

Class Actions for New Zealand

A Second Consultation Paper prepared by the

Rules Committee – October 2008

Introduction

- 1 The Rules Committee, which is constituted under section 51B of the Judicature Act 1908, has been working for some time on the development of a class action procedure. It issued a Consultation Paper on 30 April 2007 and now seeks to consult further with the legal profession and the public generally on the merits of the detailed proposal which has been developed.

- 2 Attached to this Consultation Paper is a draft Class Actions Bill and draft High Court Amendment (Class Actions) Rules. These drafts incorporate many of the suggestions made by those who responded to the Rules Committee's 2007 Consultation Paper. The Rules Committee envisages that the Rules would become a new Part of the revised High Court Rules which were recently introduced as a schedule to the Judicature (High Court Rules) Amendment Act 2008. A class action regime necessarily has some features going beyond rules of practice and procedure. This makes it necessary to seek primary legislation. That would, among other things, widen the scope of the detailed procedural rules which the Rules Committee can recommend should be made for class actions by Order in Council procedure.

- 3 There is a considerable literature on the way class actions are financed and conducted in overseas common law jurisdictions. This short Consultation Paper cannot fully reflect the different points of view that have been expressed. In Australia class actions have been available in the Federal Court of Australia and in Victoria for a number of years. The Rules Committee's proposal has been greatly influenced by the Federal Court of Australia Amendment Act 1991 (No 181 of 1991). Some provisions of the draft bill and rules have been directly copied from that Act, eg, the requirement that there be a minimum number of 7 class members.

Major Postulates

4 The Rules Committee believes that reading its draft bill and rules will be a much shorter route to understand the proposed reform than a long essay setting out the philosophy of the proposal and the detailed reasons which have led it to its various aspects. The major reasons for its proposal are the following:

- a class action procedure needs to be introduced in order to redress, and provide compensation for, those wrongs which affect many people but it is not practical or not economic for an individual to pursue a legal claim:
- a class action procedure is also justified in the interests of the efficient use of court time and judicial resources:
- the existence of class action procedure will act as a deterrent against unlawful action by large corporate bodies who may otherwise consider that the prospect of legal action being taken against them is either nil or very small:
- class actions need to be judicially supervised even before they formally commence, and the courts must have power to approve settlements, and approve costs and fees arrangements:
- class actions would probably be brought in a wide range of different circumstances: in some cases an “opt-in” type of class action would be appropriate, but the majority of class actions would more appropriately be classified as “opt-out” class actions. In an opt-out class action a person who falls within the description of the class contained in the relevant class action order will be a class member unless the person formally opts out by a date fixed in the order:
- a lead plaintiff would in practice be the only client of the instructed lawyer, and will give instructions and make decisions as the class action proceeds. But all class members would be bound by the judgment obtained, favourable or unfavourable, and could not subsequently relitigate their claims as individuals:
- the reality of modern-day litigation funding must be recognised: unless litigation funding arrangements can be made many class actions will not get off the ground, because of the high front-end costs of investigating the facts, obtaining evidence, drafting the pleadings, applying for a class action order and formally commencing the proceeding:
- wide judicial discretions are needed to enable class actions to proceed both fairly and quickly. In particular, rules are needed empowering judges and/or Associate

Judges to minimise any abuse of interlocutory procedure designed to frustrate a class action, or to buy time which would enable a defendant to pick off individual class members and pressure them to accept a low settlement figure:

- on the other hand, class action procedure must be entirely fair to defendants and proposed defendants who must, for instance, have the right to be heard on the crucial questions that arise on an application for a class action order. To take another example, they must know exactly what the allegations against them are, and those allegations cannot be allowed to be freely amended at the instance of the lead plaintiff after the class action order has been made and the action has been duly commenced on a disclosed factual and legal basis. And they are entitled to the comfort of being able to know the maximum number of people who are in the class and making claims.

Definition

- 5 Professor Rachael Mulheron in The Class Action (Hart, 2004) starts her discussion with the following basic definition of a class action:

A class action is a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ('common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.

Lead Plaintiffs

- 6 For New Zealand, however, the Rules Committee thinks it undesirable to speak of "representative plaintiffs". This would invite confusion with those who are plaintiffs in a representative action under rule 4.24 of the High Court Rules. That rule enables

one or more persons to sue, or be sued, on behalf of, or for the benefit of, “all persons with the same interest in the subject matter of a proceeding.” The Committee proposes that rule 4.24 should continue. It will be useful in a few cases, eg, when several beneficiaries are complaining of a trustee’s breach of trust. In recent years the interpretation of “same interest” has been widened by judicial decision, but representative actions under rule 4.24 do not cater for the situations for which the class action as proposed by the Committee is designed. The key player in a New Zealand class action would be the lead plaintiff. There may be one or more lead plaintiffs. And in the Committee’s proposal more than one defendant may be sued in a class action, always providing (see clause 6(4) of the draft bill) that 2 or more persons have claims against each particular proposed defendant.

The UK Position

7 In the United Kingdom, class actions as such are not permitted. Since 2000 (under Pt 19.III of the Civil Procedure Rules) Group Litigation Orders have been obtainable when claims “give rise to common or related issues of fact or law.” If an Order is made a register of group claims must be established, and a “management court” must be nominated which will oversee the claims. Any judgment or order given on a GLO issue is binding upon other parties on the group register. The consent of the Lord Chief Justice or, in chancery matters, the Vice-Chancellor is required before a GLO is possible. The GLO scheme is not a class action in the true sense because it requires that class members actively join/participate in the action as parties. The GLO is accurately described as nothing more than a “permissive joinder device”. It is an opt-in, rather than an opt-out device: see paras 11-12 below. It would not benefit many people suffering from wrongs if it was adapted and applied in New Zealand. The Rules Committee is proposing that Parliament introduce a true class action which will be beneficial to many claimants who, in the absence of such a procedure, will otherwise be denied real, effective access to justice.

The Justification of Class Actions

8 The Rules Committee repeats the reasons which it set out in paragraph 17 of its 2007 Consultation Paper for introducing class actions, and not resting content with the present representative action procedure:

- The proceedings could be issued swiftly by one or more persons claiming to represent the class without the need to identify all the members of the class and obtain their consent.
 - Other members would get the benefit of the class action unless they wanted to opt out [ie, if it is the more frequent, “opt-out”, type of class action].
 - The procedures of the courts have much more flexibility to accommodate and deal with different interests by dividing up the issues for trial.
 - Limitation periods stop running once the main action starts.
 - One set of proceedings decides all the issues.
 - The court can control the application of any remedy of damages, in a variety of ways, both as to recovery of the [lead] plaintiff’s costs and as to payment of individual members, and make directions as to how a member of the class is to establish entitlement to a share.
- 9 One of the justifications of class actions is their deterrent value. This is recognised in the literature and by Australian commentators on the experience with class actions in the Federal Court of Australia and in Victoria. As the New Zealand Bar Association said in its submission (in para 6(b)) on the Rules Committee’s 2007 Consultation Paper:
- “The threat that a proceeding might be brought by an aggrieved group, and for a substantial sum, acts as a constraint on a potential defendant and should discourage or deter the prospective defendant from unlawful conduct. The power which exists in numbers has a valuable policing effect which would not otherwise arise.”
- 10 It would be most undesirable to attempt to confine class actions to a prescribed list of categories. Nevertheless, the Rules Committee envisages that class actions would be

likely to be brought in the following situations, among several others:

- shareholders in a company claim losses suffered by investing on the basis of misrepresentations in a prospectus, and claim that directors have breached their fiduciary duties and/or acted negligently:
- ratepayers complain that a local authority has demanded payment of an unlawful rate or charge:
- consumers of a particular product claim that it was manufactured negligently and in breach of statutory obligations:
- customers of a bank claim that small amounts have been regularly but unlawfully deducted from their current cheque accounts or their credit card accounts:
- inmates of a prison or psychiatric unit complain of negligent treatment, or of physical or sexual assault by the staff of that unit:
- purchasers of “leaky homes” sue developers for misrepresentations made and other misleading conduct at the time of purchase, or a building company alleged to have used defective materials or to have built all the apartments in a particular building negligently.

Two Kinds of Class Action

11 There would be two broad kinds of class action. The first or “classic” kind is the kind employed to further the claims of a very large number of claimants, each with a small claim, eg, \$3,000 or \$5,000. The opt-out class action is appropriate in such a case. The Rules Committee notes, but discounts, the argument that it is wrong for a person to become a plaintiff in litigation by inaction, ie, failing to opt out in time, and wrong that a person should be legally bound (and estopped, should further litigation be attempted) by a judgment in a proceeding in which that person had no input or decision-making ability. If that argument were accepted, most deserving small claimants would be denied justice because they could not afford to claim.

- 12 The second kind of class action involves a comparatively small number of claimants (for example 7 or 10), each of whom has a claim for a larger sum, eg, \$150,000 or \$200,000. Under today's conditions, having regard to legal fees and the probably extensive costs of investigating the facts, each claim is quite possibly uneconomic. There is a substantial common issue of law or fact. Join the 7 claims together in a class action and the financial outlay will be tolerable, especially with the help of a litigation funder. In this situation it makes much more sense to consider an opt-in class action, in which it will be necessary for anyone who is eligible to join the class (judicially defined in the class action order) – a “qualified person” – to sign in with a registrar of the High Court, proving credentials if requested, before the stipulated date.
- 13 Recognising that one size does not fit all, the Rules Committee proposes that both opt-in and opt-out class actions be permitted. An Associate Judge would make the choice of kind after hearing submissions, including any submissions from the proposed defendant(s). Most jurisdictions do not formally recognise these two different kinds of action and permit opt-in only or opt-out only (the majority choice).
- 14 Not every multiple claimant situation where the claims meet the fundamental criterion that they are “in respect of, or arise out of, the same, similar or related circumstances” (see clause 6(1)(b) of the Bill) will be appropriately conducted as a class action. When a class action is authorised, it will often be necessary to resolve the common issue of law or fact first. Then the court will need to turn to the particularities of each individual claim, and examine (say) issues of causation and quantification of damages. The Rules Committee envisages class actions in which such issues can be readily determined if not agreed, eg, by an order for successive short hearings. The creation of sub-classes is a possibility under the draft rules, and this will sometimes help.
- 15 But some multiple claims will be denied the benefits of the class action procedure, even though a class action order is applied for. For example, suppose that 10 prisoners in the same prison seek a class action order, 3 complaining of assault by warder X, 2 of assault by warder Y, 3 of denial of rights conferred by the Bill of Rights, and 2 of a

negligent system of supervision leading to attacks by fellow prisoners. Even if the claims fulfil the second major criterion in that they “give rise to at least one substantial common issue of law or fact” (see clause 6(1)(c) of the Bill) an Associate Judge may well decide that the range of evidence likely to be given will differ so markedly as between the sub-groups that it is not “appropriate, having regard to the purpose of the Act, to deal with the claims in a class action rather than separately” (see rule 34.8(2)(d)).

The Commerce Commission

16 The Commerce Commission has powers to apply to the court for remedies under the Commerce Act 1986, the Fair Trading Act 1986, and the Credit Contracts and Consumer Finance Act 2003. The Rules Committee has consulted with the Commerce Commission and proposes that the Commission’s powers should be extended. When, but only when, a company or natural person has engaged in conduct prohibited by one of those three statutes, the Commission should have the additional power to seek to become a lead plaintiff in a class action. If so, the Class Actions Act will apply, but “modified to the extent necessary to reflect the fact that the Commission is not claiming on its own behalf” (see clauses 17, 18 and 19 of the Bill). It is emphasised that some groups of people affected by conduct contrary to one of the 3 statutes will prefer to select their own lead plaintiff, in which case the Commerce Commission will play no part in the ensuing class action.

Litigation Funding

17 According to Lord Phillips M R in *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292 at [54]:

“Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation.”

Litigation funding has emerged as a modern phenomenon. According to a recent

survey¹, five legislation funders currently operate in Australia, and account for approximately 95% of litigation funding in that country (including individual claims as well as class actions). The majority of the High Court of Australia, in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* 80 ALJR 1441 accepted that litigation funding is a reality of commercial life. They endorsed the view of Mason P. in the NSW Court of Appeal that:

“The law now looks favourably on funding arrangements that offer access to justice so long as any tendency to abuse of process is controlled.”²

More recently, in *Hall & Ors v Poolman and Ors*³, Palmer J in the Equity Division of the NSW Supreme Court extracted the following propositions from the majority judgments in *Fostif*:

- the justification for litigation funding is that it offers access to justice to those who could not otherwise afford to vindicate their legal rights:
- the fact that a litigation funder has sought out a piece of litigation in which to invest for profit is not objectionable as a matter of public policy:
- the terms upon which litigation is funded may be so onerous and unreasonable as between the intended litigant and the funder as to be unenforceable as between them, but that is no concern of other parties to the litigation and does not, in itself, make the prosecution of the proceeding by the funder an abuse of process which the court may stay:
- if a funder, driven by profit motive, attempts to interfere with, or manipulate due process in the litigation or if funder’s lawyers, for the same reason, commit breaches of their professional duties, the court has sufficient power available to cure those ills without

¹V. Morabito, “Class Actions Instituted only for the Benefit of the Clients ...” (2007) 29 Syd L.R. 5, 34

²(2005) 63 NSWLR 203, at [105]

staying the litigation itself.

- 18 Litigation funding agreements between litigation funders and those they fund must unquestionably be subject to judicial scrutiny and possible disapproval. The really difficult issues relate to the degree, the timing and the intensity of such judicial scrutiny.

The Rules Committee is dealing in this Consultation Paper with class actions only. Other proceedings involve wider considerations. But, unless the regulation of litigation funders is addressed as an integral part of the proposals for the introduction of class actions in New Zealand, there is a high risk that those proposals will be regarded with disfavour by many of those people (not rich, but not poor enough to qualify for legal aid) whom the proposals are designed to assist.

- 19 The Australian experience seems clear. According to the Law Institute of Victoria: “The growth of litigation funders is to be encouraged and *it is clear that many cases would not have been pursued but for the involvement of funders*”⁴ (emphasis added). According to Professor Vince Morabito: “Where the class representative’s [in New Zealand this will become the lead plaintiff’s] individual claims would not warrant individual litigation, it would make little sense for such claimants to bear the financial burden of a far more costly and complex type of litigation: namely, a class proceeding [in New Zealand, a “class action”]⁵. In other words, without willing litigation funders, little use will be made of the new class action procedure.

- 20 The definition of a “litigation funder” is crucial. It would be wrong to include insurance companies which finance litigation by virtue of subrogation or otherwise. Also, bodies such as unions, or the Police Association, which often finance members’

³[2007] NSWSC 1330, at [372]

⁴Quoted in Murphy and Cameron, “Access to Justice and the Evolution of Class Action Litigation in Australia”, [2006] Melb. U.L.R. 14. Cf also Cashman, *Class Action Law and Practice* (Federation Press, 2007) at 189: “In the absence of litigation funding, many meritorious cases would not be pursued at all.”

civil proceedings, should not be included. The Legal Services Agency established under the Legal Services Act 2000 is not intended to be covered. Friends who help on an *ad hoc* basis should also not be included.

- 21 The definitions of “litigation funder” and “conditional fee agreement” in the draft bill will mean that lawyers, both barristers and solicitors, acting for lead plaintiffs in class actions are not themselves “litigation funders”. Further, if the definition of a “conditional fee agreement” (which henceforth is not an illegal or an unenforceable contract: s 334) is refined in the light of experience, the class action exclusion will march with it.
- 22 Under clause 9(3)(f) of the Class Actions Bill, rules may be made for the “regulation and supervision of agreements or arrangements”, and the fixing of legal fees—
- (1) between the lead plaintiff(s) and a lawyer (which includes both a solicitor and any instructed barrister); or
 - (2) between the lead plaintiff(s) and a litigation funder; or
 - (3) between class member(s) and a litigation funder.

Class Action Orders

- 23 Under proposed rule 34.7(3)(h) the would-be lead plaintiff must, when seeking the very important pre-commencement *class action order*, supply “general information as to any arrangements, in place or prospective, for funding the proposed class action (including the existence and general effect of any agreement or proposed agreement with a litigation funder).”

Termination of Class Actions

- 24 A class action would be settled or discontinued only if the court approves: rule 34.18(1). The settlement must be “fair, reasonable and adequate”: rule 34.18(2). One mandatory factor to be considered, *inter alia*, will be “the relationship ... between amounts payable to lawyers or a litigation funder and the amounts payable to class members”: rule 34.18(3)(c). This unusual degree of judicial control over the amounts

⁵Morabito, n.1 above, at 32

payable to litigation funders after successful litigation is essential to the acceptability of class actions. The criteria to be applied when approving a settlement should not be prescribed in detail: class actions will be brought in many different contexts, and there will be marked differences among them.

Legal Fees

25 The fees payable by a lead plaintiff to the class action lawyers must also be subject to judicial supervision. This would complement the control over litigation funders. Together these controls would go a long way to ensuring that class members are the principal beneficiaries of successful class actions in which damages are awarded. A variation to a “fees agreement” as defined by rule 34.23(1) will be able to be ordered by the court if the agreement or arrangement is “oppressive or unjust” to an applicant. Again, the aim is to allow room for a wide judicial discretion having regard to all relevant circumstances. An application may be made by any class member or qualified person at any time “before distribution has occurred”: rule 34.23(3).