

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 6/2021
[2021] NZSC 76

BETWEEN ERIC MESERVE HOUGHTON
Applicant

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

CREDIT SUISSE PRIVATE EQUITY
INCORPORATED
Second Respondent

CREDIT SUISSE FIRST BOSTON ASIAN
MERCHANT PARTNERS LP
Third Respondent

Court: Glazebrook, O'Regan and Williams JJ

Counsel: A J Gavigan as Applicant
A R Galbraith QC, D J Cooper and M C Harris for First
Respondents (other than Mr Magill and Ms Withers)
T C Weston QC and M C Harris for Mr Magill
B D Gray QC and A E Ferguson for Ms Withers
J B M Smith QC, A S Olney and C J Curran for Second and Third
Respondents

Judgment: 2 July 2021

JUDGMENT OF THE COURT

A The application for recall of this Court's judgment of 6 May 2021 (*Houghton v Saunders* [2021] NZSC 38) is dismissed.

- B The application for leave to file a second application for leave to appeal is dismissed.**
 - C The application for a stay of the respondents’ application for costs in the High Court is dismissed.**
 - D Costs are reserved.**
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REASONS

[1] The Court has received a document headed “Memorandum opposing costs awards and in support of claimants’ application for recall of judgment of the Supreme Court dated 6 May 2021 on grounds of alleged accounting fraud at Feltex Carpets Limited in 2004 by certain respondents”. It was filed by Mr A J Gavigan, Director of Joint Action Funding Ltd (JAFL), on behalf of JAFL, and purportedly on behalf of some members of the claimant group also. It recites that JAFL and Mr Gavigan have been joined as non-parties to a High Court costs application by the respondents against Mr Houghton, the plaintiff representing the claimant group in this proceeding. As its header suggests, the document seeks, among other things, the recall of this Court’s judgment declining leave to appeal (the leave judgment).¹ The document names Mr Houghton as applicant in its intituling, but it appears he is not, in fact, the applicant in relation to the present application.

[2] The application for recall does not seek an amendment or correction to the leave judgment. Rather, it seeks recall and, effectively, annulment of the judgment pending investigations into allegations of fraud against the respondents.

[3] The document is irregular in many respects. The most important irregularities are as follows:

- (a) Mr Gavigan is not a lawyer and cannot represent Mr Houghton (the applicant in relation to the leave judgment), the claimant group (or a subset of that group), or JAFL. Nor does he or JAFL have standing to apply for the recall of a judgment to which he/it was not a party.

¹ *Houghton v Saunders* [2021] NZSC 38.

- (b) The document purports to be filed on behalf of 405 members of the claimant group, but neither Mr Gavigan nor JAFL is the representative plaintiff and neither represents the claimant group.
- (c) The document includes an application for a stay of the respondents' costs application. But the application for a stay is made in the wrong forum — the costs application is before the High Court, not this Court.

[4] The document contains allegations of fraud against the respondents. As the respondents point out, a lawyer could not make those allegations consistently with his or her professional responsibilities. The allegations are not new and are not able to be resurrected after the final resolution of the proceeding. They have no relevance to the subject matter of the leave judgment, and therefore no relevance to the application for recall.

[5] The document contains no challenge to any aspect of the leave judgment. It does not disclose any proper basis on which the leave judgment could be recalled.²

[6] The document recites a claim for an order staying the High Court costs application. As noted earlier, this Court has no jurisdiction in relation to that application.

[7] As an alternative to recall, the document seeks leave to commence a fresh application for leave to appeal. There are obvious issues of jurisdiction to entertain a second application for leave to appeal. But we do not need to address them because nothing in the document indicates any proper basis on which such leave could be given, even if there was power to give it.

[8] The application for recall is dismissed. The application for leave to file a second application for leave to appeal is dismissed. The application for a stay of the High Court costs application is dismissed.

² The basis on which the recall application is made appears to be that for some very special reason, justice requires the leave judgment to be recalled: *Craig v Williams* [2019] NZSC 60 at [10], citing *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

[9] If the respondents seek costs in relation to this application, they may file a memorandum to that effect within 14 days after the delivery of this judgment.

Solicitors:

Gilbert Walker, Auckland for First Respondents

Russell McVeagh, Wellington for Second and Third Respondents