CLASS ACTIONS AND LITIGATION FUNDING

Bell Gully submission on the Law Commission's Supplementary Issues Paper

Introduction

Bell Gully welcomes the opportunity to comment on Te Aka Matua o te Ture / Law Commission's Supplementary Issues Paper on Class Actions and Litigation Funding.

The Supplementary Issues Paper is a comprehensive piece of work in an important area and we thank the Law Commission for their work to date.

As an initial comment, and as we noted in our previous submission, we believe it is important to design a class action regime that fairly balances both the potential advantages and the risks inherent in class actions, and takes into account the interests of both class members and defendants. To that end, we think the Commission has reached a fair balance of interests in most areas.

We also agree with a number of the Commission's preliminary conclusions. In particular, we are supportive of the need for certification of class actions and approval of class action settlements. In our view, these aspects are important in protecting the interests of class members and defendants, and ensuring a principled regime that is not open to abuse.

We make more specific comments in relation the Commission's questions below.

Commencement and certification of a class action

Q1. Do you agree with our draft commencement provisions? If not, how should they be amended?

1. The Commission's approach of providing draft provisions is helpful in terms of setting out key design features of the regime in a concrete way. We welcome the opportunity to comment on draft provisions, and do so below.

2. Our comments on the draft provisions are subject to two considerations. First, we expect that even following the receipt of submissions, the drafting of the provisions may evolve in the course of preparing a full class actions bill (for example, to ensure that the provisions fit appropriately into a coherent and comprehensive regime) and more generally as part of the legislative process. Our comments are obviously made without the context provided by a complete bill. Second, in cases where the Commission has made a policy decision which diverges from own view (as set out in our previous submission), we have generally not sought to "re-open" the issue and have instead commented on the provision on its own merits.

3. Our suggested changes to the commencement provisions are set out below:

1 Commencement of class action

(1) A person may commence a class action proceeding against 1 or more defendants in the High Court as a proposed representative plaintiff—
  (a) on behalf of themselves and 2 or more other persons; and
  (b) if their claim and the claims of the other persons all raise a common issue.

(2) A proceeding under subsection (1) may be commenced by more than 1 proposed representative plaintiff if it is appropriate in all the circumstances to have more than 1 representative plaintiff.

(3) A State entity that has the power under another Act (the empowering Act) to bring proceedings on behalf of 2 or more persons may commence a class action proceeding against 1 or more defendants in the High Court as a proposed representative plaintiff—
  (a) on behalf of 2 or more persons; and
  (b) if the claims of those persons all raise a common issue.

(4) The commencement of a proceeding under subsection (3) is subject to any limits or requirements in the empowering Act.

(5) In this section, **common issue** means a common issue of fact or law of significance to the resolution of each person's claim.

2 Multiple defendants

(1) If a class action proceeding is commenced under section 1(1) against more than 1 defendant,—
  (a) for each defendant there must be a proposed representative plaintiff and at least 2 other persons with a claim against that defendant:
  (b) if there are 2 or more proposed representative plaintiffs, it is not necessary for each representative plaintiff to have a claim against all of the defendants:
  (c) it is not necessary for each person on whose behalf the proceeding is commenced to have a claim against all of the defendants.

(2) If a class action proceeding is commenced under section 1(3) against more than 1 defendant,—
  (a) for each defendant there must be at least 2 persons with a claim against that defendant:
  (b) it is not necessary for each person on whose behalf the proceeding is commenced to have a claim against all of the defendants.

3 Application for class action

When a class action proceeding is commenced it must be accompanied by an application for—
  (a) an order certifying the proceeding as a class action proceeding; and
  (b) an order appointing 1 or more representative plaintiffs for the proceeding.

Q2. Do you agree with our draft certification provision? If not, how should it be amended?

4. As noted in our previous submission (at [28]), we support a requirement for class certification in order to protect the interests of both plaintiffs and defendants. We also support a test for commonality which requires the common issues to predominate over individual issues (for the reasons set out in our previous submission at [33]), although we accept that the Commission has reached a different view on commonality.

5. Our suggested changes to the certification provisions, which build on our previous suggestions, are set out below:

4 Certification of class action

(1) A court may certify a proceeding as a class action proceeding ~~if~~ only if it is satisfied that—
  (a) the statement of claim discloses a reasonably arguable cause of action; and
  (b) ~~the persons on whose behalf the proceeding was commenced have claims that all~~ that cause of action raises a common issue of fact or law of significance to the resolution of ~~each claim~~ the claims of each member of the proposed class; and
  (c) ~~the 1 or more~~ each proposed representative plaintiff~~s are each~~ is suitable and will fairly and adequately represent the ~~class~~ members of the proposed class; and
  (d) if an opt-out ~~the opt-in or opt-out~~ mechanism is proposed, that ~~for the proceeding~~ is ~~an~~ more appropriate means of determining class membership in the circumstances of the proceeding than an opt-in mechanism; and

(e) a class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members.

(2) The court may consider the following when assessing the suitability of a proposed representative plaintiff and whether they will fairly and adequately represent class members:
- (a) whether there is a conflict of interest that could prevent them from properly fulfilling the role as representative plaintiff:
- (b) whether they have a reasonable understanding of the nature of the claims and class action proceedings, their rights and obligations under any funding arrangements relevant to the class action proceeding, and the rights and obligations of a representative plaintiff, including to represent the best interests of all class members, and their potential liability ~~for~~ to pay legal costs:
- (c) whether they have the means to satisfy an adverse costs award;
- (d) if they will be representing members of their hapū or iwi, the tikanga of the hapū or iwi as relevant to representation in the proceeding:
- (~~d~~e) any other factors it considers relevant.

(3) The court may consider the following when assessing whether an opt-out mechanism is more appropriate than an opt-in mechanism, or whether a class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members:
- (a) the number or potential number of class members:
- (b) the nature of the claims:
- (c) the nature and extent of the other issues that will need to be determined once the common issue is resolved:
- (d) whether the likely time and cost of the proceeding is proportionate to the remedies sought:
- (e) whether there is another procedure available to class members that would be a more appropriate means of dealing with their claims:
- (f) whether there is a real prospect that class members may be adversely affected by the order;[1]
- (g) the need for, and number of, sub-classes:
- (h) any other factors it considers relevant.

(4) Notwithstanding any other provision of this Act, the Court must not certify a class action proceeding on an opt-out basis if the proposed class would include foreign residents.

6. The reasons for our suggested changes are as follows:

a. It should be clear that this provision is a code for certification; the Court has the power to certify a class action "only if" the criteria in the section are met.

b. It should be clear that the merits assessment effectively applies to all class members' claims. That is, the claim of the proposed representative plaintiff must be reasonably arguable, and that reasonably arguable claim must give rise to common issues. The proposed representative plaintiff cannot satisfy the criteria by bringing one cause of action that has merit and another cause of action that has no merit but which raises common issues.

c. As noted in our previous submission (at [56]), we consider that the default position should be for an opt-in class action. It should be for the proposed representative to establish that an opt-out action is more appropriate. We do not consider that there should be any presumption in favour of the mechanism chosen by the proposed representative plaintiff; given the reality that in most cases this preference is driven by the litigation funder. Given the greater incursion and effect on all relevant parties' legal rights in an opt-out class action (discussed in our previous submission), it should be for the proposed representative to justify that approach.

d. As noted in our previous submission (at [48]), we agree with the Commission that adequacy of representation is fundamental to the operation of a modern class action regime, and the protection of the interest of plaintiffs and defendants. A person should not lightly be able to bring claims on behalf of, and thereby affect the legal rights of, potentially thousands of people. Before doing so, they should be required to demonstrate that they understand what a class action entails, including the influence of any litigation funder on the conduct of the proceedings, and the representative's duty to act in the best interests of all class members. This will encourage proposed representative plaintiffs to get independent legal advice on these matters prior to commencing a class action (usually procured by a litigation funder).

e. Consistent with current practice in representative actions, a proposed representative should be required to demonstrate they would have the means (whether through litigation funding or otherwise) to meet an adverse costs award.

f. As we explain below, sub-classes may be necessary to protect the interests of class members and defendants. However, there may come a point where the number of sub-classes required indicates that the claim is not suitable for the class action procedure.

g. In our previous submission we noted (at [59]) that the class action regime in the UK does not allow opt-out class actions to include foreign residents; they must opt in. There are strong policy reasons for this approach relating to jurisdiction, potential double jeopardy, and comity between nations. The Commission's latest paper does not appear to address the position of foreign residents. We have suggested an additional subsection that appropriately protects their position.

[1] *Southern Response Earthquake Services Limited v Ross* [2020] NZSC 126.

This is just one concrete example why there should not be any presumption in favour of the mechanism chosen by the proposed representative plaintiff; it should not be for a defendant to raise such issues to protect the interests of the members of the proposed class.

Q3. When should sub-classes be allowed? For example:

a) Where there is a conflict of interest among class members?

b) Where there is a common issue across all class members, as well as additional issues only shared by a sub-group?

c) Where there are sub-groups with related issues but no common issue applying to all claims?

7. We agree with the Commission that sub-classes should be used as appropriate to deal with conflicts of interest and/or important factual and legal distinctions between class members. As we noted in our previous submission (at [35]), without sub-classes, defendants may be disadvantaged in being unable to exercise legitimate defences where those defences only apply to some class members and not others. Plaintiffs may also be disadvantaged where their representative plaintiff has a conflict of interest with them.

8. We do not consider that sub-classes are required where there are sub-groups with related issues but no common issue applying to all claims. In that case, no class action should be certified at all.

Q4. Do you agree with our list of matters that should be included in the court's certification order?

9. We agree with the Commission's list of matters to be included in the certification order. We consider that the list should also include the date by which class members are required to opt-in or opt-out, and whether the representative plaintiff is required to provide security for costs (and by when).

Q5. Do you agree that the limitation periods applying to all proposed class members should be suspended when a class action is commenced?

10. Yes, we agree that limitation period should be suspended for members of the proposed class (only) when the proposed representative plaintiff files their statement of claim, and only if the class action is certified, consistent with the position adopted in various Canadian provinces. While we recognise the points made by the Commission (at [1.119]) about this potentially giving rise to uncertainty to potential class members, this ought to be weighed against the uncertainty created for defendants who have no control over when and if a class action is brought, or whether that class action has any merit. It is the representative plaintiff who purports to act on behalf of all members of the class and affect their legal rights, and the onus should therefore be on them to ensure that they make a properly constructed and timely application.

Q6. Do you agree with the events we propose should start the limitation period applying to a class member running again?

11. Given that limitation periods should only be suspended if the class action is certified, the only ways in which the limitation would need to recommence would be if and when a class member opts in or out (as the case may be), or if the claim is discontinued without a settlement (assuming that a settlement would render any further claim impossible).

Competing class actions

Q7. Do you agree competing class actions should be defined as two or more class actions with respect to the same or substantially similar issues filed against the same defendant by different representative plaintiffs? If not, how should they be defined?

12. We agree with the Commission's proposed definition. In our view, this broad definition provides maximum flexibility for the courts to manage competing class actions so as to avoid the inefficiencies, burden and confusion of competing class actions.

Q8. Do you agree that a competing class action should be filed within 90 days of the first class action being filed (or with the leave of the court)? How can information about new class actions be made available to lawyers and funders?

13. We support the Commission's proposal to require competing class actions to be filed within 90 days of the first class action (or with the leave of the court).

14. We agree that a dedicated website on the Ngā Kōti o Aotearoa | Courts of New Zealand website (and the ability to sign up to email notifications) would be a sensible means of notifying lawyers.

15. In our view, the Court registry should place details of a class action on the website as soon as practicable after it is filed. The 90 day clock should then start following the notification.

Q9. When should the court determine the issue of competing class actions?

a) Prior to certification.

b) At the same time as certification.

c) The court should have discretion to determine the issue of competing class actions prior to certification or at certification.

16. We agree that the issue of competing class actions should be determined at the same time as certification. In our view, this would be the most efficient option for both the parties and the Court.

17. Determining this issue prior to certification creates risk of procedural confusion which could be costly to all parties and inefficient from the Court's perspective. Presumably the Court in determining the preferred class action would apply similar considerations as it does at the certification stage anyway, but there is a risk (if the decision comes prior to certification) that the "chosen" class action is not then certified and there is then uncertainty for all parties.

Q10. What powers should the court have for managing competing class actions?

a) Should a court be required to select one class action to proceed and stay the other proceedings?

b) Or should the court have a broader range of powers available to it?

18. We consider that a court should be required to select one class action to proceed and dismiss the other proceedings. To leave other actions effectively "hanging" through a stay, creates issues of res judicata and a potential long tail of risk for defendants.

19. For the reasons outlined by the Commission, we consider that allowing two competing class actions to proceed would not enhance access to justice and would cause unnecessary cost and confusion. We therefore do not consider that a court should have other powers, such as to require proceedings to be tried simultaneously and successively. At most, if the Commission is not willing to go so far recommending a dismissal of proceedings, Courts ought to have the ability to consolidate competing class actions into one "chosen" proceeding.

Q11. When a court considers how competing class actions should be managed, should it consider which approach would best allow class member claims to be resolved in a just and efficient way? If not, what test do you favour?

20. We agree with part of Commission's proposed approach, but believe the test should also recognise other interests as well as the class members. A court should undertake a two step analysis and consider: (i) which approach would best allow class member claims to be resolved in a just and efficient way; and (ii) whether that approach unjustly compromises the interests of defendants over another possible approach (in which case another approach might be preferred).

Q12. What factors should be relevant to the court's consideration of which approach would best allow class member claims to be resolved in a just and efficient way? For example, should the court consider:

a) How each case is formulated?

b) The preferences of potential class members?

c) Litigation funding arrangements?

d) Legal representation?

21. We broadly agree with the factors proposed by the Commission. In our view, (a), (c) and (d) are important factors that a court should consider in determining the "just and efficient" criteria. However, we consider that they should be provided as a non-exhaustive list of considerations and a court should retain the ability to consider other facts in determining what is "just and efficient".

22. We are not convinced that an examination of the "preferences of potential class members" will assist and would favour it being removed as a consideration. A court should obviously have regard to the best interests of class members but we are concerned that the expressed preferences may not be a reliable indicator of what is in the best interests of class members. In particular, we agree with the Commission that the number of class members signed up may be a misleading indicator. We also consider that expressed preferences of class members may equally be subject to distortions depending on which class action was commenced first or the method of advertising used. It may also incentivise "game playing" by the competing class actions.

23. We agree that which class action was filed first will likely be irrelevant and that there should not be a 'first to file' presumption. That said, any evidence that a class action has been more fulsomely developed, or more efficiently pursued, will be relevant to the court's consideration (and the timing of filing may be evidence of these factors).

24. We agree that the relative prospects of success should not be considered in determining which class action should proceed. The Commission's suggested approach of considering whether each class action meets the certification criteria (before deciding which class action should proceed) seems sensible to us.

Q13. Do you have any concerns about defendants gaining a tactical advantage from a competing class action hearing? If so, how should they be managed?

25. In our view, it would be antithetical to the principles of access to justice and open justice for the defendants to be excluded from a competing class action hearing. The issues determined at the hearing will ultimately affect defendants' rights and interests and they should have the ability to submit on the issues.

26. We agree that courts have the necessary powers to manage any confidentiality issues that arise.

Relationships with class members

Q14. What obligations should the representative plaintiff have? For example:

a) Acting in the best interests of the class.

b) Ensuring the case is properly prosecuted.

c) Being liable for adverse costs (or ensuring an indemnity is in place).

d) Making decisions on any settlement, including applying for court approval of settlement.

27. We agree that the representative should have the obligations set out above. These obligations are an important protection for class members. This is particularly important in opt-out class actions where a representative plaintiff purports to represent people who have not taken any step to be part of a claim and may not even be aware of it. As the Supplementary Issues Paper points out, the representative plaintiff is in a position to affect these people's legal rights and accordingly, there must be rules in place to ensure the representative plaintiff is acting reasonably and in the class members' best interest.

28. It is also important from the defendants' perspective to have these claims brought in a responsible manner, and to have clear rule in place about liability for costs and who has authority to make settlement decisions.

Q15. Should the representative plaintiff's obligations be set out in a class actions statute?

29. Yes. They are a central aspect of a class action regime and an area where both class members and defendants could be unfairly prejudiced if representative plaintiffs act irresponsibly (in conjunction with litigation funders or otherwise). The obligations are worthy of setting out a statute rather than leaving this for case law development.

Q16. How can a representative plaintiff be supported to meet their obligations?

30. Key to supporting a representative plaintiff to meet their obligations is ensuring that the representative plaintiff understands what those obligations are. We agree with the proposal that the Court must consider whether this is the case.

Q17. Do you agree that the representative plaintiff's lawyer should be regarded as the lawyer for the class after certification?

a) If so, what duties should the lawyer owe to the class?

b) If not, what relationship should exist between the representative plaintiff's lawyer and the class?

31. Yes, we think that after certification, the duty on the representative plaintiff's lawyer is wider than acting for the representative plaintiff alone. The representative plaintiff's lawyer ought to owe solicitor-client duties to the class and we agree with legislation making that clear. There will be a number of consequential practical matters that will need to be worked through, including how the lawyer seeks instructions from the class. If this is through the funder, that needs to be carefully managed given the risks we discussed in our previous submission around class members not getting sufficiently independent advice (see our previous submission at [23]).

Q18. Do you agree communications between the defendant's lawyer and class members should be directed to the representative plaintiff's lawyer after certification? If not, how should the defendant's lawyer communicate with class members?

32. If the representative plaintiff's lawyer is to owe solicitor-client duties to the class after certification, we agree with the usual rules applying and the defendant's lawyer directing communications to the class members to the representative plaintiff's lawyer. However, the usual rule should also apply that the defendant itself is free to contact class members directly (in the same way clients can communicate directly even when represented). We see no basis why defendants or class members should be more restricted than they would be in any other proceeding.

Q19. Do you agree the court should review defendant communications with class members about individual settlements after certification? If not, what, if any, defendant communications with class members should require court review?

33. We do not think this is necessary and restricts the rights defendants would have in any other ordinary proceeding (see above).

During a class action

Q20. Do you agree with our list of events that should require notice to class members?

34. We agree with this list.

Q21. Should the court have the power to order the defendant to:

a) Disclose the names and contact details of potential class members to the representative plaintiff?

b) Assist with giving notice directly to class members?

35. This is an issue that needs to be carefully managed on a case-by-case basis. We are against any presumption that a defendant must either disclose personal information about potential class members or assist in distributing information about how to bring legal proceedings against it. When faced with proceedings a

defendant is entitled to take the steps it deems necessary to defend itself and ought not to have to divert resources to assist the plaintiff with its case. However, we accept that if opt-out proceedings are to be allowed, defendants may practically be the only party with information about the class. There may also be instances where it will be less intrusive and managed in a more even-handed way if the defendant communicates with class members or potential class members rather than the plaintiff (for example, when class members are ongoing customers of the defendant).

36. In our view, the Court should maintain a discretion in this area, but:

(a) The presumption should be that the defendant is not required to take either step (disclose information or assist in giving notice) unless the defendant agrees or the plaintiff satisfies the Court it has a good reason why this is required, for example because the claim cannot practically be progressed without this information (including that the opt-in or opt-out mechanism will not otherwise function);

(b) This can only be ordered after a class is certified; and

(c) If ordered, the plaintiff bears all costs associated with this (i.e., they are not "costs of proceedings"). It would be quite wrong in our view that a defendant bears the cost of assisting with the case against it.

Q22. Do you agree with our proposed requirements for an opt-in/opt-out notice?

37. We agree with the Commission's proposed requirements. However, we would add that the notices should inform class members of the key terms of any litigation funding agreement in place, such as the legal fees and litigation funding commission that will be deducted from any return, what the process is for agreeing any settlement, and the ability for the funder to withdraw from the proceeding and what happens if that occurs. These factors are key to enable class members to understand the risks and potential rewards of participation. That is particularly important in an opt-out class action when the class member is unlikely to have signed a litigation funding or legal services agreement

Q23. Do you agree that the High Court Rules and the court's inherent jurisdiction are adequate to ensure the efficient case management of class actions? If not, what specific provisions are needed? For example:

a) A general power for the court to make any orders necessary to a class action?

b) Specific provisions for class actions case management conferences?

c) Restrictions on filing interlocutory applications in an expedited way?

d) Automatic dismissal of a class action proceeding that is not progressed within a certain time frame?

38. In our view there is already sufficient flexibility in the High Court Rules to efficiently case manage class actions.

Q24. Do you agree that:

a) There should be a presumption in favour of staged hearings in class actions?

b) The court should have flexibility as to which issues are determined at stage one and stage two hearings?

39. We agree with this presumption for the reasons that the Commission states, and also agree with the suggested flexibility for the Court.

Q25. How can individual issues in a class action be determined in an efficient way? For example, should the court have the power to:

a) Appoint an expert to enquire into individual issues.

b) Order individual issues to be determined through a non-judicial process, where the parties agree to that.

c) Give directions as to the form or way in which evidence on individual issues may be given.

40. We agree with the Court having flexibility as to how individual issues should be determined including consideration of the sorts of mechanisms suggested.

Q26. Are current rules for discovery and information provision adequate for class actions or are specific rules required? For example:

a) Should there be a specific rule permitting discovery by class members?

b) Should the defendant be entitled to any information about class member claims such as a list of class members who have opted in or the number of class members who have opted out?

41. In our view there should be a specific rule permitting discovery to be ordered from class members. We disagree with the Commission's suggestion that non-party discovery orders are an adequate means to obtain such discovery. The non-party discovery rule (HCR 8.21) contemplates that the person from whom discovery is sought is not a party to the proceeding and would have had to discover the documents concerned if they had been a party. A class member does not neatly fit within that test because if the class has been certified and the class member has not opt-in or opted out, they are for all intents and purposes a party to the proceeding.

42. We favour a rule which expressly sets out that defendants may apply for discovery from class members. We agree with the considerations that the Canadian courts take into account when faced with such applications (set out at [4.53] of the Supplementary Issues Paper).

43. On the second limb of the question, it is important that those organising class actions keep good records of class numbers at any given point in time, both as a protection for class members, and in order that all parties to the proceeding know the size and scope of the claim. We agree with the proposal to require plaintiffs to keep a register of class members who opt in or out and to make this available to the defendant on request.

Q27. Do you support?

a) The court having an express power to make common fund orders; and/or

b) The court having an express power to make funding equalization orders.

44. We are opposed to the Court having the power to make common fund orders. Common fund orders are a vexed issue and one only needs to look to the experience in Australia to see how problematic they can become. The policy shift in Australia is telling. While originally the Federal Court was open to common fund orders in the 2016 case of *Money Max*,[2] three years later the High Court of Australia in *BMW v Brewster*[3] rightly pointed out the jurisdictional flaw inherent in common fund orders, i.e., the incorrect notion that the Court should have any role to play in improving the economics of class actions for litigation funders.

45. The problems with common fund orders were set out in detail in the Australian Parliamentary Joint Committee Report in December 2020,[4] including the windfall profits that common funder orders create for litigation funders despite very few people having signed up to litigation funding agreements. In other words, funders claiming a figure on behalf of large numbers of people who are agnostic about the action and not even motivated to take a small step to advance their claim, like filling in a form.

46. We note that there are currently proposed reforms before the Australian Parliament that would effectively ban the use of common fund orders such that litigation funders will only be able to charge fees and commissions on class members who have consented.

47. The Australian experience is a cautionary tale for New Zealand. We acknowledge the Commission's point about unfairness if some class members in an opt-out proceeding take the benefit of the funder's work and recover their share of a settlement or damages award in full, whereas other class members have agreed to pay a percentage of their recovery to the funder to cover the costs of litigation. However, that issue can be addressed through fund equalisation orders. We agree with the majority of the High Court of Australia in *BMW Australia Ltd v Brewster* that fund equalisation are a preferable way to address the problem of "free riding".

Q28. If common fund orders are available, when in the proceeding should they be made?

a) At an early stage of the proceeding, with the rate set at this stage.

b) At an early stage of the proceeding, with the court providing a provisional or maximum rate at this stage and setting the final rate at a later stage.

c) After the common issues are determined.

d) At a late stage of proceedings, such as at settlement or before damages are distributed.

e) The court should have discretion in an individual case

2 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] 245 FCR 191.
3 *BMW Australia Ltd v Brewster* [2019] HCA 45.
4 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020).

48. For the reasons set out above we are opposed to common fund orders. However, if the Commission is minded to make common fund orders available, they ought to only be available at a late stage of proceedings, such as settlement or before damages are distributed. That has been the position in Australia post-the High Court judgment in *BMW Australia Ltd v Brewster* .

49. We note that in its report, the Australian the Parliamentary Joint Committee recommended that the government legislate to allow for common fund orders at the *resolution* of a proceeding (but not the outset). The Committee noted (at [9.122]):

> The committee considers that when an application for a common fund order can only be made at the resolution (either settlement or judgment) of a class action, litigation funders may be more encouraged to undertake a book build, thereby possibly leading to a greater investigation of the level of interest among class members. Further, the application of the common fund order would be made when there is greater certainty about the class action profile (number of class members, quantum of claim) and the transaction costs incurred (the division of the proceeds from a settlement or judgment). The availability of a common fund order at the end of a proceeding promotes outcomes which are reasonable, proportionate and fair for all class members as all who financially benefit from the class action are required to contribute to the costs incurred.

50. We agree with this rationale. In our view a court should only be empowered to effectively improve the returns for funders (as common fund orders do) in circumstances where it has all of the facts to hand, including the manner in which the case has been progressed by the plaintiff, the level of interest in the claim, the size and shape of the claim, and the costs actually incurred in progressing the claim to a settlement or judgment. Those factors are only known at the conclusion of the proceedings, i.e., at settlement or after liability is determined and prior to the distribution of damages.

Judgment, damages and appeals

Q29. Do you agree with our draft provision on the binding effect of a class actions judgment? If not, how should it be amended?

51. We agree with the Commission's draft provision on the effect of judgment on a common issue. We consider that judgment on a common issue should bind every class member because this is one of the key ways that class actions promote and achieve efficiency in the administration of justice.

52. We disagree with the suggestion at [5.18] that a class member should not be precluded from bringing subsequent proceedings about issues which were not raised in the class action when they could have been. This could create indeterminate liability for defendants and undermines the efficiencies that the regime is aiming for.

Q30. Do you agree that aggregate damages should be allowed in class actions?

53. Aggregate damages are problematic as they can be inflated and defendants find themselves negotiating with an artificial "floor" (or plaintiff starting point). We consider that aggregate damages should only be allowed where individual class members cannot establish the precise amount of loss or damage suffered by them.

54. If aggregate damages are to be allowed, we agree with a test that allows them only where a reasonably accurate assessment of the total amount of damages owed to class members can be made. The basis for aggregate damages should reflect the overall compensatory objective of damages and the class action regime, i.e., any global or lump sum award against the defendant, or any formula applied to class members' claims to determine individual entitlements, ought to be connected in some way to the actual loss suffered, or reliable approximation of actual loss suffered.

Q31. Should the court be able to order cy-près damages and if so, under what circumstances?

55. In our view, the Court should not be able to order full cy-près damages. Overseas, cy-près damages fulfil a deterrence function to ensure the defendant pays the full cost of any harm they have caused. However, the Commission has suggested that the class action regime in Aotearoa New Zealand will not have deterrence as an objective (which we agree with) and it is therefore inconsistent to award cy-près damages .

56. That said, we consider the Court should be able to order cy-près damages in limited situations where "it is not practical or possible" for any portion of an award of damages, assessed on either an individual basis or aggregate basis, to be distributed to individual class members. We consider this will capture situations where damages are unclaimed by class members (e.g. due to the defendant being unable to contact the class

member after reasonable efforts have been made), or where it is impracticable, uneconomic or otherwise inappropriate to distribute direct compensation to certain individuals (e.g. where there are de minimis amounts, where smaller amounts are going to deceased estates, etc.). In our view, this is an imprecise mechanism but, in general terms, better than an alternative where the defendant retains money set aside for judgment, or submits it to the Inland Revenue as unclaimed money.

Q32. Do you agree with our draft provisions on monetary relief? If not, how should they be amended?

57. We consider that the Commission's draft section 11 (aggregate monetary relief) should be amended as follows (for the reasons set out at paragraph 53 above):

> **11 Aggregate monetary relief**
>
> (1) A court may award monetary relief to class members on an aggregate basis if—
>
> (a) individual class members cannot establish the precise amount of loss or damage suffered by them;
>
> ~~(a)~~ (b) it is satisfied that it can make a reasonably accurate assessment of the total amount to which class members are entitled (the award); and
>
> ~~(b)~~ (c) no question of fact or law remains to be determined to establish the amount of the defendant's liability other than questions relating to the assessment of monetary relief.
>
> ~~(2) For the purpose of the court's assessment of the award, it is not necessary for any individual class member to establish the amount of loss or damage suffered by them.~~
>
> [...]

58. We consider the Commission's draft section 12 (alternative distribution) should be amended as follows:

> **12 Alternative distribution**
>
> (1) This section applies if it is not practical or possible for ~~an award made under **section 11** or~~ any portion of ~~it~~ an award of damages to be distributed to individual class members.
>
> (2) The court may order that the award be paid instead to an eligible charity or organisation.
>
> (3) In this section, **eligible charity or organisation** means—
>
> (a) an entity whose activities are related to claims in the class action proceeding and whose activities are likely to directly or indirectly benefit some or all class members:
>
> (b) an entity prescribed by regulations as an eligible charity or organisation for the purposes of this section.

59. As explained at paragraph 55 above, we consider such alternative distribution should be limited to situations that require unclaimed damages to be distributed. We do not agree with the Law Commission's position that a cy-près award is allowed where "it is not practical or possible" for an award to be made on an aggregate basis as we consider such awards should be limited to a distribution function.

60. We consider there may be some overlap between s 11(3)(d), which provides that the Court may make an order directing how any unclaimed portion of the aggregate award is to be distributed, and s 12(2) which provides that the Court may order that an award to be paid instead to an eligible charity or organization. For clarity, we suggest an amendment to s 11(3)(d):

> (3) The court may make orders for the distribution of the award that it considers appropriate, and these may include an order—
>
> ...
>
> (d) directing how any unclaimed portion of the award is to be distributed, including by making an order under s 12(2):

Q33. Do you agree that parties to a class action proceeding should be able to appeal:

a) A decision on certification as of right?

b) A decision on settlement approval with leave of the High Court?

61. We consider that parties to a class action proceeding should be able to appeal a decision on certification as of right due to the significance of the certification decision to the class action proceeding.

62. We agree that parties to a class action proceeding should be able to appeal a decision on settlement approval, if there is an appealable error of fact or law in the decision, with leave of the High Court. In our view there will be very few cases that make use of this appeal pathway because:

(a) we agree that an application to approve a settlement ought to be made by both parties, so there cannot be a situation where a party would seek to appeal a decision to *approve* settlement; and

(b) where a court declines to approve settlement and indicates the areas of settlement that have caused it to decline approval, the parties can renegotiate the settlement to address these matters and submit an amended settlement for court approval.

Q34. Do you agree that class members should be able to appeal a substantive judgment on the common issues with leave of the High Court?

63. We do not agree. In our view only the representative plaintiff should be able to appeal. The Court has determined at certification that the representative plaintiff is suitable to represent the class. The Court should not do so on the basis that class members are free to pursue their own rights if they are not happy with decisions that the representative plaintiff makes on their behalf (for example, if the representative plaintiff does not appeal). If class members are not happy about those things, they ought to opt-out of the proceeding.

64. In short, to allow individual class members to appeal seriously undermines the efficiencies of a class action regime where the representative plaintiff brings the proceeding *on behalf of* class members.

Q35. Do you think there are any other decisions in a class action that class members should be able to appeal, with or without leave?

65. We do not consider there are any other decisions in a class action that class members should be able to appeal, with or without leave. One of the key efficiencies of a class action regime is that the representative plaintiff brings the proceeding on *behalf* of class members. We consider that an appeal right undermines that efficiency in circumstances where the Court's involvement in certification and settlement (discussed above and below) provides a way for class members' interests to be considered and safeguarded at key stages of the proceeding.

Settlement

Q36. Should the court be required to approve class action settlements in both opt-in and opt-out proceedings?

66. We agree that court approval of class action settlements should be required for both opt-in and opt-out proceedings. As we noted in our previous submission (at [24]), our experience is that there can be a significant divergence in interests at settlement time. This dynamic is difficult for defendants and potentially prejudicial for class members.

67. The Court's supervisory jurisdiction to protect the interests of class members (who are not parties to the proceedings) is an important one. Although the justification is even stronger in the context of opt-out proceedings (where potentially class members may not even be aware of their involvement), we consider that court approval of settlements should be necessary for opt-in proceedings as well.

Q37. Should the court be required to approve the discontinuance of a class action?

68. We agree with that court approval of a discontinuance should be required (for similar reasons as we have expressed in relation to court approval of settlements).

Q38. Do you agree with our list of the information that should be provided in support of an application to approve a class action settlement?

69. Although we are broadly supportive of the proposed list of information, we would caution against making the list too prescriptive. To that end, we would suggest a more general requirement to provide sufficient information (such as in the United States) but with the Commission's proposed list provided as guidance. This would preserve flexibility for a court in exercising its supervisory jurisdiction.

Q39. Should there be a requirement to give notice to class members of:

a) A proposed class action settlement?

b) An approved class action settlement?

70. We agree that class members should be notified of both a proposed and an approved class action settlement.

Q40. Do you agree with the information we propose should be contained in the notice of proposed settlement and the notice of approved settlement?

71. We agree with the list of information that the Commission proposes. Again, we would suggest that the list be provided as guidance in order to preserve flexibility for the Court.

Q41. Should class members be given an opportunity to object to a proposed settlement?

72. We disagree with the rationale for allowing class members to object to a proposed settlement. While we believe it is important for the Court, in its supervisory jurisdiction, to approve class action settlements, that ought to be a broad assessment rather than considering particular issues raised by individual class members. This is because:

(a) By settlement time, the Court has certified the class some time ago, and has taken into account a number of factors in doing so, including the suitability of the representative plaintiff and the appropriateness of the opt-in or opt-out mechanism;

(b) The parties will have invested significant time and resource in getting to this point, and the boundaries set should be clear. Class members have either opted in and thereby elected to be part of this proceeding (accepting whatever settlement is achieved on their behalf), or failed to opt-out (again, accepting whatever settlement is achieved on their behalf).

(c) To allow class members to then object at the point the parties have agreed a settlement, undermines the very reasons the Court has seen fit to certify the class in the first place, and will cause the parties additional time and cost to deal with these objections.

(d) It also creates a very uncertain position for defendants, who fairly approach settlement negotiations on the basis that the representative plaintiff speaks on behalf of the class.

Q42. Do you agree there should there be an express power to appoint a counsel to assist the court or a court expert with respect to settlement approval? Should the court be able to order one or more parties to meet some or all of the cost of this?

73. We do not think this is necessary. If the parties have reached an agreement, and have presented sufficient information about that agreement to the Court, the Court should be well-equipped to apply its judgment as to whether to approve that settlement. As well as being unnecessary, involving third parties in this process has the potential to greatly slow down settlement approvals.

Q43. When the court considers whether to approve a settlement, should it consider whether the proposed settlement is fair, reasonable and in the interests of the class as a whole? If not, what test should it apply?

74. We agree that this is an appropriate test. As the Commission acknowledges, a court will need to be aware that a settlement contains an inherent compromise between the parties and we consider that an examination of whether the settlement is "reasonable" will allow for that.

Q44. Should there be specific factors a court must consider when deciding whether a settlement is fair, reasonable and in the interests of the class as a whole? For example, should the court consider:

a) The terms and conditions of the settlement.

b) Any legal fees and litigation funding commissions that will be deducted from class member relief.

c) Any information readily available to the court on the potential risks, costs and benefits of continuing with the litigation.

d) Any views of class members.

e) The process by which settlement was reached.

f) Any other factors it considers relevant.

75. In our view the legislation should list mandatory considerations for a court while also allowing the Court to consider further factors in its discretion. In our view, (a), (b) and (e) should be mandatory considerations while (c) is an example of something the Court could choose to consider in a catch-all discretionary category ("any other factors if considers relevant"). However, as noted by the Commission, we do not think this should turn into a merits examination and should be limited to the information available to the Court.

76. In terms of (d), we do not think the Court should invite the views of individual class members, for the same reasons we set out above in relation to individual class members' objections to settlement. There is a real risk that the views expressed are the view of the vocal minority and not representative of the views of the class as a whole.

77. In relation to our proposed mandatory considerations:

    a. We consider that the "terms and conditions of the settlement" is the primary factor for a court to consider. We agree with the considerations that the Commission has listed under this factor. We also agree that additional payments to representative plaintiffs at settlement are inappropriate and may lead to conflicts of interest.

    b. We also agree that it is important to ensure that a proper process was followed to avoid or mitigate conflicts of interest.

    c. We agree that considering legal fees and litigation funding commissions will be part of determining the net amount that individual class members will receive from a settlement and therefore whether the settlement is fair, reasonable and in the interests of the class as a whole. This is an even more important exercise in opt-out proceedings where class members may not have signed a legal retainer or litigation funding agreement.

Q45. Should the court have an express power to amend litigation funding commissions at settlement?

78. In our view, a court should have the express power to amend litigation funding commissions at settlement. As we have noted in our previous submission, it is important that the interests of class members are protected vis-à-vis litigation funders. This is highlighted by the situation in Australia. Litigation funding was largely unregulated for a long period in Australia and real issues arose around excessive funder returns and funder behaviour. This led to the Parliamentary Joint Committee Report in December 2020 that identified that in many cases "large portions of the settlement flow to litigation funders… [and] unreasonable and disproportionate profits are obtained at the expense of class members". At the time of writing there are legislative reforms before the Australian Parliament which seek to effectively cap the returns to funders. The reforms would introduce a (rebuttable) presumption that a distribution of more than 30 percent of proceeds (i.e. not including costs) to a litigation funder will be unfair and unreasonable.

79. The proposed Australian legislation also includes an express power of the Court to vary the distribution of claim proceeds in order to ensure that they are fair and reasonable when considering the interests of class members.

80. The same risks exist in New Zealand and this is the opportunity to empower the Court to deal with them. In our view, it would be preferable for the Court to have the power to amend funding commissions rather than requiring the parties to go back to the table (which may compromise the interests of both class members and defendants, particularly as there will be clear conflict between the interests of class members and litigation funders at that point). We consider that a court should have this power even if it has previously considered the reasonableness of a funding commission earlier in proceeding. That is because, at this stage, the reasonableness of the commission can be properly evaluated, as part of ensuring that the settlement is fair, reasonable and in the interests of class members as a whole, by reference to the terms and conditions of the settlement.

Q46. Should the court have the power to convert an opt-out class action into an opt-in class action for the purposes of facilitating settlement?

81. We agree that the court should have the power to make class closure orders (i.e. to convert an opt-out class action into an opt-in class action). In our view, this power will more easily enable settlement of class actions by giving the parties greater certainty around class size. As the Australian Parliamentary Joint Committee has observed, the ability to close the class is integral to facilitating settlements in "open" (opt-out) class actions and providing defendants with finality (at [8.44]).

82. However, this is not a straightforward issue and our view is that it ought not to be available as of right. Rather, it should be assessed on a case-by-case basis and might be either: (a) agreed between the parties; or (b) ordered by the Court on application of either party if the Court determines it is in the interests of justice.

Q47. Do you agree that class members should be able to opt out of a class action settlement once it is approved?

83. We do not agree that class members should be able to opt out of a class action settlement once it is approved. In our view, allowing members to opt out would undermine the efficiencies gained by to date through certification and proceeding in the form the claim has, and create considerable uncertainty about the class when parties are negotiating a potential settlement. As we have noted, uncertainty about the size and nature of the claims may be an impediment to settlement.

84. We consider that the Court's role in ensuring that the settlement agreement is "fair, reasonable and in the interests of the class as a whole" provides sufficient protection for class members to ensure that the settlement is in their interests. It would seriously undermine the finality of settlement for defendants if this was available – litigation on issues could potential be never ending (although the limitation clock would presumably start running for those that opt-out of settlement, that is not clear).

85. If the Commission is minded to allow people to opt-out of an approved settlement, then the amount of the settlement ought to be adjusted down proportionately.

Q48. Should other potential class members have an opportunity to opt in at settlement?

86. In our view, the Court should have discretion to allow other potential class members an opportunity to opt in at settlement. We consider that this may be desirable in some cases in order for the settlement to bind the widest group possible and minimise the risk of further litigation on the issue.

Q49. When a settlement is reached prior to certification, do you agree that the court should consider whether to certify it for the purposes of settlement?

87. We agree with the Commission's proposal that when the parties seek to settle a proceeding prior to certification, the Court should decide whether to certify the class for the purposes of settlement. In our view, this will help to ensure that the class and claims subject to the settlement are adequately defined.

Q50. Should the court supervise the administration and implementation of a class action settlement?

88. We agree that in some cases, such as where there are highly individualised loss assessment, the court should have a role in supervising the administration and implementation of a class action settlement. In our view, when the court is deciding whether to approve a settlement, it should also decide its ongoing supervision role (if any). This would preserve maximum flexibility because in some cases, ongoing supervision may be unnecessary and inefficient.

Q51. Should the court have a power to appoint a settlement administrator? Who would be appropriate to fulfil this role?

89. We agree that in some cases it might be necessary to appoint a settlement administrator. In other cases, this will be unnecessary. We also agree that the court should have a discretion as to who to appoint to the role, although the person ought to be independent of the parties. Accordingly, we would not support the suggestion of the plaintiff's law firm acting as court-appointed settlement administrator.

Q52. Should there be an obligation to provide a settlement outcome report to the court? Should this be made publicly available?

90. We support the obligation to provide a settlement outcome report to the court as it is consistent with the court's supervisory role.

91. We acknowledge that in some circumstances it may be beneficial to make the report public. However, we do not think there should be a presumption in favour of this and the court should determine the issue on a case-by-case basis. We agree that confidentiality orders may be appropriate in some cases.

Q53. Do you have any other feedback on our proposed settlement provisions?

92. We do not have any further feedback or suggested amendments (other than those proposed above).

For more information

Sophie East
PARTNER

DDI +64 9 916 8668 MOB +64 21 899 619
sophie.east@bellgully.com

David Friar
PARTNER

DDI +64 9 916 8977 MOB +64 21 850 314
david.friar@bellgully.com

Jenny Stevens
PARTNER

DDI +64 4 915 6849 MOB +64 21 190 2973
jenny.stevens@bellgully.com

Jesse Wilson
PARTNER

DDI +64 9 916 8843 MOB +64 21 190 3968
jesse.wilson@bellgully.com