

Client Update

Shaping the future of insurance law

Striking out a representative action – *Houghton v Saunders*

5 JUNE 2020

AT A GLANCE

- Throughout its long life, the *Feltex* representative action proceeding has created a number of significant decisions.
- With the latest High Court decision, the matter is now on the brink of being struck out over non-compliance with security for costs.
- This latest *Feltex* judgment signals that there could now be a fairer and firmer balance between the interests of class members and defendants, together with greater judicial scrutiny over litigation funding arrangements.

BACKGROUND

Representative action regarding the Feltex Carpets Limited (Feltex) IPO has been ongoing since 2008. Throughout its life, the proceeding has created a number of significant decisions on representative actions and liability for the issue of securities. The action is now on the brink of being struck-out, with the latest judgment likely to have a wider effect on representative actions.

Feltex undertook its IPO in 2004. In 2008, a representative plaintiff (Mr Houghton) commenced proceedings against Feltex's directors and others involved in the IPO, alleging many elements of the IPO's prospectus were untrue under the Securities Act 1978 and/or misleading under the *Fair Trading Act* 1986. After various judgments permitting the action to proceed, approximately 3,600 shareholders joined as class members, with the proceeding to be heard in two parts: whether the statements were untrue or misleading, and whether the statements (if made and untrue or misleading) caused loss.

After unsuccessful judgments in the High Court and the Court of Appeal, Mr Houghton succeeded in the Supreme Court (although not against all parties) in the first stage. The claim was remitted back to the High Court for hearing stage two.

The High Court then ordered the plaintiff and class members to pay security of \$1.65 million for the defendants' costs in the stage two hearing. The security was originally to be paid by 12 July 2019. This was later extended by a month, with the stage two hearing scheduled to begin on 4 November 2019.

A week before the scheduled stage two hearing, the security had not been paid. The hearing was adjourned until 11 May 2020. The defendants subsequently applied for a permanent stay or dismissal of proceedings, as security remained unpaid as at 14 February 2020. The Court then extended the time for security to be provided by a month, and when that passed, a further month.

When that last deadline passed, the defendants pressed the Court to determine their application.

During that time, the representative plaintiff was struggling to fund the litigation. The representative action was originally funded by a British litigation funder, but that arrangement ended in 2015 following the unsuccessful High Court judgment. Funding was then sought by other means, including lastly a crowd funding offer. These funding issues, and their cause for the plaintiff's non-compliance, were central to determining the strike-out application.

THE DECISION

Dobson J was satisfied the proceeding should be struck out unless, by 14 July 2020, the plaintiffs provide the \$1.6 million security for costs, and that the plaintiff's senior counsel confirms, in his opinion, that the plaintiffs are adequately resourced to prepare and present their claims.

His Honour accepted that there should be caution to avoid treating a representative action differently than an individual claim. The repeated and prolonged delays and non-compliance in this case would not be tolerated in an individual's claim and would have seen the proceeding dismissed much earlier. These delays and non-compliance should also not be excused simply because this is a representative action that may affect many class members.



The Feltex judgment signals that there may be a fairer and firmer balance between the interests of class members and defendants.

While the delays and non-compliance in this matter arose because of funding issues, that should not provide an open-ended time period for the plaintiffs to comply. The class members chose to tie their claims to litigation funders. They continued to do so despite the funding changing, together with the terms that rewarded the funders with very significant sums. As these significant sums will be first payable to funders on recovery, the funding arrangement also dilutes any concern about the class members' access to justice.

Added to that, a number of class members are institutional shareholders, whose individual claims could justify funding their own claims. Those institutional shareholders were expressly afforded an opportunity by the Court to proceed separately, when earlier issues with security for costs arose, but chose not to do so.

His Honour also considered the defendants' interests. Granting further time would cause prejudice to the individual defendants financially, and to their personal reputations. The defendants had also been required to take steps in the proceeding without the comfort of security being paid.

In weighing the class members' interests, Dobson J commented on the offer and arrangements for crowd funding. The offer document did not mention the procedural difficulties, the adjournment of the stage two hearing, or the live strike-out application. While his Honour felt he was not able to determine the accuracy of statements made in the crowd funding offer and documents, he suggested that the Court may review the arrangement given how long it had been since it made the order to proceed as a representative action. He also ordered that copies of his judgment be given to claimants who were sent the offer document, and online copies be made available to all claimants who had access to the document.

THE IMPLICATIONS FOR INSURERS

This decision has raised some interesting points about representative actions and should be of interest to those directly and indirectly involved in representative actions.

The judgment signals a greater scrutiny of representative actions and litigation funding. Some earlier judgments might be seen to have glossed over those issues to enable proceedings to continue. However, in *Houghton Dobson J* was prepared to closely review some of litigation funding issues, albeit without making any findings. This included suggesting that funding arrangements may be more closely reviewed and any changes to those arrangements may cause the proceeding to be reassessed.

Critically, the *Feltex* judgment signals that there may be a fairer and firmer balance between the interests of class members and defendants. This includes assessment of the class membership in the broader context of the procedural issues.

NEED TO KNOW MORE?

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