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CLASS AND COLLECTIVE ACTIONS

Class/collective actions in New Zealand: overview

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OVERVIEW OF CLASS/COLLECTIVE ACTIONS AND CURRENT TRENDS

1. What is the definition of class/collective actions in your jurisdiction? Are they popular and what are the current trends?

Definition of class/collective actions

Ten years ago class actions were virtually unheard of in New Zealand. Today, reference to class actions is common in both the legal and business communities. It is a relatively regular occurrence to see interest groups (and lawyers) promoting potential class action claims and a growing number are reaching court. This development in New Zealand law has occurred despite the lack of specific procedural rules or statutes expressly facilitating class actions. It has instead developed primarily through the bringing of several high profile legal actions which have proceeded as class actions in all but strict legal name.

In particular, the *Houghton v Saunders* litigation (Feltex shareholder proceeding) (*see below, Current trends*) has resulted in a body of case law that, taken together with existing procedural rules of court, provides a framework for class actions in New Zealand. The principles governing the bringing of a class action are now regarded as well-established, and were set out by the Court of Appeal in *Ross v Southern Response Earthquake Services Ltd [2019] NZCA 431, (2019) 25 PRNZ 33 at [51]* per Goddard J. However, these actions are, strictly speaking, called "representative actions" because a representative (or representatives) brings the proceeding on behalf of others who share the same interest in the subject matter of the proceeding (*see Question 2*).

Use of class/collective actions

Representative actions of the scale and type typically seen in modern class actions overseas have been slow to emerge as a feature in the New Zealand legal landscape. The reasons for this include:

- **Lack of procedural rules.** The lack of specific procedural rules for such litigation traditionally made it difficult for a class of claimants to initiate such proceedings. This has changed in recent years (*see Question 2*).
- **Government-backed accident compensation.** In many jurisdictions class actions rose to prominence through claims relating to personal injury. Since 1974 New Zealand has had a government-backed accident compensation scheme that bars most forms of civil personal injury litigation.
- **Nominal damages.** Generally, the New Zealand courts make only nominal awards of exemplary or punitive damages in tort cases making these less attractive causes of action for litigation funders to advance (although the *Strathboss Kiwifruit Ltd v Attorney-General [2018] NZHC 1559; [2020] NZCA 98* (Strathboss Kiwifruit) claim (*see below, Current Trends*) was for damages in tort and was funded by a third party funder).
- **Small population.** The small size of New Zealand's population makes many class actions harder to justify financially as the member group will be proportionately smaller than in other countries and the potential return for a third-party litigation funder less attractive.
- **Lack of third-party funders.** Additionally, third-party funders have been slow to establish themselves in New Zealand, as have specialist class action law firms. This is changing with funders incorporating in New Zealand and a growing number of lawyers promoting class actions. Australian based funders and class action law firms are also increasingly looking for opportunities in New Zealand.
- **Traditional restrictions on litigation.** Traditional restrictions have also been relevant, such as the torts of maintenance and champerty, under which New Zealand courts previously considered litigation funding for profit to be an abuse of process. Litigation funding is no longer assumed to be such an abuse. Today, the non-funded party bears the burden of raising any concerns before a court will scrutinise a funding arrangement.

Despite some of the historical barriers, the trend is now very much toward growth in representative actions.

Current trends

The representative action procedure is available in any type of civil proceeding, provided the class members have the "same interest" (*see below*). The areas of law in which the procedure has been used, or its use has been threatened, are growing but, to date, include allegations of:

- Securities law breaches.
- Consumer law breaches.
- Competition law breaches.
- Unreasonable bank fee charges invoking the common law of penalties and a statutory cause of action under consumer legislation.
- Negligence against the New Zealand Government (including in relation to the handling of a kiwifruit vine-killing disease).
- Negligence against a ship owner for losses incurred by businesses after an environmental shipping disaster.
- Breaches of insurance contracts and breaches of the duty of good faith arising from slow claims-handling procedures following the Christchurch earthquakes.
- Negligence against manufacturers of cladding used in building works.
- Regulatory compensation claims.
- Breach of employment law obligations.

Some of the highest profile representative actions to be brought in New Zealand are:

- **The Feltex shareholder proceeding (*Houghton v Saunders [2014] NZHC 2229, [2015] 2 NZLR 74*).** This legal action was initiated in 2008, and was the first large representative action to reach trial and receive a final judgment. The claimant, Mr Houghton, brought a claim relating to losses suffered after the collapse of Feltex Carpets Ltd. He sought to recover his own losses as well as the losses of some 3,600 other Feltex shareholders he represented who had purchased shares in an initial public offering (IPO) in Feltex in 2004. The class members alleged the former directors, vendor, and joint lead managers of the IPO breached securities, fair trading and tort laws by including misleading content in the prospectus. The claim was funded by a London-based third party litigation funder. The claimants lost on all causes of action at substantive trial but not before the procedural aspects of the case were the subject of a number of significant pre-trial hearings and judgments. The trial court judgment was upheld by the Court of Appeal in 2016 (*Houghton v Saunders [2016] NZCA 493, [2017] 2 NZLR 189*). There was then a further appeal to the Supreme Court (the highest court in New Zealand). The Supreme Court released its judgment in August 2018 (*Houghton v Saunders [2018] NZSC 74, [2019] 1 NZLR 1*). The appeal was partially successful against the former directors and vendor, but not against the joint lead managers. The Supreme Court set aside the Court of Appeal's decision that an untrue statement contained in Feltex's IPO prospectus did not breach securities and fair trading laws. The Supreme Court directed that the question of whether the shareholders are entitled to any remedies for these breaches should be determined at a stage two trial in the High Court. However, at the time of writing stage two has not yet happened (and may not happen) owing to funding difficulties on the claimant's part.
- **The bank fees proceedings.** In 2013, representative actions were filed against four of the major trading banks in New Zealand: BNZ, Kiwibank, Westpac and ANZ. Representative claimants brought the proceedings on behalf of large numbers of the banks' customers. Each proceeding challenged the reasonableness of a number of different types of fees charged by the banks. These claims mirrored proceedings brought against the major banks in Australia and were funded by an Australia-based third party litigation funder. The proceedings have since settled or are otherwise not being pursued.
- **The kiwifruit claim.** In 2017, there was a trial in the High Court of a representative action brought on behalf of kiwifruit growers against the New Zealand Government. The growers alleged that the Government was negligent in carrying out its biosecurity functions thereby allowing a vine disease (*Pseudomonas syringae pv actinidiae*) (PSA) to enter New Zealand, causing loss to kiwifruit growers and post-harvest operators. The proceeding was funded by a New Zealand litigation funder, LPF Litigation Funding Ltd. In a judgment released in late June 2018, the High Court found that when exercising its biosecurity functions, the Government owed a duty of care to the members of the class that had property rights in the vines or crops affected by PSA. The Court found that the Government had breached this duty when it negligently granted a permit for the importation of the relevant plant products (*Strathboss Kiwifruit*). However, the Government successfully appealed that decision, with the Court of Appeal finding that the Government was immune from liability and, even if it was not immune, it did not owe a relevant duty of care (*Attorney-General v Strathboss Kiwifruit Ltd [2020] NZCA 98*). At the time of writing, the Supreme Court has granted leave to appeal the Court of Appeal judgment, but the substantive appeal has not yet been determined (*Strathboss Kiwifruit Ltd* v *Attorney-General [2020] NZSC 68*).
- **The James Hardie claims.** A number of claims are currently before the courts which relate to alleged defects in cladding systems manufactured by the defendants, Studorp Ltd and James Hardie (manufacturers of building products). The claimants allege the cladding systems contain defects that caused weather-tightness issues in their homes, and that the defendants misrepresented the weather-tightness of the products. One group (the Auckland group) is being funded by London-based Harbour Litigation Funding (*see White v James Hardie New Zealand [2019] NZHC 188*), while others (collectively, the Wellington group) are self-funded (*Cridge v Studorp Ltd [2016] NZHC 2451*). The High Court granted the Wellington group representative orders, and this was upheld by the Court of Appeal (*Cridge v Studorp Ltd [2017] NZCA 376*). The Supreme Court has declined to grant leave to reconsider this (*Studorp Ltd v Cridge [2017] NZSC 178*). At the time of writing, the trial in *Cridge v Studorp Ltd* was in progress, and it has been reported that the trial in *White v James Hardie New Zealand* will commence in May 2021.
- **The Southern Response claims.** A group of homeowners who have unresolved insurance claims arising out of earthquakes in Christchurch are pursuing a representative action against the defendant insurer. The group allege a wide range of misrepresentations, breaches of contract and breaches of duties of good faith by the defendant. The action is being funded by Litigation Lending Services (New Zealand) Ltd. After leave to bring the proceeding by way of representative action was initially declined (with the Court finding that there was no common issue amongst the group) (*Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd [2016] NZHC 245*), the group amended their statement of claim. Subsequently, the High Court granted representative orders (with some conditions) (*Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd [2016] NZHC 3105*). The Court of Appeal upheld the representative orders on appeal (*Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group [2017] NZCA 489, [2018] 2 NZLR 312*). The High Court also granted a different group of claimants leave to bring a representative action on an opt-in basis (declining an application that it proceeds as an opt-out action) against the same defendant insurer for alleged breach of the Fair Trading Act 1986, misrepresentation and breach of an implied duty of good faith in its settlement of claims arising out of the Christchurch earthquakes (*Ross v Southern Response Earthquake Services Ltd [2018] NZHC 3288*). That group appealed to the Court of Appeal, seeking to have the action proceed on an opt-out basis. The Court of Appeal allowed that appeal (*Ross v Southern Response Earthquake Services Ltd [2019] NZCA 431, (2019) 25 PRNZ 33*). A further appeal to the Supreme Court on the issue whether the action can proceed on an opt-out basis has been heard, but judgment has not been issued at the time of writing.
- **The CBL claims.** Two class actions have been filed against CBL Corporation Ltd, one backed by LPF and the other by Australian funder IMF Bentham, in parallel with civil and criminal proceedings brought by the Financial Markets Authority and Serious Fraud Office. The proceedings all follow the collapse of CBL in 2018. The class actions allege false or misleading statements made in the IPO documents for CBL Corporation and subsequent breach of continuous disclosure obligations. At the time of writing, the proceedings are still at an early stage.
- **The Intueri claim.** A class action has been commenced against Intueri Education Group Ltd in respect of statements made in its IPO materials, and subsequent alleged breaches of continuous disclosure obligations. The claim is funded by LPF and the claimant has notably made an application for summary judgment (that is, an application for streamlined determination of the claim on the basis that the defendant has no defence). This is the first time an application for summary judgment has been made by the claimant in a class action in New Zealand.

REGULATORY FRAMEWORK

2. What are the principal sources of law and regulations relating to class/collective actions? What are the different mechanisms for bringing a class/collective action?

Principal sources of law

There are no specific class action procedural rules or statutes in New Zealand. A draft Class Actions Bill was prepared in 2008 to 2009 and provided to the New Zealand Secretary for Justice. The Bill received no further political consideration at that time and was never formally introduced to Parliament. However, in November 2017, the New Zealand Law Commission indicated that it would be conducting a review of the law relating to class actions and litigation funding and, in 2018, the relevant Minister instructed the Commission to do so. Terms of reference for the review have been issued and a consultation document is expected to be released in 2020.

Pending any reforms that follow the Law Commission review, New Zealand claimants must rely on existing procedural rules of court (High Court Rules) to bring class action claims which are known as "representative actions".

A claim can proceed by way of representative action if those being represented have the "the same interest in the subject matter of a proceeding" as the representative party (*High Court Rule 4.24*). While this rule was not originally intended to facilitate class actions, in the context of the Feltex shareholder proceeding, the New Zealand Court of Appeal described High Court Rule 4.24 representative orders as "a form of what elsewhere are called class action orders" (*Saunders v Houghton [2009] NZCA 610, [2010] 3 NZLR 331 at [10] per Baragwanath J*).

The fact that the Rule can be used to facilitate class actions was further endorsed by the Supreme Court in the same Feltex shareholder proceedings where it said that High Court Rule 4.24 must be exercised in a flexible manner, and provided its application will not cause injustice, should be applied. The Supreme Court further observed that:

- Representative actions promote efficient and economic litigation by preventing unnecessary congestion in the courts through a multiplicity of individual actions covering the same subject matter.
- As long as defendants are not compromised and the aims underlying class or representative actions are advanced, there is scope for continued development in this area.

(*See Credit Suisse Private Equity LLC v Houghton [2014] NZSC 37, [2014] 1 NZLR 541 at [129] to [130], [147], [151], [152] and [159].*)

In light of these statements of policy from New Zealand's highest courts it is not surprising that a liberal approach to the application of the "same interest" requirement in High Court Rule 4.24 has been taken. The threshold for having the same interest is low (*see below*).

Principal institutions

The High Court of New Zealand is the principal institution used to hear representative actions. A representative action judgment of the High Court is conclusive unless overruled on appeal to the Court of Appeal first, and then the Supreme Court. It is also possible to bring representative actions in the Employment Court for breaches of employment law obligations.

Different mechanisms

Some New Zealand statutes provide alternative mechanisms for collective recovery of alleged losses in specific circumstances. For example:

- The New Zealand Commerce Commission is empowered to seek compensation orders on behalf of consumers who have suffered losses under various consumer statutes, such as the Fair Trading Act 1986 and the Commerce Act 1986.
- The Financial Markets Authority can, by High Court order, bring a claim on behalf of a class of persons sharing the same or substantially the same interests where those persons have been subject to a breach of the Financial Markets Conduct Act 2013, and where the High Court considers that the claim is in the public interest.
- The Human Rights Commission can bring representative actions under the Human Rights Act 1993 on behalf of a class of claimants where those persons have been subjected to a statutorily defined "discriminatory practice".
- The Health and Disability Commissioner Act 1994 allows the Director of Proceedings to bring representative actions on behalf of a class of claimants before the Human Rights Review Tribunal in relation to allegations of breaches of the Code of Health and Disability Services Consumer Rights.

3. Are class/collective actions permitted/used in all areas of law, or only in specific areas?

With limited exceptions, representative actions are permitted in any civil area of law provided the "same interest" requirement is satisfied (*see Question 1*). Such actions can come about as follow ups to successful regulatory actions but, to date, there have been few examples of this.

There is a degree of overlap between class actions and other areas such as consumer protection (*see Question 2*). Criminal proceedings are the exclusive domain of the Crown (that is, the government) in New Zealand, so this is not an area which could serve as a basis for a class action.

LIMITATION

4. What are the key limitation periods for class/collective actions?

The general time limits for New Zealand civil proceedings apply to representative actions and the relevant periods will be found either in the Limitation Act 2010 (which is of general application) or prescribed in a specific statute. A representative action must then be brought before the relevant limitation periods applicable to the representative claimant (or claimants) expire.

However (and controversially), the Supreme Court (by a 3:2 majority) has held that once a representative action has been initiated, and a representative order has been made by the court, time will cease to run for potential members of the identified representative class (*Credit Suisse Private Equity LLC v Houghton [2014] NZSC 37 at [127] to[129] and [170] to [171]*).

This ruling has the significant benefit for some class members of providing them with a means of access to the court for certain causes of action beyond the time prescribed by statute. As a result, and to mitigate exposure, defendants seek orders that a person who wishes to opt-in to a representative action must do so by a certain date. The courts have tended to endorse that approach ordering that a class will be closed at a certain date. If a person has failed to opt-in by that date the person will again be subject to general limitation periods in relation to any separate proceeding they may wish to bring. Similarly, in the context of an opt-out proceeding, those who opt out by the relevant date will be barred by limitation periods in the usual way.

STANDING AND PROCEDURAL FRAMEWORK FOR BRINGING AN ACTION

Standing

5. What are the rules on standing for bringing a claim in a class/collective action?

Definition of class

A "class" is defined by reference to the representative action rule which requires that the claimants (being the class members) all share the "same interest" in the subject matter of a proceeding. The threshold for "same interest" is low and only requires the representative claimant to establish that:

- There are issues of fact or law that are common to all members.
- The representative group is capable of clear definition.
- The nominated representative claimant fairly and adequately represents the group.

Theoretically, a representative action will not be available where the proposed class members have diverse interests and where members may have different defences available. However, even in these circumstances, the New Zealand courts have generally shown a degree of flexibility and leniency in approach. For example:

- In the Feltex shareholder proceeding (*see Question 1*), a key legal issue for the claimants was to prove reliance on the alleged misleading statements. Where reliance must be shown by individual members of the class a representative action may not be appropriate. However, the court there considered it possible to leave individual issues as to causation, reliance and loss to be dealt with at later stages, after determination of the issues that were common to all members of the class. In August 2018, the Supreme Court directed that the issues of reliance, causation and loss be dealt with at a stage two trial.
- In the bank fees proceeding (*see Question 1*), ANZ argued that the relevant class must be more closely defined. The claim defined six different classes of claimant and ANZ argued there was insufficient commonality of interest between all of those class members given their different contractual terms, fees at issue and characteristics of the claimants. However, the court adopted a "generous approach" preferring to make the representative order in simple terms to avoid complication in a case with so many group members (*Cooper v ANZ Bank New Zealand Ltd [2013] NZHC 2827 at [30] to[49] and [46] to[49]*).
- In one of the James Hardie representative actions (*Cridge v Studorp [2016] NZHC 2451*) the claimants brought three different claims which all alleged a form of "inherent defect" in the cladding product. The three claims concerned different cladding product types, which broadly performed the same function. The claimants argued that despite the differences, the group still shared common interests, including whether James Hardie owed the homeowners a duty of care and whether it breached the duty. The defendant considered that it was inappropriate for a court to determine the claims on a representative basis as the factual questions of causation and damage would permeate all stages of the negligence inquiry, therefore a court could not determine whether a duty of care existed or had been breached with such a diverse range of claimants. However, the court determined that the issues of whether a duty of care existed and whether a breach occurred were issues that were sufficiently common to meet the threshold for determination on a representative basis. It held that there was no reason why the variations in causation and damage would impact on whether the duty of care existed. Therefore, the issue of causation was to be determined for the remainder of the other class members at a later stage. These findings were upheld by the Court of Appeal (*Cridge v Studorp [2017] NZCA 376*).

By contrast, in the Southern Response proceedings (*Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd [2016] NZHC 245*), the High Court initially took a more stringent approach to the test for granting a representative order. The representative group in that case was made up of a collection of homeowners who had suffered earthquake damage and had not settled their claims with their insurer (the defendant, Southern Response). In their initial application for leave to bring the representative action, the group argued that the various claimants shared the same types of insurance policies and that the interpretation of the policies was the common interest. The defendant insurer argued that the statement of claim was too imprecise as to the alleged common interest and that the nominated claimant was inadequate because he was not in the same position as the other group members. The defendant also argued that the individual circumstances of the group differed significantly and any common issues shared by some members within the group would not significantly advance the resolution of the various claims. The Court agreed with the defendant and declined to grant the representative order. However, in doing so, the Court recognised that if the claimants were denied a representative action outright, many would not have the resources to individually pursue recourse through the courts. Accordingly, the Court directed the group to re-determine the common issues shared by each member of the group and possibly form subgroups.

The group then reformulated their claim, alleging that Southern Response had operated a strategy of delaying and misleading conduct with the purpose of minimising the payments it made to claimants to settle their claims. The High Court found that the reformulated claim did identify a common interest (being the strategy allegedly adopted by Southern Response) and granted the group leave to bring the proceeding as a representative action (*Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd [2016] NZHC 3105*). Some conditions were placed on the representative orders, namely that the group must provide further information about the nature of the representative action and the litigation funding arrangements to its members, and must provide members with an opportunity to withdraw from the group. Southern Response appealed the High Court's decision to grant leave. The group cross-appealed, challenging the conditions placed on the representative orders. The Court of Appeal upheld the High Court's decision to grant leave to bring the proceeding as a representative action and altered the conditions placed on the orders by the High Court (*Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group [2017] NZCA 489, [2018] 2 NZLR 312*).

Potential claimant

Any legal or natural person who can establish the "same interest" requirement is entitled to initiate a representative action as a representative claimant. However, the requirement to "share" the same interest precludes claims being made by persons who have not been injured by the defendant's alleged conduct.

Claimants outside the jurisdiction

A representative action can be brought on behalf of individuals from outside New Zealand but, as in any civil proceeding, this is subject to any objections raised by way of *forum non conveniens*. The New Zealand High Court has a general discretion as to whether or not it assumes jurisdiction and this discretion applies to representative actions like any others. The New Zealand Courts have not yet been required to consider any conflict of laws issues in representative actions.

Professional claimants

Professional commercial claimants cannot purchase consumers' claims in exchange for a share of the proceeds of any damages awarded. The requirement to share the same interest precludes

claims being made by persons who have not been injured by the defendant's alleged conduct. However, there are various options available in terms of third-party litigation funding.

Qualification, joinder and test cases

6. What are the key procedural elements for maintaining a case as a class action?

Certification/qualification

A representative action can proceed either:

- With the consent of all those represented.
- As directed by the court on application by a party or intended party to the proceeding.

If a representative claimant has the consent of every class member it intends to represent, it may issue a representative action as of right. While the representative claimant does not have to provide evidence to the court (or the defendant) of consent before commencing proceedings it is prudent to do so.

Where a case will concern a large class of many potential claimants, the representative claimant is unlikely to have obtained the consent of all potential claimants prior to commencing proceedings. Without consent from all class members, a representative claimant must apply to the court for a representative order. The court has a degree of oversight in determining the terms of how and when claimants can become members of a represented class (opt-in), or elect not to be members of that class (opt-out), through its approval of the terms of the representative order. This is in addition to the court's role in assessing the requisite "same interest" and therefore who is part of the represented class.

The large representative actions in New Zealand to date have proceeded as follows:

- The party organising the claim has advertised for claimants and people have elected to join the claim by filling in a form and agreeing to the terms of a funding agreement and a legal services agreement.
- The representative claimant has then brought the proceeding by filing in court:
  - a notice of proceeding;
  - a statement of claim;
  - an interlocutory application for leave to bring a representative action and for approval of the litigation funder and litigation funding agreement; and
  - affidavits in support of the interlocutory application (including from the funder).
- Potential claimants have continued to sign up to the proceeding (or opt-in) after the court has granted the representative order, although as noted above, the court may order that claimants opt in by a certain date.
- After that date the class is closed and the claim organiser cannot add new claimants. However, that does not prevent it initiating fresh proceedings, as long as there are no limitation issues in doing so.
- *Ross v Southern Response Earthquake Services Ltd [2018] NZHC 3288*, in which the claim was sought to be made on an opt-out basis, is a notable exception from the more common opt-in process described above.

Minimum/maximum number of claimants

The representative action procedure can be used provided there is more than one person who wishes to be a claimant. There is no maximum number of claimants but all those who wish to be included in the action must satisfy the "same interest" test.

Joining other claimants

Where the claim proceeds on an opt-in basis, further claimants can be added to the proceeding provided such a joinder complies with any representative order made by the court. In determining the terms and timing relevant to a representative order, the court may be influenced by the extent to which it is satisfied that information about the action has been brought to the attention of potential claimants; for example, if there has been extensive publicity that might suggest a shorter opt-in period is appropriate.

Where the claim proceeds on an opt-out basis, it should not be necessary to add claimants as all persons falling within the class definition will already be bound by the outcome of the claim (assuming they do not opt out).

It had previously been thought that the existing High Court Rules sit more comfortably with an opt-in, rather than opt-out, regime. The Feltex shareholder proceeding started out as an opt-out proceeding, before the representative order was later varied to an opt-in proceeding. The Court suggested that an opt-out proceeding was too radical a departure from existing procedural rules (*Houghton v Saunders (2008) 19 PRNZ 173 (HC) at [168]*; *and see also Ross v Southern Response Earthquake Services Ltd [2018] NZHC 3288 at [46] to [75]*).

Opt-in regimes are generally seen as fairer than opt-out regimes because parties consciously choose to become claimants rather than having to take steps not to be claimants. Moreover, by their nature, litigation funded proceedings need to function as opt-in proceedings because claimants will need to take steps to agree the terms of the funding agreement, including the percentage of any recovery to which the funder is entitled.

However, as already noted, the Court of Appeal held in *Ross v Southern Response Earthquake Services [2019] NZCA 431, (2019) 25 PRNZ 33* that claims can proceed either as opt-in or opt-out claims.

Test cases

There are no formal rules or procedures that govern the bringing of test cases. However, the very nature of the representative action procedure is that the position of the representative claimant (or claimants) is intended to be representative of the wider represented class. Normally, a proceeding heads to trial for determinations in relation to the represented claimant only, with the intent that the court's rulings in relation to that claimant can also be applied to other class members.

In the Feltex shareholder proceeding, for example, the Court ordered that issues raised by the proceedings must be dealt with in two stages (a bifurcated trial). The first stage determined the representative claimant's own claim, together with a set of issues common to all the other represented shareholders. The representative claimant was unsuccessful at trial but partially successful on appeal, and the Supreme Court directed that the remaining individual issues arising for other shareholders who had opted in are to be determined at a second trial. The second trial will deal with the issue of whether the shareholders suffered loss by reason of an untrue statement in the Feltex prospectus (*Houghton v Saunders [2012] NZHC 1828*; *Houghton v Saunders [2018] NZSC 74, [2019] 1 NZLR 1*). The second trial has yet to occur at the time of publication.

In the Strathboss Kiwifruit claim, the Court ordered that certain issues are to be determined at a stage one trial, including whether the defendant owed a duty of care and if so, the standard of care to be attributed to the defendant and the impact of the passing of certain legislation on that duty of care. Issues such as causation

and loss were (subject to the outcome of the appeal in respect of the first trial) to be dealt with after determination of the stage one issues (*Strathboss Kiwifruit Ltd v Attorney-General [2016] NZHC 206*). As noted, the Court of Appeal has held that the Crown is immune from liability (*Attorney-General v Strathboss Kiwifruit Ltd [2020] NZCA 98*) and this issue is under appeal to the Supreme Court. The second stage will not proceed unless and until the Supreme Court has determined that preliminary issue in favour of the claimants.

In early July 2018, the High Court made orders that there be a staged trial in the Auckland James Hardie action (*White v James Hardie New Zealand [2018] NZHC 1627*). In considering whether the case was amenable to a staged trial, the Court considered the criteria set out in another recent High Court judgment involving James Hardie that, whilst not a representative action, involved a large claimant group (*Minister of Education v James Hardie Ltd [2018] NZHC 1481*). Applying those criteria, the Court asked whether there would be difficult demarcation questions between those issues to be addressed at the first trial and those left for the second, and the efficiencies and practicalities of proceeding in stages. The result of this analysis was that the Court in *White v James Hardie New Zealand Ltd [2018] NZHC 1627* determined that issues common to the claimant class members (whether a duty was owed, whether there was a breach of duty, and whether there were breaches of relevant legislation) would be heard at a stage one trial, with the ability to further refine these common issues following the completion of discovery. Other matters would be left for the second stage of proceedings.

Timetabling

7. What is the usual procedural timetable for a case?

The procedural timetable for a representative action does not differ much from a standard procedural timetable. However, as the procedure is still relatively new, and the courts' approach and attitude to such cases is still developing, it should be expected that such proceedings will be subject to close case management. Procedural issues such as the terms of the representative order (and the opt-in date), defining the class of claimants with reference to the "same interest" requirement, third party funding arrangements, security for costs, and discovery have all been closely managed by the courts in cases brought under the procedure to date.

EFFECT OF THE AREA OF LAW ON THE PROCEDURAL SYSTEM

8. Does the applicable procedural system vary depending on the relevant area of law in which the class/collective action is brought?

The area of law does not generally affect the procedural system available to bring a representative action (*see Question 2 and Question 3*).

FUNDING AND COSTS

Funding

9. What are the rules governing lawyers' fees in class/collective actions?

Subject to the professional rules of conduct and client care for lawyers, conditional fee arrangements are permitted and such arrangements are open to representative action lawyers in New Zealand. Where a lawyer enters a conditional fee arrangement the total fee charged for the matter must be fair and reasonable and, among other conditions, must not be calculated as a proportion of the amount recovered in the litigation.

10. Is third party funding of class/collective actions permitted?

Third party litigation funding is now permitted in New Zealand. This represents a relaxation on the historical restrictions provided through the torts of champerty and maintenance (*see Question 1*).

There are no formal rules governing funding arrangements but a series of cases have developed the relevant principles. The Supreme Court has expressly rejected the submission that it is the role of the courts to exercise supervisory control over litigation funding arrangements and has held that it is not the courts' role to assess the fairness of the funding agreement as between the funder and the claimant. However, the Court stated that it can exercise jurisdiction to stay a proceeding for abuse of process (*Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91*). What is clear from the Waterhouse and Feltex cases is that where a litigation funder is involved:

- There should be a direct client-solicitor relationship between the members of the represented group and the lawyer acting for the represented group in the litigation.
- The lawyer acting for the represented group must be responsible for advising the named claimants and members of the represented group about the merits of the case and all material developments in the case. That advice must be prepared and provided without interference by the litigation funder.
- The litigation funder must not provide expert evidence in the litigation. Expert witnesses must be instructed directly by the lawyers acting in the litigation and the litigation funder should have no direct involvement in that process.
- A defendant will be able to obtain security for costs as of right against the representative claimant and the security ordered is likely to be reasonably full. An application for security is also a means for a defendant to obtain disclosure of the funding arrangements.
- If the claimant's action is unsuccessful, a funder can be directly liable for costs if it substantially controlled or stood to benefit from the proceeding (that is, the costs order can be made not just against the representative claimant, but against the funder directly).

Although a funded representative claimant should disclose the fact of litigation funding at the outset, what is not clear from the case law is whether he/she is required to disclose the actual funding agreement when proceedings are filed. Until the position is clarified, representative claimants appear to be taking a precautionary approach by seeking approval of the litigation funding agreement at the outset. For example, in both the bank fees proceedings and the Strathboss Kiwifruit claim the claimants applied to the court for directions giving approval to the litigation funding agreement (*see Question 1*). By contrast, the funding agreement was not disclosed to the defendants in the Auckland James Hardie proceedings, and Whata J declined to order disclosure in light of the order he made for security for costs (*White v James Hardie New Zealand [2019] NZHC 188 at [23]*) (although this proceeding is not strictly speaking a representative action under High Court Rule 4.24 as all of the claimants are named as parties).

Another consideration is the legal relationship between the funder, the claimants, and the lawyers acting for the claimants. According to the Lawyers Conduct and Client Care Rules 2008 (which bind members of the New Zealand legal profession), lawyers must not act for more than one client on a matter in any circumstances

where there is a more than negligible risk that lawyer will be unable to discharge obligations to one or more of the clients. However, a lawyer can act for more than one client with the prior informed consent of all parties concerned. The application of these rules to class actions is problematic if there is scope for different interests to emerge, for example, where different claimants have different settlement expectations or the funder wishes to pursue a cause of action contrary to the wishes of the representative claimant. Care is required to ensure that the lawyers have a direct solicitor-client relationship with the claimants on the one hand and can provide independent advice uninfluenced by the funder. However, the funding arrangements make clear the funder will pay the costs of the litigation (including legal fees) in return for a percentage of the recovery.

Despite the principles apparent from the cases, the former Chief Justice has commented (in a dissenting judgment) that a litigation funding arrangement was arguably contrary to law. This was due to the extent of control the funder maintained over the litigation (*PricewaterhouseCoopers v Walker [2017] NZSC 151, [2018] 1 NZLR 735*). This may raise doubts as to the legitimacy of funding agreements that give funders a high level of influence in decisions regarding the conduct of litigation, although the Chief Justice's view was a minority one and has not found favour in subsequent cases (*see Mainzeal Property and Construction Ltd (in liq) v Yan [2018] NZHC 2470*).

The question whether and to what extent the law should allow litigation funding, having regard to the torts of maintenance and champerty, is part of the Law Commission's terms of reference in its review of class actions and litigation funding.

11. Is financial support available from any government or other public body for class/collective action litigation?

There is no financial support available from government or public bodies specifically for class actions. Civil legal aid is available for natural persons in New Zealand but the terms of availability are strict and are both means and merit tested. If civil legal aid is granted it is usually limited to small amounts of pecuniary aid. It seems unlikely that class actions would ever qualify for such support (particularly if not all class members can demonstrate the lack of funds required to qualify).

12. Are other funding options available to claimants in class/collective actions?

There is no bar to claimants exploring other funding options, including specialised insurance products. However, such products are not yet widely available (or even promoted as being available) in New Zealand.

Costs

13. What are the key rules for costs/fees in class/collective action litigation?

New Zealand's standard civil procedure rules in relation to costs apply equally to representative actions as to any other civil litigation in New Zealand. The key cost principles are:

- An unsuccessful party is usually required to pay the costs of the successful party. The awarding of costs remains at the court's discretion but generally courts tend not to depart from this rule.
- There is a costs scale set by regulation based on notional daily recovery rates and time allocations for the various steps taken during litigation. The court can exercise its discretion to uplift costs above this scale where the conduct of the losing party justifies it or the time allocations in the scale are inadequate given the complexity of the proceeding. An unsuccessful party will usually also be required to pay the successful party's reasonable disbursements for court filing fees, expert witness expenses, and travel and accommodation expenses.
- The court can also award indemnity costs but such awards are exceptional.
- Generally, the assessment and award of costs will occur at the end of the substantive proceeding after judgment has been given, but costs in relation to any interlocutory applications may be assessed and fixed when the application is determined.
- The court can order that costs be awarded against non-parties including against third party litigation funders (*see above*).

In the context of a representative action it is the representative claimant (personally) who is liable for an adverse costs award. The represented claimants are technically not considered to be parties to the litigation and are therefore usually not liable for costs. Where the representative action is funded by a third party litigation funder, the representative claimant will usually seek an indemnity from the funder to cover its potential costs exposure. Similarly, a defendant is entitled to seek from the court an order for security for costs in advance and/or some other confirmation of the funder's ability to pay an adverse costs award.

The High Court has confirmed in the costs judgment for stage one of the Strathboss Kiwifruit claim that the fact that an action is funded by a third party funder is not a reason to defer the award of costs until after any appeals have been resolved (*Strathboss Kiwifruit Ltd v Attorney-General [2019] NZHC 62 at [9]*).

Key effects of the costs/funding regime

14. What are the key effects of the current costs/funding regime?

The effect of the costs regime applicable to representative actions is that without a litigation funder prepared to pay security for costs and meet any adverse costs award, class actions made up of smaller consumer/investor type groups are unlikely to proceed. A defendant is entitled to reasonable assurance that a costs award in its favour will be able to be met.

DISCLOSURE AND PRIVILEGE

15. What is the procedure for disclosure of documents in a class/collective action?

The procedure for disclosure of documents in representative actions, both in anticipation of and during litigation, is largely the same as that used in any other civil litigation. In summary:

- At the same time as initiating proceedings, a claimant is required, where possible and practicable, to serve "initial disclosure" on the defendant, which is comprised of a bundle of key documents in its control used when preparing its pleading. The defendant must also make initial disclosure when filing its defence.
- Once the litigation is on foot (and likely after the class closure date), a judge will make a discovery order obliging the parties to discover relevant documents. The terms of this can be tailored either by agreement between the parties or by court order.
- The parties can also seek a court order to obtain discovery from non-parties.

In the context of a large representative action it is generally expected that a representative claimant will discover any relevant

documents in its personal control, as will the defendant. The claim organisers are also likely to be required to discover any relevant documents in their control. The represented claimants may also need to give discovery, but the timing and scope of such discovery may depend on whether there is to be a staged approach to the proceeding.

16. Are there special considerations for privilege in relation to class/collective actions?

Like most common law jurisdictions, New Zealand law incorporates the concept of legal professional privilege and documents can be withheld from discovery if they are subject to either legal advice privilege or litigation privilege. This is set out in the Evidence Act 2006.

Legal professional privilege belongs to a client, not the legal adviser. There are no special considerations or rules relevant to privilege in class action proceedings with one exception. Unless the class members also have a direct solicitor-client relationship with the lawyer representing the representative claimant, then legal advice privilege does not apply to communications between those class members and the solicitor acting in the litigation. These communications are only protected by litigation privilege if it can be said the relevant communication is made for the dominant purpose of preparing for the representative proceeding. Whether that would be so will be fact specific. Class members to a representative action will ordinarily be asked to enter into an agreement for legal services with the relevant solicitor to ensure, among other things, that they can assert (or in some cases waive) privilege.

EVIDENCE

17. What is the procedure for filing factual and expert witness evidence in class/collective actions?

The procedure in relation to filing factual and expert witness evidence in a representative action is the same as in any other civil proceedings. Generally, both factual and expert briefs of evidence will be filed by all parties (sequentially) prior to trial and the format will need to comply with the High Court Rules. There is no word limit on witness briefs but they must be in the words of the witness, be signed by the witness, and can only contain admissible evidence.

The parties are permitted to adduce expert evidence at trial provided the expert evidence is admissible. Expert witnesses must comply with a code of conduct which includes the fundamental duty to assist the court impartially on the relevant matters within their expertise.

DEFENCE

18. Can one defendant apply to join other possible defendants in a class/collective action?

Joining other defendants

A defendant can apply to join another person as a defendant to a proceeding. To join a person as a defendant the essential requirement is that the claimant has some right to relief against the person, arising out of the same transaction, matter, event, instrument, document, series of documents, enactment, or bye-law. The courts take a liberal approach to this question.

Applications can also be made to consolidate proceedings or to have similar proceedings heard at the same time. In cases involving more than one class action against different defendants, but involving similar facts, the parties may look at these options.

Rights of multiple defendants

If a representative proceeding involves multiple defendants, they are free to make arrangements to conduct their defences together, and to share confidential information without waiver of privilege. Multiple defendants can also instruct the same lawyers. However, this rarely occurs because it is potentially problematic for a lawyer to represent co-defendants (or multiple defendants) due to issues of actual and apparent conflicts of interest arising. Multiple defendants can instruct joint experts.

DAMAGES AND RELIEF

19. What is the measure of damages under national law in the field of class/collective actions?

Damages

There are no limits on the form of relief that can be sought in a representative action merely on the basis that it is a representative action. Damages are available for a wide range of civil causes of action, including negligence and breaches of contract, according to standard common law principles of quantification. Exemplary or punitive damages are rarely awarded and, when they are, the amount is nominal.

Compensatory orders, equivalent to a damages award, are also available under many statutory regimes. For example, a defendant found liable for a breach of the Fair Trading Act 1986 for engaging in misleading or deceptive conduct can be liable for the amount of the loss or damage suffered as a result of the misleading conduct.

To date, the courts have not had to address issues of quantification of damages in representative actions involving a large class of persons. However, where the loss is not uniform across the class, it is likely that each class member will need to have their loss assessed independently. If the relevant cause of action provides the court with a discretion as to remedy, or where losses are more obviously uniform, it is possible a court may award a global amount of damages to be proportionally split between each class member or allocate an amount per claimant without needing separate proof of individual losses.

Recovering damages

A defendant subject to a damages award can seek to recover a contribution from joint tortfeasors under section 17(1)(c) of the Law Reform Act 1936.

Interest on damages

General rules relating to interest on judgment debts would apply in representative actions. The law regarding interest on money claims has recently been amended under the Interest on Money Claims Act 2016, which applies to all claims commenced after 1 January 2018. This enactment provides that, generally, interest will run, and usually be awarded, from the time when the relevant cause of action arose until the judgment debt is satisfied. The rate is determined under the Act by reference to interest rates set by the Reserve Bank of New Zealand.

20. What rules apply to declaratory relief and interim awards in class/collective actions?

Declaratory relief

All civil remedies are available in a representative action. Therefore, it is possible to seek declaratory relief, although the courts are yet to consider such a case in a true class action context.

Interim awards

All civil remedies are available in a representative action. Therefore, it is possible to seek interim awards, although the courts are yet to consider such a case in a true class action context.

SETTLEMENT

21. What rules apply to settlement of class/collective actions?

Settlement rules

As there are no specific rules governing class actions in New Zealand, the parties are free to reach an out of court settlement as they would in any other civil proceeding. However, it is likely that the litigation funding agreement will contain provisions explaining to class members how settlement would be approached and it would be common to include provisions expressly stating that settlement is subject to the approval of the represented class members, or a set percentage of those class members.

Court approval of settlements are not required in New Zealand and if a proceeding is settled it can simply be discontinued. However, it is conceivable that some settlements may be structured to request that the court make certain orders to facilitate the terms of settlement. These orders would need to be put to the court for its consideration.

Separate settlements

Where there is more than one defendant to a proceeding, one defendant can separately settle with the claimants while the litigation is continued against the remaining defendants. Settlement by one defendant will not necessarily mean that the defendant is absolved of any potential liability as other defendants may sue that defendant for contribution and they would then need to remain a party to the litigation.

APPEALS

22. Do parties have a right to appeal decisions relating to class actions, such as a decision granting or denying certification of a class action?

General rights of appeal apply to representative actions. Decisions of the High Court can be appealed, usually as of right, to the Court of Appeal. An appeal to the Court of Appeal is conducted as a "rehearing" but is heard in light of the evidence presented at the original High Court trial. Further evidence can be admitted if the Court of Appeal allows it, but this is unusual.

The Court of Appeal's decisions can be further appealed to the Supreme Court, but only if the Supreme Court grants leave. Leave is only granted to appeals that involve a matter of significant public importance or commercial significance, or if a substantial miscarriage of justice may occur if the appeal is not heard. Where leave is granted, the scope of the appeal is confined to grounds approved by the Supreme Court's order granting leave to appeal. It is conceivable that large representative proceedings could often meet the Supreme Court's thresholds in relation to both significant public importance, and/or commercial significance. For example, the Supreme Court granted leave to appeal twice in the Feltex shareholder proceedings (*Credit Suisse Private Equity LLC v Eric Meserve Houghton [2013] NZSC 25* and *Houghton v Saunders [2017] NZSC 55*) and granted leave in the Southern Response class action (*Southern Response Earthquake Services Ltd v Ross [2019] NZSC 140*). However, leave was declined in one of the James Hardie claims (*Studorp Ltd v Cridge [2017] NZSC 178*).

ALTERNATIVE DISPUTE RESOLUTION

23. Is alternative dispute resolution (ADR) available in class/collective actions?

The parties to a representative action can engage in mediation at any time and may, at some point, even be encouraged by the court to do so (but the court does not usually require it). Any resolution of the dispute at mediation is usually recorded in an out-of-court settlement agreement and, as with any settlement, need not be subject to court endorsement. The parties can agree to settle the dispute on any terms they so choose (subject to any provisions of the litigation funding agreement).

The parties can also choose to have the dispute determined by arbitration. However, class actions in New Zealand to date have presented a range of interlocutory issues which have required judicial determination in accordance with the High Court Rules. It is difficult to see how some of these issues might be resolved in a more flexible forum like arbitration with a party-agreed procedure. On the other hand, it is conceivable that interlocutory applications might be dealt with in court with the substantive dispute determined by arbitration.

PROPOSALS FOR REFORM

24. Are there any proposals for reform concerning class/collective actions?

The New Zealand Rules Committee released a comprehensive draft Class Actions Bill and Rules for consultation in 2008. A final draft bill and rules (as at 14 November 2008) was provided to the Secretary for Justice in 2009. This bill has received no political consideration since and has not been introduced to Parliament. It appears that progress has stalled since 2009 and it is not anticipated the bill will be progressed in its current form.

More recently, in 2018 the New Zealand Law Commission initiated a review of the law concerning class actions and litigation funding in New Zealand (*see Question 2, Principal sources of law*). The Commission's terms of reference are broad and include (among other things) consideration whether and to what extent the law should allow class actions at all, and whether and to what extent the law should allow litigation funding, having regard to the torts of maintenance and champerty.

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Recent transactions

- Acting for Danone in its dispute with Fonterra following the August 2013 whey protein concentrate botulism scare.
- Acted for ANZ Bank in a class action proceeding brought by claimants seeking recovery of certain bank fees charged to them.
- Acted for Singapore Airlines Cargo in proceedings brought by the Commerce Commission under the Commerce Act against a number of cargo airlines alleging price fixing.

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Recent transactions

- Acted for the former directors of Feltex Carpets in the defence of a class action brought by a group of investors. This is the largest prospectus liability claim ever brought in New Zealand.
- Acted for ANZ Bank in a class action proceeding brought by claimants seeking recovery of certain bank fees charged to them.
- Acting for the promoter of the Intueri Education Group Limited initial public offering in a class action brought by investors.