

Feltex directors and promoters win \$3.1m in legal costs over misleading prospectus claims

The directors and promoters of Feltex's 2004 IPO have been awarded \$3.1m plus disbursements after defending allegations that investors were misled. Because the case was funded by litigation funders, however, the award will be met by the funders rather than the plaintiff personally. Further, while the judge awarded costs above the normal scale in certain respects, he rejected the defendants' argument that the plaintiff's funded status meant that they were entitled to recover 100% of their costs against the losing party.

** Partner, Stuart Dalzell and Solicitor, Richard Hutchison discuss.*

Introduction

The litigation arose out of the collapse of Feltex Carpets. The plaintiff purchased shares in Feltex after a prospectus was issued in 2004. The shares soon dropped in value, and receivers were appointed in September 2006. The plaintiff represented about 3,700 of Feltex's former shareholders. He claimed breaches of the Fair Trading Act and Securities Act, and negligent misstatement. The claim was funded by two overseas litigation funders. In September 2014, in a 195-page decision, the High Court found in favour of the defendants on all claims.

Generally, in civil and commercial litigation in New Zealand, the courts' approach is that 'costs follow the event', which means that if you win your case you are entitled to recover a contribution to your reasonable legal costs and disbursements from the losing party. An award of legal costs is normally calculated on a scale, however the award is in the judge's discretion, and the judge can scale-up

the costs, even to a 100% indemnity if that is just in the circumstances.

Entitlement to indemnity costs

The defendants argued that, since the proceedings had been financed by litigation funders for profit, the successful defendants should be entitled to indemnity costs. They argued that funding had enabled a very substantial case which was ultimately without merit, had added pressure to the defendants, and that the funders had arguably had considerable influence over the running of the proceeding. The Court disagreed that indemnity costs should be awarded, finding that this "*would inevitably have some chilling effect on the potential availability of such arrangements in cases where they may well be justified in the interests of facilitating access to justice*" (at [14]). Rather, funding arrangements are simply one of the factors the Court will consider when determining whether increased costs should be awarded.

Litigation funders' liability for costs

The Court considered whether the litigation funders, who technically were not parties to the claim, should have costs awarded against them. The funders accepted that they would have some liability for adverse costs, but the Court had to consider the form their liability should take.

Both funders had contractual commitments to meet costs liabilities (with one funder's contractual liability capped at \$5 million). However, the defendants did not want to have to go through the steps of claiming costs against Mr Houghton personally, and

through him, obtaining costs from the funders and/or insurers.

The Court considered that it was appropriate make orders confirming the liability of the funders for costs. The Court ordered that the funders were to be jointly and severally liable for the costs, subject to the limitations in their contractual arrangements.

Fifty percent uplift awarded for some costs

The defendants sought increased costs, and identified a number of features of the litigation to support this claim. In particular, this was the first class action for a claim under the Securities Act of its type in New Zealand, it involved many untested legal issues, there were complex factual allegations, the hearing ran for 52 days, the common bundle comprised 1,852 documents, and the total claims were worth \$185 million. Furthermore, the plaintiff's conduct added to the defendants' costs. In particular, the defendants' argued, the pleadings lacked focus, there was significant non-compliance with the Court timetable, the plaintiff's briefs included inadmissible evidence, the plaintiff repeatedly refused to provide access to electronic data in a useable state, the plaintiff failed to abandon certain aspects of the claim which he ought reasonably to have realised were untenable, and there were a substantial number of unnecessary documents in the common bundle.

The Court agreed that increased costs were warranted. The Court distinguished the period before and after the trial preparation and the hearing, noting that before the trial preparation "*the battle lines were in some respects less clearly defined, and*

the basis for criticism of the plaintiff's conduct is arguably less."

The Court awarded an uplift to the scale costs of 50 per cent for trial preparation and appearances, and 15 per cent for the earlier stages.

Recoverable costs for overseas experts

The claims for experts' costs included over \$820,000 for Professor Bradford Cornell, an expert economist and senior consultant at Compass Lexecon, based in the United States.

Some of the defendants claimed for their proportion of the fees paid to Professor Cornell. The plaintiff argued that these fees were not reasonable, and claimed that the relevant expertise could have been found in New Zealand or Australian economists who would charge substantially less.

The Court observed that it has been relatively liberal in the past "*in not questioning the reasonableness of what, by New Zealand standards, are eye-wateringly high charges demanded by economists of international repute and other specialist experts in similarly arcane areas.*" However, the Court noted that "*the topic on which he opined was not so arcane as to be beyond competent economists in New Zealand or Australia.*" Further, "*parties cannot rely on the Court to endorse the reasonableness of choices made when it comes to recovering experts' costs and where matters addressed might be dealt with by a competent expert closer to home. The circumstances in which international experts are retained need to be assessed in the evidentiary context and the relative importance of opinion evidence to the matters in issue.*"

In this case the Court apportioned 65 per cent of the professor's invoices as being recoverable from the plaintiff.

Conclusion

The total costs and disbursements awarded against the plaintiff totalled \$5 million. Although this is a very high costs award, it reflects the significant,

costly, but ultimately unsuccessful, claim brought by the plaintiff against a number of defendants. Furthermore, we welcome the judge's rejection of the argument that the plaintiff's funded status should justify an award of indemnity costs – acceptance of which argument would undermine the access to justice values promoted by acceptance of litigation funding arrangements.