



Supreme Court of New Zealand

9 April 2014

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

**CREDIT SUISSE PRIVATE EQUITY LLC & ANOR V ERIC MESERVE
HOUGHTON & ORS (SC 100/2012)
[2014] NZSC 37**

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

Mr Houghton has brought a claim relating to losses suffered after the collapse of Feltex Carpets Ltd (Feltex) in 2006. Mr Houghton sues on his own behalf and as representative of a large number of other Feltex shareholders who purchased shares in the initial public offering in 2004. The claim is brought against the directors of Feltex (the second respondents), the promoter of the offering (the first appellant), the vendor and issuer of part of the shares in the public offering (the second appellant) and the organisers and joint lead managers of the public offer (the third and fourth respondents).

An application for a representative order was made and granted when Mr Houghton first brought proceedings. A representative order allows a person to bring a claim on behalf of others with the same interest in the subject matter of a proceeding. The High Court set an

“opt-in” date within which other Feltex shareholders who purchased shares in the 2004 offering could join the group represented in the proceedings.

The question in this appeal is whether the making of a representative order under r 4.24 of the High Court Rules means that those represented under the order have brought an action for the purposes of the limitation periods under the Limitation Act 1950 and Fair Trading Act 1986. The appellants contended that representative proceedings only settle common issues among the represented group, meaning the represented shareholders all had to file separate proceedings before the expiry of the relevant limitation periods to deal with individual issues, such as reliance and loss. This would mean that all shareholders who opted into the representative action would not be able to recover for their individual losses. Alternatively, if the Court did not accept that argument, the appellants submitted that only those shareholders who opted into the group under the opt-in procedure before the expiry of the relevant limitation periods have brought proceedings within time. This would mean that all shareholders except those who opted in before the limitation periods expired would not be able to recover for their individual losses. Mr Houghton’s position is that proceedings were brought for limitation purposes when the representative action was initially filed.

In the High Court, French J held that, in terms of r 4.24, the representative proceedings were brought “on behalf of” those with the same interest in the claim; namely the other Feltex shareholders who had purchased shares in the 2004 initial public offering. This meant time ceased to run for those shareholders when the proceedings and application for a representative order were filed. This decision was upheld in the Court of Appeal. That Court held the purpose of representative proceedings would largely be negated if all members of a represented group were required to file separate proceedings.

The Supreme Court by majority (comprising McGrath, Glazebrook and Arnold JJ) has dismissed the appeal against the decision of the Court of Appeal.

The Court has concluded that a representative action is brought by the representing plaintiff and all those represented when the statement of claim is filed. This means time ceased to run for all shareholders who purchased shares in the initial public offering when the proceedings were initially filed by Mr Houghton and the representative order made. There is nothing in r 4.24 that restricts the representative’s claim to deal solely with the common issues. How individual issues including damages are to be dealt with is a matter for the High Court. The Court accepted that the purpose of representative proceedings would be

negated if all members of a represented class had to file separate proceedings, and found the policy of limitation provisions to be satisfied on this approach.

On the second argument that only those shareholders who opted in to the representative proceedings within the limitation period have brought their claims within time, the Court has held that it is not the opting in or out that defines the represented class. Rule 4.24 provides that the class is defined by reference to the class of persons having the same interest in the subject matter. The representative order appointed Mr Houghton as the representative of all those who had purchased Feltex shares in the initial public offering. The claim was therefore brought by those shareholders. Opting in or opting out elements of a representative action should not determine when limitation periods expire. The date of the filing of the statement of claim is certain, easily ascertainable and provides a bright line test.

The Chief Justice and Anderson J dissented. Although they agreed with the majority on the first argument, they would have allowed the appeal on the second argument.

Accordingly, the appeal is dismissed.

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