sum of $1,650,000 on trust in accordance with the irrevocable instruction of [STGL] as set out in its Deed of Indemnity dated 10 October 2020,

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61 *Houghton v Saunders* CA322/2020, 15 October 2020.
62 *Houghton v Saunders* CA322/2020, 6 November 2020.

a copy of which is annexed hereto". Mr Carruthers asked for further time until 30 November 2020 to put the proposed arrangement in place.

[72] As counsel for the respondents pointed out in their memorandum dated 18 November 2020, the response did not comply with the terms of the leave granted by the Court. The new proposal was incomplete. The memorandum was consistent with the pattern of conduct observed in the High Court of new initiatives for funding being provided "shortly before each occasion on which the lack of progress is to be considered by the Court, on terms where the success of that new initiative will not be known until after the pending court hearing".[63] The time had come to bring the appeal to an end. For completeness, the respondents noted that the new and incomplete proposal was "seriously flawed". As they pointed out, the draft undertaking did not itself contain any promise by Mr Hamel to pay any sum awarded to the respondents by way of costs. The attached deed did not contain any irrevocable instruction to Mr Hamel. The "securities" that Mr Hamel was to hold — the adequacy of which would determine the adequacy of the security — had not been provided for their review. They identified a number of other defects in the proposal.

[73] On 27 November 2020 Mr Carruthers filed a further memorandum advising the Court that Mr Hamel "will sign the undertaking in the form attached to counsel's previous memorandum … 'in a timely way'". It would be signed by Mr Hamel "on the basis that he is satisfied that the security described in counsel's previous memorandum … affords sufficient protection for him in the event that his undertaking is called on". The justification for this form of security for costs was identified as the precedent provided by the initial form of security for costs directed by the High Court for stage one: an undertaking from the appellant's former solicitors. There is, Mr Carruthers submitted, no justifiable basis for rejection of this form of security having regard to the form of security previously approved by the High Court. Mr Carruthers submitted that the appeal should be allowed as the claimants can now provide the security for costs ordered.

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63 May 2020 judgment, above n 10, at [8].

[74] It appears from this memorandum that the form of security for costs it contemplates still is not in place. And we consider that the concerns raised by the respondents about the form of security contemplated by the latest proposal are well-founded. Mr Hamel does not himself undertake to pay an award of costs: he simply undertakes to hold $1.65 million on trust in the form of cash or securities in accordance with the irrevocable instruction of STGL. But no such instruction has been given. If the respondents call on the security for costs it is not clear that Mr Hamel is in fact required to pay them any cash he holds (the amount of which is not specified in the undertaking). Nor is it clear what steps he must take to enforce any relevant securities. The precise nature of the security, and his ability to enforce it in a timely way, are not apparent from the limited material provided. The respondents raised other concerns in relation to the information provided, and the terms of the Deed of Indemnity, which are not without force. But the points we have noted above are sufficient to confirm that the proposed form of security, even if put in place, would be unsatisfactory in a number of fundamental respects. The respondents' rejection of the latest proposal is reasonable.

[75] Thus by the end of November 2020, some six weeks after the appeal was heard, it remains the case that the default in complying with the June 2019 order requiring security for costs remains unremedied. Despite the further time allowed to the claimants, none of the three proposals advanced before this Court has resulted in the provision of a reasonably acceptable form of security for costs.

Discussion

Challenge to May 2020 judgment

[76] We are not persuaded that the decision to make an unless order involves the exercise of a discretion in the sense referred to in *Kacem v Bashir*, with the result that the more restricted approach to appeal set out in that case applies. Both the nature and the potentially determinative effect of an unless order point to this being a matter of evaluative judgment, with the result that there is a general right of appeal.[64]

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[64] *Kacem v Bashir*, above n 57, at [32]; and *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

[77] The respondents submitted that even if the making of an unless order involves an evaluative judgment, the settling of the precise terms of the order, and in particular the deadline for compliance, involved a discretion to which the *Kacem v Bashir* approach applied. We need not determine that argument, as there was nothing in the material before us to suggest that the Judge erred in any respect in his decision to make an unless order, or in the timeframe allowed for compliance. Mr Carruthers did not attempt to persuade us that it was premature for an unless order to be made in May 2020. We agree with the Judge that the time had come for such an order. Nor did Mr Carruthers identify any reasons why the 13 July 2020 deadline for compliance set by the Judge was unreasonable or unfair, or put forward an alternative date that would have been more appropriate. The alternative deadline proposed in the notice of appeal, 30 September 2020, had (as noted above) passed without the order being complied with.

[78] In short, no challenge to the making of unless orders in the May 2020 judgment, or to the terms of the orders made in that judgment, was seriously pursued before us. We consider that the making of the orders was justified. Nor is there any plausible basis on which the terms of those orders could be challenged. Mr Carruthers was therefore right to focus on the question of whether the claimants' non-compliance with the unless orders made in the May 2020 judgment should be excused because of a change in circumstances.

Appeal from August 2020 judgment

[79] As noted above, Mr Carruthers accepted in response to questions from the Court that the appeal from the August 2020 judgment was moot. We agree.

[80] Indeed we consider that this appeal was misconceived. Under r 12(5) of the Court of Appeal (Civil) Rules, if the High Court refuses to grant a stay pending appeal, an application may be made to this Court for a stay. A separate appeal from the August 2020 judgment was neither necessary nor appropriate.

[81] The appeal from the August 2020 judgment must therefore be dismissed.

Should non-compliance be excused?

[82] We raised with the parties the question whether any application for relief from the consequences of failure to comply with the unless order should have been made in the High Court, rather than this Court, as it was in *SM v LFDB*. We consider that where the making of unless orders has not been challenged, and the only issue is whether a failure to comply with such orders should be excused, an application for relief should be made in the High Court rather than by way of appeal to this Court. However in this case there was a challenge to the making of the unless orders in the notice of appeal, and the request for relief from non-compliance was pursued in the alternative (albeit, as matters ultimately developed, as the appellant's preferred alternative). Counsel for all parties confirmed that they sought a determination by this Court of the argument that relief should be granted. In those circumstances we consider that we can and should determine that issue, despite the absence of an application for relief in the High Court, and the absence of a decision of that Court on the issue.

[83] We accept the respondents' submission that this case is very different from *SM v LFDB* because the claimants still have not complied with the requirements of the unless orders. They have now provided the confirmation from senior counsel required by para (b) of the orders, but they have not provided security for costs in a form that is acceptable to the respondents or to the Court. Their multiple unsuccessful attempts to provide an acceptable form of security are consistent with the pattern noted by the High Court Judge, and confirm the Judge's scepticism about their ability to provide the required security for costs. There is no reason to think that they will be able to comply with the order made as long ago as June 2019 at any time in the foreseeable future.

[84] It cannot be the case that claimants in a representative proceeding are allowed unlimited time to prosecute their claim, free of the disciplines that apply to any other litigant. That would not be consistent with the public interest in the effective administration of justice. It would be profoundly unfair to the defendants in such a claim. Defendants are no less entitled to access to justice than plaintiffs. For a defendant, one very important element of access to justice is the hearing and

determination of the claims against them in a timely manner. It is oppressive and unfair for claims to be left hanging over the head of a defendant for an unnecessarily protracted period.

[85] Once one accepts that there must be some limit on the time that claimants are allowed to comply with Court orders and prosecute their claims, the critical question becomes how much time ought fairly and reasonably to be permitted. In this case, we consider that the May 2020 judgment allowed adequate, indeed generous, time for compliance. Nor did the claimants put forward any new date by which they would be able to comply with the orders made.

[86] We also accept the respondents' submission that there has not been any material change in circumstances since May 2020, let alone the significant change in circumstances claimed by Mr Houghton. At the date of the hearing before us there was no additional funding or security on offer over and above the proposals canvassed before the High Court in May 2020 and August 2020. As the respondents submitted, Mr Houghton's personal assets have always been on the line. Nothing material has changed either in relation to the rationale for requiring security for costs, or the adequacy of the arrangements made by the claimants to provide that security. That remains the position following the hearing, despite the further opportunities afforded to the claimants to put in place an appropriate form of security for costs. No security is yet in place. The latest of the three proposals advanced before us has been rejected by the respondents on grounds which, as we explained at [74] above, are well-founded and reasonable.

[87] In these circumstances, it is difficult to identify any proper basis on which the claimants' failure to comply with the orders made in the May 2020 judgment could be excused, or on which they could be relieved from the consequences of non-compliance. They have had a generous amount of time to provide security and to prosecute their claims. They have repeatedly failed to do so.

[88] We are not in a position to determine whether, as the respondents submit, the only likely beneficiaries of any further indulgence would be the litigation funders who funded stage one, rather than the claimants. Certainly they would be the initial

beneficiaries of a claim, on the basis of the distribution of proceeds contemplated by the claimants' funding arrangements. However we observe that if the funders who have first claim to any recoveries considered that the claims were strong, they would have a strong incentive to provide additional funding to enable those claims to be pursued. And if the claimants — some of whom are well resourced and have significant claims — were persuaded that there was a good prospect of success at a level that would provide them with meaningful recoveries, they could have funded stage two. They have chosen not to do so. The reluctance of the original funders and the claimants to fund any further steps casts considerable doubt on the extent of prejudice that the claimants will suffer as a result of the proceeding remaining struck out.

[89] Conversely, it is clearly contrary to the public interest to permit this proceeding to continue to absorb the finite resources of the courts, to the detriment of other litigants, for a further — potentially lengthy — period. There would be an obvious prejudice to the respondents in having the proceeding revived, with the result that it would continue into a thirteenth year, still with no certainty about when security for costs could be provided and a trial take place. As this Court said in *SM v LFDB*, in the context of an application for relief from the consequences of non-compliance with an unless order these considerations carry much more weight than the interests of the defaulting party.[65]

[90] The claimants' request that their non-compliance with the unless orders be excused fails by a wide margin.

Result

[91] The appeal from the May 2020 judgment is dismissed.

[92] The appeal from the August 2020 judgment is dismissed.

[93] Costs should follow the event in the ordinary way, as Mr Carruthers accepted at the hearing before us. The appellant must pay one set of costs for a standard appeal

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[65] *SM v LFDB*, above n 13, at [31(f)], set out at [54] above.

on a band A basis to the first respondents, and one set of costs for a standard appeal on a band A basis to the second and third respondents collectively, in each case with usual disbursements. We certify for second counsel in respect of each of the two sets of costs.

Solicitors:
Antony Hamel, Dunedin for Appellant
Gilbert Walker, Auckland for First Respondents (other than Mr Horrocks and Ms Withers)
Clendons, Auckland for Mr Horrocks
Wilson Harle, Auckland for Ms Withers
Russell McVeagh, Wellington for Second and Third Respondents