

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

CIV-2008-409-000348

BETWEEN ERIC MESERVE HOUGHTON
 First Plaintiff

AND DARRYL ALEXANDER JONES
 Second Plaintiff

AND TIMOTHY ERNEST CORBETT
 SAUNDERS
 SAMUEL JOHN MAGILL
 JOHN MICHAEL FEENEY
 CRAIG EDGEWORTH HORROCKS
 PETER DAVID HUNTER
 PETER THOMAS
 JOAN WITHERS
 First Defendants

AND CREDIT SUISSE PRIVATE EQUITY INC
 (FORMERLY CREDIT SUISSE FIRST
 BOSTON PRIVATE EQUITY INC)
 Second Defendant

AND CREDIT SUISSE FIRST BOSTON
 ASIAN MERCHANT PARTNERS LP
 Third Defendant

AND FIRST NEW ZEALAND CAPITAL
 Fourth Defendant

AND FORSYTH BARR LIMITED
 Fifth Defendant

Hearing: 23 June 2009

Appearances: A J Forbes QC & PAB Mills for First Plaintiff
 G Wakefield for Second Plaintiff
 L Clarke for First Defendants
 A Olney for Second and Third Defendants
 R Butler for Fourth Defendant
 No appearance for Fifth Defendant

RESERVED JUDGMENT OF HON. JUSTICE FRENCH

Introduction

[1] This judgment concerns two interlocutory applications.

[2] The first is an application for production of documents which raises issues of legal professional privilege and the second is an application for a stay of proceedings.

[3] At the commencement of the hearing, counsel for the second and third defendants objected to parts of an affidavit filed on behalf of the first plaintiff. The grounds of the objection were that the impugned sentences consisted of submission and/or inadmissible statements of belief and opinion. I provisionally admitted the evidence. Strictly speaking, the objections may well be correct and despite greater latitude being allowed in interlocutories, matters of submission in affidavits are to be discouraged. It has not however made any difference to the ultimate outcome as the same arguments raised in the affidavit were made to me in submissions by counsel. In all the circumstances, I have decided against excluding the evidence.

Background to the applications

[4] The first plaintiff wishes to bring representative proceedings on behalf of a large number of shareholders of Feltex Carpets Limited (Feltex) against former directors and others associated with a share issue that took place in 2004. The basis of the claim is a share prospectus which the plaintiffs say contained untrue and misleading statements.

[5] The statement of claim was filed in February 2008 and a representative order made ex parte by an Associate Judge on an opt-out basis (meaning that Feltex shareholders who were within a specified class would automatically become claimants unless they expressly opted out of the proceeding).

[6] The defendants applied to have the representative order rescinded.

[7] That application and a number of other applications filed by the defendants were heard by me in late July 2008. My judgment was issued on 7 October 2008, with the rulings summarised at [220] to [225]:

Summary of application outcomes

[220] The application for a stay of proceedings on the grounds of champerty is dismissed.

[221] The application for an order striking out certain claims on the grounds they disclose no reasonable cause of action is granted in respect of the claims by the second plaintiff in negligence and breach of fiduciary duty.

[222] The application for further particulars is adjourned to a date to be fixed by the Registrar following discovery and inspection.

[223] A ruling on the application for security for costs is deferred until the final composition and size of the represented class is determined, counsel to have an opportunity to update their existing written submissions.

[224] Subject to the statement of claim being amended in accordance with paragraph of this judgment, orders numbered 1, 2 and 3 of the order for directions made by the Associate Judge on 26 February 2008 are amended:

- (a) by providing that only the first plaintiff, Eric Meserve Houghton of Upper Moutere, investor, sues in a representative capacity for shareholders who purchased shares in the IPO on 4 June 2004 and who suffered a loss on their investment;
- (b) by rescinding those parts of the order providing for an opt out procedure and replacing them with an opt in procedure, whereby qualifying shareholders will be given until 19 December 2008 to advise the Court they consent to being part of the proceeding;
- (c) the form of the consent is to be prepared by the plaintiffs and submitted to the Court for approval;
- (d) the consent form should include an explanation of the various funding options.

[225] I reserve leave to the first plaintiff to apply for a variation to the date by which qualifying shareholders must notify the Court they consent to being part of the proceeding, in the event the date of 19 December 2008 is impractical or gives insufficient time...

[8] All defendants are appealing my decision to the Court of Appeal, with a possible hearing date in November 2009.

[9] For their part, since my judgment, the plaintiffs have been in some disarray.

[10] First, in breach of my order, an opt-in consent form was unilaterally sent to shareholders in November 2008 without first being submitted to the Court for approval.

[11] Then in March 2009, Wakefield & Associates (Wakefields) was granted leave to withdraw as solicitors for the first plaintiff on the basis of conflict and unspecified difficulties being experienced with the first plaintiff and the litigation funder. According to the solicitors' memorandum, they had advised the first plaintiff to appoint another solicitor in early February 2009.

[12] New solicitors were not however instructed until June 2009.

[13] Meantime, no amended statement of claim has been filed and no draft form of consent submitted for the Court's approval.

Application for production of documents

[14] Rule 8.23 of the High Court Rules provides:

8.23 Inspection of document referred to in pleading or other document

- (1) A party (**party A**) on whom a pleading or other document is served may, by notice in writing served on the party or person by whom the pleading or other document was filed (**party B**), require party B to produce for inspection a document referred to in the pleading or other document.
- (2) Party B must, within 5 working days after service of a notice under subclause (1), make the document available for inspection by the parties to the proceeding.
- (3) Subclause (2) is subject to any claim by party B to privilege or confidentiality.
- (4) If party A challenges a claim to privilege or confidentiality, party A may apply to the court for an order setting aside or modifying the claim.

[15] The documents at issue are documents mentioned in affidavits sworn by a Mr Anthony Gavigan on behalf of the plaintiffs.

[16] Mr Gavigan is not a Feltex shareholder himself but has played a major role in organising and promoting the claim. He has also incorporated a company called Joint Action Funding Limited (JAFL) which it is proposed will help fund the litigation. It was Mr Gavigan who was primarily responsible for sending out the unauthorised opt-in consent form.

[17] In May 2008, Mr Gavigan swore an affidavit that was filed by the plaintiffs in opposition to the defendants' various 2008 applications.

[18] In his affidavit, Mr Gavigan set out the background to his involvement in the case. It included the following reference to what I shall call "the alleged channel stuffing invoices":

11.1 One industry participant I spoke with told me that "he bet Sam Magill in May 2004 that he would not get the float away." Later, the same source showed me his company's December 2004 statement for purchases from Feltex. Half the line items by value (invoices) that I saw on the December statement were dated 1/1/05. He said these items had been manufactured pre 31.12.04 but did not have to be uplifted or paid for until after February 2005. (refer also paragraph 51 below). This practice is called channel stuffing (robbing one financial period to improve another).

[19] The affidavit also made reference to Mr Gavigan's communications with a major Australian litigation funder called IMF Limited. Mr Gavigan deposed that IMF had expressed an interest in funding this proceeding. Mr Gavigan then went on to state:

37. IMF performed an extensive due diligence in Christchurch in November 2007. By the end of that month they had significant new funding opportunities in Australia and the UK.
38. Because (a) they had never funded a case of this size in NZ, and (b) the New Zealand Securities Commission had not found any breach of the Securities Act in the course of its August 2006 investigation, they declined to fund the case.
39. Due to the continuing support of a number of Auckland based business people, I was encouraged to incorporate Joint Action Funding Limited (JAFL) on 20 December 2007. JAFL would perform the role we had hoped IMF would take.

[20] In December 2008, Mr Gavigan filed another affidavit, this time in opposition to the defendants' application for a stay and a memorandum concerning the unauthorised opt-in consent form. The defendants' memorandum had referred to clause 23 of the JAFL funding agreement which contains an acknowledgment by the shareholder that he or she has obtained independent legal advice about the funding agreement before signing it. The defendants' point was that if by signing an opt-in consent form a shareholder is to be treated as a party to the funding agreement, the recommendation to obtain independent legal advice and the acknowledgment that such advice has been obtained should be predominantly noted on the consent form.

[21] In response, Mr Gavigan deposed:

19. The defendants assert in their memoranda their concern that intending claimants be fully informed and have ample opportunity to seek independent legal advice as required by the JAFL agreement at clause 23.1. I can give them comfort on these issues.
20. FTX Investors Trust Limited is mailing to new intending claimants documents they have requested to be made available to them. Prominent, open and repeated disclosure of the requirements of clause 23.1 is being given. Electronic copies of the key documents are being provided on disk and by email to allow ready and cheap forwarding of the relevant documents to their advisors in the meantime.
21. FTX Investors Trust Limited will also post on its website important updates and make available to the public, including the defendants, all the key documents required by the legal process.
22. The defendants seem in doubt about the commitment to ensuring fairness and fullness of disclosure by and to the claimant group. Their concerns in this regard are unwarranted.

[22] The same affidavit also stated that a reference in my October 2008 judgment to Mr Gavigan being "the driving force" behind the litigation was somewhat flattering of his role and continued:

5. ... Wakefield Associates decided in early 2007 to pursue the interests of the IPO investors. It identified and instructed independent expert opinion. [I understand that this is the first step it takes in its personal injury claims business]. The legal claim against the defendants was instigated in July 2007, on the advice provided to Wakefield Associates by Professor Robb and Queen's Counsel McVeigh. They established that, in their opinion, there were solid grounds for legal action against the promoters for material omissions

from, and misleading statements in, the Feltex prospectus dated 5 May 2004.

[23] This and the other references quoted above from the two affidavits have prompted both the first and second defendants to apply under r8.23 for production of the following documents:

- (i) the opinions of Professor Robb and Mr McVeigh QC
- (ii) the documents sent to shareholders which according to Mr Gavigan's affidavit give "prominent open and repeated disclosure" of the requirements of clause 23 of the funding agreement ("the clause 23 communications")

[24] The second defendant has also applied for production of the further additional documents:

- (iii) the alleged channel stuffing invoices
- (iv) the communications with IMF, specifically:
 - (a) the considerable body of research supplied to IMF
 - (b) the research IMF supplied to Mr Gavigan in return
 - (c) IMF's advice of its decision not to fund the litigation.

[25] I turn now to deal with each of the documents.

The alleged channel stuffing invoices

[26] The plaintiffs oppose production of this document on the grounds it is not a document in their control or possession. It was only a document shown to Mr Gavigan.

[27] In light of this information, counsel for the second defendants, Mr Olney, then sought an order directing Mr Gavigan to swear an affidavit disclosing the identity of the person who showed the document to him. However, when I queried whether such an order was within the scope of r8.23, Mr Olney did not press the issue and suggested I might prefer to leave the matter to the discovery stage. In my view, that is the more appropriate course of action.

The clause 23 communications

[28] The plaintiffs are willing to provide the template of the letter sent to shareholders together with an affidavit confirming that except for individual names and addresses the template represents the actual letters that were sent and that no copies of the actual letters have been retained. The plaintiffs will also provide a copy of those parts of the accompanying documents sent to shareholders which refer to clause 23 of the funding agreement.

[29] This does not however satisfy the defendants who contend they are entitled to all of the accompanying shareholder material. I disagree. Their application was in very specific terms and confined to clause 23.

Opinions of Professor Robb and Mr McVeigh

[30] The plaintiffs are prepared to provide the defendants with a copy of Professor Robb's opinion but not that of Mr McVeigh which they argue is subject to solicitor/client privilege.

[31] For their part, the defendants contend the first plaintiff cannot claim privilege because:

- (a) the first plaintiff was not a client at the time the opinion from Mr McVeigh was commissioned in early 2007
- (b) even if the opinion was privileged, the privilege has been waived under s65 of the Evidence Act 2006

(c) it is no answer for the plaintiffs to say they never expressly authorised the disclosure. Waiver of legal professional privilege may be effected by the agent of the privilege holder without express authority so long as the agent has ostensible authority.

[32] The affidavit evidence on file establishes the following sequence of events.

[33] In early August 2006, a number of Auckland based shareholders asked Mr Gavigan to investigate the then pending Feltex collapse. He incorporated a shareholders' action group called FTX Investors Trust Limited (FTXit) with a view to taking legal action and was soon in email contact with over 100 shareholders including the first and second plaintiffs.

[34] In October 2006, FTXit instructed Wakefields to act for the group.

[35] The following month, Wakefields wrote to all 8000 shareholders. Approximately 600 shareholders replied authorising Wakefields to act on their behalf inter alia "in respect of all matters relating to my/our claims from the promoters of the Initial Public Offer dated 5 May 2004 and former directors..."

[36] It is unclear whether the first plaintiff, Mr Houghton, was one of the 600 who signed the authority form. However, there is evidence that from November 2006 onwards, Mr Houghton was a prospective claimant and had regular dealings with Wakefields. Wakefields filed an appearance on his behalf in November 2006 in the Feltex liquidation proceedings.

[37] Initially, the focus of the shareholder group was primarily on attempting to replace the directors and then the liquidation proceedings. However, after Easter 2007, the focus moved to recovery of the investment in the 2004 share issue. Wakefields sought the advice of an accounting expert Professor Robb and a legal opinion from Mr McVeigh. Those opinions were received in about June 2007.

[38] In June 2007, Mr Gavigan stated on his website:

The best route for shareholders is in my view correctly identified at para 4.5 of the Liquidators 2nd Report – and it is the initiative FTXit is pursuing, for Feltex IPO investors. In conjunction with Wakefield Associates, Wakefield and FTXit have arranged for a statement of claim to be prepared based on expert opinions we have commissioned.

[39] Another website entry on 8 July 2008 stated that “Chris McVeigh QC will act for the group”, while on 11 July 2007 there was another entry which quoted from Professor Robb’s report and continued:

“His expert’s report as commissioned [sic] by Wakefield Associates, and the legal action to sue forthwith recommended by Christchurch based QC Chris McVeigh, are detailed in a letter being sent this weekend by Wakefield Associates (with the assistance of FTXit Limited) to all 8,000 June 2004 Feltex IPO investors not yet signed up to the action.”

[40] The letter mentioned in the website as being sent to 8000 shareholders was dated 5 July 2007 and was in the following terms:

FELTEX CARPETS LIMITED (now Exftx Ltd (in rec & liq)) – CAUSE OF ACTION

Under the authority you signed last year you mandated Wakefield Associates and Tony Gavigan’s FTX Investors Trust Limited to take prudent steps in the interests of effective litigation of joint shareholder claims. We now report progress achieved. First we reviewed and data sorted the investment information you supplied to us and researched & analysed Feltex’s trading history.

Then Wakefield Associates obtained the expert opinions of leading accountancy and legal professionals **Professor Alan Robb** and **Chris McVeigh QC**.

A confidential report was prepared for Wakefield Associates by widely respected accounting expert Alan J Robb, Adjunct Professor at Saint Mary’s University (Halifax, Canada).

Professor Robb considered the Feltex Investment Statement dated 5 May 2004 (the Feltex IPO). His detailed report concludes that:-

“Overall, I consider the Feltex Investment Statement to have been more misleading than that issued by Vertex” – Professor Alan J Robb.

Professor Robb’s report was then referred to Chris McVeigh QC for his consideration and legal opinion.

LEGAL OPINION – Issue joint representative proceedings forthwith

Chris McVeigh QC has recommended that Wakefield Associates issue joint representative proceedings forthwith for recovery of their clients’ losses against the Feltex IPO vendors and promoters.

Some of the causes of action identified are under the Fair Trading Act 1986 (FTA). FTA recovery rights have time limitations. Further, some FTA amendments are due to come into effect soon; therefore time is of the essence.

[41] The letter enclosed an authorisation form for signature. The form was headed “CONSENT TO JOIN PROCEEDINGS & CONFIRMATION OF AUTHORITY TO ACT AND DIRECTION TO RECEIVE PAYMENT.” The form authorised Wakefields and FTXit to act on behalf of the signatory and also authorised the issuing of proceedings.

[42] Approximately 800 Feltex shareholders signed the July 2007 consent form.

[43] In an article published in the New Zealand Herald on 31 July 2007, reference was made to the fact that Mr McVeigh recommended Wakefields issue the proceeding. Mr Wakefield is also quoted in the paper as saying “We’ve got Professor Alan Robb, who’s an expert in corporate ethics and accounting standards, and his view is that the prospectus was misleading”.

[44] A similar report appeared on a website (www.gainz.co.nz) on 1 August 2007:

Robb conclusion leads Feltex investors to pursue recovery case

Accounting academic Alan Robb has described the Feltex Carpets Ltd 2004 IPO investment statement as misleading & deceptive, supporting a campaign to sue those involved in the float.

And Chris McVeigh QC has recommended to litigation manager Wakefield Associates, of Christchurch, that it proceed to issue joint proceedings to recover losses from the carpet company’s collapse.

Wakefield has 500 shareholder supporters and will now write to the remaining 8000 inviting them to join in a joint recovery action.

Feltex issued its investment statement on 5 May 2004, slashed its earnings projections in early 2005, reported a loss for the March 2005 quarter, went into receivership in September then into liquidation in December after the assets were sold. It also changed its name in December to Exftx Ltd.

Professor Robb, who was a senior lecturer in accountancy at Canterbury University, is now adjunct professor at St Mary's University in Halifax, Canada. In his detailed report, he concluded: "Overall, I consider the Feltex investment statement to have been more misleading than that issued by Vertex."

Tony Gavigan, of the recovery campaign group FTXIt Ltd, said: "The average IPO investor loss of \$10,000 is recoverable from the New York CSFB vendors & their agents."

...

[45] Subsequently in September 2007, Mr Wakefield and Professor Robb were interviewed on national radio about the proposed proceeding.

[46] In October 2007, the release of the Securities Commission report on Feltex prompted Mr Gavigan to issue a press release and to publish more entries on his website. The communications were to the following effect:

NZ's leading independent expert on securities matters, Professor Alan Robb, has described the Feltex IPO as misleading and deceptive. His confidential report to Wakefield focused on the overall impact of the IPO document.

He concluded it had a misleading nature and there were serious omissions of the very disclosures which were finally made to investors on 1 December 2005. Unlike the Securities Commission, he has not limited his analysis to mere compliance with the Securities Act 1978.

Gavigan says the two reports taken together tell us that certain Feltex Board members who mislead share market investors by omitting to disclose material information in late 2005, causing investor loss, also mislead, deceived and omitted to disclose material information in mid 2004 causing investor loss.

Our expert Legal Counsel, Chris McVeigh QC, has found remedies in the Fair Trading Act 1986 & elsewhere, and solicitor Garry Wakefield and I intend to pursue them for the IPO investors to recover their losses.

[47] The current proceedings were eventually issued in February 2008.

[48] Section 54 of the Evidence Act 2006 provides:

54 Privilege for communications with legal advisers

- (1) A person who obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was—
 - (a) intended to be confidential; and
 - (b) made in the course of and for the purpose of—
 - (i) the person obtaining professional legal services from the legal adviser; or

- (ii) the legal adviser giving such services to the person.

...

[49] It was common ground that s54 enshrines what was formerly known at common law as solicitor-client privilege. At common law, counsel's opinion taken by a solicitor has always been considered privileged because counsel is regarded as the client's legal adviser and/or is the alter ego of the solicitor.

[50] I am satisfied on the evidence that for the purposes of s54 a solicitor-client relationship existed between Mr Houghton and Wakefields at the relevant time so as to render the McVeigh opinion privileged. This renders it unnecessary for me to consider whether the privilege applies to a prospective solicitor-client relationship.

[51] That then leads to the question of waiver.

[52] The defendants submit any privilege has been waived under either s65(2) or s65(3)(a) of the Evidence Act 2006:

65 Waiver

- (1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.
- (2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.
- (3) A person who has a privilege waives the privilege if the person—
 - (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
 - (b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.
- (4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.

...

[53] In support of their argument the privilege has been waived under s65(2), the defendants point to the following:

- (a) the disclosures about the McVeigh opinion made to the 8000 shareholders in July 2007 without the express imposition of any obligation of confidentiality on the recipients. Counsel, Mr Clarke, emphasised there was nothing to stop the 8000 showing the material to someone else.
- (b) The repeated disclosures made on the Gavigan website and in the media.
- (c) The references made to the opinion in the course of submissions at the hearing before me last year.

[54] The issue of waiver of privilege by disclosure has been considered in a number of New Zealand decisions.

[55] It is possible to distil the following principles from the case law:

- (i) Where a party's use of privileged material destroys its confidentiality, the privilege will be treated as impliedly waived, even if that was not the party's actual intention: *Equiticorp Industries Group Ltd v Hawkins* [1990] 2 NZLR 175 at 180.
- (ii) Waiver can occur pre trial: *Equiticorp; Chandris Lines Ltd v Wilson & Horton Ltd* [1981] 2 NZLR 600.
- (iii) whether "a significant part" of privileged material has been disclosed as required by s65(2) will depend on the substance rather than the quantity of privileged material that is disclosed:

Bete Fog Nozzle Inc v Delavan Ltd & Ors HC Auckland CIV-2008-404-000169, 18 June 2008 Rodney Hansen J at [23].

- (iv) disclosure of the existence of a privileged document as distinct from its contents will not normally amount to implied waiver: *Equiticorp* at 180; *Chandris Lines* at 611; *Shannon v Shannon* [2005] 3 NZLR 757 (CA). In so far as *Tau v Durie* [1996] 2 NZLR 190 may be authority to the contrary, it should not be followed.
- (v) deliberate disclosure of a complete copy of the privileged document will amount to waiver: *Equiticorp* at 180; *Chandris Lines* at 611.
- (vi) deliberate disclosure of some of the content of the privileged document will not necessarily amount to an implied waiver but may do so: *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at 154; *Astrazeneca Ltd v Commerce Commission & Anor* (2008) 12 TCLR 116 at [39].
- (vii) the test to be applied is whether in all the circumstances the conduct is inconsistent with maintaining the confidentiality of the privileged material in a way that could lead to injustice if the privilege is upheld: *Ophthalmological Society* at 154. This test although enunciated in a pre-Evidence Act decision, is still applicable to a consideration of both s65(2) and s65(3)(a) : *Astrazeneca* at [31] – [39].

[56] Applying those principles to the facts of this case, I consider that the privilege has not been waived. The 8000 shareholders were prospective claimants and had a common interest with the first plaintiff, while all that has been put in the public arena is the existence of the legal opinion and the fact the legal advice supported the bringing of a claim under the Fair Trading Act 1986 and on other

unspecified grounds: see also *Buttes Oil Co v Hammer (No. 3)* [1981] QB 223 at 243 and 252. The references to the McVeigh opinion are limited and there is no quoting of specific extracts.

[57] Further, there is no present issue in this case that means it is misleading or unjust to have made those limited disclosures and at the same time withhold disclosure of the full opinion. There has been no abuse of the privilege such as occurred in *Equiticorp* where there was a deliberate attempt to use the contents of the opinion to influence the Court in its consideration of the interlocutory applications. Mr McVeigh certainly told me at last year's hearing he had entertained concerns about time limitation problems under the Fair Trading Act but that was simply by way of background explanation for the filing of the application for a representative order on a without notice basis. I assume those concerns are likely to have been in his opinion but it would be a quantum leap for such a reference to be held to constitute an implied waiver of privilege.

[58] The same is not true of the Robb opinion and that is presumably why the plaintiffs have agreed to provide a copy of it. Mr Olney and Mr Clarke submitted that because the two opinions were consistently coupled together in the public statements in order to persuade people the claim was well founded, that should be enough. However, in my view, there is a clear distinction to be drawn. The use made of one report has been significantly more extensive than the other.

[59] In coming to that view, I have not overlooked the dictum in *Bete Fog* that it is at least arguable the bare conclusion reached in a legal opinion constitutes a "significant part" for the purposes of s65(2) even although nothing is disclosed about the reasoning. However, as the result in *Bete Fog* itself demonstrates, that is not determinative. What is determinative is the *Ophthalmological Society* test and the context.

[60] In addition to waiver by disclosure under s65(2), the first and second defendants also rely on s65(3)(a) – waiver by putting the privileged document in issue in the proceeding.

[61] This can obviously only potentially apply to disclosures made when the proceeding was in train: see *Bete Fog*.

[62] Prior to the enactment of the Evidence Act, waiver of privilege by putting a privileged document in issue was not part of New Zealand law: *Shannon* at 766-769.

[63] However, it is clear that the principles articulated in *Shannon* and *Ophthalmological Society* in relation to implied waiver by disclosure will inform the Court's approach to s65(3)(a) as well as s65(2).

[64] In *Astrazeneca*, Panckhurst J stated at [39]:

To my mind the judgments in *Ophthalmological Society* and *Shannon* indicate where the boundaries of s 65(3)(a) lie. While the former espouses a test based on the Court's objective judgment as to the consistency of the claimant's conduct with maintaining the privilege, the discussion in *Shannon* elucidates the principles which underpin that test. The mere relevance of a privileged communication to an issue in the case provides no basis for waiver. Even a party's asserted reliance upon a privileged communication is generally insufficient. Waiver occurs where a party both asserts reliance upon the privileged communication and also seeks to inject the substance of the communication in evidence. At that point an abuse of the privilege exists. The claimant cannot have the benefit of reliance upon the substance of the advice and still seek to shield that advice from disclosure to the other side. To permit this would give rise to unfairness in the required sense, in that the party's conduct would be offensive to the trial process.

[65] I agree that Mr Gavigan's reference to having given shareholders assurances about clause 23 of the funding agreement may amount to putting an otherwise privileged document in issue. However, the plaintiffs have agreed to provide a copy of what was communicated on that topic.

[66] As regards Mr McVeigh's opinion, I am satisfied that any references to Mr McVeigh's opinion have been of a limited nature and not intended to inject the substance of the opinion into evidence. There is no unfairness to the defendants in upholding the privilege. As in *Astrazeneca*, the contents of the legal advice may be of curiosity value but no more.

[67] My conclusion on waiver means it is not necessary for me to consider whether Mr Houghton's express consent to the various disclosures was required

before the privilege could be effectively waived or whether, as argued by the defendants, it was sufficient that his agents (Wakefields and Mr Gavigan) had ostensible authority.

The communications with IMF

[68] According to the plaintiffs' affidavit evidence, the research which was emailed to IMF contained a summary of financial information relating to Feltex that had been prepared by Mr Gavigan as well as financial statements filed by Feltex's Australian subsidiaries. The information also included the prospectus and various press articles about Feltex and its collapse.

[69] The communications with IMF took place between August 2007 and December 2007, by which time Mr Houghton was clearly a client of Wakefields and the proceedings were in contemplation.

[70] The plaintiffs oppose production of all the communications with IMF on the ground they are subject to litigation privilege (s56(2)(d) Evidence Act) and confidentiality privilege (s69 Evidence Act). It was also pointed out that Mr Gavigan's affidavit never actually referred to any document received from IMF as to its reasons for declining funding.

[71] In support of the confidentiality argument, the plaintiffs have produced a copy of a written confidentiality agreement dated 8 October 2007. The parties to the contract are IMF and Mr Gavigan as representative of the claimants. The agreement states that the communications are being sent to IMF for the sole purpose of enabling IMF to determine whether it will, and on what terms, provide litigation funding and that the communications will be kept confidential by IMF. The agreement makes no mention of any reciprocal confidentiality obligation on the part of Mr Gavigan. Mr Forbes acknowledged this but submitted there was an implied obligation Mr Gavigan would keep confidential communications received from IMF.

[72] I am not convinced of that as a matter of contract interpretation. However, in my view, there is an evidential basis for the privilege asserted under s56. The

communications between Mr Gavigan and IMF and the information sent from and to IMF were communications made and information compiled for the purpose of an apprehended proceeding at a time when Mr Houghton was contemplating becoming a party to the proceedings. Mr Olney submits the IMF documents are not capable of satisfying the litigation privilege test enunciated in *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 and now enshrined in s56. I disagree. The documents were brought into existence for the dominant purpose of enabling Wakefields to advise or act with regard to the litigation.

[73] My inspection of the documents at issue has confirmed my view that they are privileged.

Application for a stay

[74] The first, second and third defendants have applied under r12(3) of the Court of Appeal (Civil) Rules 2005 for a stay of the proceeding pending the outcome of their appeals to the Court of Appeal.

[75] The grounds of the application are:

- (i) the main issue on appeal will be whether the first plaintiff is entitled to sue in a representative capacity. The Court of Appeal's decision on that issue will have a very significant effect on the future of this proceeding. It therefore makes sense to have that issue determined so there is certainty as to the class of the plaintiffs before any other steps are taken. Otherwise, there will be widespread confusion amongst the shareholders
- (ii) the defendants have prosecuted their appeal diligently
- (iii) given their own delay, the plaintiffs cannot argue with any credibility that a stay would cause prejudicial delay. They

themselves have shown no willingness to advance the proceedings pending the appeal

(iv) Mr Gavigan's conduct in embarking on an unauthorised opt-in process

(v) The fact security for costs has been deferred pending finalisation of the representative group, which means the defendants are unsecured for the costs they are currently incurring pending the appeal.

[76] For their part, the plaintiffs point out there is no certainty the appeal will be heard in November and even if it is, realistically, the Court of Appeal's decision may not be available until next year. In addition, there is the real prospect of an appeal to the Supreme Court given the ground-breaking nature of this litigation. Such delay will prejudice the plaintiffs because with the passage of time, numbers in the shareholder group will inevitably dwindle and the psychological momentum will be lost. There is also the possibility of time limitation issues. Mr Forbes acknowledged the plaintiffs have themselves been guilty of delay but submitted their house was now in order.

[77] Mr Forbes advised that the only further steps the plaintiffs wish to take pending the appeal are to amend the statement of claim and distribute the opt-in consent forms. He suggested an order could be made to that effect. In his submission, those steps will not involve the defendants incurring any significant costs, while their professed concern about shareholder confusion was at best patronising. Mr Forbes also pointed out it is highly likely the Court of Appeal would want to see the amended statement of claim and the opt-in package anyway.

[78] I have carefully considered all the submissions that have been made.

[79] It is well established that in considering applications under r12(3) the Court must adopt a flexible approach to meet the interests of justice in the circumstances of the case. Having regard to that over-arching principle and the factors identified in

Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd (1999) 13 PRNZ 48 at 50, I have come to the view that on balance it is in the interests of justice for a stay to be granted.

[80] My primary reason for coming to that conclusion is the need to avoid confusion and ensure the orderly conduct of this proceeding. As Mr Clarke submitted, to proceed to the next step would involve a court approved communication to shareholders inviting them to participate in a representative class at a time when the issue of their representative status is subject to appeal. All counsel accepted there is a very real prospect the Court of Appeal may well change the membership of the class which would mean shareholders receiving yet another form.

[81] The potential for confusion has undoubtedly been exacerbated by the sending of the unauthorised consent form. It is doubtful that I would have ordered a stay had it not been for that and the first plaintiff's delay. While some of the defendants' submissions about confusion could fairly be characterised as patronising, there will also be prejudice to them because the greater the confusion among shareholders, the greater the likelihood there are individuals in the group who should not be there. As Mr Olney put it, the case has become "messy". I am concerned to see it back on track, and on balance consider the best way of achieving that is to engender some certainty and await the outcome of the Court of Appeal decision.

[82] A stay will not prejudice the plaintiffs as far as time limitation issues are concerned. If the claim under the Fair Trading Act is statute-barred, that has already occurred so there will be no prejudice from any further delay.

[83] Mr Forbes' point about the likelihood of the Court of Appeal wanting to see the amended statement of claim and proposed shareholder package has greater force but those documents could still be tabled in draft. I also accept there is a risk of the shareholder group dispersing but, of course, a stay does not prevent the plaintiffs from communicating with the shareholders and updating them.

[84] There will therefore be an order staying the proceeding against all defendants pending the outcome of the intended appeal to the Court of Appeal.

[85] For the avoidance of doubt I confirm the stay only applies until the outcome of the Court of Appeal decision. In the event of an appeal to the Supreme Court, the matter would be able to be re-litigated. The defendants are also, of course, under an obligation to prosecute their appeal with diligence.

Outcome of Hearing

[86] The application for production of documents is dismissed with leave reserved to the defendants to bring the matter on for hearing again should any difficulties arise out of the production of those documents that has been agreed.

[87] The application for a stay pending the outcome of the intended appeal to the Court of Appeal is granted.

[88] As regards costs, my provisional view is that because the honours have been evenly divided, costs in respect of the two applications should lie where they fall. It is however a provisional view only and should the parties be unable to reach agreement and require me to make an award, then submissions of no more than five pages in length are to be filed within 20 working days.

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