IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2006-485-1376

IN THE MATTER OF	the Securities Act 1978
BETWEEN	HENDERSON GLOBAL FUNDS First Applicant
AND	HENDERSON UK AND EUROPE FUNDS Second Applicant
AND	THE SECURITIES COMMISSION Party Served

Hearing: 14 May 2008

Appearances: B M Cash and P Sutherland for the First and Second Applicants
P J Andrew and N Patel for the Securities Commission as the party served
P H Rainsford for P L and R M Reidy (Objectors)
B Moyle in person as trustee, and for and on behalf, of the Puriri Farm Trust (Objector)
J A Stratford in person (Objector)
G C Vickers in person (for himself and for his wife D J Vickers - Objectors)

Judgment: 31 October 2008 at 10.00am

RESERVED JUDGMENT OF CLIFFORD J

Solicitors: Bell Gully, Wellington for Applicants
Liam Mason, Wellington for the Securities Commission
Mr T J Goulding, Daniel Overton & Goulding, P O Box 13017, Auckland
Mr M Dirkzwager, Timpany Walton Lawyers, P O Box 240, Timaru
J C Marlow & N E Marlow, Trustees, Puriri Farm Trust, Whatitiri Road, Maungatapere, RD 9, Whangarei
Mr John Stratford, 473 Factory Road, RD 26, Temuka, South Canterbury
Mr & Mrs G Vickers, 4 Northcrest, Te Kauwhata 3710, Waikato

OUTLINE OF JUDGMENT

Introduction

[1] The applicants, Henderson Global Funds and Henderson UK and Europe Funds ("the Funds"), are open-ended investment companies (previously unit trusts) registered in England and Wales. The Funds are part of the Henderson group of companies. Shares in the Funds ("Shares") are equity securities for the purposes of the Securities Act 1978 ("the Act").

[2] In August 2000 AMP Capital Investors (New Zealand) Limited ("AMP Capital") reached agreement with the Funds to offer Shares in New Zealand. AMP Capital agreed to be responsible for compliance with the Act.

[3] AMP Capital is part of the AMP group of companies ("AMP"). In 2000, the Henderson group comprised AMP's northern hemisphere operations. AMP and the Henderson group have since demerged.

[4] AMP Capital marketed Shares in New Zealand in reliance on the Securities Act (Great Britain Collective Investment Schemes) Exemption Notices 1999 and 2004 ("the Exemption Notices").

[5] Under the Exemption Notices disclosure and regulation were to be achieved principally by:

a) requiring the provision to investors before subscription of the United Kingdom equivalent of an investment statement – the key features document – together with certain specified information for New Zealand investors; and

b) requiring the issuer to be offering the securities in compliance with the United Kingdom regulatory regime, including having a United Kingdom prospectus.

[6] Alternatively an issuer could, instead of relying on the United Kingdom key features document, prepare a New Zealand investment statement, but do so by reference to the relevant United Kingdom prospectus.

[7] The Exemption Notices therefore allowed Shares to be offered to the public in New Zealand without the need to prepare and register a separate New Zealand prospectus, as would otherwise have been required under s 37 of the Act.

[8] The Exemption Notices contained conditions requiring certain documents, including the relevant United Kingdom prospectus, to be filed with the Registrar of Companies. The Fund failed, at various times, to ensure compliance with all those conditions ("the Compliance Failures"). As a result, some Shares allotted to New Zealand investors were void. The Funds were, therefore, liable under the Act to repay subscriptions for those Shares, together with interest thereon, as soon as reasonably practicable (s 37(5)).

[9] The Funds were not alone in experiencing difficulties in complying with the terms of the Exemption Notices. Similar difficulties would appear to have been experienced by a sufficient number of overseas issuers to prompt a legislative response. Sections 37AA to 37AL and ss 37B to 37G of the Act ("the Relief Provisions") were enacted in 2004 to provide issuers with a way of being relieved of liability to repay otherwise void or voidable securities.

[10] The Funds now apply under the Relief Provisions for relief from their liabilities as regards void Shares. AMP Capital has acted as agent for and on behalf of the Funds in bringing that application.

[11] The Funds have already been granted relief as regards most of the affected Shares, because the investors in question either did not object to the Funds' application, or withdrew their objection. The hearing on 14 May 2008, in respect of which this judgment is written, considered the Funds' application as regards Shares held by 16 investors ("the Objectors") who continued to object to the Funds' application.

[12] The Objectors' details are set out in Schedule 1 of this judgment.

[13] A summary of the Compliance Failures that affected the Objectors, taken from Mr Cash's written submissions, is set out in Schedule 2.

[14] Subsequent to the hearing on 14 May, and in the course of preparing this judgment, I requested further submissions on two occasions. On 17 June I requested further submissions as regards the Funds' application (discussed at [36]), to also rely on s 37AI. On 29 July, and having been advised by Mr Cash that the Funds no longer sought to rely on s 37AI, I considered it necessary to seek clarification from Mr Cash as to the implication of certain issues he raised as regards submissions made by Objectors at the hearing. At that time, I also raised an issue as regards the InvestorNet arrangements possibly including the offer of a security. The need to obtain and consider such further submissions, which I note do not require further consideration here, explains in part, but not I acknowledge completely, the delay in delivering this judgment.

How Shares were marketed in New Zealand

[15] Relying on the 1999 Exemption Notice, AMP Capital began marketing Shares from September 2000, and in a few instances in the week prior to that.

[16] Retail New Zealand investors (i.e. – in terms of the Act – members of the public) could not hold Shares in their own names. They had to invest through selected custodial, or nominee, companies. It was those entities which, in strict legal terms, subscribed for shares.

[17] The majority of Shares sold to retail investors in New Zealand were held by Portfolio Nominees Ltd. Portfolio Nominees was a Public Trust nominee company used by AMP to hold Shares in the Funds on behalf of customers of an AMP on-line investment service operated by AMP through AMP Services (NZ) Limited ("AMP Services"), known as InvestorNet.

[18] The InvestorNet service gave AMP customers on-line access to buy and sell a range of investment products, including Shares. To be able to buy and sell investments via InvestorNet, an investor had to apply and be accepted. Investors were then given an ID and a password.

[19] Before making any investment, the InvestorNet system required the investor, or their authorised agent, to confirm that they had received, read and understood all relevant disclosure, including any investment statement.

[20] AMP Services closed the InvestorNet service on 1 March 2005. The closure of InvestorNet (which offered a number of investment products, and not just Shares) arose following an internal review and consolidation of investment offerings. Investors were notified of the closure of InvestorNet in advance of the 1 March 2005 closure date. Investors could either transfer and hold their Shares in their own name, or their Shares would be sold. The default option was that Shares would be sold. Shares subscribed for by all but three Objectors (Mr Brown, the Cunninghams and the Reidys) were sold around the time that the InvestorNet service was closed.

[21] All of the Objectors were customers of AMP who subscribed for Shares through AMP's InvestorNet service. Most, if not all, of the Objectors had experienced losses on their Shares. Those losses were, in proportionate and absolute terms, significant for those investors. Prior to the Funds' application, investors were not aware of the Compliance Failures and the consequent breaches of s 37 which voided their Shares and obliged the Funds to repay subscription monies. It is clear that in making their objections, Objectors were motivated by the losses they had incurred, and the opportunity to recover those losses through s 37.

The scheme of the Relief Provisions

[22] The Relief Provisions are not limited to situations involving failures to comply with conditions of exemption notices, nor with consequent breaches of s 37(1). Where, however, relief – as here – is sought by an issuer in that situation, the scheme of the Relief Provisions can be summarised as follows:

a) Application is made under s 37AA. If a relief order is granted, ss 37(4) to (6) do not apply to the security in question. In other words, the security is not void and repayment of subscriptions is not required.

b) The grant of relief orders may be mandatory or discretionary.

c) The grant of relief orders is mandatory:

   i) where the subscriber has been notified but has not objected (s 37AC(1)(e)); and

   ii) where the contravention of s 37 is caused by a failure to comply, prior to the Relief Provisions coming into force, with specified provisions of certain exemption notices (including clause 6 of the 1999 Exemption Notice), and where the subscriber has objected but the contravention has not materially prejudiced the interests of the subscriber (37AI(2)).

d) The grant of relief orders is discretionary under s 37AH and s 37AI(3).

e) A relief order may be made under s 37AH, notwithstanding that a subscriber has objected, where the Court considers it just and equitable to do so. In determining whether to make a relief order under s 37AH, the Court must have regard to (s 37AH(3)):

   i) all of the circumstances relating to the allotment of the security; and

   ii) the nature and seriousness of the contravention of s 37; and

   iii) whether the contravention has materially prejudiced the interests of the subscriber; and

iv) whether the subscriber has disposed of the security to any other person; and

v) any other matters that the Court thinks fit.

f) A relief order may be made under s 37AI(3), notwithstanding that a subscriber has objected and, furthermore, notwithstanding that the contravention has materially prejudiced the subscriber, where – again – the Court considers it just and equitable to do so. In determining whether it is just and equitable to make a relief order under s 37AI(3), the Court must have regard to:

i) whether the subscriber has disposed of the security to any other person; and

ii) any other matters that the Court thinks fit.

g) The Relief Provisions also provide for the Court to make orders compensating subscribers where relief orders are granted.

h) Except in cases where applications for relief orders are frivolous, vexatious or an abuse of the process of the Court, where a relief order has been applied for the Court must, pursuant to s 37AL(5), stay applications for orders under s 37(5) and (6) (i.e. requiring issuers to repay subscription monies).

Legislative history

[23] The legislative history of the Relief Provisions illustrates their remedial purpose.

[24] As observed by Gendall J in *Re Perpetual Investment Management Ltd* (2006) NZCLC 264,207 at [14]:

> The Court must be mindful of the purpose of the legislation. If there are purely technical breaches such as late filing of documents and no cogent reasons given by an objector as to how his or her interests have been "materially prejudiced" by such technical contravention, then it is obvious that the purpose of the legislation was to ensure that relief be granted.

[25] *Brookers Company and Securities Law*, at SE37AA.01, provides further insight into the background to these provisions:

> Sections 37AA-37AL … were introduced to address perceived deficiencies in the procedures for relief contained in the Illegal Contracts Act 1970 and their application to the Act. One such deficiency is the possibility that the Illegal Contracts Act does not apply to overseas issuers, as it does not apply to contracts made outside New Zealand. In particular, the new provisions were introduced in reaction to the discovery that a number of overseas issuers had committed minor breaches of certain technical conditions attaching to exemptions from ss 37 or 37A granted by various exemption notices … Many of the breaches involved the simple failure to file certain documents with the Registrar of Companies on time, as required by the relevant exemption notice. The result of a failure to comply with a condition of an exemption is that the exemption notice no longer applies. Therefore, any securities allotted during the period of non-compliance may be void (s 37) or voidable at the instance of the investor (s 37A) and the issuer will be liable to repay the subscriptions, together with any interest. This is the case even if investors had received and had the opportunity to read the relevant disclosure documents and hence had suffered no real harm. The fact overseas issuers may not be able to seek relief under the Illegal Contracts Act 1970 in these circumstances was considered unfair by Parliament. See the Commerce Committee report *Business Law Reform Bill* (562), presented 16 February 2004, at pp 6-8.
>
> The new provisions are designed to provide procedures enabling the Court to grant relief, similar to those under the Illegal Contracts Act, but tailored specifically to securities law …
>
> …
>
> The Minister for Courts, Rick Barker, on the second reading of the Business Law Reform Bill 2003, stated that the "procedure is seen as an appropriate balance of all competing rights, allowing relief in some situations and protection of investors where appropriate." See *Hansard*, 23 March 2004.

[26] In its written submissions, the Securities Commission commented on these provisions in the following terms:

> The legislative changes made by the Securities Amendment Act 2004 (introduced in ss 37AA to 37AL) seek to provide some balance between the interests of issuers and those subscribers. These changes provide a route by which issuers can obtain relief from the otherwise absolute prohibition in s 37(1). Such amendments direct the Court to focus on both substantive prejudice to investors and the nexus between the contravention and the prejudice. The legislation recognises that breaches of some of the exemption

> notices may in many cases have been immaterial and of a technical nature. This is particularly the case for those contraventions falling within s 37AI.

[27] In my judgment, therefore, the legislative history of the Relief Provisions indicates that they were designed to provide relief from the void and voidable consequences of ss 37 and 37A where:

a) The void and voidable consequences of those sections had arisen because of technical or otherwise non-material breaches of the Act;

b) Investors had otherwise, in general terms, received the required disclosure; and

c) Overseas issuers may have been unable to apply for relief under the broadly equivalent provisions of the Illegal Contracts Act 1970.

[28] The scheme of the Relief Provisions, taken overall, was intended to balance the competing rights of issuers and investors.

A preliminary issue – Were investors subscribers?

[29] As noted, retail investors did not personally subscribe for Shares. Rather, in the case of the Objectors, they provided their funds to the AMP InvestorNet service which, in turn, made applications on their behalves. Those applications were made through wholesale custodians. From the Funds' perspective, therefore, in a strict legal sense it was those wholesale custodians which subscribed for Shares, and were regarded as shareholders.

[30] Is this of any significance in terms of the entitlement of investors to object? Basically, the Relief Provisions speak generally of subscribers, particularly as regards the right to object (s 37AC(1)(e)). As regards material prejudice, the Relief Provisions refer to the interests of subscribers (s 37AH(3)(c) and s 37AI(3)).

[31] The Funds nevertheless agreed that this application would proceed on the basis that the Objectors were properly to be regarded as subscribers, with status to object and an entitlement to have their objections considered accordingly.

[32] In terms of the overall scheme of the Act, I consider that to be the proper approach. I do not think it can have been intended that the investor protection scheme of the Act could be avoided by the simple convenience of directing applications from members of the public for the subscription of securities through a custodian or other intermediary. The focus of the Act, as set out in s 33, is clearly on offers to the public for subscription. Therefore the term "subscriber" should, where appropriate, be construed by reference to the persons to whom such offers were made, rather than by reference to the legal entity used for the technical purpose of the legal act of subscription itself. In this case, offers were clearly made to the Objectors, as members of the public. I therefore conclude that investors in the position of the Objectors come within the meaning of the term subscriber where that term is found in the Relief Provisions.

The Funds' application

[33] By the time of the hearing on 14 May, the Court had granted the Funds relief in respect of the vast majority of void Shares. This was because most investors did not object to the Funds' application. In addition, a small number of investors who originally objected withdrew their objections.

[34] Those orders were made under s 37AC(1)(e), as regards investors who had not objected, and under s 37AH, as regards investors who originally objected, but had then withdrawn their objection.

[35] At the hearing on 14 May I heard the Funds' application for relief:

a) Under s 37AH in respect of Hathaway Investments Limited, an investor whose existence AMP Capital had only recently become aware of, which had advised it did not object to relief being granted, and two further investors who had objected but had subsequently withdrawn their objections; and

b) Under ss 37AC and AH in respect of the Objectors.

[36] At the outset of the hearing, and although the Funds had throughout these proceedings based their application on ss 37AC and AH, Mr Cash, in reliance on Rule 11 of the High Court Rules, applied to vary the Funds' application to include reliance on s 37AI. After the hearing, and following a request by the Court for further submissions on certain aspects of that application, Mr Cash withdrew that application. This judgment proceeds accordingly.

[37] In presenting the Funds' application to the Court, Mr Cash relied on two fundamental propositions:

a) The Compliance Failures were technical and non-material. None of the Objectors had established material prejudice causally linked in any way to those instances of non-compliance. The Compliance Failures were, therefore, the very type of contravention for which the Relief Provisions had been enacted.

b) The Funds had otherwise complied with the disclosure regime reflected in the terms of the Exemption Notices, and more generally provided for by the Act. In particular, the InvestorNet service required applicants for Shares to confirm that they had received all necessary disclosure.

[38] Further:

a) In terms of s 37AC(1), the Objectors had not, as required by subs (e)(iii)(B), included a description as to how the contravention had materially prejudiced their interests. The Funds were entitled to mandatory relief orders accordingly.

b) In terms of s 37AH, given the nature of the Compliance Failures identified, the lack of material prejudice, and other relevant considerations, the Court should conclude that it was just and equitable for relief orders to be made, and should grant them accordingly.

[39] Mr Cash also responded in detail to the written objections that had been provided. I will refer to those submissions after I summarise those objections.

[40] In all of this, Mr Cash relied on extensive affidavit evidence provided by Ms P Weston, AMP Capital's Produce and Compliance Manager. Ms Weston filed some four affidavits in all. The Court acknowledges AMP's, and Ms Weston's, diligence in making relevant information available to the Court.

Objections

Written objections

[41] Each of the Objectors had provided to AMP, as required under the Relief Provisions, a written objection to the grant of relief to the Funds.

[42] There were a number of common themes to the written objections of the Objectors.

[43] Given the performance of the Funds over the relevant period, all Objectors had incurred losses on the funds they had invested. A very common – but not universal – theme to the objections was the Objectors' dissatisfaction, in their capacity as customers of AMP, with the performance of the Funds and with AMP's role, particularly through AMP agents, in marketing the Funds and encouraging investment in them.

[44] Objectors identified a variety of more specific grounds for their objections. Those more specific grounds, as Mr Cash submitted, fall into three broad categories:

a) An objection that if investors had known of the breaches of the Act they would not have invested. They relied on the Funds having complied with all relevant laws, and objected to relief being granted now it was seen that such reliance was misplaced ("the Reliant Objection").

b) An objection that the investors did not have access to non-disclosed information and/or would not have invested had they had access to that information ("the Non-disclosure Objection").

c) An objection that if the investors had known that AMP would not support the Funds in the long term (a reference to AMP Services discontinuing the InvestorNet service on 1 March 2005, an event which a number of Objectors characterised as AMP "closing" the Funds) they would not have invested in the Funds. Moreover, they then had little option but to sell their Shares, and were in effect forced to crystallise prematurely a loss on what they considered to be a long term investment ("the Early Closure Objection").

[45] The first two of these categories are similar to the types of objection considered in the interim judgment of MacKenzie J in *BT Funds Management v Ridley-Smith*, CIV-2004-485-1846, 2053 and 2054, HC WN 14 December 2006. The third is specific to these proceedings.

[46] Each of those objections were expressed by individual Objectors in different ways. The following extracts from written statements by individual Objectors are, in my judgment, reasonably clear and representative expressions of those grounds:

The Reliant Objection

> Before we make any investment decision, we ensure that we possess as much information as possible about the issuer. This information is then carefully scrutinized by us and a decision made based on our findings. Decisions to invest include, among other things, the reliability, integrity and probity of the issuer. If a significant flaw is found in any of these qualities, we would not invest.
>
> We consider the breach of section 37(1) of the Securities Act to be one such a significant flaw. Had we known of the Fund's non compliance with lawful procedures, we would not have invested with them. We believe that a company that cannot perform basic simple procedures properly cannot be trusted to possess the necessary expertise to increase the value of our investment. Sadly for us, this has proved to be the case, as our investment showed a significant decline.
>
> (J Jeffries and Andrew Lee)

The Non-disclosure Objection

> The question can be asked. Would we have invested in the Henderson Funds if we had known that it was not covered by a registered prospectus? The answer is no, and other investments would have been sought.
>
> Had a New Zealand Registered Prospectus been in place and the information available to the investors linked to this document then the full extent of the risks associated with this investment would have been apparent to us prior to making the investment. That is, it would have been presented from a New Zealand point of view and giving vital information to a New Zealand investor. The information provided on the risk factors involved in this type of investment was quoted in general terms. It lacked vital information relevant to a New Zealand investor. Had a properly constituted registered New Zealand prospectus been the basis for the information provided, we as prospective investors would have been properly informed.
>
> (J G and Y B Radford)

The Early Closure Objection

> The funds were advertised as '**long term**' investments however they closed within five (5) years of being established. This contradicts the information provided at the time of investment that these funds should be held for a minimum of 8 years. Note that there was no legally binding prospectus for me to act upon. …
>
> On the **unexpected closure** of the funds investors were given under 30 days in which to transfer or sell their units. However as no legally valid prospectus was made available at the time of investing I had not been informed of the process, timing or options to transfer monies following the closure of the funds, information I would have expected to be detailed in the prospectus. Had the legal prospectus outlined the conditions for termination I would not have invested in this fund.
>
> (J Stratford)

[47] I summarise in the Schedule 3 of this judgment, by reference to each of those categories, the written grounds of objection advanced by or on behalf of each of the Objectors.

[48] For the Funds, Mr Cash relied on the following discussion by Gendall J in *Re Perpetual Investment Management Limited* (supra) of the concept of material prejudice, and the exercise of the Court's discretion under s 37AH:

> [17] "Material prejudice" is the key. In terms of s 37AC the objector must provide a description of how a contravention materially prejudiced him or her in order to prevent operation of the mandatory relief provisions. I accept the test to be applied as that submitted by counsel for the Securities Commission, namely whether there is a substantial likelihood that disclosure of the omitted fact would have been viewed

> by the reasonable investor as having significantly altered the total mix of information, are made available to him or her. See for example, *Coleman v Myers* [1977] 2 NZLR (CA) and *TSC Industries Inc v Northway Inc* 426 US 438 (1976) (US SC). There has to be some nexus between the statutory breach and the loss and in my view it is not sufficient for an objector to simply say that a loss has arisen which would not have occurred had the technical and procedural oversight not arisen.
>
> [18] But, because I propose to exercise the court's discretion to grant relief under s 37AH it is not necessary for me to determine conclusively whether the objection conveyed in this case sufficiently describes how the technical contravention materially prejudiced the interests of the Bauer Trust so as to grant relief under s 37AC.
>
> [19] I am fully satisfied that the court should exercise its discretion in terms of s 37AH. The nature and seriousness of the contravention is minor and a technical breach only; and there is no material prejudice caused to the objector by such breach; the subscriber has redeemed the securities. Although the trustee may have found the investments yielded less than had been hoped for, that does not comprise a prejudice, which is material to, or arose from, the technical contravention, its nature being one of timing. I am also mindful that some of the investments recorded by the objector were made during a compliant period. Further, others fell outside the statutory limitation period prior to the applicant commencing its investigation into compliance with the list. I think that the failure by the objector to particularise why in a mock [sic] way it has been materially prejudiced by non-compliance is a matter that can be considered under the heading of "Any other matters that the Court thinks fit" in terms of s 37AH(3)(e).

[49] Mr Cash, in light of that discussion, assessed each of those principal objections to the Funds' application, and submitted that they did not establish that the Compliance Failures had caused investors material prejudice.

[50] As regards the Reliant Objection, and on the basis that substantive disclosure had been made as required, there was not in Mr Cash's submission any substantial likelihood that disclosure of the Compliance Failures would have been viewed by a reasonable investor as having significantly influenced the total mix of information available. As the Court in *Re Perpetual* had concluded in similar circumstances, the Compliance Failures were minor and technical breaches. No material prejudice was caused to any Objector by the Compliance Failures. Such minor and technical filing matters were, objectively speaking, not relevant to the investment decision.

[51] The Non-disclosure Objection was misconceived. Statutory disclosure was made, as required, through the key features document or the investment statement, together with the special information for New Zealand investors. Access to the prospectus was not a statutory requirement. The information for New Zealand investors advised investors they could request a copy of the prospectus, but no-one had actually done so.

[52] As for the Closure of the Funds Objection, the Funds did not and had not closed. They continued to operate. What was closed was the InvestorNet service provided by AMP Capital. That was closed in accordance with the terms and conditions for that service. Accordingly, this was a matter unrelated to the Compliance Failures, and could not provide a basis for an objection to the Funds' application.

[53] Mr Cash, in terms of other relevant matters, made the following submissions:

a) All the Objectors had sold their Shares. There was therefore no ongoing issue in relation to those Shares and the Compliance Failures were a matter of historic interest only.

b) Thirteen of the Objectors had acquired Shares during periods of compliance. That highlighted that the Compliance Failures had been irrelevant to the investment decisions that had been made. Whether investments were affected by the Compliance Failures was a matter of chance.

c) The limitation period, which required an action to recover monies due under s 37(5) or (6), was six years as provided in s 4(1)(d) of the Limitation Act. For all bar one transaction by an investor, that period had expired by the time this application was heard. In other words the Objectors could not now obtain repayment of their subscriptions and interest.

d) Many of the objections contained little or no detail as to how the Compliance Failures had materially prejudiced their interests, and did not constitute valid objections under s 37AC.

[54] Taken overall, the issue of material prejudice, and whether there was a causative nexus between the prejudice claimed and the Compliance Failures, was the key issue for the Court to consider. The Funds' position was that none of the objections showed any causative nexus between the Compliance Failures and the material prejudice claimed. That reflected the fact that the Compliance Failures were so minor, technical and obscure in nature that they had not affected the decision to invest or the performance of any of the affected investments.

Objectors' submissions at hearing

[55] Each of the Objectors who appeared, and Mr Rainsford for the Reidys, repeated the general thrust of the written objections that had been filed.

[56] In addition, they each asserted that, contrary to the Funds' core submission, they had not received the required disclosure. In particular, they had not received the investment statement, nor – where relevant – the equivalent key features document, nor the advice for New Zealand investors. Specifically:

a) Mr Reidy deposed in an affidavit provided on behalf of himself and his wife in the following terms:

> I am quite sure that I was provided neither a prospectus nor any form of investment statement or investment summary document at the meeting with Tim Smith [the Reidy's investment adviser] or subsequently.
>
> The only documentation I received around the time we invested was the letter from Montage [the firm for which Mr Smith worked] referred to above.

b) In his written objection, Mr Stratford stated:

> In addition to not being provided with a copy of the registered prospectus I was never been provided [sic] with a copy of the registered investment statement at the time of

> making my investment and no legal investor statement was lodged per the Securities Act, at that time.

c) Mr Vickers told the Court, in the course of speaking to his objection, that following discussions he had had with Mr Andrew (who had – at the request of the Court – been made available by the Securities Commission to assist the Objectors understand matters relating to the hearing) the simple fact was that he did not get a prospectus, an investment statement or anything else. He had absolutely no recollection of those documents. There was, he said, no sign of those documents at his small but well-appointed home office.

d) Mr Moyle likewise told the Court that the Puriri Trust had never seen certain documents attached to Ms Weston's fourth affidavit, which comprised the terms of the InvestorNet arrangement and also the disclosure documents for the Henderson Unit Trusts. I took it, from this statement by Mr Moyle, that he was saying they had not received the investment statement. Moreover Mr Moyle also said that the Puriri Trust had never received the key information for New Zealand investors.

[57] I refer to this matter as the "Investment Statement Non-receipt Issue".

[58] Responding for the Securities Commission, Mr Andrew departed from his written submissions, which had addressed a number of features of the scheme of the Relief Provisions, and focussed in particular on the terms of s 37AH which require the Court to have regard to all the circumstances of an allotment.

[59] Taken overall, I consider the thrust of Mr Andrew's submissions to be that, having heard the submissions made by Mr Rainsford and the Objectors who appeared in person, the Investment Statement Non-receipt Issue was one to which the Court, on the material before it, would have to give serious consideration. That issue was, in Mr Andrew's submission, relevant as regards the requirement for the Court to make a relief order only where the Court was satisfied it was just and equitable to do so, having regard to all the circumstances of the allotment. He noted

that in *Re Perpetual* the single objecting investor had not appeared in support of his objection, and that the range of issues which had been raised by Objectors in this application had not been considered by the Court in that situation. In that context, Mr Andrew categorised the material prejudice consideration in s 37AH(3)(c) as a mandatory relevant consideration, but not one that was determinative.

[60] In this context, it was Mr Andrew's further submission that the role of investment advisers, who were also AMP agents, raised in the context of the Investment Statement Non-receipt Issue, was a relevant consideration as regards the circumstances of the allotment. The standard arrangements for the InvestorNet service allowed AMP agents, who were also client investment advisers, to be authorised to deal with that service on behalf of the investors. Those persons could, therefore, respond to the request for confirmation that an investment statement had been received, without the InvestorNet system recording whether in fact such a statement had been downloaded and had been provided by the investment adviser to the investor.

[61] Mr Andrew then made some brief, and not fully developed, submissions as regards the possible significance of limitation periods, and s 25 of the Limitation Act. I understood Mr Andrew's submission to be that, with reference to s 25(4) of the Limitation Act, the Funds' application for relief constituted or contained an acknowledgement of the right of action that had accrued for investors to recover under s 37(5) or (6). Accordingly, it could not be said – as Mr Cash had submitted - that the limitation period for claims under s 37 had necessarily expired.

[62] In response, Mr Cash submitted that, on the basis of the evidence before it, the Court was not in a position to draw the conclusion that there had been a failure to provide relevant disclosure. Moreover, he emphasised that the Funds had received, and had relied on, confirmation provided on behalf of investors that they had received the investment statement. It was in reliance on that confirmation that the Funds submitted that the Compliance Failures represented only technical contraventions.

[63] Mr Cash appeared to accept that in terms of the material before the Court there may be, to use his phrase, something of a "stalemate" as to what had happened in terms of the actual receipt by certain Objectors of relevant disclosure material. His submission was, however, that whether or not investment advisers had acted in ways that were inappropriate, or may have exposed themselves to claims by investors, those persons had not acted as agents of AMP. Investors had not established any material prejudice as a result of the Compliance Failures, and were not without remedy as regards claims against their investment advisers.

[64] Mr Cash also referred to the separate regime provided by the Act where an allotment of a security occurs in breach of the provisions of s 37A, which requires that no allotment is to be made if the subscriber has not received an investment statement before subscribing for the security. He also noted the separate validation regime that applies under ss 37B – G where such instances of non-compliance occur. He noted, in particular, that a subscriber was required to apply to avoid a security which is voidable because of a failure to comply with s 37A within the prescribed period set out in s 37A(4). That period had long expired, and therefore – evidential issues and issues of responsibility aside – the possibility that some of the Shares may have been issued in circumstances that rendered them voidable was no longer relevant.

Discussion

[65] As noted at [35], the Funds make their application for relief as regards two categories of investors. That is, Hathaway Investments Limited and the two further investors who had originally objected, but had subsequently withdrawn their objections, and as regards the Objectors.

[66] As regards Hathaway Investments, and those two further investors, I consider it is appropriate to grant the Funds relief under s 37AH. I do not consider I need discuss that matter further.

[67] As regards the Objectors, the Funds apply under each of ss 37AC and 37AH.

[68] The Funds' application under s 37AC relied on the submission that the Objectors had not, as required by s 37AC(1)(e)(3)(B), included in their objection a description as to how the contravention had materially prejudiced the interests of the subscriber. It was Mr Cash's submission that the section required the objector, at that reasonably early point in the process, to establish a substantial objection which – in the terms outlined by the Objector – met the material prejudice test Mr Cash asserted was relevant.

[69] I do not accept that submission. I think, as Gendall J concluded in *Re Perpetual* and as the Securities Commission submitted, the threshold provided by s 37AC(1)(e)(3)(B) is a much lower one. It is, in effect, a formal requirement. That is, the objector must notify their objection, and indicate to the applicant the basis for that objection. Whether or not that basis is substantial or sufficient enough to be subsequently upheld is not, in my judgment, in issue at that point. The section in effect requires the applicant to be notified of the terms of an objector's application, so that it may respond to it.

[70] On that basis, I consider that each of the Objectors met the requirements of this section, and that accordingly it would not be appropriate for this Court to make any validation orders as regards the Objectors under s 37AC.

[71] As regards s 37AH, it was the Funds' principal submission that, on the basis that the Funds had substantively complied with their disclosure obligations under the Act, it would be just and equitable to make relief orders unless, in some way, an Objector established a causal connection, or nexus, between one or more of the Compliance Failures, and material prejudice suffered by the Objector. Whilst Objectors identified the losses they had suffered on their Shares as being the material prejudice, they had not identified any other form of material prejudice. Unless, therefore, there could be a shown to be a causal nexus or connection between those losses, and a failure to comply with the terms of the Exemption Notices, relief should be granted.

[72] That was, it was submitted, the approach taken by Gendall J in *Re Perpetual* and was also the appropriate approach to take here. It was an approach that reflected the remedial purposes of the Relief Provisions.

[73] In my judgment, however, it is reasonably clear that the "just and equitable" decision under s 37AH is not limited to a consideration of whether the contraventions with respect to which relief is sought themselves caused material prejudice. Section 37AH(3) explicitly provides that, in determining whether it considers it is just and equitable to make a relief order, the Court must have regard to:

a) All of the circumstances relating to the allotment of the security; and

b) The nature and seriousness of the contravention of s 37; and

c) Whether the contravention has materially prejudiced the interests of the subscriber; and

d) Whether the subscriber has disposed of the security to any other person; and

e) Any other matters that the court thinks fit.

[74] In satisfying itself that it is just and equitable to make a relief order, the Court is to have regard not only to the contraventions, and whether they have materially prejudiced the interests of the subscriber, but also to "all of the circumstances relating to the allotment of the security", together with "any other matters the court thinks fit".

[75] I think issues of possible material prejudice associated with the Compliance Failures are principally reflected in the Reliant and Non-disclosure Objections. It is with respect to those objections that the question of a casual link between the "contravention" and any material prejudice is most likely to be relevant. In my judgment, however, the Early Closure Objection, and the Investment Statement Non-receipt Issue, are potentially relevant to the considerations of whether, having regard

to all of the circumstances relating to the allotment of the security and such other matters as the Court thinks fit, the Court considers it is just and equitable to make the relief orders sought.

[76] I approach my analysis of the objections on that basis.

The Reliant Objection

[77] The gist of this objection, in terms of prejudice identified as regards non-compliance, is that investors implicitly relied on the ability of those promoting the Funds to comply with the statutory regime in New Zealand. If Objectors had known of the Compliance Failures they would have re-assessed their view of the Funds as a suitable investment, and decided not to make that investment.

[78] The fact of non-compliance therefore goes to the suitability of the Funds as persons to be trusted with the Objectors' investments, rather than to the quality of those investments themselves.

[79] I accept that evidence of material non-compliance with statutory obligations could be a relevant consideration for an investor. It seems a relatively obvious proposition that a person seeking public moneys would be judged critically if, at the same time as seeking those moneys, that person was unable to organise its affairs so as to comply with the relevant statutory regime. The scheme of the Relief Provisions is, however, based on the proposition that the mere fact of certain types of non-compliance, in the circumstances that arose as regards the Funds and other offshore investors, is not material. I think that conclusion is evidenced by the legislative history referred to above at [23] and following. Moreover, if that were not the case, it is difficult to see why Parliament would have enacted the Relief Provisions in the first place.

[80] There may also be particularly scrupulous investors for whom any non-compliance, no matter how immaterial, would be sufficient to deter them from investing. In this context, however, I think objections have to be assessed

objectively, and against a standard of reasonableness. Again, I draw that conclusion based on the scheme of the Relief Provisions, and the fact of their enactment.

[81] I therefore agree with Gendall in *Re Perpetual* that in this context "material prejudice" is the key.

[82] On that basis, I am not persuaded that, in terms of the Reliant Objection, the Objectors have demonstrated material prejudice caused by, or linked to, the Funds failing to comply with the terms of the Exemption Notices. In my judgment, the appropriate way of categorising that Compliance Failure is that:

a) Although – subject to consideration of the Investment Statement Non-receipt Issue – all necessary disclosure had been made; and

b) Although there was available to investors on request a complying English prospectus and supporting documentation; nevertheless also

c) The Funds had not, due to an administrative oversight – at particular points in time – registered that material with the Registrar of Companies as required by the Exemption Notices.

[83] In my judgement, if a reasonable investor had had that situation explained to them, I do not think such an investor who had otherwise decided to make an investment in the Funds would have changed their mind.

[84] In terms of the test to be applied, as proposed by the Securities Commission in *Re Perpetual*, and as confirmed in the Commission's submissions as being relevant for these proceedings, it does not appear to me that there is a

> substantial likelihood that the disclosure of those circumstances would have been viewed by the reasonable investor as having significantly altered the total mix of information made available to him or her.

On that basis, and with reference to the Reliant Objection, I do not think the Objectors established a basis upon which the Court could properly decline to grant relief as sought.

The Non-disclosure Objection

[85] The gist of the Non-disclosure Objection would appear to be that the Compliance Failures, in and of themselves, meant that the Funds failed to make relevant disclosure to investors.

[86] I do not think this objection bears close scrutiny.

[87] The important factor here is that this is not an instance where the disclosure documents which the Funds failed to file in New Zealand on time had not been prepared and accepted by the relevant (in this case United Kingdom) regulatory authority. No Objector, in my judgement, established that there was material non-disclosure of information in the United Kingdom prospectus, or the key features document or investment statement.

[88] Some Objectors made the submission that if a New Zealand prospectus had been prepared and had been available, then they would have been more aware of the risks associated with investing in the Funds and that they had suffered a material prejudice accordingly. That submission, however, does not take account of the fact that the regime provided by the Exemption Notices did not require the preparation and registration of a New Zealand prospectus. In any event, even under the New Zealand regime the investment statement is the principal disclosure document for retail investors, and a prospectus is now only required to be made available on request.

[89] I also conclude that the Non-disclosure Objection does not provide a basis for declining the Funds' application for relief.

The Early Closure Objection

[90] This objection is not based on, or related to, the Compliance Failures. In that sense, therefore, it cannot be a "contravention" that has "materially prejudiced the interests of a subscriber". Rather, and in terms of s 37AH, to be able to be considered by the Court it needs to be either a matter relevant in terms of "all of the

circumstances relating to the allotment of the security", or "any other matter that the Court thinks fit".

[91] The Funds' basic proposition, that the Funds were not closed but that AMP terminated the InvestorNet service in terms of the contractual arrangements between it and investors relating to that service, cannot be disputed. It was the Funds' submission that, accordingly, the Early Closure Objection was "completely unrelated" to the Funds. I am not persuaded that I would put the position that highly. The Funds were promoted by AMP in New Zealand. AMP acted, therefore, as the agent of the Funds. The InvestorNet service was an integral part of the way in which AMP, on behalf of the Funds, marketed the Funds to retail New Zealand investors.

[92] Having said that, however, the contractual arrangements as regards the InvestorNet service were clear, and explained in relatively plain terms in the documentation submitted to the Court AMP's entitlement to discontinue that service and the consequences that would follow. On that basis, I do not consider that Objectors can now properly object to the Funds' application by reference to that consideration.

Other relevant matters

[93] Other relevant matters for me to consider are the significance of:

a) Objectors having sold their Shares;

b) Objectors having acquired Shares during periods of compliance; and

c) The possible expiry of the limitation period as regards any action to recover moneys due under s 37(5) or (6).

[94] As noted, Shares held by many investors would appear to have been sold at or around the time of the closure of the InvestorNet service. To the best of my understanding, it was not made clear whether those Objectors elected that Shares would be sold, or whether Shares were sold pursuant to the default arrangement. I infer that both situations apply. On the basis of the information provided to me, I

reach the further inference that, as regards the submission that Shares had been sold, most of the Shares sold by Objectors were in fact sold after they received notice that the InvestorNet service was to close.

[95] I conclude, therefore, that the fact that all the Objectors had sold their shares is not, for the purposes of this application, as significant as it otherwise might have been.

[96] I think it is relevant that 13 of the Objectors acquired Shares during periods of compliance. In my judgment, this generally supports the proposition, advanced by Mr Cash, that the Compliance Failures were irrelevant to investment decisions that were made, and in particular supports the conclusions I have expressed above as regards the significance of the Reliant and Non-disclosure Objections.

[97] I am not persuaded by Mr Cash's submission as regards the limitation period. Rather, I acknowledge Mr Andrew's submission as regards the possible significance, under s 25(4) of the Limitation Act, of the fact of the Funds' application for relief. I also consider that, as regards the possible significance of limitation provisions, the Court has to pay particular attention to the effect of s 37AL(5), which operates to stay applications for orders under ss 37(5) and (6) once an application for a relief order has been made. Based on those provisions, and given the limited attention this argument received at the hearing, it is not clear to me that I should proceed on the basis that the limitation period has, in fact, expired.

The Investment Statement Non-receipt Issue

[98] The gist of this issue is the claim of various Objectors, in particular those who appeared at the hearing of the Funds' application, that – contrary to the Funds' assertion – the technical failures to comply with the terms of Exemption Notices, represented by the Compliance Failures, did not occur against the background of the Funds having complied with all substantive obligations under the Act relating to the offer of Shares. Rather, as set out above, each of the Objectors who appeared stated that they did not receive the principal disclosure required by the regime set up by the Exemption Notices, namely the key features document or the investment statement.

[99] Mr Cash responded to that allegation, by reference to the procedures incorporated within the InvestorNet service which required a person applying to invest in Shares to confirm that, as noted at [19], they had "received, read and understood all relevant disclosure, including any investment statement". Ms Weston's affidavit evidence included a spreadsheet showing the date on which each objector had confirmed their acceptance of relevant disclosure in respect of their subscription for shares. She explained the general arrangements for the InvestorNet service as regards that record, in the following terms:

> **InvestorNet and the objectors' investments**
>
> As I indicated in my second affidavit …, all of the objectors invested through AMP's InvestorNet service. I outlined the InvestorNet service and how it operated in my first affidavit.
>
> InvestorNet was an online investment platform directed at sophisticated investors provided by AMP Services (NZ) Limited.
>
> Investors had to apply and be accepted.
>
> Investors could apply directly or via an investment advisor appointed to act on their behalf. In either case, the account was in the name of the individual and the system required those applying to confirm that they (or the client of the adviser) had read and agreed to the terms and conditions of the service. Investors could not be accepted and trade through the service unless they agreed to the terms and conditions.
>
> …
>
> As is explained in the terms and conditions and in my first affidavit, each account holder had to confirm when they did a trade that they had received, read and understood the relevant disclosure. In particular, when processing a trade (i.e. a buy request), the system required this confirmation to be provided and, if it wasn't, then the user was re-directed to a page which displayed the relevant disclosure and required the user to confirm that the disclosure had been read. A trade could not proceed without this confirmation.
>
> This confirmation was then stored in the system's database. If another trade was then done in respect of the same product, and there had been no change to the disclosure documents, then the system did not require the user to confirm again that they had read the disclosure and the record of the confirmation was not updated for that trade.

[100] It can be seen, therefore that the standard InvestorNet documentation provided for investors to authorise others (investment advisers) to undertake subscriptions for securities on their behalf, using the InvestorNet internet-based facilities.

[101] Accordingly, and consistent with statements made by the Objectors who appeared in person, it is possible that investment advisers, who were also – in the case of at least some Objectors' – AMP agents, who were authorised persons for Objectors in terms of the arrangements whereby the InvestorNet services were established, could have confirmed receipt of an investment statement, and other relevant disclosure, without that material in fact having been received by an investor.

[102] Moreover, a number of the Objectors stated at the hearing that, at the time, they were not connected to the Internet. They would, therefore, have had no way of using the InvestorNet service but through an investment adviser.

[103] I have, furthermore, no reason to doubt the honesty of the Objectors. In fact, the Objectors who appeared before me impressed me as careful people who, if they had received a key features document or an investment statement, would probably have retained a copy of it. Furthermore, the InvestorNet web facilities did not require an investor, or a person authorised to act on their behalf, actually to download the investment statement. Rather, what was required for the investor or their agent to "tick the box" that they had read and understood an investment statement.

[104] I acknowledge, as submitted by Mr Cash, that it may not be possible for me to reach firm factual findings as whether or not investment statements were received by Objectors. In particular, the relevant written statements, and the submissions made by Objectors who appeared before me, were not able to be tested by Mr Cash, for example by way of cross-examination. At the same time, however, Mr Cash acknowledged that the Court was faced with something of a stalemate on the evidence before it.

[105] Therefore, and as Mr Andrew submitted to me, I conclude I must take seriously the possibility that one of the circumstances relating to the allotment of Shares was that, contrary s 37A, such allotments may have been made where subscribers had not received, or read, an investment statement, notwithstanding they, or their agent, had said they had.

[106] I record at this point that I have some concern with the InvestorNet arrangements, to the extent that they did not require a download of the investment statement, but rather relied on a simple statement that an investment statement had been received and read. I note, in this context, the requirement of s 37A. It is for a subscriber to have "received" an investment statement. The term "receive" is defined in s 2 of the Act in the following terms:

> **receive,** in relation to a document, information, or other matter, includes receive by any form of electronic or other means of communication in a manner that enables the recipient to readily store the document, information, or other matter in a permanent form and, with or without the aid of any equipment, to retrieve and read it

[107] The significance of that definition was not referred to in any substantive way before me. The reference to "readily store", however, would appear to require a process that does more than provide access, on an issuer's website, to an electronic version of the document and to then require confirmation of the document having been read. It suggests that receipt involves the downloading of the document in question.

[108] The scheme of the Act is that it is the responsibility of the issuer to ensure that disclosure has been received. In *Re AIC Merchant Finance*s *Ltd* [1990] 2 NZLR 385, Richardson J, considering the obligation to register a prospectus, spoke of that obligation being placed simply and squarely on an issuer (at 392, line 26), and of that obligation being one of "absolute compliance" (at 393, line 17), although not so as to create a shield to deny subscribers access to the remedial jurisdiction under the Illegal Contracts Act.

[109] In my judgement, therefore, it would not appear to be enough for an issuer to obtain statements from investors that they have "received" an investment statement, when appropriate arrangements have not been made to ensure that that is, in fact, the case.

[110] In responding to a number of the written objections, which asserted that required disclosure had not been made available, Mr Cash asserted that the key features document or the investment statement, as the case may be, was available and that the Objector accepted that he had read that document before investing.

(See, for example, Mr Cash's analysis of Mr Stratford's objection). I am not persuaded that that is a complete answer to such an objection. Again, the obligation on issuers, an obligation imposed in terms of the investor protection scheme of the Act taken as a whole, is that investment statements must have been "received" by an investor.

[111] I have, in this context, reflected on the significance of s 4(1) of the Act. Section 4 is discussed in *Re AIC Merchant Finance*, although on a separate point. Section 4(1) provides:

> The provisions of this Act shall have effect notwithstanding anything to the contrary in any other enactment or in any deed, agreement, application, prospectus, registered prospectus, or advertisement.

[112] In my view, s 4(1) – which I note was not referred to in submissions before me – suggests that the Funds may not be in a position to rely – to any great extent – on statements in application forms that documents have been received when, as here, that was or may not in fact have been the case.

[113] From the outset, AMP advanced the Funds' application on the basis that there was no doubt that all relevant disclosure had been made to investors, and in particular to the Objectors. The Compliance Failures it had identified were technical only.

[114] I am left in the position that, as regards the Investment Statement Non-receipt Issue, I am not satisfied that that was, in fact, the case.

[115] It is, however, also to be recognised that s 37A creates a separate regime as the consequences of a breach of s 37A(1)(a), and in s 37B and following, for relief orders in respect of s 37A.

[116] Most relevantly, in my view, for these purposes, s 37A(3) provides that an allotment made in contravention of the section is voidable (and not void) at the instance of the subscriber by notice in writing to the issuer at any time within "the prescribed period". The prescribed period is, in turn, defined in s 37A(4) as meaning:

(a) a period of one year after the security or a certificate of security has been sent to the subscriber; or

(b) a period of six months after the subscriber knows, or ought reasonably to know, that the allotment was made in contravention of the provisions of this section –

whichever is the lesser.

[117] Mr Rainsford, for the Reidys, made the point that the Reidys, and other Objectors, not being aware of the requirements of the Act, were not aware of the possible breach of s 37A until the Funds made their application. I acknowledge that. At the same time, however, I think s 37A(4) is clear. That is, in this instance, the prescribed period would appear to have expired at the end of one year after the date on which the securities were "sent" to subscribers. In this instance I would interpret that point as being when confirmation of the allotment of those securities was provided to the subscribers.

[118] Therefore, at the time of the Funds' application, the scheme of the Act was that the potential voidability of Shares, which would have arisen on the basis that an Objector did not receive the key features document or (as relevant) the investment statement, was no longer – under the scheme of the Act itself – a live issue.

[119] I note, however, that the Relief Provisions direct me to give consideration to the circumstances which existed at the time of the allotments. This, I think, supports the conclusion that the fact that an investor could not now raise the issue of the potential voidability of the Shares, is not determinative of the significance of the issues that Objectors raised in the context of the Investment Statement Non-receipt Issue.

Conclusion

[120] The specific issue I must therefore decide is whether, in these circumstances and balancing all considerations I have discussed, I am satisfied it is "just and equitable" to grant the relief orders the Funds seek.

[121] I think, in this context, the phrase "just and equitable" is to be construed by reference to the overall purpose of the Act, which is that of investor protection based on disclosure and which, furthermore, places the obligation to ensure that disclosure is made on an issuer.

[122] I note further that, under s 7(3) of the Illegal Contracts Act 1970 – noting that at least one of the reasons for the enactment of the Relief Provisions was that the overseas issuers were not able to avail themselves of the provisions of that Act – the Court is directed to have regard to the conduct of the parties, and not to grant relief if it considers that to do so would not be in the public interest.

[123] Although s 4(5) of the Act now provides that nothing in the Illegal Contracts Act 1970 is to apply to ss 37 and 37A, nevertheless, I think similar considerations, although to be determined by reference to the scheme of the Act, inform the concept of when it would be "just and equitable" to make relief orders.

[124] In making this application, AMP asserted that the Compliance Failures had occurred in the context of AMP having otherwise fully complied with its substantive disclosure obligations under the Act. In my judgment, where an issuer makes an application for relief on that basis, the issuer needs to be able to establish – to the reasonable satisfaction of the Judge – that it has done so.

[125] In my judgement – as I concluded at [114] – AMP has been unable to do that in this instance. I find myself left with a real doubt as to whether relevant disclosure documents were received by the Objectors. Although AMP received statements made on behalf of the Objectors that relevant disclosure had been received, I do not consider, for the reasons I have outlined, the receipt of those statements to be a complete answer to the issue of whether or not an Objector had, in fact, received the necessary disclosure.

[126] In these circumstances I am therefore left with a real concern as to whether the overall scheme of the Act, as regards disclosure for the protection of investors, was substantively complied with by AMP in the case of the Objectors. In terms of an analysis on the balance of probabilities, I find myself unable to conclude, by

reference to that civil standard, that AMP established that all relevant substantive disclosure had been made. Moreover, I conclude that the way the InvestorNet arrangements were established, particularly as regards the "confirmation of receipt" process, and to a much lesser extent the dual role of AMP agents who were also investment advisers, mean that AMP does have responsibility for the situation that has arisen. Finally, whilst I accept that generally the Compliance Failures were technical breaches, I am not persuaded that that categorisation is appropriate for the initial failure by the Funds to file any documentation in New Zealand, prior to the commencement of the process whereby Shares were offered.

[127] On that basis, I find myself unable to conclude that it would be just and equitable to make the relief orders sought in respect of the Objectors, and decline to do so.

[128] In declining to make the relief orders sought in respect of the Objectors generally, I recognise that not all Objectors asserted that they had not received the required statutory disclosure by way of the key features document or the investment statement. However, I do not think it is practicable, nor appropriate, as regards the small number of investors who maintained their objection through to the hearing of this application, to distinguish whether or not relief should be granted by reference to that consideration. Rather, my decision to decline to make the relief orders sought as regards the Objectors fundamentally relates to AMP's failure to satisfy me, as it asserted to be the case, that all relevant disclosure had in fact been made to and received by the Objectors – as a group – in connection with the offer of Shares.

[129] I am not in a position to consider the question of further relief for Objectors as regards void Shares. I would hope that that matter can be resolved between the Objectors and AMP, no doubt with the involvement of the Securities Commission, without the need for further recourse to the Court. If, however, that is not possible, then further applications will need to be made.

[130] As to costs, as most of the Objectors who appeared did so on their own behalves, no question of orders for costs would arise. The Reidys, in terms of normal principles, are entitled to costs following the event. Costs on a 2B basis

would appear to be appropriate, but I leave that matter to be dealt with by the affected parties in the first instance. I do not understand any issue of costs to arise as regards the Security Commission's participation in these proceedings, but if that understanding is not correct, leave is reserved for an appropriate application to be filed.

"Clifford J"

SCHEDULE I

Details of Objectors

H R and K Du Mez
184 McMaster Street
Invercargill

J and Y Radford
7A Wedgewood Avenue
Cashmere
Christchurch

G C and D J Vickers
4 Northcrest
Te Kauwhata 3710.

J C and N E Marlow (as trustees – together with B Moyle – of the Puriri Farm Trust)
Whatitiri Road
R D 9
Whangarei

J Stratford
473 Factory Road
R D 26
Temuka

A S Brown
4 Colway Street
Ngaio
Wellington

J and M Barber
256 Kuku East Road
R D 20
Ohau,
Levin

G R Froggatt
10 Derry Street
Greenlane
Auckland 1051

S B Robertson
90 Bycroft Road
R D 2
Drury

T W Schneider
Little Paradise Lodge
Glenorchy Road
C/- Counter Mail
Post Office
Queenstown

J Jeffries and A Lee
23 Stable Court Lane
Christchurch

E and J Cunningham
48 Palmbrook Avenue
Havelock North

F and L Bashir-Elahi
18 Pullenvale Road
Pullenvale
Queensland 4069
Australia

L A Keenan
50 Seaview Road
Paremata
Wellington

W G Whyte
96 Waiatarua Road
Remuera
Auckland 1050

P and R Reidy
C/- Daniel Overton & Goulding
Solicitors
33 Selwyn Street
Onehunga
Auckland

SCHEDULE 2

SCHEDULE OF COMPLIANCE FAILURES

(a) **Between 23 August and 31 August 2000:**

Some shares were subscribed for before the first set of documents required to be filed with the Registrar were in fact filed. As a result, the Funds were in breach of clause 6(a) to (f) of the 1999 Exemption Notice. All the documents required to be filed under clause 6 were filed on 1 September 2000. The affected Objectors were:

F and L Bashir-Elahi
Puriri Farm Trust
G C and D J Vickers

(b) **Between 1 September and 5 September 2000:**

All documents had been filed (see above). However, transactions within five days of the end of any period of non-compliance have been included, given the potential for there to be a lag between the submission of an application and its processing. The affected Objectors were:

Puriri Farm Trust
E and J Cunningham

(c) **Between 3 November 2000 and 1 August 2001:**

The prospectus for the Global Funds was revised on 3 November 2000 but it was not filed. As a result, the Global Funds was in breach of clause 6(a) (Filing of prospectus). The affected Objectors were:

T W Schneider
G R Froggatt
A S Brown
J and M Barber
S B Robertson
H R and K Du Mez
P and R Reidy
J A Stratford

(d) **Between 1 August 2001 and 3 December 2001:**

The prospectus for the Global Funds was revised again on 1 August 2001 but it was not filed. As a result, the Global Funds was again in breach of clause 6(a). The affected Objectors were:

J and Y Radford
L A Keenan
W G Whyte
J Jeffries and A Lee

(e) **Between 3 December 2001 and 21 March 2002:**

The prospectus for both the Global Funds and the UK and Europe Funds were revised on 3 December 2001 but neither prospectus was filed with the Registrar. As a result, the Funds were in breach of clause 6(a). The affected Objectors were:

H R and K Du Mez

(f) **Between 21 March 2002 and 25 July 2002:**

The prospectus and instruments of incorporation for both the Global Funds and the UK and Europe Funds were revised on 21 March 2002 but they, and the required certificate confirming the prospectus had been filed with the Financial Services Authority, were not filed until 25 July 2002. As a result, the Funds were in breach of clause 6(a) and 6(f). The affected Objectors were:

P and R Reidy

(g) **Between 25 July 2002 and 14 August 2002:**

Whilst the then applicable overseas prospectus had been filed (see above), the prospectus had not been filed with the specified information for the New Zealand investors. As a result, the Funds were at that time in breach of clause 7(a). The affected Objectors were:

J Jeffries and A Lee

SCHEDULE 3

SUMMARY OF WRITTEN OBJECTIONS			
	Grounds of objection		
Name of Investor(s)	Reliant	Non-disclosure	Early Closure
H R and K Du Mez	√	-	√
J & Y Radford	-	√	√
G C and D J Vickers	-	√	-
J C and N E Marlow (Puriri Farm Trust)	-	√	-
J Stratford	√	√	√
A S Brown	√	√	-
J and M Barber	-	√	-
G R Froggatt	√	√	-
S B Robertson	-	-	√
T W Schneider	-	√	√
J Jeffries and A Lee	√	-	-
E and J Cunningham	√	-	-
F and L Bashir-Elahi	√	-	-
L A Keenan	-	√	-
W G Whyte	-	√	-
P and R Reidy	√	√	-