New Zealand Law Society
Te Kāhui Ture o Aotearoa

Level 4, 17–21 Whitmore Street, Wellington
PO Box 5041, Wellington 6140 · DX SP20202, Wellington
04 472 7837 · inquiries@lawsociety.org.nz

lawsociety.org.nz

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Amokura Kawharu
Tumu Whakarae | President
Te Aka Matua o te Ture | Law Commission
Wellington

By email: cal@lawcom.govt.nz

Re: Te Aka Matua o te Ture | Law Commission Issues Paper 48: *Class Actions and Litigation Funding: Supplementary Issues Paper*

1. Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Law Commission's *Class Actions and Litigation Funding: Supplementary Issues Paper* (**Issues Paper**).

1.2 We are also grateful for the opportunity to have participated in the Commission's 19 October 2021 workshop on the Issues Paper. We recognise the careful and thoughtful work of the Commission to date, which is apparent from the Issues Paper.

1.3 This submission provides high-level feedback, largely as expressed by the Law Society representatives, Daniel Kalderimis and Paul Collins, who attended that workshop. Our feedback considers, in turn:

a. the underlying concepts of the proposed class action model, and

b. the regulatory implications of that model for the legal profession.

1.4 For clarity and brevity, we are presenting our feedback under these two general headings, rather than providing specific responses to the numbered questions in the Paper.

2. Feedback on underlying concepts

2.1 As discussed at the workshop, the model proceeds on the following conceptual footing:

a. a class action is commenced by a representative plaintiff (or plaintiffs), who has responsibility for and carriage of the class action;

b. the representative plaintiff, in turn, owes duties of a quasi-fiduciary nature to all class members;

c. lawyers are engaged by the representative plaintiff, but owe duties to the class generally; and

d. litigation funders are dealt with separately, presumably primarily as a matter of contract (which may be subject to its own regulations) between the representative plaintiff and the funder.

2.2 We query whether this model may be unnecessarily influenced by the existing terms of HCR 4.24, which necessarily proceeds on the basis that one or more plaintiffs are designated as representatives in order to bring actions on behalf of themselves as well as others with the same interest in the subject matter of a proceeding.

2.3 In designing class action legislation, it is possible and may be preferable not to focus quite as closely on the status and obligations of the representative plaintiff, but to separately identify the following roles:

a. the lead plaintiff, whose name appears first on the intitulement, presumably because their case is considered to be the most 'representative' or a suitable test case for the class as a whole;

b. the person or persons responsible for conducting the litigation, who have responsibility for managing the claim;

c. the person or persons responsible for funding the litigation, who may or should have responsibility for adverse costs orders and to pay security for costs;

d. the lawyers engaged to run the claim, who should receive instructions from the person or persons responsible for conducting the litigation, but owe duties to the class as a whole; and

e. the class as a whole, who benefit from but are not generally involved in making decisions relating to the litigation.

2.4 To amplify, in our view:

a. It may not be necessary that the lead plaintiff(s) be the (only) person responsible for conducting the litigation. For instance, in the recent *Cridge* class action,[1] which lasted some 5 years, took almost 4 months of substantive trial time and involved technical building science evidence, the 4 lead plaintiffs included Ms Cridge and Mr Unwin, who together occupied a modest partitioned house in Wellington, and themselves sought less than $500K of damages, but found themselves acting on behalf of 144 owners of 151 properties. Placing sole management responsibility on the representative plaintiff may incentivise designation of that role to those with the most time and organisational skills, rather than those with the best-placed claim. This may not be strategically advantageous overall. There is also a risk that the heavy responsibility focused on the role of representative plaintiff operates as a disincentive to assuming this role.

b. It is possible for a legislative class actions scheme (unlike our present representative actions regime) to create a statutory concept of a person or persons responsible for conducting a class action litigation – which might in some cases be a litigation committee – for which some members may not be class members (although, in our

[1] *T J Cridge & M A Unwin v Studorp Ltd; K M Fowler & S Woodhead v Studorp Ltd & James Hardie New Zealand Ltd* [2021] NZHC 2077.

view, there should always be a class member involved). It seems possible, and worth exploring further, for the role of such litigation managers to be adequately defined in the legislation in a way which makes them able to give proper instructions to the lawyers engaged to run the claim and accountable to the Court.

c. In any event, the duties owed by the person or persons managing the litigation should be set out fully in the legislation as a code excluding the common law, so that there is no confusion or ambiguity as to what those duties are. We do not see this as one of the situations (such as director duties) in which potentially parallel common law fiduciary duties that have accreted in the past may, over time, continue to assist the development of an overall jurisprudence on the subject matter.

d. Litigation funding arrangements, and the responsibility of litigation funders to meet adverse costs orders and/or post security for costs, should also be addressed up front as part of the certification process. Otherwise, the procedural work that goes into the certification hearing will inevitably be followed by more procedural work, most likely in response to a security for costs application, to ensure the class action has an adequate funding basis.

2.5 All of these matters could be addressed in the lead up to and at the contemplated certification hearing. That hearing should be a 'one-stop-shop' designed to ensure that the proposed class action:

a. is the most suitable (if there is more than one proposed action) to have carriage of the claims;

b. has a proper and defined class behind it;

c. has suitable governance arrangements with respect to the person or persons responsible for conducting the class action;

d. has suitable funding arrangements, including with respect to adverse costs orders and security for costs; and

e. is otherwise viable and should proceed.

2.6 We have carefully considered whether accountability in litigation demands that the person or persons responsible for conducting class action litigation be co-extensive with the plaintiff class. The policy underlying traditional notions of maintenance or champerty reflect this and we understand that this is the Law Commission's preference.

2.7 This new regime is, however, an opportunity to consider and perhaps create room for new arrangements that do not presently exist. Traditional concerns about officious intermeddling should, in the final analysis, be weighed against the reality that a large-scale modern class action is likely to be too overwhelming to be run without assistance on a part-time basis by a person who happens to be affected by a matter giving rise to, usually relatively small but widespread, claims – such as bank fee, governmental conduct or consumer product claims.

2.8 The Law Society accepts and agrees that arrangements between the person or persons responsible for conducting the class action and the litigation funder should be contractual. So, the latter should not also be part of the former.

2.9 But that does not mean a representative plaintiff must themselves conduct the case. It is common for class action plaintiffs not only to engage funding and legal assistance, but also claims management expertise. This could be done by a further contract for management or advisory services. There is of course nothing in the Law Society's proposal to prevent this.

2.10 For some cases, though, even the construct of the representative plaintiff having sole management responsibility, which is then exercised on the basis of seeking advice from others, will be a fiction. Our suggestion is that for such cases, the necessary external advisory and management expertise is most efficiently and transparently brought in more directly through the creation of a litigation committee which could have an express relationship with funders and external lawyers as well as direct accountability to the court.

2.11 The alternative is a web of non-public side agreements and/or understandings, possibly including indemnities and waivers, by which the representative plaintiff would bring in and delegate to others the decision-making responsibility that is theirs by law, but which they do not completely exercise in practice (or necessarily fully understand). Moreover, concentrating responsibility on a representative plaintiff creates serious problems if the pressure or other circumstances causes them to leave their role.

2.12 If this analysis has merit, the question then becomes how to ensure that the person or persons with responsibility for conducting the litigation has authority to represent the class. For an opt-in class action, this could be done by election from class members or in some other way as to signify general approval. For opt-out actions, the authority of the litigation committee would need to be conferred and not merely confirmed by the court.

2.13 The next question is whether or how the person or persons designated as responsible for conducting the litigation can properly claim a mandate to act on behalf of the class as a whole. To this, it is suggested that a mandate in such circumstances is necessarily constructed, as the class is open-ended, and some class members will not even know the claim is being brought, let alone involve themselves in its governance. The best means of conferring legitimate authority in these circumstances is through transparent provision of information and accountability to the court. The court can then decide, in accordance with a defined statutory scheme, whether the proposed body has the right membership and composition to be able to effectively manage the litigation.

2.14 The suggestion then is that it may be preferable to provide greater flexibility for the future conduct of class actions than that which is contained in the proposed model. It could be that only in unusual or exceptional cases would it be permitted for the person or persons responsible for conducting the litigation to include non-class members. But it may be useful to preserve this possibility as an available tool with which to manage the diversity of class actions New Zealand will come to experience over the coming years.

2.15 Our final observation relates to the relationship between equalisation and common fund orders. We agree that both should be available. It may not, however, be necessary to accord them different names. The object of both is to ensure that funding is made on a fair and equal basis and it may be that a broad genus of order by which a court can settle funding contributions is a preferable tool than the designation of sub-species of order, depending on whether a funding agreement presently exists.

3. Regulatory implications for the legal profession

3.1 It is important that any regulatory regime for class actions anticipates and accommodates the professional responsibilities of lawyers who are engaged to run the claim, including any responsibilities arising from amendments to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

3.2 The issues of professional responsibility which must be anticipated in a class action's regime are:

a. The possibility of conflicting multiple-client duties of the sort presently regulated by Rule 6.1. Where a lawyer represents a certified class, there should be no real difficulty about conflicting duties, since the lawyer's duties are owed to the class as a whole. The difficulty arises where the lawyer is potentially responsible for, or owes duties to, different categories of plaintiffs (including members of an opt-out class who are not participating but have not opted-out). If a lawyer has professional responsibilities to persons not identified as parties to a contract of retainer with that lawyer, then the extent of those duties needs to be defined and, preferably, prescribed in a new rule, or new rules, which directly address that situation.

b. The parties to whom lawyers are required to provide information about the principal aspects of client service, under Rules 3.4 – 3.7, need to be clarified. If this obligation applies only to a certified class where either the individuals are in contracts of retainer with the lawyer or a group of individuals is represented by a management committee, then there should be no real difficulty. However, if the plaintiffs' lawyer owes duties to class members outside those categories, then the responsibility to communicate with those persons, and to provide information to them, needs to be clarified with a new rule. The same point applies in connection with parties to whom the lawyer owes a duty to disclose information under Rule 7 (Disclosure and Communication of Information to Clients).

c. The parties to whom the lawyer owes duties of confidentiality under Rule 8, if that duty goes beyond a certified class, also needs to be defined, as do the parties with whom communications are privileged.

d. The entitlement of defendants' lawyers to communicate with individual class members, including any non-participating members in an opt-out class action, needs to be clarified in an amendment or addition to Rule 10.4 (Communicating with another Lawyer's client).

3.3 Ultimately, the preferred outcome, in which the plaintiff's lawyers' professional responsibilities are most readily identified and defined, would be to create a statutory concept of a person or persons responsible for conducting a class action litigation (as discussed at paragraph 2.4 b. above). This approach would help define, and confine, lawyers' professional responsibilities (including the source of their instructions and the identity of the party to whom professional duties are owed).

3.4 Lastly, we welcome the possibility that the legislation will require the settlement of the class action to be approved by the Court (clause 6 of the Class Actions Bill). Settlements are a major source of potential conflict between a group of individual plaintiffs with differing

claims or expectations. The introduction of mandatory supervision by the Court in such circumstances would help avoid a major potential source of conflicting duties besetting a plaintiffs' lawyer.

4. Next steps

4.1 If the Commission has any questions, or if further discussion would assist, please do not hesitate to get in touch via Aimee Bryant, Manager Law Reform & Advocacy Advisor (aimee.bryant@lawsociety.org.nz).

Nāku noa, nā

Herman Visagie
NZLS Vice-President