

Class actions in New Zealand (2016)

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Legal framework

New Zealand does not have a statutory class action regime.

Instead the courts have facilitated class actions, through their approach to the use of the representative procedure available under [High Court Rule 4.24](#) of New Zealand's procedural rules. High Court Rule 4.24 permits a single plaintiff to represent a group of claimants who have the same interest in a proceeding.

The representative procedure, an import from England,¹ has been provided for in New Zealand's procedural rules since the Supreme Court Act 1882.

A representative action can be commenced with the consent of all class members or by the direction of the Court.

There is a relatively low threshold for obtaining a representative order. According to the Court of Appeal in *Saunders v Houghton* [2010] 3 NZLR 331 at [19] "The same interest' must mean that, subject to other considerations, the more the parties have in common, the more the strength of that facet of the application. Greater precision is unattainable." The courts have required identification of a substantial common issue. There does not have to be a common cause of action. Individual issues will not prevent a claim being brought as a representative action. These can be determined individually at a later stage.

The persons who are represented in the litigation are bound by any judgment given in the proceeding and the judgment creates a res judicata between the group members and the other parties.² The litigation is conducted by the representative.

There are also regimes which permit or facilitate a type of class action in specific contexts, in particular:

¹ The representative rule originally developed in the Court of Chancery. See Sorabji, John "The Hidden Class Action in English Civil Procedure" (2009) 28:4 CJQ 498 at 501-502.

² *Markt v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA) at 1039; *Barker v Allanson* [1937] 1 KB 463 (CA) at 475; *Moon v Atherton* [1972] 2 QB 435 (CA) at 441; *Saunders v Houghton (No 2)* [2012] NZCA 545, [2013] 2 NZLR 652 at [58].

- In the fair trading/consumer credit context, [s 43 of the Fair Trading Act 1986](#) provides for “any person” (which includes the New Zealand Commerce Commission) to seek compensation orders on behalf of consumers who have suffered losses under the Fair Trading Act 1986. Similarly [s 93 of the Credit Contracts and Consumer Finance Act 2003](#) provides for the Court to order compensation to a person, whether or not that person is a party to any proceedings.³
- In the securities context, [s 39 of the Financial Markets Conduct Act 2013](#) provides for the High Court to appoint the Financial Markets Authority to bring a claim on behalf of a class of persons sharing the same or substantially the same interests where those persons have been subject to a breach of the Financial Markets Conduct Act 2013.
- In the human rights context, [s 90 of the Human Rights Act 1993](#) provides for the Director of Human Rights Proceedings to provide representation to a group of persons which request representation in relation to a complaint about discrimination.
- In the health context, [s 50 of the Health and Disability Commissioner Act 1994](#) allows the Director of Proceedings to bring representative actions on behalf of a class of claimants before the Human Rights Review Tribunal in relation to allegations of breaches of the Code of Health and Disability Services Consumer Rights.
- In the employment context, [s 18 of the Employment Relations Act 2000](#) provides for unions to represent their members,

Scope and standing

The High Court Rule 4.24 representative procedure is trans-substantive. It can be used for any proceeding in which the claimants share a common interest. It can be used for any proceeding in which the representative plaintiff would have standing.

The regimes set out above are specific to their context and usually specify the party who can be the representative.

³ See *CC v Carter Holt Harvey Ltd* [2008] 1 NZLR 387 for a finding that “true class actions”, where a third party can bring a claim and obtain orders for the benefit of an indeterminate group of persons identified only by class, are not permitted by s 43(1) Fair Trading Act 1986.

Remedies

All remedies that can be sought in a conventional action are available in a High Court Rule 4.24 representative proceeding. However it is most common for the common issues that can be litigated through the class action procedures to relate to liability with the remedies being dealt with subsequently on an individual basis. As a result, the most common remedies obtained using the representative procedure will be declarations.

Opt in or opt out

The High Court has not been attracted to an opt-out mechanism, under which all members of the class are bound by the outcome unless they choose to opt out. To date New Zealand plaintiffs have proceeded on an opt-in basis, under which class members need to expressly agree to be represented. There is a good argument that in an appropriate case the courts should allow a claim to proceed on an opt-out basis.⁴

Funding and financing

The representative is personally liable for the costs of the litigation and any adverse judgment; the individuals he or she represents are not.⁵

Lawyers can enter into contingency fee arrangements subject to the requirements of ss 333-335 of the Lawyers and Conveyancers Act 2006 and Rules 9.8-9.10 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. In particular a premium that is charged under a contingency fee arrangement cannot be calculated as a proportion of the amount recovered. Legal aid may be available in some cases. The only other ways lawyers can be funded to conduct a class action are by contributions from class members or third party litigation funders.

Third party litigation funding is permitted in New Zealand. At a minimum the identity and location of the litigation funder, and its amenability to the jurisdiction of the New Zealand Courts should be disclosed.⁶

⁴ The Court of Appeal left the question open in *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 (CA) at [12] and the Supreme Court proceeded on the basis that an opt-out mechanism is an available option in *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37.

⁵ *Markt v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA) at 1039; *Moon v Atherton* [1972] 2 QB 435 at 441; *Houghton v Saunders [Lifting Stay]* (2011) 20 PRNZ 509 (HC) at [211]-[212].

In *Waterhouse v Contractors Bonding Ltd* [2014] 1 NZLR 91 at [70]-[73], the Supreme Court held that it was not the Court's role to regulate litigation funding arrangements and that further disclosure need only be made to the extent that the Court considered the arrangements to be relevant to an application before it (such as an application for security for costs).

However the Supreme Court also emphasised that its judgment was not to be taken as commenting on the supervisory role of the Court under High Court Rule 4.24 or the approach taken in the *Feltex* litigation.⁷

When considering giving a representative order in the class action context where a litigation funder is involved, the Court of Appeal had held in the *Feltex* litigation that it is necessary for the Court to approve the funder and funding arrangement.⁸

The courts have shown a concern to ensure the litigation is responsibly conducted and that the plaintiffs are appropriately protected, and have taken into account the following:

- compliance with the UK Code of Conduct for litigation funders, in particular with the provisions relating to termination rights (which require the agreement to provide that the litigation funder may only terminate the agreement when the funder reasonably ceases to be satisfied as to the merits of the dispute, reasonably believes the dispute is no longer commercially viable or reasonably believes that there has been a material breach of the agreement by the plaintiff);⁹
- provision for the role and obligations of the plaintiff's lawyers so that there is a direct client-solicitor relationship between class members and the lawyer acting in the litigation, the lawyer acting is responsible for advising the plaintiff and the class about the case without interference from the funder and the plaintiff's lawyers have a direct role in publicity about the proceeding;¹⁰

⁶ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [67]-[69].

⁷ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [28].

⁸ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 (CA) at [38] and [42].

⁹ *Saunders v Houghton (No 2)* [2012] NZCA 545, [2013] 2 NZLR 652 at [31]-[32].

¹⁰ *Houghton v Saunders [Lifting Stay]* (2011) 20 PRNZ 509 (HC) at [75]-[77].

- provision for the role of the funder: the agreement may require consultation with the funder but not agreement to every material step in the litigation.¹¹

The courts have been concerned to ensure that communications between the funder and members of the represented group, or potential members, are not misleading.¹²

Whether and how the procedure has been used

Class actions have been slow to emerge as a feature of New Zealand’s legal landscape. However in recent years between 5 and 10 class action claims have been filed¹³ and there have been media reports of others that are in the pipeline. These cases include a shareholders’ claim, product liability actions brought by leaky home owners, claims for breach of contract and bad faith against an earthquake insurer, a case challenging the reasonableness of banks’ penalty charges, a claim of Government negligence by a group of kiwifruit growers and a personal injury claim relating to hip implants. All are still working their way through the New Zealand court system.

¹¹ *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC) at [14] and [23]; *Re Gellert Developments Ltd (in liq)* (2001) 9 NZCLC 262,714 (HC); *AMP Capital Investments Ltd No 4 Ltd v IBS Group Ltd (in liq)* [2009] NZCCLR 19 (HC).

¹² *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 (CA) at [32], [33], [63].

¹³ These are discussed by J Greenland “The Power of the Collective” (15 July 2016) 892 LawTalk 14 (available at <https://www.lawsociety.org.nz/lawtalk/issue-892/the-power-of-the-collective>). See also the New Zealand contribution to “Class Actions” A Global Guide from Practical Law (Thomson Reuters, 2015) at 296-297.