JUSTIN SCOTT EMERSON

CLASS ACTION PROCEDURE

IN NEW ZEALAND

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1. INTRODUCTION

Class action procedure is a mechanism which enables a single or "representative" plaintiff to individually bring an action in which his or her claim is resolved along with the claims of others who have a similar cause of action against the defendant. Class action procedures exist in varying forms in most legal jurisdictions. In New Zealand such procedure is accommodated in Rule 78 of the High Court Rules.

The underlying concept of the class action - a single individual acting as the representative of many - raises unique issues in legal systems which are founded on the notion of individuals facing each other with each ultimately rewarded by, and accountable for, his or her actions. This uniqueness combined with the reluctance of legislatures to provide guidance on the substantive issues abounding in this area has subject the rules to the fluctuating development of case law.

This paper suggests that the case law developments in New Zealand have not advanced the rule to a form which maximises the benefits that such procedure can offer. It is suggested that the merits of a widely accessible and expanded procedure outweigh the possible costs of such a development, and that legislative reform of Rule 78 and other obstructive elements is necessary. The paper examines the issues central to the class action question, and suggests solutions appropriate to the New Zealand context.

The question of reform will be addressed with close reference to procedures used overseas and to recent developments and proposals in both Canada and Australia.

While it is possible to have class defendants as well as plaintiffs, the device is most frequently used by plaintiffs and this paper focuses only on that aspect of the law.

2. WHAT IS A CLASS ACTION?

The class action has its origins in the courts of equity. Equity saw the need for a process which avoided large numbers of persons having similar claims from pursuing separate actions against the same defendant. An earlier rule of compulsory joinder which forced all persons interested in the subject matter of the suit to become parties proved difficult to manage in practice. Equity thus responded with the class action. This course of development occurred in both England and America.[1]

The class action was developed as a device by which a single plaintiff could pursue an action on behalf of all persons with a common interest in the subject matter of the suit. The ruling of the court would bind all class members. This was perceived as a means of fostering both judicial economy and social utility - the courts would no longer be inundated with numerous claims relating to a common subject matter, and individual plaintiffs with claims too small for individual pursuit were provided access to the courts. In the United States the class action also served an effective enforcement function, especially in the areas of civil rights, anti-trust and securities law violations.

It has often been mistakenly asserted that class actions and representative actions are different devices. New Zealand and England have rules known as "representative", whereas the United States rules are known as "class". Although different in form, these rules are of identical nature, and are merely specialised developments of the more general class action concept. Thus although the New Zealand rule has special characteristics which appear to distinguish it from the American "class" description, essentially it remains a class action device.

Further confusion of terminology occurs with the distinction between class and derivative actions. The shareholders derivative action is a device which arises out of the exceptions to the rule in Foss v Harbottle.[2] In a derivative action, the plaintiff brings the action on behalf of the company to remedy a wrong done to the company. The confusion in terminology arises because the plaintiff must frame his or her action as representative of all the members of the company rather than the company itself. The action is thus

representative in nature but derivative in form. A more typical representative action involving a non-derivative claim on behalf of the shareholders could occur, for example, where the company proposes to act ultra vires.

3. CLASS ACTION PROCEDURE IN NEW ZEALAND

Class action procedure in New Zealand is more familiarly known as representative procedure. Rule 78 of the High Court Rules provides:

> Where two or more persons have the same interest in the subject matter of a proceeding, one or more of them may, with the consent of the other or others, or by direction of the Court on the application of any party or intending party to the proceeding sue or be sued in such proceeding on behalf of or for the benefit of all persons so interested.[3]

The interpretation of Rule 78 is largely governed by the case law on its precursor, Rule 79 of the Code of Civil Procedure.[4] Rule 78 is little different to Rule 79, and significantly it repeats those characteristics which have seriously detracted from the use of the procedure. English case law has played a substantial part in the shaping of the New Zealand procedure, based on the interpretation of these characteristics in the inherently similar English rule.[5]

The major difficulties with the rule stem from the judicial interpretation of the term "same interest".

The leading case which forms the basis of "same interest" analysis in England and New Zealand is Duke of Bedford v Ellis[6]. In that case, a group of stall holders in a market sued on behalf of themselves and "all other growers of fruit, flowers, vegetable, roots and herbs." The action was intended to enforce various preferential rights the stall holders contended were owed to them. The case resulted in the seminal statement per Lord Macnaghten:[7]

> Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

Lord Macnaghten's formula was not further expanded in the case, but it is clear there is considerable overlap between the three elements in the test.

The number of actions bought under the procedure in New Zealand have been few. The paucity of case law in the area has meant an accurate assessment of when an action is appropriate or is likely to succeed cannot be made, and this acts as a considerable deterrent to the utilisation of the procedure. Many other factors, though, have acted as a disincentive to the bringing of actions in class form. These factors are outlined below. A more thorough examination of the problems and possible solutions is made later in the paper.[8]

The foremost disincentive has been the limitations on the pursuit of damage claims. New Zealand cases have duplicated English restrictions in their interpretation of the requirement of "same interest". This interpretation initially imposed a blanket restriction on the use of the procedure for damage claims, thereby reducing the economic feasibility of the procedure. Although recent case law has somewhat pierced the restriction, the area is still very uncertain and remains far behind the level of utility that has been achieved in the United States with a more liberal approach.

Another factor which acts as a limitation on the use of the procedure is the financial costs involved in bringing an action. The problem arises not so much from the actual expense of the action, but from the "free-rider" notion.

The free-rider effect concerns the unjust enrichment of non-contributory class members. Class actions are brought by a representative plaintiff on behalf of the class. The members of the class, although they may benefit from the action, are under no obligation to contribute in any manner to the litigation. This financial burden on the representative plaintiff exists as a serious disincentive to class actions.

Three main areas of cost are pertinent to the problem: legal costs, party and party costs, and the costs of notice. The New Zealand legal system offers very little to soften these blows on the representative plaintiff. Although many options exist to overcome these cost barriers to litigation, each raises significant questions about who should most appropriately finance an action.

4. THE QUESTION OF REFORM

Any question of altering the existing Rule 78 class action procedure must carefully address what such changes will achieve, and at what cost. In the international context the pace of class action reform is rapid.

In 1982, the Ontario Law Reform Commission of Canada ("OLRC") produced a comprehensive report on class actions.[9] Although the report has not yet been legislatively acted upon in Ontario, the legislative proposal of the Commission remains an intelligent initial source of reference for an examination of this topic.[10]

In Australia, the Australian Law Reform Commission has been working on a document proposing reform since first issuing a discussion paper on the topic in 1979.[11] More immediate changes in Australia include a recent legislative reform of the Victorian and South Australian class action procedures.[12]

The general focus of these international reforms has been to overcome the restrictiveness of the case law by recognising the procedure as a more flexible device, to remove some of the extra-judicial obstacles to the use of the procedure (such as the costs factor), and to make the rules more procedurally express so as to eliminate uncertainty as to the appropriateness of the procedure.

Whether or not an expansion of the procedure to increase its utility is appropriate in New Zealand involves a weighing of the benefits and costs of the use of class action procedure. The benefits and costs will be discussed in turn.

4.1 THE BENEFITS OF EXPANSION

4.1.1 ACCESS TO THE COURTS

Court actions by individual persons on behalf of themselves are often rendered impracticable because the potential costs far outweigh the returns. By combining many of these individually untenable complaints the cost of litigation is dramatically decreased for the plaintiffs, and a realistic access to the courts is created.

It is often argued that increased access to the courts will lead to litigation which ought not to have been brought at all. In other words, the cost system serves the useful and desirable function of weeding out actions which do not deserve judicial attention. Opponents thus contend that class actions should be restricted only to an amalgamation of existing viable individual claims.

The weakness of this argument is the assumption that the viability of an individual claim gives an accurate assessment of its legitimacy and importance. Merely because the cost of bringing a claim makes it untenable does not dismiss its social importance. Indeed, providing access for untenable claims has been described judicially as one of the most important goals of class actions. In Naken v General Motors of Canada Ltd, Arnup J stated:[13]

> [when consumers purchase a defective article]... in many instances the pecuniary damages suffered by any one purchaser may be small, even if the article is useless. It is not practical for any one purchaser to sue a huge manufacturer for his individual damages, but the sum of the damages suffered by each individual purchaser may be very large indeed. In such cases it would clearly be convenient and in the public interest if some mechanism or procedure existed whereby the purchasers could sue as a class.

Thus the vindication of the rights of groups of people without effective strength to litigate is seen as a meritorious step even at the cost of an increase in volume of litigation.

4.1.2 JUDICIAL ECONOMY

There is no disagreement that class actions can achieve judicial economy where numerous individually recoverable claims exist. By litigating multiple small claims as a single action economies can be achieved both administratively and in terms of efficacious use of court time.

This benefit, however, must be viewed as more theoretical than real. The number of cases in which many individually practicable claims exist will be few. The real effect of an expansion will be to stimulate the condensing of

many individual claims which would not be individually pursued. In all likelihood, this would lead to an increase in the amount of litigation.

4.1.3 BEHAVIOUR MODIFICATION

An extended class action procedure can play an important role in the behaviour modification function of justice. The potential for large judgments against the defendant acts as a disincentive to the defendant or other potential defendants from risking or attempting further wrongs. Without this disincentive the wrongdoer can proceed in his or her activities without fear of any judicial recourse.

Some commentators argue that the only proper function of civil litigation is to redress conflicts between parties, and not to discourage future conduct.[14] These opponents argue that the objective of deterrence should be pursued through criminal or quasi-criminal sanctions. However, law is often recognised as having a behavioural responsibility in a much broader capacity.[15]

> The function of a legal system is not limited to its role in providing individuals with a mechanism by which to resolve disputes and redress grievances. Law also serves as a standard of the conduct which the community or the society expects from its members and by the same token, the judicial system should provide realistic sanctions which the community can invoke in order to enforce obedience to its prescribed values and rules of conduct. It seems clear, therefore, that if sellers and manufacturers are, for whatever reason, in practical effect immune from the sanctions of the present legal structure with respect to some claims which might be brought against them, the community has to that extent lost its ability to compel obedience to the standards of conduct it has established.

Any restriction on the degree to which class actions may operate has a commensurate effect on social control through the law. An extension of the class action procedure would both serve as a means of encouraging compliance with the law, and halt the feeling of impotence and dependence on Government intervention which many small claimants suffer.

4.1.4 RESOURCE EFFECTIVENESS

Closely associated with the behaviour modification benefit are the benefits accruing from a more efficient use of resources. Present sanctions for improper actions in company management may be inadequate deterrents in many situations.[16] Penalties are often token in relation to the extent of the improper gains made.

The reality of the situation is that with fixed sanctions of fines or imprisonment, an opportunity is provided for a wrongdoer to weigh the costs of his or her actions. As the OLRC concluded:[17]

> Even where a criminal sanction is available, and a conviction is obtained, there is evidence to the effect that the fines levied in criminal proceedings do not serve to deprive defendants of the fruits of their wrongful conduct or to require them to internalize the costs of the injuries imposed upon individual victims; accordingly, in many cases a conviction may do no more than impose a "licence fee" upon wrongful conduct, which remains sufficiently profitable to justify continued wrongdoing.

If the benefits of the wrong exceed the sanctions then the deterrent and prevention resources of the legal system are being ineffectively utilised. By providing the responsibility of redress to the individuals harmed through a damage claim process, the potential cost of wrongful conduct becomes greater, and resources are being more effectively utilised.

4.1.5 PREVENTION OF UNJUST ENRICHMENT

Equity has continuously devised mechanisms by which to prohibit unjust enrichment, viewing the creation of wrongful windfalls as an action worthy of redress. Without an extended class action procedure, wrongfully obtained profits remain in the possession of the wrongdoer.

The process by which unjust enrichments are extracted from wrongdoers is known as cost internalisation, and involves forcing the defendant to compensate the victims in regard to the degree of damage caused. This redistribution of the

enrichment is seen without disagreement as an equitable and fair action. Thus by extending the class action procedure a more equitable system of redress is created.

4.2 THE COSTS OF EXPANSION

4.2.1 STRIKE SUITS

Class action procedure has sometimes been described as a process for legalised blackmail and an "engine of destruction".[18] These criticisms stem from the perceived potential for class actions to be used as a means of exploitation.

A strike suit describes the process where frivolous or unmeritorious actions are bought with the singular intention of inducing the defendant to settle the claim. The calculation by a defendant to settle for such insubstantive actions is based on a number of coercive circumstantial factors.

First, the large outlay of both time and cost required to defend an action can be a deterrent even when there is a good prospect of a successful defence. This problem is exacerbated in jurisdictions where costs are not awarded to successful litigations. Second, the sheer size of the claims often involved encourages defendants to settle. Even if the defendant is reasonably certain of a favourable outcome, a small degree of doubt can often lead to a settlement when in the context of a multi-million dollar claim. Third, a defendant may be offered the prospect of settling for a very small amount, often with only the class plaintiff in an individual capacity. The small price of this compromise often takes precedence over a formal resolution of the issue. Fourth, even if the defendant is sure of a favourable outcome, there is an extensive risk of adverse publicity. The propensity for newspapers to engage in witch-hunting escalates the potential cost of an action so as to render settlement more favourable. Finally, the defendant must also be concerned with balance sheet implications. The detrimental effect of a large damages claim appearing in the balance sheet discourages defendants from letting the plaintiffs file an action.

Despite these indications of the potential for exploitation by the class, empirical evidence indicates there is "no basis for concluding that class actions are yielding disproportionate numbers of early settlements that might

reflect a pattern of 'legalized blackmail'".[19] Part of the explanation for this lack of exploitation are the mechanisms which can be used to weed frivolous and meritless claims from the procedure. The first is a procedural requirement that the action satisfy certain tests before it can be certified as appropriate for class form. In the United States, a complicated certification process locates the weakness of frivolous claims and prevents them from proceeding into litigation.[20] Second, all civil actions before the courts must satisfy the natural safeguard of being able to state a cause of action. If no reasonable cause of action can be illustrated by the representative plaintiff, then the action can be frozen at an early stage, eliminating most of the financial outlay that the defendant would have been required to make in defence.

The problem of potential defence costs acting as an incentive to settle is often met by the general rule that costs will be awarded to a successful litigant. This means any outlay the defendant makes in defending the action will be ordered to be compensated by the plaintiff. Even where rules prohibiting costs prevent this type of compensation, a more flexible approach could permit such recovery only in exceptional circumstances, such as where a claim is frivolous.

In summary, an expanded class action procedure will not necessarily create a strike action problem if the procedure is drafted appropriately.

4.2.2 UNFAIR SETTLEMENTS

Because of the peculiar representative nature of a class action there exists the possibility of unfair or abusive settlements. These involve settlements made entirely for the benefit of the class plaintiff, and/or the class lawyers.

As the class plaintiff is representative of the interests of the whole class, any settlement the plaintiff reaches should encompass the interests of the class. But often a representative plaintiff may bring a meritorious action in class form, not to benefit the class, but solely to inflate the possible settlement value of the plaintiff's individual claim; or alternatively, where the intentions of the plaintiff are good but the defendant makes a generous offer to induce a rapid settlement with the individual.

This abuse of the class action procedure is unfair not only to the defendant, who may settle for more than the individual claim of the representative plaintiff, but to class members, whose claims are exploited for the personal gain of the representative plaintiff. Although the action could be continued by a new representative plaintiff, this often proves difficult if the representative was so selected for his or her financial or other capabilities.

Settlements favourable to class lawyers can often be more damaging because the whole class is bound by the settlement and cannot pursue the action in court. Solicitors can engage in damaging settlements when their form of payment is by way of contingency fees. This takes the form of a payment of the solicitor only on the result of a successful litigation. To avoid the risk of non-payment, solicitors can be induced to settle the claim for substantially less than could have been awarded through litigation.

This guarantee of payment benefits the solicitor, but is often not in the best interests of the class. This exploitation is often possible due to the misinformed state of most classes.

The problems of unfair settlements are not without remedy, however. A convenient device to overcome this exploitation is to require an informed consent to the settlement before it can be regarded as valid or binding. This informed consent could be either judicial, or from a body such as the law society, and would effectively eliminate this potential problem.

4.2.3 FLOODGATES FEAR

Another significant concern of extending class action procedures is that existing judicial and administrative resources will be flooded by a large quantity of new class actions. This may overload the legal system to the cost of the greater administration of justice.

Many arguments exist to dispute this concern.

First, it is a sound argument that legitimate legal claims should not be sacrificed in order to meet the existing capabilities of the legal system. Thus even if a flood of litigation was imminent, resources should be expanded accordingly, rather than questioning the merits of potential claims in law.

Second, the floodgates concern fails to recognise the many other elements which detract from litigation. Questions of litigiousness, costs, other changes to the form of the procedure, the extent of civil rights provisions in the legal system, and social behaviour trends, all influence the quantity of litigation. The extension of the class action procedure is but one variable in a multi-variable equation and will not necessarily cause any substantial change.

Finally, there is the empirical evidence from the extension of the United States class action procedure in 1966.[21] This major revamping of the Federal Rule was promised to involve a drastic flood of existing legal resources. The flood never eventuated however, and the system quite comfortably accommodated a gentle increase.

Any extension of the class action procedure does raise the possibility of increasing the volume of litigation. But due to the number of variables involved no absolute determination of volume can be made. Although a flood of overloading proportions is not a serious likelihood, this area is still worthy of further investigation in an attempt to determine some indication of possible effects.

4.2.4 MANAGEABILITY

Opponents of an extension of class action procedure also contend that such an extension will encourage unmanageable claims, and will result in procedural innovations of an undesirable character in the process of accommodating difficult damage claims. It is submitted that this is an unlikely consequence due to the strong indications from United States case law as to what procedural innovations are appropriate, and the consequences which follow from them.

4.3 CONCLUSION

Although there are many problems stemming from an expanded class action procedure, closer examination reveals that many of the costs are more severe in theory than in reality, and that most of the costs can be controlled or mitigated through carefully drafted provisions within the rule itself. It is

submitted that the significant benefits that can be achieved from a limited and cautious expansion of the procedure outweigh any remaining cost residue.

5. THE NATURE OF THE EXPANSION

The nature of any reform must be carefully assessed. It must take into account the benefits sought to be achieved, the nature and philosophy of the New Zealand legal system, and avoid the pitfalls found in the procedures of other jurisdictions.

The OLRC proposal provides a useful starting point for consideration of the substantive aspects of the rule because of the comprehensive examination of the issues which accompanies the proposal.[22] In addition, comity suggests that any proposals which come from the Australian Law Reform Commission should also be considered. The appropriateness of these proposals to the New Zealand context will be evaluated.

Five main issues require specific analysis in respect of the nature and extent of the reforms. They are: damages and common interest; certification; notice; exclusion from the class; and costs. These issues will be respectively discussed below.

6. DAMAGES AND COMMON INTEREST

The damages and common interest issues are closely connected to each other. The common interest issue involves the degree of common interest that must exist between class members for the procedure to be used. More specifically, whether or not the presence of questions of law or fact unique to individual class members prevents the use of the procedure to resolve questions common to the class. The damages issue involves the case law which has suggested that a class action is never appropriate in a claim for damages because questions unique to each individual class member would always have to be resolved. Whether or not such a blanket prohibition on damage claims is justifiable has been discussed at length in recent case law developments in both New Zealand and overseas.

Because the overseas case law has had such a formative effect on the development of the New Zealand procedure, it is appropriate to examine the

furor of activity that has occurred overseas before looking at the New Zealand context. In each jurisdiction examined the history of the damage restrictions will be discussed, and an indication will be taken from the current case law as to the extent of reform necessary in New Zealand.

6.1 ENGLAND

Rule 12 of the English Supreme Court Rules provides:[23]

> (1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in Rule 13, the proceedings may be begun, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all except any one or more of them.

The difficulty in respect to the damages and common interest issues arose out of the same interest requirement in Duke of Bedford v Ellis.[24] The definition required that class members have a common interest, a common grievance, and be seeking relief that was beneficial to all class members.

The most influential case to develop this requirement was the Court of Appeal in Markt & Co v Knight Steamship Co Ltd.[25] The case concerned the loss of cargo aboard a ship sunk during the Russo-Japanese war. The plaintiffs sued for damages on behalf of themselves and all other cargo owners. The Court held that the case could not proceed as a class action. Two reasons were apparent in the judgments.

First, each of the members of the purported class had separate contracts with the owner of the vessel and therefore did not meet the test that each person must have a "common interest".

It is submitted that this reason is difficult to accept. The substance of each contract may have been different, but there existed issues common to each member of the class which could appropriately have been resolved in common proceedings. The fundamental misjudgment that the Court made was to view class actions as only appropriate where all or substantially all of the issues were common to all of the members. Buckley LJ was the only member of the Court that recognised what later became known as the two stage process,

whereby the court resolved in common proceedings those issues common to the class, and in separate individual proceedings resolved the individual issues. Buckley LJ stated that if the action had distinguished between those persons shipping contraband items and the others, then the interests of the class could be the same, and a declaration of liability could be obtained followed by "further steps such as are always necessary in a representative action to give to the represented parties the particular relief to which each is entitled".[26]

Second, Fletcher Moulton LJ held:[27]

> Where the claim of the plaintiff is for damages the machinery of a representative suit is absolutely inapplicable. The relief which [the plaintiff] is seeking is a personal relief, applicable to him alone, and does not benefit in any way the class from whom he purports to be bringing the action.

The underlying notion in Fletcher Moulton LJ's reasoning is that a claim for damages involves issues specific to each plaintiff and that a representative action would be inappropriate because of the diversity of interests that would necessarily be present in any class.

This decision had a profound effect on class actions in England, restricting classes to non-monetary remedies. With injunctions and declarations as the only available relief, the economic feasibility of instigating a class action was diminished.

The prevailing influence of Fletcher Moulton LJ's judgment is puzzling when the circumstances are considered closely.

First, accepting that the basis for the decision was to prevent the use of class actions where there was a diversity of interests, the Lord Justice took the dicta much further than was appropriate by advocating a blanket prohibition for damage claims. This ousted damage claims even in situations where all the issues were sufficiently common, such as shareholders' actions against the company where the issue of liability is the same for the whole class.

Second, the judgment was inconsistent with the earlier decision in Duke of Bedford which stated that class actions are a device of efficacy and were to remain flexible tools of convenience.[28] This was aptly stated in Taylor v Salmon:[29]

> I thought it the duty of this court to adapt its practice and course of proceeding as far as possible ... and not, from too strict an adherence to forms and rules as established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy.

However since 1970 there has been an indication that the influence of Fletcher Moulton LJ's views may be coming to an end.

In the 1970 case of John v Rees[30] the Court re-emphasised the idea of flexibility expressed in Duke of Bedford v Ellis. The case involved a representative action by a member of the Pembrokeshire Divisional Labour Party on behalf of all other members challenging the validity of certain executive appointments within the Party's ranks. The procedure was described as "being not a rigid matter of principle but a flexible tool of convenience in the administration of justice."[31]

More importantly, there has been considerable substantive development in the case law. In the landmark case of Prudential Life Assurance Co Ltd v Newman Industries Ltd[32] the representative plaintiff instigated a class action on behalf of all the shareholders in Newman Industries Limited for a declaration that the defendants had committed certain frauds and breach of duty causing them monetary loss. It was an action for declaration of entitlement to damages.

In this case Vinelott J adopted the two stage approach suggested by Buckley LJ in Markt. The Court sought to overcome the objections raised by Moulton LJ that damages were of a personal nature inappropriate to class treatment by creating a simple three stage test. First, no order would be made in favour of a representative plaintiff if the order could have the effect of conferring on a member of the class a right he or she could not have asserted in individual proceedings. Second, no order would be made in favour of a representative plaintiff unless there was some element common to the claim of

all members of the class represented. Third, the court must be satisfied that it is for the benefit of the class that the plaintiff be permitted to sue in a representative capacity.

Vinelott J thus maintained the restriction on the award of the damages due to the requirement of individual proof for its determination. If a class award was made when individual proof of liability was necessary then some individuals may be wrongly conferred a right to damages. But it was possible to permit the action for a declaration of entitlement to damages where there were common liability issues to be resolved. Individual proceedings could then proceed on the basis of this declaration:[33]

> Normally ... if not invariably, the only form of relief that will be capable of being obtained by the plaintiff in his representative capacity will be declaratory relief. A person coming within the class will be entitled to rely on the declaration [as to damages] as res judicata, but will still have to establish damages in a separate action.

This two stage process thus allowed a partial use of the class action process in damage recovery, and was an important step forward. Although the decision of Vinelott J in favour of the plaintiff was later reversed in the Court of Appeal,[34] the issue of the class action damages award was not considered there. Thus Vinelott J's decision still stands, though of limited influence as it remains a first instance ruling.

The Court of Appeal decision did, however, restrict the ambit of the class procedure to a plaintiff recovering damages resulting from a personal wrong committed by the defendant. Wrongs committed by the defendant which affected the shareholder through the effects on the company were derivative and not personal, meaning no form of individual liability existed, and hence no class action could be pursued.

The next notable achievement towards damage recovery came in 1981 in the case of EMI Records Ltd v Riley.[35] In EMI, the two stage process adopted by Vinelott J was discarded, the Court instead favouring the possibility of a direct award of damages. The case involved a representative action for an inquiry as to damages by members of the recording industry over breaches of copyright by a cassette pirate. Dillon J distinguished the restriction

Prudential had maintained on the awarding of damages by contending in the circumstances the two stage process would be impractical. Individual proof by members of the industry would be extremely difficult, and as all members belonged to the representative body, the British Phonographic Industry ("BPI"), an award to this body in a representative capacity would be most practicable. Dillon J stated:[36]

> It would seem to me that it is appropriate that damages should be recovered by the plaintiffs in the representative capacity in which they are entitled to sue for an injunction, and it would be a wholly unnecessary complication of our procedure if the court were to insist that for the purposes of the inquiry as to damages, all members of the BPI must be joined as co-plaintiffs or ... issue separate writs.

This is a strong, if somewhat amorphous, recognition that in some instances a class action for damages may be resolved in a single class proceedings. As with Prudential, however, EMI is only a first instance decision, and does not necessarily reflect the future of the case law. Another first instance case marginally preceding EMI adhered to the Markt approach.[37] This leaves the area still considerably uncertain, and ripe for legislative activity.

6.2 CANADA

Class action procedure in the various Canadian provinces has followed a path of development similar to that in England. The Ontario procedure will be used as a basis for discussion due to the extensive class action reforms proposed there by the Ontario Law Reform Commission (OLRC) in 1982,[38] and the utility of this study in an analysis of the inherently similar New Zealand rule.

Rule 75 of the present Ontario Rules of Procedure provides:

> Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorised by the Court to defend on behalf of, or for the benefit of all.

Canadian courts were for many years burdened by the constrictive Markt decision in their interpretation of same interest. No class actions for claims for damages were permitted. But in the 1970s, social pressures

impressed the judiciary with the necessity to develop a representative procedure. The result was a change in the climate which favoured a case law development of the class action procedure.[39]

In Farnham v Fingold[40] the Ontario Court of Appeal pierced the blanket restriction to examine whether a claim for damages involved issues specific to each class member. The action involved a twenty-five million dollar damage claim by minority shareholders in the company. The cause of action arose because the defendants allegedly failed to inform the plaintiffs of a third party's offer to purchase the Company at share value plus premium. The Court granted leave to file a class damage claim because the assessment of damages to the class was not dependent upon the need to resolve individual issues. Jessup JA stated:[41]

> In the present case it is clear from both the respondents arguments that the only damages alleged by the plaintiff to have been sustained by the class he represents, including damage for conspiracy, is the gross premium above market price received by the controlling shareholders on the sale of their shares to Stanton Pipes Limited and that the individual entitlement of members of the class is simply to a pro rata share of such gross premium.

Five years later further restrictions on damage claims were temporarily swept away by the Ontario Court of Appeal. In Naken v General Motors of Canada Ltd[42] a group of representative plaintiffs pursued an action for damages on behalf of every purchaser of a certain model of a General Motors car. Counsel for the class attempted to bring the case within the principles adopted in Farnham, by claiming that all class members had suffered identical damages of $1,000 in the form of depreciation. The Court of Appeal accepted this contention, but held that individual proof would still be necessary if the Court required each member to establish reliance.

This posed a dilemma to the Court: to oppose an award of damages to class members because of the presence of individual issues (in the knowledge that individual pursuit of the individual issues would be largely impracticable) or to allow the class action to continue and by some means overcome the individual requirements. The Court of Appeal chose to allow the claim for damages to continue as a class action. Arnup JA specifically stated that the

social utility of access to justice played a major role in this decision.[43] However, this step required a major degree of procedural innovation. The solution was that the common questions of liability would be dealt with by the Court, and following a favourable determination for the plaintiff the individual issues could then be examined by a Court appointed referee.

This had the dual effect of permitting class actions even where individual issues were present, and providing a means for resolution of individual issues that avoided the impracticability of additional individual claims.

This development was short lived. In two subsequent decisions the Ontario Court of Appeal itself rejected the use of such procedural innovations, and refused to allow class proceedings for damage awards in situations where individual proof was necessary.[44]

The final demise came when the Supreme Court of Canada ruled on the Naken appeal[45] and the decision of the Court of Appeal was overruled. The Supreme Court held that class actions for the award of damages would not be permitted where individual proceedings were necessary to establish the total liability of the defendant. Although this limited the potential for the pursuit of damages, the restriction was not a total prohibition. If the total amount of the defendants liability to the class can be established through common proof, then the action may proceed by way of class action. This decision draws the Canadian case law to a position similar to that established by the Prudential decision in England.

6.3 UNITED STATES

Class actions are frequently (some would say too frequently) utilised in the United States. Although many varying forms of class action exist at the state level, the most litigated provision is that which operates in the Federal courts. Rule 23 of the Federal Rules of Civil Procedure[46] distinguishes itself from the rules of the other jurisdictions discussed through its address of significant class action issues and comprehensive code of procedural requirements.

One of the major distinguishing factors of Rule 23 is its preliminary requirements that the action is one appropriate to the procedure. The

appropriateness requirements form a certification stage before the issues are heard. This provides a safeguard for both defendants and class members against the problems of inappropriate use of the procedure.

One of the appropriateness requirements establishes a preliminary test for class actions for damages. Rule 23(b)(3) requires the satisfaction of two factors.

The first is known as the predominance factor. This factor has the effect of excluding actions which do not involve a predominance of common issues. What constitutes predominance has not been clearly enunciated in the case law. However, it has been decided that the need for individual proof in claims for damages does not destroy predominance if common issues of liability are predominant.[47]

The second is known as the superiority factor. If the court can determine another procedural method for disposing of the claim which is more efficient than a class action, then a class action will not be certified. This requirement has also been the subject of much conflicting case law.[48]

These preliminary procedural questions form an initial hurdle for any damage claim to get over. It is suggested that the rule may have become top heavy in that too many procedural questions are forced before the courts before the action can proceed. This inevitably makes the procedure a very protracted and expensive option. The uncertainty resulting from the conflicting case law has also created a problem for potential litigants.

Despite these obstructions, however, the United States attitude towards damage claims has been far more relaxed than the English model.

First, Rule 23 expressly recognises that the presence of individual issues within the class claim does not restrict the use of class procedure.[49]

Secondly, the courts have made efforts to expand the utility of the procedure to cover claims even where individual issues would need to be resolved in order to determine the total extent of a defendant's liability. In other words, courts have not been overly concerned with the notion of conferring on

the defendant a liability he or she may not have incurred if individual actions were bought.

When faced with actions involving individual issues essential to the liability determination, the courts have adopted some unique and controversial solutions. Among them include the idea of conducting mini individual trials within the body of the class action and the possible use of a referee or similar impartial adjudicator to resolve those issues. This process is known as the split trial, and was a development which was rejected by the Naken[50] case in Canada. This technique, however, is subject to its own manageability limitations, and is often ineffective where the class is very large, where the identity of all the class members is not known, and where the split would cause the action to be unduly protracted.

Perhaps the most graphic example of the United States attitude towards damage recovery and the courts flexibility towards the issue, is the concept of punitive estimated awards. Where it would be impracticable or impossible to resolve in separate actions those questions unique to individuals, the courts have approved the use of computers and survey techniques supported by expert evidence to compute the loss suffered by the class.[51]

One of the most controversial estimation methods has been the "fluid recovery" approach. In Daar v Yellow Cab Co[52] an action was bought on behalf of all the passengers of a taxi company to have used the service over a specified period during which the Cab Company was unlawfully overcharging. The Court recognised the overcharge was incapable of individual assessment, and indeed the class members were incapable of identification. However, the Court was concerned with the punitive notion of the action, and ordered the Company to reduce its fares by the overcharge amount over an equivalent time period. This resulted in many persons who were not members of the class recovering under the action, but had the desired punitive effect on the Company. The case was quite exceptional, however, and has met with little judicial acceptance.

In summary, case law treatment of claims for damages where individual issues are involved has been innovative as the courts have sought to give the procedure an extensive ambit of utility. The concept of punitive estimated

damages has gained much case law support, though some aberrant decisions have taken the concept to unfavourable extremes.

6.4 AUSTRALIA

As in Canada, the Australian class action procedures differ among the various states. They are all derived from the English rule, however, and contain the undefined "same interest" component.

The early case law developments in England again provided the basis for interpretation of the rules. The recent developments of Prudential and EMI have not yet been judicially commented upon in Australia.

The restrictiveness that resulted from the Markt case was to the detriment of many actions which should have had the opportunity of legal recourse. This was the view of the Australian Law Reform Commission which proposed amendment to the class action procedure in 1977.[53] Although not adopted on a national basis, steps have been taken in both Victoria and South Australia to reform their respective class action procedures.[54]

It is submitted that the intent of the reforms was to deal with the restrictive elements raised in Markt.

The South Australian reform[55] expressly states that class proceedings will not be inappropriate for the resolution of common issues merely because the actions arise out of separate transactions, or that there is a claim for damages that would require individual issues to be resolved. The rule also expressly recognises a two stage resolution process whereby common issues would be resolved in class proceedings, and individual issues would be resolved in separate actions or separate trials within the actions.

The Victorian reform[56] is more restrictive. It is submitted that it allows resolution of common issues when individual issues remain outstanding, but requires the common issues to arise from the same series of transactions. In the context of the reforms, however, it is suggested that this restriction is likely to receive a generous case law interpretation and will not manifest itself as a hindrance. Its purpose is merely to ensure that there is some degree of commonality to all the class claimants.

In terms of class actions for damages, the most significant part of the reforms is the high degree of procedural flexibility given to the courts. Both states allow the courts to fully determine the conduct of the action. It is submitted that this may be the device by which the courts open up the procedure to allow total resolution of damage claims containing individual issues. Whether or not this would involve a descent into some of the United States excesses, or would merely involve a step towards estimated damages, is open to speculation.

It is also important to note that without some form of commensurate changes to other factors which deter the use of the procedure (such as the costs structure), the reforms may only be of limited effectiveness in achieving the benefits that can accrue from an expanded procedure.

No case law has yet determined the efficacy of the changes.

6.5 NEW ZEALAND

The treatment of damages and common interest in New Zealand was for many years in line with the English approach.

In the case of Taka Kerekere v Cameron[57] two tenants seeking to represent many other tenants sued for damages for trespass. Chapman J rapidly dealt a severe blow to the future of class actions in New Zealand by adopting without analysis the reasoning of Moulton J from Markt. He held: "A representative action is inappropriate to the settlement of numerous claims for damages".[58]

In Morgan v Taranaki Farmers Meat Co Ltd[59] 112 shareholders attempted to bring a representative action claiming damages for rescission of a contract to take up shares and other relief. The action was struck out by Ostler J on the basis of unspecified authorities.

This ended the early history of the representative action for damages in New Zealand. The renewed activity in the field of class actions in the overseas context has sparked a new judicial approach to the device in recent years, however.

In the case of The Auckland Paraplegic and Physically Disabled Association Incorporated v South British Insurance Co Ltd and Others,[60] the damages issue was discussed by Barker J. In an earlier application the applicant had claimed to be entitled to sue the defendant as representative of all the creditors of the Securitibank group. Motions were filed by the defendants seeking orders that the reference to the representative capacity in the pleadings be struck out. The applicant subsequently consented to such motions. The defendants, however, went on to claim costs in relation to the class procedure application. This involved Barker J having to determine the propriety of bringing the action in class form in the course of making a judgment on the costs question.

Although indicating that in the circumstances the multiple and diverse interests of the "class" members were too wide to constitute a single class, Barker J, whilst stating that he was not deciding the question, proceeded to recognise the developments in the Prudential case. He said:[61]

> It seems that, as the law is developing as shown by the Prudential case, representative action can be brought for a declaration that a tort has been committed in given and typical circumstances. However,...the Court will need to ensure that every claimant, with facts peculiar to him, must prove his cause of action, even though he may obtain some advantage from a claim made in a representative capacity.

The issue was not discussed again until 1986, by which time there had been further progress in England in the form of the EMI decision. In the cases of R.J. Flowers Limited v Burns[62] and E.L. Fairey & Sons v Palleson Farm Limited and Another[63], McGechan J decisively broke new ground in the use of the device in New Zealand.

The cases involved the cool storage of quantities of kiwifruit. The Defendant had contracts with many growers of fruit. The action arose from an allegation that the Defendant allowed the temperature of the store to negligently fall to a damaging level. The Plaintiffs applied to the Court for an order that each Plaintiff may take representative proceedings.

In determining how the new Rule 78 should be interpreted, McGechan J made express reference to the High Court Rule 4 requirement that all rules be

interpreted to secure the "just, speedy, and inexpensive determination of a proceeding". Focussing on the need to fashion the rule to apply and develop it to meet modern requirements, he said:[64]

> the approach to this application should be liberal ... if injustice can be avoided the rule can and should be applied to serve the interests of expedition and economy, both indeed the underlying reason for its existence.

The conclusion McGechan J came to on the basis of the English developments was that a class action was appropriate if:

1. Members of the class had a common interest in the proceedings, and each must have been able to claim as plaintiffs in separate actions in respect of the event concerned.

2. The action was beneficial to all of that class.

3. The action covered virtually the whole of the class of potential plaintiffs.

Where a claim for damages existed a class action was appropriate if:

4. The global loss of all represented members could be established.

5. The consent (or implied consent) of all represented members to the payment of global damages was established.

It is submitted that the result of his analysis is that where individual issues are present (thus necessitating individual proof) an action for damages can only be resolved in respect of those individual issues where the need for the individual proof can be made superfluous by the provision of global proof. A judgment based on global proof must not confer any additional right on any individual member of the class. That is, it must not impose any unjustified burden on the defendant. Indeed, McGechan J expressly commented : "The traditional concern to ensure that representative actions are not to be allowed to work injustice must be constantly kept in mind".[65]

Where individual issues cannot be resolved by global proof, it is submitted the McGechan analysis would allow the action to proceed in respect of those common elements only. The res judication established could then aid the rapid resolution of the individual issues in separate actions.

Concerning the question of whether the existence of separate contracts prevented the use of class proceedings, McGechan J did not treat the presence of separate individual contracts with the defendant as an impediment in itself. The Court was only concerned with the presence or not of common questions of law or fact for every member of the class.

The decision of McGechan J is first instance only and there exists a recent English case inconsistent with his findings.[66] The future of this current development is uncertain. It is submitted that some form of legislative action is necessary to bring a degree of certainty into the area.

6.6 CONCLUSIONS

It is submitted that the following ideas flowing from the case law should form the basis of a new provision in New Zealand.

First, class actions should not confer on a class member any right or remedy he or she would not have had if an individual action had been brought. This reflects the basic precept that no person should benefit from or impose a penalty on another without an appropriate cause of action. To this extent, class actions should be considered inappropriate in any instance where the ruling of the court is on any issue where common interest does not exist.

Second, despite the existence of individual issues or parties infected by issues not common to the representative plaintiffs, a class action should still be able to be brought in relation to only those common elements of the claims. This allows the advantages of class actions to accrue to the plaintiffs in the form of a res judication on the common issues.

If individual issues are present in a damages claim it is necessary that the whole action be resolved as a two stage process, with separate actions brought to resolve the individual issues. If, however:

1. The total liability of the defendant can be determined without the need for reference to individual issues, and the group structure of the class makes a class award appropriate; or

2. The individual liability to each member of the class can be determined also without the need to resolve individual issues (and hence no need for individual proof);

-then a class procedure would be appropriate and could resolve the action in a single stage.

The United States case law, however, goes significantly further than this and has expanded the ambit of the rule to accommodate damage claims for amorphous classes even where global liability could not possibly be assessed by normal methods. This has been achieved through a willingness of the courts to estimate damages.

The OLRC also recognised the need for a large degree of procedural flexibility, and proposed a procedural discretion that would allow the courts to adopt the split trial approach developed in the United States, whereby the courts can determine individual issues within the body of the class action.[67] The proposal suggests the courts may conduct such proceedings alone or with other judges of the court, or appoint one or more persons to resolve the issues by way of inquiry and report.

It is submitted that this proposal is a meritorious compromise between the excesses of the United States expansion and procedural innovations, and the restrictiveness and limited utility of the present New Zealand rule and case law. The emphasis of the discretion is revealed in section 31(2), which states:[68]

> In giving such directions [as to the individual proceedings] the court shall order the simplest, least expensive and most expeditious method of determining the issues that is consistent with justice to the members of the class, the defendant and the representative plaintiff, including dispensing with any procedure that it considers unnecessary and directing special procedures regarding such matters as discovery, admission of evidence and means of proof.

It is submitted that the movement towards the split trial concept is desirable in respect of the need to maximise the benefits which the procedure can nurture. However, it must be recognised that the breadth of the discretion given to the courts to conduct the proceedings may be a Pandora's Box in respect of the questionable procedural innovations which were spurned from the United States obsession with widening the rule and using it as a punitive device. If such was the case, then the legislature should be prepared to partake in further reforms to control the extent of the discretion, perhaps at the cost of the accessibility of the procedure.

7. CERTIFICATION

The process of certification is the means by which the courts determine at a preliminary stage whether an action should be brought as a class action. It exists as a safeguard against the unnecessary and often exploitative costs of unmeritorious actions, and allows the procedural issues to be resolved before the action is actually commenced. It is submitted that this safeguard is appropriate, as the certification test can examine not only questions related to the "same interest" issue, but other factors that may indicate an action is not suitable for the class procedure. In this respect, the OLRC proposal provides a suitable structural framework for a certification test. Much of the content of the proposal, however, is of questionable suitability to New Zealand. Each of the five requirements of the proposal will be discussed in turn.

1. "The action is brought in good faith and there is a reasonable possibility that material questions of fact and law common to the class will be resolved in favour of the class".[69]

It is submitted that the former part of the rule is justified because it prevents unmeritorious strike actions; and helps to control the increase of pressure on the administration of justice. It would be hoped, however, that most actions brought without good faith would be weeded out before this stage through a lack of a cause of action.

The criticism of this provision is in respect of the latter part. Although it reflects the need to protect the defendant from the considerable consequences

of even an unsuccessful action, it imposes an additional burden on the plaintiff and requires the courts to hold a "mini-trial" of sorts in advance of the main action. It is submitted this element is undesirable in that the cost to the plaintiff betrays the precept that a plaintiff need only establish a cause of action before the merits of the case are examined by the courts.

2. "The class is numerous".[70]

This requirement contains all the ambiguities contained in the United States rule, offering no guidance as to what size class constitutes numerosity. The existing New Zealand rule requires only "two or more persons", achieving certainty with a minimum requirement. It is submitted that this certainty provides the better option, and if for small classes a process of joinder would be more efficient this can be caught by that part of the OLRC proposal which requires the class action to be superior to other methods of resolution.[71]

3. "There are questions of fact or law common to the class".[72]

This requirement is carried over from the United States provision requiring some commonality of issues which warrants pursuing the action in class form. This would replace the "same interest" requirement in the New Zealand rule which generated the difficulty in regard to the pursuit of damages.

The major problem with this provision is its failure to define the <u>number</u> of common issues that must exist. It is submitted that there need only be one issue common to the class for the social benefits of a class action to accrue. However, it is suggested that in the interests of pragmatism and efficiency there should be included a test that the issue be one of "significance".

4. "A class action would be superior to other methods for the fair and efficient resolution of the controversy".[73]

This superiority evaluation focuses directly on the comparative merits of pursuing the action in class form. Such a test has numerous justifications and is essential in the certification process. First, the greater administrative burden imposed by widening the class action ambit warrants that

the pursuit of the claim in class action form is truly superior. Second, any innovations to the cost system resulting in substantial benefits to those pursuing class actions would warrant being restricted in use to the most suitable claims. Third, class actions involve a determination of issues on behalf of unrepresented parties. Because they involve this added responsibility class actions should afford the absent members greater security by requiring a class action is the superior method.

5. "The representative plaintiff would fairly and adequately protect the interests of the class".[74]

This requirement comes directly from Federal Rule 23. The OLRC viewed an adequacy requirement as an essential component of the certification stage. A basic tenet of the New Zealand system of justice is that no person should have his or her rights determined without being afforded an opportunity to be heard. Because class actions may involve decisions being made for absent or unascertained class members by which they will be bound, it is an essential safeguard that the representation of the class is adequate.

Fundamental to this protection are the factors the courts must address to decide the adequacy of the representation. Important issues which any New Zealand proposal should aim to cover would be: whether the plaintiff should be a member of the class; whether adequacy considerations should be influenced by the adequacy of the class solicitor (and, if so, how is that measured); whether the financial position of the plaintiff should have any effect; and the degree of difference in interest there can be between the class and the representative. The failure to address these questions in the United States provision has resulted in a degree of case law uncertainty that should be avoided.

One of the more contentious aspects of the OLRC proposal was the inclusion of a cost-benefit analysis. This comes as a second stage to the certification test, and provides the courts with a device to deny certification where the detriment of bringing the action in class form outweighs the benefit. The provision reads:[75]

> Where the court finds that the conditions set out in subsection 3(3) have been satisfied, it may nevertheless refuse to certify the action as a

> class action if, in the opinion of the court, the adverse effects of the proceedings upon the class, the courts or the public would outweigh the benefits to the class, the courts or the public that might be secured if the action were certified.

This provision thus permits exclusion even when no alternative access to the courts exists for the individuals.

Certain criticisms can be levelled, however, in response to the vagueness of the considerations that the courts must take into account. It has been argued that the test requires "a measurement and then a weighing of factors that are enormously difficult to measure and virtually impossible to compare".[76] In practice, such difficulties may lead to a vein of uncertainty within the rule. The pragmatism of the provision is also open to criticism. Even if a claim is administratively unworkable by present standards, if it is a meritorious claim there is a sound argument for adapting or remoulding the legal system with a view to accommodation. The courts should not be given licence to avoid administrative inefficiencies.

On balance, however, it is submitted this is a pragmatic test that must be accepted in a legal system with finite resources. If the courts are deprived of the power to exclude administratively unmanageable claims there will be a constant struggle to arrive at methods of accommodation. Such efforts may result in bizarre and undesirable procedural innovations. This is one of the failings of the United States provision, where the absence of such provision has forced both procedural innovation and a misshaping of the literal construction of the rule to facilitate exclusion.

8. NOTICE

The question of notice refers to the process by which members of the class receive advice that an action is being pursued on their behalf. The need for notice derives from the fact that once decided, the ruling of a court binds the whole class. Thus if a class representative could bring an action without the knowledge of the class members, and achieve a result which would prohibit individual pursuit of the action, a fundamental injustice could occur. For this reason a suitable notice provision is essential to provide the class members an opportunity of deciding their loyalties to the class.

In New Zealand, Rule 78 provides little guidance. If the action proceeds on the basis of the consent of the class members, then, by definition, notice has been given. However, where the plaintiff seeks to bring the action by the judicial consent option, notice is not explicitly required. One assumes the rules of natural justice extend to notice in such situations but no standards are provided for how notice should be given.

In the United States, the case law has established strict requirements in respect of the unspecific Federal Rule requirement of "the best notice practicable".[77] In Eisen v Carlisle and Jacquelin[78] the Supreme Court held that if individual class members were identifiable, notice must be given to each individual irrespective of other impracticabilities such as cost.

The OLRC proposal involves a more flexible requirement.[79] Both the giving of notice and the form it takes are a discretionary option that the courts must examine. The courts may take into account such factors as the cost of giving notice, the nature of the relief sought and the total amount of monetary relief claimed.

The primary concern with the creation of such a discretionary notice provision is the vast area of uncertainty for the plaintiff in terms of the potential cost of the action.

Some advantages over a mandatory provision do exist, however. The mandatory notice provision in the United States is a cumbersome problem which has deterred many claimants. Because the courts cannot determine the appropriateness or form of notice in regard to the circumstances of each case, the burden of notice is often inflated and unnecessary. The factors the courts may take into account in the OLRC proposal are designed to require individual notification only in cases where the seriousness or importance of the action warrant it. Thus although the Canadian approach may somewhat compromise the right to be informed of the action, it is submitted it is beneficial in its pragmatic facilitation of access to justice.

9. EXCLUSION FROM THE CLASS

Part of the function of providing notice to the potential class members is to enable them to decide whether or not to participate. As any class action ruling will bind all the class members, the potential members must make a decision whether or not they wish to be part of such an action. The notification provision can be drafted in two ways, however. It can automatically include the member unless he or she expressly opts out. Or alternatively, it can automatically exclude the member unless he or she expressly opts in.

The existing New Zealand provision is silent on this point, and the issue has not been discussed in case law.

The question of which is the superior alternative is a difficult issue to resolve. Opting in is criticised for its exclusive effect on apathetic or silent parties. Where damages will be small, the incentive for individuals to commit themselves to involvement will be small. This will have positive effects of reducing the administrative burden caused by an expanded class action procedure, and weeding out frivolous claims. However it also damages the behaviour modification goal by substantially reducing the size of the class or number of actions, and establishes an exclusion clause which effectively sanctions the unjust enrichment of the defendant.

Opting out, by contrast, has the opposite effect, and is the option used in Federal Rule 23.[80] Apathetic or silent parties will be automatically included thus artificially increasing the magnitude of the class beyond the actual level of interest. This has the effect of inflating the level of damages the defendant would otherwise be faced with, thus perhaps forcing behaviour modification beyond the real social requirements. It may also compound or contribute to the administrative stress faced by the courts by bringing inflated actions beyond their realistic size. However, access to justice is greatly facilitated for persons who avoid interaction with the legal system, and most importantly, a more equitable proportion of the unjust enrichment would be extracted.

The OLRC solution to the opting problem was to create a form of opt out scheme.[81] This is distinct from the traditional opt out concept, however, in that the right to exclusion from the class is within the discretion of the

courts. This means, that irrespective of the members' individual desires, they may be bound by the action.

The factors the courts must take into account reflect this concern. They must consider all relevant matters, including: whether members of the class who exclude themselves would be affected by the judgment; whether the claims of the members of the class are so substantial as to justify independent litigation; and whether there is a likelihood that a significant number of members of the class would desire to exclude themselves.[82]

The proposal is of a pragmatic nature in that it seeks to avoid class members opting out and jeopardising the benefits than can be gained by bringing the action in class form. However, it is submitted that the proposal should not be followed in New Zealand. It promotes the punitive aspects of the procedure which, in the United States, has resulted in the class action being used somewhat as an oppressive device.

The foremost function of the procedure should be to provide a means by which parties can receive compensation for wrongs committed against them. That is, the magnitude of the penalty brought against the defendant should reflect the actual degree of harm that individuals feel so motivated to act upon. This means that only an opt in proposal is capable of satisfying both parties' perceptions of justice, and should be the option that is followed.

10. COSTS

The cost of litigating a class action claim can be a major deterrent to the pursuit of any such action. Costs to the representative plaintiff are almost invariably out of proportion to any potential benefit that may individually accrue from the action. This means that the potential benefits of the class action procedure will be eliminated unless there is some mechanism by which representative costs can be controlled. Three types of cost are pertinent to the discussion: legal costs; party and party costs; and the cost of notice.

10.1 LEGAL COSTS

Legal costs are those costs incurred by the representative plaintiff for the services of legal representation. Due to the size and complexity of class

actions, legal expenses tend to be very high. If the representative plaintiff is seeking only a small amount of damages, or is seeking non-monetary relief, it is often not economically sound to pursue the action. Most class actions will be impracticable if plaintiffs must bear their own legal costs.

However, certain solutions exist to overcome this cost burden, one of which operates in the United States and is responsible for inducing many court actions there. The potential solutions are: a form of legal aid; class contributions; and contingency fees. Each will be discussed below in turn.

In New Zealand, the Legal Aid Act 1969 restricts the granting of legal aid to "any person", but excludes "any body of persons" from this term.[83] By definition, this would exclude a "class" from any aid. This has also been the opinion of the English case law, which has precluded classes from an English equivalent of this provision.[84]

Even if legal aid could be granted to a body of persons the strict financial tests imposed by the Legal Aid Act 1969 would preclude all but the most destitute plaintiffs.[85] Particularly in the context of securities laws, it is suggested that plaintiffs having shares in listed companies are unlikely to meet the tests for legal aid, yet the costs are such that even the most affluent shareholder would be reluctant to bring an action.

In Quebec, the legislature took the view that representative actions bring relief to a large number of people for whom the costs of bringing the action would outweigh the benefits.[86] Even though collectively a class could afford to pursue the action, the purpose of the class action reforms is to encourage litigation, a goal which would not be achieved purely through compulsory class contributions. The resulting system was one that provided a form of legal aid to the class, and extracted the value of the aid from any award subsequently made in its favour.

It is submitted, however, that despite the need to facilitate access to justice, legal aid is never appropriate where the cumulative financial means of the body in question is sufficient to bear the cost burden. The use of the State to support actions in these circumstances involves an extensive free rider effect at the cost of the taxpayer, and would also act as an incentive for classes to pursue unmeritorious claims. If classes with genuine claims

wish to pursue the claims through class procedure, it would seem appropriate that the risk of financial investment in the action should fall on those parties who would receive the direct benefit of an award. Although there is an inherent social benefit that stems from the use of the procedure, it is submitted that this is a secondary benefit and should not be seen as a reason for the taxpayer to subsidise the direct beneficiaries.

The free-rider basis on which class members benefit without contribution to the costs of litigation is, it is submitted, a form of unjust enrichment inconsistent with principles of fairness. The most appropriate solution would be to extract the costs of the action from the individual class members. Although this would accord nicely with prevailing social notions of user pays, in practical terms it would have the effect of scaring off class members from participation in the action due to of the potentially high costs involved in bringing an action in class form. However, this effect can also be seen as a benefit in that it acts as a mechanism to weed out non-viable claims and safeguards the defendant.

It is submitted that class contributions are the most equitable means of financing class actions, but they could also operate in conjunction with a form of limited contingency fee arrangements.

Contingency fees in the United States are a tool through which access to the courts is increased. Contingent fees involve a system of conditional payment. Lawyers conduct cases on the understanding that legal fees will be awarded only on the successful outcome of an action. However, there exist many potential detriments and dangers associated with their operation.

One significant problem was aptly stated by Buckley LJ in Wallersteiner v Moir (No 2):[87]

> Under a contingency fee agreement the remuneration payable by the client to his lawyer in the event of his success must be higher than it would be if the lawyer were entitled to be remunerated, win or lose; the contingency fee must contain an element of compensation for the risk of having done the work for nothing. It would, it seems to me, be unfair to the opponent of a contingency fee litigant if he were at risk of being ordered to pay higher costs to his opponent in the event of the latter's

> success in the action than would be the case if there were no contingency fee agreement.

Contingency fees have also been criticized as encouraging a winning attitude to the sacrifice of legal ethics; promoting a conflict of interest between solicitor and client; and encouraging the solicitation of clients and stirring of litigation by solicitors. These undesirable outcomes were the reason for the laws of champerty and maintenance in England, which effectively prohibited contingent fees. Such fees are still not sanctioned by the New Zealand Law Society's Code of Ethics.[88]

The question now to be answered is whether the need for access to representative procedure outweighs the potential abuses of contingent fees. This was the question indirectly faced by the Court in Wallersteiner[89], a case involving a derivative claim. A majority of the Court held that in the case of a minority shareholders action, a contingency fee arrangement could not be justified. However, it was held that the plaintiff would be entitled to full indemnity for his costs from the company. Lord Denning, however, went on to exclude the possibility of a contingency fee system in a wider context on the basis of questionable public policy considerations.

This was not the view taken by the OLRC, who concluded that a representative plaintiff should have a right to enter into a contingent fee arrangement, and the amount of the fee would be a matter for determination by the courts.[90]

The agreement would be subject to strict statutory conditions:

> (3) An agreement...shall not stipulate the amount of the payment either by a gross sum, commission, percentage, salary or otherwise, and any such stipulation is void.
>
> (4) Where the representative plaintiff and his solicitor have made an agreement...the court that has given judgment on the common questions or has approved a settlement shall...
>
> (a) determine the amount of the solicitor's fees and, in addition thereto, an amount that is fair and reasonable compensation to

> the solicitor for the risk incurred by him in undertaking the action on a basis of payment only in the event of success ....

This proposal would effectively control the problem of excessive fee setting by solicitors (such as a percentage of the award), but does not expressly deal with other problems such as solicitation of clients and conflicts of interest. It is submitted, however, that the benefits of contingency fee arrangements far outweigh these more minor problems. They not only facilitate greater access to justice, but they do so by levying the cost of such access on the parties to whom the benefits of a successful action will accrue (that is, the solicitor and the class). They also provide an effective device to ensure only viable claims are pursued, due to the potential cost detriment to the solicitor for a loss in the courtroom. The remaining ethical complications of contingency fees are questions which the legal profession itself should turn its mind to, and should not stand in the way of increased access to justice.

10.2 PARTY AND PARTY COSTS

Party and party costs ("party costs") refer to the legal fees and other costs of the successful party. The award of party costs against an unsuccessful litigant reflects the need to compensate the successful litigant for the burden of bringing or defending an action.

In New Zealand, the awarding of party costs is totally within the discretion of the courts.[91] As a general rule, costs will follow the event, meaning an award for the costs of the successful party will be made against the unsuccessful party.[92]

As with legal costs, this potential consequence has a weeding out effect on actions. As the class is not bound to contribute to any party cost award against the representative plaintiff (as they are not parties to the action), it is unlikely that many representative plaintiffs could be found to bring anything but the most cut and dry actions. This raises the question of whether some form of control on party costs is appropriate in order to greater promote the use of the procedure.

The OLRC favoured the United States practice of not awarding party costs.[93] The proposal varied from the United States model though by providing the courts a discretion to award costs when it would be unjust not to, and in the event of vexatious, frivolous or abusive conduct.

It is submitted that neither the United States rule nor the OLRC proposal is desirable for a New Zealand proposal. The concept behind party costs is that if a disputant chooses to test the claim or defence of another disputant, then he or she must accept the cost of forcing that other party to prove the correctness of his or her assertion. This concept is equally valid in the context of class actions, perhaps even more so considering the large costs required to contest such claims.

It is suggested that the existing New Zealand party costs provision is suitable for a New Zealand class action proposal. Under the present rules, if it appeared that justice would not be well served by the award of party costs a court could simply decline to make any award. This flexibility allows both the underlying concept and the interests of justice to be served.

By avoiding any sheltering of the representative plaintiff from the burden of costs the class is also forced to confront the question of whether or not to make an undertaking to protect the plaintiff against any award. In reality, such an undertaking would necessarily be required before an action could proceed. By forcing the class to make such a commitment, the potential cost of the action is appropriately spread over all those who seek to benefit from its success.

10.3 COSTS OF NOTICE

Although, like legal costs, a successful party can have the cost of providing notice to class members awarded in his or her favour, the difficulty arises from the enormous initial outlay that may be required by the representative plaintiff. The problem is somewhat lessened if the class has undertaken to bear the cost of the action. The question remains, however, whether there should be provision to defer or avoid the enormity of the outlay that may be required of the class (or alternatively, the plaintiff) until the action has been resolved.

The OLRC met part of the cost problem by giving the courts a discretion as to the means of notification. This means the courts may, in certain circumstances, approve a form of notice less expensive than individual communication.[94] The OLRC did not, however, address the more fundamental question of who is to meet the initial outlay of the notice expense, whatever form the notice may take. The presumption would be that this initial cost falls on the plaintiff.[95]

A possible solution would be a discretion for the courts to apportion the cost of notice between the parties as was adopted by the OLRC in its proposal on the costs of general notice.[96] The discretion would be likely to take the form of the preliminary test that was first suggested by the United States case law, involving an examination of the merits of the case and an order favouring the class plaintiff if it appeared there was a reasonable likelihood that the issues would be resolved in favour of the class.[97]

It is submitted that this deferment does not serve the interests of fairness. The defendant should not be burdened with any costs of the other party until the case has been fully heard and the defendant has had his or her opportunity to test the claims of the class. As with the other costs questions, the immediate onus connected to the specific use of class action procedure should fall on the party seeking to gain the benefit from the use of the procedure.

11. CONCLUSION

The current class action procedure available in New Zealand is in need of legislative reform. Considerable benefits can be achieved from a widely accessible procedure, one of the more important being the vindication of the rights of large groups of wronged individuals whose individual claims are untenable. Such a vindication creates accountability for wrongdoers, and forces the cost internalisation of unjust enrichments. Such benefits could be more readily achieved through a re-drafting of Rule 78 to eliminate some of the disincentives to bring actions in class form.

A New Zealand provision should attempt to crystallise the developments in the damages and common interest area which have been recognised in the recent E.L. Fairey and R.J. Flowers cases,[98] and which reflect the current trend of authorities emerging from England and Canada. The United States practice of

estimated damages should be followed to the limited extent approved by the OLRC by giving the courts liberal control over the conduct of the action. A cautious eye would have to be kept on the development of the estimated damage concept to avoid an insidious slide towards some of the United States excesses.

The OLRC proposals on the other major issues provides an appropriate structure from within which to work reforms appropriate to the New Zealand context. A general theme running through the proposals seemed to avoid placing any financial responsibility on the class in respect of the costs faced by the plaintiff. This theme should be rejected in favour of a self help or user pays ethic, which would ensure that those who were to receive the benefit of an action fully contributed to any gains that were to be made.

Class action procedure will increase in significance in New Zealand in the next few years as reforms continue overseas and New Zealanders become more aware of the possible ways to enforce their rights. The attempted use of the device is likely to become more prevalent, especially in the context of creditors and shareholders actions where the economic downturn of the past year has created much corporate instability. This change in social need for a representative device should be taken as an incentive to precipitate movements towards legislative reform in this country.

FOOTNOTES

[1]Ontario Law Reform Commission Report on Class Actions (1982), 5-9

[2](1843) 2 Hare 461

[3]Judicature Amendment Act 1985 (No 2), First Schedule

[4]Code of Civil Procedure, Rule 79:

> Where there are numerous persons having the same interest in an action, one or more of them may sue or be sued , or may be authorised by the court or a Judge to defend in such action on behalf of or for the benefit of all persons so interested

[5]Supreme Court Rules 1965 Order 15, Rule 12; see Appendix 2

[6][1901] AC 1

[7]Ibid 8

[8]Below, 13 et seq

[9]Above n 1

[10]Ontario Law Reform Commission Draft Bill Proposal, 861-878; see Appendix 1

[11]Law Reform Commission of Australia Access to the Courts-II, Class Actions (Discussion Paper No 11, 1979)

[12]Below n 54

[13](1978) 21 OR (2d) 780, 784

[14]J. Scott "Two Models of the Civil Process" (1975) 27 Stan L Rev 937

[15]Jones and Boyer "Improving the Quality of Justice in the Market Place: The Need for Better Consumer Remedies" (1971-72) 40 Geo Wash L Rev 357, 367

[16]For example, the minor fines in ss 58 and 60(2) of the Securities Act 1978

[17]Above n 1, 144

[18]Above n 1, 146

[19]Above n 1, 149-161, 163

[20]Federal Rules of Civil Procedure for the United States District Courts, Rule 23: see Appendix 3; Rule 23(a)

[21]Above n 1, 170-182

[22]Above n 10

[23]Order 15, Rule 12, Supreme Court Rules (England); see Appendix 2

[24]Above n 6, 8

[25][1910] 2 KB 1021

[26]Ibid, 1047

[27]Above n 25, 1035

[28]Above n 6, 4

[29](1838) 41 ER 53, 56

[30][1970] 1 Ch 345

[31]Ibid, 370

[32][1979] 3 All ER 507

[33]Ibid, 520

[34]Prudential Life Assurance Co Ltd v Newman Industries Ltd (No 2) [1980] 3 All ER 354

[35][1981] 2 All ER 838

[36]Ibid, 840

[37]EETPU v Times Newspaper [1980] 1 All ER 1097, 1104

[38]Above n 10

[39]J.K. Bankier, "The Future of Class Actions in Canada: Cases, Courts, and Confusion" (1984) 9 Can Bus LJ 260, 269:

> It is not coincidental that a limited class action renaissance took place in the 1970's, at a time when consumer and environmentalist groups, tenants' unions, and similar organisations had acquired a relatively high profile in Canadian society. The activities of these groups had made it clear to socially conscious judges that existing legal mechanisms were not adequate to permit many ordinary citizens to enforce their legal rights. Accordingly, class actions designed to enforce claims of these kinds subjected the courts to conflicting pressures. Judges were caught between the desire to provide a forum for claims that would otherwise be unenforceable, and their traditional reluctance to engage in judicial creativity in a controversial area.

[40](1972) 32 DLR (3d) 433

[41]Ibid, 136

[42](1978) 21 OR (2d) 780

[43]Ibid, 785

[44]Seafarers International Union of Canada v Lawrence (1979) 97 DLR (3d) 324; Stephenson v Air Canada (1979) 103 DLR (3d) 148

[45]Naken v General Motors of Canada Ltd (1983) 144 DLR (3d) 385

[46]Above n 20

[47]Blackie v Barrack (1975) 52 FR (2d) 904

[48]J.S. Solovy and others Class Actions and Derivative Suits: A Comparative Analysis of the British American Systems (1985), 26

[49]Above n 20, Rule 23(c)(4)

[50]Above n 45

[51]In re Co-ordinated Pretrial Proceedings in Antibiotics Antitrust Actions (1971) 333 F Supp 278, 289

[52](1967) 63 Ca R 724

[53]Above n 11

[54]Supreme Court Act 1958 (Victoria) s 62(1C); Federal Court Rules, Order 6 Rule 2; Supreme Court Rules (South Australia) Rule 34; see Appendix 4

[55]Idem

[56]Above n 54

[57][1920] NZLR 302

[58]Ibid, 303

[59][1935] NZLR 513

[60](1980) unrep, A1367/78 Auckland

[61]Ibid, 48

[62](1986) unrep, A92/85 Napier

[63](1986) unrep, A93/85 Napier

[64]Ibid, 22

[65]Above n 63, 22

[66]Above n 37

[67]Above n 10, s 31

[68]Above n 10, s 31(2)

[69]Above n 10, s 3(3)(a)

[70]Above n 10, s 3(3)(b)

[71]Above n 10, s 3(3)(d); Below, 30

[72]Above n 10, s 3(3)(c)

[73]Above n 10, s 3(3)(d)

[74]Above n 10, s 3(3)(e)

[75]Above n 10, s 6

[76]J.R.S. Prichard "Class Action Reform: Some General Comments (1984) 9 Can Bus LJ 309, 316

[77]Above n 20, Rule 23(c)(1)

[78]Eisen v Carlisle and Jacquelin (1974) 417 US 156

[79]Above n 10, s 16

[80]Above n 20, Rule 23(c)(2)(A)

[81]Above n 10, s 20

[82]Above n 10, s 20(2)(a)-(e)

[83]Legal Aid Act 1969, s 2

[84]Wallersteiner v Moir No 2 [1975] 1 All ER 849, 866

[85]Above n 83, s 17(1)

[86]Above n 1, 711

[87]Above n 84, 859

[88]New Zealand Law Society Code of Ethics para 6.21

[89]Above n 84

[90]Above n 10, s 43

[91]High Court Rule 46

[92]High Court Rule 47; Poverty Bay Electric Power Board v AG (1988) unrep, CP552/87 Wellington

[93]Above n 10, s 41

[94]Above n 10, s 16(3)

[95]This presumption is based on the OLRC proposal that the cost of "general" notice (see above n 10, s 18(4)) may be apportioned between the parties at the discretion of the court. Without such a specific indication to the contrary, it can be presumed the cost of other forms of notice would naturally lie with only the plaintiff.

[96]Above n 10, s 18(4)

[97]It should be noted, however, that this test was rejected by the United States Supreme Court in Eisen v Carlisle and Jacquelin, above n 78

[98]Above, 25

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APPENDICES

APPENDIX 1

ONTARIO LAW REFORM COMMISSION DRAFT BILL

An Act respecting Class Actions

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. In this Act, — Interpretation

(*a*) "certify" means to permit an action to be maintained as a class action, but does not mean to approve the merits of the action except to the extent provided by clause 3(3)(*a*);

(*b*) "class action" means an action certified as a class action by an order made under this Act;

(*c*) "court" means the Supreme Court or a county or district court;

(*d*) "discovery" means examination for discovery or production and inspection of documents under the rules of court, and "to discover" has a corresponding meaning.

COMMENCEMENT OF ACTION

2.—(1) One or more members of a class of persons may commence an action on behalf of the members of the class. — Commencement of action

(2) A person who commences an action under subsection (1) shall be known as the representative plaintiff. — Representative plaintiff

(3) The representative plaintiff shall give notice in writing to the Attorney General of the commencement of the action. — Notice to Attorney General

CERTIFICATION

3.—(1) After the commencement of an action under section 2, the representative plaintiff may apply to the court for an order certifying the action as a class action. — Application for certification order

(2) An application under subsection (1) shall be commenced within 90 days from the day upon which the defendant filed his appearance or from the defendant's default in so doing. — Time for application

(3) Subject to section 6, the court shall certify the action as a class action if the court finds that, — Prerequisites to certification order

(*a*) the action is brought in good faith and there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class;

(*b*) the class is numerous;

(*c*) there are questions of fact or law common to the class;

(*d*) a class action would be superior to other available methods for the fair and efficient resolution of the controversy; and

(*e*) the representative plaintiff would fairly and adequately protect the interests of the class.

Superiority of class action

4. In determining whether a class action would be superior to other available methods for the fair and efficient resolution of the controversy, the court shall consider all relevant matters including,

(*a*) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(*b*) whether a significant number of members of the class have a valid interest in individually controlling the prosecution of separate actions;

(*c*) whether the class action would involve claims that are or have been the subject of any other proceedings;

(*d*) whether other means of resolving the claims are less practicable or less efficient; and

(*e*) whether the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other practicable means.

Adequacy of representation

5. In determining whether the representative plaintiff would fairly and adequately protect the interests of the class, the court may consider whether provision has been made for competent legal representation that is adequate for the protection of the interests of the class.

Costs and benefits of class action

6.–(1) Where the court finds that the conditions set out in subsection 3(3) have been satisfied, it may nevertheless refuse to certify the action as a class action if, in the opinion of the court, the adverse effects of the proceedings upon the class, the courts or the public would outweigh the benefits to the class, the courts or the public that might be secured if the action were certified.

Onus

(2) The onus of establishing that an action should not be certified as a class action by reason of subsection (1) is upon the person so contending.

Order not to be refused

7. The court shall not refuse to certify an action as a class action on the ground only that the relief claimed,

(*a*) includes a claim for damages that would require individual assessment in subsequent proceedings involving the defendant; or

(*b*) arises out of or relates to separate contracts between members of the class and the defendant.

Evidence on application for certification order

8.–(1) Upon an application under section 3, the representative plaintiff and the defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely and in which each deposes that he knows of no fact material to the application that has not been disclosed.

Examination of deponent

(2) The maker of such an affidavit may be examined thereon in accordance with the rules of court as to discovery.

Contents of certification order

9.–(1) An order certifying an action as a class action shall,

(*a*) describe the class on whose behalf the action is brought;

(*b*) describe the nature of the claim made on behalf of the members of the class and specify the relief claimed;

(*c*) define the questions of fact or law common to the class; and

(*d*) state whether some or all members of the class will be permitted to exclude themselves from the class action and specify a date before which such members may exclude themselves.

Amendment of order

(2) The court may at any time amend an order certifying an action as a class action.

Interpretation

(3) An order certifying an action as a class action includes an order amending such an order.

Where class action refused

10.–(1) Where the court refuses to certify an action as a class action, the court may order that the style of cause and the pleadings be amended to eliminate any reference to the representation of members of the class, and the action may proceed accordingly.

Decertification

(2) Subject to sections 13 and 14, where it appears to the court that the conditions in subsection 3(3) are no longer satisfied, the court shall set aside the order certifying the action as a class action, and may make amendments to the proceedings to eliminate any reference to the representation of members of the class, and the action may proceed accordingly.

COMMON AND INDIVIDUAL QUESTIONS

Common and individual proceedings

11.–(1) In a class action, questions that are common to the class shall be determined in common proceedings, and questions that require the participation of individual members of the class shall be determined in individual proceedings under section 25 or 31.

Separate judgments

(2) Where there are common proceedings and individual proceedings, the court may give separate judgments in respect of each.

INTERVENTION

Intervention by class members

12.–(1) In order to ensure the fair and adequate protection of the interests of the class or for any other appropriate reason, the court, at any time in an action under this Act, may permit one or more members of the class to intervene upon such terms and conditions, including costs, as it considers proper.

Intervention by Attorney General

(2) At any time in an action under this Act, the court may invite the Attorney General, or the Attorney General may apply to the court, to intervene concerning any aspect of the action that raises a matter of public interest, including the matters raised in clauses 3(3)(*d*) and (*e*) and in section 6.

SUBSTITUTION OF REPRESENTATIVE PLAINTIFF

Change of representative plaintiff

13. At any time in an action under this Act, the court may, upon finding that the representative plaintiff does not fairly and adequately protect the interests of the class, or will not do so, make an order substituting another member of the class as the representative plaintiff.

Attorney General as representative plaintiff

14. At any time in an action under this Act, if it is in the public interest that the Attorney General act as representative plaintiff and either the representative plaintiff does not or will not fairly and adequately protect the interests of the class or the representative plaintiff consents,

(*a*) the court may invite the Attorney General to be the representative plaintiff; or

(*b*) the Attorney General may apply to the court for permission to be the representative plaintiff.

POWERS OF COURT

Powers of court

15. The court, upon the application of a party or upon its own motion, may make any order under this Act and all appropriate orders determining the course of the action for the purpose of ensuring the fair and expeditious determination thereof, including an order to prevent undue repetition or complication in the action, and the court may impose such terms and conditions upon the parties as it considers proper.

NOTICE

Notice of class action

16.–(1) After certifying an action as a class action, the court may order that notice be given to members of the class informing them of the class action.

Criteria

(2) In deciding whether to order notice under this section, the court shall consider all relevant matters including,

(*a*) the cost of giving notice;

(*b*) the nature of the relief sought;

(*c*) whether the court has determined that some or all of the members of the class may exclude themselves from the class action;

(*d*) the size of the claims of the members of the class; and

(*e*) the total amount of monetary relief claimed in the action.

Method of notice

(3) Where the court orders notice under this section, notice shall be given by advertisement, publication, posting or distribution, unless the court, having regard to the matters set out in subsection (2), orders notice by some other method, including individual notice to a sample portion of the class, and the court may order notice to be given in different ways to various members of the class.

Contents of notice

(4) Notice under this section shall include,

(*a*) a brief description of the class action including the relief claimed;

(*b*) a brief description of the class;

(*c*) a statement that a member of the class will be bound by any judgment on the questions common to the class;

(*d*) if the court has determined that individual members may exclude themselves from the class action, a statement to that effect, indicating how and by what date the members may exclude themselves and the consequences to the members if they exclude themselves or fail to do so;

(*e*) a statement that a member of the class may apply to intervene in the class action;

(*f*) the name and address of the representative plaintiff to which further inquiries may be directed; and

(*g*) any other information that the court considers proper.

Notice following judgment for class on common questions

17.–(1) Where the court gives judgment for the class on the questions common to the class and individual proceedings under section 25 or 31 are necessary, the court shall order that notice of the judgment be given to the members of the class whose participation in such individual proceedings is required.

Method of notice

(2) Unless the court orders otherwise, notice under this section shall be given by mail to members of the class who are identifiable through reasonable means in terms of expense and effort, and by advertisement, publication, posting or distribution to members who are not so identifiable.

Contents of notice

(3) Such notice shall include,

(*a*) a statement informing the members of the class that a judgment on the questions common to the class has been given and that they may be entitled to relief thereunder;

(*b*) a statement informing the members of the class of the steps necessary to establish their claims;

(*c*) a warning that, upon failure to take such steps, the member will not be entitled to relief except by leave of the court;

(*d*) the name and address of the representative plaintiff to which further inquiries may be directed; and

(*e*) any other information that the court considers proper.

General notice

18.–(1) At any time in an action under this Act, the court may order such notice as it considers necessary to protect the interests of the members of the class and the parties or otherwise for the fair conduct of the action, but the court may not order notice under this section for the purpose of requiring members of the class to take active measures to include themselves in the class action before a determination of the questions common to the class.

Criteria

(2) In deciding whether to order notice under this section, the court shall consider all relevant matters including,

(*a*) the cost of giving notice;

(*b*) the nature of the relief sought;

(*c*) the size of the claims of the members of the class; and

(*d*) the total amount of monetary relief claimed in the action.

Method of notice

(3) Where the court orders notice under this section, notice shall be given by advertisement, publication, posting or distribution, unless the court, having regard to the matters set out in subsection (2), orders notice by some other method, including individual notice to a sample portion of the class, and the court may order notice to be given in different ways to various members of the class.

Cost of general notice

(4) The court may determine by whom and to what extent the cost of notice ordered under this section shall be paid, and may apportion the cost between the parties.

Court approval of notice

19. Notice under section 16, 17 or 18 shall not be given unless the court approves its contents.

EXCLUSION

Exclusion

20.–(1) The court shall determine whether some or all of the members of the class should be permitted to exclude themselves from a class action.

Criteria

(2) In determining whether members of the class should be permitted to exclude themselves from the class action, the court shall consider all relevant matters including,

(*a*) whether as a practical matter members of the class who exclude themselves would be affected by the judgment;

(*b*) whether the claims of the members of the class are so substantial as to justify independent litigation;

(*c*) whether there is a likelihood that a significant number of members of the class would desire to exclude themselves;

(*d*) the cost of notice necessary to inform members of the class of the class action and of their right to exclude themselves; and

(*e*) the desirability of achieving judicial economy, consistent decisions, and a broad binding effect of the judgment on the questions common to the class.

Notice of exclusion

(3) Where the court has determined that some or all of the members of the class may exclude themselves, they may do so by informing the court in writing by a date specified by the court of their desire to be so excluded.

Exclusion and judgment

(4) The names of persons who have excluded themselves from the class action shall be set out in any judgment on the questions common to the class or in any settlement of the action under this Act.

Effect of exclusion

(5) A person who has excluded himself from the class action is no longer a member of the class for any purpose and is not entitled to any relief awarded in the class action.

DISCOVERY

Rights of discovery and examination before determination of common questions

21. Before the questions common to the class are decided,

(*a*) the representative plaintiff and the defendant have the same rights of discovery against each other that are available in ordinary actions;

(*b*) after discovery of the representative plaintiff, the defendant may apply to the court to discover other members of the class;

(*c*) in deciding whether to grant leave to discover other members of the class, the court shall consider all relevant matters including,

(i) the stage of the class proceedings and the issues to be determined at that stage,

(ii) whether discovery is necessary for the purpose of the defence on the issues,

(iii) the approximate monetary value of the individual claims, where monetary relief is claimed, and

(iv) whether discovery will result in oppression, undue annoyance, burden or expense for the members of the class;

(*d*) a member of the class is subject to the same sanctions under the rules of court as any party in an action for failure to submit to discovery, except that the court shall not exclude a member of the class from recovery unless it determines that no other sanction is adequate to protect the interest of the defendant; and

(*e*) the defendant shall not by subpoena require a member of the class other than the representative plaintiff to attend to be examined for the purpose of using his evidence upon any motion or application except by leave of the court, and in deciding whether to grant such leave, clauses (*b*), (*c*) and (*d*) apply *mutatis mutandis*.

MONETARY RELIEF

Aggregate assessment

22. In a class action where,

(*a*) monetary relief is claimed on behalf of the members of the class;

(*b*) no questions of fact or law other than the assessment of monetary relief remain to be determined in order to establish the liability of the defendant to some or all members of the class; and

(*c*) the total amount of the defendant's liability, or part thereof, to some or all of the members of the class can be assessed without proof by the individual members of the class with the same degree of accuracy as in an ordinary action,

the court shall determine the aggregate amount of the defendant's liability and give judgment accordingly.

Direct distribution by defendant

23.–(1) Where the court gives judgment under section 22 and the identity of any members of the class and the amount of monetary relief to which each is entitled can be determined from records in the possession, custody or control of the defendant, the court may direct the defendant to make such determinations and, subject to section 45, to distribute the amounts so determined to each class member directly by any means authorized by the court.

Payment into court

(2) Where the court gives judgment under section 22 but no order is made under subsection (1), the court shall order the defendant to pay into court or some other appropriate depository the total amount of the liability so determined.

Direct distribution by court

24. Where the court gives judgment under section 22 but does not order the defendant to make a direct distribution under

subsection 23(1), and the identity of any members of the class and the amount of monetary relief to which each is entitled can be determined without requiring evidence from each such class member, the court shall so determine the amount to which each such member of the class is entitled, and order that the amounts so determined be distributed directly to such class members by any means authorized by the court.

Individual distribution

25.–(1) Except where an order is made under section 23, 24 or subsection 26(1), the court shall afford the members of the class a reasonable opportunity to claim their respective shares of a judgment given under section 22.

Establishing claims

(2) For the purpose of establishing the claims of members of the class, the court shall authorize such procedures as will minimize the burden imposed upon the class members, including the use of standardized proof of claim forms designed to elicit the information necessary to establish and verify such claims, the reception of affidavit, documentary, or other written evidence, and the auditing of claims upon a sampling or other basis.

Average distribution

26.–(1) Where the court gives judgment under section 22 but the circumstances render impracticable the determination of the members of the class who are entitled to share in the judgment or the exact share of the judgment that should be allocated to particular class members, the court may order that the members of the class are entitled to share in such judgment on an average or proportional basis if it is satisfied that failure to so order would deny recovery to a substantial number of class members.

Exclusion from average distribution

(2) Where the court makes an order under this section, the court shall afford members of the class who apply to be excluded from an order under subsection (1) a reasonable opportunity to establish their claims under section 25, and the amount so established and awarded to such class members shall be deducted from the amounts to be distributed under subsection (1).

Cy-près distribution

27.–(1) The court may order that any money that has not been distributed under section 23, 24, 25 or 26 be applied in a manner that may reasonably be expected to benefit some or all of the members of the class, and for this purpose the court may order that any such money be returned to the defendant upon such terms and conditions respecting its use as the court considers proper.

Idem

(2) The fact that an order made under this section may benefit persons who are not members of the class or who have already received monetary relief under section 23, 24, 25 or 26 is not a bar to the making of such an order if the court is satisfied that a reasonable number of members of the class who would not otherwise receive monetary relief will benefit thereby.

Forfeiture to Crown or return to defendant

28. The court may order that any money that has not been distributed under section 23, 24, 25, 26 or 27 be forfeited to the Crown or returned unconditionally to the defendant as the court considers proper.

Notice to Attorney General

29. Before the court makes an order under section 27 or 28 or approves a settlement containing as one of its terms provision for the application of undistributed money in a manner provided for by section 27, notice shall be given to the Attorney General who may make submissions respecting the propriety of such an order.

Individual assessments

30. Where the total amount of the liability of the defendant or part thereof to some or all of the members of the class cannot be determined under section 22 or where the amount of monetary relief to which each member of the class is entitled cannot be determined as a common question, the court shall order individual proceedings for the assessment of monetary relief under section 31.

INDIVIDUAL PROCEEDINGS

Individual proceedings

31.–(1) Where the court determines the common questions in favour of the class, and subsequent proceedings that require participation by members of the class and the defendant are necessary to determine individual questions, the court may,

(*a*) conduct such proceedings alone or with other judges of the court;

(*b*) appoint one or more persons to conduct such proceedings by way of inquiry and report; or

(*c*) on consent of the defendant, and of the representative plaintiff on behalf of the class, order such proceedings and give directions for the conduct thereof.

Directions

(2) The court may give such directions as may be necessary for the conduct of proceedings under clause (1)(*a*) or (*b*), including any directions to achieve conformity of proceedings, and in giving such directions the court shall order the simplest, least expensive and most expeditious method of determining the issues that is consistent with justice to the members of the class, the defendant and the representative plaintiff, including dispensing with any procedure that it considers unnecessary and directing special procedures regarding such matters as discovery, admission of evidence and means of proof.

Confirmation of report

(3) The person who has conducted proceedings under clause (1)(*b*) shall record his findings in a report which is not effective until confirmed by the court.

Judgment on individual questions

(4) The determination of any individual questions under this section constitutes a judgment.

Failure to claim share

32. Where the court makes an order under section 25 concerning the manner in which a member of the class may claim his share of a judgment or where individual proceedings are required under section 31, a member of the class who fails to take such further action as is necessary to establish his entitlement to the relief claimed within the time prescribed by the court is not entitled to proceed under section 25 or 31 except by leave of the court.

JUDGMENTS

Payment of judgment

33.–(1) The court may direct that any amount awarded under section 22 or 31 shall be paid either in a lump sum, whether forthwith or within such period as the court may fix, or in such instalments and upon such terms and conditions as the court considers proper.

Stay of execution

(2) The court shall supervise, and may stay for a reasonable period, the execution or distribution of the whole or any part of a judgment upon such terms and conditions as it considers proper.

Binding effect of judgment on common questions

34.–(1) Judgment on the questions common to the class is not binding upon persons who have excluded themselves from the class action or upon the defendant in any subsequent proceeding brought by a person who has excluded himself.

Idem

(2) Judgment on the questions common to the class binds every member of the class who has not excluded himself from the class action to the extent only that the judgment determines the questions common to the class that are defined in the order certifying the action as a class action and that relate to the claim described and the relief specified in the order.

Contents of judgment on common questions

(3) A judgment on the questions common to the class shall,

(*a*) name or describe the members of the class who are bound by the judgment;

(*b*) describe the nature of the claim made on behalf of the members of the class and specify the relief awarded; and

(*c*) define the questions of fact or law common to the class.

LIMITATIONS

Statute of limitations

35.–(1) Any limitation period applicable to an action under this Act is suspended for the members of the class upon the commencement of the action and resumes running against a member of a class,

(*a*) upon his exclusion from the class action under section 20;

(*b*) upon his exclusion from the class description by reason of an order made under subsection 9(2);

(*c*) except as to any party, upon an order made under section 10; or

(*d*) upon dismissal of the action without an adjudication on the merits.

Interpretation

(2) For the purpose of subsection (1), the limitation period resumes running as soon as all rights of appeal have been exhausted or all appeals have been disposed of, as the case may be.

SETTLEMENT, ETC.

Settlement, etc. of action

36.–(1) An action commenced under this Act shall not be settled, discontinued or dismissed for want of prosecution without the approval of the court and upon such terms and conditions, including notice or otherwise, as the court considers proper.

Cost of notice

(2) Unless the court orders otherwise, the cost of any notice ordered under this section may be determined by agreement of the parties.

APPEALS

Appeal of order certifying or refusing to certify action as a class action

37.–(1) An appeal lies to the Divisional Court from an order certifying or refusing to certify an action as a class action or setting aside an order certifying the action as a class action.

Appeal of amending order with leave

(2) With leave of a judge of the High Court, an appeal lies to the Divisional Court from an order amending an order certifying an action as a class action.

Rights of appeal of class members

(3) For the purpose of subsection (1) or (2), if the representative plaintiff does not appeal or if he abandons his appeal, any member of the class may apply to a judge of the High Court for leave to appeal on behalf of the class.

Appeal of judgment on common questions

38.–(1) An appeal lies to the Court of Appeal from a judgment on the questions common to the class.

Rights of appeal of class members

(2) For the purpose of subsection (1), if the representative plaintiff does not appeal or if he abandons his appeal, any member of the class may apply to the Court of Appeal for leave to appeal on behalf of the class.

Appeal of individual questions

39.–(1) Where judgment has been given under section 22 and shares of the judgment have been determined under sections 23 to 26 or where judgment has been given under section 31, any member of the class who has been awarded more than $1,000 may appeal to the Divisional Court and any member of the class who has been awarded $1,000 or less may apply to the Divisional Court for leave to appeal.

Rights of appeal of representative plaintiff

(2) Where judgment has been given under section 22 and shares of the judgment have been determined under sections 23 to 26, the representative plaintiff may appeal to the Divisional Court an award to a member of the class for more than $1,000, and may apply to the Divisional Court for leave to appeal an award to a member of the class for $1,000 or less.

Rights of appeal of defendant

(3) Where judgment has been given under section 31, the defendant may appeal to the Divisional Court an award to a member of the class for more than $1,000, and may apply to the Divisional Court for leave to appeal an award to a member of the class for $1,000 or less.

Interpretation

(4) For the purpose of this section, leave to appeal shall be granted only where there has been a substantial miscarriage of justice.

Appeal of *cy-près* and forfeit orders

40. Where an order has been made under section 27 or 28, the representative plaintiff, the defendant or the Attorney General may appeal to the Court of Appeal.

COSTS AND FEES

Costs
R.S.O. 1980, c. 223

41.–(1) Notwithstanding section 80 of the *Judicature Act*, but subject to section 46, costs shall not be awarded to any party to an action under this Act at any stage of the proceedings, including any appeal, except,

(*a*) on an application for an order certifying the action as a class action, where the court is of the opinion that it would be unjust to deprive the successful party of costs;

(*b*) in the event of vexatious, frivolous or abusive conduct on the part of any party; or

(*c*) on an interlocutory motion.

Security for costs

(2) Subject to section 46, security for costs shall not be required in an action commenced under this Act.

Class members not liable for costs

(3) Subject to section 46, the members of the class, other than the representative plaintiff, are not liable for costs.

Agreements regarding payment for fees and disbursements
R.S.O. 1980, c. 498
R.S.O. 1897, c. 327

42.–(1) Notwithstanding section 30 of the *Solicitors Act* and *An Act respecting Champerty*, a solicitor may make an agreement in writing with the representative plaintiff regarding payment for fees and disbursements in respect of an action commenced under this Act stipulating for payment only in the event of success in the action.

Interpretation

(2) For the purpose of this section, success in the action includes a judgment in favour of some or all members of the class on the questions of fact or law common to such members or a settlement that benefits any member of the class.

Amount of payment not to be stipulated

(3) An agreement under this section shall not stipulate the amount of the payment either by a gross sum, commission, percentage, salary or otherwise, and any such stipulation is void.

Court to determine payment for fees and disbursements

(4) Where the representative plaintiff and his solicitor have made an agreement under this section, the court that has given judgment on the common questions or has approved a settlement shall, at the conclusion of any individual proceedings or at such other time and upon such terms and conditions as the court considers proper,

(*a*) determine the amount of the solicitor's fees and, in addition thereto, an amount that is fair and reasonable compensation to the solicitor for the risk incurred by him in undertaking the action on a basis of payment only in the event of success; and

(*b*) determine the amount of disbursements to which the solicitor is entitled, including interest thereon calculated on the balance of disbursements incurred as totalled at the end of each six month period following the date of the agreement,

and shall order that such amounts be paid to the solicitor in accordance with section 45.

Fees and disbursements where no agreement

43. Where the representative plaintiff and his solicitor do not have an agreement under section 42, the court that has given judgment on the common questions or has approved a settlement shall, at the conclusion of any individual proceedings or at such other time and upon such terms and conditions as the court considers proper, determine the amount of fees and disbursements payable by the representative plaintiff to the solicitor and shall order that such amount be paid to the solicitor.

Determination by judge

44. Determinations under section 42 or 43 shall be made by a judge.

Payment of solicitor out of fund

45.–(1) The amount ordered to be paid to the solicitor under section 42 or 43 constitutes a first charge, payable on a proportional basis, against any amount awarded to the members of the class.

Payment into court

(2) Where individual proceedings are ordered under section 31 and the defendant is ordered to pay an amount of monetary relief to a class member, that amount shall be paid into court and shall not be paid to the class member.

Payment out of court

(3) Upon the determination of the amount of the solicitor's payment under section 42 or 43 and payment thereof, the court shall order the distribution of the amounts to which individual class members are entitled.

Costs of individual proceedings R.S.O. 1980, c. 397

46. In any proceedings under section 31,

(*a*) the costs provisions of the rules made under the *Provincial Court (Civil Division) Project Act* apply to claims of $3,000 or less and their applicability shall not be restricted to The Municipality of Metropolitan Toronto; and

R.S.O. 1980, c. 223

(*b*) the costs provisions of the *Judicature Act* and of the rules of court apply to all other claims.

Costs of distributing aggregate award

47. Where judgment is given under section 22, the court may order that the costs of distribution, including costs of notice and payment of an appropriate fee to the person administering the distribution, be paid out of the proceeds of the judgment.

Offer to settle

48.–(1) The representative plaintiff or the defendant may serve on the other party an offer to settle an action under this Act.

Idem

(2) After service of the offer, the court, upon application, shall determine whether the offer is reasonable.

Idem

(3) Where the court has determined that the offer is reasonable but it is not accepted, the court may award costs against the offeree,

(*a*) if the representative plaintiff is the offeree and the amount ultimately awarded to the members of the class is less than the amount offered; or

(*b*) if the defendant is the offeree and the amount ultimately awarded to the members of the class is greater than the amount offered.

Statistical, including sampling, evidence

49.–(1) The court may admit statistical, including sampling, evidence in an action under this Act if such evidence was compiled in accordance with principles accepted by experts in the particular field.

Idem

(2) Without restricting the generality of subsection (1), a collection, compilation, analysis, abstract or other record or report of statistical information prepared or published under the authority of the Parliament of Canada or the legislature of a province or territory of Canada may be admitted in evidence.

Notice

(3) Statistical, including sampling, evidence under subsection (1) or (2) is not admissible unless the party intending to introduce it has given reasonable notice to the party against whom it is intended to be introduced together with a copy of such evidence.

Source

(4) Where evidence is of a kind mentioned in subsection (2) or is derived from market quotations, tabulations, lists, directories or other compilations generally used and relied upon by the public or by persons in particular occupations, any notice given under subsection (3) shall specify the source of such evidence.

Details of sources to be disclosed

(5) Except where subsection (4) applies, notice given under subsection (3) shall specify the name and qualifications of every person who participated in the preparation of the statistical or sampling evidence and shall specify whether any additional documents were prepared or used in the compilation of such evidence, and any party who receives such a notice may require that any such document be produced for inspection, except documents that would reveal the identity of any persons responding to a survey who have not consented in writing to such disclosure.

Cross-examination

(6) Any party against whom any evidence of a kind mentioned in subsection (4) is introduced may require for the purpose of cross-examination the attendance of any person under whose supervision the evidence was prepared, and any party against whom any evidence of a kind mentioned in subsection (5) is introduced may require for the purpose of cross-examination the attendance of any person who participated in the preparation of the evidence.

No jury

50. An action under this Act shall not be tried by a judge with a jury.

Presiding judge

51.–(1) In an action under this Act, the same judge shall preside at all motions and interlocutory proceedings before the trial of the questions common to the class and, subject to section 31 and unless the parties and the judge otherwise agree, another

judge shall preside at the trial of the questions common to the class and thereafter.

Where judge unable to continue

(2) If, at any time in an action under this Act, the presiding judge is unable for any reason to continue, another judge shall be designated in accordance with the practice of the court.

Where s.121 of R.S.O. 1980, c. 223 does not apply

(3) In an action under this Act, section 121 of the *Judicature Act* does not apply unless the Chief Justice of the High Court orders otherwise.

Rules of court apply

52. The rules of court, except to the extent that they are inconsistent with this Act and the rules made under section 53, apply to actions under this Act.

Rules may be made R.S.O. 1980, c. 223

53. The Rules Committee may make any rules under the *Judicature Act* necessary or advisable to carry out effectively the intent and purpose of this Act.

Crown bound

54. The Crown is bound by this Act.

Commencement

55. This Act comes into force on the day of , 198 .

Application of Act

56. This Act does not apply to,

(*a*) any action commenced before this Act comes into force;

(*b*) any action brought by a person in a representative capacity that is authorized by any other Act; or

(*c*) any action that before this Act comes into force was required to be brought by a person in a representative capacity.

Short title

57. The short title of this Act is the *Class Actions Act, 198* .

APPENDIX 2

SUPREME COURT RULES 1965 (ENGLAND), ORDER 15, RULE 12

12.-(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in Rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of proceedings under this Rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under Rule 6 adding that person as a defendant.

(3) A judgment or order given in proceedings under this Rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

(4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.

(5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.

(6) The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.

APPENDIX 3

FEDERAL RULES OF CIVIL PROCEDURE OF THE UNITED STATES DISTRICT COURT, RULE 23

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable

effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX 4

SUPREME COURT ACT 1958 (VICTORIA), s 62(1C)

Where provision is made by any Act, law or rule for two or more persons to be joined in one action as plaintiffs one or more of such persons may notwithstanding any Act, law or practice to the contrary but subject to any direction as to the procedure to be followed in the action given by the Court or a Judge in any particular case sue on behalf of or for the benefit of all the persons who may be so joined.

FEDERAL COURT RULES (AUSTRALIA), ORDER 6 RULE 2

Two or more persons may be joined as applicants or respondents in any proceeding-

(a) where-

i)if a separate proceeding were brought by...each of them...some common question of law or fact would arise in all the proceedings; and

(ii) all rights to relief claimed in the proceeding...are in respect of or arise out of the same transaction or series of transactions; or

(b) where the court gives leave so to do.

Representative Actions

Representative actions

34.01 (1) Where numerous persons have common questions of fact or law requiring adjudication, one or more members of that group of persons may commence an action as representative parties on behalf of all or some of the group.

(2) Without derogating from the general words of subrule (1), in actions for the protection of property including actions by remaindermen or reversioners, and in actions in the nature of waste or a devastavit, one person may sue on behalf of himself and of all persons having the same interest.

[Ontario 84]

Application to be made to allow action to continue as a representative action

34.02 The representative parties must within twenty-eight days after the day upon which the defendant filed the appearance, or after the date of the defendant's default in doing so, apply to the Court for:

(a) an order authorising the action to be maintained as a representative action;

(b) directions as to the conduct of the action.

Individual assessments of damages and separate contracts or transactions are not to preclude a representative action

34.03 Authorisation shall not be refused on the ground:

(a) that the relief claimed includes claims for damages that would require individual assessment;

(b) that separate contracts or transactions made with or entered into between the members of the group represented and the defendant are involved.

Order to define group represented, the nature of the claims, the relief claimed and the common questions of law or fact

34.04 An order that an action is to be maintained as a representative action shall:

(a) define the group on whose behalf the action is brought;

(b) define the nature of the claim or claims made on behalf of members of the group and specify the relief claimed;

(c) define the questions of law or fact common to the claims of members of the group

and make such other orders and give such directions as the nature of the proceedings may require.

Court may vary the order

34.05 An order that an action be maintained as a representative action may be varied upon the application of any party at any time before judgment in the action.

Common questions to be determined in the common proceedings and individual questions as directed in separate hearings

34.06 Questions which are common to the group shall be determined in common proceedings, and questions that require the participation of individual members of the group may be directed to be dealt with either in separate actions or by separate trials within the action.

Derivative actions not affected

34.07 Nothing in this Rule affects the bringing of derivative actions in relation to bodies corporate.

General power to allow representatives for parties

34.08 In addition to the rights and remedies given by the preceeding subrules, where numerous persons have the same interest in any proceedings,

the proceedings may be brought, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

In proceedings under 34.08 power to appoint a representative for the defendants

34.09 At any stage of proceedings under Rule 34.08 the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing the defendants who are sued, to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this Rule, the Court appoints a person not named as a defendant, it shall make an order adding that person as a defendant.

Judgment in proceedings under 34.08 binding on all parties but not to be enforced against a person not a party without leave

34.10 A judgment or order given in proceedings under Rule 34.08 shall be binding on all the persons as representing whom the plaintiffs sue, or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

Application for leave under 34.10 to be served personally

34.11 An application for leave under Rule 34.10 shall be served personally on the person or persons against whom it is sought to enforce the judgment or order.

Rights of person served under 34.11 to dispute liability

34.12 (1) Any person served with an application under Rule 34.11 may, notwithstanding the binding nature of any order made under Rule 34.10, dispute his liability to have the judgment or order enforced against him on the ground that by reason of facts or matters particular to his case, he is entitled to be exempted from liability.

(2) Any question which arises as to whether a judgment or order made or sought to be made under Rule 34.10 is or ought to be enforceable against the person, or any of the persons, against whom the application is made, may be tried and determined in any manner in which an issue or question in an action may be tried or determined.

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Emerson, Justin Scott
Class action procedure in New Zealand