IN THE SUPREME COURT OF NEW ZEALAND **SC 105/2019**
I TE KŌTI MANA NUI

BETWEEN	**SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED**
	Appellant
AND	**BRENDAN MILES ROSS and COLLEEN ANNE ROSS**
	Respondents

SUBMISSIONS ON BEHALF OF NEW ZEALAND LAW SOCIETY | TE KĀHUI TURE O AOTEAROA AS INTERVENOR

Dated 16 March 2020

Solicitor:

Bronwyn Jones
New Zealand Law Society | Te Kāhui Ture o Aotearoa
PO Box 5041
DX SP20202
Wellington 6145
P: +64-4-463 2906
E: bronwyn.jones@lawsociety.org.nz

Counsel:

Tim Stephens/Monique van Alphen Fyfe
Stout Street Chambers
PO Box 117
Wellington 6140
P: +64-4-917 1086
E: tim.stephens@stoutstreet.co.nz

MAY IT PLEASE THE COURT:

Introduction and summary

1. This appeal addresses the question of whether or not representative proceedings can proceed on an opt-out basis in New Zealand.

2. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) was granted leave to make written submissions on this issue as an intervenor. The Law Society is grateful for the opportunity to do so, and for the opportunity to attend the hearing and assist the Court with oral submissions if required.

3. In summary, the Law Society's submissions are as follows:

   (a) The jurisdiction to make an opt-order under r 4.24 is able to be exercised, notwithstanding the absence of a detailed legislative framework.

   (b) Comprehensive legislation is the preferred solution to the complexities of the subject area. However, in the meantime, the New Zealand courts are institutionally capable of addressing procedural questions that will arise from opt-order orders.

   (c) In particular, the High Court is capable of dealing with important associated issues in the opt-out context regarding:

      (i) litigation funding;

      (ii) approvals of settlement and discontinuance; and

      (iii) the management of competing opt-out claims.

   (d) The Law Society's regulatory framework does not currently respond to issues regarding the responsibilities of plaintiff lawyers to absentee plaintiffs. However, absentee plaintiffs are able to be protected by a combination of a lawyer's duties to the Court and the Court in its supervisory role in representative proceedings.

Jurisdiction

4. In a sense, it is common ground that r 4.24 confers jurisdiction on the High Court to make an opt-out order.

5. However, at the heart of the appellant's argument is the proposition that the jurisdiction is currently empty or purely theoretical: the jurisdiction can never be exercised in the absence of a detailed legislative framework that overrides individual autonomy, vindicates the rule of law, and supplies answers to important procedural questions that will typically arise in opt-out proceedings.

Individual autonomy

6. The Law Society submits that concerns regarding individual autonomy do not ground a jurisdictional-type objection to opt-out orders. Rule 4.24 is a modern

reflection of a jurisdiction developed by the courts of equity that specifically contemplates a representative plaintiff bringing a proceeding on behalf of others without first obtaining their consent. An objection based on individual autonomy runs counter to the underlying concept of representative proceedings.

7. The autonomy of the individual is of course an important value in the New Zealand legal system. The emergence of the opt-out device in fact serves to recognise a person's autonomy by giving those who do not wish to be involved in a representative proceeding the opportunity to file an opt-out notice.[1]

8. However, r 4.24 and its predecessors recognise that other values are also in play. Importantly, these days concrete barriers to justice such as socio-economic status, psychological factors, and lack of familiarity with legal processes also matter. Generally, opt-out representative proceedings are recognised as better increasing access to justice by courts,[2] by law reform bodies,[3] and in academic commentary.[4] In the New Zealand context, the common law also recognises tikanga Māori,[5] which emphasises obligations to the community as a source of individual and collective dignity through the principles of whanaungatanga, mana, and kaitiakitanga.[6]

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1 See Vince Morabito "Opt In or Opt Out? A Class Dilemma for New Zealand" (2011) 24 NZULR 421 at 440; and Vince Morabito "Class Actions—The Right to Opt Out under Part IV of the Federal Court of Australia Act 1972 (Cth)" (1994) MULR 615 at 620–622.

2 See for example *Western Canadian Shopping Centres Inc v Dutton* 2001 SCC 46, [2001] 2 SCR 534 at [28] and [49] per McLachlin CJ; and *Multiplex Funds Management v P Dawson Nominees* [2007] FCAFC 200, (2007) 164 FCR 275 at [134]–[143] per Jacobson J.

3 See for example Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC 46, October 1988) at [107] and [126]; Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Final Report 134, December 2018) at [4.1]–[4.5]; and Ontario Law Reform Commission *Report on Class Actions* (1982) vol 2 at 480–485.

4 See for example Benjamin Kaplan "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)" (1967) 81 Harv L Rev 356 at 397–398; Vince Morabito "Opt In or Opt Out?", above n 1, at 436–440; Rachael Mulheron "Justice Enhanced: Framing an Opt-Out Class Action for England" (2007) 70 MLR 550 at 557; and Vince Morabito and Jarrah Ekstein "Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study" (2016) 35 CJQ 61.

5 For how tikanga Māori or customary law can be relevant to the common law see *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [164] per Tipping, McGrath and Blanchard JJ and [94] per Elias CJ. See generally Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] NZ L Rev 1; and Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 15–16.

6 For descriptions of these concepts see Joseph Williams "Lex Aotearoa", above n 5, at 1–4; and New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP 9, 2001) at 29–35 and 40.

The rule of law and legislative reform

9. The Law Society has a well-established role in law reform and has advocated for some time for legislative reform in the area of class actions.[7] Comprehensive legislation is the preferred solution to the complexities thrown up by the subject matter. However, it is clear that a legislative response is unlikely at any time in the near future.

10. Legislation in New Zealand has been in prospect since 2007, when the Rules Committee released a consultation paper on the possible introduction of a legislative class action regime.[8] A second consultation paper followed in 2008,[9] which was released with a draft Class Actions Bill[10] and draft High Court Amendment (Class Actions) Rules.[11] In 2009, the Ministry of Justice prepared an aide memoire and a briefing paper, suggesting that policy approval should be sought from Cabinet for the introduction of the legislation.[12] However, the Bill was not progressed.

11. In 2016, the Law Society's Law Reform Committee suggested a first principles review of Class Actions and Litigation Funding be considered for inclusion in the New Zealand Law Commission's 2017–2018 work programme. The then Minister of Justice agreed to that reference in 2017, but the reference was put on hold in mid-2018 because of competing reform priorities. The Law Society wrote to the Minister in August 2018 asking that the reference be reactivated in the Commission's 2018–2019 work programme, saying it regarded class actions and litigation funding as a high priority for a first principles review.[13] The reference was subsequently reactivated.

12. On 18 December 2019, the Law Commission issued terms of reference for the project.[14] The Commission expects to report to the Minister by the end of 2021. The realities of the political process mean that any resulting bill then needs to

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7 The Law Society has a statutory mandate in this regard: see ss 65(e) and 67(1) of the Lawyers and Conveyancers Act 2006. It has a Law Reform Committee which initiates and reviews law reform proposals. It also has representatives on the Rules Committee.

8 Rules Committee *The possible introduction of class action procedures into the High Court Rules* (30 April 2007).

9 Rules Committee *Class Actions for New Zealand: A Second Consultation Paper* (October 2008).

10 Don Mathieson "Draft Class Actions Bill 2008" (14 November 2008) PCO8247/2.3, appended to the Rules Committee *Second Consultation Paper*, above n 9.

11 Parliamentary Counsel Office "Draft High Court Amendment (Class Actions) Rules 2008" (8 September 2008) PCO8248/1.5, appended to the Rules Committee *Second Consultation Paper*, above n 9.

12 Ministry of Justice "Aide Memoire—Class Actions Legislation" (30 July 2009); and Ministry of Justice "Class Actions" (10 November 2009).

13 Letter from Kathryn Beck (President of the New Zealand Law Society) to Andrew Little (Minister of Justice) regarding class actions and litigation funding (6 August 2018).

14 New Zealand Law Commission "Review of Class Actions and Litigation Funding—Terms of Reference" (18 December 2019).

be the subject of a bid by the Minister to the Cabinet Legislation Committee and allocated a priority on the Legislation Programme for government bills.[15]

13. If a legislative solution does eventuate, it is therefore clear that it is still some years away. In the meantime, the Law Society submits that the rule of law does not require class actions in New Zealand to remain in stasis at this point in their development.

14. The use of representative proceedings to supply a class action-type mechanism was itself a procedural innovation and involved something of a leap in judicial thinking. Historically, the original representative procedure applied the "same interest" requirement strictly—an approach followed still in England and Wales.[16] The complexities of modern society and modern litigation then saw a more flexible and generous approach to the "same interest" test in a number of jurisdictions, including in New Zealand, in order better to meet the interests of justice.[17]

15. The decision of the High Court in *Houghton v Saunders* in 2008 is significant for the current appeal because of the opt-in vs opt-out ruling.[18] However, at the time, the case's significance lay more in the Court of Appeal's endorsement of the relaxation of the "same interest" test that had been applied overseas and in some High Court decisions.[19] The Court of Appeal recognised that answers to complex representation questions were not currently supplied in New Zealand by additional detailed modern rules.[20] Answers to these questions have therefore unfolded incrementally, in the context of the *Feltex* litigation and elsewhere. In the absence of a detailed legislative framework, the New Zealand courts have iteratively filled the procedural void. They have made rulings:

    (a) approving the form of notice to potential opt-in parties;[21]

    (b) setting the date by which class members must opt in to a proceeding;[22]

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15 Cabinet Office Circular "Law Commission: Processes for Setting the Work Programme and Government Response to Reports" (24 April 2009) CO 09/1 at [29].

16 See for example *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284, [2011] Ch 345 at [64]; and *Lloyd v Google LLC* [2019] EWCA Civ 1599.

17 See *Dutton*, above n 2, at [39] per McLachlin CJ; *Carnie v Esanda Finance Corp Ltd* [1995] HCA 9, (1995) 182 CLR 398 at 408 per Brennan J; and *Saunders v Houghton (No 1)* [2009] NZCA 610, [2010] 3 NZLR 331 at [10]–[15].

18 *Houghton v Saunders* (2008) 19 PRNZ 173 (HC).

19 Anthony Wicks "Class Actions in New Zealand: Is Legislation Still Necessary?" [2015] 1 NZ L Rev 73 at 77–79.

20 *Saunders v Houghton (No 1)*, above n 17, at [15].

21 *LDC Finance Ltd (in rec and in liq) v Miller* [2013] NZHC 2993 at [54].

22 *Houghton v Saunders*, above n 18, at [224]; *Cridge v Studcorp* [2017] NZCA 376, (2017) 23 PRNZ 582 at [61]; *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827 at [55]; and *LDC Finance Ltd*, above n 21, at [54].

(c) requiring funding arrangements to be explained to the Court;[23]

(d) requiring specific amendments to a funding arrangement;[24]

(e) approving a funding agreement;[25]

(f) scrutinising a funding arrangement to ensure that no abuse of process is facilitated by the Court;[26] and

(g) dealing with questions of limitation.[27]

16. The New Zealand context is analogous to that faced by the Supreme Court of Canada in *Dutton* and the High Court of Australia in *Carnie*—both decided prior to the advent of detailed legislative schemes in their respective relevant jurisdictions and on the basis of procedural rules with the same provenance as r 4.24.[28] Both of those courts held their respective r 4.24–equivalents were a sufficient foundation to facilitate representative proceedings. Both courts foreshadowed consequent procedural questions such as opt-in vs opt-out, notice, settlement and discontinuance, and costs. Neither Court made detailed comment on how those matters ought to be managed.[29] According to *Dutton*, the courts should "address procedural complexities on a case-by-case basis".[30]

17. Many of the Australian and Canadian Federal and State/Provincial jurisdictions have now adopted detailed legislative schemes.[31] Even within those legislative schemes, however, resort is made to open-textured provisions in order to provide procedural rules that will respond to evolving needs.[32]

18. At the other end of the spectrum, Prince Edward Island is the last remaining Canadian province without a legislative response to the question of representative proceedings. Nonetheless, in a recent decision, the Prince Edward Island court set out a comprehensive framework for addressing common procedural matters, adapting the legislative schemes from other Provinces, and doing so as an exercise of the court's inherent power to settle matters of practice and procedure.[33]

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23 *Houghton v Saunders*, above n 18, at [224].

24 *Saunders v Houghton*, above n 17, at [111].

25 *Cooper v ANZ*, above n 22, at [9]. This issue in respect of representative proceedings was expressly left open in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [28], n 29.

26 *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489 at [76]–[82].

27 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541.

28 *Dutton*, above n 2; and *Carnie*, above n 17.

29 See *Carnie*, above n 17, at 405 per Mason CJ, and Deane and Dawson JJ; and *Dutton*, above n 2, at [32]–[34] and [49]–[50] per McLachlin CJ.

30 *Dutton*, above n 2, at [51] per McLachlin CJ.

31 The respondents' submissions provide a helpful comparative survey at [33]–[37].

32 See the discussion at [42]–[43] and [45]–[54] below.

33 *King v Government of Prince Edward Island* 2019 PESC 27, appendix A.

19. In light of this background, the exercise of the jurisdiction under r 4.24 to make opt-out orders involves less of a procedural innovation than the original relaxation of the "same interest" test. If an appropriate case for opt-out orders arises, it is submitted that the rule of law does not operate to require this Court to deny litigants the exercise of the jurisdiction because the legislature is yet to act and the body of case law to guide judicial decision-making is in its infancy.

20. Although they have not yet been adapted for today's context, the rules for representative proceedings in New Zealand should be used where they will further the administration of justice.[34] In *Credit Suisse*, this Court endorsed McGechan J's comment in *RJ Flowers* that r 4.24 "should be applied and developed to meet modern requirements".[35] There is, as the majority noted, "scope for continual development".[36]

Key procedural questions

21. For the reasons canvassed in the foregoing section, it is submitted that a detailed legislative framework is not required as a matter of principle before an opt-out order can be made.

22. Nonetheless, behind the question of whether the High Court should make an opt-out order in a given case is a set of associated questions regarding the Court's ability to deal with practical matters that will arise with an opt-out action.

23. The specifics will involve some challenging questions for the courts. The Law Society nevertheless submits that these matters can adequately be managed through r 4.24, other High Court Rules, and the Court's inherent jurisdiction. This section of the Law Society's submissions addresses the legal basis for the Court's oversight of issues regarding litigation funding, settlement and discontinuance, and competing opt-out claims, and potential tools available to address them.

Funding arrangements

24. In *Waterhouse v Contractors Bonding Ltd*, this Court stipulated that it is not the role of the courts to act as general regulators of litigation funding arrangements.[37] However, the Court expressly left open the extent of the courts' supervisory role in relation to representative proceedings, where issues of

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34 *Credit Suisse*, above n 27, at [49] per Elias CJ and Anderson J. See also *Carnie*, above n 17, at 404 per Mason CJ, and Deane and Dawson JJ: "The absence of such a prescription does not enable a court to refuse to give effect to the provisions of the rule."

35 *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 271, cited with approval in *Credit Suisse*, above n 17, at [61] per Elias CJ and Anderson J, and [130] per McGrath, Glazebrook and Arnold JJ.

36 *Credit Suisse*, above n 17.

37 *Waterhouse v Contractors Bonding*, above n 25, at [28].

fairness between class members and the potential for abuse of the courts' process are pronounced.[38]

25. In the present case, it was central to the reasoning in the Court of Appeal's judgment below that opt-out orders are likely to significantly enhance access to justice.[39] But the extent to which they will do so is linked to the courts' ability to manage opt-out proceedings in a manner that provides incentives for litigation funders to participate in them. Opt-out orders result in larger classes, which are more likely to attract funders and make claims economically viable—but only on the assumption that the funder will be able to recover costs and obtain fees or commission from the damages or settlement funds of more class members.[40]

26. In general terms, whether an opt-out order is more attractive to a litigation funder will therefore depend on the funder's ability to obtain recovery from the larger pool in order to offset the costs of litigation and provide a commercial return on their capital that takes into account the risk of failure. Otherwise, litigation funders may continue focusing on book-building for closed class opt-in orders instead.[41]

27. The Court of Appeal's judgment below included reference to two types of techniques that have been developed in Australia to ensure the costs of litigation funding are distributed across all claimants who receive the benefit of open class proceedings: the funding equalisation order (**FEO**) and the common fund order (**CFO**).[42]

28. FEOs are used in Australia pursuant to Federal and State legislation.[43] An FEO binds all those who benefit from the judgment, but only as between each other. An FEO requires a deduction from each non-funded class member's claim of an amount equivalent to the funding commission that would otherwise have been payable under the funded parties' funding agreement. This amount is then redistributed back pro rata amongst the funded members. An FEO ensures that funded and unfunded parties do not end up with unfairly disparate awards, but it does not create obligations between unfunded parties and the funder or add to the total return received by the funder. All class members

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38 At [28], n 29. See also *Southern Response Unresolved Claims Group*, above n 26, at [76]–[82].

39 *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431 [**Court of Appeal judgment**] at [98] [**COA 101.0128**].

40 Michael Legg "Reconciling litigation funding and the opt out group definition in Federal Court of Australia class actions—the need for a legislative common fund approach" (2011) 30 CJQ 52 at 53.

41 Michael Legg, Edmond Park, Nicholas Turner and Louisa Travers "The Rise and Regulation of Litigation Funding in Australia" (2011) 38 N Ky L Rev 625 at 643.

42 Court of Appeal judgment at [110] [**COA 101.0132**].

43 See, for example, Federal Court of Australia Act 1976 (Cth), s 33ZJ; and Civil Procedure Act 2005 (NSW), s 183.

share equally in the balance of the settlement sum, but the funder's recovery is capped at its contractual entitlement to commission or fees.[44]

29. With FEOs, funders therefore still need to undertake the book-building process. To realise a reasonable return on investment, the funder needs to engage with sufficient potential class members prepared to enter funding agreements. Unless class members affirmatively agree to conditional uplift fees or the funder's commission, these are not otherwise recoverable from them. A critical mass of claims is necessary to make a class action commercially viable for a funder.[45]

30. By contrast, a CFO binds all those who benefit from the judgment—not just those who have entered a contractual relationship with the funder—to paying a court-approved proportion of their damages award to the funder. CFOs are characteristically made at an early stage in the proceedings. From the funder's perspective, the advantage of the CFO at an early stage is that the funder avoids the effort, expense and risk of the book-building process.[46]

31. CFOs were first made in Australia in 2016 in *Money Max Int Pty Ltd v QBE Insurance Group Ltd*.[47] Significantly, at the time of the Court of Appeal's judgment below in this appeal, CFOs were still a feature of the Australian landscape and had been recently upheld by the Supreme Court of New South Wales in *BMW Australia Ltd v Brewster*[48] and the Full Court of the Federal Court of Australia in *Westpac Banking Corp v Lenthall*.[49]

32. In the judgment below, the Court of Appeal was careful to refrain from commenting on the availability of CFOs in New Zealand in light of the fact that an application for a CFO by the respondents remains to be determined. However, the Court stated that it was confident that the High Court has the necessary tools to address any real unfairness in the context of representative proceedings, whether under the High Court Rules or in the exercise of its inherent jurisdiction.[50]

33. The Australian terrain regarding CFOs has now changed. On 4 December 2019, the High Court of Australia gave judgment on appeals in the *Westpac* and *BMW*

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44 See the description of FEOs in *BMW Australia Ltd v Brewster* [2019] HCA 45 at [134] per Gordon J; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [5]–[6]; and Vicki Waye and Vince Morabito "Financial arrangements with litigation funders and law firms in Australian class actions" in Willem H van Boom (ed) *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge, Abingdon (UK), 2017) 155 at 192–193.

45 See Waye and Morabito, above n 44, at 177–178.

46 See the description of CFOs in Waye and Morabito, above n 44, at 177–179.

47 *Money Max*, above n 44; but held to be impermissible in the Australian legislative context three years later by the High Court of Australia in *BMW Australia*, above n 44.

48 *BMW Australia*, above n 44.

49 *Westpac Banking Corp v Lenthall* [2019] FCAFC 34, (2019) 265 FCR 21.

50 Court of Appeal judgment at [110] [**COA 101.0132**].

cases.[51] The majority allowed the appeals and held that, properly construed, the Federal and New South Wales statutes did not empower a court to make a CFO at the outset of the proceeding.

34. However, it is submitted that the majority's analysis in *BMW* is likely to be of limited assistance in determining whether New Zealand courts have jurisdiction to make CFOs. *BMW* was approached by the majority as a question of statutory interpretation in the context of comprehensive legislative regimes that clearly authorised FEOs at the conclusion of proceedings. The majority concluded that the provision on which it was claimed an early-stage CFO could be made was essentially supplementary to other specific powers provided for in the relevant Federal and State legislation.[52] A power to make CFOs at an early stage of the proceeding to incentivise litigation funding was not in accordance with the text and purpose of the statutes, when a specific power existed to address the key underlying issue of fairness arising from the free rider problem that arises with open class proceedings as between funded and unfunded parties.[53]

35. The specific reasons for favouring an FEO over an early-stage CFO in *BMW* therefore do not apply in the context of r 4.24. Rather, the manner in which the minority judgment of Edelman J examines the juridical basis for both FEOs and CFOs may be more helpful to the New Zealand courts, if and when they come to address the issues.[54] In any event, it is submitted that the Court of Appeal was correct to conclude the courts will have the tools to address unfairness in this context. The precise structure of any remedial order for cost-sharing—be it in the nature of FEOs, CFOs or other orders—is able to be determined at a later stage.

Settlement and discontinuance

36. In its submissions, the appellant suggests a representative party has no power to settle claims on behalf of the represented parties, and says the authority to do so in Australia stems from a "statutory agency". The appellant also states there is no power for the courts to approve settlements or discontinuances in New Zealand, pointing to the statutory bases for such power in Australia.[55]

37. It is correct that neither r 4.24 nor any other rule in the High Court Rules expressly confers on a representative plaintiff a power to settle on behalf of the

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51 *BMW Australia*, above n 44.

52 At [46]. The plurality judgment was given by Keifel CJ, and Bell and Keane JJ. Nettle and Gordon JJ provided their own brief reasons, largely according with those of the plurality.

53 At [3], [49]–[55], [69], [82]–[90] and [91]–[94] per Keifel CJ, and Bell and Keane JJ.

54 At [182]–[202] per Edelman J.

55 Appellant's submissions at [63]–[71].

represented parties. The courts have, however, recognised the power to settle or compromise as inherent in the power to sue or be sued.[56]

38. In the case of representative proceedings, it is submitted that authority to settle stems from the representative capacity conferred by r 4.24. Where representative proceedings are initiated under r 4.24(b)—that is, without consent but by direction of the High Court—it is submitted that the Court's supervisory role is engaged as a stand-in for the protection that would otherwise come with a party's consent.

39. It is also correct that no rule specifically requires court approval of discontinuance in representative proceedings. However, it is submitted that the High Court's power to require leave to discontinue such proceedings can be found in a combination of rr 1.2, 4.24, 15.20(3) and 1.6.

40. The nature of an opt-out representative proceeding is that other persons have an interest in the proceeding in the nature of a plaintiff, but do not actively participate in it. In ordinary proceedings, such persons would be joined as named parties, and discontinuance would require their consent or the leave of the Court under r 15.20(3). However, in a representative proceeding, by virtue of r 4.24 their interests are advanced by the representative who, by analogy, ought to be similarly constrained in settling and discontinuing proceedings as if those persons were joined.

41. It is therefore submitted that the Court can direct that its approval is needed for discontinuance as part of its orders allowing the proceeding under r 4.24. This accords with rr 1.2 and 1.6, and the spirit of r 15.20(3), which would otherwise apply in the context of multi-party proceedings. It is submitted that it follows that approvals of settlements could form part of the Court's supervisory role to protect the interests of absent represented parties as part of granting leave for discontinuance.

42. In Ontario, settlement approval by the courts has an express statutory basis but only in sparse terms.[57] It has been left to the courts to develop factors to assess the appropriateness of settlements. These are known as the *Dabbs* factors, and include:[58]

    (a) the amount and nature of discovery evidence;

    (b) the terms and conditions of settlement;

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56 See the respondents' submissions at [93]–[94] and, in particular, *Bath's case* (1878) 8 Ch D 334 (CA) to which they refer.

57 Class Proceedings Act SO 1992, c 6, s 29.

58 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 54, citing *Dabbs v Sun Life Assurance Co of Canada* 1998 CarswellOnt 5823 (Gen Div) at [13].

(c) the recommendation and experience of counsel;

(d) likely future expense and duration of litigation;

(e) the recommendation of neutral parties;

(f) the number of objectors and nature of objections; and

(g) the presence of good faith, arms' length bargaining and the absence of collusion.

43. The Law Commission of Ontario has observed that, even with statutorily required court approval, there is a heightened risk to absent represented plaintiffs in the "adversarial void" of such settlements:[59] the representative plaintiff and the defendant have a coinciding interest to convince the court that the settlement is appropriate, but that coinciding interest may not align with the interest of absent represented plaintiffs. The Commission noted that lawyers ought to have a duty to make full and frank disclosure to the court in such circumstances, and that the court is empowered to appoint amicus curiae to assist in assessing the proposed settlement in appropriate cases.[60]

Competing opt-out claims

44. Competing claims to represent others with the same interest have real potential to undermine the advantages of a class action regime, as well as being potentially oppressive to defendants.[61]

45. Competing claims are a prospect whether an opt-in or an opt-out procedure is adopted. Currently, two competing opt-in proceedings against the directors of the failed CBL Corporation Ltd are on foot in New Zealand—funded by LPF Group Ltd and IMF Bentham Ltd respectively.[62] In the judgment below in this case, the Court of Appeal observed that an opt-out approach does not preclude the possibility of parallel claims: claimants can opt out and bring their own claim or opt out and participate in another opt-in claim.[63] The Court of Appeal also commented that there cannot be two opt-out proceedings on behalf of the same class—"that would make no sense".[64] The Court of Appeal did not, however, go on to clarify the manner in which the New Zealand courts are to deal with the prospect of two opt-out claims.

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59 At 55–56.

60 At 55–56. The Commission recommended that these matters be given specific legislative recognition because—particularly in the case of amicus—the courts had not yet used that power in the context of settlement assessment.

61 Australian Law Reform Commission *Integrity, Fairness and Efficiency*, above n 3, at [4.49]–[4.53].

62 See "CBL Class Action" <www.cblclassaction.co.nz>; and IMF Bentham "CBL Corporation Ltd Shareholder Class Action" <www.imf.com.au>.

63 Court of Appeal judgment at [100] [**COA 101.0129**].

64 Court of Appeal judgment at [100] [**COA 101.0129**].

46. The Canadian and Australian experiences illustrate that competing class proceedings have the potential to create significant issues. In those jurisdictions, the questions are made more complicated as a result of their federal contexts. Almost all of the Australian States and Canadian Provinces have detailed legislative schemes for class actions. Those schemes do not, however, typically address how to manage competing class proceedings.

47. Ontario—where the majority of Canadian class proceedings take place—deals with competing class actions by requiring a "carriage motion" to determine which lawyer will carry the proceeding.[65] The jurisdiction to do so comes from the courts' ability to make orders under s 12 of the Class Proceedings Act SO 1992, c 6, and from the ability to stay class proceedings under s 13.

48. Ontario case law has developed a comprehensive set of factors to be considered in carriage motions. In practice, it appears that no single factor predominates, and courts have generally focused on the best interests of the class. Notably, courts have been unwilling to assess the relative quality of each legal team, stating that the motion is not a "beauty pageant".[66]

49. In reviewing this area, the Law Commission of Ontario recorded criticism that this approach is costly, unseemly, and thorny and difficult. It recommended reform, and reviewed the options of Quebec's "first-to-file" rule and the "mandatory notice; fixed deadline" model proposed by the Australian Law Reform Commission.

50. The Commission summarised Quebec's rule as follows:[67]

> (1) The first motion for authorization to be filed will, in principle, be the first to be heard;
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> (2) Subsequent motions will be stayed and will proceed only if the first-class action is not authorized;
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> (3) The priority of the first motion may be challenged by lawyers litigating the subsequent class actions;
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> (4) The onus is on the lawyers in the subsequent cases to show that the first action constitutes an abuse of the first-to-file rule and is not in the best interests of the class; and
>
> (5) Judges considering motions challenging should not use as criteria the level of preparation, resources or experience of counsel, which involve a highly discretionary and largely subjective exercise.

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65 See Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms*, above n 58, at 23–29.

66 At 23–24.

67 At 25, citing *Schmidt v Johnson* 2012 QCCA 2132 at [42].

51. The Law Commission of Ontario rejected the first-to-file rule for several reasons, including its encouragement of "a race to the court".[68] The Commission instead recommended the "mandatory notice; fixed deadline" model proposed by the Australian Law Reform Commission.

52. In Australia, despite no legislative direction, the Federal Court has determined several available options which might be chosen depending on the specific circumstances of the case: [69]

    (a) consolidating relevant proceedings;

    (b) making a "de-classing" order under s 33N(1) of the Federal Court of Australia Act 1976 (Cth);

    (c) requiring a joint trial of competing proceedings;

    (d) staying one or more competing proceeding; and

    (e) closing classes within competing proceedings but leaving one open, and having a joint trial of them all.

53. The Australian Law Reform Commission has responded recommending statutory powers to resolve competing class actions, including by a stay of proceedings.[70] It also recommended development of the Class Action Practice Note (GPN-CA) to provide for further case management procedures for competing class claims, including the "mandatory notice; fixed deadline" model to which the Law Commission of Ontario was attracted. Under this approach:[71]

    (a) the first-to-file plaintiff firm notifies potential claimants and their lawyers that a class action has commenced;

    (b) potential claimants and their lawyers are required to lodge a competing class action within a set time period; and

    (c) a selection hearing occurs to determine the way in which the class action is to proceed.

54. It is therefore apparent from the Canadian and Australian examples that, even in the context of detailed legislative schemes, courts have needed to fill procedural gaps in order to manage competing representative claims, and they have fallen back on open-ended provisions to do so. In time, statutory reform

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68 At 26. The Australian Law Reform Commission has also commented on this policy problem created by a first-to-file rule: Australian Law Reform Commission *Integrity, Fairness and Efficiency*, above n 3, at [4.102]–[4.104] and [7.133].

69 See Australian Law Reform Commission *Integrity, Fairness and Efficiency*, above n 3, at [4.59], citing *Perera v GetSwift Ltd* [2018] FCAFC 202 at [44].

70 Recommendation 4.

71 Recommendation 5; and at [4.97]–[4.98].

has been proposed in order to address issues that have arisen in the course of iterative procedural development.

55. In New Zealand, at this juncture, it is submitted that the issues arising out of competing representative claims are capable of case management through the application of ordinary rules of procedure: for instance, the High Court could potentially adopt the approach suggested by the Australian and Ontario law commissions by a combination of High Court Rules rr 4.24 (requiring notice under subr (b)), 10.12 (consolidating proceedings) and 15.1 (staying proceedings). Answers will inevitably be context-specific. Guidance from application of the High Court Rules in their traditional context is likely to be helpful, as will guidance from the application of similar models overseas. It is submitted that the High Court has the jurisdiction and institutional competence to deal with the issues that arise.

Regulating lawyers

56. In arriving at its approach to the issues in this appeal, the Law Society has given some thought to the response of its regulatory function to lawyers acting for plaintiffs in opt-out proceedings.

57. Named plaintiffs and members of the class who actively choose to enter into a retainer with the plaintiffs' lawyers do not present any difficulty because they come within the conventional lawyer–client relationship.

58. In the context of opt-out proceedings, the issue that arises is with absentee represented plaintiffs—that is, those who have elected not to engage with the plaintiff law firm or, potentially, do not even know about the action. It appears that this is something of an undeveloped area. There is a lack of any reference to it in this country's professional responsibility texts and the conclusion in the leading Australian text is that the boundaries of ethical obligations and obligations in equity and tort ultimately await judicial determination or some legislative intervention.[72]

59. In the absence of legislative reform, the Law Society submits there are two interrelated answers to these questions.

60. First, absentee plaintiffs ought not to be considered clients of the lawyer in any meaningful sense. There are none of the ordinary incidents of a professional relationship—a contract, agreed scope of retainer, agreed fees, and reporting obligations. In addition, there are no practical bases on which a lawyer could provide all the required information to the absentee plaintiffs.[73] In fact, this would conflict with a lawyer's other obligations not to disclose information to

72 G E Dal Pont *Lawyers Professional responsibility* (6th ed, Lawbook Co, Sydney, 2017) at [7.110]. See also Simone Degeling and Michael Legg "Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts between Duties" (2014) 37 UNSWLJ 914.

73 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.4–3.7.

unknown persons.[74] Instead, the existence of a relationship is the result of r 4.24. That rule, and its incidents, define the relationship.

61. Secondly, absentee plaintiffs are able to be protected by a combination of a lawyer's duties to the Court, and the Court in its supervisory role in opt-out class proceedings. The role of the Court was confirmed by Brennan J in *Carnie*:[75]

> However, it is precisely because of the flexible utility of the representative action that judicial control of its conduct is important, to ensure not only that the litigation as between the plaintiff and defendant is efficiently disposed of but also the interests of those who are absent but represented are not prejudiced by the conduct of the litigation on their behalf. The self-proclaimed carrier of a litigious banner may prove to be an indolent or incompetent champion of the common cause in the courtroom. As Vinelott J said in the course of his judgment in *Prudential Assurance Co Ltd v Newman Industries Ltd*, the court must be satisfied the "issues common to every member of the class will be decided after full discovery and in the light of all the evidence capable of being adduced in favour of the claim". I would add that if, for any reason, the court is not satisfied that the interests of the absent but represented class are being properly advanced, the court should exclude the represented persons from the action. That power can be exercised at any time before the judgment is perfected.

62. The Court also has inherent and statutory power to control lawyers as officers of the Court.[76] These naturally extend to supervision of lawyers representing absentee plaintiffs. In the circumstances of opt-out proceedings, it is submitted that the duties of lawyers acting for the represented group would include:

    (a) diligent prosecution of the proceeding in the interest of all represented plaintiffs;

    (b) dealing in good faith and even-handedly with all represented plaintiffs;

    (c) diligent compliance with orders of the Court in its exercise of its supervisory role of the class action; and

    (d) bringing to the Court's attention anything the Court would be expected to know about in its supervisory role.

63. The law on this issue is not well developed. It has not, to counsel's knowledge, been the subject of substantive argument in these proceedings or elsewhere. In

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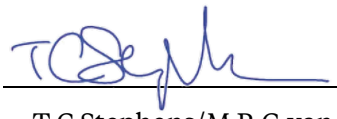
74 Rule 7.

75 *Carnie*, above n 17, at 408 (footnote omitted).

76 Lawyers and Conveyancers Act 2006, ss 4(d) and 268; and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.

the absence of a detailed legislative scheme, however, it is submitted that the foregoing approach avoids regulatory conundrums that would arise from constructing an artificial lawyer–client relationship with absentee plaintiffs, and provides a practical basis on which the interests of absentee plaintiffs can be protected.

Dated 16th March 2020



T C Stephens/M R G van Alphen Fyfe
Counsel for New Zealand Law Society | Te Kāhui Ture o Aotearoa