THE LAW REFORM COMMISSION OF HONG KONG

REPORT

CLASS ACTIONS

This report can be found on the Internet at:
<http://www.hkreform.gov.hk>

MAY 2012

The Law Reform Commission of Hong Kong was established by the Executive Council in January 1980. The Commission considers for reform such aspects of the law as may be referred to it by the Secretary for Justice or the Chief Justice.

The members of the Commission at present are:

Chairman: ***Mr Wong Yan-lung, SC, JP, Secretary for Justice***

Members: ***The Hon Chief Justice Geoffrey Ma***
Mr Eamonn Moran, JP, Law Draftsman
Mr John Budge, SBS, JP
The Hon Mr Justice Patrick Chan, PJ
Mrs Pamela Chan, BBS, JP
Mr Anderson Chow, SC
Mr Godfrey Lam, SC
Ms Angela W Y Lee, BBS, JP
Mrs Eleanor Ling, SBS, JP
Mr Peter Rhodes
Professor Michael Wilkinson

The Secretary of the Commission is **Mr Stephen Kai-yi Wong, Principal Government Counsel** and the Commission's offices are at:

20/F Harcourt House
39 Gloucester Road
Wanchai
Hong Kong

Telephone: 2528 0472
Fax: 2865 2902
E-mail: hklrc@hkreform.gov.hk
Website: http://www.hkreform.gov.hk

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

CLASS ACTIONS

CONTENTS

Preface

Terms of reference

1. In 2000, the Chief Justice appointed a Working Party to review the civil rules and procedures of the High Court. One of the recommendations in its final report, published in 2004, was that:

> *"In principle, a scheme for multi-party litigation should be adopted. Schemes implemented in comparable jurisdictions should be studied by a working group with a view to recommending a suitable model for Hong Kong."*[1]

2. The Working Party said that the introduction of a multi-party litigation scheme was widely supported, including by bodies such as the Special Committee on Personal Injuries of the Hong Kong Bar Association and the Consumer Council.[2] The final report also suggested that it might be appropriate for the Chief Justice or Secretary for Justice to refer the subject of multi-party proceedings to the Law Reform Commission of Hong Kong.[3]

3. At its meeting on 5 September 2006, the Law Reform Commission agreed that the subject of class actions should be taken on as a project, with the following terms of reference:

> *"To consider whether a scheme for multi-party litigation should be adopted in Hong Kong and, if so, to make suitable recommendations generally."*

The Sub-committee

4. A Law Reform Commission sub-committee under the chairmanship of Mr Anthony Neoh, SC, was appointed in November 2006 to consider this subject and to make proposals to the Commission for reform. The membership of the sub-committee was:

---

1 Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform: Final Report* (2004), Recommendation 70 at 240.

2 Cited above, at 239, para 464.

3 Cited above, at 240, para 465.

Mr Anthony Neoh, SC *(Chairman)*	Senior Counsel
Hon Mr Justice Barma	Judge of the High Court
Ms Agnes Choi	General Manager & Head of Corporate Insurance HSBC Insurance (Asia-Pacific) Holdings Limited
Hon Mr Justice Fok[4]	Justice of Appeal of the Court of Appeal of the High Court
Mr Ambrose Ho, SC	Senior Counsel Vice Chairman of the Consumer Council
Professor Elsa Kelly[5]	Adjunct Associate Professor Faculty of Law Chinese University of Hong Kong
Mr Mickey Ko Man-kin	Managing Director Integrated Corporation
Mr Thomas Edward Kwong	Deputy Director (Litigation) Legal Aid Department
Mr Kenneth Ng	Head of Legal and Compliance Hongkong and Shanghai Banking Corporation Ltd
Mr Martin Rogers	Solicitor Clifford Chance
Professor Tsang Shu Ki	Senior research fellow Institute for Enterprise Development School of Business Hong Kong Baptist University
Mr Anthony Wood *(from 1 June 2010)*	Deputy Chief Counsel Securities and Futures Commission
Mr Byron Leung *(except from September 2007 to June 2009)*[6]	Secretary

[4] Mr Justice Fok served on the sub-committee initially as a member of the Bar and continued to serve after his appointment to the High Court with effect from 1 February 2010.

[5] Professor Kelly was previously Associate Professor of Law at the School of Law, Chinese University of Hong Kong.

[6] Mr Lee Tin Yan *(Secretary from September 2007 to June 2009).*

Meetings

5. The sub-committee commenced the study of its reference in January 2007 and between then and the publication of the Consultation Paper held a total of five meetings. The Consultation Paper was published in November 2009. Since then, the sub-committee have held five more meetings to consider the responses from the public and finalise the report. The report was then discussed by the Law Reform Commission.

Multi-party litigation and definition of class actions

6. Multi-party litigation has been defined as referring to:

> *"... instances where a collection or group of users [of courts] shares characteristics sufficient to allow them to be dealt with collectively. The central, common feature will vary with the group, but will militate in favour of a collective or group approach. This feature may be found in a question of law or fact arising from a common, related or shared occurrence or transaction. The definition of the combining force necessary to commence a multi-party procedure is intended to be as flexible a concept as the overriding principles of administrative efficiency and fairness will permit."*[7]

7. As pointed out by the Working Party on Civil Justice Reform, the need for specific procedures to deal with cases involving numerous potential litigants arises in two main situations.[8] The first is where a large number of persons have been adversely affected by another's conduct, but each individual's loss is insufficient to make undertaking individual litigation economically viable. The second is where a large number of similar or related claims (each of which may be individually viable in financial terms) are instituted at the same time, which presents problems for the court in disposing efficiently with the various proceedings. In most major common law jurisdictions these situations are met by procedures to allow what is termed a "class action".

8. Rachael Mulheron, author of *The Class Action in Common Law Legal Systems*, defines a class action as:

> *"A legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged*

---

7 Law Reform Commission of Ireland, *Multi-Party Litigation* (2005, Report LRC 76-2005), at 3.

8 Chief Justice's Working Party on Civil Justice Reform, *Interim Report and Consultative Paper* (2001), at 146.

wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ('common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation."[9]

9. The potential advantages of such an approach include the fact that it promotes access to justice (by allowing claimants to seek compensation who could not have afforded to do so individually), avoids court resources being expended unnecessarily on numerous individual actions and ensures that a consistent disposal is applied to all claimants with a similar cause of action. The availability of a procedure for a class action is particularly useful in relation to consumer litigation, where the individual claim may be small though numerous individuals may be involved. In its submission to Lord Woolf in relation to his review of access to justice, the UK's National Consumer Council said:

> *"As we become an increasingly mass producing and mass consuming society, one product or service with a flaw has the potential to injure or cause other loss to more and more people. Yet our civil justice system has not adapted to mass legal actions. We still largely treat them as a collection of individual cases, with the findings in one case having only limited relevance in law to all of the others."*[10]

10. While class actions are generally "plaintiff-led", "defendant-led" class actions are also possible (though a rarity in practice). In recommending the introduction of a new procedure for multi-party actions, the Law Reform Commission of Ireland observed that, while defendant multi-party actions would constitute a very small fraction of multi-party actions overall, there was "*no reason to exclude the possibility of defendant multi-party actions*."[11]

11. Rachael Mulheron sums up the principal objectives of a class action regime as including the following:

> *"… to increase the efficiency of the courts and the legal system and to reduce the costs of legal proceedings by enabling common issues to be dealt with in one proceeding; to enhance access by class members to legally enforceable remedies in the event of proven wrongful behaviour in a timely and meaningful fashion; to provide defendants with the opportunity to avoid*

---

9 R Mulheron, *The Class Action in Common Law Legal Systems* (2004, Oxford and Portland, Oregon: Hart Publishing), at 3.

10 Lord Woolf, *Access to Justice, Final Report* (July 1996), at 223.

11 Law Reform Commission of Ireland, *Multi-party Litigation* (2005, Report LRC 76-2005), at 42.

inconsistent decisions over long periods of time and possibly in different forums; to take account of personal autonomy of putative class members where appropriate; to provide predictability of procedural rules and outcomes; and to arrive at an outcome employing the philosophy of proportionality rather than perfection."[12]

12. Most of these (enhancement of access to justice, reduced costs, greater likelihood of consistency of decisions, etc) could equally well be described as "advantages" of a class action regime. Such a regime arguably reduces social costs by not only making the process of litigation more efficient but also enabling parties to achieve finality in legal disputes, and thereby enables them to assess risks and costs more readily. For example, a publicly listed company cited as a defendant in a class action can gauge the extent of its exposure and make informed provisions in its accounts far more readily than would otherwise be possible if faced with a multitude of potential legal actions. In the latter case, the law on limitation of actions would help, but a defendant would still face uncertainty during the period of limitation prescribed by law.[13]

Typical elements of a class action regime

Control by the courts: certification

13. In all regimes studied, one essential feature of the class action predominates. It is that all class actions must be managed by the courts. Generally, the process of court management starts with authorisation of the class action. The court's examination of whether certain criteria are fulfilled before authorising the commencement of a class proceeding is generally known as "certification". This initial process of certification is not without controversy. For instance, the Australian Law Reform Commission (ALRC) argued strongly against the adoption of a certification process and said that, rather than bringing about procedural efficiency, it achieved the reverse. The ALRC pointed to the experience in the United States and Quebec, where:

"the preliminary matter of the form of the proceedings has often been more complex and taken more time than the hearing of the substantive issues. Because the Court's discretion is involved, appeals are frequent, leading to delays and further expense."[14]

---

12 R Mulheron, *The Class Action in Common Law Legal Systems* (2004, Oxford and Portland, Oregon: Hart Publishing), at 66.

13 The periods of limitation for different causes of action are prescribed by the Limitation Ordinance (Cap 347). The limitation period of the most commonly found causes of action is set out in section 4 of the Limitation Ordinance as follows:

> *"(1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say - (a) actions founded on simple contract or on tort; …"*

14 ALRC, Grouped Proceedings in the Federal Court (Report No 46, 1988), at 146.

14. The contrary view is that, given the special nature of a class action, the process of certification protects absent class members and the defendants:

> *"A class proceeding cannot proceed as of right … since members of the class who are not active in the litigation will have their rights determined by class proceeding, the Court must decide whether the litigation is appropriate for class treatment, including that the absent members' interest will be adequately represented in the litigation. The certification motion also provides (the defendant) opposing certification to demonstrate why the litigation should not go forward as a class proceeding."*[15]

15. Jurisdictions which have implemented the class action have generally adopted the certification procedure.[16] In deciding whether or not proceedings can be certified, the court will generally need to be satisfied that the minimum class size has been fulfilled (what is termed the "numerosity" issue); that there is the requisite nexus between the individual parties' claims; that a class action is preferable to alternative procedures; and that the representative plaintiff and the lead case is adequate and typical.

Opt-in or opt-out

16. An issue which inevitably arises in class proceedings is the question of how the members of the class should be determined. Under an "opt-out" scheme, persons who hold claims concerning questions (of law or fact) which are raised in the class proceedings are bound as members of the class and will be subject to any judgments made in the class proceeding unless they take an affirmative step to indicate that they wish to be excluded from the action and from the effect of the resulting judgment.[17]

17. The "opt-out" approach has been adopted in jurisdictions such as Australia, the United States,[18] Quebec and British Columbia. This

---

15 R Mulheron, *The Class Action in Common Law Legal Systems* (2004, Oxford and Portland, Oregon: Hart Publishing), at 24.

16 Certification is required under the regimes of, for example, Ontario and the USA. The Australian scheme is different in that an action commences as a class action under Part IVA of the Federal Court of Australia Act proceeds unless a judge orders otherwise. (R Mulheron, at 24) In Sweden, section 9 of the Group Proceedings Act 2002 provides that an action for a group is to be instituted in accordance with the Code of Judicial Procedure's rules concerning applications to commence actions and no special leave to commence proceedings ("certification") is required. (Per Henrik Lindblom, *National Report: Group Litigation in Sweden* (report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007), at 11).

17 R Mulheron, *The Class Action in Common Law Legal Systems* (2004, Oxford and Portland, Oregon: Hart Publishing), at 29.

18 Absolute opt-out rights were inferred in class actions for damages under US Federal Rules of Civil Procedure Rule 23(b)(3).

procedure enables the entire class to be protected as to the running of time prescribed by limitation of actions laws. Once a class action is started the clock stops for the certified class. Those who opt out will have to look after themselves as the clock keeps running against them.

18. Under the "opt-in" approach, a potential class member must expressly opt into the class proceeding by taking a prescribed step within the stipulated period. Once he becomes a member, he will be bound by the judgment or settlement and be open to receive the benefits incurred. The main benefit of an "opt-in" regime is the preservation of the autonomy of the individual to participate in litigation only if he wishes to do so. A further benefit is that the size of the plaintiff group is reduced and allows for an easier ascertainment of damages and case preparation for all parties involved. But here, only those members who have opted in are protected against the running of time in relation to limitation of actions. Those who have not opted in must look after themselves.

Cut-off date

19. To achieve finality of result of the action, a "cut-off" date is incorporated into the class action regime. The "cut-off" date refers to the date from which no potential party can be added to the action. The setting of a cut-off date is necessary to guard against the threat of an endless accumulation of parties to the action over time. The Law Reform Commission of Ireland considered that, in determining an appropriate cut-off date, it was necessary to balance the interests of an unregistered plaintiff and his right to join in the action with the interests of the defendants and the class, whose interests lay in an expeditious conclusion of the suit.[19] The Law Reform Commission of Ireland concluded that the question of when the cut-off date would fall in the future was best determined at certification.[20]

Notification

20. Class action schemes generally include provisions as to how potential members of the class are to be notified of the action for the obvious reason that the existence of the action should be as widely known as possible to enable them to decide either to opt-out or opt-in depending on which kind of procedure the regime adopts. In his final report, Lord Woolf favoured a flexible approach to notification requirements:

> *"[the court] should have a discretion as to how this is to be done – individual notification, advertising, media broadcast,*

---

19 The Law Reform Commission of Ireland, *Multi-party Litigation* (2005, Report LRC 76-2005), at 44-5.

20 The Law Reform Commission of Ireland, *Multi-party Litigation* (2005, Report LRC 76-2005), at 45.

notification to a sample group, or a combination of means, or different means for different members of the group.[21]

[The] Court must have the discretion to dispense with notice enabling parties to opt-out having regard to factors such as the cost, the nature of the relief, the size of individual claims, the number of members of a group, the chances that members will wish to opt out and so on."[22]

21. In the United States, it has been recognised that it may be appropriate to dispense with the requirements of giving notice in cases where notice may be so expensive as to be disproportionate to the costs and benefits of the litigation. Thus, the courts have the discretion to dispense with notice which informs potential claimants of their option to opt-out. In the dispensation of such notice, the court is to have *"regard to factors such as cost, the nature of the relief, the size of individual claims, the number of members of a group, the chances that members will wish to opt out and so on."*[23]

22. It should be noted that giving notice may be necessary at various stages of the proceedings, including commencement of the proceedings and at settlement.[24] Furthermore, with the popularity of the Internet, class action web pages are set up in court websites, and the press, operating in multi-media (print, radio, television, webcasting, websites) can be expected to play a role in publicising class actions.

Subgroups and lead or representative cases

23. In many cases there will be no need to divide the plaintiff group into sub-groups since there will be only one unitary group. However, where there are many claimants and certain claims of one group differ from those of another group of claimants, it is generally useful to divide the general group into different sub-groups:

"Most instances of multi-party litigation involve not only central issues common to the collective group, but also a web of distinct issues at an individual or sub-group level. Any attempt to deal conclusively with these issues en masse would be to over-reach the potential of the procedure and to render the entire process unmanageable … it will be most important to divide up the various elements of the case into convenient categories which lend themselves to collective resolution."[25]

---

21 Lord Woolf, Master of the Rolls, *Access to Justice: Final Report* (1996), at para 49.

22 Lord Woolf, Master of the Rolls, *Access to Justice: Final Report* (1996), at para 49.

23 US Federal Rules of Civil Procedure 23.

24 Lord Woolf, Master of the Rolls, *Access to Justice: Final Report* (1996), at para 47.

25 The Law Reform Commission of Ireland, *Multi-party Litigation* (2005, Report 76-2005), at 18.

24. The use of lead or representative cases may lead to the more efficient resolution of proceedings.[26] The lead cases should, so far as possible, fairly and adequately represent the interests of the group. Whether test cases are suitable or not depends on the circumstances and there should not be a rigid rule regarding their selection.[27]

Need for flexible set of rules to achieve optimal outcome

25. It can be seen from the above introductory remarks that irrespective of whether an opt in or opt out procedure is adopted, the Court in which the class action is brought has a central role to play to ensure the optimal outcome for resolution of the dispute. A set of rules should therefore be adopted to allow the Court a high degree of discretion to flexibly manage the case within a principled framework.

Public consultation

26. The Consultation Paper was published in November 2009. The consultation period officially ended on 4 February 2010, but we received requests from various individuals and bodies to submit their responses after this date. We have altogether received responses from 61 respondents. Tables 1 and 2 in Chapter 3 set out the respondents who either support or oppose (or have reservations about) the proposed class actions regime respectively.[28] An article on the Consultation Paper was published in the January 2010 issue of *Hong Kong Lawyer*. In addition, the Chairman of and the Secretary to the sub-committee have explained the recommendations in the Consultation Paper:

(a) to the public in a radio programme of Metro Finance in November 2009;

(b) to the Panel on Administration of Justice and Legal Services of the Legislative Council in November 2009;

(c) to the Hong Kong General Chambers of Commerce in January 2010;

(d) in a forum organised by both Hong Kong Institute of Certified Public Accountants and the Hong Kong Coalition of Professional Services in May 2010.

---

[26] The Law Reform Commission of Ireland, *Multi-party Litigation* (2005, Report 76-2005), at 38-9.

[27] The Law Reform Commission of Ireland, *Multi-party Litigation* (2005, Report 76-2005), at 39.

[28] Apart from these respondents, the following respondents have expressed views on various issues raised in the consultation paper: Allen & Overy, Financial Services and the Treasury Bureau, GU MinKang, Hong Kong Economic Journal editorial (7 November 2009), Labour and Welfare Bureau, Legal Aid Department, LIU Kum Shu and P Y LO.

Layout of this report

27. The first chapter sets out the present rules for representative action procedures in Hong Kong and their inadequacies as revealed in their application to a range of different types of potential mass litigation cases. Chapter 2 examines the law on representative and class action proceedings in other jurisdictions whilst Chapter 3 sets out the arguments for and against the introduction of a class action regime. Chapter 4 turns to the procedural options of adopting an opt-in or opt-out model for class actions. Chapter 5 examines the treatment of public law cases under the class action regime while Chapter 6 deals with the issue of the choice of plaintiff and avoidance of potential abuse. Chapter 7 looks at the handling of class actions involving parties from other jurisdictions and Chapter 8 sets out the funding model for the class actions regime. The Commission's recommendations on procedural details are set out in Chapter 9, while Chapter 10 contains a list of all our recommendations.

Acknowledgements

28. We wish to express our particular thanks to Ms Shirley Avner of the Israeli Ministry of Justice, Mr John Hatzistergos (Attorney General of New South Wales), Dr Christopher Hodges of the University of Oxford, Professor Jasminka Kalajdzic of the University of Windsor, Mr Patrick McCabe of the New Zealand Ministry of Justice, Professor Vince Morabito of Monash University, Professor Rachael Mulheron of the Queen Mary University of London, Mr Bernard Murphy of Maurice Blackburn Pty Ltd, Australia and Dr Chao Xi of the Chinese University of Hong Kong. In addition, we would like to acknowledge the kind assistance afforded to the Chairman of the sub-committee when he visited the Federal Court of Australia, by the Honourable Justice Michael Black, AC, Chief Justice of the Federal Court of Australia and the Honourable Madam Justices Margaret Stone and Annabelle Bennett. The advice and assistance rendered to us in the course of the preparation of this report by all concerned have proved invaluable.

29. Finally, we must acknowledge our debt of gratitude to the two sub-committee Secretaries, Mr Lee Tin Yan, who acted as sub-committee Secretary from September 2007 to June 2009 and Mr Byron Leung who acted as sub-committee Secretary from inception to the conclusion of this report but for the period Mr Lee stood in his place. Both sub-committee Secretaries have greatly assisted the sub-committee and the Commission in this long endeavour with meticulous research, unfailing patience and exemplary industry.

Chapter 1

The current rule on representative proceedings in Hong Kong

Introduction

1.1 In Hong Kong, the machinery for dealing with multi-party proceedings is provided by Order 15, rule 12 of the Rules of the High Court (Cap 4A) (RHC). Order 15, rule 12(1) provides:

> *"Where numerous persons have the same interest in any proceedings … the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."*

According to Order 15, rule 12(2), the Court is also empowered, on the application of the plaintiffs, to appoint a defendant to act as representative of the other defendants being sued.

1.2 A judgment or order given in representative proceedings will be binding on all persons so represented.[1] It is open to a defendant, however, to dispute his liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he should be exempted from such liability.[2]

1.3 The current Order 15 Rule 12 in Hong Kong is modelled on the former Order 15 Rule 12 in England.[3] The rule has been rigidly applied in both jurisdictions until recent years, where inroads have begun to be made. In *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd,*[4] Deputy Judge Saunders (as he then was) adopted what Megarry J said in *John v Rees*[5] that the rule for representative actions was not a rigid one, but was a rule of convenience; and that what was important was to have before the court, either in person or by representation, all those who would be affected, so that all should be bound by the result.

---

1 Order 15, rule 12(3), RHC (Cap 4A).

2 Order 15, rule 12(5), RHC (Cap 4A).

3 This rule was superseded by Section III of Part 19 of the Civil Procedure Rules which will be further discussed in Chapter 2 under the heading "England and Wales".

4 [2004] 2 HKC 673, at para 7.

5 [1970] Ch 345.

1.4 The English rule on representative proceedings was considered in the landmark case, *Markt & Co Ltd v Knight Steamship Co Ltd*.[6] In this case, each of the 45 shippers had cargo onboard the defendant's vessel which was sunk during the war. The representative plaintiffs sued the defendant for "*damages for breach of contract and duty in and about the carriage of goods by sea*" on behalf of themselves and other shippers. The Court of Appeal held by majority that the shippers did not have the "same interest" as required by the rule.

1.5 The classic judicial statement on the "same interest" requirement was made by Lord Macnaghten in *Duke of Bedford v Ellis*:

> *"[g]iven a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."*[7]

The Hong Kong High Court applied these criteria in *CBS/Sony Hong Kong Ltd v Television Broadcasts Ltd,*[8] and decided that the plaintiffs had to comply with the threefold test of establishing "*a common interest, a common grievance and a remedy which is beneficial to all the plaintiffs*".[9] The court held that the plaintiffs failed to satisfy the test.[10] On the other hand, in *Fynn v AG,*[11] Mayo J allowed a police research officer to sue the Government, on behalf of colleagues similarly affected, for breach of contract of employment because of the Government's decision to provide for separate pay scales within the Disciplined Services. The court held that the plaintiff met the requirements in Order 15 rule 12 and *Prudential Assurance Co Ltd v Newman Industries.*[12]

1.6 In *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd (No 2)*,[13] Lam J held that the court's main concern in deciding whether representative action was appropriate was to ensure that the interests of the individual members who might potentially be affected by the outcome had been fairly and sufficiently safeguarded. At the interlocutory stage, all that the court could do was to assess by reference to the materials and the

---

6 [1910] 2 KB 1021 (CA).

7 [1901] AC 1 (HL), at 8. Fletcher Moulton LJ in the "*Markt*" case regarded this as the "*most authoritative*" definition. It has repeatedly been quoted in English decisions, and "*has been accorded almost the status of a statutory formula*".

8 [1987] HKLR 306.

9 [1987] HKLR 306, at 311.

10 Jones J said that even if he was wrong, he would exercise his discretion to disallow the action to be continued in its present form as it was both inconvenient and unfair to the defendants. In particular, a representative action would deprive the defendants of their right to make an application for security for costs and to apply for an order of discovery.

11 [1991] 1 HKLR 315.

12 [1981] Ch 229.

13 [2005] 1 HKC 565, at paras 16 and 17.

submissions before it whether there was sufficient identity of interest amongst those members so that it would be fair and just for the action to proceed by way of representative action. The commonality of the represented parties' interests in the proceedings could be reviewed as the case developed, and the court had jurisdiction to order the proceedings not to proceed in the representative form.[14]

1.7 The defects of the current provisions have been summarised by the Chief Justice's Working Party on Civil Justice Reform as follows:

> *"The limitations of these provisions are self-evident. While they are helpful and merit retention in the context of cases involving a relatively small number of parties closely concerned in the same proceedings for such cases, they are inadequate as a framework for dealing with large-scale multi-party situations.*
>
> *In the first place, the availability of representation orders is narrowly defined and subject to considerable technicality. Secondly, even where a representation order has been made and the case has proceeded to judgment, finality is not necessarily achieved. Individuals affected by the representation order are still free to challenge enforcement and to re-open the proceedings on the basis that facts and matters peculiar to his case exist. Thirdly, the rule makes no specific provision for handling the special problems of multi-party litigation (discussed further below).*
>
> *Without rules designed to deal specifically with group litigation, the courts in England and Wales and in Hong Kong have had to proceed on an ad hoc basis, giving such directions as appear appropriate and seeking, so far as possible, agreement among parties or potential parties to be bound by the outcome of test cases. Such limited expedients have met with varying degrees of success."*[15]

1.8 The effect of Lord Macnaghten's judicial statement in *Duke of Bedford v Ellis* (above) is that all class members have to show identical issues of fact and law, and the implication is that they have to prove:

(a) the same contract between all plaintiff class members and the defendant – a representative action could not be founded upon separate contracts between each of the class members and the defendant. Separate contracts do not have a "*common source of right*" and are "*in no way connected*".[16]

---

14 In *China Vest II-A, LP v Chan Kueng Un, Roy* [1998] 4 HKC 453 (CA) (at 459), Godfrey JA held that, while a representative action brought on behalf of a number of sellers was properly constituted, he found a representative action unsatisfactory as some of the sellers were incorporated in various places outside the jurisdiction. He therefore ordered that all the sellers be added as plaintiffs in the proceedings.

15 Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform Interim Report and Consultative Paper* (2001), paras 385 to 387 at 148-9.

16 [1910] 2 KB 1021 (CA), at 1040 (Fletcher Moulton LJ).

The result is that a representative action is not available in consumer cases, even where each class member's claim arises out of a "standard form" contract with the same defendant. In other words, a representative action is unavailable where it is otherwise likely to have most effect.

(b) the same defence (if any) pleaded by the defendant against all the plaintiff class members – if a defendant can raise separate defences against different plaintiff class members, separate trials may be required and liability cannot be decided in the same proceedings. On the other hand, it would be unjust to disallow the defendant from raising such defences which could have been raised in a unitary action.

The result is that the mere availability of a defence against *one* member of a plaintiff class is sufficient to deny the class the "same interest" in the proceedings.

(c) the same relief claimed by the plaintiff class members -- no representative action can be brought where the relief sought by the representative plaintiff is damages on behalf of all class members severally.[17] Since proof of damages is unique to each class member and the facts underlying the measure of damages would be different, the damages awarded may not be the same for all class members. This further limits the utility of the representative procedure. The phrase "beneficial to all" in Lord Macnaghten's statement can also be interpreted to mean that "*the plaintiff must be in a position to claim some relief which is common to all*", but there is no objection if he also claims relief unique to himself.[18]

The result is that because of the same relief requirement, representative proceedings cannot be used to claim damages where some class members do not have a claim for relief identical to those of all other members, even though their claims have the same factual basis (for example, where passengers on a ship which sinks can claim personal injury or property damage or both). Proof of damage is a necessary ingredient of a tortious cause of action, and the representative plaintiff cannot, by proving his or her own damage, claim to represent the class and obtain relief on behalf of all class members.[19] Hence,

---

17 [1910] 2 KB 1021 (CA), at 1040 -1041 (Fletcher Moulton LJ). In this case, each of the class members had a separate measure of damages (ie the value of their lost cargos), and had no interest in the damages claimed by the representative plaintiffs. Hence, proof of damages was personal to each class member, and had to be proved separately since the facts underlying the measure of damages differed.

18 [1910] 2 KB 1021 (CA), at 1045 (Buckley LJ).

19 "… there was a long-held view that, under the English representative rule, 'if the cause of action of each member of the class whom the plaintiff purported to represent was founded in tort and would, if established, be a separate cause of action and not a joint cause of action belonging to the class as a whole, no representative action could be brought.' Proof of damage was a necessary ingredient of a tortious cause of action, and the representative plaintiff could not, by proving his or her own damage, claim to represent the class and obtain relief on behalf of all

equitable relief, such as a declaration or injunction, has normally, if not invariably, been the only form of relief which has been awarded in English representative actions.[20]

Relaxation of the "same interest" requirement

1.9 The application in the *Markt* decision of the "same interest" requirement expounded by Lord Macnaghten meant that few actions could be brought under the representative actions rule. As a result, the courts sought ways to relax the requirements so as to make it easier to bring representative proceedings.[21]

Changing from the "same interest" test to the "common ingredient" test

1.10 In *Prudential Assurance Co Ltd v Newman Industries,* the representative plaintiff sued the defendant, on behalf of the company shareholders, for the tort of conspiracy.[22] The defendant contended that since each class member had a separate cause of action founded in tort, proof of damage was needed for each member and, since there were separate damages claims, no representative action could be brought.

1.11 Vinelott J upheld the action as validly commenced, and highlighted the "common ingredients" in the action for conspiracy that could be dealt with in the representative action: the misleading statements made by the defendant in the challenged circular. He stated that "*there must be a common ingredient in the cause of action of each member of the class*"[23] or "*some element common to the claims of all members of the class*",[24] which the representative plaintiff was representing. If the common ingredient was proved, class members could rely on the judgment as *res judicata* and could prove the remaining elements of the cause of action in separate proceedings.[25]

---

class members." R Mulheron, The Class Action in Common Law Legal Systems, a Comparative Perspective (2004, Oxford and Portland, Oregon: Hart Publishing), at 82.

20 *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229, at 244, 255. His Lordship went on to say that even with injunctive relief, there was the "separate defences" problem - class members needed to prove separately an apprehension of injury and were subject to individual defences of laches or acquiescence.

21 See also the discussion under the heading "Order 15 of the Rules of the High Court" in Chapter 9.

22 [1981] Ch 229.

23 [1981] Ch 229, at 255.

24 [1981] Ch 229, at 252.

25 [1981] Ch 229, at 255.

1.12 The change from the "same interest" test to the "common ingredient" test made the rule on representative proceedings more flexible and useful. However, the view of Vinelott J has not been further developed in English jurisprudence, even though it has been adopted in other jurisdictions.[26]

Separate contracts no longer a hindrance

1.13 The "same contract" requirement has been relaxed in cases subsequent to the *Markt* case. In *Irish Shipping Ltd v Commercial Union Assurance Co plc (The Irish Rowan)*,[27] a defendant representative action, the plaintiff shipowners sued the representative defendants pursuant to Order 15 Rule 12. The representative defendants were sued on their own behalf and on behalf of all the other 77 liability insurers. Each insurer had a separate contract of insurance, and none was liable for the other insurers' liability. The Court of Appeal held that the action was validly commenced, as the defendant class had the "same interest" in defending the action, despite their separate contracts. A common leading underwriter clause in each contract of insurance provided that all settlements of claims undertaken by the representative defendants would be binding upon all class members.

1.14 There was no common leading underwriter clause in *Bank of America National Trust and Savings Association v Taylor (The Kyriaki)*, but this defendant representative action was upheld by Walker J because of the convenience of the representative proceedings.[28] He endorsed the view expressed in *The Irish Rowan* case that it would be very inconvenient to have separate actions.[29] In the light of these developments it can be said that the existence of separate contracts is no longer a hindrance to establishing the requisite "same interest" element.

Separate defences not an impediment

1.15 In the New Zealand case, *RJ Flowers Ltd v Burns*,[30] separate defences were pleaded by the defendant against different members of the plaintiff class. McGechan J said that the action could be divided into various smaller representative proceedings so as to deal with each defence separately. Staughton LJ in *The Irish Rowan* case also said that it was "*theoretically possible*" for the 77 defendants to defend the action separately.[31] Hence, it seems that the mere fact of presenting separate defences against different

---

26 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 84.

27 [1991] 2 QB 206 (CA).

28 [1992] 1 Lloyd's Rep 484 (QB), at 493.

29 [1991] 2 QB 206 (CA), at 231-326 (Sir John Megaw).

30 [1987] 1 NZLR 260 (HC).

31 [1991] 2 QB 206 (CA), at 222.

class members does not preclude the satisfaction of the "same interest" requirement.

1.16 In a recent case in England, *Independiente Ltd v Music Trading On-Line (HK) Ltd*,[32] the plaintiff class members were owners or exclusive licensees of the UK copyright in various sound recordings. The defendant operated a website, selling compact discs of popular artists imported from Hong Kong. The plaintiff class members complained that the practice amounted to parallel importation, and sought an injunction, damages or an account of profits, and delivery up of infringing copies. The defendant disputed the appropriateness of the representative action. The court rejected the defendant's arguments and held that the "same interest" requirement was satisfied and the representation action could proceed, even though separate defences could be raised against different plaintiff class members.

Damages can be awarded in representative actions

1.17 Judicial attempts have been made to award damages in representative actions. First, in *Prudential Assurance Co Ltd v Newman Industries,* the relief claimed was not damages, but a declaration of the class members' entitlement to damages because of the company officers' conspiracy.[33] Armed with the court's declaration, class members could subsequently claim damages individually.

1.18 Secondly, the entire liability of a defendant could be owed to the class as a lump sum, without the need to make individual assessments.[34] This will satisfy the "same relief" requirement. This method would be particularly useful where class members agreed to the payment of the damages to a particular body,[35] or where the representative was obliged to distribute the fund *pro rata*.[36]

1.19 Thirdly, Sir Denys Buckley in *CBS Songs Ltd v Amstrad Consumer Electronics plc*[37] regarded the pursuit of damages by the class members in different measure as an adjunct to the major relief claimed, an injunction common to the entire class. The class claimed an injunction so as to prevent the defendant's infringement. The court in the *Independiente* case, in which both injunctive relief and damages were sought, expressly followed Sir Denys Buckley's views.[38] Similarly, in *Duke of Bedford v Ellis*,[39] the main

---

32 [2003] EWHC 470 (Ch).

33 [1981] Ch 229.

34 *Walker v Murphy* [1915] 1 Ch 71 (CA), at 85 (Kennedy LJ), at 90 (Swinfen Eady LJ); *EMI Records Ltd v Riley* [1981] 1 WLR 923 (Ch), at 926 (Dillon J).

35 *EMI Records* [1981] 1WLR 923 (Ch) at 926.

36 Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners) [1947] AC 265 (HL).

37 [1988] Ch 61 (CA).

38 [2003] EWHC 470 (Ch), at para 30.

remedies sought were a declaration as to the construction of a statute and an injunction restraining breaches of the statute. The claim to an account of the amount overcharged was just an adjunct to the main remedies sought.

Other developments that facilitate representative actions

1.20 Apart from the relaxation of the "same interest" requirement, there are other developments that could facilitate the commencement of representative actions.

1.21 *Formation of sub-classes* - Sub-classes, having a particular question in common which is not common to other class members, have been allowed in respect of plaintiff classes[40] and defendant classes.[41] The formation of sub-classes can facilitate the commencement of representative actions.[42]

1.22 *Class description rather than identification* - Order 15 Rule 12 does not specify whether the identities of the members of the class must be known or, at least, can be ascertained when commencing the action. Academics have suggested that, in case of doubt, the names of the class members should be annexed to the writ. However, the court has allowed a description of the defendant class, without identifying its members, where injunctive relief was sought against the class.[43] In the *Independiente* case, the defendant argued that the "same interest" requirement could not be satisfied where the owners and exclusive licensees of the UK copyright varied from day to day. The court, however, held that the difficulty in ascertaining the number and identities of the class members did not bar the commencement of the representative action.[44]

1.23 *Assessment of relative benefits of representative action* - The rationale for representative actions is convenience and judicial economy.[45] There have been recent judicial observations that the court should take into account judicial economy and convenience when considering whether to allow a representative action. Purchas LJ said in *The Irish Rowan* case,

---

39 [1901] AC 1 (HL).

40 *Duke of Bedford* [1901] AC 1 (HL) (3 classes of growers represented in an action against a defendant).

41 *The Kyriaki* [1992] 1 Lloyd's Rep 484 (QB).

42 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 90.

43 In *EMI Records Ltd v Kudhail* [1985] FSR 36 (CA), the court allowed the representative action where the plaintiffs could not ascertain identity of all members because of the secretive nature of the activities of the defendant class.

44 [2003] EWHC 470 (Ch), at 23.

45 Lord Macnaghten observed in *Duke of Bedford v Ellis* [1901] AC 1 (HL), at 8, "when the parties were so numerous that you never could 'come at justice'".

> *"The benefits of a representative action, of course, in a multiple contractual arrangement of this kind are too obvious to require statement and on balance the convenience and expedition of litigation is far better served with a wide interpretation of the rule."*[46]

There should be a comparison between the benefits and burdens of representative and unitary proceedings. If a representative action is not more suitable than a unitary action, no representative action should be allowed.[47] A more recent example is the *Independiente* case where the defendant argued that a representative action would prolong the trial, given the facts of the case. The court was not convinced:

> *"It is true that the representative element of the claim is likely to make the proceedings longer and more expensive than would be the case if they were confined to the claims of the individual claimants. But that is not the only comparison to be made. The other is to compare the aggregate time and cost involved if there were separate claims brought by these claimants and each and every Relevant Member. Plainly the saving of time and expense by permitting the representative element of the claim to be pursued in conjunction with the individual claims of the claimants is considerable. If the claim succeeds then the defendants can hardly complain. If it fails they will get their costs of the claim as a whole or of the representative part of it as the case may be."*[48]

1.24 *No need to have express consent of the class* - Express consent of the class members appears not to be necessary for commencing a representative action. The nature of a representative action is that those with like interests may not know, or approve, of the action commenced by the representative plaintiff.[49] In the *Independiente* case, the defendant argued that the representative plaintiffs had not demonstrated that they had the authorisation of the class members. The court accepted that there was no such authorisation, but that was "*irrelevant as a matter of law*".[50] This decision was subsequently followed in *Howells v Dominion Insurance Co Ltd*.[51] In *Sung Sheung Hong & Ors v Leung Wong Soo Ching & Ors*[52] it was held

---

46 [1991] 2 QB 206 (CA), at 241.

47 Megarry J in *Bollinger SA v Goldwell Ltd* [1971] FSR 405 (Ch), at 411-412.

48 [2003] EWHC 470 (Ch), at 38.

49 *Gaspet Ltd v Elliss (Inspector of Taxes)* [1985] 1 WLR 1214 (Ch), at 1220-1221.

50 [2003] EWHC 470 (Ch), at para 32.

51 [2005] EWHC 552 (QB), at para 26. The court decided: "the authority of the members to the bringing and continuing of proceedings was irrelevant, such authority being clearly provided in the circumstances by the provisions of the [representative rule]".

52 [1965] HKLR 602, at para 612.

that the consent of the class was not necessary in choosing the representatives who could be self-chosen.

Applying the judicially expanded rule on representative proceedings to types of cases that may invoke the class actions regime

1.25 It would seem from the above discussion that judicial attempts to mitigate the restrictions placed by the *Markt* case on the existing representative rule have provided some of the key features and a framework for multi-party litigation.

1.26 The change from the "same interest" test to the "common ingredient" test makes the rule on representative proceedings more flexible and useful. Separate contracts and separate defences are no longer impediments to bringing representative actions. Damages can also be awarded in such actions. All these judicially initiated changes have, to a certain extent, enabled the commencement of representative actions to resolve multi-party disputes. However, few multi-party cases have been instituted under Order 15 Rule 12(2) despite the judicial initiatives taken to make representative proceedings under the rule more flexible.

1.27 We have considered the application of the judicially expanded rule on representative proceedings to different types of multi-party disputes, such as insurance cases, real estate development cases, environment cases, labour disputes, consumer cases, public interest cases, securities cases, etc. These types of cases are set out in Annex 1 to this report. Some of the salient features of specific types of cases warrant discussion.

1.28 *Labour disputes* – Labour disputes tend to revolve around unpaid wages. The existing Protection of Wages on Insolvency Fund may have already taken care of the situation where an employer is insolvent. *Ex gratia* payment may be made out of the fund. In addition, section 25 of the Labour Tribunal Ordinance (Cap 25), which is broadly worded, specifically provides for representative claims in the context of labour disputes. There are almost identical provisions in section 24 of the Minor Employment Claims Adjudication Board Ordinance (Cap 453) and section 21 of the Small Claims Ordinance (Cap 338). In addition, employees may also apply under the Protection of Wages on Insolvency Ordinance (Cap 380) for *ex gratia* payment from the Protection of Wages on Insolvency Fund, which is financed by an annual levy on business registration certificates. The Labour Department processes and verifies applications for payments from this fund.

1.29 Wage disputes are usually resolved through the presentation of a petition for bankruptcy or company winding up. Solvent employers would resolve the dispute by paying up and thereby avoiding bankruptcy or winding up. Some may resort to the tactical step of paying only the legally aided petitioner who would then have no reason to carry on with the petition. In such cases, other employees who are not legally aided would have the

opportunity to substitute as petitioners and thereby carry on with the proceedings. In the course of the Consultation, it has been proposed that the Legal Aid Department should be empowered to file a petition on behalf of a group of employees so that the employer must clear all employees' outstanding wages before the petition will be dismissed, thereby even dispensing with the need for substitution. As these matters by their nature do not require more than one petitioner at a time, a representative or class action would not be appropriate. We accordingly leave this suggestion to be pursued by its proponents through relevant channels.

1.30 *Consumer cases* - The Consumer Council's Consumer Legal Action Fund (CLA Fund) is a trust fund set up to enable consumers to obtain legal redress by providing financial support and legal assistance. The advice obtained from the CLA Fund and the field experience of the Consumer Council show that the representative action procedure under Order 15 rule 12 of the RHC has not been used because of uncertainties with interpretation of the present rules. In fact, no representative action has been commenced by the CLA Fund so far. There are also perceived complications arising from representative actions. With reference to the consumer case studies[53] we observe that (with the exception of the mobile phone operator case) because of the limited ascertainable number of consumers, a test case was the preferred option to commence proceedings. Where a test case was used, a single legal action was raised against the defendant and the defendant was not protected from other legal actions. It was questionable whether the defendant could settle with the other consumers on the basis of the judgment in the test case. We also observe that in cases involving disputes in relation to a residential development, each case was different and the issues were open-ended. A representative action was therefore not adopted.

1.31 *Public interest cases* - This category covers a wide range of cases, including human rights cases, constitutional issues, civil service and right of abode cases, as well as statutory provisions on discrimination cases. These cases could lend themselves to representative proceedings in some situations, but so far, the preference has been to use test cases, as in the right of abode case. For more detailed discussion of this, please refer to "The right of abode group litigation experience" under the heading "Test cases" in Chapter 5.

1.32 *Securities cases* - Five scenarios have been considered by us. First, in respect of misappropriation or theft of clients' assets by officers of licensed corporations, the compensation scheme in Part XII of the Securities and Futures Ordinance (Cap 571) appears to provide a more effective remedy than litigation for clients who suffer loss less than $150,000. Investors whose loss exceeds this amount will have a claim for damages.[54] The Securities and Futures Commission may apply for various remedies pursuant to section

---

53 Under the heading "Consumer Legal Action Fund" in Chapter 8.

54 However, in practice, proceedings are not often pursued because the potential respondents tend to be in financial difficulties and are wound up, leaving investors to prove in the liquidation for any outstanding loss.

213(1) of Cap 571 to protect the clients' interests. There does not seem to be a special need to invoke multi-party litigation in these circumstances, although where losses are larger than this amount, a representative action could have assisted in efficient resolution of disputes arising under this scenario. Secondly, in the case of a shortfall in securities held on behalf of clients by an insolvent intermediary, a practice of grouping clients' claims according to the facts and seeking court directions on sample claims for the purpose of determining entitlements has been followed and that has resulted in a more efficient and cost-effective manner. It is possible that a representative action may add some value to resolution of such disputes, but it has obviously not been used.

1.33 The third scenario involves claims arising from mis-selling, unsuitable recommendations or negligent investment advice. By the nature of these claims, liability hinges on the clients' personal circumstances, and each case can be different from each other. The "same interest" requirement is unlikely to be fulfilled. Mr Justice Vinelott's change from the "same interest" test to the "common ingredient" test in the *Prudential Assurance* case may make it easier for claimants to invoke the rule on representative proceedings. He stated that "*there must be a common ingredient in the cause of action of each member of the class*"[55] or "*some element common to the claims of all members of the class*",[56] which the representative plaintiff was representing. Whether there is a "common ingredient" is a matter of fact. If the common ingredient is proved, class members can rely on the judgment as *res judicata* and then prove the remaining elements of the cause of action in separate proceedings.[57] As to the difficulties in awarding damages which should be calculated with reference to the particular loss suffered by each member, there have been judicial attempts to deal with these. For example, in the *Prudential Assurance* case, the relief claimed was not damages, but a declaration of the class members' entitlement to damages because of the company officers' conspiracy. The class members could subsequently claim damages individually, using the court's declaration. Separately, in such a scenario, the Securities and Futures Commission may, in appropriate cases, seek to facilitate a settlement for investors, although the Commission has no power to order a licensed person to pay compensation.[58] In the Lehman's mini-bonds alleged mis-selling matter, the Securities and Futures Commission and the Hong Kong Monetary Authority were able to persuade a consortium of banks plus a few other licensed entities to voluntarily offer compensations arrangements to their clients. However, a remaining core of investors who are either unwilling to accept the compensation arrangements offered by the banks or licensed entities, or are not covered by the compensation arrangements could, if they wish, engage in litigation. Nevertheless, there has been no recorded case of representative proceedings taken.

---

55 [1981] Ch 229, at 255.

56 [1981] Ch 229, at 252.

57 [1981] Ch 229, at 255.

58 For example, the negotiations on the Lehman Brothers minibonds in 2009.

1.34 The fourth scenario is the civil liability arising from the causes of action created by a number of investor protection provisions in the Securities and Futures Ordinance (Cap 571) which could give rise to individual but related claims against a defendant.[59] As in the previous scenario, the judicially expanded rule on representative proceedings may, as discussed, make it easier for claimants to invoke this type of proceedings, but no such case has been instituted to our knowledge.

1.35 The fifth scenario involves losses caused by an unregulated person. Where a large number of claimants suffer loss arising out of similar circumstances, they may, as in the last two scenarios, find it easier to bring representative proceedings because of the judicially expanded rule on this type of proceedings. But to date, we have not seen such actions.

1.36 *Discrimination cases* - Under rule 3 of the Sex Discrimination (Investigation and Conciliation) Rules (Cap 480B),[60] a representative complaint alleging that another person has committed an unlawful act may be lodged by, *inter alios*, a person aggrieved by the act, on behalf of that person and another person or other persons also aggrieved by the act. The Equal Opportunities Commission (the EOC) is required by law to first investigate the case and then try to settle the matter through conciliation. If the complaint cannot be resolved through conciliation, the complainant may apply to the EOC for legal assistance to go to court, including legal advice, representation by the EOC's lawyers, legal representation by outside lawyers or any other form of assistance the EOC considers appropriate.

Conclusion

1.37 Despite the judicial efforts to expand the limits of Order 15 Rule 12(2), there have been very few cases where representative proceedings have been used in this jurisdiction. In particular, we take note of the fact that in the types of cases which are most likely to involve, and have involved, multi-party disputes, the approach so far has been to resort to extra-judicial compensation schemes or to test actions. The reason for this lies in part with the fact that the judicial initiatives taken have been piecemeal and the landmark cases restricting the rule's application, have never been expressly over-ruled by an Appellate Court in Hong Kong. In the midst of such uncertainty, it is understandable that the Consumer Council's Consumer Legal Action Fund has hitherto preferred to use test cases rather than test the limits of a representative action. When resources useable for litigation are scarce, it would hardly be sensible to test uncertain judicial waters.

---

[59] Sections 108, 281, 305 and 391.

[60] There are identical provisions in Rule 3 of the Disability Discrimination (Investigation and Conciliation) Rules (Cap 487B) and Rule 3 of the Family Status Discrimination (Investigation and Conciliation) Rules (Cap 527A).

1.38 Our survey of the present regime and its limitations thus leads us into considering whether there is a need for a more certain, but flexible regime for multi-party litigation.[61]

[61] Our conclusion is that the existing order 15 rule 12 should be retained at least until the class actions regime proposed in this report is extended to all cases. Whether this rule should still be retained after the extension to all cases should be reviewed at that time. See Recommendation 1 in Chapter 3 and Recommendation 9(3) in Chapter 9.

Chapter 2

The law on representative proceedings and class action regimes in other jurisdictions

---

Introduction

2.1 We have looked at the law on representative proceedings and class actions in a number of common law jurisdictions: Australia, Canada, England and Wales, Ireland, New Zealand, Singapore, South Africa, and the United States of America. We have in addition looked at the representative proceedings regime in the People's Republic of China (the Mainland), as that is a jurisdiction which is closely related to Hong Kong. Australia and the USA have multiple jurisdictions, and the following paragraphs focus mainly on their respective federal regimes (which tend to be reflected in state procedural statutes). We have included reference to law reform proposals in some jurisdictions which have not yet introduced a class action regime, notably Ireland and South Africa. These summaries of the class action regimes in other jurisdictions are intended to serve as a background against which the recommendations in later chapters may be considered.

Australia: federal regime

2.2 In Australia, the Commonwealth, New South Wales and Victoria have specific legislation on representative proceedings. In 1988, the Australian Law Reform Commission published its proposals for a class action regime.[1] The Commission's proposals were in large part implemented with the enactment of Part IVA of the Federal Court of Australia Act 1976 (Cth) (FCA Act) as inserted by the Federal Court of Australia Amendment Act 1991 No 181 (section 3).

2.3 Part 4A (Group Proceeding) of the Supreme Court Act 1986 governs the conduct of class proceedings in the state of Victoria. The provisions of Part 4A are substantially the same as those of Part IVA of the FCA Act. On 4 March 2011, Rules 7.4 and 7.5 of the Uniform Civil Procedure Rules 2005 on representative proceedings in New South Wales were repealed and a new Part 10 was added to the Civil Procedure Act 2005,

---

[1] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988).

implementing a comprehensive class action regime modeled on Part IVA of the FCA Act.[2] The following discussion will focus on the federal regime.

Commencement of representative proceedings

2.4 Part IVA of the FCA Act is entitled "representative proceedings", and a "representative proceeding" under Part IVA is defined by section 33A to mean a proceeding commenced under section 33C. Section 33C(1) of the Act lists the criteria which must be met before a representative proceeding can be commenced:

(a) there must be *"7 or more persons"* having claims against the same person,

(b) the claims of all those persons are in respect of, or arise from, the same, similar or related circumstances, and

(c) the claims of all those persons must give rise to "*a substantial common issue of law or fact*".

2.5 It is immaterial whether the claims arise from separate transactions or contracts between the respondent and individual group members, or arise from separate acts or omissions by the respondent.[3] A person commencing a representative proceeding must have a sufficient interest to warrant a proceeding on his own behalf.[4] There is no certification required from the court. An exception to the numerosity requirement is stipulated in section 33L, which allows the court "*on such conditions (if any) as it thinks fit*" to continue the proceedings if at any stage it appears to the court that there are fewer than seven group members.[5]

Opt-out scheme

2.6 An application commencing a representative proceeding may either describe or otherwise identify the group members, but it is not necessary to name, or specify the number of, the group members.[6] The "opt-out" scheme has been adopted under the Australian federal regime. Section 33E(1) of the FCA Act stipulates that *"the consent of a person to be a group member in a representative proceeding is not required."* The court must fix a cut-off date for a group member to opt out of the representative proceeding[7] and a group member wishing to opt out must do so by written notice before that date.[8]

---

2 In contrast, the federal jurisdiction and Victoria keep, alongside their class actions regimes, their rules on representative proceedings similar to our Order 15 rule 12. See more under the heading "Order 15 of the Rules of the High Court" in Chapter 9.

3 Section 33C(2)(b), FCA Act.

4 Section 33D, FCA Act.

5 Under this section, the court may also order that the proceeding no longer continue.

6 Section 33H, FCA Act.

7 Section 33J(1), FCA Act.

8 Section 33J(2), FCA Act.

Notice requirements

2.7 Notice must be given to the group members in respect of the following matters:

(a) the commencement of the proceeding and their right to opt-out before a specified date;

(b) a respondent's application for the dismissal of the proceeding on the ground of want of prosecution; and

(c) a representative party's application to seek leave to withdraw under section 33W as representative party.[9]

The court can dispense with any of these notice requirements if the proceeding does not include a claim for damages.[10] The form and content of a notice under section 33X, and the way in which (and by whom) the notice is to be given, must be approved by the court.[11]

Sub-group

2.8 As regards the resolution of issues common to only some members of the group, the court may give directions in relation to the establishment of sub-groups within the group and the appointment of a person to be a sub-group representative party.[12] The manner in which the resolution of individual issues should be conducted is also dealt with by directions of the court.[13] The court is afforded a wide range of powers to protect the interests of the group. The court may substitute another group member as the representative party if, on a group member's application, it appears to the court that the current representative party is not adequately representing the interests of the group members.[14]

Wide power of the court

2.9 In addition to specific powers, the court is granted the power to *"make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding".*[15] The approval of the court must be obtained before a representative proceeding may be settled or discontinued.[16] Similarly, settlement by a representative party of his individual claim is also only allowed with leave of the court.[17]

---

9 Section 33X(1), FCA Act.

10 Section 33X(2), FCA Act.

11 Section 33Y, FCA Act.

12 Section 33Q(2), FCA Act.

13 Section 33Q(1), section 33R and section 33S, FCA Act.

14 Section 33T(1), FCA Act.

15 Section 33ZF(1), FCA Act.

16 Section 33V(1), FCA Act.

17 Section 33W, FCA Act.

Judgment

2.10 The court may, in determining a matter in a representative proceeding,

(a) determine an issue of law;

(b) determine an issue of fact;

(c) make a declaration of liability;

(d) grant any equitable relief;

(e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the court specifies;

(f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members; and

(g) make such other order as the court thinks just. [18]

2.11 A judgment must describe or otherwise identify the group members to be affected, and will bind all such persons but not those persons who have opted out of the proceeding under section 33J.[19] A judgment must make clear that the impact of the judgment on the members of the class has already been taken into account.[20]

Appeal

2.12 A representative party may appeal a judgment on behalf of group members to the extent that it relates to issues common to the claims of group members. [21] Similarly, a sub-group representative party may appeal a judgment on behalf of sub-group members to the extent that it relates to issues common to the claims of sub-group members. In addition, a respondent to the original representative proceeding and an individual member (relating to his individual claim) may also make an appeal under section 33ZC. If a representative party or sub-group representative party does not bring an appeal within the prescribed time, another member of the group or sub-group may bring an appeal as representing the group or sub-group, as the case may be (section 33ZC).

Costs

2.13 Where the court is satisfied that the costs reasonably incurred in relation to the representative proceeding are likely to exceed the costs recoverable from the respondent, the court may, upon a representative party's

---

18 Section 33Z, FCA Act.

19 Section 33ZB, FCA Act.

20 *Jenkins v NZI Securities Australia Ltd* (1994) 52 FCR 572, at 577, 124 ALR 605, Federal Court of Australia, Full Court.

21 Section 33ZC, FCA Act.

application under section 33ZJ, order that an amount equal to the whole or a part of the excess be paid to the representative party out of the damages awarded. The court may also make such other order as it thinks just.

Procedural matters

2.14 The Federal Court Rules 1979 (No 140) provide the practice and procedure for actions commenced under the Federal Court of Australia Act 1976, with a specific part on representative proceeding in Order 73. Order 73 contains, *inter alia*, the forms for commencing a representative proceeding and an opt-out notice, and governs applications for orders involving notice. The more detailed aspects of the practice and procedure for representative proceedings (such as discovery, expert evidence and other case management or interlocutory matters) are governed by the general provisions of the Federal Court Rules 1979. These provisions also apply to other types of proceedings and are not specific to class proceedings. It is therefore not necessary to set them out in this report.

Current reform

2.15 Class Action User Group meetings have been convened in Melbourne and Sydney to examine ways of streamlining the conduct of representative proceedings in the Federal Court of Australia.[22] These meetings involve judges, court registrars and legal practitioners, and are in response to concerns about the time and resources that can be involved in representative proceedings. The aim is to develop and implement procedures that will help reduce the number of interlocutory hearings and bring matters to trial as quickly as possible (having regard to the complexity of many of these proceedings). The meetings also look at such issues as the role of commercial litigation funders and whether there might be problems with the legislative regime itself.

2.16 In the Federal Court, representative proceedings may be brought under Part IVA of the Federal Court of Australia Act 1976. This legislation is the responsibility of the Government, with any changes ultimately being a matter for the Parliament. To the extent that the User Group meetings may identify issues concerning the legislative regime, those issues will be referred to the Government for its consideration.

Canada

2.17 In Canada, in addition to the Federal Court, eight of the ten provinces have legislation on class proceedings: Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario

[22] Mr Philip Kellow, Deputy Registrar of the Federal Court of Australia, in his email to the Secretary of the Sub-committee dated 24 June 2008.

and Saskatchewan.[23] Their provisions are more or less the same, and are mainly based on the Uniform Class Proceedings Act, adopted by the Uniform Law Conference of Canada in 1996.[24] Some jurisdictions (for example, Ontario) have kept their rules on representative proceedings alongside the class actions regime.[25] The following discussion will focus on the Class Proceedings Act 1992 (the 1992 Act) in Ontario.

Commencement of class proceedings

2.18 Under section 2 of the 1992 Act, one or more members of a class of persons may commence proceedings in the court on behalf of the members of the class. A person commencing such proceedings must make a motion to a judge of the court for an order certifying the proceedings as class proceedings and appointing the person as representative plaintiff (section 2(2)).

2.19 Under section 4, any party to proceedings against two or more defendants may, at any stage of the proceedings, make a motion to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative defendant.

Certification

2.20 Under section 5, the court would certify a class proceeding on a motion where:

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

---

23 Alberta (Class Proceedings Act): http://www.qp.alberta.ca/574.cfm?page=C16P5.cfm&leg_type=Acts&isbncln=0779727452&display=html

British Columbia (Class Proceedings Act): http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96050_01

Federal Courts Rules (SOR/98-106), Part 5.1: http://laws-lois.justice.gc.ca/eng/regulations/SOR-98-106/page-60.html#h-103

Manitoba (Class Proceedings Act): http://web2.gov.mb.ca/laws/statutes/ccsm/c130e.php

New Brunswick (Class Proceedings Act): http://www.gnb.ca/0062/acts/acts/c-05-15.htm

Newfoundland and Labrador (Class Actions Act): http://assembly.nl.ca/Legislation/sr/statutes/c18-1.htm

Nova Scotia (Class Proceedings Act): http://nslegislature.ca/legc/statutes/classpro.htm

Ontario (Class Proceedings Act): http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_92c06_e.htm

Saskatchewan (Class Actions Act): http://www.qp.gov.sk.ca/documents/english/statutes/statutes/c12-01.pdf

24 The Law Reform Commission in Ireland, *Consultation Paper on Multi-Party litigation (Class Actions)* (2003), No 23, at para 2.16.

25 See more under the heading "Order 15 of the Rules of the High Court" in Chapter 9.

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceedings that sets out a workable method of advancing the proceedings on behalf of the class and of notifying class members of the proceedings, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

2.21 Where a class includes a subclass whose interests, in the opinion of the court, should be separately represented, the court must, before certifying the class proceedings, ensure that there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceedings that would advance the proceedings on behalf of the subclass; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.[26]

Opt-out scheme

2.22 Any member of a class may, under section 9, opt out of the class proceedings in the manner and within the time specified in the certification order.

Notice requirements

2.23 The following notices must be given:

(a) a notice by a representative party to the class members informing them of the certification of a class proceeding (section 17);

(b) where the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, a notice by the representative party to those members (section 18);

[26] Section 5(2) of the 1992 Act.

(c) a notice by any party where the court considers it necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceedings (section 19).

These notices must be approved by the court before they are given (section 20).

Common issues and individual issues

2.24 The 1992 Act explicitly recognises the possibility of dividing common issues and individual issues within a single procedural agenda.[27] The court will generally deal with the common issues of the class, followed by the common issues of any subclass and then any issues relating to individual class members (sections 24 and 25).[28]

2.25 Common issues for a class or subclass will be determined together.[29] Individual issues that require the participation of individual class members are determined individually in accordance with sections 24 and 25. Under section 11(2), the court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

Wide power of the court

2.26 Throughout the proceedings, the court may make any order respecting the conduct of a class proceeding to ensure its fair and expeditious determination and may also stay such proceeding and, for these purposes, may impose such terms on the parties as it considers appropriate. [30]

2.27 For the purposes of determining issues relating to the amount or distribution of a monetary award under the 1992 Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics. [31]

Judgment

2.28 A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding (section 27(3)). The judgment, however, does not bind (a) a person who has opted out of the class proceedings; or (b) a party to the class proceedings in any

---

27 The Law Reform Commission in Ireland, *Consultation Paper on Multi-Party litigation (Class Actions)* (2003), No 23, at para 2.22.

28 See also the Law Reform Commission in Ireland, *Consultation Paper on Multi-Party litigation (Class Actions)* (2003), No 23, at para 2.22.

29 Section 11 of the 1992 Act.

30 Sections 12 and 13 of the 1992 Act.

31 Section 23(1) of the 1992 Act.

subsequent proceedings between the party and a person mentioned in (a) above.[32]

Discontinuance, abandonment and settlement

2.29 Under section 29(1) of the 1992 Act, a class proceeding commenced and certified under the Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. A settlement of a class proceeding is not binding unless approved by the court, and would, upon the court's approval, bind all class members (section 29(2) and (3)).

Appeal

2.30 Under section 30, a party to a class proceeding may appeal:

(a) from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding;

(b) with leave of the Superior Court of Justice, from an order certifying a proceeding as a class proceeding;

(c) from a judgment on common issues.

According to sub-sections 30(4) and (5), if a representative party abandons an appeal or does not appeal, any class member may make a motion to the court for leave to act as the representative party. In addition, a class member, a representative plaintiff or a defendant may appeal from an order under section 24 or 25 determining an individual claim.[33]

Costs, fees and disbursements

2.31 Class members, other than the representative party, are not liable for costs except in relation to the determination of their own individual claims.[34] The court, in exercising its discretion in respect of costs, may take into account whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.[35]

2.32 To counter the disincentive to litigate, section 33 enables a solicitor and a representative party to enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding (despite the general prohibition on contingency fees in civil proceedings).[36] Such an agreement is not enforceable unless approved by

---

32 Section 27(2) of the 1992 Act.

33 Sub-sections 30(6) and (11).

34 Section 31(2) of the 1992 Act.

35 Section 31(1) of the 1992 Act.

36 The Solicitors Act and An Act Respecting Champerty, chapter 327 of Revised Statutes of Ontario, 1897; Law Reform Commission in Ireland, *Consultation Paper on Multi-Party litigation (Class Actions)* (2003), No 23, at para 2.23.

the court, on the motion of the solicitor. [37] A solicitor may make a motion to the court to have his or her fees increased by a multiplier so as to counter the risk involved in an agreement for payment only in the case of success. [38] The agreement must be in writing:

(a) state the terms under which fees and disbursements will be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. [39]

Under section 32(3), amounts owing under such an agreement are a first charge on any settlement funds or monetary award.

Funding mechanism

2.33 The Law Society Amendment Act (Class Proceedings Funding) 1992, in amending the Law Society Act 1990, established the Class Proceedings Committee and the Class Proceedings Fund. The purpose is to provide financial support for a plaintiff in respect of disbursements in a class proceeding and to pay costs awarded against the plaintiff.[40] The Class Proceedings Committee decides whether funding should be granted for a particular case and, if so, the amount.[41] In making funding decisions, the committee considers various factors, including the merits of the case, whether the plaintiff has made reasonable efforts to raise funds from other sources, whether the plaintiff has a clear and reasonable proposal for the use of any funds awarded, and whether the plaintiff has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award, public interest and likelihood of certification.[42]

2.34 In return for the funding, a levy is payable by a recipient of the financial aid when he gets a monetary award from the court or when one or more persons in the class is entitled to receive settlement funds out of settlement of the case.[43] The amount of the levy is the sum of the amount of any financial support paid (excluding any amount repaid by a plaintiff) and 10 per cent of the amount of the award or settlement funds.[44] The viability of this scheme is questionable, however. There is a detailed discussion of the reasons for its limited success in Chapter 8 of this report.

---

37 Section 32(2) of the 1992 Act.

38 Section 33(4) of the 1992 Act.

39 Section 32(1) of the 1992 Act.

40 Section 59.1(2) of the Law Society Act 1990.

41 Section 59.3(3) of the Law Society Act 1990.

42 Section 59.3(4) of the Law Society Act 1990 and Regulation 5 of the Class Proceedings Regulation 771/92.

43 Regulation 10(2) of the Class Proceedings Regulation 771/92.

44 Regulation 10(3) of the Class Proceedings Regulation 771/92.

Procedural matters

2.35 According to section 35 of the 1992 Act, the rules of court apply to class proceedings. The rules of court are the Rules of Civil Procedures 1990 (Regulation 194) (the RCP) made under the Courts of Justice Act 1990. Rule 12 of the RCP is made specifically for class proceedings, but this rule is brief, piecemeal and supplementary in nature.[45] The function of this rule is not to provide any comprehensive procedure applicable to class proceedings, but rather to provide supplementary provisions applicable to class proceedings and to rationalise the operation of the RCP generally to the conduct of class proceedings.[46] Hence the procedure to be followed in class proceedings is partly in the 1992 Act and partly in the RCP generally.[47]

2.36 Section 12 of the 1992 Act allows the court, on the motion of a party or class member, to make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, the court may impose such terms on the parties as it considers appropriate. This broad discretion given to the court is to enable the court to supplement the RCP to the extent necessary to accommodate the special nature of class proceedings, but it is not designed to circumvent the RCP.[48]

2.37 Specifically, section 15 of the 1992 Act provides that parties to a class proceeding have the same rights of discovery under the RCP against one another as they would have in any other proceedings. After discovery of the representative party, a party may move for discovery under the RCP against other class members.

England and Wales

2.38 Section III of Part 19 of the Civil Procedure Rules (CPR) introduced the concept of the "Group Litigation Order" (GLO). It was added to the CPR by rule 9 of the Civil Procedure (Amendment) Rules 2000 (SI 2000 No 221), and came into force on 2 May 2000, implementing the recommendations in Lord Woolf's final report on Access to Justice.[49] Rules 19.10 to 19.15 of section III are designed to achieve the objectives stated in the report, and are supplemented by Practice Direction 19B. Nonetheless, these rules and the practice direction cannot be regarded as a comprehensive

---

45 For example, Rule 12.02 provides that the title of class proceedings must include, after the parties' names, "Proceeding under the Class Proceedings Act, 1992". Another example is that under Rule 12.06, leave to appeal to the Divisional Court under section 30 of the 1992 Act shall be obtained from a judge other than the judge who made the original order.

46 *Canadian Encyclopedic Digest: Ontario* (Carswell, 3rd Ed), Vol 24, Title 105, at para 189.

47 *Canadian Encyclopedic Digest: Ontario* (Carswell, 3rd Ed), Vol 24, Title 105, at para 189.

48 *Canadian Encyclopedic Digest: Ontario* (Carswell, 3rd Ed), Vol 24, Title 105, at para 231.

49 Lord Woolf, Access to Justice - Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO, July 1996), in Chapter 17.

regime of court procedures for conducting group actions as other provisions of the CPR also affect group litigation.[50] These rules, however, establish a framework for case management and provide flexibility for the court to deal with group litigation.[51] A GLO differs fundamentally from a class action in that a GLO involves not a single suit but a number of distinct suits which are administered together.[52] Practice Direction 19B applies where the multiple parties are plaintiffs. Section III, Part 19 of the Practice Direction also applies where the multiple parties are defendants.[53]

2.39 A GLO is defined as an order which provides for the *"case management of claims which give rise to common or related issues of fact or law"* (GLO issues).[54] The words "*common or related issues*" are significant since the interests of the individuals do not have to be the "same", as is required in representative proceedings.

Application for a GLO

2.40 Before applying for a GLO, an applicant's solicitor should consult the Law Society's Multi Party Action Information Service to obtain information about other cases giving rise to the same GLO issues.[55]

> *"It will often be convenient for the claimants' solicitors to form a Solicitors' Group and to choose one of their number to take the lead in applying for the GLO and in litigating the GLO issues. The lead solicitor's role and relationship with the other members of the Solicitors' Group should be carefully defined in writing and will be subject to any directions given by the court under CPR 19.13(c)."*[56]

2.41 Rule 19.11(1) does not specify a minimum number of claims before a GLO can be made, nor who may apply for such an order. An application for a GLO must be made in accordance with CPR Part 23, may be made before or after the claims have been issued and may be made by a claimant or a defendant.[57] An application notice must state (a) what order the applicant is seeking; and (b), briefly, why the applicant is seeking the order (rule 23.6). An application notice or written evidence filed in support of the application should include the following information:

---

50 *Civil Procedure Vol 1* (Sweet & Maxwell, 2007), at para 19.9.9.

51 *Civil Procedure Vol 1* (Sweet & Maxwell, 2007), at para 19.9.9.

52 The Law Reform Commission in Ireland, *Consultation Paper on Multi-Party litigation (Class Actions)* (2003), No 23, at para 2.35.

53 Practice Direction, 19BPD.1.

54 Rule 19.10, CPR.

55 Practice Direction, 19BPD.2.1.

56 Practice Direction, 19BPD.2.2.

57 Practice Direction, 19BPD.3.1.

(1) a summary of the nature of the litigation;

(2) the number and nature of claims already issued;

(3) the number of parties likely to be involved;

(4) the common issues of fact or law (the GLO issues) that are likely to arise in the litigation; and

(5) whether there are any matters that distinguish smaller groups of claims within the wider group.[58]

2.42 The importance of case management by the court is reflected in the fact that, before an order can be made, the approval of the Lord Chief Justice (Queen's Bench Division), the Vice-Chancellor (Chancery Division) or the Head of Civil Justice (county court), as the case may be, is necessary.[59] That approval may be sought before or after the hearing of the application for the GLO. In addition, the court may make a GLO of its own initiative.[60]

Making of a GLO

2.43 Pursuant to rule 19.11(1), the court may make a GLO where there are or are likely to be a number of claims giving rise to GLO issues. A GLO must give directions regarding the establishment of a register (the group register) on which the claims will be entered, must specify the GLO issues to be managed as a group under the GLO and must also specify the management court which will manage the claims on the register.[61]

2.44 Under rule 19.11(3), a GLO may:

(a) in relation to claims which raise one or more of the GLO issues —

(i) direct their transfer to the management court;

(ii) order their stay until further order; and

(iii) direct their entry on the group register;

(b) direct that from a specified date claims which raise one or more of the GLO issues should be started in the management court and entered on the group register; and

(c) give directions for publicising the GLO.

2.45 The GLO procedure applies the "opt-in" system. A claim must be issued before it can be entered on a group register.[62] An exception to the opt-in requirement is set out in rule 19.11(3)(a)(iii), rule 19.11(3)(b) and

---

58 Practice Direction, 19BPD.3.2.

59 Practice Direction, 19BPD.3.3.

60 Practice Direction, 19BPD.4. CPR 3.3 deals with the procedure where a court proposes to make an order of its own initiative.

61 Rule 19.11(2)(c), CPR.

62 Practice Direction, 19BPD.6.1A and Rule 19.11(3), CPR.

Practice Direction 9.1. The management court may specify a cut-off date to opt in or be entered on the group register.[63] Any application to vary the terms of the GLO must be made to the management court.[64]

Group register

2.46 When a GLO has been made, a group register will be established on which will be entered such details as the court may direct of the cases which are to be subject to the GLO.[65] According to the Practice Direction (19BPD.6.2), any party to a case may apply for details of a case to be entered on a group register. Unless the case gives rise to at least one of the GLO issues, an order for details of the case to be entered on the group register will not be made.[66] The group register will normally be maintained by and kept at the management court, but the court may direct this to be done by the solicitor for one of the parties to a case entered on the register.[67]

2.47 Under rule 19.14, a party to a claim entered on the group register may apply to the management court for the claim to be removed from the register. Where the management court orders the claim to be removed from the register, it may give directions about the future management of the claim.

Effect of a GLO

2.48 Where a judgment or order is given or made regarding a GLO issue, that judgment or order is to be binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made.[68] The court may also give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register.[69] However, a party who is adversely affected by a judgment or order which is binding on him may seek permission to appeal the order under rule 19.12(2) of the CPR.

2.49 Unless the court orders otherwise, disclosure of any document relating to a GLO issue by a party to a claim on the group register is disclosure of that document to all parties to claims on the group register, and those subsequently entered on the group register.[70]

---

63 Practice Direction, 19BPD.13.

64 Practice Direction, 19BPD.12.2.

65 Practice Direction, 19BPD.6.1.

66 Practice Direction, 19BPD.6.3.

67 Practice Direction, 19BPD.6.5.

68 Rule 19.12(1)(a) CPR.

69 Rule 19.12(1)(b) CPR.

70 Rule 19.12(4) CPR.

Case management

2.50 Under rule 19.13, the management court is afforded a wide range of powers with regard to the case management of the class proceedings. Accordingly, the management court may give a wide range of directions, including those:

(a) varying the GLO issues;

(b) providing for one or more claims on the group register to proceed as test claims;

(c) appointing the solicitor of one or more parties to be the lead solicitor for the claimants or defendants;

(d) specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met;

(e) specifying a date after which no claim may be added to the group register unless the court gives permission; and

(f) for the purpose of entering any particular claim which meets one or more of the GLO issues on the group register.[71]

2.51 The management court may give case management directions at the time or after the GLO is made.[72] Pursuant to rule 19.12(1), directions given at a case management hearing will generally be binding on all claims that are subsequently entered on the group register.[73] Case management will usually be carried out by one judge throughout the life of the case, assisted as necessary by a Master alone or together with a Costs Judge.[74] The managing judge *"will assume overall responsibility for the management of the claims and will generally hear the GLO issues."*[75] A Master or a District Judge may be appointed to deal with procedural matters, which he will do in accordance with any directions given by the managing judge.[76] A Costs Judge may be appointed and may be invited to attend case management hearings.[77]

2.52 Cut-off dates imposed under rule 19.13(e) only limit entry to the group litigation.[78] They would not affect the limitation period and do not preclude an individual from seeking the court's permission to join the group at a later date or to issue separate proceedings.[79]

---

71 Rule 19.13 CPR.

72 19BPD.12.1.

73 19BPD.12.1.

74 *Civil Procedure Vol 1* (Sweet & Maxwell, 2007), at para 19.13.1.

75 19BPD.8.

76 19BPD.8.

77 19BPD.8.

78 *Civil Procedure Vol 1* (Sweet & Maxwell, 2007), at para 19.13.1. See also 19BPD.13.

79 *Civil Procedure Vol 1* (Sweet & Maxwell, 2007), at para 19.13.1.

Test claims

2.53 Under rule 19.13(b), the management court may direct one or more of the claims to proceed as test claims. Where a claim, as a test claim, is settled, the management court may order that another claim on the group register be substituted as the test claim.[80] Neither the CPR nor the practice direction provides a definition of "test claim" or any guidance on when and how test cases might be selected. No detailed rules are provided in the CPR to give directions on how test cases are to be chosen. Commentary to the CPR states as follows:

> *"Test claim is not defined or referred to in the CPR Glossary and neither the rule nor the practice direction provide any guidance on when and how test cases might be selected. In fact group litigation can be case managed in a number of different ways, including division of the group into subgroups, identification of generic or common issues, use of a master pleading, trial of preliminary issues, and some investigation of a sample or all individual claims, as well as the test case approach. By only referring to test cases the rule implies that this is the preferred option."* [81]

2.54 In *Boake Allen Ltd & Ors v Her Majesty's Revenue and Customs,* the House of Lords heard an appeal arising out of test cases brought by groups of companies seeking relief against discrimination in treatment by the tax authority. The House of Lords considered the need to amend the statement of case to clarify the basis on which the plaintiffs were seeking a remedy. Lord Woolf described the GLO regime as follows:

> *"Primarily, it seeks to achieve its objective, so far as this is possible, by reducing the number of steps litigants, who have a common interest, have to take individually to establish their rights and instead enables them to be taken collectively as part of a GLO Group. This means that irrespective of the number of individuals in the group each procedural step in the actions need only be taken once. This is of benefit not only to members of the group, but also those against whom proceedings are brought. In a system such as ours based on cost shifting this is of benefit to all parties to the proceedings.*
>
> *…*
>
> *In the context of a GLO, a claim form need be no more than the simplest of documents. It needs to be read together with the application to register and the register bearing in mind its place in the GLO process and the need to limit pre-registration costs so far as this is possible. In this case the suggested deficiency in the claim forms are that they did not sufficiently identify the basis of the revenue being under an obligation to repay the tax*

---

80 Rule 19.15 CPR.

81 *Civil Procedure Vol 1* (Sweet & Maxwell, 2007), at para 19.15.1.

paid assuming this should not have been claimed by the revenue. This is an area of the law the parameters of which are still evolving. In my judgment it would be wholly inconsistent with the objective of the GLO to require the nature of the remedy claimed to be spelt out in detail in the claim forms of the taxpayers. The Revenue knew perfectly well the basis of the claims once the issues had been defined for the purpose of the GLO. For each of the parties to have to spell out details of the manner in which they would advance their claim at the outset would have caused substantial extra costs to be incurred researching the law. Cumulatively this would have been grossly wasteful."[82] (Emphasis added).

2.55 Outside the GLO context, the English Court of Appeal considered the relevant principles for a test case in the decision of *R v Hertfordshire County Council ex p Cheung.*[83] Donaldson MR said:

"I wholly accept the proposition that if a test case is in progress in the public law court, others who are in a similar position to the parties should not be expected themselves to begin proceedings in order to protect their positions. I say this for two reasons. First, it would strain the resources of the public law court to breaking point. Second, and perhaps more important, it is a cardinal principle of good public administration that all persons who are in a similar position shall be treated similarly. Accordingly, it could be assumed that the result of the test case would be applied to them by the authorities concerned without the need for proceedings and that, if this did not in the event occur, the court would regard this as a complete justification for a late application for judicial review."[84] *(Emphasis added)*

2.56 There are a number of problems associated with the use of the test case as a procedural device for the handling of group litigation. Professor Mulheron identified the following problems in the context of multi-party litigation:[85]

(a) the procedure requires that the determination of other cases be stayed until the outcome of the test case. It is arguable that the indefinite postponement of the investigation or progress of a case which is not treated as a test case might breach article 6(1) of the European Convention of Human Rights.[86] It might be

---

82 *Boake Allen Ltd & Ors v Her Majesty's Revenue and Customs* [2007] UKHL 25, paras [31] and [33].

83 Unreported, The Times, 4 April 1986.

84 *R v Hertfordhsire County Council ex p Cheung*, cited above, at page 5 of the transcript.

85 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing) at 102-5.

86 Article 6(1) of the *European Convention of Human Rights provides, in part, that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone*

contended that the individual litigants have the right to have their cases determined within a reasonable time and the selection and determination of test cases deprive the individual litigants of that right;

(b) The pre-action protocols which apply to judicial review under the CPR require that all plaintiffs investigate and fully disclose their cases before commencing proceedings. The selection of test cases is contrary to that approach; and

(c) The significance of referring to the possible use of test cases in CPR is uncertain where a choice had usually to be made between a generic issues approach, use of test cases or trial of selected individual cases.

2.57 The Manitoba Law Reform Commission also criticised the use of test cases in group litigation. In its view, leading or test case litigation was of limited utility in multi-party litigation because:

> *"The plaintiff does not owe any legal obligation to have regard to the impact of their case on future litigation by others, and the lawyer is bound to obtain the most favourable result for the client – even if such a result may create a precedent which is not useful, or is potentially harmful, to other similar litigants. Furthermore, test cases are often settled on terms favourable to the plaintiff without a resolution of the underlying issues (such as admissions of liability, amendments of legislation, or changes in government programming) that gave rise to the litigation in the first place."*[87]

2.58 The management court may give directions about how the costs of resolving common issues or the costs of claims proceeding as test claims are to be borne or shared as between the claimants on the group register.[88]

Determination of generic issues

2.59 Alternatively, the court will proceed to determine issues arising out of individual cases as generic issues. Those issues are common to a number of parties under a GLO but do not determine the disputes of any individual case which turns on its own facts. In *Esso Petroleum Co Ltd v David, Christine Addison & Ors,*[89] Moore-Bick J dealt with a group of Esso licensees who carried on business as retailers of motor fuel at petrol stations. The central question arose in relation to a products promotion scheme and turned on whether upon the true construction of the licence agreements and in the light of the way in which the promotion was operated, Esso was entitled

---

is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

87 Manitoba Law Reform Commission, *Class Proceedings*, Report #100(1999) 10-11.

88 19BPD.20 (12.4).

89 [2003] EWHC 1730 (Comm).

to recover from the licensees the cost of the promotional gifts supplied to them to enable them to operate the products promotion scheme. Moore-Bick J made an order to enable the court to determine common issues concerning the construction of the licence agreement in relation to the promotion scheme and such other issues arising out of the licence agreement as might conveniently be determined with them. The GLO was deliberately framed as broadly as possible to allow the court to determine similar cases within the group litigation. His Lordship spelt out his thinking as follows:

> *"Although the issues for determination were largely agreed well in advance of the trial, there remained a certain amount of debate about their precise scope and content which had not been fully resolved. Broadly speaking, [counsel for the defendants] urged me to determine as many issues of fact and law as possible on this occasion in order to enable his clients to obtain the maximum benefit from the group litigation. [Counsel for the claimants] was more concerned to ensure that in the absence of full evidence from both sides the court did not determine issues that were specific to individual licensees. In deciding in the light of the evidence and arguments what issues can and cannot conveniently be determined at this stage I have been guided by two considerations. The first is that I should only determine generic issues, that is, issues that are common to all, or most, of the licensees, or which … are common to a defined group of licensees. This restriction is necessary both because it is in the nature of group litigation that the court can only decide issues that are common to a number of parties and because it would have been quite impossible at this trial, or indeed any single trial, to determine in an efficient manner a large number of disputes which turn on their own particular facts. One consequence of this approach is that although I received evidence from eight of Esso's Area Managers and seventeen of the licensees, I have not attempted to make findings about what passed between any particular licensee and his own Area Manager at any stage. The second is that I should determine as many generic issues as possible in order to make full use of the benefits offered by this form of procedure and to enable the licensees to know as far as possible where they stand."*[90]
> (Emphasis added)

Settlements

2.60 The CPR and practice direction do not specifically offer any guidance on dealing with settlements in relation to group litigation.[91] Some of

---

90 *Esso Petroleum Co Ltd v David, Christine Addison & Ors* [2003] EWHC 1730 (Comm) at para [14].

91 *Civil Procedure Vol 1* (Sweet & Maxwell, 2007), at para 19.15.1.

the problems are specific to group litigation, and can lead to disputes between claimants, which are not easy for their legal representatives to resolve.[92]

Trial

2.61 The management court may give directions for the trial of common issues, and for the trial of individual issues.[93] Common issues and test claims will normally be tried at the management court. The court may direct that individual issues be tried at other courts whose locality is convenient for the parties.[94]

Costs

2.62 Part 44 of the CPR governs generally the costs of court proceedings, and rule 48.6A applies, in particular, where the court has made a GLO. The general rule under rule 44.3(2) that an unsuccessful party will be ordered to pay the costs of the successful party applies to group litigation. According to rule 48.6A(4), a group litigant is liable for the individual costs of his own claim. Any order for common costs against group litigants imposes on each group litigant liability for an equal proportion of the common costs, unless the court orders otherwise.[95] Furthermore, a group litigant coming late to the group register may be held liable for a proportion of the costs incurred before his name is entered on the register.[96]

2.63 Where the court makes an order about costs in relation to any application or hearing which involves one or more GLO issues, as well as issues relevant only to individual claims, the court will direct the proportion of the costs that is to relate to common costs and the proportion that is to relate to individual costs.[97]

Other procedural matters

2.64 Section III of Part 19 of the CPR and Practice Direction 19B cannot be regarded as a comprehensive regime for conducting group actions because other provisions of the CPR also affect group litigation.[98] For

---

92 *"… (a) what should happen when an 'acceptable' offer to settle a lead or test case is made (beyond giving the court the discretion to order that another case might be substituted), and (b) what the court might do when a 'global' offer to settle the entire action is made, without the offeree specifying how the sum might be divided between the individual recipients …" Civil Procedure Vol 1* (Sweet & Maxwell, 2007), at para 19.15.1.

93 Practice Direction, 19BPD.15.1.

94 Practice Direction, 19BPD.15.2.

95 Rule 48.6A(3) and (4) CPR. "Common costs" is defined in rule 48.6A(2) as -

"(*i*) *costs incurred in relation to the GLO issues;*

(*ii*) *individual costs incurred in a claim while it is proceeding as a test claim; and*

(*iii*) *costs incurred by the lead solicitor in administering the group litigation".*

96 Rule 48.6A(6) CPR.

97 Rule 48.6A(5) CPR. See also 19BPD.24 (16.2).

98 *Civil Procedure Vol 1* (Sweet & Maxwell, 2007), at para 19.9.9.

example, while Practice Direction 19BPD.14 provides some specific guidance on statements of case and particulars of claim in relation to group litigation, the general rules in rule 16.4 and Practice Direction (Statements of Case) still apply.

The Civil Justice Council's reform proposals

2.65 The Civil Justice Council (CJC) published its report on "*Improving Access to Justice through Collective Actions*" (the report) in November 2008. It found that the existing procedure did not provide sufficient or effective access to justice for a wide range of citizens, particularly but not exclusively consumers, small businesses and employees wishing to bring collective or multi-party claims. There was overwhelming evidence that meritorious claims which could have been brought were currently not being pursued. The report found that the existing collective actions were effective in part, but could be improved considerably to promote better enforcement of citizens' rights, whilst protecting defendants from non-meritorious litigation.[99] There was a good deal of evidence to support the proposition that some types of claim were better suited to resolution via an opt-in action whereas others were better suited to resolution through an opt-out action.[100]

2.66 The CJC made 11 recommendations to the government and invited the Lord Chancellor to provide a formal response. In 2009, the Ministry of Justice decided not to support the report's recommendation that a generic right of collective action be introduced. Instead, the Ministry believed that such rights should be considered, and if appropriate, be introduced on a sector-by-sector basis.[101] The Financial Services Bill 2009 aimed at introducing collective proceedings in respect of the financial sector. For the first time, an opt-out provision had been encompassed in legislative form in England. However, the Conservative Opposition proposed a detailed series of amendments to the Bill. Given the limited Parliamentary time remaining before the 2010 General Election, the Government agreed to withdraw the provisions on, *inter alia*, collective proceedings in order to secure the passage of the Bill. Lord Myners, the Financial Services Secretary to the Treasury, said in Parliament:

> "*the Government continue to believe that these provisions are necessary, sensible and desirable. However, in the interests of securing other important elements of the Bill, on which greater consensus exists, the Government have agreed to withdraw them*."[102]

---

99 Civil Justice Council, *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions"* (November 2008) pp 17-18. http://www.civiljusticecouncil.gov.uk/files/Improving_Access__to_Justice_through_Collective_Actions.pdf

100 See above, p 145.

101 The Ministry's full responses can be found via this link: http://www.justice.gov.uk/publications/docs/government-response-cjc-collective-actions.pdf.

102 Hansard HL, 8 Apr 2010, col 1663: http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100408-0002.htm#10040856001029

Hence, the Financial Services Act 2010 was enacted on 8 April 2010 without, *inter alia*, the part on collective proceedings.

Ireland

2.67 There are two principal ways to pursue privately driven multi-party litigation in Ireland: (1) representative actions and (2) test cases.[103] Rule 9 of the Rules of the Superior Courts 1986 sets out the procedure for representative actions:

> *"Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested."*

However, the following restrictions have been read into rule 9:[104]

(a) The remedies available are confined to injunctive and declaratory relief; damages may not be sought in a representative action.

(b) Because of the "same interest" requirement, very strict requirements have been read into the nature of the link that must exist between the parties to a representative action.

(c) Legal aid is not available in a representative action: section 28(9)(a)(ix) of the Civil Legal Aid Act 1995 excludes from the remit of civil legal aid any application "*made by or on behalf of a person who is a member, and acting on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned.*"

2.68 The combined effect of these restrictions is that rule 9 is of limited utility for most instances of multi-party litigation. Particularly restrictive is the unavailability of damages as a remedy. The Irish Law Reform Commission believes that with its parameters so strictly set, the representative action has remained an underused and largely overlooked means of dealing with the demands of multi-party litigation.[105]

2.69 The nature of a test case is the application by analogy of the findings in one case to the facts of others. A test case may arise in two ways. The first is where a particular litigant's claim is chosen from a pool of similar actions as the most appropriate to be used as a test case. Under this

---

103 Law Reform Commission of Ireland, Report *on Multi-Party litigation* (2005, Report LRC 76-2005), at para 1.16.

104 Law Reform Commission of Ireland, Report *on Multi-Party litigation* (2005, Report LRC 76-2005), at para 1.19.

105 Law Reform Commission of Ireland, Report *on Multi-Party litigation* (2005, Report LRC 76-2005), at para 1.20.

approach, there is a degree of organisation among the prospective litigants. The second involves less coordination and is where the outcome of the "first" case to proceed provides guidance as to the outcome of subsequent cases. The "first" case will in effect operate as a test case. In either circumstance, the test case plaintiff acts solely in his own interest, and is not burdened by responsibilities or duties toward the rest of the pool.

2.70 Being more flexible than a representative action, the test case approach is more commonly used in Ireland.[106] The Irish Law Reform Commission, however, pointed out that the test case approach has a number of problems.[107] First, the court hearing the test case may not have an accurate picture as to the scope of the litigation in mind when arriving at a judgment. Plaintiffs in subsequent cases may not be able to secure the same amount of damages, even though they may have equally meritorious claims. Secondly, a defendant will need to face the uncertainty that there will be future claims and the possibility of a full set of costs for each of the claims. Thirdly, there will be duplication of the resources of both lawyers and the courts where there are multiple cases involving common issues. This is especially the case where different lawyers deal with different cases falling within the pool. In such circumstances, there will be duplication of work on the common issues and this will be reflected in the costs incurred. This may prove particularly costly where expert witnesses are involved.

2.71 In view of the deficiencies of the existing representative actions and the test case approach, the Irish Law Reform Commission recommended introducing a formal procedural structure to be set out in the Rules of Superior Courts to deal with instances of multi-party litigation (the Multi-Party Action).[108] The Commission's detailed recommendations are as follows:

1. The proposals for multi-party litigation are based on the **principles of procedural fairness** for plaintiffs and defendants, procedural efficiency and access to justice, and are not to be considered as replacements for existing procedures, particularly the test case, but rather as providing an alternative procedure.
2. **Judicial certification** of a Multi-Party Action is to be considered a necessary preliminary step to the commencement of a Multi-Party Action.
3. There is **no minimum number requirement for certification** of a Multi-Party Action, but this would be a matter to be taken into account by the court when considering whether a Multi-Party Action offers a fair and efficient means of resolving the issues, both known and anticipated.

---

106 Law Reform Commission of Ireland, Report *on Multi-Party litigation* (2005, Report LRC 76-2005), at para 1.21.

107 Law Reform Commission of Ireland, Report *on Multi-Party litigation* (2005, Report LRC 76-2005), at paras 1.23 to 1.31.

108 Law Reform Commission in Ireland, Report *on Multi-Party litigation* (2005, Report LRC 76-2005), at 69-71.

4. A case for which certification is sought should give rise to **common issues of fact or law** rather than be required to show strict commonality.

5. It is **not necessary that common issues predominate** over individual issues in a Multi-Party Action.

6. In deciding whether to certify proceedings as a Multi-Party Action, the court must be satisfied that a **Multi-Party Action would be an appropriate, fair and efficient procedure** in the circumstances.

7. At the certification stage, the court will determine a **cut-off date** beyond which entry on the register will require the authorisation of the court.

8. There should be provisions for **defendant Multi-Party Actions**.

9. The new procedure would operate on an **opt-in basis**, subject only to a power vested in the court to oblige an action to be joined to an existing group.

10. **Pleadings** in a Multi-Party Action must disclose a cause of action.

11. A **representative or lead case** for a Multi-Party Action should be selected to litigate a specific issue which will fairly and adequately represent the interests of individual litigants in the Multi-Party Action. The number or need for lead cases is to be left to the discretion of the court.

12. A **single legal representative** is responsible for the management of the generic issue of the Multi-Party Action. Nomination of this representative may take place on the basis of a voluntary or judicial appointment and will require judicial approval. Separate legal representatives may be responsible for discrete issues within the group on either a sub-group or individual level.

13. Where individual litigants wish to **remove themselves from the register** after the filing of the defence, the authorisation of the court must first be sought.

14. The terms upon which a **settlement** would be accepted or rejected should be agreed by individual members of the group at the opt-in stage. The court should be made aware of the terms of this agreement at certification. The court will have the jurisdiction to set the terms of acceptance or rejection of the settlement only in exceptional circumstances.

15. The **Statute of Limitations** will not stop running against each claim until that case has been filed. This will be followed by judicially controlled entry onto the register.

16. **Costs** involved in the litigation of a generic issue of a Multi-Party Action are to be shared in equal measure as among the constituent members unless the court considers that in the

interests of the particular case this rule should be varied. As a general rule, liability for the costs will be deemed to come under a scheme of joint and several liability.

17. The **Civil Legal Aid Act 1995** should be amended to make provision for the funding of an otherwise eligible group member for his proportion of any eventual costs order.

2.72 The Commission's recommendations have not yet been implemented by legislation according to the website of the Law Reform Commission in Ireland.[109]

New Zealand

2.73 Unlike Australia and Canada, New Zealand does not have specific legislation devoted to class actions. Rule 78 of the New Zealand High Court Rules nonetheless amounts to a simplified version of Hong Kong's order 15 rule 12 in Hong Kong. It reads as follows:

> *"Where 2 or more persons have the same interest in the subject-matter of a proceeding, one or more of them may, with the consent of the other or others, or by direction of the Court on the application of any party or intending party to the proceeding, sue or be sued in such proceeding on behalf of or for the benefit of all persons so interested."*

A plaintiff that has obtained the consent of all the persons having the same interest in the subject matter of the proceedings can issue representative proceedings as of right.[110] The persons being represented are bound by the judgment, even though they are not individually named as parties.

2.74 In July 2009, the Rules Committee in New Zealand handed over the draft Class Actions Bill and Rules to the Secretary for Justice, who will determine if and how the proposal should be taken forward.[111] The draft bill has been put "on hold" for 2010 due to other government priorities, and it is unclear at this stage whether the Bill will be included in the 2011 legislative programme.[112]

---

109 http://www.lawreform.ie/Table_of_Implementation_of_Law_Reform_Commission_Recommendations/Default.171.html

110 *Laws of New Zealand* (Butterworths, Service 39, as at 21 April 2005), Vol 5 Civil Procedure: High Court, at para 69.

111 See website of the Courts of New Zealand: http://www.courtsofnz.govt.nz/about/system/rules_committee/projects/Rules-Committee-note-on-class-actions-30-7-09.pdf

112 In a letter from the New Zealand Secretary for Justice to the Sub-committee's Secretary dated 18 November 2010. A spokesman for the Justice Minister Simon Power said that the Government would consider and progress the proposed bill as other priorities allowed, but there was no timetable for that, as reported at: http://www.interest.co.nz/news/slow-progress-class-actions-bill-may-stymie-exception-fee-case-against-banks

People's Republic of China (the Mainland)

2.75 Matters concerning the institution of class actions are provided for under the Civil Procedure Law of the PRC（中華人民共和國民事訴訟法）[113] (CPL) and the Opinion of the Supreme People's Court on the Several Questions Concerning the Application of the "Civil Procedure Law of the PRC"（最高人民法院關於適用〈中華人民共和國民事訴訟法〉若干問題的意見）[114] (the SPC Opinion). The provisions on class actions under the CPL and the SPC Opinion have not been amended since their promulgation in 1991 and 1992 respectively.[115]

Meaning of class action

2.76 Article 55 of the CPL has specific provisions for an action in which the subject matter of the claims is of the same category, and there is a large but uncertain number of persons comprising one of the parties at the commencement of the action.[116] Academics generally regard the action specified under this article as a "class action"（群體／集團訴訟）.[117]

2.77 According to Article 59 of the SPC Opinion, the reference to "*the number of persons comprising one of the parties is large*" under Article 55 of the CPL means "*more than ten persons*（十人以上）". In other words, if one of the parties has more than ten persons in an action concerning the same subject matter, a "class action" may be instituted under Article 55 of the CPL.

Issuance of public notice by the People's Court

2.78 Under Article 55 of the CPL, the People's Court may issue a public notice stating the claims and particulars of the class action to inform those who are entitled to participate in the action to register their rights with the People's Court within a specified period of time.[118] The People's Court has the discretion to decide whether a public notice should be issued under

---

113 Adopted at the 4th Session of the 7th NPC on 9 April 1991, effective as of the same date.

114 Promulgated by the Supreme People's Court on 14 July 1992, effective as of the same date.

115 According to Michael Palmer and Chao Xi "*Collective and Representative Actions in China*" (report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007), at 2, under the CPL, there are broadly three types of "collective suits". These are "non-representative group litigation" (Article 53 of the CPL), "representative group litigation in which the number of litigants is fixed" at the time the case is filed (Article 54 of the CPL) and "representative group litigation in which the number of litigants is not fixed" at the time the case is filed (Article 55 of the CPL). The following paragraphs will focus on the provisions of Article 55 of the CPL.

116 "訴訟標的是同一種類、當事人一方人數眾多在起訴時人數尚未確定的……"。

117 梁書文：《民事訴訟法適用意見新釋》(中國法制出版社)，第104頁；and 唐德華（主編）：《新民事訴訟法條文釋義》（人民法院出版社），第106–107頁。

118 "……人民法院可以發出公告，說明案件情況和訴訟請求，通知權利人在一定期間向人民法院登記……"。

Article 55 of the CPL.[119] The People's Court has decided that in a case under Article 55, the People's Court "may" issue a public notice and is not obliged to do so in every case.[120] Article 63 of the SPC Opinion stipulates that the period of the notice will be determined according to the facts of the case but that period will not be less than 30 days.[121]

2.79 The CPL and SPC Opinion do not provide for the manner in which the public notice should be issued. It has, however, been suggested that the public notice may be issued in the following ways:

(a) by posting on the notice board of the People's Court which is located within the district where the parties in the case reside;

(b) by posting within the district where the parties in the case reside; or

(c) by publication in newspapers.[122]

2.80 Apart from the provisions relating to the issuance of a public notice in a class action by the People's Court, the CPL and the SPC Opinion do not provide for how a class action may be commenced by the parties involved.

Registration of the parties to a class action

2.81 According to Article 55 of the CPL, the purpose of the public notice issued by the People's Court is to notify those who are entitled to participate in the class action to register their rights with the court. Article 64 of the SPC Opinion stipulates that the registering persons should prove to the court their legal relationship with the opponent party in the action and the damage suffered.[123]

2.82 It is believed that under Article 64 of the SPC Opinion a registering person merely has to produce evidence to prove the bare fact that his rights have been damaged.[124] Article 64 further provides that if the person fails to prove these matters, the court should not register him. He may, however, commence a separate action.[125]

---

119 梁書文：《民事訴訟法適用意見新釋》（法制出版社），第110頁。

120 The case was not reported but was discussed and commented in an article：吳飛：“從清華‘200卡’案件評中國集團訴訟”《法學》，1999年第10期，第60-64頁。In this case, twenty-two university students claimed damages against中國郵電電信管理總局、北京市郵電電信管理總局and湖北省郵電電信管理總局for failure to provide services。The plaintiffs applied to the Xicheng District People's Court of Beijing（北京市西城區人民法院）for the issuance of a public notice under Article 55 of the CPL to inform other victims to register their claims。

121 “……公告期限據具體案件的情況確定，最少不得少於三十日”。

122 《〈中華人民共和國民事訴訟法〉釋論》（中國政法大學出版社出版），第81頁。

123 “……向法院登記的當事人，應証明其與對方當事人的法律關係和所受到的損害……”。

124 梁書文：《民事訴訟法適用意見新釋》（法制出版社），第112頁。

125 “……証明不了的，不予登記，當事人可以另行起訴……”。

Appointment of representatives

2.83 Members of a class may elect representatives（代表人）to act on their behalf to conduct the action under Article 55, which also stipulates:

> *"Those who have registered their rights with the People's Court may elect representatives to proceed with the action; if no representatives have been elected, the People's Court may decide the representatives in consultation with those who have registered their rights with the court."*[126]

2.84 If no representative has been chosen after consultation, Article 61 of the SPC Opinion provides that the People's Court may designate representatives among the parties to the case.[127] The CPL and the SPC Opinion, however, have not set out the criteria and procedure for the election or designation of representatives.

2.85 According to Article 62 of the SPC Opinion, the number of representatives under Article 55 is restricted to two to five persons, and under Article 58 of the CPL, each representative may appoint one to two persons as their "*agents ad litem*".[128]

Authority of the representatives

2.86 Article 55 of CPL stipulates that the acts of a representative in a class action bind the persons he represents. However, if a representative modifies or waives the claims, admits the claims of the other party or settles with the other party, the representative should first obtain the consent of the persons he represents.[129]

Effect of the judgment

2.87 Under Article 55 of the CPL and Article 64 of the SPC Opinion, judgment in a class action binds persons who have registered their rights with the court.[130] According to Article 55(4), the judgment will also be used to adjudicate the cases of those who have not registered their rights but institute legal proceedings in the People's Court within the limitation period.

---

126 "……向人民法院登記的權利人可以推選代表人進行訴訟；推選不出代表人的，人民法院可以與參加登記的權利人商定代表人……"。

127 "……協商不成的，也可以由人民法院在起訴的當事人中指定代表人……"。

128 "……第五十五條規定的代表人爲二至五人，每位代表人可以委托一至二人作爲訴訟代理人……"。Article 58 of the CPL provides that a party to an action may appoint one to two "agents ad litem（訴訟代理人）"。

129 "……代表人的訴訟行爲對其所代表的當事人發生效力，但代表人變更、放棄訴訟請求或者承認對方當事人的訴訟請求，進行和解，必須經被代表的當事人同意……"。

130 "……人民法院作出的判決、裁定，對參加登記的全體權利人發生效力。未參加登記的權利人在訴訟時效期間提起訴訟的，適用該判決、裁決" —— 第五十五條。

Costs

2.88 Generally speaking, a party who files a civil case with the People's Court needs to pay the prescribed "court costs"（案件受理費）(excluding lawyers' fees) under Article 107 of the CPL. However, Article 129 of the SPC Opinion provides that parties to cases under Article 55 of the CPL are not required to pay court costs in advance, and the costs will be paid by the losing party after the conclusion of the case according to the amount of the subject matter of the action.[131]

2.89 As regards lawyer's fees, the "loser pays" costs system that makes the losing party in the litigation pay some or all of the winning party's legal expenses does not exist. Chinese courts generally leave each side responsible for its own lawyer's fees, regardless of who wins.[132]

2.90 Under Article 130 of the SPC Opinion, where people who have not registered their rights but institute legal proceedings within the limitation period apply for execution of the judgment made under Article 55, they are required to pay the "*fee for the application for execution*" in accordance with Article 8(1) of the Provisions on the Collection of Fees for Litigation in the People's Court（人民法院訴訟收費辦法）.[133]

2.91 Article 12 of the 2006 Measures on Lawyer's Fees prohibits contingency fees in collective actions and the lawyers are not allowed to receive fees that involve a percentage of the net recovery of proceeds.[134]

Other procedures

2.92 Apart from the relevant articles in the CPL and SPC Opinion discussed above, there seems to be no other specific provision on class actions. There are some court decisions invoking Article 55, but they have not fleshed out the procedures for class actions.[135] Hence, it appears that the

---

131 "依照民事訴訟法第五十五條審理的案件不預交案件受理費，結案後按照訴訟標的額由敗訴方交納"。

132 Michael Palmer and Chao Xi "Collective and Representative Actions in China" (report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007) at 15.

133 Promulgated by the Supreme People's Court on 12 July 1989, effective as of 1 September 1989。"依照民事訴訟法第五十五條第四款的規定，未參加登記的權利人向人民法院申請執行的，按《人民法院訴訟收費辦法》第八條第(一)項的規定交納申請執行費。"

134 According to Michael Palmer and Chao Xi "Collective and Representative Actions in China" (report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007) at 17.

135 The reported cases recorded in the國家法規數據庫（operated by國家信息中心）are：

(i) 景連喜等51戶蝦農訴中晨公司等在建港吹填作業中回水污染其養殖水源損害賠償案；

(ii) 程學文等146戶養殖戶訴焦作市糧油運輸綜合公司富達養殖廠利用虛假廣告誘使簽訂的合同無效糾紛案；

(iii) 周迪武等34人訴衡陽市飛龍股份有限公司按原定優先股股利率支付股息糾紛案；

(iv) 陳百謙、秋里煥等832人訴哈爾濱市道里區太平鎮人民政府購銷玉米種子質量糾紛案；and

general provisions on civil procedures, primarily in the CPL and the SPC Opinion, would also govern the practice and procedure of class actions.[136]

Singapore

2.93 Like New Zealand, there is no Australian or Canadian style legislation on class actions in Singapore. Order 15 Rule 12 of the Rules of Court made under the Supreme Court of Judicature Act (Cap 322), which is identical to the Hong Kong Order 15 Rule 12, governs representative proceedings. It appears that the representative proceedings procedure has rarely been used. In the period from 2003 to 2007, there was only one reported case involving representative proceedings pursuant to Order 15 Rule 12: *Tan Chin Seng & Others v Raffles Town Club Pte Ltd.*[137]

2.94 The Committee to Develop the Singapore Legal Sector considered that the scope of the existing rule of representative proceedings was limited. The committee therefore recommended that consideration be given to allowing class actions in appropriate categories of cases in Singapore.[138] The committee was of the view that class actions could be used as a tool to enhance access to justice in instances where a large number of persons had been adversely affected by another's conduct and the total amount at issue was significant but each individual's loss might be insufficient to make it commercially viable for that individual to attempt to vindicate his rights alone.[139] But the committee also recognised that the class action procedure might be abused if it were implemented without appropriate limits or control.[140] The Government has accepted in principle the committee's recommendations.[141] The Ministry of Law in Singapore has informed that there has been no further development since then.[142]

(v) 劉先鋒等44戶農民認爲鹽亭縣黃甸鎮人民政府違法加重農民負擔案。

136 There are other laws and regulations which govern specific areas of the practice and procedures of civil cases, for example, Supreme People's Court's Regulation on Evidence in Civil Cases (promulgated on 1 April 2002)（最高人民法院關于民事訴訟證據的若干規定）。

137 [2002] SGHC 278 (High Court); [2003] 3 SLR 307 (Court of Appeal) See further, Professor Jeffrey Pinsler (2007) "*Responses to Questions on Class Actions and Group Litigation*", country report submitted to the Globalization of Class Actions Conference.

138 Final Report of the Committee to Develop the Singapore Legal Sector (September 2007), at para 3.28.

139 Final Report of the Committee to Develop the Singapore Legal Sector, cited above, at para 3.19.

140 Final Report of the Committee to Develop the Singapore Legal Sector, cited above, at para 3.20.

141 See press release issued by the Ministry of Law of Singapore dated 7 December 2007 at: http://app2.mlaw.gov.sg/News/tabid/204/ctgy/Press%20Release/currentpage/4/Default.aspx?ItemId=95

142 In an email to the Sub-committee's Secretary dated 27 October 2011.

South Africa

2.95 In the opinion of the South African Law Commission, the South African law of standing has traditionally been relatively restrictive: the courts have required a personal, sufficient, and direct interest before a litigant is accorded standing in court.[143] The Commission believes that class actions (as well as public interest actions)[144] are part of the global movement to make access to justice a reality.[145] If the traditional requirement of standing is strictly adhered to, public spirited individuals would not be able to claim relief in the public interest or in the interests of other people who are unable to enforce their rights.[146] The South African Law Commission therefore recommended enacting new legislation for class actions. According to the Commission's 2008-2009 Annual Report, the Commission's report on class actions was submitted to the Department for Justice and Constitutional Development in September 1998 and it is still under consideration.[147] The Commission's proposals in respect of class actions are as follows:[148]

1. **"Class action" should mean** an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified as a class action in terms of the Act.
2. The **person commencing the class action** or the person appointed as a **representative** in the class action should not need to be a member of the class. Only suitable persons should be appointed as representatives as the quality of the representative may be relevant. The person who brings the application for certification should be able to request the court to appoint him or another person (with that person's prior consent) to be the representative. Before the court appoints a representative, it would have to be satisfied that the

---

143 South African Law Commission, *Report on the Recognition of a Class Actions and Public Interest Actions in South African Law* (1998), Project 88, at para 1.2.1.

144 The Commission proposed in the report (at page 24) to define "public interest action" as *"an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest. Judgment of the court in respect of a public interest action shall not be binding (res judicata) on the persons in whose interest the action is brought."* A discussion of the problems in relation to the application of standing rule in public interest action under Article 38 of the Constitution of South Africa can be found in Clive Plasket, "Representative Standing in South African Law", (report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007). The discussion in the following paragraphs in this report will focus on the Commission's proposals in respect of class actions.

145 South African Law Commission, *Report on the Recognition of a Class Actions and Public Interest Actions in South African Law* (1998), Project 88, at para 1.2.2.

146 South African Law Commission, *Report on the Recognition of a Class Actions and Public Interest Actions in South African Law* (1998), Project 88, at para 1.2.2.

147 South African Law Commission, *Annual Report 2008-2009*, at 83. http://www.justice.gov.za/salrc/anr/2008-09_ar.pdf

148 South African Law Commission, *Report on the Recognition of a Class Actions and Public Interest Actions in South African Law* (1998), Project 88, at vi.

contemplated action is a *bona fide* class action. The court could dismiss a representative on good cause shown.

3. A preliminary application to court should be brought requesting leave to institute or defend an action as a class action. An **application for certification** as a class action could be granted by the court where:

   (a) there was an identifiable class of persons;

   (b) a cause of action was disclosed;

   (c) there were issues of fact or law which were common to the class;

   (d) a suitable representative was available;

   (e) the interests of justice so required; and

   (f) the class action was the appropriate method of proceeding with the action.

4. The court hearing the application for certification as a class action is to have the power to give **directions as to the appropriate court in which the action should be commenced**.

5. **Notice to class members and prospective class members** should always be given as a general rule. The proposed legislation should deal with the issues of when, by whom, to whom, and how notice should be given. The court is to have the discretion to make opt-in, opt-out or no notice orders. The court would have to consider, in all cases, whether notice of the application for certification should be given to all persons eligible to be a class member.

6. Initially, only the Supreme Court of Appeal, the Constitutional Court, the High Courts, the Land Claims Court, and Labour Court would be allowed to adjudicate class actions. Eventually, **class actions would be allowed to be instituted in any court**. The authorities empowered to make rules for the courts are to prescribe appropriate procedure for the courts.

7. The court would be able to **order that a class action no longer proceed as such** if any of the criteria for certification were no longer satisfied at any time after a certification order had been granted.

8. As part of the certification process, the court should be asked for directions as to procedure. The court is to have a **wide discretion to determine its own procedures**.

9. The court is to have **broad general management powers** exercisable either on the court's own motion, or on the application of a party or class member.

10. The proposed legislation is to define the term **"common issues"**. Common issues are to be determined together, while

issues requiring the participation of individual class members are to be determined individually. The court should not refuse to authorise a class action merely because there are issues pertaining to any claim which would require individual determination or different relief was sought for different class members.

11. Prior court approval is to be required for settlement, discontinuance or abandonment of a class action.

12. The court is to have the discretion to make an order in respect of the binding effect of its judgment on the class members.

13. The court would be able to make an aggregate assessment or individual assessments of the amount of damages to be awarded. The court would be able to appoint a commissioner to assist the court in this respect. Where the court makes an aggregate assessment, it should give directions regarding distribution of the award to class members and could, if appropriate, require the defendant to distribute the award directly to the class members. The proposed legislation is to have provisions on the aggregate assessment of monetary awards and the disposal of any undistributed residue of an aggregate award.

14. The decision to certify an action as a class action would be only the first step in the proceedings and would not be subject to appeal, while non-certification of an action as a class action would be subject to appeal. Where a representative does not appeal, another member of the class could appeal with leave of the court.

15. The court is to retain its discretion to apply the general rule that costs follow the result. Unless there are special circumstances, the court should not order the representative to provide security for costs. The court would be able to certify a class action on condition that the Legal Aid Board granted the necessary funds or indemnified the defendant for his costs. Opting-in class members could be ordered to contribute towards costs and, if appropriate, to provide security for costs.

16. Subject to the Contingency Fees Act, a legal practitioner could make an arrangement with the representative for the payment of fees, disbursements or both only in the event of success.

17. The existing Legal Aid Board should be utilised as the mechanism to provide legal aid to indigent litigants in class actions.

18. The certification of an action as a class action is to suspend limitation periods for all class members until the member opts out, the member is excluded from the class, or the action is decertified, dismissed, abandoned, discontinued or settled.

United States of America: federal regime

Prerequisites to a class action

2.96 Rule 23 of the US Federal Rules of Civil Procedure (FR CP), which governs class actions in federal courts, dates back to 1938, and has operated in its present form since 1966.[149] A class action is defined as an action in which *"one or more members of a class may sue or be sued as representative parties on behalf of all."*[150]

2.97 Rule 23(a) provides that the prerequisites to a class action are that:

> *"(1) the class is so numerous that joinder of all members is impracticable,*
>
> *(2) there are questions of law or fact common to the class,*
>
> *(3) the claims or defences of the representative parties are typical of the claims or defences of the class, and*
>
> *(4) the representative parties will fairly and adequately protect the interests of the class."*

2.98 Rule 23(b) imposes an additional requirement and provides that a class action may be maintained provided that one of the three conditions there is satisfied. The first is that separate actions would create a risk of inconsistent adjudications which would establish contradictory standards of conduct for the defendant, or that adjudications in respect of some individuals would adversely affect the interests of other class members not parties to the adjudications (rule 23(b)(1)). The second is that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or declaratory relief with respect to the class as a whole (rule 23(b)(2)).

2.99 The third condition is the one most commonly applied. This is that the court finds that questions of law or fact common to members of the class predominate over issues affecting only individuals, and that a class action is superior to other available methods for the fair and efficient adjudication of the matter. In determining whether a class action satisfies the

---

149 Although rule 23 only applies to class actions sought in federal courts, most states now have a class action mechanism more or less similar to the post-1966 version of rule 23. To avoid diversity in class action law and practice and to avoid the potential for a single class action filed in one state to affect citizens residing across its border, the Class Action Fairness Act of 2005 (Public Law 109-2) was enacted in 2005. Under the Act, defendants of class actions filed in state courts now have the ability to have their cases transferred to federal district courts for processing if any of the parties (including individual class members) are citizens of different states and if the aggregate amount in controversy exceeds US$5 million (Nicholas M Pace, "Class Actions in the United States of America: An Overview of the Process and the Empirical Literature", report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007, at 2-3.)

150 FR CP 23(a).

third condition, rule 23(b)(3) continues to provide that "*matters pertinent to the findings*" include:

> *"(A) the interest of members of the class in individually controlling the prosecution or defence of separate actions;*
>
> *(B) the extent and nature of any litigation concerning the controversy already commenced by or against any members of the class;*
>
> *(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;*
>
> *(D) the difficulties likely to be encountered in the management of a class action."*

Certification of a class action

2.100 Pursuant to rule 23(c)(1)(A), a class action must be certified by the court "*at an early practicable time*". The order certifying the action must define the class and the class claims, issues or defences, and must appoint the class counsel.[151] According to rule 23(c)(1)(C), an order may be altered or amended before final judgment.

Notice

2.101 For any class certified under rule 23(b)(1) or (2), the court may direct appropriate notice to the class (rule 23(c)(2)(A)). For any class certified under rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

> *"•* *the nature of the action,*
>
> • *the definition of the class certified,*
>
> • *the class claims, issues, or defenses,*
>
> • *that a class member may enter an appearance through counsel if the member so desires,*
>
> • *that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and*
>
> • *the binding effect of a class judgment on class members under Rule 23(c)(3)".*[152]

---

151 FR CP 23(c)(1)(B).

152 FR CP 23(c)(2)(B).

Subclasses

2.102 Under rule 23(c)(4), an action may be brought or maintained as a class action with respect to particular issues. Alternatively, a class may be divided into subclasses and each subclass can be treated as a class, and the provisions of this rule will then be construed and applied accordingly.

Wide powers of the courts

2.103 Rule 23 gives the courts wide power in relation to the proceedings of the courts. Rule 23(d) sets out the orders a court may make to govern the conduct of the action for the purposes of:

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

Settlement, voluntary dismissal or compromise

2.104 Rule 23(e) refers to the powers given to a court to govern any settlement, voluntary dismissal or compromise which occurs in the proceeding. Any form of settlement, voluntary dismissal or compromise of claims, issues or defences must be approved by the court, and the court may do so only after a hearing and on finding that the settlement, voluntary dismissal or compromise is fair, reasonable, and adequate.[153] The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal or compromise (rule 23(e)(1)(B)).

---

153 FR CP 23(e)(1).

Under rule 23(e)(4)(A), any class member may object to a proposed settlement, voluntary dismissal or compromise.

Judgment

2.105 Rule 23(c)(3) provides that a judgment in a class action under rule 23(b)(1) or (b)(2), whether or not favorable to the class, will apply to those whom the court finds to be members of the class. A judgment in a class action under rule 23(b)(3), whether or not favorable to the class, will apply to those to whom the notice was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

Appeals

2.106 Under rule 23(f), a court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification if an application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Class counsel

2.107 The court that certifies a class action must also appoint a class counsel[154] and must assess, *inter alia,* whether the attorney appointed will fairly and adequately represent the interests of the class.[155] The court may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and non-taxable costs, and may make further orders in connection with the appointment (rule 23 (g)(1)(C)). An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class (rule 23 (g)(1)(B)). The order appointing class counsel may include provisions about the award of attorney fees or non-taxable costs under rule 23(h).[156]

Attorney fees award

2.108 Under rule 23(h), the court may award reasonable attorney fees and non-taxable costs authorised by law or by agreement of the parties. A claim for an award of attorney fees and non-taxable costs must be made by motion at a time set by the court. A class member, or a party from whom payment is sought, may object to the motion. The court may refer issues

---

154 FR CP 23(g)(1)(A).

155 FR CP 23(g)(1)(B) and (C). In appointing class counsel, the court must also consider:

> *"• the work counsel has done in identifying or investigating potential claims in the action,*
>
> *• counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,*
>
> *• counsel's knowledge of the applicable law, and*
>
> *• the resources counsel will commit to representing the class."*

156 FR CP 23(g)(2)(C).

related to the amount of the award to a special master or to a magistrate judge.

Conclusion

2.109 In our survey of the common law jurisdictions set out above, we have found that they commonly acknowledge the need to deal with multi-party litigation in a manner which is efficient and just. In a civil law jurisdiction such as the People's Republic of China (the Mainland), there is similar acknowledgment. In the United States, Canada and Australia, there has been accumulated experience in the use of class actions for the resolution of multi-party disputes. We find that Ireland and South Africa are working towards a generic class action regime. England and Wales, whilst acknowledging the need for a multi-party regime, had decided to follow a sector by sector approach, but the part on collective proceedings in the relevant legislation was withdrawn for reasons unrelated to the merits of the regime. Singapore has decided to study the feasibility of a class action regime. In the light of these developments, Hong Kong would be well justified in considering the feasibility of such a regime.

Chapter 3

The need for the introduction of a class action regime

Introduction

3.1 In this Chapter we consider more closely whether there is a need for the introduction of a class action regime in Hong Kong. We have considered the choice of different models for group litigation in the light of the following overall policy objectives:

(a) Promoting greater access to justice

The civil justice process should be made more accessible to plaintiffs who are able to bring deserving claims. The Ontario Law Reform Commission spoke of "*the goal of permitting the advancement of meritorious claims which have heretofore been uneconomical to pursue because the damages for each individual plaintiff would be too small for each claimant to recover through usual court procedure.*"[1] Lord Woolf spoke of providing "*access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable*."[2]

(b) Facilitating final resolution

The civil justice process should facilitate the binding resolution of civil disputes and thereby eliminate the need to revisit issues or claims in separate proceedings. This principle embodies the idea that defendants should not have to spend money or face adverse publicity as a result of a multitude of potential legal actions. As the Alberta Law Reform Institute pointed out: "*[t]he principle [also] encompasses the idea that, where plaintiffs are able to make out a recognized cause of action, the civil justice system should provide defendants with an opportunity to make their defence in a proceeding in which the rules are known, and the results can be predicted with a reasonable degree of certainty, obtained within a reasonable length of time and limited in costs.*"[3]

---

1 Ontario Law Reform Commission, *Report on Class Actions*, 3 vols (1982), quoted in *Abdool v Anaheim Management Ltd* (1993), 15 OR (3rd) 39.

2 Lord Woolf, *Access to Justice* (Final Report, 1996) at 223, para 2.

3 Alberta Law Reform Institute, *Class Actions* (2000), Final Report No 85, at para 97.

(c) Promoting judicial efficiency

The civil justice system should promote judicial efficiency. A court could certify a class action to give all persons affected an opportunity to be heard and to produce a uniform and binding judgment. The Ontario Law Reform Commission spoke of "*the goal of resolving a large number of disputes in which there are common issues of fact or law within a single proceedings to avoid inconsistent results, and prevent the court's resources from being overwhelmed by a multiplicity of proceedings*" and of *"an economy of scale"* that can come from *"permitting a representative plaintiff to sue for damages for an entire class.*"[4]

3.2 These policy objectives are also reflected in the underlying objectives outlined in the Civil Justice Reform proposals as follows:[5]

> *"(i) increasing the cost-effectiveness of the court's procedures;*
>
> *(ii) encouraging economies and proportionality in the way cases are mounted and tried;*
>
> *(iii) the expeditious disposal of cases;*
>
> *(iv) greater equality between parties;*
>
> *(v) facilitating settlement; and*
>
> *(vi) distributing the court's resources fairly*
>
> *always recognizing that the primary aim of case management is to secure the just resolution of the parties' dispute in accordance with their substantive rights."*

Benefits to plaintiffs

Improved access to justice

3.3 Access to justice is regarded as the "*cornerstone of class proceedings*". According to Rachael Mulheron, the author of "*The Class Action in Common Law Legal Systems, a Comparative Perspective",* the notion "access to justice" has several aspects.[6] First, a class action regime can arm the substantive law with teeth. Sophisticated jurisprudence on tort or contract alone will not help much if the legal system is short of practical and economical ways to enforce deserving claims.[7] J Prichard explains the relationship between class actions and the substantive law as follows:

---

4 Ontario Law Reform Commission, *Report on Class Actions*, 3 vols (1982), quoted in *Abdool v Anaheim Management Ltd* (1993), 15 OR (3rd) 39.

5 Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform Final Report Executive Summary* (2004), para 23.

6 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 53.

7 Manitoba Law Reform Commission, *Class Proceedings* (1999), MAN LRC REP 100, at 23.

> *"In the absence of effective procedural mechanisms for pursuing legitimate and legally cognizable claims, the full meaning of our substantive law can never be known. Thus, both common law and statutory statements of our legal rights are often illusory in that they may generate high expectations that are subsequently dashed on the rocks of procedural barriers."*[8]

3.4 The second aspect is to overcome cost-related hurdles. The combined effect of the cost of litigation and the restricted availability of legal aid in civil cases discourages people from seeking redress through litigation, especially when the claims are small in amount. A single plaintiff's claim may not be economically viable to pursue because of the costs involved, but the aggregate claims of the plaintiff class may become substantial enough to justify the potential costs. The third aspect is to narrow down the disparity between the parties, especially when a plaintiff is a single litigant or consumer claiming against a governmental body or a wealthy multinational corporation which is backed by an insurance company, with the benefit of tax deductibility for expenses incurred in defending the claim. HB Newberg observes,

> *"[class members] gain a more powerful adversarial posture than they would have through individual litigation [and this] serves to balance a currently imbalanced adversarial structure, in which large defendants with sufficient economic means are able to enjoy an overwhelming advantage against parties with small individual claims."*[9]

3.5 Apart from economic considerations, there are other barriers to the commencement of legal proceedings which a class action regime can help overcome:

> *"Empirical evidence from Australia and overseas indicates that factors such as fear of sanctions from employers or others in a position to take reprisals; fear of involvement in the legal system; and ignorance of their legal rights prevent injured persons from taking the legal measures, such as litigation, which enforcement of their rights entails. These persons 'could be assisted to a remedy if one member of a group, all similarly affected, could commence proceedings on behalf of all members.'"*[10]

3.6 We therefore think that there is much to commend the Manitoba Law Reform Commission's view that "*a modern class proceedings regime operates to ensure the widest possible access to justice for people who have*

---

8 JRS Prichard, "Class Action Reform: Some General Comments" (1984) 9 *Canadian Business* LJ 309, 322-23.

9 HB Newberg and A Conte, *Newberg on Class Actions* (4th Ed 2001, Colorado Springs, McGraw-Hill Inc), at para 5.57 p 478.

10 Victorian Attorney-General's Law Reform Advisory Council, *Report on Class Actions in Victoria: Time for a New Approach,* 1997, at para 2.8.

suffered losses as the result of someone else's fault, particularly where those losses are not large enough in financial terms to justify involvement in the expensive process of litigation".[11]

Benefits to defendants

Avoiding multiple related lawsuits

3.7 A class action regime can spare defendants repetitive proceedings involving similar (or even identical) issues by resolving those issues in one single trial. This will save defendants the time, cost and inconvenience expended in defending multiple related, similar or identical claims, which may stretch over long periods of time in different jurisdictions. The Ontario Law Reform Commission noted,

> *"Class actions aggregating individually recoverable claims, are beneficial not only to plaintiffs, but also to defendants, since such actions reduce defence costs by eliminating the need to assert common defences in each individual suit."*[12]

Finality of disputes and early opportunity of closure

3.8 To defendants, a class action regime is advantageous because it could lead to finality and class-wide resolution of disputes, preferably through settlement. This is because rulings or settlement agreements on common issues bind all class members. The Alberta Law Reform Institute noted in its report,

> *"Rather than waiting for individual claims to pile up, corporate defendants can clean up their liabilities in one proceeding, without risking inconsistent decisions or facing multiple lawsuits in numerous jurisdictions."*[13]

Defendants welcome class-wide settlement, and may even favour as broad a definition of the class as possible so as to bind class members definitively and cap liability exposure.[14]

---

11 Manitoba Law Reform Commission *Class Proceedings Report #100* (1999), at 25.

12 Ontario Law Reform Commission, *Report on Class Actions* (1982), at 118.

13 Alberta Law Reform Institute, *Class Actions* (2000), Final Report No 85, at para 122.

14 DR Hensler, NM Pace, B Dombey-Moore, E Giddens and J Gross, EK Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica, RAND Institute for Civil Justice, 2000), at 410 and 402.

Negotiated certification

3.9 The Alberta Law Reform Institute endorsed the views of an Ontario defence counsel that a negotiated certification could provide defence counsel with the chance of influencing the nature of the class, limiting the claims and establishing an expeditious and cost-effective way for resolving the claims of the class members.[15]

Benefits to society

Increased judicial economy

3.10 A class action regime can enable the court to deal with claims involving common issues of fact or law within a single proceeding, instead of determining the claims individually. This is particularly true where it would be viable to litigate the claims individually. This collective approach will save scarce judicial resources from being used for repetitive proceedings involving similar or identical issues, for example, by obviating the need for re-hearing witnesses' testimonies in different proceedings. This is especially relevant in the modern world:

> *"as we become an increasingly mass producing and mass consuming society, one product or service with a flaw has the potential to injure or cause other loss to more and more people."*[16]

The US Supreme Court stated that class actions could promote "*the efficiency and economy of litigation which is a principal purpose of the procedure*".[17] In addition, most class actions settle before trial,[18] and class actions can bring about early settlement.

3.11 However, a class action regime does not necessarily promote judicial economy in all respects.[19] According to some empirical analysis, class actions consume more judicial resources than typical civil cases.[20]

---

15 Alberta Law Reform Institute, *Class Actions* (2000), Final Report No 85, at para 123, quoting the views of Jeffrey Goodman of Heenan Blaikie.

16 Submission by the National Consumer Council, cited in Lord Woolf, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (1996), Ch 17, at para 1.

17 *General Telephone Co of Southwest v Falcon* 457 US 147, 159, 102 S Ct 2364 (1982).

18 The Federal Judicial Centre undertook a study of all class actions (except mass tort class actions) terminated between 1 July 1992 and 30 June1994 in four federal district courts. Less than 4% of class actions filed went to trial: TE Willging, LL Hooper and J Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996).

19 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 59.

20 Class actions typically took two to three times longer from filing to disposition, and consumed five times as much judicial time as typical civil cases: TE Willging, LL Hooper and J Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory*

Nevertheless, if separately recoverable claims are to be litigated individually, the hearings would be duplicative and cumulatively more consumptive of judicial resources.[21]

Enhancement of justice

3.12 The Alberta Law Reform Institute observed that a class action regime could enhance justice in various ways.[22] First, greater access to justice can be attained, and society will be more just. Secondly, different or even inconsistent rulings on similar or identical claims brought by plaintiffs in separate actions can be avoided. Thirdly, judges in class actions can, by way of case management, reduce areas of dispute and increase the likelihood of reaching a fair and equitable ruling.

Deterrence of wrongdoing (behaviour modification)

3.13 A class action regime can have the effect of deterring potential wrongdoers, such as corporations or governmental bodies, from committing wrongful acts, and prompting them to have a stronger sense of obligation to the public.[23] This is achieved by "*making it feasible for victims to recover damages from wrongdoers who were previously insulated from having to account for their wrongs because of economic and other barriers to individual proceedings*".[24] The underlying philosophy is that:

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

Committee on Civil Rules (1996), at 9. Manitoba Law Reform Commission, *Class Proceedings* (1999), MAN LRC REP 100, at 26.

21 Manitoba Law Reform Commission, *Class Proceedings* (1999), MAN LRC REP 100, at 26.

22 Alberta Law Reform Institute, *Class Actions* (2000), Final Report No 85, at para 114.

23 The Ontario Attorney-General's Advisory Committee on Class Actions, *Report of the Attorney-General's Advisory Committee on Class Action Reform* (1990), at 17. Manitoba Law Reform Commission, *Class Proceedings* (1999), MAN LRC REP 100, at 28, 30 and 35. Alberta Law Reform Institute, *Class Actions* (2000), Final Report No 85, at para 115. Ontario Law Reform Commission, *Report on Class Actions* (1982), at 140-146.

24 *Webb v K-Mart Canada Ltd* (2000), 45 OR (3d) 389 (SCJ) [44] (Brockenshire J).

the community has to that extent lost its ability to compel obedience to the standards of conduct it has established."[25]

3.14 The US judiciary, including the Supreme Court, also recognises the deterrence function of class litigation.[26] It has been observed that one effect of a class action regime is to prompt corporations to pay more attention to their financial and employment practices, and manufacturers to think twice about their product design decisions.[27]

3.15 In contrast, the Scottish Law Commission stated that the "*sole proper object*" of a civil action, including a multi-party proceeding, was "*to obtain compensation*".[28] The Commission believed that behaviour modification should be achieved by reforming substantive law or by introducing regulatory regimes with criminal penalties, rather than by reforming court procedures. Similarly, the Australian Law Reform Commission also said that the deterrent effect on behaviour was only incidental to the main goal of facilitating access to justice.[29]

Principle and consistency

3.16 In Rachael Mulheron's opinion, a class action regime can provide another advantage to plaintiffs, defendants and the courts: procedural

---

25 Jones and Boyer, "Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies" (1971-72) 40 *George Washington Law Review* 357, at 361, cited in Victorian Attorney-General's Law Reform Advisory Council, *Report on Class Actions in Victoria: Time for a New Approach,* 1997, at para 2.13.

26 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 63-64.

27 DR Hensler, NM Pace, B Dombey-Moore, E Giddens, J Gross, EK Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica, RAND Institute for Civil Justice, 2000), at 50, ch 15, section 4, and Table 15-16.

28 Scottish Law Commission, *Multi-Party Actions* (Scot Law Com No 154, 1996), at para 2.23. For criticisms of the behaviour modification goal see: K Scott, "Two Models of the Civil Process" (1975) 27 Stanford Law Review 937, at 937-9; and Simon, "Class Actions - Useful Tool or Engine of Destruction" (1972) 55 Federal Rules Decisions 375, at 392.

29 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988), at para 323. See also Alberta Law Reform Institute, *Class Actions* (Memorandum No 9, 2000), at paras 116 and 118: "*While agreeing that increased judicial economy would benefit society, persons who question the wisdom of class actions reform reminded us that it is important to consider the many interests that require balancing. These interests include the need to balance the costs of litigating class actions against the benefits to the class. … With respect to the deterrence of wrongdoing, they point out that mechanisms such as consumer protection legislation already discipline companies in the market place. They argue that the regulatory enforcement of corporate conduct is a matter for government, not the courts, and that this is particularly so in consumer cases in which each class member claims a small loss but the sum of the losses is huge. The argument, in effect, is that these cases should not be litigated at all. They suggest that a better solution might be to reverse the trend toward enforcement through private action by bolstering government regulation. Governments have access to a wide spectrum of information and to experts who can make decisions based on sound economic opinion whereas courts are limited to the evidence before them and therefore don't see the 'world view.' They make the further point that problems involving many individual differences, as was the situation with respect to the leaky condos in Vancouver, are not helped by class actions and may be better dealt with through increased government regulation.*"

certainty at the outset.[30] Before advising his clients, a lawyer needs to evaluate whether commencing a class action is appropriate for the circumstances. A set of concrete rules on class actions can facilitate lawyers' evaluation. The Alberta Law Reform Institute also noted,

> *"the civil justice system should provide defendants with an opportunity to make their defence in a proceeding in which the rules are known".*[31]

The Supreme Court of Canada looked at this from the judiciary's angle:

> *"While it would have been possible for courts to accommodate moderately complicated class actions by reliance on their own inherent power over procedure, this would have required courts to advise ad hoc solutions to procedural complexities on a case-by-case basis. ... The Class Proceedings Act, 1992, was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than ad hoc basis, with the increasingly complicated cases of the modern era."*[32]

3.17 In addition, a class action regime can enhance consistency of rulings on similar or identical claims:

> *"[a class action regime] protects defendants from inconsistent obligations that may be created by varying results in different courts, and similarly, it promotes the equitable principle that similarly situated plaintiffs should receive similar recoveries."*[33]

Potential risks of class action regime

3.18 We have identified several potential risks of class actions that have also been considered by various overseas law reform agencies. Details of those risks and their possible answers are set out in Annex 2 of this report. We set out here a few major risks of class actions.

Risk of promoting unnecessary litigation

3.19 Firstly, there is concern that unnecessary litigation may be encouraged if a class action regime were introduced in Hong Kong which,

---

30 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 47-49.

31 Alberta Law Reform Institute, *Class Actions* (Memorandum No 9, 2000), at para 15.

32 *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [14].

33 *US Parole Comm v Geraghty*, 445 US 388, 402-3, 100 S Ct 1202 (1980).

unlike some other legal cultures, is not a litigious society. As observed by the Alberta Law Reform Institute:

> *"some persons who would not choose to sue in the absence of class action legislation will join class actions solely because they happen to be members of a defined class. This is most likely to occur where the claims are small because joining the class action costs little or nothing. In this way, class actions promote litigation unnecessarily."*[34]

There could be social costs involved for corporations, for example, in having to take out additional insurance to cover the risk of class litigation.

Risk of bringing unmeritorious legal proceedings

3.20 Secondly, some opponents assert that a class action regime will prompt many proceedings which lack merit. This criticism was summarised by the Australian Law Reform Commission as follows:

> *"[the opponents] point to amorphous classes where one person or a small group have brought legal proceedings purporting to make claims on behalf of … 'all persons in the United States'. … They allege that large classes of unidentified members each with a small claim result in 'strike suits', that is, frivolous claims which utilize the threat of unmanageable and expensive litigation to compel defendants to settle because of the risks inherent in any litigation and the enormous costs of defending a class action. They say that a defendant faced with a class action is, therefore, forced to settle even if the plaintiff's claim is weak."*[35]

Risk of benefiting entrepreneurial lawyers

3.21 The third potential risk of introducing a class action regime is to benefit persons not intended to benefit at the expense of the class members, ie entrepreneurial lawyers. It is asserted that they will increase the variety and frequency of class actions litigation. The risk is that class actions will become simply vehicles for entrepreneurial lawyers to obtain fees. Plaintiffs' lawyers may launch an action in the hope of obtaining huge fees for relatively little work by reaching a quick settlement.[36]

---

34 Alberta Law Reform Institute, *Class Actions* (2000), Final Report No 85, at para 126.

35 Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979) at para 23.

36 Alberta Law Reform Institute, *Class Actions* (2000), Final Report No 85, at para 131.

Risk of insufficient protection of the class members' interests

3.22 The risk is exacerbated by the lack of protection of the interests of class members by the class action procedure. The risk stems from the fact that class members typically play a small role in the litigation. If the representative plaintiff is not actively instructing the class counsel, this "clientless" litigation may lead plaintiff lawyers to engage in questionable practices, serving their own financial ends rather than the interests of class members. The Rand Institute pointed out that:

> *"[t]he powerful financial incentives that drive plaintiff attorneys to assume the risk of litigation intersect with powerful interests on the defence side in settling litigation as early and as cheaply as possible, with the least publicity. Procedural rules, such as the requirements for notice and judicial approval of settlements, provide only a weak bulwark against self-dealing and collusion."*[37]

Relevance of American experience to Hong Kong

3.23 Introducing a class action regime may involve some risk. In particular, we have been mindful of the risks inherent in the US class action. As the local consumer market is substantially smaller than its US counterpart, however, it is likely that there will be fewer class actions and the size of the class in any action is likely to be smaller.[38] Moreover, there are some features in the US legal system which are not shared by the Hong Kong system. We set out these differing features in the following paragraphs.[39]

Punitive or treble damages

3.24 In the US, the courts would frequently award exemplary, punitive or treble damages:

> *"Some legislation, particularly anti-trust legislation in the United States, provides that a successful party recovering damages for a legal wrong is entitled to receive treble damages. Verdicts for enormous sums of damages in class actions are often awards of treble damages. In other cases, class actions are brought to recover statutory penalties or minimum damages where the*

---

37 Deborah R Hensler & Ors, *Class Action Dilemmas: Pursuing Public Goods for Private Gain*, (Santa Monica, CA RAND Institute for Civil Justice, 2000), at 119 -120.

38 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 35.

39 Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co, 2005), at para 1.210.

legislation fixes an arbitrary and generally inflated sum as the minimum damages payable."[40]

In contrast, damages in Hong Kong are always awarded to compensate the actual loss or injury suffered, except in extremely rare cases of egregious tortious activity.[41]

Juries in civil trials

3.25 In the US, civil trials can be conducted before juries:

"Some critics express fears about the alleged extravagance of possible jury verdicts in class actions. In the United States juries assess damages in civil trials and often return verdicts imposing very high awards of damages."[42]

In Hong Kong, juries in do not sit on civil trials except in very limited circumstances with leave of court.[43]

Contingency fees

3.26 Lawyers can be compensated by contingency fees in the US:

"Contingent fees paid to lawyers are a considerable stimulus to class action litigation in the United States. Lawyers usually charge nothing if unsuccessful but are paid an agreed portion of the damages recovered, if successful. The proportion is usually in the order of 20% to 30% of the verdict. … In the United States steps have been taken to control this abuse by

---

40 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 34.

41 *Rookes v Barnard* [1964] AC 1129 held that the only situations in which damages are allowed to be punitive, ie with the purpose of punishing the wrongdoer rather than aiming simply to compensate the claimant, are in the case of (a) oppressive, arbitrary or unconstitutional actions by the servants of government; (b) where the defendant's conduct was 'calculated' to make a profit himself; (c) where a statute expressly authorises this.

42 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 36.

43 S33A(1) of the High Court Ordinance provides that:

"(1) Where, on the application of any party to an action the Court of First Instance is satisfied that there is in issue –

(a) a claim in respect of libel, slander, malicious prosecution, false imprisonment or seduction; or

(b) any question or issue of a kind prescribed for the purposes of this paragraph by rules of court,

the action shall be tried with a jury, unless the Court is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury."

requiring court supervision of fees awarded to lawyers in class action litigation. However, the contingent fee does stimulate an entrepreneurial aspect to litigation in the United States …"[44]

Hong Kong does not allow contingency fees. In its report on *Conditional Fees*, the Law Reform Commission of Hong Kong recommended that they should not be adopted in Hong Kong.[45]

Costs rule

3.27 Each party bears their own costs in the US. In Hong Kong, costs would follow the event: the unsuccessful party in an action pays the costs of the successful party.

Need to take note of differences between US and HK

3.28 In making our recommendations, we take note of the fact that the US legal system is different to that in Hong Kong and that the use of the class action has given rise to litigation on a scale which Hong Kong can ill afford as a community. The Civil Justice Council also points out similar differences between the US and UK jurisdictions.[46] Accordingly, we believe that the law and practice in other common law jurisdictions, such as Canada and Australia, provides more appropriate precedents for reform in Hong Kong.

Time needed to dispose of class actions proceedings

3.29 In accordance with the policy objective of judicial economy, we have looked at the time needed for plaintiffs concerned to achieve results in class actions, as compared with unitary actions commenced by individual litigants.

3.30 In response to requests from the organisers of the International Conference on the Globalization of Class Action, reporters from a number of common law jurisdictions that have class actions procedures were asked to respond to a Protocol on various aspects of collective litigation in their respective regimes. The following are extracts from their responses to the question of "what is the average time to dispose of a group case, and how does this compare to comparable non-representative non-group litigation?"

---

44 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 37.

45 "*Conditional Fees"* Report, Law Reform Commission of Hong Kong (July 2007).

46 Civil Justice Council, "Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions" (July 2008) pp 29-34.

Canada

"The time it takes for a case to get to the certification motion varies greatly from action to action. On average, it is expected that the certification motion will not be heard for at least one year from the time the action is commenced. It is not unusual for the hearing to be heard two or three years after the claim is instituted, because of pleadings motions, cross-examination on the certification material, and scheduling difficulties. Ordinary litigation also can take three years or more to get to trial, depending on the same variable.

Courts have commented on the length of time cases are taking to get to certification and determination on merits. The Chief Justice of the Court of Appeal for Ontario commented in one case, which went to the Supreme Court of Canada twice on interlocutory matters, that the protracted nature of the matter 'cast some doubt on the wisdom of hearing a case in instalments'. He continued, noting that '[b]efore employing an instalment approach, it should be considered where there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible. As it does little service to the parties or to the efficient administration of justice."[47] *More recently, a judge refusing leave to appeal from a certification order, noted that the claim had been commenced over three years earlier and that it was 'now time for the issues raised to be sent on for trial. The interests of justice and, I would have thought, the parties, demand resolution."*[48] *On the other hand, in complex litigation experienced counsel have argued that litigating the key issues in advance of certification rather than the entire case at once shortens rather than lengthens the proceedings and contains costs.*[49] *Moreover, to address the concern about the length of time cases are taking to get to the certification hearing, case management judges are becoming more open to insisting on the 90-day rule, which requires that the certification motion be brought within 90 days of the close of pleadings.*[50]

---

47 *Garland v Consumers' Gas Co*, [2001] OJ No 4651 at para 76 (CA)(QL).

48 *Smith v National Money Mart Co* (2 April 2007), Court File No 03-CV-1275 (Ont, SCJ) [unreported].

49 See eg *Attis v Canada (Minister of Health)* [2007] OJ No 2990 at para 11 (SCJ) (QL). See also Roy Millen, "Addressing the Merits of a Proposed Class Proceeding in Advance of Certification", *Class Action* V: 4 (July 2007) 367, who argues that "*pre-certification motions on the merits have become an important tool for streamlining proposed class action proceedings, in order to reduce the risks of wasted cost, delay and uncertainty necessitated by the process of and following certification.*"

50 Observation by Chief Justice Winkler in commenting on a draft of the paper of W A Bogart, Jasminka Kalajdzic and Ian Matthews entitled "Class Actions in Canada: A National Procedure in a Multi-jurisdictional Society?" (see above). The 90-day rule is common to many class proceedings statutes, including Ontario Class Proceedings Act at section 2(3) and the British Columbia Class Proceedings Act at section 2(3).

The length of time required for a case to reach the trial of the common issues is, of course, even longer. In Mandville v Manufacturers Life Insurance Co, for example, an action commenced in December 2001, the certification and summary judgment motions were argued in September 2002 [2002] OJ No 5386 (SCJ) (QL), the appeal argued and denied in June 2004 [2004] OJ 2509 (CA) (QL), and as of the summer of 2007, was still in the oral and documentary discovery stage. The case is not expected to go to trial before 2008."[51]

England and Wales

"It is not possible to state an average time for [Group Litigation Orders] ('GLOs'): the answer depends on the individual case. Cases that involve many individual claimants will obviously need some time for communications between the generic team of lawyers and the individual claimants. The essence of the GLO approach, however, involves some form of economic short-circuiting of normal procedures in those cases where individual issues do not predominate and need to be investigated and considered by the court in any depth,[52] *and resolving major dispositive issues at an early stage, on the basis of test cases or a preliminary issue."*[53]

United States of America

"Research suggests that the average federal class action consumes about five times as much in the way of court resources compared to non-class litigation.[54] *This figure would likely be quite different if the focus was only on certified class actions that were vigorously opposed through the certification process. It is difficult, however, to identify sets of 'ordinary' cases that would be roughly comparable to class actions, mass joinders, or mass consolidation in terms of complexity for a more precise comparison. Moreover, it is generally believed that though more judicial time may be spent per class action or per mass consolidation, there is a net benefit to the court in processing related claims on a group basis compared to what*

---

51 W A Bogart, Jasminka Kalajdzic and Ian Matthews, "Class Actions in Canada: A National Procedure in a Multi-jurisdictional Society?" a report prepared for the Globalization of Class Actions Conference, December 2007, at 32.

52 Individual issues do not predominate in cases such as pharmaceutical or tobacco product liability cases, where it is usually a false economy to avoid investigation of individual medical issues.

53 Christopher Hodges, "Global Class Actions Project Country Report: England and Wales", a report prepared for the Globalization of Class Actions Conference, December 2007, at 30.

54 In this connection, reference is made to the findings of Thomas E Willging, Laurel L Hopper and Robert J Niemic in their *Empirical Study of Class Actions in Four District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center, 1996) pp 22-23. The report also stated that "*[i]n comparison with nonclass civil cases, class actions are not routine in terms of their longevity. Overall, the median time for filing to disposition for class actions was two to three times that of other civil cases in three of the four districts [under study], and in the fourth (SD Fla), class actions took about four and a half months longer at the median.*" (at 19).

would be required if each claim were prosecuted as a separate lawsuit. On the other hand, the claims of members in many class actions would evaporate outside of a class action process because of the low monetary stakes."[55]

3.31 In Australia, Professor Vince Morabito is conducting the first major empirical study of Australia's class action regimes. Two reports have been published to date[56] and more reports will, we are informed, be released in due course. The objective of Professor Morabito's project is to determine the extent to which the class action regimes in Australia have achieved their purposes (ie by promoting access to justice and judicial economy). The average duration of all finalised Part IVA proceedings is 698 days (approximately 23 months) and the median duration is 446 days (approximately 14 months). Nearly 42% of all finalised Part IVA proceedings were resolved within 12 months and nearly 70% were concluded within two years.[57]

3.32 It is difficult to generalise and state an average time for the disposition of class action proceedings as compared with non-group proceedings. The length of time cases take to reach the certification hearing is a cause for concern. Limited empirical studies reveal that class actions tend to consume more judicial resources than typical civil cases. But it is suggested that the class actions procedure provides net benefit to the court in processing claims on a group basis. If separately recoverable claims are to be litigated individually, hearings would be duplicated and there would be greater overall use of judicial resources.

Regulatory action

3.33 Before concluding the review of the arguments for and against a class action regime, it might be noted that regulatory bodies in the exercise of their statutory powers may pursue actions that may benefit individual citizens whose interests have been affected by misconduct. For example, the Securities and Futures Commission (SFC) has statutory power under section 214 of the Securities and Futures Ordinance (Cap 571) (the SFO) to seek orders from the Court of First Instance for prescribed remedies in cases of misconduct in the affairs of listed or previously listed companies, including oppression and unfairly prejudicial treatment of shareholders. Such orders are likely to benefit the shareholders of these companies, albeit generally indirectly. The SFC may also seek restitutionary remedies under section 213(2)(b) of the SFO in respect of contraventions of the SFO. The SFC may

---

55 Nicholas M Pace, "Class Actions in the United States of America: An Overview of the Process and the Empirical Literature" a report prepared for the Globalization of Class Actions Conference, December 2007, at 93-4.

56 V Morabito, An Empirical Study of Australia's Class Action Regimes, First Report, Class Action Facts and Figures (2009), Second Report, Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives (2010).

57 V Morabito, cited above, First Report, at 20.

take disciplinary action in respect of misconduct or if it determines that a licensed person or registered institution is not a fit and proper person to undertake a regulated activity under the SFO. The penalty the SFC imposes may take account of any compensation paid by the licensed person or registered institution although the SFC itself does not have power to require payment of compensation. Further information about the regulatory powers of the SFC can be obtained from its website at www.sfc.hk. Whilst regulatory action may achieve some measure of redress or benefit for individuals, it cannot be regarded as a substitute for better individual access to the courts through class action.

Comparison of a full class action regime with the judicially expanded rule on representative proceedings

3.34 While acknowledging the judicial endeavour to mitigate the strictness imposed by the *Markt* decision, there is nevertheless strong belief among academic writers that a full regime of multi-party litigation is more desirable so as to enable efficient, well-defined and workable access to justice. A full regime, in Professor Rachael Mulheron's opinion, provides statutory protection and a number of benefits and advantages that the representative procedure does not:[58]

Conduct of proceedings protection

(a) discovery against individual class members (with its potentially burdensome effects) is only available with the leave of the court, not as of right;

(b) the admissibility of statistical evidence under strict, statutorily-described, conditions;

(c) staying any counterclaim against a class member by the defendant until the common issues have been resolved;

Protecting representative claimant

(a) whilst permitting applications for security for costs against the representative claimant, judicially treating these more generously than in the case of unitary actions;

(b) allowing the representative claimant by statutory mandate to claim the costs of any successful action as a first charge upon the judgment sum paid by the defendant, thereby protecting the representative claimant from exposure to costs in the event of success;

[58] Rachael Mulheron, "From Representative Rule to Class Action: Steps Rather Than Leaps", (2005) 24 CJQ 424, at 445.

Costs and lawyers' fees

(a) special costs provisions, or the availability of public funding, to ameliorate the burden of instituting class suits, otherwise unavailable to unitary claimants;

(b) judicial monitoring and approval of solicitor-client fee agreements (particularly fee agreements contingent upon success), which offers protection for both the successful class (which wishes to protect the judgment sum from incursions from high legal fees) and for claimant solicitors who have carried the risk of an expensive, burdensome and ultimately successful class suit;

Disposal of the case

(a) a power in the court to award damages by specifying a sum in respect of each class member, or alternatively, in an aggregate amount without needing to specify amounts awarded in respect of individual class members;

(b) permitting settlement or discontinuance of the class suit *only* with the approval of the court;

(c) a power in the court to order the constitution of a fund (controlled by the court or by a party nominated by the court) from which payments to class members are to be made;

(d) permitting by statutory mandate a *cy-pres* distribution where distribution of a judgment sum to class members is impossible or impracticable;

Miscellaneous

(a) requiring court-approved notice to be disseminated to the class members following key events, such as withdrawal or settlement by the representative claimant of his or her claim, commencement of the class suit, judgment, or where either a settlement proposal or an application for discontinuance of the class suit is made by the defendant;

(b) suspending the limitation period from running against individual class members, upon the commencement of the class suit.

3.35 We are of the view that even with the adoption of a more liberal view by the court of Order 15, rule 12 of the RHC, there remains a substantial degree of uncertainty in using the current representative action procedure. We agree with Professor Mulheron that a comprehensive regime for class action litigation is more desirable.

Consultation and conclusion

3.36 Recommendation 1 in the Consultation Paper recommended the introduction in Hong Kong of a comprehensive regime for multi-party litigation. Thirty five of those who expressed views on this recommendation were in

favour, while 18 were against it or expressed reservations.[59] The views for and against the proposal both came from a range of different sectors in society. Those in favour generally endorsed the consultation paper's rationale for a class action regime that it could enhance access to justice by providing one more channel for potential claimants to seek redress. Some also believed that the regime could deter wrong-doing because of easier access to justice by a large number of victims in one lawsuit.

3.37 The general opposing view was that the risks of a class action regime outweighed its benefits. The arguments against a class action regime can be grouped into several categories.

(a) No specific need identified

3.38 Some[60] said that the Consultation Paper had not identified a specific body of victims who had been unable to seek justice under the present regime, and that there was no pressing demand for a class action regime. We do not know whether opposing respondents have considered the types of cases that might be suitable for class action proceedings in Annex 1 of this report. Victims in these classes of cases do not have access to an efficient multi-party regime and, as we have shown in Chapter 1, representative proceedings under Order 15 Rule 12 are fraught with uncertainty. In addition, with the possible introduction of an anti-competition regime and the adoption of a statutory minimum wage, the potential for multi-party disputes will increase.[61] A class action regime would be a more convenient and economical way to deal with multiple claimants collectively if the experiences in other jurisdictions are any guide.

---

59 Those who supported or opposed the introduction of a class action regime are listed at Tables 1 and 2 respectively at the end of this Chapter. A further six respondents who opposed the regime did not wish their names to be included in this report.

In a separate online survey conducted by David Webb, 243 of those responding were in favour of allowing class actions in Hong Kong, while 14 were against and one was undecided. In a survey by the International Human Rights Channel, eight respondents thought that the present rules were sufficient to protect the public's rights to access to justice while 43 respondents did not.

60 For example, the Federation of Hong Kong Industries, the Hong Kong General Chamber of Commerce, PricewaterhouseCoopers, the Hong Kong Institute of Certified Public Accountants and Clifford Chance.

61 Competition Bill: http://www.legco.gov.hk/yr09-10/english/bc/bc12/general/bc12.htm

Minimum Wage Ordinance (Cap 608): http://www.hklii.org/hk/legis/en/ord/608/

While the main forum for handling disputes arising from the Minimum Wage Ordinance (Cap 608) is the Labour Tribunal or the Minor Employment Claims Adjudication Board, the Labour Tribunal may decline jurisdiction and transfer the claim to, *inter alias*, the Court of First Instance.

(b) Vulnerability of the proposed regime to be abused

3.39 Understandably, a number of respondents[62] had concerns that the proposed regime would be exploited by unmeritorious claimants and entrepreneurial lawyers. This, it was argued, would be manifested in a number of ways. First, the proposed reform would lead to a proliferation of litigation, including speculative or nuisance litigation. Defendants would be pressured into "blackmail settlements", regardless of the merits of the claims, in order to avoid adverse publicity. A proliferation of cases would also strain judicial resources, which would deny access to justice rather than enhancing it. In a nutshell, there was a possibility that Hong Kong would face abuses of similar magnitude to those in the United States. We were aware of these concerns, and had considered and discussed them in Chapter 3 of the Consultation Paper.[63] In light of the worries expressed to us, we have reviewed the evidence elsewhere and the differences between the relevant circumstances in Hong Kong and other jurisdictions. Upon consideration of these matters, we have come away satisfied that the benefits of a generic class action regime would hold substantial benefits for the community, while the abuses brought to our attention may be addressed in the procedural safeguards built into the regime.

3.40 We take further comfort from the experience in Australia and Canada that the introduction of a statutory class action regime has not by itself created a proliferation of litigation. In Australia, the relevant statistics from Professor Morabito's first two reports are as follows:

- 249 applications filed, pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth), up to 3 March 2009; an average of 14.64 class action proceedings every 12 months (and a median rate of 11 class actions) since the Part IVA regime came into operation on 4 March 1992;[64]
- in no financial year, since Part IVA came into operation, have Part IVA proceedings constituted more than 0.74% of all Federal Court proceedings (with an average percentage of 0.4%);[65]
- 28 class actions brought in the Supreme Court of Victoria, pursuant to Part 4A of the Supreme Court of Victoria Act 1986 (Vic), as at the end of 2009; an average of 2.8 Part 4A proceedings every year (and a median rate of three such proceedings per year) since the Part 4A regime deemed to come into operation on 1 January 2000;[66]

---

62 For example, PricewaterhouseCoopers, Economic Synergy, the Hong Kong Retail Management Association, Lovells, the Hong Kong General Chamber of Commerce, the Federation of Hong Kong Industries, and the Hong Kong Institute of Certified Public Accountants.

63 Under the headings "Potential risks of class action regime" and "Relevance of American experience to Hong Kong" in Chapter 3.

64 V Morabito, cited above, Second Report, at 13.

65 V Morabito, cited above, Second Report, at 16.

66 Second Report, at 17-18.

- the 249 Part IVA proceedings filed on or before 3 March 2009 were brought with respect to a total of 169 legal disputes (thus, the average number of legal disputes litigated as class action proceedings (every 12 months since March 1992) is 9.94 (this phenomenon of "related" class action proceedings, ie proceedings with respect to the same disputes, was widespread).[67]

These statistics suggest that there has been only limited use of the class action regimes in the Federal and Victorian jurisdictions, and not the avalanche of litigation previously feared. Professor Morabito believes that excessive litigation in the United States is attributable more to the unique features of the legal system there than to the mere availability of class actions.[68] Chapter 3 of the Consultation Paper shares this view.[69] These statistics from both the Federal and Victorian jurisdictions suggest that class actions have not made Australia a more litigious society and have not led to a proliferation of litigation.[70]

3.41 Furthermore, the average duration of all finalised Part IVA proceedings is 698 days (approximately 23 months) and the median duration is 446 days (approximately 14 months). Nearly 42% of all finalised Part IVA proceedings were resolved within 12 months and nearly 70% were concluded within two years.[71]

3.42 In Canada, there has been no equivalent empirical study of the class actions regime as extensive as that attempted by Professor Morabito. However, Professor Jasminka Kalajdzic has tried to "*take stock of class actions in Ontario*" and has conducted a survey by sending questionnaires to plaintiffs' class counsel across the country in a thesis for her LLM degree.[72] The survey data, reflecting activities of about 77 class counsel working in 13 firms, reveals that there were about 332 class actions pending as of early 2009.

3.43 Statistics on numbers of class actions can also be found in the voluntary National Class Action Database established by the Canadian Bar Association.[73] Only some jurisdictions have made it mandatory by judicial Practice Directions to list class actions in the database. The completeness of the statistics in this database hinges on whether lawyers in the remaining jurisdictions have listed their class actions on the database. The database

---

67 Second Report, at 21-22.

68 V Morabito, "Australia's Experience with Class Actions" (2007), at 11.

69 Para 3.35.

70 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 1991, 3284-3285.

71 First Report, at 20.

72 J Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions In Ontario* (2009) (for the LLM degree of the University of Toronto).

73 http://www.cba.org/ClassActions/main/gate/index/default.aspx

shows the numbers of class actions commenced for each of the years from 2007 to 2010 to be 154, 115, 72 and 93 respectively.

3.44 There are no statistics in Canada to gauge and compare the relative burden placed on Canadian courts by class actions and ordinary civil litigation. At times, class actions may require more significant case management by the court than other complex litigation. Class actions can, nonetheless, proceed smoothly to certification and then settlement, requiring little by way of judicial oversight until certification and settlement approval hearings.[74] Although there are variations from action to action, on average certification motions will not be heard for at least one year from commencing an action. It is not unusual to take two or three years, because of pleadings motions, cross-examinations on certification materials and scheduling difficulties. By the same token, ordinary litigation may also take three years or more to get to trial.

(c) Impact on local economy and hidden costs to society

3.45 Some respondents, including Clifford Chance, Economic Synergy and Lovells, shared the concern that the US experience indicated that a class action regime could be a major disincentive to investment in the local economy. For example, it was believed the threat of class actions had been a major factor in deterring companies from raising capital in New York. Lovells said:

> "*According to the European Justice Forum Key Messages ('EJF'), collective litigation can drive companies out of business, and destroy employment, pensions and investments. The EJF pointed to a report published by Mayor Bloomberg and Senator Schumer in 2007, which said that the competitiveness of New York capital markets was on the decline. In the report, they identified the litigiousness of the US, exemplified by the threat of class actions, as the major factor in deterring companies from raising capital in New York*."

We note that the accent is placed on the litigiousness of the US. The excesses exemplified by class actions may well arise from the unique features of the US legal system, as has been observed by academic writers on the subject of class actions.[75]

3.46 Lovells, the Hong Kong Institution of Engineers and the Federation of Hong Kong Industries believed that a class action regime would

---

74 Bogart, Kalajdzic and Matthews, "Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?" (A report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007), at 32: "*Nevertheless, most plaintiffs counsel agree that class proceedings require significant assistance from judges in terms of scheduling, enforcement of timetables, and procedural motions.*"

http://www.law.stanford.edu/library/globalclassaction/PDF/Canada_National_Report.pdf

75 V Morabito, "Australia's Experience with Class Actions" (2007), at 11.

lead to hidden costs to society as more businesses would take out insurance against possible class actions and these costs would ultimately be borne by consumers. Similarly, payments made for "blackmail settlements" will ultimately be shouldered by consumers. This is because these additional business overhead costs will be reflected in the cost of goods and services. Although it is undoubtedly true that some upfront costs incurred by suppliers of goods and services would ultimately be passed on to consumers, a class action regime can have the effect of deterring potential wrongdoers from committing wrongful acts and prompting them to have a stronger sense of obligation to the public.[76] A more vigilant commercial sector would create economic benefits which can be shared by all.

(d) No such regime in some other jurisdictions

3.47 Some respondents[77] pointed out that a number of jurisdictions with comparable legal systems, including the United Kingdom, Ireland, New Zealand, Singapore and South Africa, still had not adopted a class action regime. Our further researches have revealed new developments overseas since the publication of the Consultation Paper. The Rules Committee in New Zealand handed over the draft Class Actions Bill and Rules to the Secretary for Justice in July 2009, who will determine if and how the proposal should be taken forward.[78] The draft bill has not progressed due to other government priorities, according to the Ministry of Justice.[79] New South Wales announced in August 2010 that it would introduce class actions legislation modelled on the Victorian and federal regimes. The NSW Attorney General said on 6 August 2010,

> *"This approach will have a number of benefits for the NSW justice system. Firstly, it will eliminate the lack of clarity in current NSW court rules which may be discouraging potential litigants from pursuing legitimate class actions. Reducing uncertainty may also cut legal costs and court time currently involved in pursuing a class action in NSW. Secondly, the Federal and Victorian laws have proven to be a successful model and NSW courts will be able to draw on that experience."*[80]

---

76 See under the heading "Benefits to Society" in this Chapter.

77 For example, the Hong Kong Institute of Certified Public Accountants, Cheung Kong (Holdings) Ltd, Economic Synergy, and the Hong Kong Retail Management Association.

78 See the website of the Courts of New Zealand: http://www.courtsofnz.govt.nz/about/system/rules_committee/projects/Rules-Committee-note-on-class-actions-30-7-09.pdf

79 A spokesman for the Justice Minister Simon Power said that the Government would consider and progress the proposed bill as other priorities allowed, but there was no timetable for that. Reported in this website: http://www.interest.co.nz/news/slow-progress-class-actions-bill-may-stymie-exception-fee-case-against-banks

80 http://www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/pages/LL_Media_Centre_attorney_general_2010#c_action

The Attorney General continued, "… *class actions are an important vehicle for improving access to justice, particularly for people who cannot afford to pursue a case on their own…*". On 21 October 2010, the NSW Attorney General invited public feedback on the Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill modelled on the federal Class Action regime.[81] Finally, Schedule 6 of the Courts and Crimes Legislation Further Amendment Act 2010, which was assented on 7 December 2010, introduced the representative actions regime by way of amending the Civil Procedure Act 2005.

3.48 In Canada, eight provinces with common law jurisdictions have legislation on class proceedings: Alberta, British Columbia, Manitoba, Newfoundland and Labrador, New Brunswick, Nova Scotia, Ontario and Saskatchewan. Their provisions are more or less the same. As we have noted in Chapter 2, both South Africa and Singapore are considering class actions.

(e) Not desirable to have a generic regime

3.49 The Hong Kong Association of Banks,[82] *inter alios*, expressed reservations about the introduction of a generic right of class action. They were of the view that a generic class action regime might not be suitable for all sectors, particularly where the sectors were highly regulated. For example, banks are regulated by both the Hong Kong Monetary Authority and the Securities and Futures Commission. The Hong Kong Institute of Certified Public Accountants and PricewaterhouseCoopers considered that if such a regime were to be introduced, it should be restricted to the context of consumer-related claims. The Hong Kong Institution of Engineers also observed that the regime should start with consumer or insurance cases. They also considered that the new regime should not be applicable to the engineering profession because of its multi-disciplinary nature and complexity, nor should it apply to the performance of professionals and consultants. Some respondents[83] also pointed out that the Ministry of Justice in England and Wales, in its 2009 response to the Civil Justice Council's 2008 Report,[84] decided not to support the report's recommendation to introduce a generic right of collective action. Instead, the Ministry believed that such rights should be considered, and if appropriate introduced, on a sector-by-sector basis.

---

81 In his Media Release on 21 October 2010: http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Media_Centre_attorney_general_2010#class_action

82 Hong Kong Institute of Certified Public Accountants, Pricewaterhouse Coopers and Clifford Chance.

83 For example, Hong Kong Association of Banks, Hong Kong Bar Association, Cheung Kong (Holdings) Ltd, Hong Kong General Chamber of Commerce, and Hong Kong Retail Management Association.

84 Civil Justice Council, *Improving Access to Justice through Collective Actions* (2008). The Ministry's full responses can be found via this ink: http://www.justice.gov.uk/publications/docs/government-response-cjc-collective-actions.pdf

3.50 In response to these views, we would point out that the Consultation Paper concluded that consumer claims were particularly suitable for class actions (a view which appears to be generally accepted) and priority should be given to funding class action litigation in this area.[85] There is also an obvious need in such cases in view of the disparity in resources between consumers and big businesses. In addition, the Consumer Council's Consumer Legal Action Fund has been up and running since 1994, and offers a ready-made structure to provide financial support and legal assistance to qualified consumers. The consultation paper recommended that consideration should be given to expanding the scope of the Fund with the injection of new funds to finance suitable consumer class actions. Recommendation 8 later in this report maintains this proposal.[86] Nonetheless, according priority to consumer claims does not do away with the need for a mechanism for a generic class action regime.

(f) Viable existing regimes available

3.51 A number of respondents believed that the existing regime for multi-party litigation could be deployed to better effect so as to enable access to justice, without the need to introduce a new regime. Cheung Kong (Holdings) Ltd, Economic Synergy, the Hong Kong Institution of Engineers and the Federation of Hong Kong Industries believed that the existing representative proceedings could be significantly improved by way of, *inter alia*, strong court control and case management. The Consultation Paper has already considered this option and has acknowledged the fact that the courts have been more relaxed in invoking the regime, but has concluded that that would only be piecemeal and a substantial degree of uncertainty would remain.[87]

3.52 The Hong Kong Association of Banks, Lovells, Cheung Kong (Holdings) Ltd and the Hong Kong Retail Management Association considered that alternative dispute resolution (such as mediation and arbitration) could provide sufficient, efficient and fair redress for collective claims. The Consultation Paper has also acknowledged the value of alternative dispute resolution, and has indeed proposed incorporating that into the class actions regime, but that does not mean that alternative dispute resolution can be a substitute for a comprehensive class action regime.

3.53 In Clifford Chance's opinion, the recommendations in the Consultation Paper are too drastic, involving too many major changes such as class actions, contingency fees, abolition of the common law offence of champerty, etc. They favoured a gentler and accretive approach building on the existing law, such as widening the *res judicata* principle (something akin to the Group Litigation Order in England & Wales). They suggested that public

---

85 Recommendation 7(3) in the Consultation Paper.

86 See further discussion of the Fund under the heading "The Consumer Legal Action Fund" in Chapter 8.

87 Paras 1.34 -1.35 in the Consultation Paper.

bodies could co-ordinate and supervise test cases. For example, the Consumer Council can be empowered to foster communication and the organisation of consumer activism in deserving cases. We understand that these devices can to a certain extent deal with collective claimants, but believe that they cannot be a substitute for a comprehensive and principled regime.

3.54 Lovells, Cheung Kong (Holdings) Ltd and the Hong Kong Retail Management Association observed that various regulatory authorities could also provide redress for collective claims. We consider, however, that regulatory regimes and the class action regime address different concerns. For instance, 16 distributing banks and some Lehman Brothers minibonds claimants agreed to settle on a voluntary basis.[88] The Securities and Futures Commission has no statutory power to impose settlement terms on the banks. Although the resolution of this dispute was, relatively speaking, speedy, any *ad hoc* mechanism would hinge on the parties' willingness to participate or on the regulatory authorities' stepping in. The concerted efforts of the relevant regulatory authorities, in the face of the unprecedented avalanche of media coverage and public outrage, went a long way towards bringing about this speedy settlement. Nevertheless, a number of claimants (for example, professional investors) were not covered by the settlement. Hence, a class action regime would still have a role to play for such claimants. We are aware of the English Ministry of Justice's 2009 responses to the Civil Justice Council's 2008 report. The Ministry did not agree with the Civil Justice Council's underlying assumption that regulation is "*not primarily suited to resolve the very wide range of detriment that can give rise to the need for large scale remedial action*" and that private action is therefore to be preferred. The Ministry believed that while regulatory aims and objectives were usually strategic and not specifically focused on compensatory objectives, this did not preclude their adaptation for this purpose. Regulatory bodies could for example be given power to order compensation to consumers in addition to, or instead of, a financial penalty.[89] We reiterate that even if a class action regime is in place, claimants would not be compelled to litigate. They could still choose other channels to seek redress, as they could opt-out. The mere presence of a regulatory regime does not negate the need or desirability of having a class actions regime.

(g) Impact on auditors

3.55 The Hong Kong Institute of Certified Public Accountants, *inter alios*, was concerned that a class action regime would expose auditors to

---

88 See the Press Release of the Securities and Futures Commission dated 22 July 2009: http://www.sfc.hk/sfcPressRelease/EN/sfcOpenDocServlet?docno=09PR100

89 The decision on whether to adopt what might be termed a "regulation plus" model would be for the Government Department responsible for the relevant sector, but it might be a more cost-effective way of dealing with cases involving a large number of small claims. A retailer could for example be ordered by a regulator to pay a full or partial refund to all affected consumers who could prove purchase. That would be far less expensive and risky than a collective action, especially where the individual amounts at stake are very small.

much bigger claims, especially in view of the current laws on joint and several liability under which a party who is not the perpetrator of misconduct could nonetheless be held responsible for the damages awarded to a class of claimants. They specifically highlighted their liabilities in relation to prospectuses under the Companies Ordinance (Cap 32). Joint and several liability, the prohibition on limiting auditors' liability and the increasing difficulty in securing professional liability insurance coverage may render their profession unsustainable in the long term.

3.56 We believe that the House of Lords decision in *Caparo Industries Plc v Dickman*[90] should, to a certain extent, alleviate their concerns in relation to their liabilities to shareholders and outsiders. The plaintiffs in this case had taken over F Plc and brought an action against*, inter alios*, its auditors claiming that they were negligent in carrying out the audit and making their report under the Companies Act 1985. The plaintiffs alleged that they had begun purchasing shares in F Plc a few days before the annual accounts had been published to shareholders, that in reliance on those accounts they made further purchases of shares so as to take over the company, and that the auditors owed both shareholders and potential investors a duty of care in respect of the certification of the accounts. The Court of Appeal, by a majority, held that a duty of care was owed to the plaintiffs as shareholders but not as investors.

3.57 On appeal by the auditors and cross-appeal by the plaintiffs, the House of Lords allowed the appeal and dismissed the cross-appeal. The court held that liability for economic loss due to negligent mis-statement was confined to cases where the statement or advice had been given to a known recipient for a specific purpose of which the maker was aware and upon which the recipient had relied and acted to his detriment. As the purpose of the statutory requirement for an audit of public companies under the 1985 Act was the making of a report to enable shareholders to exercise their class rights in general meeting, it did not extend to the provision of information to assist shareholders in the making of decisions as to future investment in the company. There was also no reason in policy or principle why auditors should be deemed to have a special relationship with non-shareholders considering investment in the company in reliance on the published accounts. Therefore, the auditors did not owe any duty of care to the plaintiffs in respect of their purchase of the shares either as a potential investor or an existing shareholder. In other words, there was not sufficient proximity between an auditor and a company's shareholders or potential investors in respect of their decision to invest in the company.

3.58 Under section 38C of the Companies Ordinance (Cap 32), a prospectus inviting persons to subscribe for shares in or debentures of a company and including a statement purporting to be made by an expert cannot be issued unless:

---

90 [1990] 2 AC 605.

(a) the expert has given and has not, before delivery of a copy of the prospectus for registration, withdrawn his written consent to the issue thereof with the statement included in the form and context in which it is included; and

(b) a statement that he has given and has not withdrawn his consent as aforesaid appears in the prospectus.

The expression "expert" includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him.

3.59 Under section 40(1), a person who has given his consent as an expert under section 38C is liable, in respect of any untrue statement purporting to be made by him as expert, to pay compensation to persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of the untrue statement.[91]

3.60 Where a company has been floated on the stock market, it seems that no duty of care is owed to investors who seek to sue on the prospectus. In *Alfred Leung* v *Ernst & Young & others*,[92] Deputy High Court Judge Carlson held that Ernst & Young (first defendant), as auditors and reporting accountants of the second defendant, owed no duty of care to the plaintiff in respect of the prospectus. The particular accounts in question were those for the years ended 1998 to 2000 inclusive and for the seven months ending on 31 October 2000. The first defendant, who prepared the last two sets of accounts, incorporated all of these accounts into its accountant's report for the second defendant's prospectus of 30 March 2001 for the purposes of the second defendant's application to be listed on the Stock Exchange.

3.61 Following its listing the plaintiff, as a private investor, purchased the second defendant's shares in August 2002 following which he suffered losses as the second defendant's share price fell sharply. The fall in the share price was caused by the fact that it had been fraudulently operated by a number of its directors (the third to the eighth defendants). Apart from relying on *Caparo Industries Plc* v *Dickman*, Deputy High Court Judge Carlson, in reaching his decision, also relied on *Al-Nakib Investments (Jersey) Ltd* v *Longcroft*[93] and quoted what Mervyn Davies J said in the latter case:

---

91 He is, however, not liable if he proves that -

(a) he withdrew it in writing before delivery of a copy of the prospectus for registration; or

(b) after delivery of a copy of the prospectus for registration and before allotment thereunder, he withdrew his consent in writing and gave reasonable public notice of the withdrawal, and of the reason therefor; or

(c) he was competent to make the statement and that he had reasonable ground to believe and did up to the time of the allotment of the shares or debentures believe that the statement was true.

92 HCA 390/2005.

93 [1990] 3 ALL ER 321. In this case, the Plaintiff purchased shares through the rights issue but it also subsequently purchased shares on the stock market relying on the statement in the prospectus and in the interim report.

"Although directors of a company owed a duty of care to persons who subscribed for shares in reliance on a prospectus they did not owe a duty of care to a shareholder or anyone else who relied on the prospectus for the purpose of deciding whether to purchase shares in the company through the stock market, because the prospectus was addressed to shareholders for the particular purpose of inviting a subscription for shares and if it was used by a shareholder for the different purpose of buying shares in the stock market there was not a sufficiently proximate relationship between the directors and the shareholder for a duty of care to arise on the part of the directors. It followed that any reliance on the part of the plaintiff on the prospectus or the interim report issued by the company in connection with a rights issue to buy shares in CT plc and M Ltd in the stock market did not give rise to a duty of care on the part of the defendants (see p 327 f to h and p 329 bc post)"

(h) Securities related class actions

3.62 Lovells and another respondent who wanted to remain anonymous pointed out that in a securities-related class action, the plaintiffs could be shareholders of the defendant company. Where the company pays damages or settles, the plaintiffs may receive compensation on one hand, but also bear the burden of paying the damages indirectly as shareholders on the other hand. They also mentioned that in February 2010 the Financial Services and Treasury Bureau published a consultation paper, proposing the establishment of an Investor Education Council and a Financial Dispute Resolution Centre ("FDRC"). The FDRC would try to resolve monetary disputes between consumers and financial institutions through mediation and, failing that, arbitration. As the proposal is in line with the Government's wish to encourage mediation and arbitration, these respondents suggested waiting for the results of the consultation on the FDRC before introducing a class actions regime. On 12 December 2010, the Financial Services and Treasury Bureau decided to establish the FDRC by mid-2012 and an Investor Education Council.[94] A claimant can claim up to $500,000 through the FDRC. We are of the view that a decision on whether or not to introduce a class action regime should not depend on whether there is an alternative regime for resolving securities related disputes.

3.63 In addition, according to the survey conducted by Professor Morabito, there were only 24 shareholder class actions brought in Australia under Part IVA from 4 March 1992 to 3 March 2009 (ie 9.9% of the total class action proceedings brought over that period).[95] In Canada, out of the 332 cases there were about 37 cases relating to disputes on securities (11%).[96]

---

94 http://www.fstb.gov.hk/fsb/ppr/consult/doc/consult_iec_fdrc_conslusion_e.pdf

95 First Report, at 25 – 26: as classified by Professor Brendan Sweeney in Table 17.

96 J Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions In Ontario* (2009) (for the LLM degree of the University of Toronto), at Fig 1.

It seems that securities-related class actions do not account for an overwhelming percentage of total class actions.

3.64 Lovells also mentioned that the Securities and Futures Commission's proposal to consult on whether there was a need for a financial ombudsman with statutory powers to order compensation, which would address many of the problems identified in the Consultation Paper. The Financial Affairs Panel of the Legislative Council considered the suggestion in June 2001 and February and June 2002. A report compiled after an overseas duty visit paid by a delegation from the Panel concluded:

> *"it is premature to suggest if a neutral body similar to the single ombudsman in the UK is needed in Hong Kong. The free service of the FOS may appear very attractive to consumers. However, the problem of preventing the making of unsubstantiated complaints remains unresolved. The possible abuse of a free ombudsman service needs serious consideration as the funding of which might cut into the competitiveness of Hong Kong as an international financial centre."*[97]

The consensus was that neither the volume and nature of complaints nor the deficiencies in the existing arrangements would justify the creation of such an elaborate machinery.[98] In any event, unless the financial ombudsman is given exclusive powers to deal with all financial disputes, the courts remain the forum for resolution of disputes for which neither regulatory nor voluntary intervention has succeeded.

(i) Funding, a prerequisite

3.65 Cheung Kong (Holdings) Ltd, the Hong Kong Institute of Certified Public Accountants and the Federation of Hong Kong Industries considered that as litigation funding was a prerequisite to the initiation of collective actions, it was premature to introduce a class actions regime before figuring out an acceptable litigation funding method. We share the view that funding is crucial to the success of a class actions regime, and will deal with the issue in Chapter 8.

---

97 Legislative Council, *Report on the Financial Systems in the United Kingdom and the United States of America based on the findings of the overseas duty visit paid by the delegation of the Financial Affairs Panel and the Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000 in April 2001* (June 2001) (LC Paper No CB(3) 866/00-01), at para 7.32.

98 Financial Services and the Treasury Bureau, *Consultation Paper on Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre* (February 2010), at para 1.5 in Part II.

(j) Miscellaneous

3.66 Clifford Chance pointed out that litigation should not be the principal means of redress and the multi-party litigation regime should not inadvertently discourage sensible settlements. We sympathise with such sentiments and emphasise that a class action is one of the ways to resolve disputes, alongside mediation and arbitration. Experience from other jurisdictions indicates that only a small percentage of class actions go all the way to trial, and most are settled. According to Professor Morabito's reports, the most frequent way in which Part IVA proceedings have been resolved in Australia is through settlement: 85 of the 218 resolved Part IVA proceedings (38.9%) were settled. The next most frequent outcome is dismissal of the proceeding (46, or 21.1%).[99] In Canada, it appears anecdotally that less than 5% of all class actions go to trial, consistent with ordinary litigation.[100]

3.67 Economic Synergy believed that class actions involved a large number of stakeholders and complicated legal procedures. Much money, resources and time have to be spent, which is financially burdensome and very stressful to both plaintiffs and defendants. We agree that litigation is time-consuming, stressful and expensive. Resolving a large number of claims collectively under a well-thought out class actions regime can, however, be beneficial to both sides as already pointed out in Chapter 3 of the Consultation Paper.[101]

3.68 Economic Synergy and Lovells were concerned that a class action regime might lead to an overlapping of the functions of courts and those of some existing regulatory or supervisory bodies in relation to disputes involving consumers and investors, as such bodies might already assume the functions of supervision, compensation, claim or even punishment. This might even lead to "over-correction". Businesses may face both the sanctions of such regulatory or supervisory bodies, as well as court ordered remedies from class litigation. In addition, claimants not satisfied with the outcome of the sector specific redress mechanisms may seek to have a "second bite of the cherry" by bringing a class action.[102] This may also lead

---

99 First Report, at 3: "The next three ways in which Part IVA proceedings have been resolved are as follows: the proceedings were discontinued by the applicants (39–17.8%); proceedings were discontinued as Part IVA proceedings (26–11.9%) and judgments were delivered that were favourable to the applicant/class (16–7.3%)."

100 Bogart, Kalajdzic and Matthews, "Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?" (A report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007), at 21.

http://www.law.stanford.edu/library/globalclassaction/PDF/Canada_National_Report.pdf

101 See paras 3.3 – 3.9.

102 Before compiling the responses to the Consultation Paper, Lovell had sought the views from their clients in different sectors: financial institutions, banks, commodities traders, insurance firms, accountancy firms, retail corporations, construction companies, etc. Their clients are more receptive to the idea of a multi-party litigation regime if such a regime would dispel the need for all these existing sectorial mechanisms, even though that would mean that they would face one large but manageable litigation.

to inconsistent findings. We understand these concerns, but as we have pointed out, regulators play a role different from that of the courts. Even if regulatory intervention results in compensation it is voluntarily negotiated and it is always up to individual claimants to accept compensation in lieu of court action. The dangers of second bites and double compensation can be addressed through carefully crafted negotiated schemes. The problems of cost and fairness in class actions could be built into a case management regime empowered to deal with each case flexibly in accordance with its own special circumstances.

Our overall conclusions

3.69 Before we draw overall conclusions from our review of the public comments, it may be useful to briefly recap the experience in other jurisdictions in relation to class actions. This experience has been that whilst statistics are incomplete and it has not been possible to undertake research by rigorous empirical standards, a general picture has emerged that class actions do perform a function of bringing greater access to justice to those who would otherwise find themselves unable to do so, and judicial economy has been achieved when otherwise there would have been a multiplicity of individual cases. No conclusions can yet be drawn as to whether societal behaviour has actually been modified by class actions, although one would expect the publicity created by some class actions would have an effect on behaviour. Professor Bogart, Professor Kalajdzic and Ian Matthews, have the following observation in evaluating the Canadian regime:

> *"… one can venture to suggest that overall class actions are performing at an acceptable level. Precise measurements are clearly lacking. However, there is no concerted criticism that would suggest that class actions, in total, are doing more harm than good. One indication is commentary from those who represent defendants. Counsel involved in class actions typically represent only plaintiffs or defendants. Lawyers who represent defendants are, generally, well organized and well funded. Thus, they are a prominent source for pointing out negatives associated with class actions. They have levied a wide variety of critiques, for example, regarding the ability and appropriateness of courts of individual provinces certifying national class actions. However, none of these criticisms strike at the existence of class actions or their legitimacy. In addition, there have been no concerted criticisms from members of the public, or otherwise, regarding lack of actual benefit to class members, an issue about which there should be constant vigilance."*[103]

---

[103] Bogart, Kalajdzic and Matthews, "Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?" (A report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007), at 35.

http://www.law.stanford.edu/library/globalclassaction/PDF/Canada_National_Report.pdf

3.70 Professor Kalajdzic added that while there was no organized opposition to class proceedings *per se*, commentary in the public press was generally mixed.[104] Nonetheless, public support for class actions remains high, as gauged by the number of claimants who seek advice and assistance from class action firms. While there is limited academic scholarship on issues related to class actions generally, there is virtually none that mounts a serious critique of class proceedings of the kind encountered in the US. More recently, Professor Kalajdzic said in her thesis that there were good reasons to doubt that class actions were fulfilling their access to justice potential, notwithstanding the many incidents of class action settlements for parties who would not otherwise have had the ability to litigate their claims.[105] This is so for a number of reasons. First, there is a very narrow understanding of the scope of the term "access to justice",[106] and second, there is a lack of information as to how class actions are operating on the ground. She concluded as follows:

> *"While class actions are and should continue to be an important part of Ontario's civil justice system, the assumption that all class actions further access to justice is misplaced. Complacency should be replaced with vigilance; there is a need to monitor class actions, both their conduct, oversight and outcomes, in order to ensure that the power of the class proceeding mechanism is harnessed to promote access to justice in the fullest sense. …*
>
> *Class actions do increase the number and types of claims being litigated. The extent to which they are successful in providing a fair remedy for the injuries suffered by the class, or whether they incentivize private Attorneys General to prosecute on behalf of the most powerless, is not self-evident. …*
>
> *Pending more systematic information about how Ontario's class action regime actually functions, I can make the following concluding observation. Class actions have the distinct potential to promote social good by filling regulatory gaps and ensuring corporate (and government) wrongdoers do not*

---

104 Kalajdzic, "Class Actions in Canada: Country Report Prepared for The Globalization of Class Actions Mini-Conference" (Oxford University, December 2008), at 10.

http://www.law.stanford.edu/library/globalclassaction/PDF/Canada_Country_Report%20Update.pdf

105 J Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions In Ontario* (2009) (for the LLM degree of the University of Toronto).

106 "*The definition of access to justice adopted in this paper contemplates more than access to a court procedure. The term also invokes fundamental concepts like procedural fairness, a transparent process, and substantive justice, either by way of meaningful compensation to class members or the exposure and curbing of unlawful behaviour. … Class actions advance access to justice not only if they overcome economic barriers to litigation, but if they also serve to expose previously unnamed harms that affect the most disempowered and vulnerable in society – those most in need of access to justice. The term also necessarily requires that the procedure to which access is given must be a fair one, from the perspective of class members. The limited rights of participation granted to class members must be real ones: meaningful and informed opportunities to object or opt out, as well as access to direct compensation or manageable claims processes*."

inevitably escape culpability. I share the belief expressed by many access to justice scholars that class actions are singularly able to redress wrongs that would otherwise go unremedied, and to provide meaningful justice for the disempowered in contemporary, massified societies. It is precisely because of this promise that we must be constantly vigilant about how the device is used. Complacency is ill-advised, particularly where we are only now, ever so slowly, beginning to ask what is happening 'on the ground', and to collect the information necessary to provide answers."

3.71 The fact that there are eight jurisdictions in Canada that have introduced a class action regime one after another means that the regime is, at least to a certain extent, serving its purpose. The same can be said about Australia, as New South Wales has recently introduced legislation modeled on the federal and Victorian class action regimes.

3.72 After carefully considering the responses from the public, in particular the concerns specifically discussed in this chapter, we consider that there is a convincing case for reform of the existing procedures governing multi-party actions in Hong Kong, so that the policy objectives set out at the start of this chapter can be better achieved. We have tried to address those concerns so far as practicable on a point-by-point basis, in the preceding paragraphs. In our view, appropriate reforms could enhance access to justice and offer an avenue to redress wrongs to claimants without means to mount an individual action or where an individual action would be prohibitively costly compared to the claim. In addition, it could be argued that a class action regime could redress the imbalance of resources between the consumer and the corporate sector. Hong Kong, like all jurisdictions with developed economies, has companies which command large market shares and huge resources, but apart from the Consumer Council (which is itself thinly resourced) there are no organised consumer groups. Our deliberations therefore lead us to the position that reform is needed and we recommend that reform take the form of a regime which can deal with potential class actions in Hong Kong and achieve equal access to justice for all.

3.73 We have carefully considered the potential risks of bringing in a class action regime. The risks identified by various overseas law reform agencies and academics, and their answers to those risks, are set out in Annex 2 of this report. We are conscious that a class action regime in Hong Kong may prompt unnecessary litigation. There could be additional costs involved for corporations, for example, in having to take out insurance to cover the risk of class litigation. Equally, however, corporations are in a position to manage their risks by avoiding the very circumstances giving rise to the risk of class litigation.

3.74 We are not persuaded that these concerns tip the balance against reform, though in framing our recommendations for reform we have remained alert to the concerns, opposition and reservations expressed in the

public responses in respect of the possible risks associated with the introduction of a class action regime in Hong Kong. After carefully considering this issue, we have come to the conclusion that consideration could be given to phase in the implementation of a class action regime. In England, the Ministry of Justice decided in 2009 to take a sector by sector approach, starting with the financial services sector.[107] Hong Kong could take a similar approach by starting with consumer cases[108] which, we believe, would constitute a large segment (or probably the majority) of cases suited to class actions. This incremental approach could reassure those who are now unsure of, or have expressed opposition, reservations or concerns regarding a class action regime. An incremental approach would have the merit of having the proposed regime assessed and, with experience gained, a decision could be made to have it extended to other types of cases. A further practical reason in favour of an incremental approach is that both the consultation paper and Chapter 8 of this report have pointed out that without proper funding for representative plaintiffs of limited means a class action regime could not achieve much. Recommendation 8 in Chapter 8 of this report concludes that it is not likely that a comprehensive funding mechanism could be instituted in the short term, given the inherent complexities and difficulties in funding class actions. Nonetheless, with proper injection of resources, the Consumer Council's Consumer Legal Action Fund would be readily available to fund class actions brought by consumers, thus enabling an early start to be made to implementing a class action regime.

Recommendation 1

We believe that there is a good case for the introduction of a comprehensive regime for multi-party litigation so as to enable efficient, well-defined and workable access to justice. In the light of opposition and reservations expressed in the consultation exercise, an incremental approach to implementing a class action regime merits consideration. For this purpose, a class action regime may start with consumer cases, and in the light of experience gained, the regime may be extended to other cases.

3.75 We bear in mind the need for caution to ensure that the introduction of a class action regime in Hong Kong does not encourage unmeritorious litigation. It is important that there are appropriate procedures for filtering out cases that are clearly not viable and appropriate rules should be in place to ensure fairness, expedition and cost effectiveness. At the same time, it will be necessary to explore procedures alternative to the court process which will complement the class action.

---

107 See further under the heading "England and Wales" in Chapter 2.

108 This will be further discussed in Chapter 9 under the heading "Consumer cases".

Mediation and arbitration

3.76 Dr Christopher Hodges, in giving his comments on the introduction of a class action regime in Hong Kong, has drawn our attention to the growth in alternative dispute resolution (ADR) mechanisms, led by a desire to avoid the costs and delays of litigation processes and adoption of new techniques involving ADR and ombudsman mechanisms.[109] A 2007 study led by Professor Jules Stuyck reached the following conclusions:[110]

(a) in the EU States, ADR is a continuum, encompassing the main elements of direct negotiation, mediation/arbitration, small claims procedures, collective actions for damages and actions for injunction;

(b) every Member State of the EU has put in place a unique mix. The ADR matrix in a state must be seen in the context of the organisation and effectiveness of its ordinary judicial proceedings, the way its business is structured and consumers are organised, the effectiveness of market surveillance, the way administration operates at local and general levels, and historic, political, socio-economic, educational and cultural factors;

(c) no particular method or mix of ADR processes or techniques could be put forward as the best choice from a consumer perspective;

(d) generally, whether a dispute resolution mechanism is appropriate in a particular situation will depend on a series of variables, including the circumstances of the dispute, the nature of the complaint or claim, the amounts of money involved, as well as the experience, personality, resources, knowledge and understanding, skills, confidence and attitudes of the consumers and businesses in question. These variables might differ from jurisdiction to jurisdiction so that the mix that functions appropriately in one jurisdiction will not necessarily be effective in another jurisdiction.

3.77 Class actions seeking damages usually consist of two parts. The first part deals with the determination of the applicable legal principles that have to be applied to the individual cases and, where appropriate, also deals with the determination of the issue of liability of the defendant. The second part of the litigation deals with the application of those legal principles to individual cases and, where appropriate, the assessment of the quantum of damages to be paid to the individual class members. ADR procedures are

---

109 Christopher Hodges, "Global Class Actions Project: Summary of European Union Developments", a report prepared for the Globalization of Class Actions Conference, December 2007, at 8.

110 J Stuyck and others, *An Analysis and Evaluation of Alternative Means of Consumer Redress Other Than Redress Through Ordinary Judicial Proceedings* (Catholic University of Leuvan, January 17, 2007, issued April 2007) and its executive summary at 5 -15. This is an important study which includes reports from every EU member plus USA, Canada and Australia on the range of existing mechanisms.

especially useful to the second part of the class action litigation. We have considered the procedural framework for class actions in Australia and find the following provisions to be of practical relevance to the introduction of a class action regime in Hong Kong.

Section 53A of the Federal Court Act

3.78 Section 53A of the Federal Court Act of Australia 1976 (Cth) empowers the Court to refer proceedings to a mediator, even without the consent of the parties, or to arbitration where the parties agree.

> *"(1) Subject to the Rules of Court, the Court may by order refer the proceedings in the Court, or any part of them or any matter arising out of them, to a mediator or an arbitrator for mediation or arbitration, as the case may be, in accordance with the Rules of Court.*
>
> *(1A) Referrals under subsection (1) to a mediator may be made with or without the consent of the parties to the proceedings. However, referrals to an arbitrator may be made only with the consent of the parties."*

3.79 Order 10 of the Federal Court Rules makes provision for mediation and arbitration:

> *"1. Directions hearing – general*
>
> *(1) On a direction hearing the Court shall give such directions with respect to the conduct of the proceedings as it thinks proper.*
>
> *(2) Without prejudice to the generality of subrule (1) or (1A) the Court may - ...*
>
> *(g) order, under Order 72, that proceedings, part of proceedings or a matter arising out of proceedings be referred to a mediator or arbitrator.*
>
> *(h) order that the parties attend before a Registrar for a conference with a view to satisfying the Registrar that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken, or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter, or otherwise to shorten the time taken in preparation for and at the trial …"*

3.80 Similarly, where class action proceedings are pending in the Supreme Court of Victoria the Supreme Court Rules make provision for the

court to refer proceedings, or any part of the proceedings, to a mediator with or without the consent of any party.[111]

3.81 In addition, at both Federal Court and Victorian Supreme Court level, there are a variety of other procedural alternatives open, including the referral of matters or issues to special referees.[112]

Relevant Australian cases

3.82 In *McMullin v ICI Australia Operations Pty Ltd*[113] following the decision on liability, the Federal Court proceeded to hear the claims of seven group members, constituted 16 subgroups consisting of particular persons who each claimed less than $100,000 and delegated to a judicial registrar the power to hear and determine those claims. Wilcox J, writing extra-judicially, observed that the circumstances relating to the assessment of damages payable to each group member:

> *"varied enormously, so there was no escape from individual assessment. However, the parties selected a few cases that raised major points of principle. These were heard over a few days and rulings made. The parties then entered into negotiations in relation to individual cases, exchanging information in accordance with directions made by the Court and with mediation of many cases by a Court officer. Two or three cases were not resolved by agreement. The damages in those cases had to be determined by a judge. All the rest were agreed.*
>
> *Towards the end of the process of negotiating settlements, the Court ordered publication of advertisements in newspapers circulating amongst graziers notifying group members that they must submit any outstanding claims by a particular date, or be excluded from the benefit of the judgment. By the time that date arrived, 499 claims had been received. After the last of them was resolved, the total payout reached some $100 million. Total court time for the whole operation was only about 30 days."*[114] (Emphasis added)

3.83 In *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2),*[115] Gillard J received written submissions, but did not make any directions, in relation to the appropriate regime for the hearing and determination of the claims of remaining group members. His Honour preferred to wait until the

---

111 See Supreme Court (General Civil Procedure) Rules 2005 (Vic), O 50.07.

112 See eg Supreme Court (General Civil Procedure) Rules 2005 (Vic), O 50.

113 (1997) 72 FCR 1.

114 See Wilcox M, "Class Actions in Australia" (Paper presented to the Commonwealth Law Conference, Melbourne 2003) at 7-8, cited in D Grave & K Adams, *Class Actions in Australia* (Thomson, 2005) at 323.

115 [2003] VSC 212.

class of claimants able to maintain a claim in the proceeding was closed. The plaintiffs proposed that group members:

- with claims exceeding $250,000 should be given leave pursuant to section 33R(1) of the Supreme Court Act 1986 (Vic) to take part in the proceeding for the purpose of determining their compensable loss and that directions be made to progress each of these to trial by judge. If appropriate, the court could also refer a particular claim to a special referee for assessment pursuant to rule 50.01 of the Supreme Court (General Civil Procedure) Rules 1996 (Vic).
- with claims between $50,000 and $250,000 should *not* be given leave to take part in the proceeding pursuant to section 33R(1) of the Supreme Court Act 1986 (Vic). The claims of those group members should be particularised and referred to a joint mediation and, if agreement was not reached at that mediation, they should then be given leave pursuant to section 33R(1) of the Supreme Court Act, and the assessment of their claims should be referred to a special referee pursuant to rule 50.01 of the Supreme Court (General Civil Procedure) Rules 1996 (Vic);[116]
- with claims of less than $50,000, should be particularised and referred to a mediation. If agreement was not reached at that mediation then either the claims of those group members should be referred by the court to a special referee pursuant to rule 50.01 of the Supreme Court (General Civil Procedure) Rules 1996 (Vic) or there should be a trial for the purposes of determining, pursuant to s33Z(1)(f) of the Supreme Court Act 1986 (Vic), an award of damages in an aggregate amount.

3.84 Gillard J said (at [83]) that:

> *"In my view, the parties should seriously consider a regime whereby the claims are referred to an arbitration pursuant to r 50.08. This procedure is only available if the parties consent. However, it has the advantage that usually arbitration awards are final and the avenues open to dispute the findings are limited, whereas references to special referees are sometimes bogged down by the application of a party seeking an order that the court decline to adopt the report under r 50.04."*[117]

3.85 A recent case illustrates the growth in the use of alternative dispute resolution mechanisms in class action proceedings to avoid the costs and delays of litigation processes. On 23 May 2008, a class action was commenced in the Federal Court of Australia against Centro Properties Ltd

---

116 See also *Federal Court Act*, section 53A above.

117 See also the comments to the same effect by Gillard J in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2)* [2003] VSC 212 at [85].

and others. The defendants were alleged to have breached the Australian Securities Exchange Listing Rules, the Corporation Act 2001 (Cth), the Australian Securities and Investment Commission Act 2001 and the Trade Practices Act 1974 (Cth) by making certain representations to the market and by failing to immediately disclose to the Australian Securities Exchange information that a reasonable person would expect to have a material effect on the price or value of the company's securities. The Federal Court ordered that mediation be held to explore the possible resolution of the claims in the Centro class action. With the consent of Centro and the law firms representing the investors, the Federal Court of Australia ordered on 17 December 2008 that the Centro class action be mediated by 17 April 2009. Strict time limits were imposed for all shareholders to register a claim to stay within the class action or to opt out of the proceedings. The court ordered that if the remaining shareholders did not register by the deadline with the plaintiff's law firm they would be barred from making any claim against the defendants in respect of, or relating to, the subject matter of proceeding. The potential members of the class were reminded that this was the last chance to join the class action and participate in the mediation which had been agreed after Centro agreed to explore a resolution of the claims.[118]

3.86 In Hong Kong, the Chief Justice's Working Party on Civil Justice Reform has recommended the provision of better information and support by the court to the litigants with a view to encouraging greater use of purely voluntary mediation (Recommendation 138 of the Working Party's report). The Working Party has also recommended the adoption of appropriate rules to empower the court, after taking into account all relevant circumstances, to make adverse costs orders in cases where mediation has been unreasonably refused after a party has served a notice requesting mediation on the other party or parties; or after mediation has been recommended by the court on the application of a party or of its own motion (Recommendation 143).

3.87 The Working Party pointed out that in suitable cases, mediation may result in very substantial savings in costs. The costs savings can be even more dramatic in relation to complex and hard-fought cases.[119] In addition, meditation can produce flexible and constructive outcomes as between the parties which traditional legal remedies cannot offer as well as provide the chance of a swifter resolution of the dispute in conditions of confidentiality and in an atmosphere where the parties are channelled towards seeking settlement rather than towards inflicting maximum adversarial damage on each other.[120]

3.88 In the case of *Halsey v Milton Keynes General NHS Trust,*[121] although the English Court of Appeal declined to sanction mandatory

---

118 See media release and notice to the shareholders posted by the law firm Slater & Gordon on their website at: www.slatergordon.com.au.

119 Chief Justice's Working Party on Civil Justice Reform *Civil Justice Reform Final Report* (2004) para 798.

120 Same as above at paras 799-800.

121 [2004] 4 All ER.

mediation, it indicated that in making its decision on costs, the court may take into account the conduct of the parties both before and during the legal proceedings, as well as their efforts to resolve the dispute. For a costs sanction to apply, the unsuccessful litigant must prove that his opponent's refusal to have recourse to ADR was "*unreasonable in all the circumstances*".

3.89 In the recent case of *iRiver Hong Kong Ltd v Thakral Corporation (HK) Ltd*, Mr Justice Yeung endorsed the dicta of Dyson LJ in *Halsey*[122] that:

> *"[t]he value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigations should now routinely consider with their clients whether their disputes are suitable for ADR."*[123]

Mr Justice Yeung also cautioned that under the new Order 1A of the Rules of High Court (which includes the underlying objective of the rules "*to facilitate the settlement of disputes*") and Order 1B of the Rules of High Court (which sets out the case management power of the Court), parties and their lawyers have a duty to the court to further the underlying objectives. They would, he said, *"be well advised to have the above comments on ADR in mind in making attempts to resolve their disputes effectively*".[124]

3.90 The Law Reform Commission of Ireland also recommended the use of ADR as a method of dealing with multi-party scenarios without resorting to litigation.[125] It discussed the United Kingdom case in the late 1990s where it emerged that a number of hospitals had, for many years, retained the organs and other body tissue of infants without the consent of their parents and guardians. ADR methods were used successfully to resolve some of the cases outside the courts. The Commission observed that while claims for damages might be appropriate in some cases, ADR, in which the parents and guardians received an appropriate explanation and apology, could offer a non-litigious way to resolve the dispute. For instance, the group litigation concerning organ retention by Alder Hey Hospital (comprising about 1,100 claims) was settled by way of a three-day mediation through the Centre for Effective Dispute Resolution. The settlement included financial compensation but it was accepted that the ability to discuss non-financial remedies ensured a successful conclusion. The families involved produced a "wish list" and this resulted in the provision of a memorial plaque at the hospital, letters of apology, a press conference and contribution to a charity of the claimants' choice.

3.91 We are of the view that the use of ADR could promote cost-effective dispute resolution of class actions if this can be done in a

---

122 [2004] 4 All ER, cited above, at paragraph 11.

123 CACV No 252 of 2007 dated 8 August 2008, at paragraph 100.

124 CACV No 252 of 2007, cited above, at paragraph 106.

125 The following example is given by the Law Reform Commission of Ireland in its *Multi-Party Litigation* (2005, Report LRC 76-2005) at paras 1.11-1.12.

controlled manner. Full exploitation and adoption of ADR techniques such as meditation and arbitration on both an interim and final basis in class action proceedings, in the light of the relevant experience in overseas jurisdictions, should be further considered in greater detail in Hong Kong.

Settlement of opt-out class actions

3.92 We have considered the proper relationship between an opt-out class action regime and any mediation in which the lead plaintiff will have to negotiate a binding settlement agreement on behalf of the absent class members.

3.93 This issue arises in Australia.[126] Unlike traditional settlements in conventional civil litigation, group members in class actions, who will be bound by the settlement agreement if it is approved by the court, will usually not have participated in the settlement negotiations and will not have consented to, or even been aware of, the proposed terms of settlement. In order to try and ensure that the interests of the group members are protected the Australian federal legislation incorporates important provisions for court approval. Section 33V of the Federal Court of Australia Act 1976 provides as follows:

> *"(1) A representative proceeding may not be settled or discontinued without the approval of the Court.*
>
> *(2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court."*

3.94 Because the lawyers acting for the applicant and the group in the case will often only be paid and recoup significant out-of-pocket expenditure if the litigation is successfully concluded they will often have a strong financial incentive to settle. Similarly, a commercial litigation funder which has financed the case will have a strong commercial interest in seeing a return on its investment. There are often also a variety of reasons why it may be in the commercial interests of the respondent(s) to settle a class action. As Bongiorno J noted in *Tasfast Air Freight v Mobil Oil Australia Ltd*, with reference to the substantially equivalent provision in the Victorian legislation:

> *"[T]he principles upon which a s33V is based might be said to be those of the protective jurisdiction of the Court, not unlike the principles which lead the Court to require compromises on behalf of infants or persons under a disability to be approved."*[127]

---

126 See discussion of Vince Morabito in 'An Australian Perspective on Class Action Settlements' (2006) 69(3) *Modern Law Review* 347 and Peter Cashman, *Class Action Law and Practice* (2007, The Federal Press) at 348-400.

127 [2002] VSC 457, [4].

3.95 We have set out the relevant Australian cases on the assessment of costs to be paid to the solicitors acting for the plaintiffs in Chapter 8 under the heading "Costs in case of settlement".

3.96 Professor Morabito suggested that the following lessons can be learnt from the Australian experience of requiring judicial approval of settlements:[128]

(a) To enable the courts to discharge satisfactorily the extremely challenging task of reviewing class action settlements, effective assistance and detailed guidance with respect to the substantive and procedural issues should be provided. It is suggested that, similar to the US practice, special counsels/masters should be appointed to represent the class in order to preserve the adversarial nature of the proceedings. The guardian can serve as "devil's advocate" both to safeguard the interests of the absentee class and to provide more information to the court;

(b) Courts must be assisted in safeguarding the interests of unrepresented class members. With reference to the US federal class actions, it is suggested that the courts should consider appointing a committee of unrepresented class members in class actions where class members include represented and unrepresented parties, to serve as spokespersons for the unrepresented parties; and

(c) Class action regimes must specify the factors that the courts are to apply when reviewing proposed settlement agreements. A tentative list of the relevant factors for consideration includes the following:[129]

"(i) The terms of the settlement;

(ii) Likely duration, cost and complexity of the action if approval were not given;

(iii) Amount offered to each class member in relation to the likelihood of success in the class action;

(iv) Even if the class won at trial, judgment amount not significantly in excess of settlement offer;

(v) The recommendations and experience of class legal representatives;

(vi) The recommendations of neutral parties, if any;

(vii) The attitude of the class members to the settlement (including the number of objectors);

---

128 Vince Morabito in 'An Australian Perspective on Class Action Settlements' (2006) 69(3) *Modern Law Review* 347 at 380-382.

129 See the discussion of these factors in R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004), Oxford and Portland, Oregon Hart Publishing) at 397-8.

(viii) Good faith, absence of collusion and consistency with class action objectives; and

(ix) Whether distribution of settlement benefits satisfactory."

Dispute resolution mechanism for the financial industry

3.97 We have considered recent proposals in Hong Kong for the establishment of dispute resolution mechanisms in the financial industry.[130] We note that in other jurisdictions where such mechanisms exist, there is still a need for a class action regime.

Consultation and conclusion

3.98 Recommendation 2 in the Consultation Paper recommended, *inter alia*, that the principle of equal access to justice, founded on the concepts of fairness, expedition and cost effectiveness, should guide any change to the present system for mass litigation, and alternative dispute resolution techniques should be invoked. Those who commented on this recommendation (which included the Chinese General Chamber of Commerce, the Consumer Council, the Democratic Alliance for the Betterment and Progress of Hong Kong and the Equal Opportunities Commission) supported those principles. The Hong Kong Bar Association, however, suggested that the considerations raised in the Ministry of Justice's 2009 response to the Civil Justice Council's 2008 Report in England should be addressed[131] and, in particular, a full assessment should be made of the likely economic and other impacts before implementing any reform. We have revisited the Ministry's response and note their conclusion that a meaningful global impact assessment would be virtually impossible to achieve, and that an overall assessment would inevitably miss or underplay considerations specific to individual sectors. The Ministry therefore adopted a sector-by-sector approach, starting with the financial services sector.

3.99 The Bar Association also highlighted the following views of the Ministry of Justice:

> *"10. … both the Government and the courts view litigation as, in general, the dispute resolution system of last resort. Before proceeding to look at court based solutions it is important to consider alternatives and, in the context of problems affecting a large number of people to examine in particular whether there*

---

130 Including the Securities and Futures Commission's Issues Raised by the Lehmans Minibonds Crisis – Report to the Financial Secretary (December 2008), para 35.5 and the Hong Kong Monetary Authority's Report on Issues Concerning the Distribution of Structured Products Connected to Lehman Group Companies (31 December 2008), para 8.49.

131 Civil Justice Council, *Improving Access to Justice through Collective Actions* (2008). The Ministry's full response can be found at: http://www.justice.gov.uk/publications/docs/government-response-cjc-collective-actions.pdf

are viable regulatory alternatives. The scope for ADR (alternative dispute resolution) should also be explored before resorting to court. If court proceedings are appropriate, it will be vital to ensure that there is a strong case management and filters in place to safeguard against weak or trivial litigation and control costs."

We share these views, and had already made recommendations in the Consultation Paper on alternative dispute resolution, case management and certification.[132] In the circumstances, we therefore maintain our original Recommendation 2 without amendment.

Recommendation 2

(1) We consider that the principle of equal access to justice, that is founded on the concepts of fairness, expedition and cost effectiveness, should guide any change to the present system for mass litigation. Thus guided, we are satisfied that, a good case has been made out for consideration to be given to the establishment of a general procedural framework for class actions in Hong Kong courts, bearing in mind the need for caution that litigation should not thereby be unduly promoted.

(2) We believe that in any system for class actions it is crucial that there are appropriate procedures for filtering out cases that are clearly not viable and that appropriate rules should be in place to assure fairness, expedition and cost effectiveness.

(3) In addition, Alternative Dispute Resolution techniques such as mediation and arbitration, on both an interim and final basis, should be fully utilised.

[132] The recommendations on case management and certification can be found in Chapter 9 of both the Consultation Paper and this report.

Table 1

Respondents who support the proposed regime

Legal sector

1. A Group of Solicitors
2. Baker & McKenzie
3. Companies Registry
4. Department of Justice (Civil Division)
5. Department of Justice (Legal Policy Division)
6. Hong Kong Bar Association[133]
7. Hong Kong International Arbitration Centre and the Hong Kong Mediation Council
8. Law Society of Hong Kong (qualified support subject to their comments)
9. Priscilla LEUNG Mei Fun
10. LIU Pui Yee
11. Ludwig NG
12. Neville SARONY, QC SC
13. Slaughter and May
14. Winston & Strawn LLP

Public bodies

15. Consumer Council
16. Equal Opportunities Commission
17. Home Affairs Bureau

---

[133] The Hong Kong Bar Association said: *"The HKBA supports as a matter of principle any initiative that would allow greater access to justice and facilitate the pursuit of legitimate civil claims in the courts. The HKBA believes that access to justice should not be fettered by inadequate or limiting provisions in civil procedure. The HKBA acknowledges that access to justice may also be achieved through the exercise of regulatory power; and other means, such as alternative dispute resolution. …*

The HKBA considers that the Sub-committee should further explore building on RHC Order 15 rule 12 and also view its case for 'the introduction of a comprehensive regime for multi-party litigation' as an enlargement, extension or supplementation of the representative action provision in Order 15 rule 12, as opposed to a replacement of or breaking away from it." and

"Nevertheless, the HKBA makes further submissions on the Sub-committee's other Recommendations on the qualification that what is sought to be introduced is a more rule-based 'comprehensive regime for multi-party litigation' in enlargement, extension or supplementation of RHC Order 15 rule 12."

18. Mandatory Provident Fund Schemes Authority
19. Office of the Privacy Commissioner for Personal Data

Professional bodies

20. Hong Kong Institute of Chartered Secretaries (only when there are workable safeguards against the potential risks)

Commercial sector

21. The American Chamber of Commerce in Hong Kong
22. The Chinese General Chamber of Commerce
23. Hong Kong Federation of Insurers
24. Hong Kong Institute of Directors

Individuals

25. CHAN, Kiwi
26. Vincent CHEUNG
27. Patrick HO Chi-ping
28. LAU Ching-ching
29. David WEBB

Social services sector

30. Hong Kong Christian Service
31. Society for Community Organization

Miscellaneous

32. Democratic Alliance for the Betterment and Progress of Hong Kong
33. Hong Kong Federation of Trade Unions
34 IMF (Australia) Ltd
35. South China Morning Post editorial (7 Nov 2009)

Table 2

Respondents who oppose the proposed regime or have reservations[134]

Legal sector

1. Clifford Chance[135]
2. Hong Kong Corporate Counsel Association
3. Lovells[136]

Accounting sector

4. Hong Kong Institute of Certified Public Accountants
5. PricewaterhouseCoopers

Commercial sector

6. Hong Kong Association of Banks
7. Cheung Kong (Holdings) Ltd
8. Economic Synergy
9. Federation of Hong Kong Industries
10. Hong Kong General Chamber of Commerce
11. Hong Kong Retail Management Association

Professional bodies

12. Hong Kong Institution of Engineers

---

134 Six respondents do not want to be named in the report.

135 In their responses, it was stated, "[Clifford Chance] considers the merits of the proposals from the standpoint of the public interest and in particular the interests of the business community. In compiling this part, we invited a wide cross-section of our clients to participate in a round-table discussion on the Consultation Paper, and our comments reflect the views (including our own views) expressed at that discussion. Six individuals, one employed by a commercial bank and five by investment banks, took part in the discussion. The views they expressed were their own, and not necessarily those of their employers."

136 In their responses, it was stated, "… in addition to consulting internally, [Lovells] have also taken opinions from our clients in various industry sectors with a view to preparing a comprehensive submission in respect of a number of the pervasive questions raised in Chapter 10 of the Consultation Paper. These include the views and opinions taken from representatives of financial institutions, banks, commodities traders, insurance firms, accountancy firms, retail corporations and construction companies amongst others."

Chapter 4

"Opt-in" v "Opt-out"

Introduction

4.1 An question which inevitably arises in class proceedings is how the members of the class should be determined. In fact, law reform agencies in other jurisdictions have regularly acknowledged that the choice between an opt-in and an opt-out regime is possibly the most controversial issue in the design of a multi-party litigation regime.[1] Under an "opt-out" scheme, persons who hold claims concerning questions (of law or fact) which are raised in the class proceedings are bound as members of the class and their rights will be subjected to any judgments made in the class proceeding unless they take an affirmative step to indicate that they wish to be excluded from the action and from the effect of the resulting judgment.[2] The "opt-out" approach[3] has been adopted in jurisdictions such as Australia, British Columbia, Ontario, Quebec and the United States[4]. In contrast, under the "opt-in" approach, a potential class member must expressly opt into the class proceeding by taking a prescribed step within the stipulated period. A person will not be bound by the judgment or settlement unless he has opted in to the proceedings.

Basic features of the two procedures for class actions

4.2 According to Professor Mulheron, the "opt-out" procedure involves two stages:

> *"First, the representative plaintiff must take steps to notify those who may qualify as class members about the class action being on foot. The second stage requires that the opt-out notice be*

---

1 For example, the Ontario Law Reform Commission in *Report on Class Actions* (1982), at 467.

2 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 29.

3 Professor Mulheron observed at 34 (above):

"... an opt-out model, by which persons are bound as members of the class unless they take an affirmative step to indicate that they wish to be excluded from the action and from the effect of judgment, has been overwhelmingly adopted among the common law jurisdictions. The opt-out approach allows a class action be commenced by the representative plaintiff <u>without the express consent of the class members.</u>" (emphasis added)

4 Absolute opt-out rights were inferred in class actions for damages under section 23(b)(3) of the *Federal Rules of Civil Procedure*.

lodged by those people who fall within the class description and who do not wish to participate in the action."[5]

The flowchart below highlights the salient features of a typical opt-out class action claiming monetary relief. Under an opt-out model, those falling within the description of class members but not intending to be part of the proceedings and to be bound by the outcome must indicate their intention by opting out before the date and in the manner determined by the court and specified in the notification (Box 8 in the flowchart). The court and the lawyers involved would endeavor to make sure that the notification would enable those falling within the description of class members to make an informed decision on whether to opt out or not.[6] To this end, the terms of the notification informing class members of their right to opt out, the deadline and the means to do so have to be carefully considered and drafted (Box 6 in the flowchart).

4.3 A class is shaped by the way it is defined. The class definition is important when drafting the notification so as to enable those who read it to know whether or not they are class members. A class can be defined by mere description. It is not essential to name or identify the class members, or to quantify their number, at the outset.[7] Different jurisdictions have different approaches as to how the class should be notified of the proceedings and the opt-out option, ranging from personal notice to various forms of public notice (Box 6 in the flowchart).[8]

4.4 The consequences are different for those members who have opted out from those who have not. Those who have opted out will be treated as having disassociated themselves from the proceedings altogether and are therefore able to bring their own separate actions. They cannot benefit from any court-sanctioned remedy or settlement relief obtained by the class representative, nor will they be bound by a judgment in favour of the defendant. By contrast, those who have not opted out will be bound by any settlement agreement, or by the court's decision on the common issues, whether or not these are in their favour (Boxes 7 and 12 in the flowchart). If

---

5 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 35.

6 The issues relating to class members from other jurisdictions are dealt with in Chapter 7 of this report.

7 Such as section 6(4) of the 1992 Act in Ontario and section 33H(2) of the FCA Act in Australia.

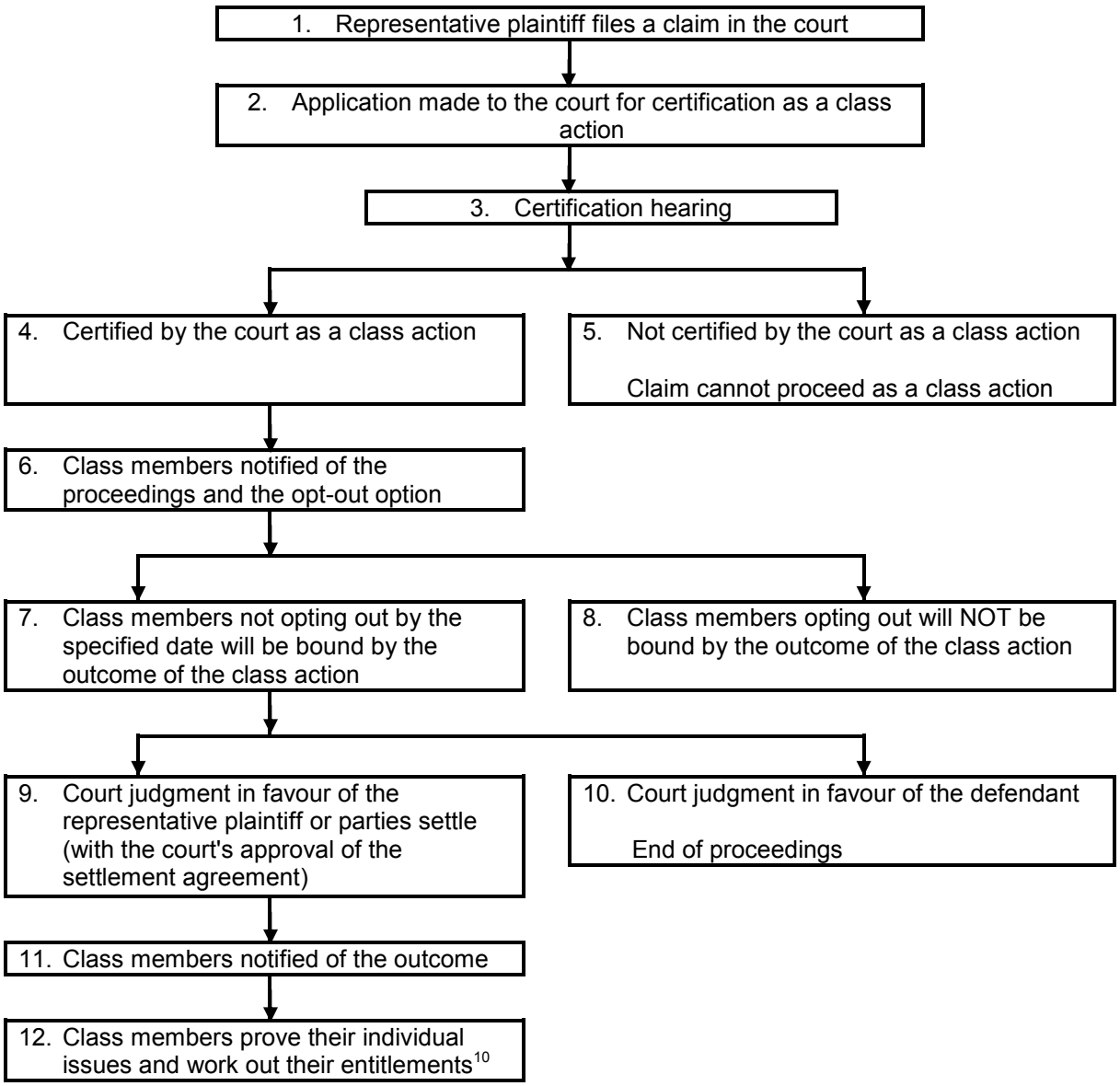
8 Under section 17(4) of the 1992 Act in Ontario, the court may order that notice be given, (a) personally or by mail; (b) by posting, advertising, publishing or leafleting; (c) by individual notice to a sample group within the class; or (d) by any means or combination of means that the court considers appropriate.

Under section 33Y of the FCA Act in Australia, the court may order that the notice be given by means of press advertisement, radio or television broadcast, or by any other means, and the court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.

Under rule 23(c)(2)(B) of the US Federal Rules of Civil Procedure, the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

the court decides in favour of the defendant, the class members cannot then sue the defendant on the same matter (Box 10 in the flowchart).

Salient features of a typical opt-out class action claiming monetary relief[9]



4.5 In contrast, under the "opt-in" approach, a potential class member must expressly opt into the class proceeding by taking a prescribed step within the stipulated period. Once he becomes a member, he will be

---

[9] For brevity, this flowchart does not include interlocutory proceedings and other miscellaneous procedures.

[10] It may not be necessary for class members to prove their individual issues, if the court can work out class members' entitlement to monetary relief from the defendant's record or by some other ways.

bound by the judgment or settlement and be eligible to receive any benefits which accrue. The main benefit of an "opt-in" regime is the preservation of the autonomy of the individual to participate in litigation only if he wishes to do so. A further benefit is that the size of the plaintiff group is reduced and it allows for an easier ascertainment of damages and case preparation for all parties involved. This is the approach adopted in England and Wales under the Group Litigation Order procedure, albeit with a slight caveat that the litigant's claims may be consolidated to a group action by order of the court.[11] A discussion of the Group Litigation Order procedure can be found under the heading "England and Wales" in Chapter 2.

Competing arguments

4.6 The arguments for and against the opt-out approach are summarised by Professor Mulheron as follows:

Competing arguments: the opt-out approach[12]

For	Against
(a) defendants are unlikely to have to deal with any claims other than those made in the class action, and if they do, then they can know more precisely how many class members they may face in subsequent individual proceedings; (b) the opt-out regime enhances access to legal remedies for those who are disadvantaged either socially, intellectually or psychologically and who would be unable for one reason or another to take the positive step of including themselves in the proceedings; (c) increased efficiency and the avoidance of multiplicity of proceedings to the benefit of	(a) it is objectionable that a person can pursue an action on behalf of others without an express mandate; (b) a person is required to take a positive step to disassociate from litigation which he/she has done little or nothing to promote; (c) class actions may be raised by busy-bodies, encouraged by unprincipled entrepreneurial lawyers; (d) absent class members may know about the litigation too late to opt out, in which case they are bound by the result, whether or not they want to be; (e) unfairness to defendants is increased by creating an unmanageably large group in

11 *Civil Procedures Rules*, Rule 19.11(3)(b).

12 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 37-38.

For	Against
all concerned; (d) access to justice is the basic rationale for class actions, and inclusiveness in the class should be promoted (ie, the vulnerable should be swept in); (e) safeguards can prevent "roping in" (eg, adequate notice explaining opt-out rights, permission to opt out late in the action, and other procedural requirements); (f) for each class member, the goal of individual choice whether or not to pursue a remedy can be achieved if the decision for the class member is whether to continue proceedings rather than commence them; (g) opting out more effectively ensures that defendants are assessed for the full measure of the damages they have caused rather than escaping that consequence simply because a number of class members do not take steps to opt in; (h) the meaning of silence is equivocal, and does not necessarily indicate indifference or lack of interest, so class members should not be denied whatever benefits are secured by the class action by failing to act at an early stage of the action – fairer for the silent to be considered part of the class than not.	which the members are not identified by name and it is very difficult to undertake negotiations for a settlement; (f) it is unattractive for a court to enforce claims against the defending party at the instance of plaintiffs who are entirely passive and may have no desire to prosecute the claim; (g) opt-out regimes create potential for the general *res judicata* effect of the class action judgment to be undermined by individual class members exercising their right of exclusion; (h) to the extent that class members exercised opt-out rights for the purpose of prosecuting their individual suits, the desired economies would suffer and the risk of inconsistent decisions would increase; (i) opt-out regimes do not cure the fact that persons will not want to engage in litigation because they are timid, ignorant, unfamiliar with business or legal matters, or do not understand the notice – the same persons who would not opt in may also opt out, which can undermine the purpose of inclusive class membership.

Access to justice

4.7 The reasons for adopting an opt-out regime are stated by the Australian Law Reform Commission as follows:

> *"[a] requirement of consent will effectively exclude some people from obtaining a legal remedy. It may also undermine the goals of efficiency and avoidance of a multiplicity of proceedings. **All** these policies can only be served by enabling proceedings to be commenced in respect of all persons who have related claims arising from the same wrong without requiring their consent …."*[13]

4.8 In contrast, an opt-in requirement for class actions would omit from a lawsuit those who did not take the steps necessary to opt in. In particular, where the cause of action involves small losses to a large number of persons, an opt-in requirement may prove unsatisfactory simply because the losses are too small to attract potential class members' attention. It has also been suggested that the adverse effects of an opt-in requirement might be felt more acutely by the more disadvantaged members of society.[14] That would defeat the policy objective of achieving equal access to justice by way of introducing a class action regime.

4.9 Professor Morabito has suggested that the failure to opt in is attributable to a number of reasons other than lack of interest in the class action:[15]

(a) those who fail to opt in may not have received the notice either because they cannot be identified individually or because they have moved their residence;

(b) they may not have taken the affirmative step because of ignorance, timidity and unfamiliarity with business or legal matters;

(c) they may be afraid of sanctions from employers or others in a position to take reprisals and afraid of involvement in the legal process;

(d) class members are often uneducated, unknowledgeable or fearful and lack the education and understanding to respond properly to a legal notice requiring them to opt in.

---

13 Australian Law Reform Commission, Report No 46, *Grouped Proceedings in the Federal Court,* para 108.

14 Deborah R Hensler and Thomas D Rowe 'Complex Litigation At the Millennium: Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform' 64 *Law & Contemporary Problems* 137 (Spring/Summer 2001) at 145-146.

15 Vince Morabito "Class Actions: The Right to Opt Out Under Part IVA of the Federal Court of Australia Act" 1976 (CTH) 19 *Melbourne University Law Review*, 615 (1994) at 630-633.

To sum up, Professor Morabito stated that:

> *"[A]n opt in scheme would deprive those most in need of the benefits of class actions, that is those who cannot initiate individual proceedings (such as those with individually non-recoverable claims), from obtaining the benefits of such an action."*[16]

4.10 A recent Research Paper of the Civil Justice Council of England and Wales seeks to identify whether there is an unmet legal need for a new initiative for collective redress, over and above the representative rules and the Group Litigation Order (GLO). The paper suggests that the "unmet need" could be satisfied by the introduction of an opt-out collective redress regime. The Council found that the number and types of collective actions in England were limited by the opt-in system under the GLO. It reported that:

> *"A Questionnaire distributed to Respondents who have had experience in conducting opt-in group litigation in England produced some interesting insights during the course of preparing this Research Paper. The experience in English group litigation indicates that, under an opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all (90%), or all, of group members opting to participate in the litigation. In several instances, however, the percentages of opting-in could not be determined because early cut-off dates were established, and the total number in the group was never able to be ascertained before the litigation was finalised. Respondents indicated that the vast majority of the [actions under study] sustained some procedural difficulties because they were conducted under an opt-in regime – and the tasks of identifying and communicating with large classes, together with pleadings requirements at the outset, were especially difficult.*
>
> *Furthermore, the experience derived from English group litigation indicates … that there are almost twenty (20) reasons as to why group members may not opt in to litigation – reasons that are as diverse as is human nature. While some of these reasons will preclude these claimants ever choosing to litigate their grievances, many of the reasons for not opting-in that emerged in the study for this Research Paper are particularly pertinent when the litigation is in its 'infancy', prior to any determination or settlement of the common issues, and when the litigation inevitably retains such an 'individualised' hue."* [17] (emphasis added)

---

16 V Morabito, "Class Actions: The Right to Opt Out Under Part IVA of the Federal Court of Australia Act" 1976 (CTH) 19 *Melbourne University Law Review*, 615 (1994), at 633.

17 Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need*, a research paper for submission to the Civil Justice Council of England and Wales, (2008), at 160.

Empirical data on degree of participation under different schemes

4.11 In a comparative study covering the major class action systems in a number of jurisdictions it was found that the degree of participation under opt-in systems was lower than that found under opt-out systems. The study concluded that:

> *"The exercise of 'crunching the numbers' on opt-in versus opt-out confirms the anecdotal evidence that opt-out 'catches more litigants in the fishing net'. Where modern empirical data exists, the median opt-out rates have been as low as 0.1%, and no higher than 13%. Where widespread empirical data does not exist as yet, judicial summations of opt-out rates indicate a range of opt-outs between 40% (which is rare, on the cases surveyed) and 0%, with a tendency for the rates of participation under opt-out regimes to be high … . On the other hand, whilst the experience in English group litigation indicates that, under its opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all group members opting to participate in the litigation, European experience sometimes indicates a very low rate of participation (less than 1%) where resort to opt-in was necessary in consumer claims and where the class sizes were very large. In the United States too, a much lower participation rate has been evident under opt-in than under opt-out. In that respect, the dual pillars – access to justice and judicial efficiency in disposing of the dispute once and for all – are enhanced by an opt-out regime."*[18] (Emphasis added)

Finality and closure of issues

4.12 The opt-out procedure overcomes the difficulties of identifying and naming all class members affected by the defendant's misconduct and achieves the closure of issues between the parties. The Irish Law Reform Commission said:

> *"Opt-out systems appear to commend themselves in terms of finality. At one stroke the major share of putative cases can be dealt with, and defendants can predict, with some certainty, closure of the issue. … From the outset, the defendant will be aware of the extent of the plaintiff group. This may also prove beneficial for the plaintiffs in that the defendant may be amenable to settlement. Where the defendant is a company dependent on its good name and reputation in the market, the*

[18] Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need*, a research paper for submission to the Civil Justice Council of England and Wales, (2008), at 160-1.

sooner a line can be drawn under a multi-party claim which attracts public attention the better. …

Closure may also be beneficial to the functioning of the judicial system, which has an interest in encouraging the efficient disposal of the litigation. Under an opt-out system the courts are more likely to be spared the slow-drip effect of identical factual or legal issues arising in a series of separate cases … ."[19]

4.13 Protecting the interests and dignity of class members does not require an absolute and unrestricted right to opt out. The desirable goals of a class action system which adopts an opt-out model can be fulfilled as long as the following requirements are satisfied:

> *"(a) the prerequisites which need to be complied with for the commencement of the class proceedings do not generate unfairness as a result of bringing together in the one action excessively diverse claims;*
>
> *(b) absent group members have a sufficient degree of participation in, and control over, the class action;*
>
> *(c) absent group members are adequately represented by the representative plaintiff;*
>
> *(d) the court presiding over the class litigation plays an active role in order to protect the interests of absent group members; and*
>
> *(e) an opportunity is conferred on group members to persuade the court that they should be allowed to opt out."*[20]

Human rights and basic law considerations

4.14 We have looked into the issue of whether the proposed opt-out model will meet the requirements of access to justice and protection of property rights guaranteed under Articles 6 and 35 of the Basic Law. We are satisfied that the proposed "opt-out" model does pursue legitimate aims and that appropriate procedures can be devised for such a model which amount to a proportionate response to the legitimate aim of promoting access to justice. As long as the opt-out model includes sufficient threshold requirements in the application of representative proceedings and procedural safeguards to preserve a group member's freedom of choice comparable to those provided for in Part IVA of the Federal Court Act, we believe it will meet the "fair balance" requirement arguably implicit in Articles 6 and 35 of the Basic Law.

---

19 The Law Reform Commission of Ireland, *Multi-party Litigation* (2005, Report LRC 76-2005), at paras 2.20-2.21.

20 V Morabito, "Class Actions: The Right to Opt Out Under Part IVA of the Federal Court of Australia Act" 1976 (CTH) 19 *Melbourne University Law Review*, 615 (1994), at 622-3.

More detailed discussion of the human rights and Basic Law issues can be found in Annex 3

Consultation and conclusion

4.15 Recommendation 3 in the Consultation Paper recommended that, subject to discretionary powers vested in the court to order otherwise in the interests of justice and the proper administration of justice, the new class action regime should adopt an opt-out approach. Seventeen of those who responded to this recommendation supported an opt-in approach, while 14 favoured an opt-out approach. The points put forward by respondents broadly echoed the arguments for and against an opt-out approach set out in the table earlier in this chapter.

4.16 In addition, a number of those who opposed the opt-out approach[21] were concerned that the approach would inflate damages and costs by aggregating the claims of large numbers of claimants, including those who had not made a conscious decision to join a lawsuit or might not even wish to be part of it. The Democratic Alliance for the Betterment and Progress of Hong Kong doubted that class members would know the time limit and procedures to opt out.

4.17 The Consumer Council was of the view that each case turned on its own facts, and an opt-out procedure might not be suitable in some circumstances. Therefore, a default approach was not necessary, and the court should be vested with discretion to decide on which approach to adopt on a case-by-case basis. In contrast, the Department of Justice (Civil Division) believed that leaving discretion to the court might create much uncertainty, delay the proceedings, or even result in undesirable satellite litigation by way of interlocutory appeals, with human rights and Basic Law challenges. If a default position were adopted, any such challenge could be definitively ruled on by the Court of Final Appeal once and for all.

4.18 Based on their experiences in Australia, Canada and England, Baker & McKenzie supported an opt-out approach as the default position (subject to the court's discretionary power to order otherwise) for the following reasons:

(a) The approach ensures more certainty of outcome for both claimants and defendants;

(b) Experience of an opt-out approach in Ontario has shown that the approach has been effective. Very few claimants opt out, and even if they do, they rarely commence separate legal proceedings;

(c) Although the approach may result in higher damages, those damages are likely to be more proportionate to the cost of

[21] They prefer to remain anonymous.

litigation involved for both sides. Conversely, an opt-in approach (for example under the Enterprise Act in the UK) can lead to an award of damages which is disproportionate to the costs incurred by both sides; and

(d) A system without a default position (for example the GLO in England)[22] is procedurally more complex and expensive, and is rarely used.

4.19 The Law Society of Hong Kong, on balance, also supported an opt-out approach as the default position. The Law Society pointed out that Hong Kong could take comfort from the fact that the Financial Services Bill 2009 in England aimed at introducing collective proceedings in respect of the financial sector. This was the first time that an opt-out provision had been encompassed in legislative form in England, a principal common law jurisdiction.[23] The Bar Association of Hong Kong accepted the opt-out approach (subject to the court's discretion to order otherwise), but on a tentative basis for two reasons. First, the Bar suggested that the hybrid models formulated by the Ministry of Justice in England should be considered. We deal with this under the heading "Opt-out regime as the starting point" later in this chapter. Secondly, the Bar made some observations and suggestions on human rights and Basic Law issues, which we deal with in Annex 3 under the heading "Australian jurisprudence".

Opt-out regime as the starting point

4.20 In its Response to the Civil Justice Council's Report published in 2008,[24] the Ministry of Justice in England pointed out that the distinction between opt-in and opt-out was not always clear cut. The Ministry shared the concerns about a full opt-out model, and considered that the same objectives would be better met in most cases by one of their suggested hybrid models. In order to claim a share of the determined damages, a claimant would have to opt in sooner or later, subject to a time limit. The Ministry

---

22 See also R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 99: "*The GLO schema is an opt-in regime …, in which litigants have to choose affirmatively to litigate by entering their names on the group register, or having their claims adjoined by judicial consolidation to the group action*."

23 However, serious concerns were expressed in the House of Lords on, *inter alia*, the part on collective proceedings. Given limited time remaining in the Parliament because of the looming election in 2010, the Government agreed to withdraw the provisions on, *inter alia*, collective proceedings in order to secure the passage of the remainder of the Bill. The Financial Services Secretary to the Treasury (Lord Myners) said on 8 April 2010 in the Parliament, "*the Government continue to believe that these provisions are necessary, sensible and desirable. However, in the interests of securing other important elements of the Bill, on which greater consensus exists, the Government have agreed to withdraw them*." House of Lords Hansard (8 Apr 2010: Column 1663). Hence, the Financial Services Act 2010 was enacted on 8 April 2010 without, *inter alia*, the part on collective proceedings.
http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100408-0002.htm#10040856001029

24 Civil Justice Council, *Improving Access to Justice through Collective Actions* (2008). The Ministry's full responses can be found via this link:
http://www.justice.gov.uk/publications/docs/government-response-cjc-collective-actions.pdf

considered that a better way of looking at the issue was by considering the stage by which people have to come forward to claim their share of the damages. The class to be compensated is effectively defined and closed at that point.[25] The Ministry considered that both the need and the appropriate model for representative actions should be assessed and decided on a sector by sector basis. We are, however, of the view that this will unduly complicate the operation of a generic class action regime as proposed in the last chapter, and stakeholders would probably find its operation confusing.

4.21 After carefully considering the responses from the public, we propose that the class action regime in Hong Kong should adopt an "opt-out" approach unless there are strong reasons to depart from this in the interests of justice. We believe that as long as the opt-out model includes sufficient threshold requirements and procedural safeguards to preserve a group member's degree of participation in, and control over, the class action, a fair balance can be achieved between the goal of promoting greater access to justice and the preservation of the parties' autonomy. That said, no regime can cater for all circumstances and we consider that a discretion should be vested in the court to depart from the opt-out regime where there are strong reasons for doing so. The essential justification must be that justice could not otherwise be attained.

Judicial discretion

4.22 We have also considered whether the court should be invested with a sufficient degree of discretion to attain the objectives of the class action. We have reviewed in detail the flexibility favoured by both the Woolf Report and the Civil Justice Council Report in England and Wales and by the South African Law Commission. However, we are concerned that flexibility of the class action rules should not result in a lack of predictability of procedural outcomes. We agree with the Alberta Law Reform Institute's conclusion that "*judicial choice places the parties in a position of uncertainty because they do not know in advance which procedure will be followed; and it invites litigation over the procedural choice*."[26] This conclusion was also supported by the Law Reform Commission of Ireland.[27]

---

25 The key cut-off points in their suggested hybrid models are as follows.

(1) Before the claim is issued - This is a pure opt-in system.

(2) Before the common issues of liability are decided - The action would be brought initially in terms of a defined class with a minimum number of identified members. Other members of the class could opt-in at any time before the decision on liability and could then be included in any judgment or settlement. This is a modified opt-in, or hybrid system.

(3) After the decision on liability but before the quantification of damages - The issue of liability would be *res judicata* for any claimants who had not expressly opted-out before it was decided. This is also a hybrid system, modifying the opt-in approach to avoid its perceived disadvantages in the early stages of cases, and to avoid the issues that arise with an opt-out approach.

(4) After the quantification of damages - This is a fully-fledged opt-out model.

26 Alberta Law Reform Institute, *Class Actions Final Report* No 85 (December 2000), at para 242.

27 The Law Reform Commission of Ireland, *Multi-Party Litigation* (2005, Report LRC 76-2005), at para 2.24.

4.23 We think it important to fashion a framework of principles within which judicial discretion may be exercised, taking account of the need for fairness to be shown to potential claimants and defendants as well as the need to fashion resolution machinery which is efficient and effective. This framework of principles should also take account of the extent to which the members of the class might be prejudiced by being bound by a judgment given in an action which may not have come to their attention. Many practical problems will need to be addressed in the course of managing a class action. Practical difficulties may arise in the definition of the class – an overly inclusive class of plaintiffs may prejudice defendants while at the same time making notice requirements overly costly. Practical difficulties might make the giving of individual notice to all members impossible, impracticable or unaffordable. Thus, a cost benefit calculation and the interests of justice must be considered at various stages of any class action. In order to be predictable, there must be a default opt-out procedure which the affected parties can apply to modify in appropriate circumstances. Judicial discretion is therefore of particular importance. An applicant wishing to depart from the default opt-out position must show that the exceptional circumstances of the case dictate that only different requirements will serve the interests and proper administration of justice. Accordingly we maintain our original recommendation that there should be a default opt-out procedure subject to the exercise of judicial discretion.

Recommendation 3

We recommend that, subject to discretionary powers vested in the court to order otherwise in the interests of justice and the proper administration of justice, the new class action regime should adopt an opt-out approach. In other words, once the court certifies a case suitable for a class action, the members of the class, as defined in the order of court, would be automatically considered to be bound by the litigation, unless within the time limits and in the manner prescribed by the court order a member opts out.

Chapter 5

The treatment of public law cases

Introduction

5.1 In this Chapter, we consider whether, in light of the special features of public law litigation in Hong Kong, including in particular the unique constitutional position prevailing under the Basic Law, the adoption of a class action regime such as we have proposed in Recommendations 1 to 3 is suitable, either generally or with modifications, for public law cases. The Consultation Paper put forward, for public discussion, four possible options for class actions in public law litigation.

5.2 A challenge to the substantive or procedural lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function is made by way of an application for judicial review pursuant to section 21K(1) of the High Court Ordinance (Cap 4) and order 53 of the Rules of the High Court. The procedure involves a two-stage process. The applicant must first apply for leave to move for judicial review. At the leave stage, the court will examine the application to see that (i) the applicant has a sufficient interest in the matter under challenge, (ii) the case is reasonably arguable, and (iii) there has not been inappropriate delay in the making of the application. Once leave is granted, the applicant may proceed with a substantive application for judicial review.

5.3 In many situations, a public law decision on an application for judicial review may have wider ramifications beyond the individual applicant's case. By way of example, a challenge to the constitutionality of primary legislation will, if successful, generally result in a declaration of inconsistency with the Basic Law. Similarly, a challenge to the lawfulness of a Government policy or a judicial review seeking to enforce a legitimate expectation generated by a representation made by the Government will generally have consequences for a larger group of persons than the individual applicant in the judicial review. It is therefore pertinent to examine whether a class action regime, and in particular whether an opt-out model of such a regime, is appropriate in the context of public law litigation generally and in Hong Kong in particular.

The appropriateness of class action procedures to public law litigation generally

5.4 In Canada, certain courts have shown a reluctance to certify class proceedings in applications for declarations of constitutional invalidity

and of other legal rights, as these can be resolved through a test case or an individual action for declaratory or injunctive relief. This would then be binding and achieve the same result as a class action.[1] A number of courts have taken a similar approach towards litigation claiming a declaration of constitutional invalidity of a statute.[2] More recently, there have been some cases to the contrary, especially when damages are also sought.

5.5 In Australia, anyone seeking judicial review, traditionally, had to use the common law procedure of issuing a "prerogative writ" which is an order from the sovereign to an inferior tribunal or court. There are three main types of writ relevant to judicial review: mandamus, certiorari and prohibition. In addition to these three writs, courts also have power to grant an injunction and a declaration.

5.6 *Federal level* In 1977 the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the "1977 Act") was enacted to simplify the remedies and procedures applicable to judicial review, especially simplifying the language of judicial review. Despite the 1977 Act, the common law procedure of seeking a writ remains relevant, because the 1977 Act does not apply to all administrative actions.[3] If the 1977 Act is not applicable, the Judiciary Act 1903 (Cth) (the "1903 Act") (usually section 39B) would apply, but at times it is necessary to invoke both statutes.[4]

5.7 *Victoria* In Victoria, the Administrative Law Act 1978 (Vic) (the "1978 Act") was enacted to simplify the procedures applicable to review of Victorian decisions. For matters outside the 1978 Act, Victoria went on to abolish the writs of certiorari, prohibition and mandamus altogether and replaced them with an application for "*an order in the nature of*" certiorari, mandamus or prohibition under Order 56 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic). Despite retaining the old language of certiorari, mandamus or prohibition, Order 56 procedure is in many ways more straightforward than the procedure in the 1978 Act.

5.8 Some Australian cases have considered how a class action regime should operate in the context of judicial review. French J said in *Zhang De Yong v Minister of Immigration, Local Government & Ethnic Affairs* in relation to the Australian Federal class action regime:

---

1 Bogart, Kalajdzic and Matthews, "Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?" (A report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007), at 4.

2 *Guimond v Québec (Attorney General)*, [1996] 3 S C R 347, rev'g (1995), 123 D L R (4th) 236 (Qc C A) - Mr Justice Gonthier stated "*it is true that it is not necessary to pursue a class action to obtain a declaration of constitutional invalidity and therefore, that it is generally undesirable to do so* …".

3 For example, the 1977 Act does not cover decisions made "outside" a statute, and many decisions under the Migration Act 1958 (Cth).

4 Another option for judicial review on a federal matter is to issue a writ in the High Court under section 75 of the Constitution. For the court to have jurisdiction, one has to seek a writ of mandamus, prohibition or injunction against an officer of the Commonwealth.

> *"The new procedure was said to enable groups of people, whether they be shareholders or investors or people pursuing consumer claims, to obtain redress and do so more cheaply and efficiently than would be the case with individuals actions. There was no reference in the Second Reading Speech to the use of the representative action in judicial review proceedings … Prior to and at the time of the enactment of the legislation, the emphasis of public discussion was on its application to possible consumer class actions and their impact on business. But there is nothing in the language of Pt IVA which limits its application to such actions. Nor is there anything to prevent its application to appropriate proceedings for an order of review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) or prerogative relief."*[5] (Emphasis added)

5.9 Zhang was a citizen of the PRC. In 1990 he traveled by boat to Australia as a stowaway. He then claimed refugee status, but his claim was unsuccessful. In 1992, Zhang filed an application under section 15 of the 1977 Act and section 39B of the 1903 Act "as a representative party" for a class of persons who had been refused refugee status within a certain period. He argued that the principles of natural justice conferred upon all persons applying for refugee status a legal right to an oral hearing by the relevant decision-maker. French J after construing Pt IVA of the Federal Court of Australia Act 1976 as being not limited to private law actions, went on to consider and explain its applicability to public law actions. In this respect, he questioned whether it was appropriate to invoke the class action regime simply because there were some common issues among the class whereas some of their individual circumstances might already warrant the setting aside of the review decision.

5.10 Certain features of public law litigation call for special attention to be given to the procedural rules governing multi-party situations. One such feature is the fact that, in public law litigation, although there may be issues of law and/or facts which are common to the group, the individual circumstances of each claimant's case may be highly material to the outcome of the administrative decision-making process. A decision to allow a class action to proceed involves a balance of convenience and justice between on the one hand allowing individuals to fully engage the court's attention to their individual circumstances and on the other dealing first with common issues of law and/or facts before determining individual cases thereafter. In *Zhang De Yong*, it was held on the facts of the case that a class action was appropriate because what were contended to be common questions of law or fact applicable to all of the group members were sufficiently common that determination of those common issues would be helpful. However, the individual circumstances of each case might have an important bearing on the outcome of the administrative decision, notwithstanding the existence of one

---

[5] *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 118 ALR 165 at 183.

or more common issues sufficient to justify the use of the class action procedure. The court noted the following:

> *"A challenge to the lawfulness of an administrative policy or practice affecting the exercise of statutory power may raise, as does this case, a narrow point for decision. Individual claims in relation to particular determination under the power are left unheard if the representative action fails. The possibility arises of the extended principle of res judicata affecting issues wider than those ventilated in the representative proceedings. Having regard to that possibility, the utility of the representative action in judicial review requires scrutiny. The question must be asked in each case whether members of the group and the decision makers are likely to be better off with a determination which binds them all on one issue but fails to deal with the individual claims. Where the lawfulness of a policy is contested by an individual, the test case may, pending an appeal, establish the law. However, it does not provide as firm a bulwark against re-litigation of the same point in like cases as does the determination in representative proceedings which directly binds the decision-maker and members of the group. The costs and benefits of representative proceedings in the area of judicial review will have to be assessed on a case by case basis.*
>
> *40. In the present case, the relationship between the circumstances of each group member is defined by a few common integers which leaves room for considerable diversity in circumstances which might support individual claims to set aside the review decisions. Some applicants may have complaints about aspects of the decision-making process which have nothing to do with the question whether or not they should be afforded an oral hearing. There may be applicants who are able to show that even if there is no common entitlement to the opportunity of an oral hearing, the particular circumstances of their cases require such a hearing as a matter of natural justice. …"*[6] (Emphasis added)

5.11 French J held that, despite that possibility, the claims of the class as defined in the application were connected by circumstances sufficiently related to warrant the use of the class action regime for the determination of the common issue of law defined in the application. In so holding, he had regard to the need for a purposive approach to the construction of the relevant legislation. An important consideration in determining the appropriateness of a class action procedure is the adverse consequence for individual group members arising from the operation of the extended doctrine of *res judicata*, in particular when there are significant points of difference as between the various individuals' claims. French J analysed the issue as follows:

---

6 *Zhang De Yong v Minister of Immigration, Local Government & Ethic Affairs* (1993) 118 ALR 165, at 184.

"… The question whether the extended principle of res judicata is capable of application to representative proceedings confined as these have been to a common issue of law or fact remains open. Section 33Q [the court may appoint sub-groups within the group or give directions on the resolution of individual issues] contemplates the hiving off of individual claims when the common determination does not finally determine the claims of all group members. That may support a view that the extended principle may operate when the claims are not hived off under that section. In a case in which the group members have not raised individual claims but have been defined into the group on their related circumstances and the common issue, it is necessary that care be taken to ensure that claims based on individual circumstances of which the Court knows nothing are not prejudiced."[7] (Emphasis added)

5.12 French J decided to deal with, and give judgment on, the common issues in the class action, but thereafter the proceedings would no longer continue as such. Individual cases would then be adjudicated upon individual circumstances taking into account the decision on common issues.[8] In other words, while he had disposed of Zhang's claim, the claims, if any, of other class members to set aside the decisions affecting them individually were to be pursued by their individual applications. This case illustrates the need to scrutinise closely the appropriateness of the class action procedure in the public law context and, if that procedure is thought suitable, to have regard to (and, if necessary, limit) the consequences of a determination of the claim of the representative applicant so that the subsequent pursuit of individual applications by other members of the represented class are permissible (albeit subject to the decision of the court on the common issue). If there is any possibility that a common issue of law or fact may prejudice any individual claim within the class, then, unless some method is found to prevent injustice to the individual by making sub-class orders or exclusionary orders for individuals who could not be accommodated within the class, a class action should not be ordered.

5.13 Another example is the case of *Nguyen Thanh Trong v the Minister of Immigration, Local Government and Ethnic Affairs and Refugee Review Tribunal*.[9] Seventeen persons who arrived in Australia on board a boat known as the "Vagabond" in 1994 each claimed to be entitled to refugee status under the Migration Act 1958. Fourteen of them were unsuccessful.[10]

---

7 Zhang De Yong v Minister of Immigration, Local Government & Ethic Affairs (1993) 118 ALR 165, at 185-6.

8 French J held that there was no basis in the case that warranted a requirement for affording to any person applying for refugee status an opportunity for an oral hearing.

9 [1996] FCA 1481.

10 Because of an amendment since October 2001, section 486B(4) of the Migration Act 1958 (Cth) provides that representative or class actions are not permitted in or by a migration proceedings (ie, proceedings in the High Court, the Federal Court or the Federal Magistrates Court that raise an issue in connection with visas, deportation, or removal of unlawful non-citizens.)

The representative plaintiff sought relief under Part IVA of the Federal Court of Australia Act 1976 on his own behalf and on behalf of 10 of the other claimants who had arrived on the Vagabond with him.

5.14 Merkel J held that most, if not all, of the so-called "common grounds" were not common to individual cases. Each decision was distinct, self-contained and based on each individual claimant's allegations of persecution.[11] Merkel J gave directions that the matter proceed as a representative proceeding under Part IVA on two common issues of fact and law and that each of the 11 individuals' claims be heard and determined separately.[12] In respect of hearing individual claims, Merkel J only proceeded with the representative plaintiff's claims for review of the decision that he was not a refugee.

5.15 Merkel J went on to state that the matter involved a class action by a group of persons having little command of the English language and even less knowledge and understanding of the Australian legal system. That fact, together with the additional fact that the action was a class action, led to a greater responsibility on the court in relation to the conduct of the hearing, especially when group members were strictly not parties in the proceeding and unable to give instructions, but were bound by the result.[13]

A particular constitutional feature in Hong Kong

5.16 In our deliberations over the appropriateness of a class action regime in the context of public law litigation in Hong Kong, we considered a special constitutional feature which is not present in other jurisdictions. This is Article 158 of the Basic Law, which provides:

> *"The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.*
>
> *The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.*
>
> *The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their*

---

11 [1996] FCA 1481, at para 11.

12 [1996] FCA 1481, at para 12.

13 [1996] FCA 1481, at para 42.

final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law."

5.17 An interpretation may be a free-standing interpretation by the Standing Committee of the National People's Congress under Basic Law Article 158(1)[14] or it may be an interpretation by the Standing Committee on a judicial reference mandated by Article 158(3).[15] In either case, the interpretation is binding on and bound to be followed by the courts of the Hong Kong Special Administrative Region.[16] We have called the former type of interpretation a "free-standing" interpretation because the provision of the Basic Law under interpretation need not be the subject matter of any litigation. The latter type, arising under Article 158(3), requires the existence of a case before an HKSAR court.

5.18 Once made, an interpretation of the Basic Law by a Hong Kong court dates from 1 July 1997, since it will have declared what the law has always been (consistent with the common law declaratory theory of judicial decisions).[17] However, in the case of an interpretation by the Standing Committee of the National People's Congress, whether on a judicial reference under Article 158(3) or on a free-standing basis under Article 158(1), applying the common law principle of finality, judgments previously rendered shall not

---

14 (1) The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law (adopted on 26 June 1999);

(2) The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law (adopted on 6 April 2004); and

(3) The Interpretation by the Standing Committee of the National People's Congress of Paragraph 2, Article 53 of the Basic Law (adopted on 27 April 2005).

15 *Democratic Republic of the Congo and others* v *FG Hemisphere Associates LLC,* FACV Nos 5, 6 and 7 of 2010. The main question of law in this case was about the extent of the state immunity from suit and execution available in the courts of Hong Kong. Is it absolute immunity or is it restrictive immunity which does not extend to commercial transactions? In other words, is sovereign immunity confined to sovereign activities or does it extend to commercial activities? The majority of the Court of Final Appeal concluded, "*the Court is bound to make a reference under Article 158(3) of the Basic Law to the Standing Committee of the National People's Congress of questions of interpretation of the Basic Law which involve Articles 13(1) and 19 which concern respectively affairs which are the responsibility of the CPG and the relationship between the Central Authorities and the Region*." (Date of judgment: 8 June 2011, at paragraph 407)

16 See Lau Kong Yung & Ors v Director of Immigration (1999) 2 HKCFAR 300, at 326G-H.

17 See *Lau Kong Yung*, cited above, at 326D-E.

be affected by the interpretation.[18] In the *Ng Siu Tung Case*,[19] the Court of Final Appeal held that "*judgments*" in the phrase "*judgments previously rendered*" only covered the formal orders pronounced by the courts in determining litigation and did not extend to the *ratio* and reasoning of a judgment. A judgment therefore only bound the parties to the litigation but not strangers to the litigation. The latter only enjoyed any benefit of a judgment by virtue of the operation of precedent. If the value of the judgment as a precedent were overturned by a subsequent interpretation of the Standing Committee of the National People's Congress, the judgment would no longer represent the law to be applied.

5.19 Since the principle that judgments previously rendered are not affected by an interpretation of the Standing Committee of the National People's Congress only applies to the actual parties to concluded litigation, individuals with a public law claim concerning the proper interpretation of the Basic Law might consider it in their interests to commence litigation to ensure that they are parties to a court judgment and therefore not affected by any subsequent interpretation by the Standing Committee of the National People's Congress which may be adverse to their interests.

5.20 It might therefore be argued that a class action regime adopting an opt-out model could conceivably dilute the effect of an interpretation by the Standing Committee of the National People's Congress since all potential claimants would automatically be parties to the judgment previously rendered unless they opted out. It has been suggested to us that a class action regime of the type we have proposed in Recommendations 1 to 3 would become, by a side wind, a vehicle for what, in practical terms, amounts to "*a radical constitutional change*." The contrary view which might be argued is that a class action regime of the type proposed does no such thing: the legal and constitutional status of an interpretation by the Standing Committee of the National People's Congress as envisaged in the Basic Law remains unaltered. It will apply to any future litigation and is binding on the HKSAR courts. Whether that interpretation affects one person or 1,000 has no bearing on the legal and constitutional position.

5.21 This particular feature of the constitutional position in Hong Kong will be further discussed below under the heading "Option 1".

Possible alternative approaches

5.22 In light of the special constitutional position in Hong Kong, it is difficult to draw direct assistance from the experience of other jurisdictions in relation to public law class actions. To deal with our particular constitutional situation, we have considered the following four options for the treatment of public law cases in a class action regime:

---

18 See *Ng Siu Tung & Ors v Director of Immigration* (2002) 5 HKCFAR 1, at para 36 and para 37.

19 See *Ng Siu Tung*, cited above.

Option 1: Public law cases should be excluded from the general class action regime and dealt with separately, leaving the class action regime for private law cases only;

Option 2: The court should be given the discretion in a public law case to adopt either the opt-in or opt-out procedure, with no presumption in favour of the opt-out procedure (as is proposed in our Recommendations 1 to 3);

Option 3: Public law cases should follow the same opt-out model that we are recommending for general application (Recommendations 1 to 3), with additional certification criteria to be put in place to filter out public law cases that are not suitable for class action proceedings; and

Option 4: Public law cases should adopt an opt-in model, so that only those persons who have expressly consented to be bound by a decision in a class action will be treated as parties to that judgment.

The arguments for and against each option are set out below.

Option 1: Exclusion of public law cases from the class action regime

Alternative approaches

5.23 We have searched for an appropriate way to exclude public law cases from the class action regime. We found that there are a number of ways in which constitutional cases (or some of them) could be excluded from the general class action regime:

(a) exclude by legislation specified subject matter from the class action regime (along the lines of, for instance, section 486B of the Australian Migration Act 1958 and section 3(a) of the Israeli Class Actions Law 2006);

(b) limit class actions to actual members of the class and exclude those who do not have a direct cause of action (such as the restriction of an application for a Group Litigation Order to a claimant or a defendant pursuant to Part 19 III of the Civil Procedure Rules in England); or

(c) allow the courts to take into account possible adverse consequences for the public of allowing a class action against the government (as is done by, for instance, clause 8(b)(1) of the Class Actions Law of Israel).

5.24 Details of these alternative approaches can be found in our discussion of Option 3 below. These mechanisms do not necessarily result in the exclusion of all public law proceedings from the general class action regime. Method (a) above only excludes specific public law subject matter from class action proceedings whilst method (b) only disallows the

commencement of class action proceedings by legal persons who have neither a direct cause of action nor a direct basis for complaint. Method (c) is a residual discretion given to the courts to refuse to certify class action proceedings on the ground that such proceedings would risk "*severe harm to the public*". These are therefore ways of carving out some constitutional cases and would not exclude all public law proceedings from the class action regime.

Arguments for and against the exclusion of public law cases from the class action regime

5.25 We outlined in our discussion above the argument that including public law cases of a constitutional nature in the class action regime could conceivably dilute the effect of a free-standing interpretation of the Standing Committee of the National People's Congress under Article 158(1) of the Basic Law, in that members of a class would benefit from a judgment rendered before the interpretation. Although there have to date been only three interpretations by the Standing Committee of the National People's Congress and it is reasonable to suppose that interpretations will continue to be made only in exceptional circumstances, the possibility of an interpretation can never be ruled out. It has therefore been suggested that it would be best to exclude constitutional public law cases from the proposed class action regime altogether. Because an interpretation would not affect those covered by judgments previously rendered,[20] and because it is likely that a greater proportion of prospective claimants would litigate if a class action regime were available than would choose to do so on their own, concern has been expressed as to whether or not the extension of the class action regime to constitutional law cases involving interpretation of the Basic Law may dilute the constitutional purpose and effect of a Standing Committee interpretation pursuant to Article 158. The basis of the argument is that including constitutional public law cases in the class action regime would have the effect of reducing the number of claimants who would be affected by the interpretation. Hence, as the argument goes, excluding constitutional public law cases from the class action regime would mean that an interpretation would impact on a larger number of prospective claimants and therefore, not dilute the effect of the interpretation.

5.26 An added difficulty, however, is that it is not always possible to predict with certainty whether or not a Basic Law question will arise in the course of proceedings. If the concern expressed about the application of an NPC interpretation is to be met, it may therefore be necessary to exclude all public law cases from the class action regime. It has been suggested that the effects of such a general exclusion would be mitigated by existing case management techniques, such as the use of a test case.[21]

---

[20] See further on the discussion of the *Ng Siu Tung* case in the preceding paragraphs under the heading "A particular constitutional feature in Hong Kong".

[21] The use of test cases will be further discussed under the heading "Test cases" below.

5.27 Nonetheless, a number of arguments can be raised against the exclusion of public law cases. Firstly, the experience of the right of abode litigation and the adverse consequences for those who were not parties to the Hong Kong court judgment which preceded the interpretation of the Standing Committee of the National People's Congress would suggest that, even in the absence of a class action regime, each individual claimant would be likely to begin a separate action. There would be a flood of cases and a race to obtain judgment to avoid the risk of an interpretation adverse to their interests. Thus, if there were a class action, a deluge of cases would be avoided.

5.28 Secondly, it can be argued that the fact that an interpretation would be likely to impact on a smaller number of persons where a class action regime applied than where it did not does not affect the legal or constitutional status or validity of the interpretation, nor can it reasonably be said to amount to a "radical constitutional change".[22] The interpretation will still apply to any future litigation and is binding on the Hong Kong courts. Whether that interpretation affects one person or 1,000 is irrelevant to the legal and constitutional position. In any case, the problem (if problem there be) is unlikely to arise in all but a tiny handful of cases and does not justify excluding from the benefits of a class action regime every claimant in a public law case. The rationale of any class action regime is to enhance access to justice for all. The number of cases which is likely to engage Article 158(3) of the Basic Law can be expected to be tiny and it is open to question whether the scale of the perceived problem is sufficient to outweigh the general public interest in enhancing access to justice.

5.29 It might also be observed that the way in which the Court of Final Appeal sought an interpretation under Article 158(3) of the Basic Law from the Standing Committee in *Democratic Republic of the Congo and others* v *FG Hemisphere Associates LLC*[23] may allay concerns of a "radical constitutional change". In deciding to seek an interpretation, the court made clear that its orders were "*subject to the Standing Committee's interpretation of the provisions concerned*" under Article 158(3).[24] The appeal will be restored to the list after receipt of the Standing Committee's interpretation, to be dealt with as appropriate. Because of this, the parties to this case will still be bound by the subsequent Standing Committee's interpretation.

5.30 As to a free-standing interpretation under Article 158(1), there can be two scenarios: (1) an ongoing case with a forthcoming interpretation; and (2) an already delivered court judgment with a subsequent interpretation. Regarding the first scenario, the court can adjourn the proceedings pending the interpretation, or make their orders subject to the interpretation as in the above *Democratic Republic of the Congo* case. In relation to the second scenario, we believe that this would only happen in very exceptional and

---

22 Under the heading "A particular constitutional feature in Hong Kong".

23 FACV Nos 5, 6 and 7 of 2010.

24 FACV Nos 5, 6 and 7 of 2010, 8 June 2011, at para 415. See also FACV Nos 5, 6 and 7 of 2010, 8 September 2011, at paras 2 and 8.

extremely rare circumstances. Such exceptionality and rarity should not be a good reason for excluding public law cases from the class action regime.

5.31 After considering the issue carefully, we do not consider that the issue of an interpretation of Article 158 would justify excluding public law cases from the class action regime. In addition, as pointed out by some of the respondents to the consultation paper, adopting a different approach for public law (as opposed to private law) litigation might be perceived as "favouritism" towards the Government.[25]

The Group Litigation Order regime in England and Wales as a model for Hong Kong

5.32 If it is decided that the class action regime should not be applicable to public law cases, there is obviously still a need to give the courts flexibility to deal with the issues involved in multi-party litigation. One alternative would be to set up a new but separate regime modelled on the Group Litigation Order ("GLO") procedure now in use in England.

5.33 The Civil Procedural Rules ("CPR") in England establish a framework for the case management of "*claims which give rise to common or related issues of fact or law*".[26] They are intended to provide flexibility for the court to deal with the particular problems created by these cases. The court is empowered to make a GLO "*where there are or are likely to be a number of claims giving rise to the GLO issues*".[27] The rules enable the court to manage the claims covered by the order in a co-ordinated way. The GLO will contain directions about the establishment of a "group register" on which the claims to be managed under the GLO will be entered and will specify the court ("the management court") which will manage the claims on the register.[28] Judgment, orders and directions of the court will be binding on all claims within the GLO.[29]

5.34 Directions given by the management court may include an order specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met. Paragraph 14.3 of the Practice Direction on Group Litigation indicates that a schedule of information on individual claims, or questionnaires, may be used to obtain the specific facts relating to each claimant on the group register. It will often be more cost effective than requiring each individual group litigant to prepare his/her own particulars of claim.

---

25 This will be further discussed towards the end of this chapter.

26 Rule 19.10.

27 Rule 19.11.

28 Rule 19.12.

29 Rule 19.12(1).

Test cases

5.35 **Test cases under a GLO** As described above in Chapter 2, under a GLO the management court is given case management powers which enable it to deal with generic issues by, for example, selecting particular claims as test claims.[30] The relevant case law and the potential problems associated with the use of a test case as a procedural device for the handling of group litigation have been discussed above.

5.36 Alternatively, the court can proceed to determine issues arising out of individual cases as generic issues. We have considered the case of *Esso Petroleum Co Ltd v David, Christine Addison & Ors,*[31] details of which have been set out in Chapter 2 of this report.

5.37 **The right of abode group litigation experience** In Hong Kong, test cases were used as a means of handling public law litigation involving a constitutional challenge in the right of abode litigation: see *Ng Ka Ling & Ors v Director of Immigration*[32] and *Chan Kam Nga & Ors v Director of Immigration*.[33]

5.38 Prior to the transfer of sovereignty of Hong Kong in July 1997 and shortly thereafter, a number of judicial review proceedings (ie HCAL 9, 13, 44 of 1997) were brought by persons claiming to have rights of abode pursuant to Article 24(2)(3) of the Basic Law.[34] The court invited the legal representatives of the parties to comment on Mr Justice Keith's proposal for the speedy disposition of those cases and later applications. The court brought another similar application to the Department of Justice's notice. Department of Justice (DoJ) on behalf of the Director of Immigration ("the Director") responded to the Court's proposals. Meanwhile, HCAL 60 of 1997 was commenced by three applicants. The DoJ was informed of the court's view that this case raised issues which would have been raised in the previous cases and also an additional issue in relation to para 1(2) of the new schedule 1 to the Immigration Ordinance introduced by the Immigration (Amendment) (No 2) Ordinance (No 122 of 1997) (which limits eligibility of right of abode to Chinese citizens whose father or mother was settled or had right of abode in Hong Kong at the time of birth of the person or at any later time) and thus should be heard first in an expedited hearing towards the end of July 1997.

---

30 Rules 19.13(b) and 19.15.

31 [2003] EWHC 1730.

32 (1999) 2 HKCFAR 4.

33 (1999) 2 HKCFAR 82.

34 Article 24(2) of the Basic Law provides:

"The permanent residents of the Hong Kong Special Administrative Region shall be (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region; (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region; (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2); …".

5.39 Clarke & Liu indicated in their correspondence to the DoJ that they were assigned by the Director of Legal Aid ("DLA") to seek judicial review on behalf of about 54 other right of abode applicants, and that they intended to select a few representative cases to canvass all relevant issues. A directions hearing was held before Mr Justice Keith (who was then in charge of the Constitutional and Administrative Law List of the Court of First Instance) during which the questions of selecting appropriate representative cases was discussed. A number of suitable representative applicants were selected to test the legal issues involved so that it would not be necessary for the court to hear each of the cases then pending before the court and these other pending cases could be stayed. As a result of this hearing, the court ordered that no further steps be taken in HCAL 9, 13, 44, 56 and 60 of 1997 until such representative cases which were to be identified and selected had been heard and determined.

5.40 At the request of the DLA, the Director agreed that for those applicants who had been granted legal aid but by whom legal proceedings had not be instituted, the Director would not remove them from Hong Kong pending the outcome of the test cases. Correspondence was exchanged between the DoJ and Clarke & Liu on the selection of appropriate representative cases. Eventually, the parties agreed that four representative cases involving five representative applicants would be selected for determination by Mr Justice Keith.

5.41 The hearing of the representative cases took place before Mr Justice Keith as scheduled. Apart from HCAL 9, 13, 44, 56 and 60 of 1997, proceedings in HCAL 79 and 107 of 1997 and HCAL 5 of 1998 were also stayed pending the determination of Mr Justice Keith in the representative cases.

5.42 Those cases eventually culminated in the judgments of the CFA in the *Ng Ka Ling* and *Chan Kam Nga* cases. Subsequently, the Standing Committee of the National People's Congress issued an interpretation of the relevant provisions of the Basic Law which had the effect of reversing a substantial part of the CFA's judgments in those cases. Thereafter, a group of over 5,000 applicants sought to obtain the benefit of those earlier judgments in the *Ng Siu Tung* case, in part arguing that they were to be treated as parties to the original cases. In this context, the CFA had occasion to examine the effect of the earlier test cases and held:

> *"In Ng Ka Ling and Chan Kam Nga, the questions at issue were contentious questions of public law. They were understood generally to be 'test cases'. It could be assumed that the principles declared, being the answers to the questions of law, in the test cases would be applied to persons in similar position. That result would come about because effect would be given by the government and its agencies in other cases to the decisions*

and, if need be, by the courts applying the doctrine of precedent."[35]

5.43 In the light of the above dicta, it is suggested that, in so far as constitutional cases are concerned, the adoption of a test case approach provides a possible mechanism for dealing with multi-party public law litigation. However, given the need for individuals to be parties to a relevant judgment in order to benefit from the principle that judgments previously rendered are not affected by a subsequent interpretation under Article 158 of the Basic Law, it may reasonably be anticipated that multi-party public law litigation may involve very large numbers of claimants. For this reason, a test case regime on its own may not be sufficient and we consider that further case management powers would need to be given to the courts to enable such litigation to be efficiently and effectively managed.

General management powers of the courts

5.44 In various class action regimes the court is given broad general management powers so that the complexity of most class actions can be dealt with and the rights and obligations of those not before the court can be determined fairly. For example, article 1045 of the Quebec Code of Civil Procedure provides:

> *"The Court may, at any stage of the proceedings in a class action, prescribe measures designed to hasten their progress and to simplify the proof, if they do not prejudice a party of the members."*

5.45 Similarly, section 12 of the Ontario Class Proceedings Act provides:

> *"12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose such terms on the parties as it considers appropriate."*

5.46 Having considered the class action legislation in a number of jurisdictions, the South African Law Commission proposed the following draft provision governing procedural matters in the case management court in a class action regime:

> *"9. (1) The court in which the class action is prosecuted shall –*
>
> *(a) give directions as to the procedure to be followed in the conduct of the class action;*

---

[35] Ng Siu Tung & Ors v Director of Immigration (2002) 5 HKCFAR 1, at 38 (para 80).

(b) *delineate the common issues to be decided in the class action;*

(c) *determine whether there are individual issues that require separate adjudication and, if so, give directions as to the procedure to be followed in order to adjudicate such issues; …"*[36]

5.47 In this context, it is relevant to note that a key proposal arising from the recent review of civil justice in Hong Kong by the Chief Justice's Working Party on Civil Justice Reform (CJR) was to give express case management powers to the court. Amendments have been made to both primary and subsidiary legislation as a result of the CJR's proposals. Order 1A has been added to the Rules of the High Court (RHC) to set out the underlying objectives (ie increasing cost-effectiveness in the court's procedures, as expeditious disposal of cases as is reasonably practicable, reasonable proportionality and procedural economy in the conduct of cases, ensuring fairness between the parties, facilitating settlement and fair distribution of court's resources), with the primary aim of securing the "*just resolution of disputes in accordance with the substantive rights of the parties*".

5.48 The court must seek to give effect to the underlying objectives when exercising its powers or interpreting the rules.[37] The parties and lawyers must assist the court to further the underlying objectives, and those underlying objectives also require active case management by the court.[38]

5.49 Active case management includes the court encouraging the parties to co-operate with each other, fixing the time-table, identifying, isolating or consolidating the issues, encouraging the parties to seek Alternative Dispute Resolution, dealing with the case without requiring the parties to attend, etc.[39]

5.50 Order 1B has been added to the RHC to set out some express powers of case management, including in particular the court's power to make orders on its own motion with or without first hearing the parties (in the latter case the parties have a right to apply to set aside the order), and to give procedural directions by way of orders *nisi* if the court thinks the parties unlikely to object to such directions.

5.51 Order 25 of the RHC has been redrafted to replace Summons for Directions with Case Management Summons and Conference procedures to facilitate active case management. Prescribed questionnaires are to be filed by all parties within 28 days after the close of pleadings. Parties who

---

36 South African Law Commission, Report on the Recognition of Class Actions and Public Interest Actions in South African Law (1998), Project 88, at 96–97.

37 Order 1A rule 2 of the RHC.

38 Order 1A rule 3 & rule 4 of the RHC.

39 Order 1A rule 4 of the RHC.

are not able to come to an agreement on the court directions to be given on case management may take out a summons seeking directions. The court is empowered to give directions and fix a case management time-table for the steps to be taken up until the date of the trial. The time-table will include milestone dates and non-milestone dates (only the latter may be varied by consent summons). Order 25 of the RHC also deals with fixing case management conferences and/or pre-trial review, etc.

5.52 The various amendments to the RHC come into effect in April 2009.

5.53 With the benefit of the new case management powers introduced as a result of the CJR, it may be that a scheme for public law litigation in Hong Kong could be modelled on the GLO in England (even in the absence of a new class action regime). In this model, the court should be empowered and encouraged to exercise a flexible management regime so that multi-party public law litigation can be dealt with efficiently, cost-effectively and fairly.

Option 2: Judicial discretion to adopt opt-in or opt-out approach in public law cases

5.54 Proposals have been put forward in England, South Africa and New Zealand that the court should have the option of adopting either an opt-in or opt-out procedure in any given case, depending on the circumstances. The tentative reform proposal in New Zealand was discussed in Chapter 2. In England, Lord Woolf stated in the *Access to Justice (Final Report)*:

> *"The court should have powers to progress the MPS ["multi-party situation"] on either an 'opt-out' or an 'opt-in' basis, whichever is most appropriate to the particular circumstances and whichever contributes best to the overall disposition of the case. In some circumstances it will be appropriate to commence an MPS on an 'opt-out' basis and to establish an 'opt-in' register at a later stage."*[40]

5.55 The Civil Justice Council's (CJC) November 2008 report on "*Improving Access to Justice through Collective Actions*" took a similar line to that of the Woolf Report and considered that both the opt-in and opt-out approaches to collective actions had their merits. Key Finding 9 of the CJC's report was that:

> *"There should be **no presumption** as to whether collective claims should be brought on an opt-in or opt-out basis. The Court should decide, according to new rules, practice directions and/or guidelines, which mechanism is the most appropriate for any particular claim taking into account all the relevant*

[40] Lord Woolf, *Access to Justice* (Final Report, 1996) at 236, para 46.

circumstances. In assessing whether opt-in or opt-out is most appropriate the court should be particularly mindful of the need to ensure that neither claimants' nor defendants' substantive legal rights should be subverted by the choice of procedure."[41] (original emphasis)

5.56 The CJC therefore recommended that it should be possible to bring collective claims on an opt-in or an opt-out basis, subject to court certification. Where an action is brought on an opt-out or an opt-in basis, the limitation period for class members should be suspended pending a defined change of circumstance.[42]

5.57 The South African Law Commission recommended that the proposed legislation on class actions should provide for the notice requirement to class members and prospective class members. After a thorough review of the various notice regimes, the South African Law Commission found in favour of the discretionary approach of the Ontario Law Reform Commission and recommended that the court's discretion should be further extended by providing a choice between an opt-in notice (in limited circumstances), an opt-out notice and no notice at all. The underlying reasons are set out as follows:

"We believe that the discretionary approach adopted by the Ontario Commission is appropriate for the reasons stated. However, it is recommended that the court's discretion should be further extended by providing a choice between opt-in notice (in limited circumstance), opt-out notice, and no notice at all. The reason for disagreeing with the rejection of opt-in proceedings is that there are circumstances in which the members of the class have such substantial claims that they might suffer severe prejudice in the event of the action failing or not being as effectively prosecuted as it could be. Such a judgment would make the individual claims res judicata and prevent any further litigation on the same issue. In these circumstances it is important to ensure that the claimants have knowledge of the action and the way in which it is being prosecuted if they are to be bound by it."[43] (Emphasis added)

5.58 The South African Law Commission also made it clear that the opt-in notice requirement should only be applied as an exception to the general opt-out rule and should be ordered only in limited circumstances. It discussed the US regime and stated its reason why the opt-in notice should be an exception rather than the rule as follows:

---

41 Civil Justice Council of England & Wales, "Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions" (November 2008), at 18-19.

42 See above, at 145.

43 South African Law Commission, *The Recognition of A Class Action in South African Law* (Working Paper 57, 1995), para 5.23.

"While it is suggested that requiring opt-in notice should be an option open to the court, it is accepted that the giving of this kind of notice should be the exception rather than the rule. The reason for preferring opt-out to opt-in procedures which is attributed to the drafters for the 1966 amendment [to Rule 23 of the US Federal Rules of Civil Procedure] is entirely valid. A large percentage of South African society is illiterate, ignorant and impecunious because they have been denied the benefit of a good education. The need to ensure that benefits flowing from class actions accrue to such people is probably far greater in South Africa than in the United States. For this reason it is recommended that the court should order opt-in notice only where the court is of the opinion that the class members may be significantly prejudiced by the fact they will be bound by a judgment given in an action which may not have come to their notice. The kind of case in which it is envisaged that there would be significant prejudice would be, for instance, where a large number of people suffer damages as a result of the same incident, such as an airplane crash. Where the individual claims are sufficiently large to make it probable that they would enforce their own claims then they should not be bound by a judgment unless they have expressly consented to be bound. …"[44] (Emphasis added)

5.59 It could be argued that if the class action regime in Hong Kong were to allow the court to decide whether the opt-in or opt-out procedure would apply in any given case, this would enable the court to take into account the possible constitutional prejudice caused to the HKSAR by a binding judgment given in an opt-out class action, assuming that the HKSAR Government could say at the outset that the Basic Law question was likely to attract an interpretation by the Standing Committee. On the other hand, once it became known that the Government was asking for the opt-in procedure to apply because of a possible interpretation by the Standing Committee, that would itself be likely to cause large numbers of litigants to opt in. It may therefore make little practical difference whether an opt-out or an opt-in procedure is adopted.

5.60 A further question to consider is whether it is appropriate to give the court a discretion to decide in public law cases in which Basic Law provisions are not invoked (and the potential problem of an interpretation of the Standing Committee of the National People's Congress does not therefore arise) whether an opt-out or an opt-in regime should apply. In such cases, adopting an opt-in procedure would merely add to the cost of the action.

5.61 A final issue is that, if the court is given a discretion, principles will need to be developed as to how that discretion is to be exercised. The

---

[44] South African Law Commission, *The Recognition of A Class Action in South African Law* (Working Paper 57, 1995), para 5.25.

court will have to be guided by a balance between justice and convenience, and such consideration as is thought appropriate of the NPC interpretation issue we have discussed above.

Option 3: Opt-out model for class actions in public law cases

5.62 If an opt-out model for class actions is adopted, absent members would be included in the class and a subsequent interpretation of the Standing Committee of the National People's Congress would have no practical effect upon them. In practical terms, the number of those who are parties to a class action judgment where the opt-out procedure is adopted will inevitably be greater than if the litigation had been conducted under the opt-in procedure: the individual must take positive steps to join the class under the latter procedure; he need do nothing under the former.

5.63 Even if an opt-out model were to be adopted for class actions in Hong Kong, there may be a need to introduce additional criteria for certifying public law actions. We have considered a number of possible restrictions to the application of a general class action regime to public law cases with regard to the subject matter, the identity of the applicant for certification of a class action, or possible adverse consequences for the public of allowing a class action against the government.

5.64 **(a) exclude certain subject matter** Section 486B of the Migration Act 1958 (Aus) (which was introduced with effect from 1 October 2001) provides that class actions are not permitted in migration proceedings (that is, proceedings which raise an issue in connection with visas, deportation, or removal of unlawful non-citizens).[45]

5.65 Section 3(a) of the Israeli Class Actions Law 2006 provides that no class action may be submitted for certification as a representative claim "*unless it is a suit as specified in the second addition [to this Law] or in a matter set in an explicit instruction of the law, which allows for the submitting of a class action*". The second addition to the Class Actions Law sets out a list of causes of action in respect of which a plaintiff may request that a court certify a claim as representative. The final item on the list, item 11, provides that a request for certification of a claim as representative may be made *vis-a-vis* claims against a state agency for return of unlawfully collected moneys, including taxes, fees, or other mandatory payments. Ms Shirley

---

[45] The amendment reflected the Federal Government's policy intention to seek to address the increasing use of class action litigation by people with no lawful authority to remain in Australia to obtain a bridging visa and thereby substantially extend their time in Australia. Class actions were being used to encourage large numbers of people to litigate in circumstances where they would not otherwise have litigated. It was believed that large numbers of people were being encouraged to participate in class actions in order to obtain a visa. They did not have a lawful entitlement to be in Australia but used class actions in order to access a bridging visa (see the submissions of the Australian Department of Immigration and Multicultural Affairs as summarised in paras 1.6-1.15 of Joint Standing Committee on Migration of the Parliament of the Commonwealth of Australia, *Review of Migration Legislation Amendment Bill (No 2) 2000*, (October 2000).

Avner of the Israeli Ministry of Justice expressed the view to us that the most efficient filter to weed out unsuitable administrative law cases was the adoption of a limited, incremental approach where new causes of action in specific areas could be added over time to the list after careful deliberation. Therefore, the filing of suits as class actions should be confined to the causes of action listed in the second addition to the Class Actions Law.[46]

5.66 Thus, precedent elsewhere demonstrates that, by means of specialist legislation, certain types of class actions could be excised from the ambit of a generic Hong Kong class action.

5.67 **(b) limit class actions to members of the class** Professor Mulheron has suggested that, if a Hong Kong class action regime were to be drafted so as to require that any class action in relation to a public law matter must be brought by a *member of the class*, then purely "ideological claimants" would be disallowed. By "ideological claimant" is meant a legal person (such as a trade union or community organisation) which does not have any direct cause of action or a direct basis for complaint, other than provisions contained in its articles of association indicating linkage with the subject matter of the proceedings. As a practical matter, this is a way of limiting certain public interest litigation (especially if the class member is subject to a security for costs order with which he cannot comply) to parties with direct causes of action. In Hong Kong, standing requirements are in order 53 rule 3(7) of the Rules of the High Court which provides that: "*the court shall not grant leave [to apply for judicial review] unless it considers the applicant has a sufficient interest in the matter to which the application relates*". "Ideological claimants" would have to satisfy these existing requirements before they could start any public law litigation. However, they would have to further pass the "direct interest" hurdle before they could be considered a member of the class.

5.68 In England, para 3.1 of Part 19B of the Practice Direction provides that any application for a Group Litigation Order (GLO) under Part 19 III of the Civil Procedure Rules may be made only by a claimant or a defendant. Therefore any claimant under the GLO must be a class member. That procedure is therefore not available to an "ideological claimant".

5.69 If the approach suggested by Professor Mulheron were adopted in Hong Kong, a public law case could not be brought in Hong Kong by a claimant representing a class of claimants unless the individual claimant himself had a direct cause of action. While this approach would exclude certain public law cases from the scope of a class action regime, it would seem difficult to justify excluding non-class member claimants from public law cases but not, for instance, from private actions on consumer or environmental issues. While it might be possible to exclude public law litigation from a generic class action regime by means of a specific legislative exclusion or by requiring a class action to be brought by a "member of a

[46] Email to the Secretary of the Sub-committee dated 17 May 2009 from Shirley Avner, Advocate, Head Counselling Assistant, Ministry of Justice, Israel.

class", we do not recommend proceeding in this way, as this would be a piecemeal approach.

5.70 **(c) allow the courts to take account of possible adverse consequences for the public** We have also considered the provisions of the Israeli Class Actions Law 2006 which allow the court, in deciding whether or not to approve an application for a class action against the state, to consider the possible adverse consequences for the public of allowing the litigation to proceed by way of a class action. Opponents of the use of class actions against the state in Israel argue that a distinction can be drawn between the state and other legal entities in this context. They argue that there are a number of factors which should legitimately exclude the possibility of class actions against the state:

(a) in Israel, there exists an alternative, superior mechanism for protecting the kind of public goals that representative actions are intended to attain in other jurisdictions, namely, direct petitioning of the Israeli Supreme Court, sitting as the High Court of Justice, in matters pertaining to the legality of actions and decisions of the state;

(b) The inability to bring class actions against the state does not undermine the existing rights of Israeli litigants to sue the state, in the same way as any other entity, for any individual damage caused; and

(c) The possibility of compelling state authorities by way of a class action to return unlawfully collected dues, taxes, fees or other mandatory payments would not only cause havoc for public administration (particularly for local authorities) but would be contrary to the interests of the public, as funds collected by state authorities are used to serve public interests, and not for private gain.

5.71 The Class Actions Law of Israel was passed on 12 March 2006. The national report submitted by Amichai Magen and Peretz Segal to the Globalization of Class Actions Conference pointed out that the provision represents:

> *"a compromise between proponents and opponents [of the availability of class actions against the state] where, on the one hand representative action against the state has been included in the list of causes of action which can be pursued by means of representative suits, while on the other hand, the Law contains a number of instruments designed to address the concerns voiced by opponents by granting the state … protection."*[47]

5.72 Clause 8(b)(1) of the Class Actions Law of Israel provides that where:

---

[47] Amichai Magen & Peretz Segal, "*National Report: Israel*", report to the Globalization of Class Actions Conference, December 2007, at 20.

"A request for approval [of a class action] was submitted against the state, one of its authorities, a local authority or a corporation lawfully established, and the court was convinced that the very fact of the suit being managed as a class action may cause severe harm to the public in need of the defendant's service or the public in general versus the benefit expected to come to the group members and the public by managing the suit in this way, and the damage cannot be prevented by way of approving changes as aforementioned in clause 13 [which empowers the court to approve a class action in such changed form as it deems necessary to ensure a fair and efficient management of the class action], the court is allowed to take this into consideration when deciding whether to approve a class action ... ."

5.73 Ms Shirley Avner of the Israeli Ministry of Justice informed us that clause 8(b)(1) of the 2006 Class Actions Law evolved from similar tests that were set out in specific Israeli laws in relation to class actions against banks and insurance companies. No reference was made to overseas experience during the legislative process. Ms Avner advised us that there have been few court cases which have considered and interpreted the "*severe harm to the public*" test. In each case, the court has rejected the request for certification for other reasons, such as failure to exhaust all other legal remedies (especially in suits against the tax authorities, since in Israel there are special appeal committees), or the fact that the suit does not rely on one of the causes of action specified in the second addition to the 2006 Class Actions Law. There have been no cases where changes to the suit have been approved under clause 13 to prevent the "*severe harm to the public*" which would otherwise be caused by a class action. If a similar provision were to be adopted in Hong Kong, it might be argued that the possible precipitation of a constitutional dilemma would constitute "severe harm to the public" on the facts of the case and would therefore be sufficient to justify the exclusion of class action proceedings in a constitutional case against the government.

5.74 The opt-out approach creates a more all-embracing class, including its silent members. It may be argued that a class action regime does not invalidate an interpretation by the Standing Committee of the National People's Congress under Article 158(3) of the Basic Law. Apart from restricting the application of a general class action regime to public law cases in the ways discussed above, we have also considered practical steps which could be taken when a public law case comes up for certification. If the HKSAR Government considers that the Basic Law question is likely to be interpreted by the Standing Committee, a temporary stay of the application might be sought and granted upon terms which would preserve the status quo for all parties. The Hong Kong courts will in any event be bound by the interpretation in subsequent cases. On the other hand, it involves the HKSAR Government indicating a likelihood of interpretation by the Standing Committee of the National People's Congress. It might be argued that this suggestion creates some difficulty since references to the Standing

Committee of the National People's Congress can come about in two distinct ways: either because of the judicial reference mandated by Article 158(3) or by a free-standing interpretation under Article 158(1). Expecting the HKSAR Government to announce an intention to seek an interpretation where the relevant Basic Law provision is not an excluded provision which would require a judicial reference mandated by Article 158(3) might be thought to be unrealistic. Moreover, the announcement of such an intention itself might well precipitate a constitutional dilemma.

Option 4: Opt-in model for class actions in public law cases

5.75 The last option we have considered is to adopt the opt-in model as the default position for multi-party public law litigation in Hong Kong, so that only those persons who have expressly consented to be bound by a decision in a class action will be treated as parties to that judgment. This would enable and facilitate multi-party public law litigation in Hong Kong, while at the same time avoiding the possible constitutional difficulty to which we have referred.

5.76 As the opt-in model would not bar an individual who has not opted in to the class proceedings from subsequently litigating over the same issue, it is unlikely that this model could be said to interfere with the right to access to court protected under the Hong Kong Bill of Rights and the Basic Law. In the circumstances, the adoption of opt-in procedures for public law class actions would be unlikely to give rise to any objections under Article 10 of the Hong Kong Bill of Rights or Article 35 of the Basic Law (access to the courts), or under Articles 6 and 105 of the Basic Law (protection of property rights).

Consultation and conclusion

5.77 The discussion of the above options has taken account of Hong Kong's unique constitutional circumstances and the significance of Article 158 of the Basic Law. Chapter 5 of the Consultation Paper did not reach a firm decision on the matter and invited the community's views before drawing any conclusion.

5.78 There was more or less the same support for each of these four options from those who responded on the issue: four respondents in favour of options 1 and 2, five respondents in favour of option 3 and three respondents in support of option 4.[48] The Law Society of Hong Kong favoured option 1 as they did not consider a convincing case had been made out for introducing a class action regime for public law cases. They also considered that the present separation of public law and private law cases should be maintained.

[48] Democratic Alliance for the Betterment and Progress of Hong Kong observe that as this matter involves an important "constitutional reform", views from various parties should continue to be canvassed before drawing a conclusion at a later stage.

This view was shared by the Society for Community Organisation. The Bar Association supported the opt-out model under option 3 with additional certification criteria to filter out unsuitable cases, and believed that concerns about Article 158 did not justify disapplying the regime to public law cases.

5.79 In supporting option 2, Allen & Overy saw no rational basis for carving out public law claims from class actions, and private enterprises would be justified in asking why they should be exposed to class action risks where the government had immunity. Similarly, the Department of Justice (Civil Division) also believed that sufficient justification was needed to avoid being accused of being discriminatory against claimants who wished to invoke their constitutional rights in a class action. Otherwise, such differentiation between public and private law cases may be challenged on its constitutionality.[49] The department also pointed out that if a case was to be denied the utility of a class action once it involved the interpretation of a Basic Law provision, the class action regime might be emasculated by litigants who pleaded a defence or counterclaim hinging on the interpretation of such a provision. The department, however, considered that the opt-out approach might not be appropriate for public law cases, especially immigration cases where large numbers of people who had no right to enter or remain in Hong Kong might abuse the system by staying in Hong Kong pending final resolution of their cases. The problem is particularly acute under an opt-out approach as the identities and numbers of such people may be unknown. The department therefore preferred an opt-in approach (option 4) which may better contain the possible adverse effect of depriving an NPCSC interpretation of any practical effect, and may enable the court to obtain more accurate information in respect of class members before deciding whether the proceedings should be certified as a class action. In response, we stress that the consultation paper recommended the opt-out approach only as the default position, subject to the court's discretion to order an opt-in approach in the light of the specific circumstances of the case. In any event, such illegal residents will still need to come forward to substantiate their claims after the determination of the common issues even under the opt-out approach as this type of cases hinges very much on the facts of each case. If they cannot substantiate their claims, the authority can then deport them.

5.80 We believe there is a clear need to devise procedures to cater for group litigation in public law cases. We further believe that the present separation between public law and private law cases should be maintained as supported in the responses from the public. At present, public law cases are initiated in the Court of First Instance of the High Court and are governed by Section 21K(1) of the High Court Ordinance and Order 53 of the Rules of the High Court. We recommend that there be no change to this basic system and that any group litigation regime should be built upon it. We note that the Bar Association agreed with this approach.

---

[49] For example, under Article 25 (equality before the law) and Article 35 of the Basic Law (access to the courts), as well as Article 1 (rights shall be enjoyed without distinction), Article 10 (equality before the courts and tribunals) and Article 22 (protection against discrimination) of the Hong Kong Bill of Rights.

5.81 The remaining questions are whether the class actions regime should apply to public law cases and, if so, whether the opt-in or opt-out approach should be adopted. We understand that public law cases do not need to invoke the class actions regime. The principle-declaratory stage, which is applicable to all, could be dealt with by the test case approach as demonstrated in Canada and our local right of abode group litigation experiences as discussed above. After all, the individual circumstances of each claimant still need to be addressed separately.

5.82 After taking into account the public responses and the relevant issues, we believe that it would be advantageous to invoke the class actions regime in public law cases for the sake of finality and prevention of a flood of individual cases. We have already carefully considered the issue of an interpretation under Article 158 and have concluded that this issue would not justify excluding public law cases from the class action regime.[50] Furthermore, as the regime would apply to private law cases, it should also apply to public law cases for consistency's sake. As highlighted by some of the respondents to the consultation paper, adopting a different approach for public law cases might be perceived as "favouritism" towards the Government or discrimination against public law claimants. The constitutionality of adopting different approaches might be challenged. We are acutely aware of this possibility and recommend that there should be a uniform approach. We consider the same opt-out approach should be adopted as the default position for both public and private law cases, provided the court is empowered to choose the opt-in approach on its own initiative or if the defendant can show cause. The approach for public law and private law cases would then be consistent, which would address the "favouritism"/discrimination concern.

Recommendation 4

We recommend that:

(1) the new class actions regime should apply to public law cases, in addition to the current section 21K(1) of the High Court Ordinance (Cap 4) and Order 53 of the Rules of the High Court; and

(2) an opt-out approach should be the default position unless the court orders otherwise in the interests of justice and the proper administration of justice.

[50] See the discussion under the heading "Option 1" earlier in this chapter.

Chapter 6

Choice of plaintiff and avoidance of potential abuse

Introduction

6.1 We consider that where there is a risk in a class action that the successful defendant will not be able to recover his costs from an impecunious plaintiff acting as the class representative, appropriate protection should be put into place against such unsuccessful claims. A related question arises from the Australian experience, where the law firms acting for the representative in class actions have had to deal with a large number of procedural disputes raised by the defendant.[1] The funding of indigent plaintiffs is an issue which needs to be addressed by any class action regime. We will deal with the funding issue in Chapter 8 of this report.

6.2 To avoid abuse of the process of the court and to ensure that those put at risk of litigation should be fairly protected, we believe that procedural safeguards should be established. The feasibility of relying on the usual principle of abuse of the process of the court is examined. We have considered whether funding proof should be provided upon certification of a class action by the representative. We have also studied the applicability to class actions of the established principles on security for costs so as to strike the right balance in allowing reasonable access to justice by indigent litigants whilst at the same time giving sufficient protection to defendants.

---

[1] The situation is described by the Australian courts as follows:

"there is a disturbing trend that is emerging in representative proceedings which is best brought to an end. I refer to the numerous interlocutory applications [lodged by defendants], including interlocutory appeals, that occur in such proceedings. … By giving appropriate directions the court can ensure that the parties get on with the litigation and do not become bogged down in what are often academic or sterile arguments about pleadings, particulars, practices and procedures. It is not unknown for respondents in class actions to do whatever is necessary to avoid a trial, usually by causing the applicants to incur prohibitive costs. The court should be astute to ensure that such tactics are not successful". (Bright v Femcare Ltd (2002) 195 ALR 574, at 607).

"many class actions become bogged down by interminable and expensive interlocutory applications and protracted and even more expensive appeals from interlocutory orders" (Bray v F Hoffmann-La Roche Ltd (2003) 200 ALR 607, at 660).

The problem identified

6.3 It is a general feature of class action regimes that if the class loses, the class members enjoy specific and unilateral costs immunity. This immunity is statutorily provided in, for example, Australia,[2] British Columbia[3] and Ontario.[4] However costs are generally awarded against the representative plaintiff in an unsuccessful class action. In such circumstances, there is a strong incentive on the part of the class members to structure class action proceedings so as to avoid wealthy class members paying adverse costs. If the defendant wins the action (or wins the certification battle at the outset), and obtains an award of costs in its favour, it can easily be confronted with significant legal costs, which cannot be recovered. This was recognised by Senator Vanstone in the Australian parliamentary debates concerning the enactment of the costs immunity provision for class members (section 43(1A) of the Federal Court of Australia Act 1976 (FCA Act)). Senator Vanstone said:

> *"The coalition supports the general principle that a court should not be able to award costs against a person on whose behalf a proceeding has been commenced, especially since that person could have been joined to the action without their knowledge or consent. However, we believe there is scope for abuse. For example, relative wealthy members of a class who are considering bringing an action could deliberately choose an impecunious representative party. Then, if the action is unsuccessful and it is only the representative party which or who can be liable for costs, the defendant will not be able to recover any costs. Therefore, we believe that the court should have discretion in exceptional circumstances to award costs against persons on whose behalf a proceeding has been commenced. Obviously this would only apply when required in the interests of justice."*[5] (Emphasis added)

6.4 The fact that the representative claimant may be poorly-funded also has ramifications in other ways (eg who is going to pay for the costs of the opt-out notice if the class action is allowed to progress and an opt-out notice is thus required?) Individual notices to class members whose identities are known, and media advertisements of the class action, can be expensive.

6.5 There are four ways in which the indigent representative claimant issue can be handled, either within the class action regime itself or by recourse to the usual civil procedural rules. They are discussed in the following paragraphs.

---

2 Federal Court of Australia Act (Aus), sections 33Q, 33R and 43(1A).

3 Class Proceedings Act (BC), section 37(4).

4 Class Proceedings Act (Ont), section 31(2).

5 Parliamentary Debates, Senate (Cth), November 24, 1992, 3348.

Reliance on vexatious/abusive rules of court

6.6 Deliberately choosing a "straw" claimant with no financial means could be construed as vexatious and abusive conduct, thereby bringing the proceedings to a halt on that basis. Whilst no cases can be found in Australia or Canada where the proceedings have been stopped on that basis, it is acknowledged as a possible ground of objection.

6.7 Notably, this argument was run by the defendants in the Australian case of *Cook v Pasminco Ltd (No 2)*, where an undischarged bankrupt was chosen as the representative plaintiff. The propriety of avoiding costs liabilities has been considered by Lindgren J:

> *"But faced with a number of potential representative parties, solicitors are not obliged to make a choice in the interests of the prospective respondent. No doubt a variety of factors may lead to one person rather than another becoming representative party, such as the proximity of the person to the solicitors' office; ease of communication between the solicitors and the person; degree of interest and involvement; likely performance as a witness; the facts of the individual cases.*
>
> *Assume now that one prospective representative party is a person whose means appear to be sufficient to meet, wholly or partially, an adverse costs order, while another is almost insolvent. Solicitors are not subject to any legal or ethical obligation to choose the former. Certainly they could not be criticised for choosing the latter. It may even be suggested (I express no view) that they owe a duty to the former to choose the latter, unless other factors suggest a different choice."* [6] (Emphasis added)

6.8 The Australian court was not prepared to draw adverse inferences as to why an undischarged bankrupt was chosen as the representative plaintiff in that case. A more critical stance towards the structuring of class action to avoid liability for costs can, however, be found in the Canadian case of *Sturner v Beaverton (Town)*, where Middleton J said in respect of a representative proceeding:

> *"In this case it is not said that Hamilton 'merely has an interest in the suit'. It is said and shewn that it is his suit and that he has been guilty of something in the nature of barratry and maintenance, because, desiring to try his own right, he has procured this man of straw to allow the litigation to be brought in his name.*
>
> *This, as the cases show, is an abuse of the process of the Court, and I think a contempt of a most serious character, because the Court, which is called into existence to administer justice, is*

[6] (2000) 107 FCR 44, at 29-30.

> *being used as a tool and instrument by which an injury is inflicted, it is said, it can in no way redress.*
> …
> *Can there be a fraud which this Court ought to visit more strongly than the conduct pursued in this case, in which, in order to avoid the payment of the costs of a doubtful litigation, to which the plaintiff might be made liable, the real plaintiff procures a pauper to become the nominal plaintiff …?"* [7]
> (Emphasis added)

6.9 This passage was cited with approval by Dawson J in *Knight v FP Special Assets Ltd*. In this case, the High Court of Australia held that the Supreme Court of Queensland had the power to order costs against the receivers and managers of two insolvent companies that were not parties to the litigation in question. In so holding, the majority justices stated that it is:

> *"appropriate to recognise a general category of case in which an order for costs should be made against a non-party … . That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party … has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."* [8]
> (Emphasis added)

6.10 In the light of the above, it is always open to a court to draw that inference or impose such an obligation if the sense of frustration of the defendant sufficiently convinces the court that a "straw plaintiff" is being used to shield more financially viable class members from costs orders. However, we have come to the view that the usual vexatious/abusive provisions of the court rules and the principles distilled from case law are not sufficiently effective because they are not aimed at tackling the problem of impecunious class representatives. Instead, we prefer the following options which set out qualifying criteria for certification.

The representative certification criterion

6.11 One of the certification criteria in any opt-out class action regime is the "*adequacy of the representative claimant*". This has been held to include that the representative claimant has the ability to satisfy any adverse costs order that might be awarded against it. If the representative claimant has no means of proving to the court that it can do that, then certification of the class action may be disallowed (or at least with that particular representative claimant).

---

7 (1912) 2 DLR 501.

8 (1992) 174 CLR 178, at 201-202.

6.12 The financial resources of the representative claimant have figured in the assessment of the adequacy of the representative at the certification stage in cases from both Commonwealth and US jurisdictions. In the case of *Fehringer v Sun Media Corp*, the Ontario court was of the view that the class representative's financial resources should be a relevant consideration in determining whether he or she will be an adequate representative. It was held that:

> *"the court must be satisfied as to the financial ability of the representative plaintiff to bear the expense that is necessarily involved for the proper prosecution of a class action …. The absence of such evidence leaves the court without an essential element necessary to conclude that the proposed representative plaintiff would fairly and adequately represent the interests of the class."*[9] (Emphasis added)

Funding proof at certification

6.13 We are of the view that a new Hong Kong class action regime should also contain an explicit provision that the representative must prove to the satisfaction of the court that suitable funding and costs-protection arrangements (on the part of the representative claimant and/or his lawyers) have been made for the litigation. This type of enquiry could feasibly form part of the certification enquiry.

6.14 Although this explicit criterion has not been enacted in any of the class action regimes we have reviewed, we consider that it does bear some similarity to the requirement, in the US regime, of rule 23(g)(1)(B) of the Federal Rules of Civil Procedure which provides that the court must appoint a class counsel who, it is satisfied, will *"fairly and adequately represent the interests of the class*". Under rule 23(g)(1)(C)(i), the court must explicitly consider the "*resources counsel will commit to representing the class*". This provision is unique amongst the class actions statutes. By analogy, it seems reasonable to ensure (by means of an explicit provision in the legislation establishing the class action regime) that the court should be satisfied of the ability of the class representative to satisfy any adverse costs order, should it lose.

Security for costs

6.15 In the context of class actions, the deliberate structuring of a representative proceeding under Part 4A of the *FCA Act* so as to immunise solvent class members from an order for costs may result in the making of a

[9] (2002), 27 CPC (5th) 155 (SCJ), at para 35.

security for costs order.[10] In *Ryan v Great Lakes Council*, the court observed:

> *"If the group members or some of them were impecunious companies or persons ordinarily resident outside Australia and a 'person of straw' had been deliberately chosen to be the representative party, it might be appropriate to order that the representative party provide security and that the proceeding be stayed until the security was provided."*[11]

6.16 Law reform agencies held different views on whether the defendant should have a general right to make an application for security for costs. Some strongly opposed this[12] while others were in support.[13] Professor Mulheron commented that:

> *"The purpose of security for costs rule is to enable a successful defendant to be partially protected where party and party costs are awarded against the losing representative plaintiff; and if security is not awarded, this may well cause the defendant considerable hardship if it is eventually successful and cannot recover those costs. On the other hand, the practical effect of allowing security for costs could be to deter meritorious claims where the representative plaintiff seeks to represent others similarly positioned, is not well-off, and has only a modest personal claim."*[14]

6.17 The Australian Commonwealth Parliament expressly provides in section 33ZG of the FCA Act that:

> *"Except as otherwise provided by this Part, nothing in this Part affects:*
>
> *…*
>
> *(c) The operation of any law relating to*
>
> *…*
>
> *(v) security for costs."*

6.18 Section 56 of the FCA Act empowers the Federal Court to order security for costs in an amount and at a time it specifies. The relevant rules governing the furnishing of security for costs can be found in Order 28 of the

---

10 Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co, 2005), at para 5.220.

11 *Ryan v Great Lakes Council* (1998) 155 ALR 447, at 456.

12 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) [270] and Ontario Law Reform Commission, *Report on Class Actions* (1982), at 745-46.

13 South African Law Commission, *The Recognition of a Class Action in South African Law* (Working Paper No 57, 1995), at 5.43, was in favour of a security for costs regime provided that the court should consider when exercising its discretion in relation to security for costs whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest; see also South African Law Commission, *Report on The Recognition of Class Actions and Public Interest Actions in South African Law*, para 5.17.5.

14 R Mulheron, *The Class Action in Common Law Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 368.

Federal Court Rules.[15] The principles that may be distilled from the Australian case law are summarised as follows:[16]

(a) Ordinarily a representative party will sue for itself and others. If so, the circumstances described in O28 r3(1)(b) of the Federal Court Rules (ie an applicant is suing, not for the applicant's own benefit, but for the benefit of some other person) will not exist;

(b) Where the applicant is a corporation, the Federal Court exercises its discretion to order security for costs under either section 1335 of the Corporations Act 2001 (Cth)[17] or section 56 of the FCA Act;

(c) Where the applicant is a natural person, the Federal Court exercises its discretion to order security for costs under section 56(1);

(d) The fact that group members have an immunity to costs orders under section 43(1A) of the FCA Act is irrelevant to the determination of an application for security for costs under section 56(1);

(e) A representative proceeding is brought for the benefit of others. This is a factor which may favour making an order for security for costs;

(f) An impecunious natural person may be ordered to provide security for costs. The traditional rule that security for costs will not be ordered against a natural person by reason only of his impecuniousness (as poverty is no bar to a litigant), does not apply.

---

15 Order 28 rule 3 of the Federal Court Rules provides:

"Cases for security

(1) When considering an application by a respondent for an order for security for costs under section 56 of the Act, the Court may take into account the following matters:

(a) that an applicant is ordinarily resident outside Australia;

(b) that an applicant is suing, not for the applicant's own benefit, but for the benefit of some other person and the Court has reason to believe that the applicant will be unable to pay the costs of the respondent if ordered to do so;

(c) subject to sub rule (2), that the address of the applicant is not stated or is incorrectly stated in the originating process;

(d) that an applicant has changed address after the commencement of the proceeding in an attempt to avoid the consequences of the proceeding."

16 Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co, 2005), at para 10.200.

17 Section 1335(1) of the Corporations Act 2001 provides:

"Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given."

(g) Even if the traditional rule against ordering that security be given by an impecunious natural person survived the enactment of section 56 of the FCA Act, it has little relevance to representative proceedings. The characteristics of the group members are important in exercising the discretion with respect to security for costs and are perhaps more significant than the characteristics of the representative party;

(h) Whether security for costs ought to be ordered in a representative proceeding, as in a non-representative proceeding, is a question to be determined by reference to the whole of the circumstances;

(i) Three features of representative proceedings which are relevant to the making (as opposed to the *quantum*) of a security for costs order are:

i. the identity and characteristics of the group members;

ii. the source of funding of the proceedings; and

iii. the merits of the claims.

(j) As part of the first feature identified in point (i) above it may be relevant to consider whether security for costs would be ordered against the individual group members if separate proceedings were brought by them against the respondent;

(k) A relevant consideration in the exercise of discretion whether or not to order security for costs is any delay in moving the Federal Court for an order for security for costs.

6.19 As discussed in the case of *Cook v Pasminco Ltd (No 2),*[18] the lawyers for the class are not obliged to take the interests of the prospective defendant into account when choosing the representative plaintiff. On the facts of that case, there was no evidence presented to the court to prove why an undischarged bankrupt had been chosen as representative plaintiff, and the court was not prepared to draw any inferences.

6.20 On the other hand, a more robust view was expressed by the Full Federal Court in *Bray v F Hoffmann-La Roche Ltd*:

> *"Depending upon the particular circumstances, I do not think that an order providing reasonable security for costs necessarily operates indirectly to remove the effect of the immunity provided by s43(1A). It is one thing for a group member to be saddled with an order for what might be joint and several liability for a very substantial costs order at the end of the hearing of a representative proceeding, but it is another thing to have the choice of contributing what might be a modest amount to a pool by which the applicant might provide security for costs. It is a question of balancing the policy reflected in s43(1A) against the*

[18] (2000) 107 FCR 44, at 29-30.

risk of injustice to a respondent … which, on the admitted facts, has no chance of recovering very substantial costs from the applicant if it is successful in defending the proceedings. Much would depend upon the number of group members involved, their financial circumstances and in particular whether an order for security for costs might stifle the proceedings. In that regard, in my opinion, it was for the applicant to adduce evidence about the likely effect of any order for security for costs."[19] (Emphasis added)

6.21 The Full Court in *Bray v F Hoffmann-La Roche Ltd* held that:

(a) there was no inconsistency between an order for security and section 43(1A);[20]

(b) it was not a condition precedent that there be shown to be group members "of substance", or that the representative plaintiff was deliberately selected as a "person of straw";[21]

(c) some of the features relevant in determining whether to require security include:

(i) the characteristics of the group;

(ii) who is responsible for "interminable and expensive interlocutory applications and protracted and even more expensive appeals from interlocutory orders";

(iii) who is funding the litigation, and whether the representative plaintiff's solicitors are acting on a conditional fee basis;

(iv) the merits of the claim.[22]

6.22 The more robust attitude to security for costs is evident from the following statement of Finkelstein J in the same case:

"While class actions provide many benefits to the community, they have their attendant dangers. They can be used as an instrument of oppression. It is not unknown for a class action to be brought in relation to an unmeritorious claim in the hope of compelling the defendant to agree to a settlement to avoid the enormous expense of fighting the case. Those types of action can be discouraged by an appropriate order for security."[23] (Emphasis added)

6.23 Finkelstein J's approach has been criticised by commentators. In circumstances where group members may be large and financially strong,

---

19 (2003) 200 ALR 607 (Full FCA) at 141-142.

20 (2003) 130 FCR 317, at paras 141 and 250.

21 (2003) 130 FCR 317, at para 144.

22 (2003) 130 FCR 317, at para 252 (Finkelstein J, Branson J concurring).

23 Cited above, at 214.

but have no interest in contributing to the costs of the litigation, there is a risk that the claim of the representative party may be stopped as a result of a security for costs order. This would undermine the costs immunity enjoyed by class members under section 43(1A) of the FCA Act.[24] In a study of major Australian class actions, no evidence was found that impecunious plaintiffs had been intentionally put forward as the lead plaintiffs to ensure that no order for security for costs could be made. On the contrary, the lead plaintiffs in these cases had usually been people of means.[25]

6.24 Professor Morabito has also pointed out that[26] this judicial approach is inconsistent with (a) the traditional rule in this area that impecuniosity on the part of the plaintiff does not justify an order for security for costs; (b) the views of the Australian Law Reform Commission that an order for security for costs should not be made on the sole basis that the proceedings conducted by the representative party are for the benefit of the group members rather than himself,[27] (c) the need not to create significant obstacles to the availability of the Part 4A regime; and (d) the importance of not removing, in practice, the immunity from costs that is extended to class members by section 43(1A). In relation to points (c) and (d), it has been observed that an order for security for costs would either stultify the continuance of the actions or force the parties to commence individual actions. Professor Morabito has pointed out the anomaly that if security for costs were to be ordered on a ground analogous to the impecunious nominal plaintiff ground, the defendants would be better off on the issue of security for costs by having been sued in representative proceedings under Part 4A than they would have been if sued by the group members in separate actions.

6.25 Professor Morabito therefore proposed that the court should adopt the principle that security for costs will only be made if the group members (or some of them) are impecunious companies or persons ordinarily resident outside the jurisdiction and a "person of straw" has been deliberately chosen to be the representative party.[28]

6.26 Hollingworth J of the Victorian Supreme Court identified various matters the court might take into account in ordering security for costs against a representative plaintiff:

(a) whether the representative plaintiff and group members have an arguable and *bona fide* claim for relief against the defendant;

---

24 Bernard Murphy and Camille Cameron, "Access to Justice and the Evolution of Class Action Litigation in Australia", (2006) *Melbourne University Law Review* Vol 30 399, at 421.

25 Bernard Murphy and Camille Cameron, "Access to Justice and the Evolution of Class Action Litigation in Australia", (2006) *Melbourne University Law Review* Vol 30 399, at 421 and the text accompanying footnotes 160-7, at 433-4.

26 Vince Morabito, "Class Actions in the Federal Court of Australia – The Story So Far" (2004), Vol 10 *Canterbury Law Review* 229, at 255.

27 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), at 181.

28 Vince Morabito, "Class Actions in the Federal Court of Australia – The Story So Far" (2004), Vol 10 *Canterbury Law Review* 229, at 256.

(b) the characteristics of the group, including whether it comprises corporations or natural persons, the financial standing of the group members and whether security would have been ordered if separate actions had been brought by group members;

(c) whether the representative plaintiff has been deliberately selected as a "person of straw" in order to immunise from costs orders group members of substantial means;

(d) whether someone else who stands to benefit from the litigation is funding the action, including the representative plaintiff's solicitor charging a "contingency fee" in return for funding the litigation;

(e) whether an order for security would stifle the proceeding or otherwise be oppressive;

(f) whether the proceeding has become bogged down with "interminable and expensive interlocutory applications" for which the representative plaintiff bears responsibility; and

(g) whether the proceeding is essentially defensive in nature.[29]

Professor Peter Cashman succinctly summarises the relevant factors in making an order for security for costs:

> *"Particular circumstances which may support an order for security for costs include where the case appears weak on its merits; where unnecessary costs have been incurred by the conduct of the applicant; or where there is positive evidence that the applicant was deliberately selected as a person of straw.*[30]
>
> *Factors which may weigh against an order for security for costs may include where the proceeding appears to have substantial merit; where there are specific issues of public interest sought to be determined in the proceeding;*[31] *the size of the group affected by the proceeding; the conduct of the respondent (including where interlocutory applications and appeals are unsuccessful); and the public interest in the pursuit of class action proceedings generally."*[32]

6.27 Professor Mulheron was of the view that security for costs may be ordered where it is apparent that the representative claimant has no means to satisfy a potential adverse costs order. If it was thought

---

29 *Hall v Australian Finance Direct Ltd* [2005] VSC 306, at paras 107 and 108.

30 See eg *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 1004, at para 69 (Wilcox J); *Nendy Enterprises Pty Ltd v New Holland Australia Pty Ltd* [2001] FCA 582, at para 4 (Whitlam J).

31 See the discussion of public interest considerations in security for costs applications in *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 1004, at paras 116-125 (Wilcox J).

32 Peter Cashman, *Class Action Law and Practice* (The Federation Press, 2007), at 440.

appropriate to adopt that approach, the new Hong Kong class action provision could include a provision similar to section 33ZG of the FCA Act.

6.28 We also note that the Civil Justice Council of UK is in favour of extending the existing powers of the court to award security for costs to provide protection for defendants against blackmail claims lodged by impecunious claimants.[33]

Private litigation funding and security for costs

6.29 As discussed in Chapter 8, class actions may be funded by the involvement of private litigation funding companies. In the context of an application for security of costs, the existence of a third party commercial litigation funding arrangement may be considered relevant in the exercise of judicial discretion whether to make an order and/or to the quantum of such costs. In *Baygol Pty Ltd v Huntsman Chemical Co Australia Pty Ltd,* Tamberlin J said that, in his view, weight should be given to the fact that a matter is funded when determining the level of security for costs:

> *"I consider that weight should be given to the fact that the litigation is being funded as an investment, which, in my view, weighs on balance in favour of a more liberal provision, especially given the consequences of having inadequate security. In the event that [the defendant] is successful, it could be out of pocket by a large sum. If [the defendant] is not successful then [the plaintiff] will have the amount of security discharged. I do not consider this to be a controlling consideration, and I do not consider that it should be given great significance, but it ought be taken into account in assessing the quantum of security."*[34]

Consultation and conclusion

6.30 Recommendation 4 in the Consultation Paper recommended stipulating appropriate requirements for adequacy of representation to prevent deliberately selecting an impecunious member to act as the class representative, and empowering the court to order security for costs to avoid abuse of the process of the court. The Consultation Paper also proposed enabling truly impecunious litigants to have access to funding. A vast majority of those responding supported the proposed measures. Winston & Strawn LLP, however, disagreed and was worried that security for costs would stifle meritorious claims. They believed that the risk of abuse through the use of impecunious plaintiffs could be dealt with at the certification stage. In contrast, a respondent who preferred to remain anonymous observed that

---

33 Civil Justice Council, *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions*" (July 2008), at 156-157.

34 [2004] FCA 1248, at para 39.

the proposed measures might not be strong enough to prevent abuses, although he supported the recommendations generally.

6.31 Far more respondents, including, the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Institute of Directors and the Hong Kong Association of Banks, agreed that both appropriate requirements for adequacy of representation and security for costs were needed and should be sufficient to prevent abuses. Allen & Overy proposed making the recommendation more specific by including the suggestions in paras 6.11 and 6.13 of the Consultation Paper on making the representative plaintiff's ability to satisfy an adverse costs order a certification criterion and requiring the representative plaintiff to prove to the court's satisfaction suitable funding and costs-protection arrangements already in place at the certification stage. Such measures are not to stifle genuine claims brought by a class of impecunious plaintiffs. Allen & Overy believed that these measures would address both the wider concern of costs protection for defendants, and allow the courts to make orders to deter any suspected abuse of process. While supporting this recommendation, the Department of Justice (Legal Policy Division) believed that the problem might be reduced if the usual "costs follow the event" rule were to be replaced by a "no costs order" rule for class actions.

6.32 Australian experience of class representatives may be relevant here. Class representatives there can be divided into the following broad categories: individuals, corporations, unions, the Australian Competition and Consumer Commission, an association incorporated under the Associations Incorporation Act 1984 (NSW), and a council.[35] The occupations of individual class representatives are diverse, including barrister, senior lecturer, doctor, dental surgeon, dentist, investment banker, engineer, nurse, teacher, property developer, farmer, plumber, factory worker, university student, housewife, retiree, etc. The age of class representatives ranges from seven years to 88 years. Their average age is 46.66 years while their median age is 45 years. Class representatives in both federal and Victorian class actions have come from "all walks of life". Professor Morabito commented in his report:

> *"This scenario represents a surprisingly positive finding. In fact, the frequent descriptions of plaintiff solicitors as the real class representatives and the firm belief by some class action respondents and their legal representatives, that persons of straw are regularly chosen to ensure that such respondents will not recoup their costs in the event of an unsuccessful outcome for the class, made us expect a different scenario. A scenario where class representatives came only from particular sectors of our society instead of reflecting, to some extent, the wide*

[35] V Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report, Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (2010), at 45.

spectrum of backgrounds, occupations and expertise that can be found in our community."[36]

6.33 Having carefully considered the responses from the public, we are satisfied that, on balance, the security for costs mechanism would provide a reasonable filtering process which could effectively prevent class members with sound financial capability from deliberately selecting impecunious plaintiffs to act as the class representatives, thereby abusing the process. The effectiveness of the mechanism will, of course, depend upon the integrity of class lawyers in presenting reliable information as to the class members' identity and financial standing. Equally, the court will have to examine a range of financial factors concerning the parties at an early stage of the proceedings.

6.34 As already mentioned in the Consultation Paper, we are of the view that reliance upon the existing vexatious/abusive litigant provisions of the court rules would not be an effective way to prevent litigation being brought by an impecunious representative. Hence, the new class action statute could include a provision similar to section 33ZG of the FCA Act to empower the court to order security for costs in appropriate cases. In addition, the representative claimant's financial standing could properly form part of the "adequacy of the representative" certification criterion. Furthermore, the ability of the representative claimant (and its legal representatives) to fund the action and to meet any adverse costs award could be made part of the certification scrutiny to which the court will subject the action at the outset.

Recommendation 5

We recommend that:

(1) To prevent class members with sound financial capability from deliberately selecting impecunious plaintiffs to act as the class representatives, and thereby abusing the court process, a representative plaintiff's ability to satisfy an adverse costs order should be made a certification criterion and he should be required to prove to the court's satisfaction that suitable funding and costs-protection arrangements are already in place at the certification stage.

(2) Truly impecunious plaintiffs should have access to discretionary funding providing financial support for them to obtain legal remedies.

---

[36] V Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report, Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (2010), at 49.

(3) **To avoid abuse of the court process and to ensure that those put at risk of litigation should not suffer unfairly, the court should be empowered, in appropriate cases, to order representative plaintiffs to pay security for costs in accordance with the established principles for making such orders and by way of a provision similar to section 33ZG of the Federal Court of Australia Act 1976.**

Chapter 7

Handling of class actions involving parties from other jurisdictions

---

The problem identified

7.1 We envisage that parties in class actions commenced in Hong Kong may straddle across a number of jurisdictions (eg mainland China, Hong Kong and a third jurisdiction). Problems associated with class actions involving parties from other jurisdictions include forum shopping, duplication of proceedings and the *res judicata* effects of a judgment on foreign or extra-territorial class members. For the purpose of this Chapter, we define a "foreign plaintiff" as a member of a class of persons on whose behalf class action proceedings have been commenced and who is not resident in Hong Kong.[1] We define a "foreign defendant" as a juridical or natural person who could not be served with legal process in Hong Kong.[2]

7.2 Class actions may be brought by plaintiffs in any one of many jurisdictions – locally, nationally or internationally. As the Rand Institute points out, "*class action lawyers often have greater latitude in their choice of forum or venue than their counterparts in traditional litigation*" and this drives transaction costs upwards:

> *"Under some circumstances, an attorney filing a state wide class action can file in any county of a state and an attorney filing a nationwide class action can file in virtually any state in the country, and perhaps any county in that state as well. In addition, class action attorneys often can file duplicative suits*

---

1 We suggest adopting the same definition given in the draft Civil Procedure Rules put forward by the Civil Justice Council in *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions (Final Report),* (November 2008), at 190.

2 See – *Hong Kong Civil Procedure 2011* (Sweet & Maxwell Asia), Vol 1 Part A:

"11/0/2 *Anyone may invoke the jurisdiction of the Court of First Instance, or become amenable to it. A writ or equivalent must be made personally on the defendant, or by post, or by inserting a copy through the defendant's letter box. For personal service, even service on a defendant resident abroad only fleetingly present within the jurisdiction will suffice, Colt Industries v Sarlie (No 1) [1966] 1 WLR 440, CA; [1966] 1 All ER 673. For service by post or letterbox, such service must be effected on the defendant in Hong Kong or, if by post or inserting in a letter box, doing so while the defendant is in Hong Kong: see O10. …"*

"11/0/3 … *[T]he inability of the plaintiff to effect service on the defendant because the defendant is not present within the jurisdiction to enable service to be effected may have the effect of denying the court jurisdiction in cases which are appropriate for trial here (eg a tort committed within the jurisdiction). However, the court has a discretionary power to grant a plaintiff leave to service a writ upon a defendant outside the jurisdiction in a variety of circumstances."*

and pursue them simultaneously. These are powerful tools for shaping litigation, providing opportunities not only to seek out favourable law and positively disposed decision makers, but also to maintain (or wrest) control over high-stakes litigation from other class action attorneys."[3] (Emphasis added)

7.3 The Uniform Law Conference of Canada made the following observations on the problem of multiplicity in class proceedings involving parties from different jurisdictions:

> *"With the broad availability of class actions in Canada it is possible that overlapping multi-jurisdictional class actions concerning the same or similar subject matter could be commenced in several different Canadian jurisdictions. As a result, potential class members may find themselves presumptively included in more than one class action in more than one jurisdiction and consequently subject to conflicting determinations. Further, defendants and class counsel may be faced with uncertainty as to the size and composition of the class. In addition, there may be difficulty in determining with certainty which class members will be bound by which decisions."*[4]

Res judicata concerns

7.4 Even where due notice *is* given to the foreign class members, difficulties in respect of the recognition and enforcement of a class action judgment in another jurisdiction may arise. The problem has been set out in the following terms:

> *"Judgment for [a class action] can be granted as a result of a settlement of an action or at the conclusion of a trial. In either circumstance, claimants from jurisdictions other than the jurisdiction in which the judgment is granted will wish to know if they are or can be bound by the foreign [class action] judgment, and if so, how they go about enforcing, or objecting to the enforcement of, that judgement. Similarly, defendants against whom the judgment is issued after a trial and more so, if it is issued as a result of a settlement, will wish to ensure that the*

---

3 Deborah R Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain,* (Santa Monica, CA RAND Institute for Civil Justice, 2000), at 411.

4 Uniform Law Conference of Canada's comment on the Uniform Class Proceedings Act (Amendment) 2006. See also the Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Inter Jurisdictional Issues: Background, Analysis and Recommendations dated March 9, 2005 [14]-[18]. In particular, at [18] it was pointed out that: *"[t]he uncertainty created by the potential for multiple actions may also mean that fewer class actions will be brought, since (1) class counsel in any given jurisdiction will not know the scope of the class that he or she will eventually be granted authority to represent; and (2) this in turn will make some class actions less economically viable, since counsel will have to enter into financial arrangements with multiple counsel, thus reducing both the expected fee and potential compensation to class members."*

judgment resolves their liability in respect of the broadest group of claimants possible."[5]

7.5 Where foreign class members have been included in US class actions the question arises as to how binding the class action judgment or settlement is on foreign class members. *Res judicata* concerns were raised, for example, in the District Court of the Southern District of New York recently in *In re Vivendi Universal SA Securities Litigation,* in which the court was troubled by the fact that *'there is no clear authority addressing the res judicata effect of a US class action judgment in England*."[6]

7.6 Since the realistic prospect of recognition of any potential judgment is a condition required by US courts before granting certification to a group of plaintiffs which also includes foreign absent class members, the certification of trans-national class actions will be hampered if European jurisdictions are not prepared to give *res judicata* effect to US class judgments. The most incompatible US class action feature seems to be the opt-out rule, by which plaintiffs who have not expressly manifested their wish to claim are incorporated in the group.[7]

7.7 The International Bar Association (IBA) published "*Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress — A Report of the IBA Task Force on International Procedures and Protocols for Collective Redress*" for discussion at the IBA conference in Singapore in October 2007. The purpose of the guidelines is to provide for circumstances where a class action judgment issued in one jurisdiction may be enforceable in another jurisdiction, thus binding foreign class members in that second jurisdiction. The guidelines were adopted in October 2008 by the Legal Practice Division of the IBA. They do not have the force of law, but they provide a useful framework as to how jurisdictions, generally, are concerned about duplicative litigation and the application of *res judicata* from one jurisdiction to another.

7.8 The guidelines' eventual aim is that jurisdictions with opt-out class action regimes will ratify the guidelines by implementing Practice Directions encompassing their thrust. However, it is unclear at present as to when and to what extent different jurisdictions will be willing to do so, or indeed, whether those jurisdictions' domestic law on the recognition of foreign judgments would permit such Practice Directions. Nevertheless, it is an important step forward in the debate on duplicative litigation in class actions litigation.

---

5 International Bar Association *Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress* (A Report of the IBA Task Force on International Procedures and Protocols for Collective Redress presented for discussion at the IBA Conference in Singapore in October 2007).

6 242 FRD 76 (SDNY 2007), at 91.

7 Andrea Pinna, "Recognition and *Res Judicata* of US Class Action Judgments in European Legal Systems" *Erasmus Law Review*, Vol 1, Issue 2 [2008] 31, at 60.

Recognition and enforcement of Hong Kong class action judgments by Mainland courts

7.9 In so far as a class action commenced in Hong Kong may include members from both Hong Kong and the Mainland, we have considered the following questions:

(a) whether the courts in the Mainland will have legal reservations in recognising and/or enforcing judgments given in Hong Kong and other common law jurisdictions where an opt-out model for class actions is followed;

(b) whether it would be feasible in future to expand the scope of mutual legal assistance to include judgments in class actions so that there can be mutual recognition and reciprocal enforcement of Mainland and Hong Kong class action judgments; and

(c) whether there are any provisions in PRC law which may impinge on the mutual recognition and enforcement of class action judgments between the Mainland and HKSAR if an opt-out class action regime is adopted in Hong Kong and, if so, whether there are any procedural safeguards which could address the PRC law objections.

7.10 In summary, we note that although the "Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned" (the REJ Arrangement) provides for the enforcement of Hong Kong civil judgments in the Mainland, the enforcement of class action judgments in the Mainland is outside its scope. It is doubtful if the scope of the REJ Arrangement will be extended to cover judgements in respect of class actions in the foreseeable future.

7.11 Furthermore, it is difficult to predict whether the Mainland, when it enters into the reciprocal recognition and enforcement agreement with a common law jurisdiction (such as Hong Kong), would insist on applying PRC law when determining the procedural rights of litigating parties. There is also a potential risk that the Mainland courts would regard the award of counsel's fees as contradicting the basic principle of PRC law that litigants are responsible for their own lawyers' fees and, consequently, refuse to recognise and enforce the judgment altogether. Finally, the exact parameters of the *ordre public* doctrine have yet to emerge so that it is not possible to predict whether enforcement of certain kinds of class action judgments may or may not be contrary to the PRC's public interests.

Possible solution

7.12 We have considered whether legal restrictions should be imposed on the commencement of class actions by plaintiffs coming from a number of different jurisdictions. If there are to be no such restrictions on

commencing a class action, alternative ways to streamline the litigation process will need to be identified.

7.13 In the following paragraphs we consider four approaches to controlling class action proceedings commenced by a multi-jurisdictional class of plaintiffs: (a) a court discretion to transfer class action proceedings to another jurisdiction in the interests of justice; (b) the exclusion of foreign class members from the proceedings; (c) sub-classing of foreign plaintiffs; and (d) an opt-in requirement.

(a) Discretion to transfer class action proceedings in interests of justice

7.14 It is possible that the Hong Kong class action regime legislation could allow the court in the interests of justice to order a transfer of the proceedings or a stay of proceedings on the basis of the inappropriateness of Hong Kong as the litigation forum. A number of Australian authorities set out the relevant factors when considering the appropriate forum for the commencement and conduct of class actions.

7.15 In *Mobil Oil Australia Pty Ltd v The State of Victoria,*[8] the High Court of Australia applied the orthodox analysis of service on the defendant as determining the Supreme Court's jurisdiction for class action proceedings under Part 4A of the Supreme Court Act 1986 (Vic*).*[9] Although the Supreme Court may have jurisdiction to adjudicate the class action, where the alleged wrong was committed in another State and all group members, plaintiffs and defendants were located in that state, the plaintiff would be confronted with an application to transfer the proceeding under section 5 of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic). The possibility of a transfer of proceedings or the stay of proceedings by reason of the inappropriateness of the forum in light of the interests of justice was recognised by Gaudron, Gummow and Hayne JJ in *Mobil Australia Pty Ltd v The State of Victoria* where the court said:

> *"In the ordinary case, where service of the proceeding is effected within the State, the territorial nexus between the proceeding and the State is evident. … [W]here service is effected within Australia, under the Service and Execution of Process Act 1992 (Cth), no nexus must be shown. … <u>It may be noted … that the defendant to a proceeding in a Supreme Court, served under the Service and Execution of Process Act, may always seek to have it cross-vested to another State Supreme Court."</u>*[10] *(Emphasis added)*

---

8 (2002) 211 CLR 1.

9 See Gleeson CJ at [11], and Gaudron, Gummow and Hayne JJ at [53], [55] and [56].

10 (2002) 211 CLR 1, at para 60.

7.16 An application may be made for an order to transfer a proceeding under section 5(2)(b)(iii) of the Jurisdiction of Courts (Cross-vesting) Act of the state concerned.[11] The High Court made the following observations about section 5(2)(b)(iii) in *BHP Billiton Ltd v Shultz*:[12]

(a) The "interests of justice" in the sub-section are not synonymous with the transferring court being a clearly inappropriate forum, which is the test applied for a *forum non conveniens* application.[13]

(b) What constitutes "the interests of justice" involves a range of considerations. The interests of justice are not the same as the interests of one party, nor are they divorced from practical reality.[14] Nor are the interests of justice to be determined by preferring the public policy reflected in an Act of one State Parliament over the Act of another State Parliament.[15] Regard may be had to the specialist nature of a court or tribunal and the procedural facilities peculiar to it.[16] An important consideration in the interests of justice for a claim in tort will be the place of the tort. Where the place of the tort and the residence of the parties coincide, that will generally be determinative of the appropriate court. Likewise, an important consideration will be the law of the contract and the jurisdiction of any statutory provision relied upon.[17]

(c) Once it appears to the transferring court that in the interests of justice the proceeding ought to be determined in the transferee court, the proceeding must be transferred. No question of discretion arises.[18]

(d) Once a proceeding is transferred there is a question as to whether the transferee court is exercising its own jurisdiction or is exercising jurisdiction "conferred" by the cross-vesting legislation.[19]

7.17 There is doubt as to the transferability of at least some group proceedings. There is no reported case on this issue, but the observation of

---

11 Section 5(2)(b)(iii) provides that a Supreme Court (transferring court) shall transfer a proceeding to another Supreme Court (transferee court) if it appears to the transferring court that it is in the interests of justice that the transferee court determine the proceeding.

12 (2004) 211 ALR 523. Cited in Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co, 2005), at para 3.310.

13 At paras 14 and 25 per Gleeson CJ, McHugh and Heydon; and 69 per Gummow J.

14 At para 15 per Gleeson CJ, McHugh and Heydon JJ and 258 per Callinan J.

15 At para 26 per Gleeson CJ, McHugh and Heydon JJ.

16 At para 31 per Gleeson CJ, McHugh and Heydon JJ.

17 At paras 170 and 259.

18 At paras 14, 62 and 172.

19 At paras 52-54 per Gummow J.

Bongiorno J in *McLean v Nicholson*[20] is relevant. It was suggested that an effective transfer of a group proceeding may be made under the cross-vesting legislation. The judge made the *obiter* observation that group proceedings commenced in Victoria may be cross-vested and heard as group proceedings in other Supreme Courts, notwithstanding the absence of legislation in those jurisdictions for the commencement and conduct of group proceedings. There is, however, uncertainty as to whether the Supreme Court to which the proceeding is transferred would adopt the same procedure under Part 4A of the Supreme Court Act 1986 (Vic).[21]

7.18 Similar considerations on the choice of forum were contemplated by the Uniform Law Conference of Canada. It was proposed that the relevant legislation should require the court to take into account a number of factors in considering whether, and to what extent, to certify any class proceedings. The primary consideration was whether multi-jurisdictional class proceedings involving the same or similar subject matter had been commenced. Section 4 of the Uniform Class Proceedings Act (Amendment) 2006 provides that:

> *"(2) If a multi-jurisdictional class proceedings or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada that involves the same or similar subject matter to that of the proceeding being considered for certification, the court must determine whether it would be preferable for some or all of the claims of the proposed class members to be resolved in that proceeding.*
>
> *(3) When making a determination under subsection (2), the court must*
>
> *(a) be guided by the following objectives:*
>
> *(i) ensuring that the interests of all parties in each of the relevant jurisdictions are given due consideration,*
>
> *(ii) ensuring that the ends of justice are served,*

---

20 (2002) 172 FLR 90. In this case Bongiorno J considered an application to transfer a group proceeding under Part 4A of the *Supreme Court Act 1986 (Vic)* to the Supreme Court of Queensland. Ultimately, it was not necessary to transfer the proceeding as a group proceeding because it was ordered, pursuant to section 33N of the *Supreme Court Act*, that the proceeding no longer continue as a group proceeding. The court held that (at para 24):

"The Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic) permits this Court to transfer a proceeding to the Supreme Court of another State or Territory when it is in the interests of justice to do so. The cross-vesting Act confers on the Supreme Court of Queensland all the jurisdiction of this Court: s4(3) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic). Thus it would have jurisdiction to determine the defendant's application that this proceeding no longer continue under Part 4A of the Supreme Court Act. However the power of this Court to cross-vest a case depends upon the interests of justice requiring such transfer. Having regard to the unique nature of Part 4A (there is no Queensland equivalent) and the fact that an order under s33N does not affect any party's substantive rights, the interests of justice do not require that this Court refrain from deciding the s33N application notwithstanding the conclusion reached that the merits of the case should be ultimately determined in the Supreme Court of Queensland." (Emphasis added)

21 Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co, 2005), at para 3.315.

(iii) where possible, avoiding irreconcilable judgments,

(iv) promoting judicial economy; and

(b) consider all relevant factors, including the following:

(i) the alleged basis of liability, including the applicable laws,

(ii) the stage each of the proceedings has reached,

(iii) the plan for the proposed multi-jurisdictional class proceedings, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class,

(iv) the location of class members and class representatives in the various proceeding, including the ability of class representatives to participate in the proceedings and to represent the interests of class members, the location of evidence and witnesses."

7.19 The court may make any order it deems just, including:[22]

(a) certifying a multi-jurisdictional opt-out class proceeding, if (i) all statutory criteria for certification have been met and (ii) the court determines that it is the appropriate venue for a multi-jurisdictional class proceeding;

(b) refusing to certify an action on the basis that it should proceed in another jurisdiction as a multi-jurisdictional class proceeding;

(c) refusing to certify that portion of the proposed class that includes class members who may be included within a pending or proposed class proceeding in another jurisdiction; and

(d) requiring that a subclass with separate counsel be certified within the class proceeding.

(b) Excluding foreign class members

7.20 An alternative approach is to exclude foreign class members, if the court regards this as appropriate. For example, the Supreme Court of Victoria may of its own motion exclude persons from the group. Section 33KA of the Supreme Court Act 1986 (Vic) provides:

"(1) On the application of a party to a group proceeding or of its own motion, the Court may at any time, whether before or after judgment, order –

---

22 Section 4.1 of the Uniform Class Proceedings Act (Amendment) 2006.

(a) that a person cease to be a group member;
(b) that a person not become a group member.

(2) The Court may make an order under sub-section (1) if it is of the opinion that –

(a) the person does not have sufficient connection with Australia to justify inclusion as a group member; or
(b) for any other reason it is just and expedient that the person should not be or should not become a group member.

(3) If the Court orders that a person cease to be a group member, then, if the Court so orders, the person must be taken never to have been a group member."

7.21 In *Mobil Oil Australia Pty Ltd v Victoria,*[23] the High Court of Australia noted that this was an undemanding test, in the sense that connection with Victoria was not a test for inclusion in the group and that the location of persons outside Victoria, or even outside Australia, was not necessarily a barrier to their inclusion. The court observed that section 33KA was a troubling provision. Section 33KA(2) refers to the court forming an opinion that a group member does not have sufficient connection with Australia. It was implicit that the existence of group members outside Victoria but within Australia raised no issue, subject to the practical reasons raised concerning the appropriateness of the forum. But a member outside of Australia did raise an issue, as it was unclear what constituted a connection, or for that matter a sufficient connection, with Australia for the purpose of section 33KA.[24]

7.22 In the US, the courts have also excluded foreign class members where the statute under which the class action has been instituted does not have sufficient extra-jurisdictional effect to catch foreign class members. This has recently occurred in respect of the litigation in *In re Parmalat Securities Litigation,*[25] and *F Hoffmann-La Roche Ltd v Empagram.*[26]

7.23 Whilst the above two methods of excluding parties from other jurisdictions from invoking the class action regime in Hong Kong are options for discussion, we are not in favour of adopting a rigid exclusionary rule. If plaintiffs from other jurisdictions are excluded from class action proceedings in Hong Kong, then the judgment of those proceedings will only bind class members who are resident in Hong Kong. Depending on the court's interpretation of what amounts to "resident" in Hong Kong and whether future plaintiffs would be caught by this definition, future plaintiffs in other

---

23 [2002] HCA 27, at para 5.

24 See the comments made by Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co, 2005), at para 3.280.

25 497 F Supp 2d 526 (SDNY 2007) (re the Securities Exchange Act of 1934).

26 SA, 542 US 155, 124 S Ct 2359 (2004) (re the Foreign Trade Antitrust Improvements Act of 1982 and the Sherman Act).

jurisdictions may be barred from commencing fresh legal proceedings on the same subject matter of the class action proceedings. If litigants from other jurisdictions were excluded from a class, then it would be difficult for the court to deal with the common issue of the class action. In principle, the court should allow as many members of the class as possible to have the benefit of the class action. We also note that an opt-out procedure for class actions involving parties from other jurisdictions would be expensive and the associated practical issues, such as the giving of proper notice, should be carefully considered.

(c) Sub-classing of class members from other jurisdictions

7.24 Instead of excluding any party from another jurisdiction, we suggest that procedural/case management techniques should be identified to streamline the litigation process. As a management technique, foreign class members participating in the class action in Hong Kong could be required to form their own sub-class with their own representative claimant. In that way, separate notice requirements could be applied to that representative in respect of members of the sub-class, and if separate legal issues arise that are common to that sub-class alone, they can be accommodated, but dealt with separately from the main class action (even by separate hearing). The use of sub-classes in this way could be helpful in streamlining the class action. A sub-class of foreign class members was created, for example, in *Kruman v Christie's plc.*[27]

(d) Opt-in requirement

7.25 The notice requirements for foreign class members raise particular difficulties. As a matter of practicality, it may be difficult to identify all places in which notices should be advertised and it is likely that, however many notices are placed, there can be no certainty that they will come to the attention of all potential plaintiffs. Other notices at the time of settlement, or post-judgment on the common issues, may also be required, adding to the burden. Any attempt to be comprehensive is likely to be expensive. In any event, it is doubtful whether courts in other jurisdictions would regard an opt-out approach as satisfactory, since it could hardly be said that plaintiffs from other jurisdictions who had not opted out (for whatever reason) had invoked the jurisdiction of the Hong Kong courts. This would have implications for the enforceability of the judgment in respect of such plaintiffs, and as to the binding nature of the judgment on them. As a result, the *res judicata* effect of the class action for those members could not be achieved.

7.26 As a means of controlling or limiting foreign class members, and of ensuring that due process concerns are met as regards those foreign class members, the British Columbia Class Proceedings Act provides that a British Columbia resident may commence an action on behalf of a class of resident

---

[27] 284 F 3d 384 (2nd Cir 2003).

who will be bound unless they opt out. Opting in signified that the foreign class members submitted to the jurisdiction of the British Columbia court.

7.27 Section 16 of the Class Proceedings Act provides that non-residents may participate in the proceedings by opting in and joining as a sub-class.[28] Certification of multi-jurisdictional class action is permitted.[29] The drafters of the British Columbia legislation adopted the following suggestion set out in a discussion paper prepared by the British Columbia Ministry of the Attorney General:

> *"A class defined in a class action brought under the Ontario Act may purport to include individuals whose causes of action arose in BC. If such an individual did not opt-out of the Ontario class action and attempted to sue the defendants in BC, he or she would likely be met by the argument that he or she was bound by the Ontario judgment and was barred from bringing an individual action. The response of the BC litigant would be that legislation in Ontario did not bind him or her. The availability of an expanded class action procedure in a number of provinces could result in several class actions involving the same defendant and the same issues being commenced in each jurisdiction. In some cases, this could undermine the goals of judicial economy which underlie class actions. …*
>
> *One commentator has suggested that class members could be sub-classed into two groups – provincial residents and extra-provincial residents. Class members residing in the province under whose legislation the class action was filed, or whose cause of action arose in the jurisdiction would be subject to the ordinary opt-out requirements of the Act. Extra-provincial class members would be required to opt-in in order to be part of the class."*[30] (Emphasis added)

---

28 Section 16 of the Class Proceedings Act (BC) provides as follows:

> *"(1) A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.*
>
> *(2) Subject to subsection (4), a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.*
>
> *(3) A person referred to in subsection (2) who opts in to a class proceeding is from that time a member of the class involved in the class proceeding for every purpose of this Act.*
>
> *(4) A person may not opt in to a class proceeding under subsection (2) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of section 6(1)(a), (b) and (c)." (Emphasis added)*

29 See for example *Harrington v Dow Corning* (1996), 22 BCLR (3d) 97 (SC), supplemented (1997), 29 BCLR (3d) 88 (SC), in which the Court approved an application to include in the class women who had been implanted anywhere in Canada (outside Ontario and Quebec), or who had been implanted anywhere and were now resident anywhere in Canada (outside Ontario and Quebec).

30 British Columbia Ministry of the Attorney General, *Class Action Legislation for British Columbia*; Consultation Document, c12 "Interjurisdictional Issues", at 22 (1994) cited in footnote 40 to

7.28 In the case of *Harrington v Dow Corning Corp,*[31] the British Columbia Supreme Court considered the application to include in class actions women who were not residents of British Columbia. In this case, the plaintiff brought an action against the manufacturers and distributors of breast implants. The action was certified as a class proceeding. The plaintiff applied to include all women implanted with one or more breast implant mammary prosthetic devices who were resident in Canada, anywhere other than Ontario and Quebec, or were implanted in Canada, anywhere other than Ontario and Quebec. The manufacturers and distributors argued that the non-resident class should be limited to women, now non-resident, who were implanted in British Columbia. They also argued that the British Columbia resident sub-class should also exclude women who were implanted outside the province.

7.29 The Court allowed the application to include non-resident plaintiffs if they had received breast implants in Canada (but outside Quebec or Ontario) or lived in Canada anywhere other than Quebec or Ontario. The Court endorsed the following dictum by Sopkina J in *Amchem Products Inc v British Columbia (Workers' Compensation Board)*:

> *"With the increase of free trade and the rapid growth of multi-national corporations it has become more difficult to identify one clearly appropriate forum for this type of litigation. The defendant may not be identified with only one jurisdiction. Moreover, there are frequently multiple defendants carrying on business in a number of jurisdictions and distributing their products or services world wide. As well, the plaintiffs may be a large class residing in different jurisdictions. It is often difficult to pinpoint the place where the transaction giving rise to the action took place. Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives."*[32]

7.30 The Court in *Harrington* (above) recognised the demands of multi-claimant manufactures' liability litigation for concurrent jurisdiction of courts within Canada. The court held that the common issue of the manufacturer's liability established the real and substantial connection necessary for jurisdiction. The common issue would not be made any more complicated by the inclusion of non-resident class members. The defendants might be deprived of the opportunity of trying that factual issue separately in several jurisdictions but, if that was prejudicial, it was outweighed by the advantage to the class members of having a single determination of a complex issue that could only be litigated at substantial

---

Janet Walker, "Crossborder Class Actions: A View from Across the Border" 2004 *Michigan State Law Review* 755.

31 (1997), 29 BCLR (3d) 88 (SC).

32 [1993] 1 SCR 897, at 911-2.

cost. The Court was of the view that if the plaintiff succeeded on the common issue, subsequent proceedings in this case would be more extensive because of the non-resident sub-class but they ought to be less costly than separate proceedings in different jurisdictions. The court opined that non-resident class members, by opting in, would assume the obligation of providing relevant evidence that was necessary for the proper disposition of their claims (at [19] of the judgment).

7.31 However, the requirement for non-resident members to opt in to the class was criticised by one commentator on the following grounds:[33]

(a) An under-inclusive plaintiff class means that the costs internalised by the class action are less than the costs generated by the wrongful conduct;

(b) To the extent that class actions are intended to facilitate compensation for wrongs suffered, under-inclusive plaintiff classes result in the failure of members of the plaintiff class to receive compensation;

(c) To the extent that class actions are intended to also bring closure for defendants, the under-inclusiveness of plaintiff classes means that defendants will be left with unresolved claims that might be brought in other actions or in other fora.

7.32 The Manitoba Law Reform Commission was of the view that class certification should be allowed for all potential plaintiffs, no matter where their places of residence were:

> *"[t]here is no compelling reason to preclude Manitoba courts from certifying class proceedings that include non-residents of the province, and that to enable them to do so would introduce a desirable reciprocity among provinces with class proceedings legislation. We are further of the opinion that the best procedure for doing so is [by permitting certification of a class covering all potential plaintiffs regardless of their residence], for two reasons. First, requiring non-residents to opt in to a proceeding will inhibit participation, and thereby limit access to justice, in the same manner that an opt in requirement would inhibit participation by Manitoba residents. The second reason an opt-in procedure is undesirable is the fact that, realistically, class proceedings involving classes composed of both residents and non-residents will tend to be brought in those jurisdictions that do not require non-residents to opt in."*[34] (Emphasis added)

7.33 The Uniform Law Conference of Canada has considered the problem of multi-jurisdictional class actions. "Multi-jurisdictional class proceedings" are defined as class actions that involve class members who do

---

33 Janet Walker, "Crossborder Class Actions: A View from Across the Border" 2004 *Michigan State Law Review* 755, at 770.

34 Manitoba Law Reform Commission, *Class Proceedings* (1999), at 67.

not reside in the certifying jurisdiction.[35] To resolve the problem of multiplicity in multi-jurisdictional class proceedings, the Committee on the National Class And Related Inter-jurisdictional Issues of the Uniform Law Conference of Canada put forward model legislation for reform. The committee proposed that class action legislation should provide that a plaintiff seeking to certify a class proceeding must give notice of such an application to plaintiffs in any class proceedings in Canada with the same or similar subject matter. Section 2(2) of the Uniform Class Proceedings Act (Amendment) 2006 provides as follows:

> *"The member who commences a [multi-jurisdictional class] proceeding … must*
>
> *(a) apply to the court for an order*
>
> *i. certifying the proceeding as a class proceeding, and*
> *ii. subject to subsection (4), appointing the member as the representative plaintiff for the class proceeding; and*
>
> *(b) give notice of the application for certification to*
>
> *i. the representative plaintiff in any multi-jurisdictional class proceeding, and*
> *ii. the representative plaintiff in any proposed multi-jurisdictional class proceeding*
>
> *commenced elsewhere in Canada that involves the same or similar subject matter."*

Consultation and conclusion

7.34 Recommendation 5 in the Consultation Paper recommended (a) an opt-in approach for class proceedings involving foreign plaintiffs (subject to the court's discretion to adopt an opt-out approach); (b) adopting the current rules on service of process outside Hong Kong; (c) adopting the rule of *forum non conveniens*; and (d) publishing class proceedings information on a website. A vast majority of those who responded supported these recommendations.[36] In supporting the recommendations, Baker & Mckenzie pointed out that the Canadian experience showed that an opt-out default position with an opt-in approach for non-residents was an "effective and workable approach". However, Lovells was concerned that foreign plaintiffs might introduce problems such as forum shopping and the potential duplication of proceedings. Lovells believed that the proposed regime

---

35 Section 1 of the Uniform Class Proceedings Act (Amendment) 2006.

36 For example, the Chinese General Chamber of Commerce, the Hong Kong Corporate Counsel Association, the Hong Kong Institute of Certified Public Accountants, the Hong Kong Institute of Directors, Baker & Mckenzie, the Hong Kong Association of Banks, the Hong Kong Bar Association, the Hong Kong Federation of Insurers, the Hong Kong Institute of Chartered Secretaries, the Law Society of Hong Kong, Neville Sarony QC SC, Slaughter and May and Winston & Strawn LLP.

should be restricted to local plaintiffs, because the regime was aimed at enhancing access to justice for those people. In contrast, David Webb considered that as Hong Kong was an international city serving global markets, almost any shareholder action and most consumer actions would involve foreign plaintiffs. Thus, an "opt in" approach for foreign plaintiffs would, in his opinion, undermine the viability of the proposed regime.

7.35 As highlighted at the beginning of this chapter, we are aware of the potential problems mentioned by Lovells. This chapter aims to put forth safeguards to address such problems. We also understand that Hong Kong is an international city with an open economy. We, therefore, agree that a balance has to be struck between extending the class action regime to foreign plaintiffs and avoiding abuses. To this end, the Consultation Paper set out certain options and recommendations.

7.36 Allen & Overy suggested imposing a condition on opting-in foreign plaintiffs requiring them to give a declaration and undertaking that the class action judgment amounts to a full and final settlement of their claims. We agree that this suggestion would help prevent abuses, but as a class action is most likely to be settled without a trial, we would also include settlement as a final and conclusive resolution of their claims.

7.37 We conclude that, in contrast to the opt-out regime we recommended in Chapter 4 for class actions in general, the default position for any class members residing in a jurisdiction outside Hong Kong should be that they must opt in to the class action proceedings commenced in Hong Kong in order to be bound by, or to benefit from, a judgment on the common issues. Practically speaking, such a requirement ensures that the class representative (and his lawyers) knows who the class members from other jurisdictions are. To assist potential parties from other jurisdictions, class action proceedings commenced in Hong Kong could be publicised on a website.

A class action database

7.38 We have considered the way in which class action proceedings in Canada are publicised via the Internet. The National Class Action Database (NCAB) is a pilot project initiated by the Civil Litigation Section of the Canadian Bar Association (CBA), following a recommendation by a Uniform Law Conference of Canada's Working Group on Multi-jurisdictional Class Actions. The CBA serves as the repository for the database, which is available for viewing and use on the CBA's website.[37] The database

[37] www.cba.org/classactions/main/gate/index. Such a database serves a general public good by allowing citizens to know when and if there are proposed class actions that may impact their rights. Given that the filing of a class action generally stops the limitation clocks from running, this will ensure that individual proceedings are not filed needlessly. Further, prospective class members can voluntarily provide information to either the plaintiff or the defendant, which may assist in the certification process. Finally, prospective class counsel in the same other jurisdictions may not file overlapping actions if they see that the prospective class is already being "taken care of" by competent counsel (although there is no bar to such filing). (See

contains information about the existence and status of class actions across Canada so that the public, counsel, and the courts need only look to one source for this information, and without cost to them. The database lists all class actions filed in Canada after 1 January 2007 that are sent to the CBA. Once posted, a class action proceeding will remain on the database unless and until it is dismissed as a class action by the court.

7.39 Counsel who wish to have proceedings posted on the database must complete the Database Registration Form located on the database webpage and send it along with the original pleadings and certification motion (in PDF or Word format) to the CBA. Counsel who submit the registration form are asked to verify the accuracy of the information when it is posted on the web and inform the CBA if and when the information needs to be modified. Once posted, users of the database will be able to browse class action proceedings, obtain useful information and download relevant documents. The database includes brief descriptors of the class action proceedings, including the filing date, style of cause, description of the class, subject-matter of the action, and status of the case.

7.40 Practice directions from courts have been issued in some Canadian jurisdictions requiring the plaintiff's counsel to send the relevant class actions information to the CBA. However, the CBA cannot guarantee the exhaustiveness of the class actions listed, or the accuracy of the information posted.

7.41 We have also noted that the Securities Class Action Clearinghouse of the Stanford Law School provides detailed information relating to the prosecution, defence and settlement of US federal class action securities fraud litigation on its website.[38] A securities class action is a case brought pursuant to Federal Rules of Civil Procedures 23 on behalf of a group of persons who purchased the securities of a particular company during a specified period of time. The complaint generally contains allegations that the company and/or certain of its officers and directors violated one or more of the federal or state securities laws. The clearinghouse maintains an index of filings for those who have been named in federal class action securities fraud lawsuits since passage of the Private Securities Litigation Reform Act of 1995.

7.42 In Hong Kong, the Law Society or the Bar Association might be the likely candidates for the maintenance and updating of a website along the lines of that operated in Canada. Lawyers of a class action commenced in Hong Kong might be required by Practice Directions issued by the court to send relevant class action information to the responsible professional body for onward posting to the website. Another possibility to be explored is to establish a class action database that is university-based (as is the case with the Stanford University database). In this connection, the possibility of

---

Ward K Branch and Christopher Rhone "Solving the National Class Problem", 4th Annual Symposium on Class Actions (Toronto: Osgoode Hall Law School of York University, 2007) at 9-10).

38 http://securities.stanford.edu/info.html#about03.

linking this class action database to the official website of the Hong Kong Judiciary should also be explored. The Hong Kong Bar Association suggested there should be discussion among all stakeholders to identify the appropriate institution to maintain the online database, and tentatively suggested the Hong Kong Judiciary website could be an option.

Extension of time for opting in

7.43 In the event that our recommendation for an opt-in procedure for foreign plaintiffs is adopted, then it should be noted that there could well be good reason for particular plaintiffs, through either lack of knowledge of the class action or through disability such as sickness, not being able to opt-in within the time period stipulated by the Court. The Rules of the High Court already make provision for extensions of time. Extensions of time are always subject to the circumstances of each case. We believe that foreign plaintiffs in class actions should be able to take advantage of the extension of time provisions in the Rules of the High Court.

Class actions involving defendants from other jurisdictions

7.44 Where a defendant is from a jurisdiction outside Hong Kong, the current rules on service of process outside Hong Kong as set out in order 11 of the Rules of High Court, as well as the case law on the rule of *forum non conveniens,* should be equally applicable and sufficient to control class actions with defendants outside Hong Kong.

7.45 Order 11 rule 4 of the Rules of High Court provides as follows:

> *"(1) An application for the grant of leave under rule 1(l) must be supported by an affidavit stating -*
>
> *(a) the grounds on which the application is made;*
>
> *(b) that in the deponent's belief the plaintiff has a good cause of action;*
>
> *(c) in what place the defendant is, or probably may be found; and*
>
> *(d) where the application is made under rule 1(1)(c), the grounds for the deponent's belief that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the Court to try.*
>
> *(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."*

7.46 If a writ is to be served outside the jurisdiction, the conditions referred to in order 11, rule 1(1) must be complied with. Rule 1(1) sets out different categories of cases in which service of a writ outside the jurisdiction is permissible. The categories most relevant to class actions commenced in Hong Kong appear to be the following:

> *"(1) … [S]ervice of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ -*
>
> *…*
>
> *(d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which –*
>
> *(i) was made within the jurisdiction, or*
> *(ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or*
> *(iii) is by its terms, or by implication, governed by Hong Kong law, or*
> *(iv) contains a term to the effect that the Court of First Instance shall have jurisdiction to hear and determine any action in respect of the contract;*
>
> *(e) the claim is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;*
>
> *(f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction; …"*

7.47 Each separate plaintiff in a given action who wishes to pursue a cause of action against defendants abroad requires separate leave, although this may be applied for in one application.[39] In the context of class action proceedings, this requirement may pose difficulties in proving that each class member has a cause of action against the foreign defendant. In the case of *Inverness Corp & Ors v Magic Dreams Cosmetica Infantil, SL & Ors,* Yeung J (as he then was) set aside the order for service out of jurisdiction on the ground that the other plaintiffs had failed to show that they had good reasons

[39] *Hong Kong Civil Procedure* 2011 (Sweet & Maxwell Asia), Vol 1 Part A, at para 11/1/1.

to join their claim in the same action with the plaintiff who had made out a case for a grant of leave. Yeung J was of the view that:

> *"… [I]n an action involving more than one plaintiff against defendants who are out of the jurisdiction, each of the plaintiffs must show that their claims against their respective defendants fall within the ambit of O11 r1(1)(a)-(u) before an order for service out of jurisdiction in respect of the action can be properly obtained."*[40]

7.48 There is a need to relax the legal restriction so as to allow an application for service outside the jurisdiction without the need to show each claim of the members in a class action falls within the ambit of order 11 rule 1(1). As long as the representative plaintiff can make out a case for a grant of leave, an order could be made for service outside jurisdiction.

The common law doctrine of forum non conveniens

7.49 Apart from any statutory provisions, the common law has developed the doctrine of *forum non conveniens* to deal with the situation where either the plaintiffs seeking access to justice in the local court or the defendants resisting claims before the local court are from another jurisdiction. The principles were explained in the English case of *Spiliada Maritime Corp v Casulex Ltd.*[41] In considering whether or not to decline jurisdiction, Hong Kong courts usually follow the two-step test of the *Spiliada* case with minor modification. *Adhiguna Meranti (Cargo Owners) v Adhiguna Harapan (Owners)*[42] outlines the approach to be adopted by Hong Kong courts as follows:

> *"(I) Is it shown that Hong Kong is not only not the natural or appropriate forum for the trial, but that there is another available forum which is clearly or distinctly more appropriate than Hong Kong? The evidential burden is here upon the applicant [for stay of the proceedings]. The emphasis is upon 'appropriate' rather than 'convenient' because this is not simply a matter of practical convenience. The purpose is to identify the forum 'with which the action has the most real and substantial connection' …. Failure by the applicant [for stay of the proceedings] at this stage is normally fatal.*
>
> *(II) If the answer to (I) is yes, will a trial at this other forum deprive the plaintiff of any 'legitimate personal or juridical advantages'? The evidential burden here lies upon the plaintiff [of the legal action].*

---

40 [1997] HKLRD 1377, at 1383 G-H.

41 [1987] 1 AC 460.

42 [1987] HKLR 904.

> *(III) If the answer to (II) is yes, a court has to balance the advantages of (I) against the disadvantages of (II) … Deprivation of one or more personal or juridical advantages will not necessarily be fatal to the applicant [for stay of the proceedings] provided that the court is satisfied that notwithstanding such loss 'substantial justice will be done in the available appropriate forum'. The court must try to be objective. Proof of this, which can fairly be called the ultimate burden of persuasion, rests upon the applicant for the stay. By these means he establishes that on balance the other forum is more suitable 'for the interests of all the parties and the ends of justice.' This may be another way of saying that the plaintiff's choice of forum has been shown to be so inappropriate as to deserve the pejorative description of 'forum-shopping' and to be restrained accordingly."*[43]

7.50 We are of the view that the application of the existing rules relating to *forum non conveniens* are sufficient to deal with the situation. Although when a Hong Kong court faced with an application for stay of Hong Kong class action proceedings would apply Hong Kong rules on *forum non conveniens*, we believe that the rules applied by foreign courts in a group litigation context provide a useful reference. We have set out our research findings in Annex 4, which reviews the relevant case law and commentary in the UK, Australia and the USA.

7.51 To recap our conclusions, we are in favour of a requirement to form sub-classes for foreign plaintiffs as the court may see fit and adopting the opt-in approach as the default position for foreign plaintiffs. In addition, the current court rules in order 11 of the Rules of the High Court with appropriate adaptation and the common law rule of *forum non conveniens* could be used to control class actions involving either plaintiffs or defendants from other jurisdictions.

Recommendation 6

We recommend that:

(1) (a) Where class action proceedings involve foreign plaintiffs, an opt-in procedure should be adopted as the default position, subject to the court's discretion to adopt an opt-out procedure for the entire class of foreign plaintiffs or for defined sub-classes, which may have their own representatives, in the light of

[43] *Adhiguna Meranti (Cargo Owners) v Adhiguna Harapan (Owners)* [1987] HKLR 904, at 907-8.

the particular circumstances of each case upon application.

(b) On opting-in, foreign plaintiffs would need to give a declaration and undertaking that the class action judgment or settlement would amount to a final and conclusive resolution of their claims.

(2) The current rules on service of process outside Hong Kong as set out in order 11 of the Rules of the High Court should be applicable to foreign defendants, with an adaptation to the effect that as long as the representative plaintiff can make out a case for a grant of leave, an order should be made for service out of jurisdiction.

(3) The court may stay class action proceedings involving foreign plaintiffs or defendants in reliance on the common law rule of *forum non conveniens,* if it is clearly inappropriate to exercise its jurisdiction and if a court elsewhere has jurisdiction which is clearly more appropriate to resolve the dispute.

(4) To assist potential foreign plaintiffs to consider whether to join in class action proceedings commenced in Hong Kong, information on those proceedings should be publicised on a website.

Chapter 8

Funding models for the class actions regime

The problem identified

8.1 It is clear that the costs of litigation are a crucial issue in class action proceedings. It is generally accepted that if a suitable funding model could not be found which allows plaintiffs with limited funds to take proceedings, little could be achieved by a class action regime. As observed by the Ontario Law Reform Commission:

> *"The question of costs (of litigation) is the single most important issue that this Commission has considered in designing an expanded class action procedure … the matter of costs will not merely affect the efficacy of class actions, but in fact will determine whether this procedure will be utilized at all."*[1] (Emphasis added)

8.2 The additional procedural requirements of class actions increase substantially the costs incurred by the representative plaintiff and render a class action a considerably more expensive form of litigation than individual proceedings. Extensive empirical study of class actions in the USA concluded that:

> *"[c]lass actions are costly. We estimate that total costs in the ten cases [studied], excluding defendants' own legal expenses, ranged from about $1 million to over $1 billion. Eight of the cases cost more than $10 million; four cost more than $50 million; three cost more than half a billion dollars.*
>
> *Transaction costs in class action lawsuits include not only fees and expenses for the plaintiff class attorneys and defense attorneys, but also the costs of notice and settlement administration, which can be substantial."*[2]

---

1 Ontario Law Reform Commission, *Report on Class Actions* (1982) 647.

2 Deborah R Hensler et al, *Class Action Dilemmas – Pursuing Public Goals for Private Gain* (Executive Summary; RAND Institute for Civil Justice; Santa Monica; 1999), 22 as cited in Vince Morabito "Contingency Fee Agreements with Represented Persons in Class Actions – An Undesirable Australian Phenomenon" (2005) *Common Law World Review* Vol 34 201, at 207.

Costs rules

8.3 The general rule that "costs follow success",[3] if applied unchanged to a class actions regime, would constitute a major obstacle to commencing a class action. The broad effect of the application of this general rule to a class action would be as follows:[4]

The incidence of liability for costs where costs follow success

Result of action	**Representative plaintiff**	**Other members of class**	**Defendant**
Action succeeds (Class wins)	*Entitlement*: to "party and party" expenses from defendant. *Liability:* for own solicitor's fees not covered by the party and party expenses allowed by the Court on "taxation" (assessment) of the litigation costs reasonably incurred in prosecuting the action ("solicitor and client").	*Entitlement:* None. *Liability:* None.	*Entitlement:* None. *Liability: for* (a) own solicitor's fees ("solicitor and client") and (b) representative plaintiff's expenses ("party and party")
Action fails (Class loses)	*Entitlement:* None. *Liability: for* (a) own solicitor's fees ("solicitor and client") and (b) defendant's expenses ("party and party")	*Entitlement:* None. *Liability:* None.	*Entitlement*: to "party and party" expenses from representative plaintiff. *Liability*: for own solicitor's fees ("solicitor and client").

[3] See order 62, rule 3(2) of the Rules of High Court which provides that: *"[i]f the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."* The existing rule for costs in Hong Kong is that the unsuccessful party will pay the successful party's costs. No matter whether it is the plaintiff or the defendant who wins, the costs incurred by the successful party will not be fully recovered from the unsuccessful party. There is likely to be a substantial difference between the amount of the successful party's actual costs in conducting the action (solicitor and client costs) and the amount that he or she will be entitled to recover from the unsuccessful opponent (party and party costs).

[4] Table adapted from the Scottish Law Commission, *Multi-Party Actions* (No 154, 1996), at para 5.6.

8.4 Plaintiffs will face the prospect of being liable for their own legal costs and a significant portion of the costs incurred by the defendant should their cases fail. This potential liability for large amount of costs has the practical effect of deterring many individuals from taking legal actions, even though they have meritorious claims. As pointed out by Professor Morabito, the goals could not be achieved because of the costs barrier:

> *"Potential representative plaintiffs whose claims are individually non-recoverable would be unlikely to commence class actions as the extent of their potential liability for costs would exceed the value of their own claim. This state of affairs precludes the attainment of the 'access to justice' goal of class actions. In relation to those potential class representatives, whose claims are individually recoverable, individual proceedings constitute a more appealing option than grouped proceedings as they involve lower costs. Consequently, another major goal of class actions, commonly referred to as the 'judicial economy' goal, becomes unreachable."*[5] (Emphasis added)

8.5 Two alternative costs rules have been implemented or proposed in class action regimes in other jurisdictions:

(a) ***No costs order rule*** – under this rule the successful litigant is ordinarily not entitled to collect legal costs from the loser. This approach is adopted in the USA. The Ontario Law Reform Commission recommended the adoption of this rule because it would be beneficial to plaintiffs and would remove the threat of a large costs award as a barrier to potential class proceedings.[6] British Columbia has, in essence, adopted this approach: successful parties are not entitled to costs, unless there has been "*vexatious, frivolous or abusive conduct on the part of any party*", "*an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing the costs or for any other improper purpose*", or "*there are exceptional circumstances that make it unjust to deprive the successful party of costs*".[7] The Victorian Law Reform Advisory Council recommended the adoption of the American "no costs" rule and pointed out that the use of the "costs follow the event" rule as a means of dealing with unfounded claims created risk and uncertainty for all litigants.[8] The losers were penalised simply for having lost, no matter how sound their decision to

---

5 Vince Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs", (1995) *Monash University Law Review*, Vol 21, No 2, 231, at 233-4.

6 Ontario Law Reform Commission, *Report on Class Actions* (1982), at 704.

7 *Class Proceedings Act*, RSBC 1996, sections 50 and 37.

8 Vince Morabito and Judd Epstein, Victorian Attorney-General's Law Reform Advisory Council, *Expert Report 2 on Class Actions in Victoria: Time for a New Approach*, 1997, at paras 7.22-7.28.

litigate or to resist settlement might have been.[9] The Manitoba Law Reform Commission recommended following the approach in British Columbia. This would ensure that potential plaintiffs were not deterred from launching a class action by their potential exposure to a large costs award in the event that the proceedings were unsuccessful, and as a result would enhance access to justice for potential claimants.[10]

(b) ***Costs follow the event rule*** – under this rule the successful party is *prima facie* entitled to costs. Contrary to the Ontario Law Reform Commission's recommendations, the Ontario government adopted the "costs follow the event" rule. In exercising its discretion with respect to costs, the court is directed to consider whether the class action was a test case, raised a novel point of law, or involved a matter of public interest.[11] The plaintiff risks having to pay the defendants' costs (which may be substantial) if he is unsuccessful in certifying the action as a class proceeding or if he is unsuccessful on the merits. In the United Kingdom, the Scottish Law Commission recommended that the court should retain its discretion to apply the general rule that expenses follow success.[12] Lord Woolf was of the view that multi-party actions were not sufficiently different from ordinary litigation as to justify a change in the costs follow the event rule.[13] The South African Law Commission recommended that the court should retain a discretion to consider whether to apply the general rule that costs follow the event in class proceedings.[14] The Australian Law Reform Commission has recommended the retention of the general rule in civil and judicial review proceedings that the loser pays the winner's costs.[15]

---

9 G A Hicks, 'Statutory Damage Caps are an Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Action' (1989) 49 *Louisiana Law Review* 763, 791 cited in Vince Morabito and Judd Epstein, *Victorian Attorney-General's Law Reform Advisory Council, Expert Report 2 on Class Actions in Victoria: Time for a New Approach*, 1997, at para 7.25.

10 Manitoba Law Reform Commission, *Class Proceedings* (1999) at 75.

11 Class Proceedings Act (Ont), section 31(1).

12 Scottish Law Commission, *Multi-Party Actions Report* (1996), at para 5.10.

13 Lord Woolf, *Access to Justice* (Final report, 1996), at 239, at para 58.

14 South African Law Commission, *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (1998) Recommendation 22, at paras 5.17.1-5.17.5.

15 Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation* (Rep No 75, 1995) para 4.30, recommendation 8. The costs follows the event rule also applies under the Australian federal class action regime (see ALRC, *Costs Shifting – Who Pays for Litigation Report*, at paras 16.25-16.26).

Costs in case of settlement

8.6 Judicial approval of settlement is required in the jurisdictions of Canada, USA and Australia that we have surveyed. We will concentrate our discussion on the position in Australia. Section 33V of the Federal Court of Australia Act 1976 (FCA Act) provides as follows:

> *"(1) A representative proceeding may not be settled or discontinued without the approval of the Court.*
>
> *(2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court."*

8.7 Where a proposed settlement involves payment of costs of the solicitors for the plaintiffs, courts have required evidence as to the manner in which these costs have been determined and must be satisfied that the amount was fair and reasonable having regard to the work undertaken.[16]

8.8 In *Williams v FAI Home Security Pty Ltd (No 5)*, Goldberg J referred to evidence from an independent legal costs consultant who had reviewed the files of the applicants' solicitors together with their time records.[17] The judge was satisfied on the basis of that evidence that the costs to be paid to the applicants' solicitors were fair and reasonable and were lower than those which they would have been entitled to charge their clients.

8.9 In *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd),* Moore J stated that the applicant relied on an affidavit filed by a barrister and solicitor of the Supreme Court of Victoria who had practised exclusively in the area of legal costs consultancy since 1992 and who had expressed the opinion that the account prepared by the applicant's solicitors was fair and reasonable and accurately reflected and applied the method of calculating costs and disbursements agreed by the solicitors and the applicant.[18] The solicitors' fees included an uplift fee of 25% and Moore J did not consider that this aspect of the agreement should preclude approval of the settlement.

8.10 In *Courtney v Medtel Pty Ltd (No 5),* the court asked for evidence from an independent, experienced solicitor or costs consultant before determining an application for approval of a settlement under section 33V(1) of the FCA Act.[19] The court said that in deciding whether to approve the settlement it was required to consider:

---

16 *Williams v FAI Home Security Pty Ltd* (No 4) (2000) 180 ALR 459, at para 47.

17 [2001] FCA 399, at para 19.

18 [2003] FCA 980, at para 15.

19 [2004] FCA 1406. See also *Williams v FAI Home Security Pty Ltd* (No 5) [2001] FCA 399, at para 19 (Goldberg J); *Williams v FAI Home Security Pty Ltd* (No 4) [2000] FCA 1925, at para 19 (Goldberg J); as cited in *Jarrama Pty Ltd v Caltex Australia Petroleum Pty Ltd* [2004] FCA 1114, at para 10 (Crennan J).

(a) the reasonableness of the fee and retainer agreements, including the provisions for ancillary services, interest and an uplift factor;

(b) whether the fee and disbursements charged had been calculated in accordance with the fee and retainer agreement; and

(c) whether any significant portion of the fees and disbursements had been inappropriately or unnecessarily incurred in conducting the proceedings on behalf of the representative applicant and the represented group.[20]

8.11 In that case, Sackville J was of the view that there were "special circumstances" which warranted the need for evidence from an independent experienced solicitor or costs consultant as to the reasonableness of the costs. Those circumstances included:

(a) the provision for payment of "*an apparently large amount by way of fees and disbursements*";

(b) the fact that a proportion of those fees and disbursements was to be borne by the group members; and

(c) the fact that the represented group included persons who were not individually legally represented in the proceedings.[21]

As Sackville J noted, these circumstances created at least the possibility of a conflict of interest between the solicitors and some remaining group members.

8.12 The judge was also concerned at the proposal that no compensation was to be paid to the representatives of class members who had died before the commencement of the proceedings. In his view, the proposed settlement scheme would be fair and reasonable, so far as this sub-group was concerned, if the 47 members of the sub-group had received notice of the proposed settlement and had not opted out of the proceedings. In his opinion, fairness required that they should receive notice with an opportunity to opt out. Subsequently, after considering further evidence, including from an independent solicitor and costs consultant, Sackville J approved the settlement.[22]

Costs where proceedings no longer continue as a class action

8.13 The Federal Court of Australia may make an order (under sections 33L, 33M or 33N of the FCA Act) that a proceeding is no longer to continue as a representative proceeding under Part IVA.

---

20 [2004] FCA 1406, at para 61.

21 [2004] FCA 1406, at para 59.

22 *Courtney v Medtel Pty Ltd* (No 6) [2004] FCA 1598.

8.14 In such circumstances, the proceeding may be continued as a proceeding by the representative party on his own behalf (section 33P(a)) and, on their application, group members may be joined as applicants in the proceeding (section 33P(b)).

8.15 Group members who become parties for the purpose of the ongoing conduct of the (non-representative) proceeding will lose the immunity from potential liability for adverse costs orders which they enjoyed as group members during the course of the representative proceeding. Former group members will not necessarily remain immune for any order for costs in respect of that period during which the proceedings were being conducted as a class action.[23]

Costs-shifting measures in other jurisdictions

8.16 To overcome the costs barrier, measures have been introduced in other jurisdictions to shift the costs burden from the representative plaintiffs to the defendant, the class members, the class lawyers or to an external funding source.

(a) Shifting costs to the defendant

8.17 In Ontario, the costs follow success rule applies (ie a losing representative plaintiff is liable for the party and party costs of the successful defendant), but section 31(1) of the Ontario Class Proceedings Act allows the court to make a different costs order in certain specified circumstances:

> *"In exercising its discretion with respect to costs under subsection 131(1) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest."* (Emphasis added)

8.18 Professor Mulheron found that attempts by unsuccessful representative plaintiffs to invoke the discretion of the court under one of the three categories of special case have had mixed success.[24] Moreover, recent court decisions have indicated that the judiciary has tended to treat class actions as a non-special branch of civil litigation. Professor Mulheron concluded that:

> *"The Ontario experience serves to emphasise that, in reality, any statutorily introduced directives to the courts by which to soften the potentially harsh effect of the [costs follow success] rule depends ultimately on judicial discretion, which will not be of*

---

23 Peter Cashman, *Class Action Law and Practice* (2007, the Federation Press), at 456.

24 R Mulheron, *The Class Action in Common Law Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 450.

much comfort to a representative plaintiff potentially or actually exposed to a formidable costs bill from a successful defendant."[25] (Emphasis added)

8.19 We are of the view that because of the exceptional circumstances in which costs could be transferred to the successful defendant and the narrow scope for the exercise of judicial discretion, this does not provide a solution to the general problem of funding class actions and we do not propose its adoption in Hong Kong.

(b) Shifting costs to class members

8.20 The Australian legislative scheme for class actions implements a means of protecting the representative plaintiff in relation to the costs incurred in conducting a class action. Section 33ZJ(2) of the FCA Act provides that, in successful class actions seeking monetary relief:

> *"If … the Court is satisfied that the costs reasonably incurred in relation to the [class action] by the person making the application [representative plaintiff] are likely to exceed the costs recoverable by the person from the respondent, the Court may order that an amount equal to the whole or a part of the excess be paid to that person [the representative] out of the damages awarded."*

8.21 This provision is similar to the US "common fund" doctrine.[26] Provisions similar to section 33ZJ(2) have been proposed by the Australian Law Reform Commission,[27] the Ontario Law Reform Commission[28] and the South Australian Law Reform Commission.[29] It ensures that "*any difference between the costs recovered under the party/party order and the costs reasonably charged by the solicitors in respect of the litigation is met out of recovered damages.*"[30] Moreover, the provision overcomes the problem of class members who obtain a "free ride".[31] Section 33ZJ(2) allows the court

---

25 R Mulheron, *The Class Action in Common Law Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 451.

26 The "common fund" doctrine is explained by Professor Mulheron thus: *"[w]here a fund is created, then under the 'common fund' doctrine, those lawyers whose conduct of an action results in 'the creation, preservation or increase of a fund in which others have an interest' are entitled to receive the costs of the litigation, including attorney's fees, from the fund as compensation for their services on the other's behalf, in addition to any fees to which they may be entitled from their own clients."* (R Mulheron, *The Class Action in Common Law Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 440.

27 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988), at para 289.

28 Ontario Law Reform Commission, *Report on Class Actions* (1982) 714.

29 Law Reform Committee of South Australia, *Report Relating to Class Actions* (Report No 36, 1977) 13.

30 Noted in *McMullin v ICI Aust Operations Pty Ltd* (FCA, 27 Nov 1997) 4.

to exact indirect contributions from class members in the event of a successful class action for damages. However section 33ZJ(2) has a number of limitations:

(a) If the class action only seeks non-monetary relief, such as an injunction or declaration, there will be no monetary recovery from which fees and disbursements can be deducted;

(b) The Court can only make an order in respect of an award of damages. If the class members have recovered damages or compensation from a defendant by way of settlement, the provision does not apply;

(c) The provision does not deal with the problem of insufficient funds to initiate the proceedings at the outset; and

(d) The provision does not address the issue of a possible adverse costs order which might be made against the representative plaintiff if the proceeding fails.[32]

8.22 It is a general feature of all class action regimes that, if the class loses, the class members will enjoy a specific and unilateral costs immunity. This immunity is statutorily provided in Australia,[33] Ontario[34] and British Columbia.[35] Rather than imposing on the class members a liability to pay, section 19(7) of the Class Proceedings Act in British Columbia provides for an alternative method of financing the initiation and conduct of a class action:

> *"With leave of the court, notice [of certification] may include a solicitation of contribution from class members to assist in paying solicitors' fees and disbursements."*

8.23 In the absence of any sanction on class members if they fail to make a contribution, it is doubtful whether this is an effective method of financing class actions. Professor Morabito has referred to the reluctance of absent class members to contribute to the expenses of the class action:

---

31 The problem of a "free ride" has been described as follows: *"Absent class members who are the beneficiaries of the efforts of the class representative and the class lawyer, get a 'free ride' in two respects. First, since absent class members are not parties to the action, they are not potentially liable for the party and party costs of the defendant should the class action fail. Secondly, absent class members are not obliged to contribute to the solicitor and client costs owed by the class representative to the lawyer for the class, unless they have entered into agreements to do so."* (Emphasis added) Ontario Law Reform Commission, *Report on Class Actions* (1982) 657.

32 Vince Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs", (1995) *Monash University Law Review*, Vol 21, No 2, 231 at 237-8 and R Mulheron, *The Class Action in Common Law Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 463-4.

33 Federal Court Act (Aus), 22 33Q, 33R and 43(1A).

34 Class Proceedings Act (Ont), section 31(2).

35 Class Proceedings Act (BC), section 37(4).

> *"This reluctance is attributable to two major factors. In the first place, class members will be able to enjoy the benefits flowing from a successful class suit whether or not they provide any financial assistance to the representative plaintiff. Another reason for this reluctance is due to the remoteness of any potential benefit at the time the request for contributions is normally made, namely, at an early stage of the proceedings."*[36] (Emphasis added)

8.24 Given the limitations of a provision along the lines of section 33ZJ(2) and the reluctance of class members to contribute voluntarily to the costs of the representative plaintiffs, we do not think that transferring the financial burden to the class members is likely to provide the necessary funding for class action litigation.

(c) Shifting costs to the class lawyers

8.25 In the context of class actions, mechanisms for transferring the financial risks inherent in litigation from the representative plaintiff to the class lawyers are provided for in the agreements as to the lawyers' fees. "Conditional fees" involve the payment of legal fees on the traditional basis of calculation plus an additional percentage if the class action is won. If the class action is lost, then no legal fee will be charged. In contrast, "contingency fees" are based on the amount of compensation recovered from a class action. If the class action is lost, no legal fee will be charged, whereas if the class action is won, then a percentage of the compensation recovered will be charged as legal fees.[37]

8.26 Traditionally, common law did not allow private funding of litigation. The offence of maintenance[38] is punishable at common law by a fine or imprisonment. Maintenance consists in the unlawful taking in hand or upholding of or assisting in civil suits or quarrels of others, to the disturbance of common right, and from other than charitable motives. "Champerty"[39] is a bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they succeed in their litigation, in return for which the champerter funds the party's suit.

8.27 In the United States, counsel are permitted to take on class actions (and other proceedings) on the basis of a contingency fee agreement,

---

36 Vince Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs", (1995) *Monash University Law Review*, Vol 21, No 2, 231, at 236.

37 See the definitions given in the Law Reform Commission of Hong Kong, *Conditional Fees* (July 2007), at para 6.

38 See *Bradlaugh* v *Newdegate* 11 QBD 1; *Alabaster* v *Harness* [1895] 1 QB 339; *Holden* v *Thomson* [1907] 2 KB 489; *Neville* v *London "Express" Newspapers, Ltd* [1919] AC 368.

39 As to what is champertous, see *Re Thomas* [1894] 1 QB 747; *Rees v De Bernardy* [1896] 2 Ch 437.

under which the lawyers do not receive payment of any kind unless the claim is successful. The amount which the lawyers are entitled to receive is either defined as a percentage of the amount recovered, or is determined through the "lodestar" method (ie where the fee is based on a multiplier: the hourly rate adjusted for complexity and carrying costs multiplied by risk. The multiplier fee may be topped-up by a counsel fee, if appropriate).[40]

8.28 Following the abolition of the offence and tort of maintenance and champerty in the United Kingdom in 1967, the Australian jurisdictions of Victoria, South Australia, New South Wales and the Australian Capital Territory all subsequently followed suit.[41]

8.29 In British Columbia, lawyers are allowed to receive a set percentage of the quantum of damages recovered by the class if the class wins. A fairly wide range of percentages has been judicially permitted.[42] The Ontario Class Proceedings Act expressly provides that a lawyer and a representative party may enter into a written agreement which provides that fees and disbursements will only be paid if a class action is successful. Section 33 provides:

> *"(3) 'base fee' means the result of multiplying the total number of hours worked by an hourly rate … 'multiplier' means a multiple to be applied to a base fee …*
>
> *(4) … the solicitor [may apply] to the court to have his or her fees increased by a multiplier …*
>
> *(7) … the court (a) shall determine the amount of the solicitor's base fee; (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; ….*
>
> *(8) In making a determination under (7)(a), the court shall allow only a reasonable fee.*
>
> *(9) In making a determination under (7)(b), the court may consider the manner in which the solicitor conducted the proceeding."*

8.30 The Ontario legislation does not specifically provide for a contingency fee based on a percentage of the amount of any recovery, but it has been judicially endorsed on the basis that such arrangements promote

---

40 Manitoba Law Reform Commission, *Class Proceedings* (1999), at 35.

41 The Law Reform Commission of Hong Kong, *Conditional Fees* (July 2007), at para 5.2.

42 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004), Oxford and Portland, Oregon Hart Publishing), at 471-3.

efficiency in the litigation and discourage unnecessary work that might otherwise be done by the lawyer simply in order to increase the base fee.[43]

8.31 In Manitoba, section 58 of the Law Society Act authorises contingency fee agreements based on a percentage of an award or settlement. Given the peculiar nature of class proceedings, the Manitoba Law Reform Commission recommended the inclusion within the class proceedings legislation of provisions that deal specifically with contingency fee agreements in the context of class proceedings. The Commission was of the opinion that contingency fee agreements should be permitted in the context of class proceedings, and that section 58 of the Law Society Act should apply to class proceedings to the extent that the class proceedings legislation did not specifically affect its provisions. The Commission further recommended that an application to the court for a declaration that a contingency fee agreement was not fair and reasonable to the client should be made to the judge who either presided over the trial or approved the settlement agreement, whichever the case might be.[44]

8.32 The Australian Law Reform Commission recommended the introduction of an uplift contingency fee for class proceedings conducted under Australia's federal regime.[45] This proposal was not enacted. However, Australian lawyers, with the possible exception of Victorian lawyers, are permitted to charge a speculative fee, as long as they believe that their client has a reasonable cause of action and they do not bargain with their client for an interest in the subject matter of the litigation.[46] Lawyers in South Australia and New South Wales are permitted to enter into uplift fee arrangements.[47]

8.33 The Scottish Law Commission strongly opposed the introduction of percentage contingency fees for class actions in that jurisdiction, although it noted that "speculative fees" (where the lawyer is paid only if the client is successful in the litigation and the fee payable may be the normal fee and an agreed percentage of up to 100% of that fee) are already permissible in Scotland.[48] The South African Law Commission, on the other hand, suggested the adoption of the Ontario rule. The Contingency Fees Act 1997

---

43 *Crown Bay Hotel Ltd Partnership* v *Zurich Indemnity Co of Canada* (1998), 160 DLR (4th) 186, 40 OR (3rd) 83 (Gen Div) [11].

44 Manitoba Law Reform Commission, *Class Proceedings*, Report #100(1999) 79-80.

45 It was proposed that the court be authorised to approve fee agreements, which could include an uplift fee (but not a percentage contingent fee), in advance of the conclusion of the proceeding: Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), at paras 296-297.

46 Vince Morabito and Judd Epstein, Victorian Attorney-General's Law Reform Advisory Council, *Expert Report 2 on Class Actions in Victoria time for a New Approach*, 1997, at para 7.11.

47 Legal Profession Act 1987 (NSW), sections 186, 187(2), (3), (4); Legal Practice Act 1996 (Vic), section 98; Legal Practitioners Act 1981 (SA), section 42 and Rules of Professional Conduct and Practice 2003(SA), rule 42; and Barristers' Rules (Qld), rule 102A(d). Tasmania prohibits the charging of uplift fees by barristers: Rules of Practice 1994 (Tas), rule 92(1).

48 Scottish Law Commission, *Multi-Party Actions Report* (1996), at paras 5.12-5.15.

was enacted in South Africa to allow legal practitioners, in the event of successful litigation, to receive, in addition to their normal fees for the case in question, an uplift to a maximum of 100% of their normal fees. The South African Law Commission recommended that a legal practitioner in a class action should be allowed to make an arrangement with the representative that fees, or fees and disbursements, will only be paid in the event of success.[49]

8.34 The Scottish Law Commission set out the following factors for consideration in deciding whether contingency fee arrangements should be permitted:

> *"The perceived advantages of contingency fees include the following:*
>
> *(a) Poor clients who are unable to pay lawyers' fees can bring their cases to court.*
>
> *(b) Lawyers accepting cases on this basis will have a stake in winning the case and, therefore, will be more committed and more diligent in their preparation and presentation.*
>
> *(c) Lawyers may benefit by a simplification of the administrative procedures by which they are paid and by an increase in their earnings.*
>
> *On the other hand, the following are the perceived disadvantages of contingency fees:*
>
> *(a) It is said, on the basis of experience in America, that a contingency fee system leads to excessive awards and an explosion in litigation.*
>
> *(b) They create a conflict of interest between the lawyer and the client to avoid the heavy expense of preparing for a trial (proof) the lawyer may encourage settlement when that is not in the client's best interests.*
>
> *(c) Fees are excessive since lawyers can charge an unreasonable percentage (in the absence of arrangements to control excessive fees).*
>
> *(d) Lawyers are encouraged to use unethical tactics in the way they conduct cases.*
>
> *(e) The rule that expenses follow success reduces the attractiveness of contingent fees to litigants in the United Kingdom since if they lose they will still have to pay the other side's costs.*
>
> *(f) They seem to offer little to those legally aided litigants who have no contribution to pay (unless there is a strong risk of the statutory claw back taking most of the award).*

---

[49] South African Law Commission, *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (1998) Recommendation 23, at paras 5.18.1-5.18.6.

(g) *They are only applicable where a financial claim is being made and not, for example, in actions of [injunction or declaration] or in applications for judicial review."*[50]

8.35 Arguably, the most important benefit is that of increasing access to justice by removing or reducing some of the costs disincentives that currently deter the initiation of class actions. This is achieved by transferring some of the risk, and part of the cost, of litigation from the clients to their lawyers, who are better able to assess the risks involved and to bear those risks by spreading them over a large number of law suits.[51] On the other hand, perhaps the most persuasive argument against contingency fees is the potential for conflict of interest which they create in relation to such matters as the settlement of the client's claim. The contingent nature of the lawyer's remuneration creates a strong financial incentive for the lawyer to accept a small settlement in order to ensure some fees, rather than risk losing at trial and recovering nothing. The losses incurred as a result of the conflicts of interest which may exist between principals and agents are described by economists as "agency costs".[52]

8.36 The problem of agency costs in class actions can be addressed by a requirement that settlements be approved by the court presiding over the class suit. The legislation governing the class proceedings regimes in both British Columbia and Ontario stipulates that any fee agreement (whether a contingency fee agreement or not) between the class lawyer and representative plaintiff must be in writing[53] and must be approved by the court.[54]

8.37 The two justifications which have been cited for judicial scrutiny of fee agreements in class actions are, first, to protect other class members who may be bound by the terms of a retainer agreement that they did not negotiate, and secondly, to ensure that legal fees are not disproportionate to the services provided.[55]

8.38 The experience in the US indicates that if judicial approval of class settlements is to provide an adequate safeguard against conflicts of

---

50 Scottish Law Commission, *Multi-Party Actions Court Proceedings and Funding* Discussion Paper No 98, at paras 8.20-8.21. Cf views of the Law Reform Commission of Hong Kong, *Conditional Fees,* report, (July 2007) at paras 7.5-7.30.

51 Vince Morabito and Judd Epstein, Victorian Attorney-General's Law Reform Advisory Council, *Expert Report 2 on Class Actions in Victoria: Time for a New Approach*, 1997, at para 7.13 and footnote 36.

52 Vince Morabito and Judd Epstein, Victorian Attorney-General's Law Reform Advisory Council, *Expert Report 2 on Class Actions in Victoria: Time for a New Approach*, 1997, at paras 7.15-7.16.

53 Class Proceedings Act (BC), section 38(1); Class Proceedings Act (Ont), section 32(1).

54 Class Proceedings Act (BC), section 38(2); Class Proceedings Act (Ont), section 32(2).

55 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004), Oxford and Portland, Oregon Hart Publishing), at 477.

interest between class lawyers and class members, judges must be prepared to abandon their traditional passive approach and pursue vigorously the role of guardians of the interest of the absent class members.[56] In their case studies of ten recent class actions for damages, RAND analysts found wide variation in what was delivered to class members as a result of litigation, and in what class counsel received in return.[57] RAND interpreted the case-study findings as demonstrating that when judges scrutinized proposed settlements and fee requests more closely and refused to approve questionable deals and requests, class members received more of what defendants were willing to pay to settle the cases. The analysts concluded that:

> *"… the balance of benefits and costs was more salutary when judges*
>
> - *required clear and detailed notices*
> - *closely scrutinized the details of settlements including distribution strategies*
> - *invited the participation of legitimate objectors and intervenors*
> - *took responsibility for determining attorney fees, rather than simply rubber-stamping previously negotiated agreements*
> - *determined fees in relation to the actual benefits created by the lawsuit [and]*
> - *required ongoing reporting of the actual distribution of settlement benefits."*[58]

8.39 High percentage contingency fees of the order of 30-40% have been awarded in the USA and in British Columbia.[59] In practice, these awards provide "war chests" which enable the lawyers themselves to fund the class action, thus enhancing access to justice.

8.40 The Law Reform Commission of Hong Kong considered the issue of conditional fees in a report published in July 2007.[60] The "costs follow the event" rule operates in Hong Kong, which means that the unsuccessful litigant will usually be ordered to pay the legal costs of the successful party, in addition to his own. The report noted that, if conditional

---

56 Vince Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs", (1995) *Monash University Law Review*, Vol 21, No 2, 231, at 248.

57 Deborah Hensler et al, RAND, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000) cited in Deborah R Hensler and Thomas D Rowe, "Complex Litigation at the Millennium Beyond 'It just ain't worth it': Alternative Strategies for Damage Class Action Reform" Spring/Summer, 2001, 64 *Law and Contemporary Problems* 137, at 148.

58 Same as above, at 149.

59 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon Hart Publishing), at 469-73.

60 The Law Reform Commission of Hong Kong, *Conditional Fees,* report (July 2007).

fees were allowed in Hong Kong, an unsuccessful claimant who had a conditional fee arrangement would be relieved from paying his own lawyers, but would still be liable to pay the defendant's legal fees unless he had obtained after-the-event insurance (ATE insurance) to cover these costs. The report pointed out that a wealthy corporate client might choose to use conditional fees without obtaining ATE insurance after weighing up the amount of the premium, the likelihood of losing the case and their financial ability to pay for the other side's costs should the need arise. Experience in other jurisdictions suggested, however, that ATE insurance was an integral component of a conditional fees regime, particularly for those of limited means whom a conditional fee arrangement was intended to assist. Since it was doubtful that ATE insurance would be available at an affordable premium and on a long-term basis in Hong Kong, the report concluded that the current conditions were not appropriate for the introduction of conditional fees.[61]

8.41 The Consultation Paper suggested that this issue might be re-examined in the class action context. The Civil Justice Council of the UK addressed the issue of contingency fee funding in multi-party claims and suggested that:

> *"[i]n multi party cases where no other form of funding is available, regulated contingency fees should be permitted to provide access to justice. The Ministry of Justice should conduct thorough research to ascertain whether contingency fees can improve access to justice in the resolution of civil disputes generally."*[62]

8.42 We have proposed in Recommendation 5(3) that, in appropriate cases, the representative plaintiffs should be ordered by the court to pay security for costs in accordance with the established principles for making such orders. In other words, the court will ensure that any claimants themselves have sufficient means to pay any adverse costs and provide protection for defendants against blackmail claims lodged by impecunious claimants. The claimants will need to demonstrate that they are sufficiently funded to meet the adverse costs order or that they are adequately insured by ATE insurance. So long as the appropriate financial requirements for adequacy of representation are satisfied, there may be scope for the prospective claimants to seek private funding by way of contingency fee arrangements. Reflecting the assessment of the current situation in Hong Kong as revealed in the Law Reform Commission of Hong Kong's report on conditional fees, the Consultation Paper made no recommendation to allow conditional fee arrangements in class actions. However, the Consultation Paper suggested that further research should be conducted to ascertain whether conditional fees could improve access to justice in the resolution of civil disputes generally.

---

61 LRC report, cited above, Recommendation 1, at paragraphs 7.5-7.30.

62 Civil Justice Council, *The Future Funding of Litigation – Alternative Funding Structures* (June 2007), Recommendation 4, at 68.

Other alternative sources of funding

Conditional legal aid fund

8.43 In its report on *Conditional Fees*, the Law Reform Commission of Hong Kong recommended establishing a Conditional Legal Aid Fund ("CLAF") which would combine conditional fees and legal aid.[63] The fund would take a proportion of the money received by a successful plaintiff to meet claims on the fund by unsuccessful plaintiffs. The initial funding would have to be provided by the Government. An applicant would have to satisfy the fund, as in the case of legal aid, that he had an apparently good case. A new administrative body would be set up to administer the CLAF and to screen applications for the use of conditional fees, brief out cases to private lawyers, finance the litigation, and pay the opponent's legal costs should the litigation prove unsuccessful. The report recommended that the CLAF should be permitted to engage the private lawyers it instructs on a conditional fee basis, while the CLAF should be permitted to charge the client on a contingency fee basis.

8.44 In September 2007, the Law Society of Hong Kong published the Report of its Working party on Conditional Fees in response to the Law Reform Commission's proposals. The Law Society was of the view that the disadvantages of conditional fee agreements outweighed their possible advantages as a means of increasing access to justice. A CLAF as suggested by the Law Reform Commission was unlikely to be financially viable and would be untenable given the unavailability of ATE insurance in Hong Kong. The Law Society believed that if the Supplementary Legal Aid Scheme were expanded to include other types of cases which had a high chance of success and certainty of recovery of damages or restoration of property, then the expansion would not jeopardise its financial viability.

8.45 It seems unlikely that the Commission's recommendations on CLAF will be taken forward. The Legal Aid Department has made clear in its response to the Commission's earlier Consultation Paper on this subject that it did not favour an expansion of the existing Supplementary Legal Aid Scheme. As regards the CLAF, while the Commission believed that such a scheme could (like the existing Supplementary Legal Aid Scheme) be self-financing, it would require seed money to set the ball rolling. It is unlikely that neither the Government nor the legal profession will be willing to provide the necessary initial funding.

Legal aid

8.46 Consideration may be given to whether the existing legal aid regime should be expanded to finance class actions in the light of overseas experience. The Scottish Law Commission and the South African Law Commission both considered that legal aid was the most suitable means of

[63] The Law Reform Commission of Hong Kong, *Conditional Fees* (July 2007), at 157-167.

providing financial assistance for class actions.[64] In view of the limitations discussed on other forms of funding by third parties, legal aid was in practice the only feasible means of third party funding if it is desired to provide public financial assistance. The Scottish Commission noted that the present civil legal aid arrangements were not specifically designed to apply to class actions litigation.[65] Legal aid was made available separately to each of the litigants, since each assisted person litigates separately. The financial conditions which must be met before legal aid was granted meant that one or more members of a group might be refused legal aid. If civil legal aid were to be available to the representative plaintiff in a class action it was likely that the financial conditions would have to be disapplied.

8.47 The Australian Law Reform Commission was of the view that the existing legal aid arrangements were not appropriate for group proceedings.[66] The application of strict eligibility criteria in relation to the "means test" would create a poverty trap which would catch people who were too rich to qualify for legal aid but not rich enough to pay lawyers' fees. The means test creates additional problems in the context of class actions. The application of the means test not just in relation to the financial means of the representative plaintiff but also to the means of all class members creates obvious administrative problems, especially in opt-out schemes which do not require the identification of, and the express consent to the bringing of the class suit by, the class members. A fundamental problem is that the availability of legal aid in individual actions does not address the problem that the potentially enormous costs of litigation far exceed the amount of each plaintiff's personal stake and it would be economically irrational to initiate class actions.[67]

8.48 We have consulted the Director of Legal Aid ("DLA") and explored the possibility of extending legal aid to class action proceedings commenced in Hong Kong. He made it clear that the current statutory framework only allowed the granting of legal aid on an individual basis.[68] It

---

64 Scottish Law Commission, *Multi-Party Actions Report,* para 5.50; South African Law Commission, *Report on The Recognition of Class Actions and Public Interest Actions in South African Law*, at para 5.19.13.

65 Scottish Law Commission, *Multi-Party Actions Court Proceedings and Funding* Discussion Paper No 98, at para 8.27.

66 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988), at para 305.

67 Vince Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs", (1995) *Monash University Law Review*, Vol 21, No 2, 231, at 263-5).

68 The long title of the Legal Aid Ordinance (Cap 91) is:

"To make provision for the granting of legal aid in civil actions to persons of limited means and for purposes incidental thereto or connected therewith."

Section 2(1) provides that:

"An 'aided person' means a person to whom has been granted a legal aid certificate which is still in force and 'person' does not include a body of persons corporate or unincorporate so as to authorise legal aid to be granted to such a body."

Section 10 provides that:

would be necessary to amend the Legal Aid Ordinance (Cap 91) if changes were to be made to the individual-based legal aid scheme.

8.49 If legal actions were jointly commenced by legally aided and non-legally aided plaintiffs, all that the DLA would pay is that portion of the costs attributable to the legally aided plaintiffs. If the nominal plaintiff in a class action were eligible for legal aid (meaning that he satisfied both the means and merits tests), legal aid would have to be granted. The DLA would not be concerned about whether the action proceeded as a class action or whether the remaining class members could get funding from other sources, but the DLA would only be responsible for the costs of the aided person as if that person had conduct of the action as a personal as opposed to a representative party.

8.50 If the class action failed, the DLA would be liable to pay the legal costs incurred by the legally aided person as if he were a private plaintiff pursuing the action on his own. The DLA would not be liable to pay the additional costs otherwise incurred by the class action proceedings. Nor would the DLA be held accountable for the costs incurred by other class members. As a corollary, if the class action succeeded, the DLA would recover the common fund costs, plus any outstanding contribution from the legally aided person only, and seek to recover his share of the party and party costs in the action. The additional costs for class action proceedings would have to be borne by the nominal plaintiffs themselves.

8.51 In response to our inquiry as to whether the DLA could be given more discretion to take into account the public interest element and to grant legal aid in appropriate cases, the DLA stressed that the underlying policy of legal aid was to help those who could not afford to get access to justice. As a matter of principle, well-off class members should not be allowed to "free ride" on the legally aided representative of the class.

"(1) Subject to subsections (2) and (3), the Director may grant to a person a certificate that that person is entitled under the provisions of this Ordinance to legal aid in connection with any proceedings if the Director is satisfied that -

(a) legal aid is sought in connection with proceedings for which legal aid may be granted under section 5 or, as the case may be, section 5A;

(b) in the case of legal aid to which section 5 applies, subject to section 5AA, the financial resources of that person do not exceed the amount specified in that section in respect of financial resources; and

(c) in the case of legal aid to which section 5A applies the financial resources of that person do not exceed the amount specified in that section in respect of financial resources …

(3) A person shall not be granted a legal aid certificate in connection with any proceedings unless he shows that he has reasonable grounds for taking, defending, opposing or continuing such proceedings or being a party thereto, and may also be refused legal aid where it appears to the Director that - …

(g) there are other persons concerned jointly with, or having the same interest as, the applicant in seeking a substantially similar outcome of the proceedings unless the applicant would be prejudiced by not being able to take his own or joint proceedings."

8.52 The DLA has made clear that, so long as individual applicant is qualified for legal aid under the Legal Aid Ordinance, the commencement of a class action will not itself disqualify him from that entitlement. But since common fund costs cannot normally be recovered from the opposite party on taxation, it will be necessary to disaggregate from the total common fund costs in the representative action the common fund costs attributable to the legally aided person, as if the action had been pursued as a personal action. Thus, if a legally aided person were willing to be a representative plaintiff in a class action, he would have to be made aware that he would have to bear not only the common fund costs due to the DLA but also the residual common fund costs of the action, unless he could seek indemnity from other members of the class or other representative plaintiffs.

8.53 In this connection, unless the costs order handed down by the court could divide the common fund costs among the class members equitably, there will be little incentive for anyone to take the leading role in commencing a class action.

8.54 Recommendation 6 in the Consultation Paper recommended that a legally aided representative plaintiff in a class action should only be funded as if he were pursuing a personal action and that part of the total common fund costs attributable to him should be disaggregated, and class members who are not legally aided should share equitably in the costs. These suggestions were supported and generally regarded as fair by those who responded, including the Department of Justice (Civil Division and Legal Policy Division), the Hong Kong Association of Banks, the Hong Kong Bar Association, the Hong Kong Federation of Insurers and the Law Society of Hong Kong. We therefore maintain these recommendations, except Recommendation 6(3) which proposed that if the Legal Aid Ordinance (Cap 91) were amended to accommodate legal aid for class actions, mechanisms should be devised to ensure that those who are not legally aided should share equitably in the costs. This is because we conclude at the end of this chapter that legal aid schemes should not be extended to cover class actions.

Recommendation 7

We recommend that:

(1) A legally aided person should not lose his legal aid funding by agreeing to act as representative plaintiff in a class action, but he should only be funded or protected to the extent as if he were pursuing a personal, as opposed to a class action.

(2) If a legally aided person becomes a representative plaintiff in a class action, that part of the total common fund costs which would be attributable to

the aided person as if he were pursuing the action on a personal basis should be disaggregated.

Class action fund

8.55 A further means of funding class litigation is by the establishment of a class action fund (CAF). The need for a special fund to provide financial assistance to representative plaintiffs was explained by the Australian Law Reform Commission as follows:

> *"The grouped procedure is designed to provide access to legal remedies for people who might not otherwise be able to pursue their rights because of cost and other barriers. In the case of individually non-recoverable claims, a special fund available to provide support for the applicants' proceedings … would assist people to obtain a legal remedy … In individually recoverable cases the fund could be used to assist with the additional costs which the principal applicant might otherwise have to bear thus promoting judicial economy by encouraging the grouping of these proceedings. Public funding would be an acknowledgement that there is a public purpose to be served by enhancing access to remedies where this is cost effective, especially where many people have been affected."* [69]
> (Emphasis added)

8.56 Such a special fund would be entitled to make discretionary grants. That discretion might extend to the financial resources of applicants and there might be a means test on applications or the exaction of a financial contribution such as a proportion of the proceeds of a successful action. The principal advantage of such a fund is that it would be entitled (although not bound) to assist all class litigants (not only impecunious plaintiffs, as with legal aid) to bring actions for any kind of remedy (not only actions for damages, which might be the only actions supported by a CLAF as discussed above).[70] The creation of such a special class actions fund has been described as "*the most attractive method of supporting class proceedings*." [71] The two Canadian jurisdictions of Quebec and Ontario have set up special funds to finance class actions.

---

69 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) para 308.

70 Scottish Law Commission, *Multi-Party Actions Court Proceedings and Funding* Discussion Paper No 98, para 8.43.

71 Federal Court of Canada, The Rules Committee, *Class Proceedings in the Federal Court of Canada*, Discussion Paper (2000), 102.

Quebec: Fonds d'aide aux recours collectifs

8.57 In Quebec, An Act Respecting the Class Action 1978 established the Fonds d'aide aux recours collectifs (the *Fonds*). Section 23 of the Act provides that when deciding whether or not to grant assistance, the Fonds:

> *"shall assess whether or not the class action may be brought or continued without such assistance; in addition, if the status of the representative has not yet been ascribed to the applicant, the Fonds shall consider the probable existence of the right he intends to assert and the probability that the class action will be brought."*

8.58 Sections 5 and 6 of the Act provide that when an action financed by the *Fonds* is successful, the representative plaintiff must reimburse to the *Fonds* any fees, costs or expenses received from the defendant, and the *Fonds* may withhold a percentage of the amount recovered. Section 29 of the Act provides that the *Fonds* shall pay the assisted person's attorney's fees and expert's fees and other incidental expenses expedient to the preparation or the bringing of the class action.

8.59 The latest available report (2003 - 2004) on the activity of the *Fonds* demonstrates the continued vigour of this approach. Sixty-five claims were presented and 51 accepted. The level of aid was Can$1,509,123 up by Can$40,000 on the previous year. While 85 per cent of claims were made by individuals 8 per cent were by non-profit making bodies and 5 per cent by co-operatives. Eighty-nine per cent of defendants were for-profit organisations, local or central government.[72]

Ontario: Class Proceedings Fund

8.60 Section 59(1) of the Ontario Law Society Act established a class proceedings fund:

> *"The board shall,*
>
> *(a) establish an account of the Foundation to be known as the Class Proceedings Fund;*
>
> *(b) within sixty days after this Act comes into force, endow the Class Proceedings Fund with $300,000 from the funds of the Foundation;*
>
> *(c) within one year … endow the Class Proceedings Fund with a further $200,000 from the funds of the Foundation"*

8.61 The purpose of the Class Proceedings Fund is to provide financial support for a plaintiff in respect of disbursements in a class

---

[72] *Fonds D'aide Aux Recours Collectifs Rapport Annuel 2003-2004* cited in Alan Riley and John Peysner, "Damages in EC Antitrust Actions: Who Pays the Piper?" (2006) 31 *EL Rev* 748, at 758.

proceeding and to pay costs awarded against the plaintiff.[73] The Class Proceedings Committee established under the Act decides whether funding should be granted for a particular case and, if so, the amount.[74] In making funding decisions, the Committee considers various factors, including the merits of the case, whether the plaintiff has made reasonable efforts to raise funds from other sources, whether the plaintiff has a clear and reasonable proposal for the use of any funds awarded, whether the plaintiff has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award, public interest and the likelihood of certification.[75] If the class action is successful, the representative plaintiff must reimburse the Fund for the amount it paid out, plus a levy of 10% of the court-ordered award or settlement amount,[76] as a "top-up" mechanism for the benefit of future litigants who may require recourse to the Fund.

8.62 The 2002 and 2003 Annual Reports of the Ontario Fund show that fewer than a dozen applications were made in the period from 2001 to 2003, and that only a handful of applications were granted.[77] In 2005, only six applications for funding were made. Funding was approved for one application, refused in another and was pending in the remaining four as at the end of the fiscal year 2005. The total amount of money awarded to applicants in 2005 (including monies paid in respect of previous years' awards) was only $288,149.22.[78] While the Fund was still under-utilised, 2008 has witnessed some progress: whereas only three applications for funding were received by the Fund in 2007, in the first eight months of 2008 the Fund approved six new applications, refused one and deferred the eighth.[79] There have been criticisms of the Fund's operation. First, it has been suggested that the 10 per cent levy on any judgment or settlement may be too high. It may deter low income class members while those with strong cases may not wish to forfeit 10 per cent. Secondly, it has been suggested that, because of the modest initial financial endowment, the Class Proceedings Committee has been too risk-averse in granting applications for funding. The under-utilisation of the Fund is arguably due to the Committee's policy of not considering a request for funding until a statement of defence has been

---

73 Section 59.1(2) of the Law Society Act 1990.

74 Section 59.3(3) of the Law Society Act 1990.

75 Section 59.3(4) of the Law Society Act 1990 and Regulation 5 of the Class Proceedings Regulation 771/92.

76 Regulations 8(4)(c) and 10(1) of the Class Proceedings Regulation 771/92.

77 Cited in Alan Riley and John Peysner, "Damages in EC Antitrust Actions: Who Pays the Piper?" (2006) 31 *EL Rev* 748, at 758.

78 See W A Bogart, Jasminka Kalajdzic and Ian Matthews, "Class Actions in Canada: A National Procedure in a Multi-jurisdictional Society?" (report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007), at 30.

79 Semi-Annual Report of the Fund as cited in Jasminka Kalajdzic, *Class Actions in Canada: Country Report Prepared for the Globalization of Class Actions Mini-Conference,* Oxford University (December 2008), at 6.

delivered in the action.[80] Bogart and others found that the primary reasons plaintiffs do not seek funding more often are: the low approval rate by the Class Proceedings Committee; the minimal amount of funding granted; and the high proportion of the ultimate settlement or judgment amount which is levied by the Fund.[81] As pointed out by Professor Mulheron, the Ontario experience also demonstrates that, under the usual "costs follow the event" rule, if a successful defendant can apply to a fund for reimbursement in the event of success in the action, the risk of an adverse costs award may be just as large a deterrent to those administering the fund as to the representative plaintiff.[82] On the other hand, the Quebec *Fonds* is regarded as more vibrant:

> *"Ward Branch … suggests that in contrast, the Quebec Fund is a very vibrant entity. The fact that the Fund takes a portion of all class settlements or judgments, whether or not it provides funding, creates an energizing cycle: (1) the Fund is well-funded by virtue of its levy on all settlements and judgments; (2) making it easier to accept applications; (3) creating an incentive to apply; and (4) hence, the Fund is used in most cases (since you are going to be 'charged' in any event and the funding is liberal)."* [83]

Victorian Law Reform Commission: proposed Justice Fund

8.63 In its 2008 report on *Civil Justice Review*, the Victorian Law Reform Commission proposed the establishment of a Justice Fund, which would (a) provide financial assistance to parties with meritorious civil claims, and (b) provide indemnity for any adverse costs order or order for security for costs made against the party assisted by the fund.

8.64 For administrative convenience, and to minimise establishment costs, the Commission recommended that the fund should be established, at least initially, as an adjunct to an existing organisation. The Commission suggested that one possible body might be Victoria Legal Aid.

8.65 The Commission recommended that the Justice Fund should seek to become self funding through:

---

80 See the discussions on the criticisms on the Fund in R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon Hart Publishing), at 457-9.

81 See W A Bogart, Jasminka Kalajdzic and Ian Matthews, "Class Actions in Canada: A National Procedure in a Multi-jurisdictional Society?" (report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007), at 30.

82 R Mulheron (same as above), at 459.

83 See W A Bogart, Jasminka Kalajdzic and Ian Matthews, "Class Actions in Canada: A National Procedure in a Multi-jurisdictional Society?" (report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007), at 30.

(a) entering into funding agreements with assisted parties whereby the Justice Fund would be entitled to a share of the amount recovered by the successful assisted party;

(b) having statutory authority in class action proceedings under Part 4A of the Supreme Court Act 1986 (Vic) to either

  (i) enter into agreement with an assisted representative party whereby the fund would be entitled to a share of the total amount recovered by the class under any settlement or judgment, subject to approval of the court, or

  (ii) to make application to the court for approval to receive a share of the total amount recovered by the class under any settlement or judgment;

(c) recovering, from other parties to the proceedings, costs incurred in providing assistance to the assisted party where the assisted party is successful and obtains an order for costs;

(d) receiving funds by order of the Court in cases where *cy–près* type remedies (ie distribution of proceeds obtained from the legal proceedings that indirectly benefit the public as a whole in some way relating to the purpose of the class action litigation) are available; and

(e) entering into joint venture litigation funding arrangements with commercial litigation funding bodies.

8.66 The Commission proposed that where the Justice Fund provides assistance, the lawyers acting for the assisted party should normally be required to conduct the proceedings without remuneration or reimbursement of expenses until the conclusion of the proceedings. Where the proceedings were successful they should normally be remunerated by costs recovered from the unsuccessful party and/or out of any monies recovered in the proceedings, without the Justice Fund having to pay the costs incurred in the proceedings. Where the assisted party was unsuccessful, the Justice Fund should meet the costs of the funded party as set out in the funding agreement or varied thereafter by agreement between the Justice Fund and the law firm conducting the assisted party's case.

8.67 The Commission proposed that during the first five years of operation (or such lesser period as the trustees of the Justice Fund might determine in light of the fund's financial position), the liability of the fund for any order for costs or security for costs made against the funded party should be limited, by statute, to the value of the costs incurred by the assisted party which the Justice Fund was required to pay to the lawyers acting for the assisted party under the funding agreement. During that period the Justice Fund would have a discretion to pay some or all of the shortfall between the amount ordered by way of adverse costs or security for costs against the

assisted party and the amount of those costs for which the Justice Fund was liable.[84]

8.68 At any stage of the proceedings the Justice Fund or the assisted party could apply to the court for an order limiting the amount of costs that the assisted party may be ordered to pay to any other party if the funded party is unsuccessful in the proceedings.

8.69 In summary, the basic mechanism of a typical CAF is as follows:

(a) a representative plaintiff applies to the management body of the CAF which will decide whether to approve the application;

(b) depending on the design of the CAF, the fund may be responsible for any combination of the representative plaintiff's disbursements, legal fees incurred or an adverse costs order if the defendant wins the case;[85]

(c) to enable the CAF to be self-financing, a representative plaintiff is required to reimburse the CAF for the amount it paid out and a levy of a certain percentage of the court-sanctioned award upon winning the case or of the settlement amount;

(d) since CAF only provides funding to parties to a class action, CAF will not fund individual class members seeking to prove their individual issues in individual proceedings after the determination of the common issues in their favour.[86]

In our view, the CAF concept offers a useful means of funding a modern class action regime.

---

84 Victorian Law Reform Commission, *Civil Justice Review Draft Proposals* (2007), at 52-3, explained and justified the proposal as follows: "*(f)or actuarial and solvency reasons it would be necessary, initially at least, to be able to quantify the potential liability of the fund to meet any adverse costs order in cases in which assistance has been provided. It is proposed that this be done using the approach adopted by the English Court of Appeal in determining the liability of commercial litigation funders for adverse costs in civil litigation in England & Wales [in the case of Arkin v Borchard Lines Ltd [2005] 3 All ER 613]. Thus the legal liability of the fund in respect of adverse costs would be capped at the level at which financial assistance had been provided to the party assisted by the fund. In other words, if the fund had provided financial assistance in the sum of say $1 million dollars to the assisted party, the maximum liability of the fund in respect of any adverse costs order would be the same amount. Although this may not adequately indemnify successful defendants in some cases, particularly where there are multiple defendants, such financial indemnity is a considerable improvement on defendants presently confront in defending class actions brought by parties of limited means.*"

85 The Class Proceedings Fund in Ontario covers "*disbursements related to the proceeding*" but not solicitor's fees. Disbursements include expenses which arise only in class proceedings, such as the cost of the class notice. The *Fonds* in Quebec is more generous than the Ontario's Fund in that it will pay for both lawyers' fees and disbursements, but is less generous in that it does not relieve an unsuccessful representative plaintiff of the liability for the defendant's costs.

86 R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon Hart Publishing), at 457.

Litigation funding companies

8.70 Litigation Funding Companies (LFCs) have been defined as:

> *"… commercial entities that contract with one or more potential litigants. The LFC pays the costs of the litigation and accepts the risk of paying the other party's costs if the case fails. In return, the LFC has control of the action and, if the case succeeds, is paid a share of the proceeds (usually after reimbursement of costs)."*[87]

Judicial consideration of LFCs

8.71 **Australia** - LFCs have increasingly been recognised as accommodating the commercial realities of class action litigation. Much of the uncertainty concerning the legal status of litigation funding agreements at common law has been resolved by the High Court of Australia in its decision in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd.*[88] The case involved a large number of tobacco retailers recovering licence fees paid to a wholesaler. The amounts of each retailer's claim were too small to justify legal action, but Firmstone, an LFC, approached a number of affected retailers and then brought a class action, at the same time seeking to use the discovery process to identify all other members of the class. The defendant contended that Firmstone was in effect trafficking in litigation and that their involvement constituted an abuse of process. The New South Wales Court of Appeal considered that the central question was the degree of control that the LFC in fact exercised over the litigation and the Court made the following observations:

> *"In my opinion, a conclusion about abuse of process must stem from a finding directed at the actual or likely conduct of the party in whose name the litigation is brought (or its agents). The court is not concerned with balancing the interests of the funder and its clients. Indeed, it is not concerned with the arrangements, fiduciary or otherwise, between the plaintiff and the funder except so far as they are corrupted or have a tendency to corrupt the processes of the court in the particular litigation. It is only when they have that quality that the defendant has standing to complain about them."*[89] (Emphasis added)

8.72 On appeal, the majority of the High Court of Australia dismissed the notion of abuse of process as a basis upon which the defence might claim that funded proceedings should be stayed, simply because a funding

---

87 Law Council of Australia, *Submission to Standing Committee of Attorney-General, in response to Litigation Funding in Australia*, 14 September 2006, at para 2.

88 [2006] HCA 41.

89 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) NSWLR 203 at [114] per Mason P with whom Sheller JA and Hodgson JA agreed; see also Mason P at [132].

agreement existed. The High Court agreed with the principal findings of Mason P that:

> *"the law now looks favourably on funding arrangements that offer access to justice so long as any tendency to abuse of process is controlled."*[90]
>
> *"the standard of proof for establishing an abuse of process and thereby obtaining the summary dismissal or permanent staying of proceeding is a high one (See Williams v Spaults (1992) 174 CLR 509 at 518-520). Appropriately so, since questions of access to justice are involved."*[91]

8.73 For the majority, Chief Justice Gleeson wrote:

> *"Even if the intervention of a litigation funder seeking to promote an assertion by more retailers of their rights be regarded as some form of intermeddling there is no justification for denying the existence of the matter."*[92]

8.74 Also for the majority, Justices Gummow, Hayne and Crennan wrote:

> *"The appellants submitted that special considerations intrude in 'class actions' because, so it was submitted, there is the risk that such proceedings may be used to achieve what, in the United States, are sometimes referred to as 'blackmail settlements'. However, as remarked earlier in these reasons, the rules governing representative or group proceedings vary greatly between courts and it is not useful to speak of "class actions" as identifying a single, distinct kind of proceedings. Even when regulated by similar rules of procedure, each proceeding in which one or more named plaintiffs represent the interests of others will present different issues and different kinds of difficulty…"*[93] (Emphasis added)
>
> *"The difficulties thought to inhere in the prosecution of an action which, if successful, would produce a large award of damages but which, to defend, would take a very long time and very large resources, is a problem that the courts confront in many different circumstances, not just when the named plaintiffs represent others and not just when named plaintiffs receive financial support from third party funders. The solution to that problem (if there is one) does not lie in treating actions financially supported by third parties differently from other actions. And if there is a particular aspect of the problem that is to be observed*

---

90 (2005) 63 NSWLR 203 at 227, Mason P, at [105].

91 (2005) 63 NSWLR 203 at 237, Mason P, at [151].

92 [2006] HCA 41, at para 19.

93 [2006] HCA 41, at para 94.

principally in actions where a plaintiff represents others, that is a problem to be solved, in the first instance, through the procedures that are employed in that kind of action. It is not to be solved by identifying some general rule of public policy that a defendant may invoke to prevent determination of the claims that are made against that defendant."[94] (Emphasis added)

"It follows that the funding arrangements made and proposed to be made by [LFCs] did not constitute a ground to stay the present proceedings."[95]

8.75 Also for the majority, Kirby J wrote:

"To lawyers raised in the era before such multiple claims, representative actions and litigation funding, such fees and conditions may seem unconventional or horrible. However, when compared with the conditions approved by experienced judges in knowledgeable courts in comparable circumstances, they are not at all unusual. Furthermore, the alternative is that very many persons, with distinctly arguable legal claims, repeatedly vindicated in other like cases, are unable to recover upon those claims in accordance with their legal rights." [96]

"It is against the inherent inequalities, presented by these litigious facts of life, that a representative action may, under proper conditions, afford a litigant with an individual claim and a justifiable prospect to secure practical access to that litigant's legal rights in association with many others. The individual claim may (as in the case of many tobacco retailers in these proceedings) be comparatively small and hardly worth the expense and trouble of suing. But the aggregate of the claims of those willing to proceed together, as proposed by a funder and organiser such as [LFCs], might be very large indeed. What is a theoretical possibility, as an individual action or series of actions, needs therefore to be converted into a practical case by the intervention of someone willing to undertake a test case, followed by others willing to organise litigants in a similar position, and under appropriate conditions, to recover their legal rights by helping them to act together."[97] (Emphasis added)

"Real access to legal rights: Apart from the foregoing considerations, it is important to recognise how exceptional it is for a court to bring otherwise lawful proceedings to a stop, as effectively the primary judge did in this case. It is very unusual to do so by ordering the permanent stay of such proceedings. The Court of Appeal recognised this consideration. Properly, it

94 [2006] HCA 41, at para 95.

95 [2006] HCA 41, at para 96.

96 [2006] HCA 41, at para 120.

97 [2006] HCA 41, at para 138.

emphasised that it was for the appellants to establish that the respondents' proceedings constituted an abuse of process …"[98]

"The reason why it is difficult to secure relief of such a kind is explained by a mixture of historical factors concerning the role of the courts; constitutional considerations concerning the duty of courts to decide the cases people bring to them; and reasons grounded in what we would now recognise as the fundamental human right to have equal access to independent courts and tribunals. <u>These institutions should be enabled to uphold legal rights without undue impediment and without rejecting those who make such access a reality where otherwise it would be a mere pipe dream or purely theoretical</u> …"[99] (Emphasis added)

"<u>The importance of access to justice, as a fundamental human right which ought to be readily available to all, is clearly a new consideration that stimulates fresh thinking about representative or 'grouped' proceedings.</u>"[100] (Emphasis added)

"In my opinion those reasons [for excluding LFCs] disclose an attitude of hostility to representative procedures that is a left-over of earlier legal times. They are incompatible with the contemporary presentation of multiple legal claims. And, most importantly they are fundamentally inconsistent with the rules made under statutory power and the need to render those rules effective."[101]

8.76 However, the minority judgment of Callinan and Heydon JJ was firm in its disapproval of third party funding:

"Institutions like Firmstone & Feil [the LFC in question], which are not solicitors and employ no lawyers with a practising certificate, do not owe the same ethical duties. No solicitor could ethically have conducted the advertising campaign which Firmstone & Feil got Horwath [an advertising company] to conduct. The basis on which Firmstone & Feil are proposing to charge is not lawfully available to solicitors. Further, organisations like Firmstone & Feil play more shadowy roles than lawyers. Their role is not revealed on the court file. Their appearance is not announced in open court. No doubt sanctions for contempt of court and abuse of process are available against them in the long run, but with much less speed and facility than is the case with legal practitioners. <u>In short, the court is in a position to supervise litigation conducted by persons who are parties to it; it is less easy to supervise litigation, one side of which is conducted by a party, while on the</u>

98 [2006] HCA 41, at para 143.

99 [2006] HCA 41, at para 144.

100 [2006] HCA 41, at para 145.

101 [2006] HCA 41, at para 148.

other side there are only nominal parties, the true controller of that side of the case being beyond the court's direct control."[102] (Emphasis added)

8.77 At the end of their judgement, they added:

"If that conclusion is thought by those who have power to enact parliamentary or delegated legislation to be unsatisfactory on the ground that the type of litigation funding involved in these appeals is beneficial, then it is open to them to exercise that power by establishing a regime permitting it. It would be for them to decide whether some safeguards against abuse should be incorporated in the relevant legislation." [103] (Emphasis added).

8.78 **England and Wales** - The same change in public policy to allow a party who has a legitimate interest in the outcome to provide funding for a case has also occurred in England and Wales. The Civil Justice Council summarised the position in England and Wales as follows:

"English courts have taken the view that third party funding is now acceptable in the interests of access to justice, particularly where the prospective claimant is unable to fund their claim by any other means. In short, the individual's right to access to justice must ultimately be subsumed to the doctrinal concerns of champerty and maintenance."[104]

8.79 In *London & Regional (St George's Court) Ltd v Ministry of Defence,*[105] Coulson J summarised the existing case law as follows:

(a) the mere fact that litigation services have been provided in return for a promise in the share of the proceeds is not by itself sufficient to justify that promise being held to be unenforceable;

(b) in considering whether an agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice, and that question requires the closest attention to the nature and surrounding circumstances of a particular agreement;

(c) the modern authorities demonstrated a flexible approach where courts have generally declined to hold that an agreement under which a party provided assistance with litigation in return for a share of the proceeds was unenforceable;

---

102 [2006] HCA 41, at para 266.

103 [2006] HCA 41, at para 289.

104 Civil Justice Council, *Improved Access to Justice – Funding Options and Proportionate Costs* (June 2007) para 127.

105 [2008] EWHC 526 (TCC) at [103] and citing from the earlier summary of Underhill J in *Mansell v Robinson* [2007] EWHC 101, QB (unreported).

(d) the rules against champerty, so far as they have survived, are primarily concerned with the protection of the integrity of the litigation process.

8.80 **Canada** - The legal status of LFCs in funding litigation was considered by the Ontario courts in the decision of *Nantais v Telectronics Proprietary (Canada) Ltd.*[106] Permission was given to strangers to the litigation, who were investors with no legal interest in the class proceedings, to provide funding for costs and disbursements in the proceedings at a high rate of return and on a purely contingent basis.

Arguments for and against LFCs

8.81 The advantages of allowing LFC funding include the following:

(a) It provides a level playing field for litigants, and access to justice for those who could not otherwise afford to prosecute their claims.

(b) It helps clients to manage the costs of litigation, which can range between reasonable and astronomical.

(c) It fills a gap caused by the reduction in legal aid funding, the lack of Conditional Fee Arrangements in commercial (as opposed to personal injury) litigation, and the difficulties with securing and enforcing ATE insurance.

(d) It focuses the client (who might otherwise lose interest if being funded under a "no win, no fee" arrangement) on what the litigation might cost him. The funder's due diligence provides a further filter by which claims are scrutinised before consuming litigant and judicial resources, thereby reducing the number of unmeritorious lawsuits.

(e) Litigation funding protects a successful defendant by providing a high probability that (at least some of) its costs will be recovered.

(f) It ensures that costs are minimised, and hence, better competition in legal services should ensue.

(g) A funder's unwillingness to take on risky, low-merit cases means that, in reality, only a potentially small number of cases will suit

---

106 28 OR (3rd) 523 (Gen Div). This was a class action lawsuit against the manufacturer of a defective pacemaker, the investor financing scheme had the apparent approval of the trial judge. A handful of wealthy individuals contributed a total of $35,000 to assist in the financing of the lawsuit. The arrangement was that if the litigation succeeded, the investors were to receive repayment of their initial investment as well as 20% annual interest on their investment, with priority over all other parties, including the plaintiffs. If the lawsuit failed, the investors would have lost their entire investment. The case settled for $23.5 million three years after the commencement of the suit, and the investors were compensated according to the agreement. The investor financing scheme was given approval likely because there was compliance with the relevant securities laws, the return on the investment was reasonable to both the investors and the plaintiffs and the lawsuit appeared to be meritorious. (See the discussion of Poonam Puri, "Financing of Litigation By Third-Party Investors: A Share of Justice?" *Osgoode Hall Law Journal* [1998] Vol 36 No 3, 515, at 540).

third-party funding and there is unlikely to be excessive litigation.[107]

8.82 The arguments against LFCs include the following:

(a) Some note that it is important that any "rogue" funders who cannot show upfront that they can pay a winning defendant's costs should be excluded, so as to preserve the integrity of the industry.

(b) Some fear that funders will generate more large-scale litigation and that "blackmail suits" and the "compensation culture" are fostered by such funding, and that it will increase the defensiveness of business and those who provide professional services to business.

(c) Others remark that it could provide hedge funds with increasing investment opportunities at the expense of defendants who may be tempted to settle.

(d) Some caution that funders' successes will impact upon professional indemnity insurance premiums and/or encourage more potential defendant firms to seek the increased protection of limited liability partnership status.

(e) Some fear that funders have the capacity to squeeze the legal fees that lawyers can charge in the action.

(f) It has also been said that funders subtly seek to influence the outcome of cases which they fund ("anyone who's writing a cheque is interested in how it's being spent").

(g) Others note that third-party funding is too expensive to appeal to many (with the success fee between 25 and 50 per cent in most cases).[108]

8.83 Experience in Australia shows that LFCs took the lion's share of any damages awarded. In *Green v CGU Insurance Ltd,*[109] albeit not a class action, there were abuses of process and failure of liquidators and lawyers to discharge their responsibilities. In that case, the liquidator appeared unlikely to be able to satisfy an adverse costs order of the size contemplated. The liquidator had entered into a litigation funding agreement with an LFC under which the liquidator was indemnified for adverse costs orders, including security for costs. About Aus $2 million was spent in costs when the court estimated that only Aus $500,000 might have been sufficient. It appeared that the LFC was a special purpose entity and the size of its assets was questionable. It was therefore doubtful whether any costs orders could be enforced against it. Hodgson JA, with whom Campbell JA agreed (Basten

---

107 Rachael Mulheron and Peter Cashman "Third-party Funding of Litigation: A Changing Landscape" [2008] *Civil Justice Quarterly* Vol 27, Issue 3, 312, at 316-7.

108 Same as above, at 317.

109 [2008] NSWCA 148.

JA dissenting), held that in the circumstances security for costs should be awarded against the liquidator. The court held that:

> *"[A] court should be readier to order security for costs where the non-party who stands to benefit from the proceedings is not a person interested in having rights vindicated, as would be a shareholder or creditor of a plaintiff corporation, but rather is a person whose interest is solely to make a commercial profit from funding the litigation. Although litigation funding is not against public policy (Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd [2006] HCA 41; 229 CLR 386 at [87]-[95]), the court system is primarily there to enable rights to be vindicated rather than commercial profits to be made; and in my opinion, courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails."*[110]

8.84 It appears that the ongoing debate in other jurisdictions focuses on whether LFCs have displaced the proper role of the parties and assumed undue control of the conduct of the litigation. Justice French of the Federal Court of Australia in a paper presented at the Second Anti-Trust Spring Conference on 29 April 2006 discussed the efficiency of representative proceedings:

> *"It may be said that the evolution of arrangements under which the costs risk of complex commercial litigation can be spread is arguably an economic benefit if it supports the enforcement of legitimate claims. If such arrangements involve the creation of budgets by commercial funders which are knowledgeable in the costs of litigation it may inject an element of commercial objectivity into the way in which such budgets are framed and the efficiency with which the litigation is conducted. The formation of such a budget does not amount to the assumption by the funder of control of the conduct of the litigation. It is not for the court to judge such arrangements as contrary to the public interest unless it can be shown that a particular arrangement threatens to compromise the integrity of the court's processes in some way. See PSX v Ericsson (No 3) (2006) 66 IPLR 277 at 289-90."*[111] (Emphasis added)

8.85 Professor Mulheron was of the view that, if the judgment in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[112] were applied elsewhere, it would open the doors for LFCs to provide funding to the representative claimant whilst also indemnifying the defendant against its costs, should the class lose the action.

---

110 *Green v CGU Insurance Ltd* [2008] NSWCA 148, at para 51.

111 Cited in Law Council of Australia, *Submission to Standing Committee of Attorney-General, in response to Litigation Funding in Australia*, 14 September 2006, at para 38.

112 [2006] HCA 41.

8.86 Similarly, the Law Council of Australia published a submission in favour of litigation funding in which it stated that such funding provides an important means of improving access to justice and should be encouraged.[113] The Law Council commented that LFCs have an important role to play in both insolvency and non-insolvency litigation as a means of creating an option for parties that would otherwise be prohibited from pursuing a legitimate claim, due to the cost of litigation. The Council considered that arguments in favour of permitting LFCs to fund non-insolvency litigation greatly outweighed any contrary arguments, provided relatively simple criteria were met and the courts accepted a supervisory role. The Council also noted that access to justice was the primary public policy consideration that should drive and inform any discussion about litigation funding or any proposed regulation.[114]

8.87 Based on an understanding of how third party funding arrangements currently operate in England and Wales, the Civil Justice Council came to the conclusion:

> *"… that third party funding should be encouraged, subject to (i) the constraints laid down by Arkin [ie that the legal liability of the fund in respect of adverse costs would be capped at the level at which financial assistance had been provided to the party assisted by the fund: Arkin v Borchard Lines Ltd [2005] 3 All ER 613] and (ii) suitable regulation of commercial third party funders to ensure consumer protection particularly in the retainer relationship between funder, lawyer and client, and who has control of the litigation. Such regulation could be by Rules of Court and/or the existing scope of Financial Services Regulation, and/or (possibly) new provisions of the Compensation Act in relation to claims handling."*[115]

8.88 The conclusion reached by Poonam Puri after comparing other forms of financing (though not in the context of class actions) was that third party sources of funding in the form of investor financing may have a useful role to play by plugging the gaps left by established financing arrangements.[116]

---

113 Law Council of Australia, *Submission to Standing Committee of Attorney-General, in response to Litigation Funding in Australia*, 14 September 2006.

114 Law Council of Australia, *Submission to Standing Committee of Attorney-General, in response to Litigation Funding in Australia*, 14 September 2006.

115 Civil Justice Council, *Improved Access to Justice – Funding Options and Proportionate Costs* (June 2007) para 155.

116 Poonam Puri, "Financing of Litigation By Third-Party Investors: A Share of Justice?" *Osgoode Hall Law Journal* [1998] Vol 36 No 3, 515, at 525.

Champerty and maintenance

8.89 Traditionally, where the costs are calculated as a proportion of the amount recovered, they offend the common law rule against maintenance and champerty. "Maintenance" involves the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor a motive recognised as justifying the interference.[117] "Champerty" is a particular form of maintenance, namely maintenance of an action in consideration of a promise to give the maintainor a share in the proceeds or subject matter of the action.[118] If LFCs were to be allowed in Hong Kong, changes would have to be made to the common law rule against maintenance and champerty.

8.90 As discussed earlier in this chapter, the common law offences of champerty and maintenance were abolished in the UK by the Criminal Law Act 1967. Section 13(1) abolished these as criminal offences and section 14(1) provided that no one could be liable in tort for any conduct amounting to maintenance or champerty. However, section 14(2) provided that these steps to remove criminal and civil liability, "*shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal*".

8.91 The Access to Justice Act 1999 also sought to address explicitly the topic of litigation funding. Section 28 of that Act inserted a new section 58B to the Courts and Legal Services Act 1990, under which:

> *"A litigation funding agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a litigation funding agreement."*

The intention of section 58B was to provide, "*a comprehensive scheme by which the Lord Chancellor may authorise a person or body to offer ... litigation funding agreements.*"[119] The section, however, has not yet come into force.

8.92 In Hong Kong the law of champerty and maintenance continues to apply unchanged.[120] It has recently been thoroughly considered by the Hong Kong Court of Final Appeal in *Unruh v Seeberger.*[121] An agreement to share the spoils of litigation was traditionally regarded as encouraging the perversion of justice. Gambling on the outcome of the litigation would endanger the integrity of the judicial process. The Court of Final Appeal was

---

117 *Halsbury's Laws of Hong Kong* (LexisNexis), at 115-212.

118 *Halsbury's Laws of Hong Kong* (LexisNexis), at 115-212.

119 See Standing Committee E, Access to Justice Bill (Lords), May 13, 1999.

120 *Archbold Hong Kong: Criminal Law, Pleading, Evidence and Practice* (2007), paras 30-123 to 126. And see *Cannoway Consultants Ltd* v *Kenworth Engineering Ltd* [1995] 2 HKLR 475 and *R* v *Wong Chuk Lam*, unreported, 6 April 1989

121 [2007] 2 HKLRD 414.

of the view that these traditional legal policies underlying maintenance and champerty continued to apply.[122] However, the courts had developed categories of conduct excluded from the sphere of maintenance and champerty. One category of cases involved "access to justice" considerations. Mr Justice Ribeiro PJ pointed out *obiter* that:

> *"In Hong Kong, art 35 of the Basic Law recognizes access to the courts as a fundamental right. It has never been a defence to an action nor a ground for a stay to show that the plaintiff is being supported by a third person in an arrangement which constitutes maintenance or champerty. Neither does liability for maintenance or champerty depend on the action or the defence being bad in law. It follows that an attack on an arrangement said to constitute maintenance or champerty could well result in a claim which is perfectly good in law being stifled where the plaintiff, deprived of the support of such an arrangement, is unable to pursue it. This is a powerful argument for such cases to be excluded from the ambit of maintenance and champerty."*[123] (Emphasis added)
>
> *"It is again obvious that this access to justice category is not static. The development of policies and measures to promote such access is likely to enlarge the category and to result in further shrinkage in the scope of maintenance and champerty. Different measures, whether statutory or judicial, may be taken in different jurisdictions. Here in Hong Kong, a litigant who is funded by the Supplementary Legal Aid Scheme is required to make a contribution out of recovered proceeds for the benefit of the Fund. In England and Wales, conditional (but not contingency) legal fee arrangements have received statutory support in certain types of cases. This has entailed the development of after the event insurance against adverse costs orders. The development of multi-party litigation or class actions raises questions concerning the conduct of promoters and funders of such litigation."*[124] (Emphasis added)

8.93 The decision of the High Court of Australia in *Fostif* (above) has clarified the position at common law and it is suggested that there is no longer a justification for maintaining a legislative prohibition. Most recent jurisprudence suggests that access to justice is now a paramount concern and the court has sufficient means at its disposal to protect its processes from abuse.[125] In *Fostif* the High Court ruled that the proceedings were not an abuse of process and that litigation funding arrangements were not contrary to public policy for the following reasons:

---

122 At paras 82-86 and 100-102.

123 At para 95.

124 Above, para 97.

125 Law Council of Australia, *Submission to Standing Committee of Attorney-General, in response to Litigation Funding in Australia*, 14 September 2006, para 65.

(a) there was no general rule against maintaining actions. Rules against maintenance and champerty had already been heavily qualified by the rules of insolvency and rules relating to subrogation applying to contracts of insurance;[126]

(b) a number of states in Australia (specifically New South Wales in this case) had passed laws abolishing the crimes and torts of maintenance and champerty, removing any foundation for concluding litigation funding arrangements were generally contrary to public policy;[127]

(c) questions of illegality and public policy might still arise and there was no objective standard against which the fairness of the agreement might be measured. These were questions which must be answered according to the prevailing circumstances;[128] and

(d) existing substantive and procedural rules were sufficient to protect court processes.

8.94 If there is a case in Hong Kong for the involvement of LFCs in class action financing, we are of the view that it will be necessary to change the law on champerty and maintenance. Consideration may have to be given to a proposal similar to that suggested by the Law Council of Australia to repeal the law against maintenance and champerty.[129]

Operation of recovery agents in Hong Kong

8.95 Recovery agents have been defined as "*organisations which assist victims in the recovery of damages, usually arising from personal injury cases, in return for a fee as percentage of the damages recovered*."[130] In its report on *Conditional Fees*, the Law Reform Commission of Hong Kong describes the operation of recovery agents in Hong Kong as follows:

> *"There are indications that [recovery agents] are becoming more active in Hong Kong. Some lawyers have expressed the view to us that [recovery agents] are mostly interested in maximising their profits within the shortest time. These lawyers assert that [recovery agents] often take on high value cases with a good prospect of success and then charge 20% - 30% of the compensation recovered. The claimants could have paid much*

---

126 Above, para 89.

127 Above, para 66-67.

128 Above, para 92.

129 Law Council of Australia, *Submission to Standing Committee of Attorney-General, in response to Litigation Funding in Australia*, 14 September 2006, para 64.

130 Background brief on recovery agents prepared by the Legislative Council Secretariat for the meeting of the Panel on Administration of Justice and Legal Services of the Legislative Council dated 17 February 2009, at 1.

less, the lawyers say, had they employed the services of a qualified lawyers. …"[131]

If maintenance and champerty are abolished that will have consequences for both LFCs and recovery agents.

8.96 In its report on *Conditional Fees*, the Law Reform Commission of Hong Kong considered the possible impact of abolishing the common law offences of maintenance and champerty. It was suggested that recovery agents might employ more aggressive marketing techniques to enhance their share of the litigation market, as had been the case in England, but the Law Commission concluded that there was*,* "*very little material on which to base an assessment of what the impact is likely to be.*"[132]

Summary on LFCs

8.97 LFCs have been recognised and regulated in Australia. If properly managed in Hong Kong, LFCs might enhance access to justice for a wide range of people, especially when the legal costs are likely to exceed the amount of a single litigant's claim. Adequate supervisory measures would need to be in place before litigation funding was allowed. These might include a check-list for lawful LFAs, requirements for disclosure of the funding arrangements, and adequate protection of the independence of the lawyers involved. The Consultation Paper invited the community's views as to whether LFCs should be recognised in Hong Kong and, if so, what are the appropriate forms of control and regulation to prevent abuse. We discuss later in this chapter under the heading "Consultation and conclusion" the public's responses on this issue.

The way forward: existing sectorial funds

8.98 Each of the options discussed above for funding class action proceedings presents difficulties: public funding would be needed for a general expansion of legal aid to class action proceedings, or to establish a class action fund, and the introduction of LFCs would have considerable ramifications and should be treated with caution.

8.99 In the light of these difficulties, the Consultation Paper proposed that a better alternative would be to look at specific sectors where there are already funding mechanisms in place, with the aim of applying the new class action regime to one or more of these sectors first to test out its operation. The Consultation Paper discussed litigation funds in the financial sector and the Consumer Council's Consumer Legal Action Fund. The Consultation Paper did not reach any firm conclusion on the preferred option and invited

---

131 The Law Reform Commission of Hong Kong, *Conditional Fees* (July 2007) paragraph 6.38 at 124.

132 The Law Reform Commission of Hong Kong, *Conditional Fees* (July 2007) paragraph 6.54 at 128.

the community's views on this. We have concluded in the light of the responses to the consultation paper that the new class action regime should be introduced incrementally, starting with consumer cases. We nevertheless also discuss in the following paragraphs litigation funds in the financial sector, in the expectation that the proposed regime may in time be extended to that sector also.

Sectorial litigation funds in the financial sector

(a) The SFC's Investor Compensation Fund

8.100 We have considered the feasibility of expanding the coverage of the existing Securities and Futures Commission's Investor Compensation Fund (ICF) to fund class actions in the securities field. We do not think the ICF would provide the solution. The ICF was established under section 236 of the Securities and Futures Ordinance (the SFO) to provide a measure of compensation to clients of a specified person who sustain loss by reason of a default by the specified person (including intermediaries licensed or registered for certain regulated activities under the SFO) in connection with specified securities or futures contracts. Payments may only be made out of the ICF in the limited circumstances set out in section 242 of the SFO. The levy on transactions is also expressly for the purposes of the ICF and therefore linked to the objects of the fund. To use the ICF to fund class actions would change its purpose and alter its nature considerably and require primary legislation. We have reservations about recommending the ICF as a possible class action funding model for the financial sector and, in any event, it cannot provide an immediate solution.

(b) The Hong Kong Association of Minority Shareholders' proposal

8.101 Mr David Webb has proposed setting up the Hong Kong Association of Minority Shareholders (HAMS) to exercise shareholders' rights on members' behalf in quasi-class actions and to deter shareholder abuse. The HAMS proposal was last updated on 1 July 2001.[133] We have also consulted Mr Webb on his views on the suggestion that a sectorial litigation fund be set up to assist class action proceedings. HAMS would admit any individual or institutional investor or potential investor, whether local or overseas, as a member and would operate in three key areas:

- **Policy** - to promote and lobby for improvements to the legislative and regulatory framework for investment.
- **Corporate governance ratings** - to encourage good corporate governance and deter bad corporate governance, by means of a comprehensive and objective corporate governance rating system.

[133] At www.webb-site.com/articles/ham.htm (last access on 27 May 2008).

- **Enforcement** - converting the framework into a meaningful deterrent to bad corporate governance, by quasi-class action litigation of the worst cases on behalf of investor members.

8.102 It is suggested that the direct charges for membership of HAMS would be designed to cover solely the cost of communications with members. Keeping the entrance fee low would attract as broad a participation of the public investors as possible. The annual fee might be around HK$100 for individuals and HK$1,000 for institutions (corporates). Those individuals who wished to receive hard-copy mail communications might be charged an additional $100 to cover postage and printing.

8.103 Mr Webb estimated there are at least 500,000 regular investors (both local and overseas) in the Hong Kong markets, and he would expect membership of at least 50,000 in the first two years, with the number increasing as the benefits of HAMS begin to materialise. With those kinds of numbers, Mr Webb believed that HAMS would be authoritative and investors' views would carry real weight in the process of corporate governance reform.

8.104 The overall direction and policies of HAMS would be determined by a non-executive Board of Governors. In order to be truly representative of investors' wishes and accountable to investors, Mr Webb suggested that the Board of Governors should be elected by its members. To provide a balance between the occasionally differing interests of individual and institutional investors, half of the board would be elected by individual members and the other half by corporate members. Mr Webb was of the view that If HAMS were run by Government-appointed directors, then it would be unable to fulfil its goals.

8.105 Mr Webb suggested that a team of highly skilled lawyers and other professionals in the HAMS Enforcement Division would use the shareholder rights won by the HAMS Policy Division on behalf of all members. With 50,000 members or more, Mr Webb believed that any target stock would have been held at some time in the past by a HAMS member.

8.106 The HAMS Enforcement Division would target the worst cases of abuse, with the highest chances of success, by claiming, and if necessary, suing, for damages. It would also leverage off the findings of any Market Misconduct Tribunal under the SFO, using these findings as evidence. Once a case was in progress, HAMS could advertise for any member who had been a shareholder at the appropriate time to act as plaintiff. This would include anyone who joins HAMS to participate in the action. Many members would be represented by HAMS and would receive a proportionate share of the damages recovered if the case was won.

8.107 Mr Webb suggested that the HAMS Enforcement Division would press claims against companies and their directors for bad governance, such as false and misleading statements, breach of fiduciary duty, oppression of minority shareholders and expropriation of assets. Like other units, the Enforcement Division would be financed from the HAMS operating budget,

but it would also seek to recover its costs plus a surplus on those cases that it won. Mr Webb believed that the creation of a credible well-funded litigation deterrent would deter bad corporate governance and would increase the willingness of offenders to reach a settlement without necessarily admitting liability.

8.108 Mr Webb suggested that the fairest practical method to finance the HAMS initiative would be a levy on the market, which he proposed be named the Good Governance Levy (GG Levy). The volume which an investor trades is roughly proportional to the size of their portfolio. Frequent traders would pay a little more than long-term investors. Mr Webb estimated that a reasonable funding level for HAMS would be afforded by a 0.005% levy, or $1 for every $20,000 of purchase or sale. Part of this would be used to accumulate a contingency fund, since market volume and value fluctuates whereas operating expenses are more fixed. To apply such a levy to the market would require legislation.

8.109 Mr Webb's website reports that the Standing Committee on Company Law Reform (SCCLR) rejected the HAMS proposal. The Deputy Secretary for Financial Services (DSFS) conveyed the SCCLR's views and wrote:

> *"[I]n the light of the views expressed by members of the SCCLR, we are not in a position to take the HAMS proposal forward, in its present form. As at present advised, it is unlikely the HAMS proposal will from part of SCCLR's recommendations in its forthcoming consultation paper as part of the corporate governance review."*

Furthermore, DSFS wrote:

> *"Members of the [SCCLR] expressed the view that whatever merit there might be in some of the HAMS proposals there was a fundamental difficulty in respect of the accountability of the body to be set up as to the use of public monies."*

8.110 Mr Webb responded that a variety of checks and balances had been built into the scheme: the governing board would be non-executive (half elected by institutional members and half by retail members); anyone could join HAMS for a token annual fee to cover communication costs; and its CEO would have to report annually to the Legislative Council on how it was spending its revenue, at the risk of losing the levy.

8.111 Mr Webb stressed that the Enforcement Division of HAMS was only needed "*in the absence of a proper class-action system*". It would be far better to have a class-action system in Hong Kong (not just for shareholders, but consumers in general). In his view, HAMS was a second-best alternative. Mr Webb added that a number of the Australian class actions had been linked to breaches of competition law such as price-fixing, so it was timely that Hong Kong was now considering introducing class actions, at the same time as a competition law. Mr Webb considered

that this was important because fining a firm 10% of its turnover for anti-competitive behaviour, and paying the fine to the Government, did not directly compensate the victims of that firm's behaviour, who might be a much smaller class than the general public whom the Government represents. The victim class should be able to seek compensation directly through a class action. Likewise, in insider dealing cases, paying fines to the Government did not compensate those who suffered loss due to the insider dealer's behaviour.

8.112 The establishment of a fund along the lines of HAMS would face many obstacles as it does not enjoy general support. The proposal has already been rejected by the SCCLR and would be likely to be strongly opposed by some sectors in the community. It is by no means certain that legislation could be devised which would satisfy the concerns both of legislators and Mr Webb. The Consultation Paper therefore concluded that a fund modelled on HAMS would not be likely to provide a solution in the short term to the funding of class actions in the financial sector. The public consultation has not persuaded us to change our minds.

The Consumer Legal Action Fund[134]

8.113 The Consumer Council's Consumer Legal Action Fund (the Fund) is a trust fund set up in November 1994 to give greater consumer access to legal remedies by providing financial support and legal assistance. Legal assistance may be in the form of advice, assistance and representation by a solicitor and counsel. The Fund aims to provide assistance in the following circumstances:

(a) to assist consumers to bring or defend a representative action. This type of action enables one consumer to act on behalf of a group of consumers with the same interest in the matter;

(b) to assist consumers to pursue joint claims out of the same or same series of transactions with a common question of law or fact;

(c) to group consumers with similar causes of action and claims together administratively and arrange for them to be heard at the same time or consecutively;

(d) to bring action in the interest of the public; and

(e) to handle cases of significant consumer interest.

8.114 Application for legal assistance under the Fund can be made by a consumer or a group of consumers involved in a matter which:

---

[134] Details of the Consumer Legal Action Fund have been extracted from the following document found on the Consumer Council's website:

http://www.consumer.org.hk/website/ws_en/legal_protection/consumer_legal_actions_fund/CLAFBriefPDF.pdf

We have also obtained information on the operation of the Fund from the Consumer Council.

(a) relates to consumer transactions (such as sharp, unscrupulous or restrictive trade practices or false or misleading advertising claims),

(b) involves significant public interest or injustice,

and the consumers have exhausted all other means of dispute resolution in the matter and the consumers do not qualify for any form of legal aid. However, the trustee of the Fund has discretion in granting or refusing assistance in appropriate cases.

8.115 When considering whether or not to grant legal assistance, the Fund may consider, in particular, the following:

(a) whether a group has been, or there is potential for a large group of consumers to be, adversely affected;

(b) whether court action is the most effective means of resolution in the circumstances;

(c) the cost effectiveness of the action;

(d) the chance of success of the matter;

(e) the bargaining power of the consumers;

(f) the questions of fact or law common to the consumer group (if a group is involved);

(g) the size of the group (if applicable);

(h) the financial security of the other party involved;

(i) whether, if successful, the matter has publicity value and can promote the consumer cause and have a deterrent effect on unscrupulous business practices;

(j) whether the matter may create an undue financial burden on the Fund; and

(k) the practicality of the Fund offering timely assistance in the matter.

8.116 If the consumers' legal action is unsuccessful, they need not make any payment other than the application fees. The Fund pays for all their costs and expenses. If the legal action is successful, a contribution to be calculated as follows is to be paid to the Fund:

(a) the actual legal costs and expenses paid for the legal action less any costs payable by, and recovered from, the opposite party;

(b) all other sums paid for the legal action out of the Fund; and

(c) 10% of the amount of money (not including the costs recovered from the opposite party) received on behalf of the consumer, the value of property recovered or preserved, the amount by which the liability of the consumer is reduced or discharged or the

value of any benefit gained by the consumer in the matter (Benefit Value).

This contribution is subject to a cap of 25% of the Benefit Value for matters that may be, or are, actually determined in the Small Claims Tribunal and 50% for all other matters.

8.117 The number of successful applications to the Fund and the expenses incurred each year since its establishment are as follows:[135]

Year	*Number of successful application*	*Total expenses (HK$)*
1995-96	2	24,000
1996-97	5	140,000
1997-98	1	121,000
1998-99	5	321,000
1999-2000	1	235,000
2000-01	3	215,000
2001-02	2	329,000
2002-03	2	125,000
2003-04	2	284,000
2004-05	4	66,000
2005-06	0	855,000
2006-07	4	636,000
2007-08	1	375,000
2008-09	0	831,000
2009-10	3	831,000
2010-11	2	1,013,000

Expenses incurred by the Fund each year include litigation expenses, as well as costs related to court proceedings, such as obtaining company search reports and seeking legal opinions for consideration of the applications, but does not include inhouse legal fees and other administrative and overhead costs of the Consumer Council and the Fund. As litigation takes time, the total expenses incurred by a successful application may spread over a number of years.

8.118 The Consumer Council is the trustee of the Fund. Two committees are in charge of screening the applications. The Management Committee considers fund applications and recommends to the Board of

[135] See the written reply of the Secretary for Economic Development and Labour to the Legislative Council on 8 June 2005, *Official Record of Proceedings of the Legislative Council,* at pages 8232-3. Statistics from 2004-05 were provided by the Consumer Council.

Administrators whether assistance should be granted to the applicant. The Board of Administrators is responsible for the overall administration and investment of the Fund. It manages fund policy and approves applications after receiving recommendations. Upon receiving applications, legal counsel draft papers on the case background and legal issues to brief the Management Committee. The Management Committee conducts about 4 - 5 meetings per year.

Factors to be considered in an application to the Consumer Legal Action Fund

8.119 The various factors relevant to an application are illustrated in the following cases:

- **No cause of action**

  A young lady was hired as fitting model by a trading company. She was required to (and did) purchase a beauty services package provided by the trading company. She was paid for her modelling job and did not find the price of the package unreasonable or the service quality unacceptable. However, she suspected it was a scam luring her to purchase the package. This application was rejected because there was no evidence of fraud and she had suffered no loss. It was obvious that there was no cause of action.

- **No public interest**

  Factors to be considered include how much media attention will be attracted, whether any significant consumer issue is involved, whether the public will be educated and whether any precedent will be established.

  The applicants joined a tour organised by a travel agent to Europe and complained that the accommodation did not meet the standard promised. They were not satisfied with the compensation offered by the travel agent and applied to the fund to assist them to claim loss of enjoyment. Their application was rejected as it was likely that the court would make only a small award for loss of enjoyment. Also, there was no public interest involved.

- **A case in which assistance was granted**

  Two kindergartens had charged parents of students excessive fees which exceeded those approved by the Director of Education. The operators of the kindergarten submitted that the parents had suffered no loss because they had received good consideration. The approved fees were insufficient to cover the expenses. Even with the over-charged fees, the kindergartens were running at a loss.

  The parents won their case at the Small Claims Tribunal. The operators of the kindergartens appealed to Court of First Instance (CFI). The parents then applied to the Fund for help. The case was considered to be of public interest and to promote

the consumer cause to the public. Counsel's opinion had been sought on the merits of the case before assistance was granted. With the Fund's assistance, the parents won the case and the appeal was dismissed.

After the parents' application and the case were reported by the mass media, around 136 other affected parents made complaints to the Consumer Council or applied to the Fund. Since the High Court had decided in favour of the parents, the liability issues had been settled. It was therefore only necessary for those parents to establish the level of damages before the Small Claims Tribunal. A representative action under section 21 of the Small Claims Tribunal Ordinance (where the claims of more than two persons against the same defendant can be brought by one of them as representative) was not invoked because each claimant needed to have their damages assessed individually.

The school operators were willing to settle. Claimants who were unwilling to settle obtained judgment from the Small Claims Tribunal.

- **Video rental store case**

  Assistance was also granted in cases involving a substantial number of consumers. For instance, in 1998, 1,951 complaints were received against a video rental store and 581 applications were received by the Fund. Though a large number of consumers were affected, the Fund did not proceed because the operator had ceased business.

- **Mobile phone users case**

  Another example involved issues affecting millions of mobile phone users. Telecommunications operators varied unilaterally the term of their fixed term contracts by imposing a monthly charge of $10 as a cross harbour tunnel/ mobile service fee. More than 100 complaints were received. Having considered Counsel's advice, the Fund decided that assistance should be granted. Thirty-eight complainants applied for assistance but only 10 subsequently entered into agreement with the Fund for assistance, and the number of those preparing their cases with the Fund's assistance was further reduced to six. This was probably because of the time and effort required and the small amount of claims involved. Of these six assisted consumers, three subsequently had their cases settled before action, two settled after filing their respective claims, and one proceeded to trial and succeeded. Representative procedures were not invoked.

- **Misrepresentation case**

  Examples of cases involving groups of consumers who allegedly suffered loss as a result of misrepresentation included a number of flat owners complaining against the developer for its promise

of unobstructed views, allegedly made when they entered into the contract.

8.120 The factors to be considered in deciding whether assistance will be granted include the merits, the number of consumers involved, common interest, chances to achieve consumer education, and whether some significant consumer and legal issues are involved (eg whether the contractual terms are unconscionable). Not all these criteria must be met. For example, when the case affects significant consumer interests or illustrates new tactics for cheating consumers, applications may still be approved even though not many consumers are involved.

8.121 The fact that assistance has been granted in one case does not necessarily mean that it will be granted in subsequent similar cases. Assistance may not be granted in subsequent cases, for instance, if public education has already been achieved by assisting the original case.

8.122 A successful claim assisted by the Fund may help the Consumer Council in resolving similar complaints filed against the same trader by mediation. This worked in the kindergarten case. In considering whether to grant assistance, the Fund would take into account whether methods of dispute resolution other than litigation (such as mediation) have been exhausted.

Recovery of costs and contribution

8.123 Assisted consumers are required to make a contribution if they have benefited as a result of the Fund's assistance, through litigation or settlement, or otherwise. The contribution is equivalent to the net legal costs (costs actually expended minus costs recovered) and other expenses plus 10% of the benefit derived from the assistance (the damages awarded or the settlement sum). The contribution is capped at 25% of the benefit for small claims cases and 50% of the benefit for cases proceeding in higher courts.

8.124 If one of a group of assisted cases is selected to be a test case, other assisted consumers will be required under their agreements with the Fund to contribute to the costs of the test case if they also obtain benefit (eg through settlement) as a result of the success of the test case. Theoretically, the Fund would exercise its discretion to decide how much of the costs have to be borne by the other assisted consumers. Factors such as the stage of proceedings to which the other assisted consumers had pursued their claims when the test case succeeded may be considered.

8.125 In the kindergarten case, the cases proceeded separately. Most claimants only started actions after the Small Claims Tribunal appeal (which involved nine assisted respondents) was dismissed by the High Court. A majority of them (56) settled with the defendants and 20 refused to accept the settlement offer and proceeded to obtain judgment. The costs of the appeal were recovered on an indemnity basis and had no implications for the contribution to be made by the assisted respondents and other assisted

consumers. However, the Fund had incurred expenses in seeking counsel's advice for its consideration of the applications. The Fund therefore required the assisted respondents and the assisted claimant in the small claims action who had derived benefits from the Fund's assistance to share the costs of counsel's advice *pro rata* to the benefit they had obtained. At the same time, the Fund did not require a contribution on this particular item from those assisted consumers who had accepted the settlement offer before commencing proceedings without incurring substantial costs to the Fund.

Lehman Brothers investment products

8.126 The collapse of Lehman Brothers in 2008 caused significant losses to holders of minibonds which it had issued. Thousands of complaints were made to the Consumer Council, alleging mis-selling of this derivative product by the retail banks. In addition to arranging mediation between the bond-holders and the banks, the Council screened the complaints for cases which might be suitable for the Fund's consideration. The selection criteria focused mainly on the vulnerability of the complainants, as well as the cogency of evidence regarding untoward sales tactics, inadequate risk disclosure and misrepresentation, etc. For the year from 1 April 2009 to 31 March 2010, the Fund considered 143 applications involving 30 consumer incidents.[136]

Consultation and conclusion

8.127 We encapsulate the options for the funding of a class action regime in the form of a table below. The first four options would require legislation (albeit that option 4 does not require public funding). The LFC option would have significant implications for the current civil justice system. Depending on the operation and performance of the sectorial funding arrangements, adjustments could be made to the first three options.

8.128 The table also indicates the compatibility of the different options. It should be pointed out that if a public class action fund is established, then the sectorial litigation funding arrangements may not be necessary. Otherwise, the various options (albeit with varying scope of operation) are generally compatible and could be implemented together.

8.129 In fact, we think that the various options complement one another and may be said to serve different parts of the litigation market. On one hand, public funding should be available where there is a public interest in litigating issues with significant legal implications, even though the chances of success are no better than even. At the other end of the spectrum, the LFCs would be likely only to invest in those cases where the chances of

[136] Consume Council, Consumer Council 2009-2010 Annual Report, at 143: "A 'consume incident' here means an incident concerning consumer dispute(s) which may involve an applicant or applicants with similar factual background or causes of action against identical trader."
http://www.consumer.org.hk/website/ws_chi/profile/annual_reports/pdf20092010.pdf

success are high and in such circumstances there is little need for public funding. In relation to all the modes of funding where public money is involved (no matter whether it is by the extension of legal aid, the establishment of a special public fund or the expansion of the Consumer Legal Action Fund) the policy concern should be the same and a merits test should be rigorously applied.

Funding options for a class action regime

Options	Source of funding	Legislation required	Compatibility with other options		Scope of operation	Public interest consideration
			Mutually exclusive	Cumulative		
Extension of legal aid	Public	To change the individual-based eligibility criteria	No	Yes	All those eligible to legal aid	Significant
Class actions fund(CAF)	Initial public funding	To establish CAF	HAMS	Yes	Open to all class action applicants	Significant
Litigation funding company (LFC)	Private	To recognise and regulate LFCs	No	Yes	Cases with high level of commercial viability	Not significant
HAMS proposal	Private	To impose levy on stock transactions	CAF	No	Only for HAMS members	Not significant
Consumer Legal Action Fund	Initial public funding	No	CAF	No	Only for consumer claims	Significant

8.130 Recommendation 7(1) in the Consultation Paper stated that little could be achieved by a class action regime unless suitable means could be found to fund plaintiffs who were of limited means, and conditional fee agreements warranted further study. There was a consensus from the public responses that funding plays a pivotal role in the success of a class action regime as class proceedings can be costly, especially in the light of the "costs follow the event" rule.

8.131 There were, however, different opinions on conditional fee agreements: two respondents were in favour and four were against.[137] On the one hand, there were some who believed that those best placed to assess the merits of a case and whether to fund it were often the lawyers involved,

[137] Professor Gu Minkang supports further consideration. It must be pointed out that the respondents used the term "contingency fees" which is different from conditional fees. We take it that they mean any agreement that links a lawyer's interests to the outcome of his client's litigation.

and customers and suppliers should be free to negotiate any fee basis in a free market.[138] Professor Gu Minkang observed that pegging lawyers' interests with the case's outcome did not mean that there would be abuses because such actions were subject to certification by the court. On the other hand, Clifford Chance was against such arrangements for consumer-type cases in which clients were inexperienced about legal proceedings and possibly vulnerable and/or financially insecure. Such arrangements, because of conflicts of interest, undermine the integrity of the solicitor-client relationship in cases which need it most. The Law Society of Hong Kong was also opposed to the introduction of conditional fee agreements as lawyers should not have a financial interest in their clients' litigation. The Hong Kong Bar Association reiterated the views expressed in its response to the Law Reform Commission's Consultation Paper on conditional fees that the question of why the legal profession should bear the responsibility to finance litigation had not been addressed, and there was no reason not to opt for the expansion of the Supplementary Legal Aid Scheme instead of taking what the Bar Association believed to be the more risky path of implementing conditional fee agreements.[139]

8.132 We are aware that in his *Review of Civil Litigation Costs: Final Report* published in December 2009, Lord Justice Jackson recommended that solicitors and counsel should be permitted to enter into contingency fee agreements with their clients, provided:

(a) the unsuccessful party in the proceedings, if ordered to pay the successful party's costs, was only required to pay an amount for costs on the conventional basis and not by reference to the contingency fee, with any difference to be borne by the successful party; and

(b) the terms on which contingency fee agreements might be entered into were regulated and they should not be valid unless the client had received independent advice, to safeguard the interests of clients.[140]

Lord Justice Jackson believed that allowing the use of contingency fee agreements increases the types of funding available, which should enhance access to justice. Nonetheless, the Conditional Fees Sub-committee of the Law Reform Commission of Hong Kong had already considered and rejected

---

138 191 of those who responded to David Webb's online survey agreed that lawyers should be allowed to charge on a contingency basis, while 40 disagreed and 27 remained undecided.

139 Bar Association of Hong Kong, *The Hong Kong Bar Association's Position Paper on Conditional Fees: A Response to the Law Reform Commission's Consultation Paper* (April 2006), at para 78. http://www.hkba.org/whatsnew/submission-position-papers/2006/20060428.pdf

140 http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf

See Chapter 12. A contingency fee agreement, presently not allowed in England and Wales, is an agreement under which a lawyer is only paid if his client's claim is successful, and the lawyer is paid out of the settlement sum or damages awarded, usually as a percentage of that amount.

the option of contingency fees , because it would give "*lawyers too much of a direct personal interest in the litigation*".[141] In view of the strong reservations expressed by the Hong Kong legal profession on conditional fee arrangements as indicated in the preceding paragraph, we cannot see any future, at least until attitudes change, for this option. We therefore withdraw our observation on further studying the option of conditional fees in Recommendation 7(1) in the Consultation Paper. At the risk of stating the obvious, we maintain our observation that if a suitable funding model for plaintiffs of limited means could not be found, little could be achieved by a class action regime.

8.133 Recommendation 7(2) in the Consultation Paper proposed extending the ordinary legal aid and supplementary legal aid schemes to class actions and eventually establishing a general class actions fund. Twelve respondents supported the extension of the legal aid schemes to class actions, including the Hong Kong Association of Banks, the Law Society of Hong Kong and the Society for Community Organisation. The Department of Justice (Civil Division) preferred to invoke the class actions fund or the legal aid schemes rather than relying on LFCs which might lead to exploitation by "legal entrepreneurs" who were driven purely by commercial considerations.

8.134 Eight respondents, however, believed that class actions should not be funded out of the public purse. Baker & Mckenzie observed that class actions should be privately funded, either by claimants themselves or third party litigation funding. Slaughter and May believed that as many applicants could not get legal aid because of its strict eligibility criteria, the public would not allow precious resources to be diverted to class actions rather than to cases currently not being legally-aided due to lack of resources. The Legal Aid Department ("DLA") expressed reservations on extending the legal aid schemes because of class members' immunity from costs, the costs liability possibly inflicted on representative plaintiffs and the legal aid schemes, and the ramifications of an opt-out approach.

8.135 DLA further elaborated on the reasons for their reservations. First, given that class members tended to be reluctant to contribute to the costs, financially well-off class members would be able to "enjoy the benefits flowing from a successful class suit" but would be entirely immune to an adverse costs order at the expense of taxpayers. That would not be a proper and prudent use of public funds. Secondly, class actions would be likely to substantially increase the risk exposure of the Supplementary Legal Aid Fund (which was self-financing) and would severely undermine its financial viability.

8.136 Thirdly, although these concerns might be addressed by requiring all class members whose means were above the legal aid eligibility limits to contribute towards the costs when the case was lost, the opt-out approach would make it impossible to identify who they were.[142] In any

---

[141] Law Reform Commission of Hong Kong, *Consultation Paper on Conditional Fees* (2005), at para 7.41.

[142] This view was shared by Slaughter and May.

event, there would be difficulties in enforcing payment of contributions when the action was lost unless such contributions were levied as the case progressed. By the same token, it would be difficult for DLA to reject class members' applications as they were not identified.

8.137 Finally, the Australian Law Reform Commission also decided that legal aid was not appropriate for class actions because of the obvious administrative difficulties in assessing the means of class members and in terms of cost benefit considerations.

8.138 Similarly, the Home Affairs Bureau also had reservations on extending the legal aid schemes. First, legal aid schemes should only assist individual plaintiffs who satisfied both the means and merits tests. However, the schemes would be exposed to substantial financial risks as well-off class members could take a "free ride" on the legally-aided representative plaintiff. Secondly, the Bureau shared DLA's concerns about the practical difficulties in identifying those who were not financially eligible for legal aid and holding them liable for their share of the costs. Thirdly, the Supplementary Legal Aid Fund Scheme covered specific types of cases where the claim for damages exceeded or was likely to exceed $60,000, and its financial viability hinged on a high success rate and a good chance of costs recovery. Class actions would inevitably prejudice the financial viability of the scheme. The Hong Kong Bar Association shared some of the DLA's concerns referred to in the Consultation Paper, and hence did not support Recommendation 7(2).

8.139 We have carefully considered these responses. In particular, we share the concerns of DLA and the Home Affairs Bureau. It would not be easy to fit the class action regime into the legal aid schemes. If the class action regime is to operate within the strait-jacket of the legal aid schemes, the regime might well be constrained. We do not think that that is desirable and conclude that the legal aid schemes should not be extended to cover class actions.

8.140 As to the establishment of a class action fund, 11 respondents supported it while seven respondents were against it, and the Hong Kong Bar Association commented that a further and more specific consultation with more details was needed before drawing a conclusion. The Hong Kong Retail Management Association believed that class actions should be privately funded, to avoid unfairness to taxpayers.[143] Baker & Mckenzie also opposed the proposal because it was uncertain where such funds would come from. It was questionable to use taxpayers' money to fund private litigation outside the legal aid sphere. Furthermore, the experience of the Consumer Council's Consumer Legal Action Fund did not suggest that a similar fund for class actions would be successful. Allen & Overy considered that sectorial funds would be sufficient. Furthermore, the Department of Justice (Legal Policy Division) doubted if this would be viable in a relatively small jurisdiction like Hong Kong.

---

[143] Another respondent who does not want to be identified shared this view.

8.141 In contrast, the Law Society of Hong Kong believed that a class action fund was the best method of third party funding because it was more flexible in operation. The fund could assist all class litigants (not just those who were impecunious, as under the legal aid scheme) for any kind of remedy sought (not just damages). It would be funded by the government and subject to its oversight, and class members' interests would be better protected as the fund was not profit-making. A class action fund, being similar in structure to legal aid, would be self-financing after the initial funding by the government, as generally demonstrated by the legal aid schemes. Slaughter and May agreed that a class action fund would be useful, particularly for public law cases where damages were unlikely to be awarded and therefore third party funding would not be forthcoming. However, the fund should only be complementary, rather than as a substitute, to third party funding. The Hong Kong Federation of Insurers also endorsed a class actions fund.[144] The Hong Kong Federation of Trade Unions suggested that a class action fund should be managed by DLA, which was experienced in processing similar applications, and duplication of administrative procedures could be avoided.

8.142 On balance, it appears to us that a separate class action fund to be administered by DLA would seem to be the more acceptable solution. The DLA's experience of administering the self-financing Supplementary Legal Aid Fund is particularly relevant.

8.143 Recommendation 7(3) in the Consultation Paper proposed, in the short term, invoking sectorial funds to finance class actions in those sectors to test out the operation of the new regime. The Consultation Paper ruled out the proposed model of the Hong Kong Association of Minority Shareholders, but recommended extending the Consumer Legal Action Fund to consumer class actions. Eighteen respondents supported this proposal, while four respondents were against it.

8.144 The Hong Kong Association of Banks considered that there was no need to extend the Consumer Legal Action Fund, if class actions could be funded by legal aid and/or by LFCs. However, before these two mechanisms were ready, the Consumer Legal Action Fund could be invoked in the meantime. David Webb strongly believed that there was no need for a public fund to finance class actions. In his opinion, Hong Kong could not afford to take a "step by step" approach to removing barriers to access to justice, and to impose new barriers (ie a government-appointed "gatekeeper" committee which would have possibly exclusive rights to decide which cases could go to court and deserved to be funded out of taxpayers' money). In any event, a government-run body would be "interventionist and distort the market".

---

[144] The Federation has, however, pointed out, *"However, there are three issues which remain unclear. Firstly, how would the CAF operate and what is the scope of cases to be covered by it? Secondly, what criteria would be adopted in assessing applications for the CAF? Thirdly, how would the CAF deal with situations where the recoverable proceeds are less than the legal costs incurred or, the funded member loses in the action?"*

8.145 On the other hand, Allen & Overy supported extending the Consumer Legal Action Fund, as this would allow specific industries to budget for the additional costs. This would in turn allow class litigation risks to be fairly reflected in relevant transaction costs in those industries and markets. The legal aid schemes could fill the gaps not covered by sectorial funding. The Consumer Council pointed out that as the Consumer Legal Action Fund had considerable experience in handling cases involving large groups of aggrieved consumers with similar questions of facts or law, it would be pragmatic and expedient to extend the Fund to consumer class actions. The Council, as trustee of the Fund, would be willing to undertake additional responsibilities. Slaughter and May supported the proposal, as consumer cases were particularly suitable for class litigation, but third party funding might not be readily available. The Hong Kong Bar Association and the Law Society of Hong Kong were also in favour of this proposal.

8.146 It is generally agreed that a class action regime would only be academic without access to proper funding. Recommendation 1 in this report proposed an incremental approach to the implementation of a class action regime, starting with consumer cases. The current Consumer Legal Action Fund, with proper injection of resources, would be readily available to fund class actions. In fact, as part of a package of recommendations in a February 2008 report arguing for comprehensive trade practices legislation, the Consumer Council proposed increasing the Fund's resources to enhance its availability.[145] The Consumer Council suggested that consumers' access to redress might be improved either by relaxing the means test under the Supplementary Legal Aid Scheme or by enhancing the availability of the Fund by increasing its resources. After carefully considering the minority views from the public responses against our proposal and the overwhelming support, we decide to maintain the proposal in the Consultation Paper. We believe that increasing the resources of the Consumer Legal Action Fund so as to enable it to fund class actions, would deal with a large segment of cases (probably the majority of cases) where class actions would be most likely. Once experience is accumulated in the funding of class actions by this Fund, then a general Class Action Fund extended to actions outside the ambit of the Consumer Council could be considered if the proposed regime is extended to other types of cases.

8.147 Recommendation 7(4) in the Consultation Paper pointed out that LFCs would be controversial, and invited comments from the public. This issue has indeed aroused much discussion from respondents. Eight respondents were in favour of allowing LFCs, while 13 respondents disagreed. Five respondents suggested further consideration of the matter and two respondents remained neutral.

---

[145] Consumer Council, *Fairness in the Marketplace for Consumers and Business* (February 2008, Hong Kong) para 2.56.

8.148 The International Human Rights Channel believed that the public were strongly in favour of LFCs.[146] Lovells found the advantages of LFCs set out in the Consultation Paper persuasive. David Webb believed that there was no need for a public fund to finance class actions.[147] Instead, private sectors should be allowed to assess cases' merits and decide whether to finance them in return for an agreed share of any settlement sum or damages. Everyone should be allowed to do so, including law firms, third parties, or wealthy lead plaintiffs, etc. Instead of creating a regulatory framework for LFCs (with the implication that everyone else would be prohibited from funding a case), David Webb believed that Hong Kong needed to legislate to remove barriers that stood in their way. He also considered that the archaic laws against champerty and maintenance, devised in medieval England to counter the risk of corruption of the courts, should be consigned to history.

8.149 IMF (Australia) Ltd, a litigation funder, set out its arguments at length. In brief, IMF (Australia) Ltd believed that LFCs should be recognised in Hong Kong, broadly, for three reasons. First, the worldwide trend is in favour of permitting third party litigation funding and concerns about maintenance and champerty are receding. Secondly, the cost of litigation and difficulties in obtaining access to justice are increasing. Thirdly, any concerns about potential abuses can be effectively dealt with under existing laws or by specific regulation.

8.150 In contrast, the Hong Kong Federation of Trade Unions were firmly against LFCs. As its experience in handling cases of work injuries reveal, agencies for work injuries claims intentionally procrastinate about making claims or coerce victims into accepting a much lower settlement amount by threat or inducement. The Department of Justice (Legal Policy Division) were also not in favour of allowing LFCs. The Law Society of Hong Kong expressed reservations at permitting LFCs to operate. It was concerned that LFCs would lead to frivolous litigation, as funding class actions would be regarded as a business. This could seriously undermine one of the main goals of class litigation, which was to improve judicial economy and prevent unnecessary waste. Secondly, there might also be conflicts of interest for it might be in the best interests of LFCs to settle because of less work and costs but high return, albeit at the expense of class members. The

---

146 In a survey by the International Human Rights Channel, all 51 persons responding to the survey agreed that LFCs could provide people with more choice to finance their litigation and enhance access to justice for a wide range of people, and 50 of those responding considered that LFCs should be recognised in Hong Kong. Fifty agreed that the common law offences of maintenance and champerty should be abolished. All 51 of those responding did not think that LFCs might abuse the court process. Thirty eight of those responding agreed that it would be fairer to taxpayers if private litigation were financed by LFCs rather than the Government (ie legal aid), while 13 disagreed. Fifty of those responding said they would consider using LFCs even if they were eligible for legal aid, and only one person said he would not.

147 In David Webb's online survey, 194 of those responding agreed that third parties should be allowed to provide litigation funding, while 41 disagreed and 22 remained undecided. About 172 of those responding agreed that the laws against maintenance and champerty should be abolished, while 27 disagreed and 53 remained undecided.

Department of Justice (Civil Division) suggested further consideration of the matter, as an agreement to share the spoils of litigation might encourage perversion of justice and endanger the integrity of the judicial process, and a champertous arrangement might be objectionable in that it involved a stranger in "trafficking or gambling in the outcome of the litigation".

8.151 In April 2005, the Hong Kong Bar Association produced a report on a study of the issues arising from non-legally qualified persons interfering in, or encouraging, litigation for reward.[148] The report concluded that the contracts between recovery agents [149] and accident victims were champertous and could not be enforced. The Bar Association said in the Legislative Council that the activities of recovery agents were illegal, and they did not serve the public interest.[150] They had an interest in settling cases quickly with minimal costs, and there were conflicts of interests between recovery agents and their clients. Recovery agents also charged a disproportionate fee of about 25% of the recovered damages. The Bar reiterated these views in its response to the consultation paper and observed that LFCs and recovery agents shared a similar, if not common, business model, with the latter being more aggressive in marketing and control.

8.152 We have carefully considered the arguments for and against allowing LFCs to operate in Hong Kong. We are aware of the number of respondents who are against the idea or think that this matter should be further considered. We have come to the conclusion that it is not appropriate to permit LFCs to operate in Hong Kong at this juncture, as the community at large do not accept the idea of funding litigation for profit. In any event, any adoption of LFCs would be premature without changes to the law relating to maintenance and champerty.

Recommendation 8

(1) We conclude, as generally accepted, that if a suitable funding model for plaintiffs of limited means could not be found, little could be achieved by a class action regime.

(2) In the long term we recommend establishing a general class actions fund, that is a special public fund which can make discretionary grants to all

148 Bar Association of Hong Kong, *Report from Special Committee on Recovery Agents* (April 2005). http://www.legco.gov.hk/yr04-05/english/panels/ajls/papers/aj0523cb2-1516-1e-scan.pdf

149 Just like LFCs, recovery agents operate for profit and on the basis of "no win, no pay", ie, the "clients" will only be liable to pay a fee if their claims are successful. Where their claims fail, the liability for the costs of the unsuccessful litigation will be borne by the recovery agents.

150 Minutes of meeting of the Panel on Administration of Justice and Legal Services in the Legislative Council 28 November 2005 (LC Paper No CB(2)897/05-06) (Ref: CB2/PL/AJLS), at para 28. http://www.legco.gov.hk/yr05-06/english/panels/ajls/minutes/aj051128.pdf

eligible impecunious class action plaintiffs providing financial support for them to obtain legal remedies and which in return the representative plaintiffs must reimburse from proceeds recovered from the defendants.

(3) Given the complexity and the difficulties of introducing a comprehensive funding mechanism in Hong Kong and our recommendation that the proposed class action regime should be implemented incrementally, starting with consumer cases, we recommend increasing the Consumer Legal Action Fund's resources to make funding available for class action proceedings arising from consumer claims. If the scope of the Fund were to be expanded to cover class actions, it would be important to devise mechanisms to ensure that class members who are not assisted by the Fund should share equitably in the costs of the proceedings.

Chapter 9

Main features of the proposed regime

Detailed design issues

9.1 We recommended earlier in this report that a new court procedure for class actions should be introduced in Hong Kong. The new procedure should be introduced incrementally, and should start with consumer cases before extending the procedure to other types of cases in due course once the regime has proved satisfactory. Despite this incremental approach, the mechanism for a full class actions regime would need to be in place from the outset. There is a need to consider what the design features of the new procedure should be and what specific provisions should be adopted if a class action regime is introduced.

9.2 First, it is necessary to clarify what claims falling within the broad heading "consumer cases" should be considered eligible for class action litigation. We discuss this issue below.

9.3 Secondly, we have proposed that at the outset the court must consider, with reference to prescribed criteria, whether a case is appropriate for the class action procedure. The class certification requirements and rules for the litigation process require further study. Procedural safeguards will have to be put in place to tackle possible abuse of the process. The procedure adopted for class actions will need to reflect the concerns and discussion relating to the four main issues (ie the treatment of public law cases, avoidance of potential abuse by plaintiffs, handling of class actions involving parties from other jurisdictions and the funding of class actions regime) that we have considered. The court should be given more case management power and a high degree of flexibility in determining the most appropriate approach in particular cases. Finally, we discuss towards the end of this chapter the way forward after the publication of this report.

Consumer cases

9.4 There are two issues to be dealt with. First, it is necessary to decide which categories of consumer claims should be covered by the proposed class action regime once it is up and running. Secondly, it is also essential to define what is meant by "consumer" for this purpose.

9.5 As to the first issue, section 4 of the Consumer Council Ordinance (Cap 216) sets out the Consumer Council's functions:

"(1) The functions of the Council are to protect and promote the interests of consumers of goods and services and purchasers, mortgagors and lessees of immovable property by -

(a) collecting, receiving and disseminating information concerning goods, services and immovable property;

(b) receiving and examining complaints by and giving advice to consumers of goods and services and purchasers, mortgagors and lessees of immovable property;

(c) taking such action as it thinks justified by information in its possession, including tendering advice to the Government or to any public officer;

(d) encouraging business and professional associations to establish codes of practice to regulate the activities of their members;

(e) undertaking such other functions as the Council may adopt with the prior approval of the Chief Executive in Council."

The Consumer Council is given a wide mandate and much discretion in deciding what claims should be taken up by the Consumer Legal Action Fund. One approach for determining which categories of consumer claims should be covered by the proposed regime would be to follow section 4 of Cap 216 and extend the proposed regime to cover claims made by consumers in relation to goods, services and immovable property.

9.6 An alternative approach would be to decide what claims to include based on the number of cases likely to arise in respect of each particular category of consumer case. The number of complaints received by the Consumer Council in recent years might provide some indication of this. It could be argued that claims arising in those areas generating the most complaints to the Consumer Council should therefore be included in the initial scope of the proposed regime, as to do so might be expected to have the potential to benefit the largest proportion of consumers.

9.7 A third approach would be to include within the scope of the proposed regime those categories of consumer case which could involve significant financial loss or personal injury. That might include, for example, claims arising in relation to medical services, insurance and property.

9.8 On balance, we are in favour of the first approach for a number of reasons. First, the policy underlying section 4 of Cap 216 has already been accepted in Hong Kong. Secondly, the downside of the second and third approaches is that consumers whose claims do not fall within one of the specified categories would be disadvantaged. Thirdly, the problem with

cherry-picking only certain categories of claim is that circumstances may change over time and the relative importance of particular categories may rise and fall. For instance, the number of complaints to the Consumer Council relating to banks and financial services has fallen sharply from a very high figure in 2009. Furthermore, if applicable claims are confined to past experience, a particularly egregious case may arise in the future which is not covered. Fourthly, defining with precision the particular categories of consumer claim to be included would be difficult. Fifthly, the difficulty of the third approach is that any decision which is not based on statistical data would inevitably be subjective and would depend on the varying judgment of individuals as to which categories of case should or should not be included.

9.9 As far as the basis of the claim is concerned, both contractual and tortious claims should be included in the class action regime. Mass torts involving physical harm may arise from a large scale accident or the supply of faulty mass-produced goods by retailers or pharmacies, prompting victims to sue manufacturers under the *Donoghue v Stevenson* [1] principle. A consumer may also wish to bring alternative causes of action, such as misrepresentation, deceit or other tortious claims. The proposed regime should allow this, though in every case the tortious claims would have to have arisen in a consumer context if they were to be covered by the new scheme.

9.10 We therefore recommend that the proposed class actions regime should cover tortious and contractual claims made by consumers in relation to goods, services and immovable property. The Consumer Legal Action Fund would only be able to fund some of the claims which are mounted and the decision on which claims to fund should rest with the body administering the Consumer Legal Action Fund. The certification process by the court would also weed out unsuitable cases.

9.11 The next issue is what is meant by "consumer" for the purposes of the class action regime. The term "dealing as consumer" has been defined in various provisions of Hong Kong's legislation. Some of these definitions (for example, in the Waterworks Ordinance (Cap 102) and the Sewage Services Ordinance (Cap 463)) are sector-specific, and are therefore not suitable for general application. A more general definition can be found in section 3 of the Unconscionable Contracts Ordinance (Cap 458):

> "*(1) A party to a contract 'deals as consumer' in relation to another party if -*
>
> *(a) he neither makes the contract in the course of a business nor holds himself out as doing so;*
>
> *(b) the other party does make the contract in the course of a business; and*
>
> *(c) the goods passing or services provided under or in pursuance of the contract are of a type ordinarily*

[1] [1932] AC 562.

supplied or provided for private use, consumption or benefit.

(2) Notwithstanding subsection (1), on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer.

(3) It is for the person claiming that a party does not deal as consumer to prove that he does not."

9.12 There are very similar definitions in section 2A of the Sale of Goods Ordinance (Cap 26), section 4 of the Control of Exemption Clauses Ordinance (Cap 71), and section 4 of the Supply of Services (Implied Terms) Ordinance (Cap 457). These definitions are modeled on section 12 of the Unfair Contract Terms Act 1977 in England.[2] A consumer can be a natural person, a corporation or a business.[3] Section 2 of Cap 458 provides that "business" includes the following:

(a) a profession;

(b) the activities of a public body or public authority; and

(c) the activities of a board, commission or committee or other body appointed by the Chief Executive or Government.

9.13 Section 3 of Cap 458 defines "consumer" by virtue of the specific transaction in question. An individual is not defined as "a consumer" for all purposes and all times. Rather, an individual is treated as "dealing as consumer" in respect of the specific transaction if he satisfies the terms of section 3. It is possible that an individual may be treated as a consumer in respect of one transaction and not another. It is equally possible that a corporate entity may "deal as consumer" in certain circumstances. What is necessary to satisfy the terms of section 3 is that one party did not make the contract "*in the course of a business*" (and the other did) and that the goods or services involved are "*of a type ordinarily supplied or provided for private use.*"

9.14 We are of the view that a definition with similar effect to section 3 in Cap 458 should be adopted. A suggested draft definition is as follows:

(1) A person (A) is a consumer in relation to a dealing with another person (B) if –

(a) the dealing results in A –

(i) receiving or having the right to receive goods or services; or

(ii) acquiring or having the right to acquire immovable property as purchaser, mortgagor, chargor or lessee; and

---

2 Section 12 of the Unfair Contract Terms Act 1977 has been amended by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045).

3 *Benjamin's Sale of Goods* (8th Ed, Sweet & Maxwell, 2010), at para 13-073.

(b) A is not acting, or purporting to act, in the course of a business but B is so acting or purporting to so act.

(2) It is for the person claiming that a person is not a consumer in relation to a dealing to prove that fact.[4]

Models of certification criteria

9.15 In this connection, we have noted that Professor Mulheron has identified sixty design issues for an opt-out collective action regime in her submission to the Civil Justice Council in England (CJC).[5] Further work is required to consider the various design issues associated with the procedure at each stage of an opt-out class action.

9.16 A certification stage is an essential element of any class actions mechanism. The CJC recommended that:

> "*No collective claim should be permitted to proceed unless it is certified as being suitable to proceed as such. Certification should be subject to a strict certification procedure, which is to include provisions for the imposition of security for costs.*"[6]

9.17 The CJC therefore recommended that the new collective action mechanism should incorporate a certification process, which should take place as early as possible in the litigation and which should be applied rigorously by the court. Rigorous application will require the representative party to satisfy the court of the following certification criteria:

(a) There are a minimum number of identifiable claimants (the "numerosity" criterion);

(b) The claim is not merely justiciable (discloses a genuine cause of action) but has legal merit (ie certification requires the court to conduct a preliminary merits test) (the "merits" criterion);

(c) There is sufficient commonality of interest and remedy among members of the class (the "commonality" criterion);

---

4 *business* includes –

(a) a profession;

(b) the activities of a public body or public authority; and

(c) the activities of a board, commission, committee or other body appointed by the Chief Executive or Government;

consumer (in relation to a dealing) - see the text above;

goods has the same meaning as in the Sale of Goods Ordinance (Cap 26);

services does not include services provided or to be provided under a contract of employment within the meaning of the Employment Ordinance (Cap 57).

5 Rachael Mulheron, *Sixty Design Issues for an Opt-out Collective Action Regime*, paper submitted to the Civil Justice Council (March 2008).

6 Civil Justice Council, *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions* (November 2008), Recommendation 4, at 51.

(d) The class action is the most appropriate legal vehicle to resolve the issues in dispute (ie it is a superior redress mechanism to, for instance, either pursuing the claim on a traditional, unitary, basis through the civil courts or a specialist tribunal or alternatively, through pursuit of a compensatory remedy via regulatory action where that is available and where it is able to deliver effective access to justice) (the "superiority" criterion); and

(e) The representative party of a class action takes the action forward on behalf of all the group members: he or she is looking after his or her personal interests and the similar interests of the other members of the group. The judgment of a class action will bind not only the representative plaintiff but also the members of the group on whose behalf he or she sues. The representative party should have the standing and ability to represent the interests of the class of claimants both properly and adequately (the "representative" criterion).[7]

9.18 With reference to the certification criteria in four jurisdictions (Australian federal regime, British Columbia, Ontario and the USA federal regime) we have set out in the following table a range of certification requirements to be applied to a hypothetical consumer claim. Using this illustration, it is possible to determine whether an action will satisfy those criteria and will therefore fall within the scope of a class action regime. In the meantime, the table provides a starting point for public discussion of whether or not the different certification criteria in other jurisdictions may be too wide and should be modified before adoption in Hong Kong.

[7] Civil Justice Council, *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions* (November 2008) pp153-4. Detailed discussions on the case law in relation to the interpretation of the certification requirements in each jurisdictions under review can be found in Chapters 5–8 of R Mulheron, *The Class Action in Common Law Legal Systems* (2004, Oxford and Portland, Oregon: Hart Publishing).

Certification criteria in four jurisdictions with an illustration of a consumer claim[8]

Broad area of consideration	Questions to be asked	In particular …	Australia: Federal regime	Ontario	British Columbia	USA: Federal regime
Minimum numerosity	How many consumers should be necessary in order for the class action to be warranted?	Is a minimum specified number to be selected? Or simply two or more consumers? Or by stating that wherever their joinder or consolidation is impracticable?	FCA(Aus), s33C(1)(a): "7 or more persons have claims against the same person"	CPA (Ont), s5(1)(b): "an identifiable class of two or more persons"	CPA (BC), s4(1)(b): "an identifiable class of two or more persons"	FRCP r23(a)(1): "the class is so numerous that joinder of all members is impracticable"
Preliminary merits	What, if any, preliminary merits filter should be satisfied (apart from the usual requirement that the pleadings disclose a cause of action)?	Should it be necessary to show that the class action has a "high probability of success", to warrant the fact that it will be consumptive of judicial resources? Is a minimum financial threshold per consumer warranted? Should a cost-benefit	No express requirement	CPA (Ont) s5(1)(a): "the pleadings or the notice of application discloses a cause of action"	CPA (BC), s4(1)(a): "the pleadings or the notice of application discloses a cause of action"	No express requirement

[8] The first three columns of the table are adapted from R Mulheron "Justice Enhanced: Framing an Opt-Out Class Action for England" [2007] 70(4) *Modern Law Review* 550.

Broad area of consideration	Questions to be asked	In particular …	Australia: Federal regime	Ontario	British Columbia	USA: Federal regime
		analysis be required in the class action's favour?				
Commonality of issues	How is the degree of commonality to be worded?	How significant must the common issues be? Predominant? Important in moving the litigation forward? Merely a "triable issue"? How significant must the individual issues be before the class action fails certification?	FCA (Aus), s33C(1)(c): "the claim of all [class members] give rise to a substantial common issue of law or fact"	CPA (Ont) s5(1)(c): "the claims … of the class members raise common issues"	CPA (BC), s4(2)(a): "In determining whether a class proceeding would be the preferable procedure ... the court must consider … (a) whether question of fact or law common to the members of the class predominate over any questions affecting only individual members"	FRCP r23(a)(2): "there are questions of law or fact common to the class" FRCP r23(b)(3): 'the question of law or fact common to the members of the class predominate over any questions affecting only individual members"
Superiority	Must the class action be the superior means of resolving the common issues, or the entire dispute?	What factors will make up that superiority matrix? Costs comparisons between unitary and class litigation? Look at the characteristics of the consumers? Look at whether there is any	FCA (Aus), S33 N(1): Court may order discontinuance where it is in the interests of justice to do so because: (a) the costs incurred as a	CPA (Ont), S5(1)(d): The court must find that a class action would be the "preferable procedure for the resolution of the common issues"	CPA (BC), S4(1)(d) and S4(2): When determining preferability, the court must consider: (a) whether common questions of	FRCP r23(b)(3): The court must find that a class action is superior to "other available methods for the fair and efficient adjudication of the controversy"

Broad area of consideration	Questions to be asked	In particular …	Australia: Federal regime	Ontario	British Columbia	USA: Federal regime
		"need" for the class action? Should it matter if the defendant is to be adversely affected by the class action? What effect does the institution of separate proceedings have upon superiority?	class action > the costs if each class member sued individually; (b) all the relief sought can be obtained by proceeding other than a class action; (c) the class action will not provide an efficient and effective means of dealing with the class members' claims; (d) it is "otherwise inappropriate" that the claims be pursued by class action.		fact or law predominate over individual questions; (b) whether a significant number of class members have valid interest in individually controlling actions; (c) whether the class action would involve claims presently being litigated in another action; (d) whether other means of resolving the claims are less practical or less efficient; (e) whether a class action would be more difficult to administer than	Pertinent matters include: (a) the interest of class members in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation already commenced by class members; (c) the desirability of concentrating the class litigation in the particular forum; (d) the difficulties likely to be encountered in the management of the class action.

Broad area of consideration	Questions to be asked	In particular …	Australia: Federal regime	Ontario	British Columbia	USA: Federal regime
					if relief were sought by other means.	
The representative	Should an absence of conflict of interest, adequacy, and typicality, all be required for the representative to pass certification?	How is conflict to be assessed? What factors matter to adequacy, and which are to be considered irrelevant? Is there any place for typicality? If so, does it mean that there has to be an interest in the litigation on the part of the consumers?	FCA (Aus), s33T(1): "If … it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and make such other orders as it thinks fit"	CPA (Ont), s5(1)(e): "there is a representative plaintiff or defendant who, (i) would fairly and adequately represent the interests of the class, (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and	CPA (BC), s4(1)(e): Similar to CPA (Ont), s5(1)(e)	FRCP r23(a)(4): "the representative parties will fairly and adequately protect the interests of the class" FRCP r23(a)(3): "the claims or defenses of the representative parties are typical of the claims or defenses of the class"

Broad area of consideration	Questions to be asked	In particular …	Australia: Federal regime	Ontario	British Columbia	USA: Federal regime
				(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members"		

Abbreviations :
FCA (Aus) : Federal Court of Australia Act 1976.
CPA (Ont) : Class Proceedings Act 1992, SO 1992, C 6 of Ontario.
CPA (BC) : Class Proceedings Act, RSBC 1996, C 50 of British Columbia.
FRCP : Federal Rules of Civil Procedure (US).

9.19 For example, a manufacturer sold toys widely throughout Hong Kong. A particular type of dolls contained serious design defects and caused monetary loss and physical injuries to a large number of consumers and their children. Mass tort class actions were commenced on behalf of all those affected.

9.20 The implications of the different formulations of the certification criteria in relation to this hypothetical example are as follows:

(a) Numerosity criterion - the Australian and Canadian provisions for a specified minimum number of litigants are straightforward and impose a lower threshold for commencing a class action. In contrast, the US Federal regime requires a consideration of whether the application of the conventional procedure of consolidation is inappropriate or impracticable. This is a more stringent requirement for certification. Depending on the particular factual matrix of the cases, the mass tort actions may not be able to fulfil this more restrictive requirement if imposed.

(b) Merits criterion - the certification court would have to undertake a preliminary assessment of the merits of the applicant's proposed case. The existing provisions in the Canadian regimes only require the disclosure of a cause of action. This is a usual requirement for commencing legal action and should not be difficult to fulfil for mass tort actions.

(c) Commonality criterion - it is clearly an essential requirement for certifying a class action that there should be an identifiable group whose members raise claims with a common basis. In the case of claims for damages in respect of allegedly defective toys, there is likely to be no connection between the claimants other than that they claim to have been injured by the same toys. Their injuries will have occurred at different times and in different circumstances, there will be questions about whether the injury is attributable to the defective toys or to some other causes peculiar to the claimants. The different formulae for commonality found in the four jurisdictions reflects the varying degrees of commonality required, ranging from "*common issues*" in Ontario to "*substantial common issue of law or fact*" in the Australian federal regime and common questions of fact or law which "*predominate over any questions affecting only individual members*" in British Columbia and the US federal regime. For mass tort actions, it may be more difficult to demonstrate that the common questions of law or fact predominate over any questions affecting only individual members because the issue of causation between the defective products and the injuries suffered by individual claimants would have to be considered on a case by case basis. Such cases would more easily satisfy the lower threshold of common issues stipulated in the Ontario class action regime.

(d) Superiority criterion - it is necessary to make clear that a class action should be resorted to only where it is likely to be the preferable or superior means of resolving the common issues when compared with the traditional means of dispute resolution. In the absence of a certification hearing, the Australian federal court may order that the class action *no longer continue* because it is not in the interests of justice to do so. Nevertheless the list of factors that should be taken into account is similar to that in the other jurisdictions. It is noted that none of the lists of relevant matters to be taken into account are meant to be exhaustive and Ontario does not specify a list or relevant matters at all. The Canadian regimes of Ontario and British Columbia are different from the US federal regime in two key respects. Class proceedings need only be a "preferable", not a "superior" method of proceeding (although the precise difference between these terms is not necessarily obvious). The second difference is that whilst the US federal rule requires that the class action is the superior method to resolve the "controversy", class actions need only be preferable in respect of the "common issues" (and not all of the issues between the parties) in the Canadian regimes.[9] In this respect, it appears that it is easier for mass tort class actions to fulfil the requirements under the Canadian regimes than the US federal regime. A final point of distinction between the jurisdictions revolves around the question of "superior to what?" Under the US Federal Rules of Civil Procedure rule 23(b)(3), the court must compare a class action with "other available methods" for the resolution of the dispute. In other words, a class action cannot be inferior to an alternative that is simply not available to the class member. On the other hand, the Australian federal rule requires alternative litigation in the sense of "a proceeding in court", not an alternative dispute resolution method. The possibility of an alternative to class litigation is much greater in the other jurisdictions under review than in Australia, as a result of the less restrictive legislative drafting.[10]

(e) Representative criterion - the Scottish Law Commission explained the two representative requirements of fairness and adequacy as follows:

> *"The requirement of 'fairly' promoting the interests of the class or group implies that the person concerned should be independent of the [defendants], that there should be no apparent conflict of interest with other group members and that one member of the group is not likely to be favoured at the expense of another. The requirement*

---

9 See the observations made by the Manitoba Law Reform Commission, *Class Proceedings Report #100* (1999), at 52.

10 See the comments of R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing), at 225.

that the representative party should protect the interests of other class members 'adequately' implies that he (or she) has the financial resources likely to be necessary to support the litigation and the determination to pursue the litigation to a conclusion."[11]

The determination of whether or not the class representative can act fairly and adequately to represent the interests of the class rests on the following factors:

"(i) the absence of any conflict with the interests of other class members, at least in relation to the common issues of law or fact;

(ii) a plan or scheme for the proceedings and a methodology for presenting and advancing the class interests;

(iii) a means of notifying class members of the existence and conduct of the proceedings;

(iv) adequate legal representation for the class."[12]

We have discussed the importance of the representative's sufficiency of financial resources as one of the qualifying criteria under the headings "the representation certification criterion" and "funding proof at certification" in Chapter 6. The reference to security for costs in Chapter 6 also ties in with the adequacy of the representative criterion.

The US Federal Rules of Civil Procedure rule 23(a)(3) provides for a separate requirement of typicality on the part of the representative parties (ie that the claims of the class representative are typical of the class). The Irish Law Reform Commission commented that: "*[s]trict interpretation of the requirement has allowed judges unsympathetic to class actions to reject certification on this ground. This is one of the reasons that neither the Canadian nor the Australian regimes include a typicality requirement.*"[13]

9.21 The above table sets out in some detail the different models for each element of the certification requirements in each of the four jurisdictions examined. Recommendation 8(2) in the Consultation Paper recommended that to filter out unsuitable cases, class actions should not be allowed to continue as collective proceedings unless certified by the court. All 15 respondents who responded to this issue endorsed this recommendation. We therefore maintain the recommendation. Lovells and the Hong Kong Association of Banks observed that defendants should have the right to be

---

11 Scottish Law Commission, *Multi-Party Actions* (No 154, 1996), at para 4.36.

12 The Law Reform Commission of Ireland, *Multi-Party Litigation (Class Actions)* Consultation Paper (LRC CP 25-2003), at 71.

13 The Law Reform Commission of Ireland, *Multi-Party Litigation (Class Actions)* Consultation Paper (LRC CP 25-2003), at 72.

heard at certification hearings. We agree with this suggestion which we would consider indisputable and we would expect that this right would be incorporated in the implementing legislation in any event, as it is such a fundamental right. Although certification is a prime design feature of the class action, there are, in addition other design features which must be incorporated into the class action regime, such as discretion to be given to the court to:

(a) avoid abuse of the process;

(b) extend time for opt-in or opt-out as may be justified;

(c) amend the definition of the class or order formation of sub-classes;

(d) fashion reasonable and cost effective notice requirements;

(e) order alternative dispute resolution procedures such as mediation or arbitration; and

(f) make such other orders as would ensure efficient and effective case management.

The academic literature and reports of the CJC would enable the designers to obtain a wealth of material of the design features which should go into a class action regime.

Legislation to implement a class action procedure in Hong Kong

9.22 In some other jurisdictions provision for class actions has been made by rules of court, rather than by legislation. The Ontario Commission[14] acknowledged that subordinate legislation provides greater flexibility and easier amendment but, for two reasons, it recommended primary legislation. The first reason was that it was often difficult to determine whether a provision was substantive or procedural and if a provision contained in a rule were held to be substantive it would be liable to be struck down as being *ultra vires*. Primary legislation might be necessary if it was desired to confer new power on the court. The second reason was that the potential impact of the introduction of a class action on the courts, the parties and the public raised important and controversial issues that deserved to be debated fully in the legislative assembly, rather than passed by way of regulation.[15]

9.23 The CJC in its 2008 report on *Improving Access to Justice through Collective Actions* recommended that while there was considerable scope for reform by amending the Rules of Court (the Civil Procedural Rules), it would be preferable for reform to be taken forward by primary legislation. This would enable those elements of reform which might affect substantive

---

14 *Report on Class Actions*, at 305-6.

15 See also the *Report of the Attorney General's Advisory Committee on Class Action Reform* 1990, at 24-5.

law to be debated fully and implemented in a way that would preclude *ultra vires* challenges.[16]

9.24 Overseas experience shows that it may be preferable to introduce reform through statutory enactment rather than subsidiary legislation. If the recommendations in this report are accepted and are to be implemented, there will be a need to pass enabling legislation and make changes to the rules pursuant to that enabling legislation. We set out below the areas that any future legislation will have to cover. The list of topics is not intended to be exhaustive. Details of the provisions to be included in the class action regime will need to be further considered.

Primary legislation for a class action regime

9.25 To introduce a class action procedure to Hong Kong, provisions similar either to those in Australia or the United States will have to be passed. The legislation should cover the definition, nature and type of class actions, the suspension of any applicable limitation period relating to members of a represented class, as well as any other matter relating or incidental to the proper management and conduct of class action proceedings. Where an opt-out approach is adopted for the generic class action regime, provisions will have to be made for (a) fair, reasonable and adequate notice to be given to the class members of the class action and (b) a fair, reasonable and adequate period of time ("cut-off date") in which class members can elect to opt out of the represented class for the purpose of the class action proceedings.

9.26 According to the CJC, only two opt-out collective action regimes are contained within rules of civil procedure, namely, the United States federal regime (as contained in rule 23 of the Federal Rules of Civil Procedure) and rule 334.1-334.40 of the Canadian Federal Court Rules 1998. Otherwise, the regimes of Australia (federal), Victoria (state) and all the existing opt-out regimes in Canada, have been implemented by primary legislation.[17] In Victoria, the opt-out regime, now contained within Part 4A of the Supreme Court Act 1986, was originally implemented by court rules (via order 18A of the Supreme Court (General Civil Procedures) Rules). The rules were challenged, however, by the first defendant sued in *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd (Attorney-General for the State of Victoria intervening)* who argued that order 18A was *ultra vires* of the rule-making powers vested in the judges under section 25(1) of the Supreme Court Act 1986 and therefore invalid.[18] The Victorian Court of Appeal held by a narrow majority of 3:2 that order 18A was valid. Before a further appeal to

---

16 Civil Justice Council, *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions* (November 2008), at 183 (with draft Civil Proceedings Act and Rules of Court attached at 185–226).

17 Civil Justice Council, *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions* (November 2008), at 432-433.

18 [2000] VSCA 103.

the High Court of Australia on that question was heard, however, legislation was passed by the Victorian Parliament to remove any doubt about the legality of the regime.

9.27 In the light of the above, Recommendation 8(1) in the Consultation Paper recommended that provision for introducing a class action procedure in Hong Kong should be made by primary legislation. This was well supported in the public consultation. The Law Society of Hong Kong agreed that primary legislation was more desirable as the introduction of a class actions regime would raise controversial issues and questions which would require further public consultation and debate. The Department of Justice (Civil Division and Legal Policy Division) and the Hong Kong Association of Banks, *inter alios*, also endorsed this recommendation. The Hong Kong Bar Association was, however, concerned that primary legislation might be narrowly drafted to allow only "class actions" of a specific type that satisfied specific criteria. Allowing one form of multi-party litigation by legislation could be construed as prohibiting other forms falling outside the prescribed scope which might otherwise satisfy the wide scope and purpose of the existing Order 15 rule 12.

9.28 In our view, the experience in Victoria described in the preceding paragraphs suggests that it would be safer to implement a class action regime by way of primary legislation.[19] A class action regime entails some modification of the substantive laws that would otherwise apply to unitary litigation, including, for instance, an expansion of limitation periods, revised *res judicata* rules and aggregate assessment of damages.[20] In response to the Bar's concern that other types of multi-party litigation might be excluded if the class action regime were brought in by way of primary legislation, we note that various types of multi-party litigation co-exist in, for example, Ontario, Victoria and the federal jurisdiction of Australia. This will be further discussed in the paragraphs below under the heading "Order 15 of the Rules of the High Court".

9.29 In the light of the foregoing discussion, we maintain the Consultation Paper's recommendation that provision for introducing a class action regime in Hong Kong should be made by primary legislation

9.30 The Bar made the further related point that while the sub-committee's terms of reference referred in general to "a scheme of multi-party litigation", the Consultation Paper mainly focused on the more specific topic of "a class action regime." The Bar did not support such a limitation of the terms of reference.

---

19 Referring to what happened in Victoria, Professor Mulheron said, "*caution ultimately dictated the statutory route."* See R Mulheron, *The Class Action in Common Law Legal Systems* (2004, Oxford and Portland, Oregon: Hart Publishing), at 42.

20 R Mulheron, *The Class Action in Common Law Legal Systems* (2004, Oxford and Portland, Oregon: Hart Publishing), at 39.

9.31 In describing the available channels for multi-party litigation in Australia, Professor Morabito said:

> *"Where the class action and representative action procedures are not available or are not employed, three, extremely unsatisfactory, alternatives exist to deal with legal disputes involving multiple claimants. One alternative is to join all of the plaintiffs with a common claim in one action. Another approach is to commence a separate action for each claimant, and then try "test cases" to determine the common issues. The third alternative is to consolidate existing non-group proceedings that relate to the same dispute with respect to the same defendants."*[21]

We have noted the Bar's concern, but would point out that in recommending the adoption of a class action regime, we have not ruled out alternatives to the regime, namely test cases, joinder and consolidation as described above by Professor Morabito. In addition, we also recommend below that the existing order 15 rule 12 on representative proceedings should be retained at least until the proposed regime is extended to all cases.[22]

Order 15 of the Rules of the High Court

9.32 We have considered whether the existing rules for representative proceedings provided by order 15 rule 12 of the Rules of the High Court (RHC) should be retained. The Consultation Paper recommended (Recommendation 8(3)) that a self-contained order of the RHC on the general procedural framework for class actions would be needed to replace the current rule. This was supported by most of those who responded on this issue, including the Hong Kong Association of Banks, Neville Sarony QC SC and Winston & Strawn LLP. Both the Law Society of Hong Kong and Slaughter and May supported this recommendation, but also considered that the present regime could be retained to run in parallel until the new regime had developed, or for plaintiffs who might be wary of bringing a class action. The Hong Kong Federation of Insurers, however, believed that the current rule was irreplaceable and the Hong Kong Bar Association considered it essential that the current rule was "*in no way curtailed*". The Bar also suggested building on the current rule and that the introduction of a comprehensive regime for multi-party litigation should be regarded "*as an enlargement, extension or supplementation of the [current rule], as opposed to a replacement of or breaking away from it*".

9.33 The Bar Association referred to the Australian case of *Carnie* v *Esanda Finance Corporation Ltd*,[23] in which the High Court of Australia

---

21 V Morabito, "Class Actions, Group Litigation & Other Forms of Collective Litigation", (Naitonal report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007), at 7.

22 Under the heading "Order 15 of the Rules of the High Court".

23 (1995) 127 ALR 76.

unanimously overturned a judgment of the New South Wales Court of Appeal striking out an action on the basis that it was not within rule 13(1) Part 8 of Supreme Court Rules 1970 (NSW) which was almost identical to Hong Kong's Order 15 rule 12. The Bar emphasised that the Australian jurisprudence took a more liberal approach to the "same interest" requirement than the British jurisprudence reflected in *Prudential Assurance v Newman Industries.*[24] Mason CJ, Deane and Dawson JJ said in their joint judgment:

> *"In our view, this interpretation might not adequately reflect the content of the statutory expression. It may be it extends to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings. Be that as it may, it has now been recognized that persons having separate causes of action in contract or tort may have 'the same interest' in proceedings to enforce those causes of action."*[25]

McHugh J was of the view that the test should be "*whether the plaintiff and the members of the represented class have a community of interest in the determination of some substantial issue of law and fact*".[26] Brennan J agreed with this.[27]

9.34 The Bar Association also highlighted the following view of Mason CJ, Deane and Dawson JJ:

> *"[the absence of a detailed legislative prescription regulating the incidents of representative action] does not enable a court to refuse to give effect to the provisions of the rule. Nor, more importantly, does the absence of such prescription provide a sufficient reason for narrowing the scope of the operation of the rule, as the Court of Appeal did, without giving effect to the purpose of the rule in facilitating the administration of justice".*[28]

9.35 We note that Australia (Commonwealth), Victoria and Ontario keep, alongside their class actions regimes, their own rules on representative proceedings similar to our Order 15 rule 12. The regimes in Australia (Commonwealth) and Victoria were based on the report of the Law Reform Commission in Australia which stated:

> *"The Commission makes no recommendations with respect to defendant classes in this report. The existing representative procedure should, however, be retained to enable defendant*

---

24 [1981] Ch 229 at 255. This case was discussed under the heading "Relaxation of the 'same interest' requirement" in Chapter 1.

25 (1995) 127 ALR 76, at 79.

26 (1995) 127 ALR 76, at 82.

27 Toohey and Gaudron JJ considered that "a significant question common to all members of the class" was sufficient for being in the same interest in proceedings for declaratory relief.

28 (1995) 127 ALR 76, at 79. Toohey and Gaudron JJ expressed a similar view ((1995) 127 ALR 76, at 92).

> *representative actions to be brought in appropriate circumstances."*[29]

In Ontario, the rule on representative proceedings has been retained to give claimants an alternative to the new class action regime, especially actions against a class of defendants.[30]

9.36 In contrast, New South Wales did away with its Rules 7.4 and 7.5 of the Uniform Civil Procedure Rules 2005 on representative proceedings upon the commencement of its class actions regime on 4 March 2011. The New South Wales Attorney General said during the Second Reading of the Bill:

> *"… rules 7.4 and 7.5 of the Uniform Civil Procedure Rules 2005 … lack procedural clarity. The regime that is proposed by these amendments will provide a greater level of certainty for both litigants and the court, and will enhance the community's access to justice."*[31]

Because the class action regime in New South Wales incorporated the features of the pre-existing rule on representative proceedings, it was generally regarded as sensible to delete the rule once the class action regime had been introduced.[32]

9.37 In Scotland, the representative rule equivalent to order 15 rule 12 of the RHC was described by the Scottish Law Commission as "*brief and unhelpful*", with "*[a] number of matters left unprovided for and open to judicial interpretation.*"[33] The Scottish Law Commission held the view that "*[t]he representative action procedure does not adequately meet the difficulties of multi-party litigation in Scotland and could not readily be adapted to do so.*"[34] The CJC, in light of its examination of other jurisdictions and following extensive stakeholder consultation, recommended that a generic collective action be introduced generally.[35] The CJC proposed that the current rule governing representative actions set out in Civil Procedure Rules 19.6 should

---

29 Law Reform Commission in Australia, *Group Proceedings in the Federal Court* (Report No 46, 1988), at para 6.

30 In an email to the Secretary to the Sub-committee from Professor Jasminka Kalajdzic dated 6 August 2011. R Mulheron, *The Class Action in Common Law Legal Systems* (2004, Oxford and Portland, Oregon: Hart Publishing), at 44 - 45.

31 http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/d2117e6bba4ab3ebca256e68000a0ae2/18ddaff9c0fa8f87ca2577e40018d5ec/$FILE/LC%2013510.pdf (at para 4, page 2).

32 In an email to the Secretary to the Sub-committee from Professor Vince Morabito dated 6 August 2011.

33 Scottish Law Commission, *Multi-Party Actions* (No 154, 1996), at para 5.10.

34 Scottish Law Commission, *Multi-Party Actions* (No 154, 1996), at para 5.13.

35 Civil Justice Council, *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions* (November 2008), at 137.

be replaced by a generic collective action procedure as provided for in a revamped Civil Procedure Rules 19.[36]

9.38 The more liberal approach adopted by the High Court of Australia towards the more conventional multi-party litigation regime in the *Carnie* case would go some way towards improving access to justice by a group of claimants, but it does not negate the desirability of having a more comprehensive regime. Mason CJ, Deane and Dawson JJ also said in that case: "... *one might prefer to have a detailed legislative prescription by statute or rule of court regulating the incidents of representative action*".[37] As Recommendation 1 in Chapter 3 recommended an incremental approach to implementing a class action regime, we consider that the existing order 15 rule 12 should be retained at least until the proposed regime is extended to all cases. Whether this rule should still be retained after the extension to all cases should be reviewed at that time.

Certification criteria

9.39 To implement our Recommendation 2 on appropriate procedures for filtering out cases that are clearly not viable, class action proceedings may not continue as collective proceedings unless certified by a court in accordance with rules set out in the RHC. For the purpose of certification, provisions will have to be made for when certification is to take place, the criteria applicable to certification and which courts may certify proceedings as class action proceedings. The Hong Kong Bar Association agreed that the new regime should have a certification process. The details of that process should be debated and decided. The Hong Kong Corporate Counsel Association, the Hong Kong Association of Banks and Lovells agreed to the five certification criteria set out in the above paragraphs. The Law Society of Hong Kong had the following observations on the certification criteria:[38]

1. Minimum numerosity - It is difficult to lay down a hard and fast rule as to the minimum number of claimants required, as each case depends on its own facts. It would also be artificial as it cannot cater for every situation.

---

[36] For the draft Civil Procedure Rules 19 please see Civil Justice Council, *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions* (November 2008), at 189–222.

[37] (1995) 127 ALR 76, at 78.

[38] Lovells suggest the following criteria:

1. minimum numerosity - 10 persons may be a starting point;
2. preliminary merits - Has legal merit, not just justiciable (disclosing a genuine cause of action);
3. commonality of issues - Sufficient commonality of interest and remedy among class members;
4. superiority - Being "*the most appropriate legal vehicle*" to resolve the issues in dispute;
5. representative - Standing and ability to represent class interests.

2. Preliminary merits - An extra merits test is unnecessary, as there are existing rules dealing with cases which disclose no cause of action or which amount to an abuse of process. If a "merits" criterion is to be adopted, the threshold should be set higher than that of showing a cause of action.

3. Commonality of issues -The degree of commonality should not be lower than the existing requirements for consolidation under Order 4 Rule 9 of the RHC, or joinder of parties under Order 15 Rule 4 of the RHC.[39]

4. Superiority - The court should consider various factors, instead of simply adopting "preferable" as in Ontario.[40] It is more appropriate to conduct further study and consultation before deciding which factor to adopt.

5. Representative - A class representative should be able to fairly and adequately represent and protect class interests. Relevant factors include his financial ability, no conflict with class interests, adequate legal representation, means (including financial) to provide adequate information to class members on the progress, etc. Typicality of his case should not be a pre-requisite. The court should be able to replace a representative where appropriate. It is more appropriate to conduct further study and consultation before deciding which factor to adopt.

We believe that these observations should be taken into account in the detailed design of the class action regime together with the academic literature and the reports of the CJC. We therefore make no specific recommendation, other than that there should be a certification process to filter out unsuitable cases. This report has only highlighted the most important design features and the detailed design should take account of the academic literature and reports we have referred to in this report.

---

39 The Law Society of Hong Kong suggest the following criteria:

"*Whether if each member of the class is to commence a separate action instead of a single class action,*

(a) some common question of law or fact would arise in such separate actions; and

(b) the rights to relief claimed in such separate actions are in respect of or arise out of the same transaction or series of transactions or transactions with substantially the same subject matter."

40 The Law Society of Hong Kong suggest the following factors:

(a) Costs efficiency between unitary and class litigation;

(b) Number of claims (including litigation and other dispute resolution methods) already commenced by the member of the class;

(c) The distribution of the members of the class in terms of geographical locations or legal jurisdiction;

(d) Availability of alternative means of resolving the dispute;

(e) Whether class action is in general appropriate.

Treatment of public law cases

9.40 We recommended in Chapter 5 that the new class actions regime should apply to public law cases, in addition to the current section 21K(1) of the High Court Ordinance (Cap 4) and Order 53 of the RHC, and an opt-out approach should be the default position unless the court orders otherwise in the interests of justice and the proper administration of justice. This means that public law cases will be treated in the same way as private law cases insofar as the opt-out feature of the class action is concerned. We have made observations in Chapter 5 of the particular differences of public law compared to private law litigation. These differences will continue to dictate how public and private law litigation will proceed.

Choice of plaintiff and avoidance of potential abuse

9.41 Pursuant to our Recommendation 5, an explicit certification requirement should be that the representative plaintiff must prove to the satisfaction of the court that suitable funding and costs-protection arrangements (on the part of the representative claimant and/or his lawyers) have been made for the class action litigation, similar to the adequacy of class counsel requirement under rule 23(g) of the Federal Rules of Civil Procedure of the USA.

9.42 Furthermore, to implement our Recommendation 5(3), provision should be enacted along the lines of section 33ZG of the Federal Court of Australia Act 1976 to empower the court to order the representative plaintiffs to pay security for costs in accordance with the established principles for making such orders in appropriate cases.

Handling of parties from other jurisdictions

9.43 Our Recommendation 6 deals with the handling of parties from other jurisdictions. A foreign plaintiff should be defined as a member of a class of persons on whose behalf class action proceedings have been commenced and who is not resident in Hong Kong. To accommodate class actions involving parties from jurisdictions outside Hong Kong, the legislation should provide for an opt-in procedure for foreign plaintiffs and give a discretion to the court upon application to allow the entire class of foreign plaintiffs or defined sub-classes to opt out, in the light of the particular circumstances of each case (Recommendation 6(1)). For the avoidance of doubt, the court should be given explicit power to stay class action proceedings involving foreign plaintiffs or defendents in reliance on the common law rule of *forum non conveniens* (see Recommendation 6(3)).

9.44 Where defendants are from jurisdictions outside Hong Kong, we recommend (at Recommendation 6(2)) that the current rules on service of process outside Hong Kong as set out in order 11 of the RHC should be amended to accommodate an application for service outside the jurisdiction

without the need to show that each claim of the members in a class action falls within the ambit of order 11 rule 1(1) of the RHC. In other words, as long as the representative plaintiff can make out a case for a grant of leave, an order for service outside the jurisdiction should be granted.

9.45 We propose that information on class action proceedings commenced in Hong Kong should be publicised on a website (Recommendation 6(4)). Consideration will have to be given to whether rules of court or practice directions should be enacted requiring the plaintiff's counsel to send the relevant class action information to the responsible body for posting on a website. In addition, we have made the observation in Chapter 7 that certain foreign plaintiffs may have missed the opportunity to opt in after the time to do so has passed. We believe that out-of-time opting-in may be catered for by the time extension powers of the Court in deserving cases.

Funding options for class actions

9.46 We have discussed and recommended a package of viable options for funding class actions in Hong Kong in Chapter 8. There is a need to put the funding mechanism on a sound legal basis and legislation will therefore be needed to implement whichever proposals are accepted by the community.

9.47 If our recommendation for the establishment of a public class action fund (CAF) is to be implemented (Recommendation 8(2)), then enabling legislation will be needed to provide for its financing, the extent to which the CAF should be entitled to reimbursement from assisted parties and whether there will be a limit on the fund's liability for any adverse costs orders made against the assisted parties (eg at the level at which financial assistance had been provided to the parties assisted by the CAF).

9.48 In the light of the complexity and difficulty of introducing a comprehensive funding mechanism for class actions in Hong Kong and the recommendation that the proposed class action regime be introduced incrementally, starting with consumer cases, we have suggested that consideration should be given to expanding the scope of the Consumer Legal Action Fund (the Fund) to provide legal assistance in class action proceedings (Recommendation 8(3)). On the basis of the present framework of a trust fund providing financial support and legal assistance, assisted persons are required to make a contribution if they have benefited as a result of the Fund's assistance. However, if the liability of the Fund for any adverse costs order made against the assisted parties is to be capped, or appropriate mechanisms are to be introduced to ensure that members of the class action who are not assisted by the Fund should share equitably in the costs of the proceedings, then legislation would be required. Since consumer actions are likely to constitute a large segment of class action cases, we believe that this alternative would at least cater for a large number of cases to start with.

Case management powers

9.49 We believe that the procedure adopted for class actions should reflect the experience gained from the implementation of the Civil Justice Reform (CJR) report's proposals for express case management powers.[41] Provisions have been added to the Rules of the High Court which make clear that the primary aim is to achieve a just resolution of disputes in accordance with the substantive rights of the parties. Recommendation 8(4) in the Consultation Paper recommended that depending on operational experience, features which facilitate active case management (such as case management conferences and alternative dispute resolution procedures) might be useful and could be incorporated into the class action procedural rules. This recommendation was endorsed by those who responded,[42] and is therefore maintained. The case management powers must be considered together with the design features of the class action regime that we refer to above.

Jurisdiction to hear class action cases

9.50 Consideration must be given to which courts should be authorised to hear class actions. Judges play a significant role in ensuring that class actions are efficiently and appropriately handled. Suitable fine tuning of procedural rules can be incorporated in light of experience. Recommendation 8(5) in the Consultation Paper proposed deferring the extension of the jurisdiction of the lower courts to hear class actions until such time as the procedure has been in operation in the Court of First Instance for five years or more and a body of case law has been established. All the respondents who responded to this proposal supported it. They include the Equal Opportunities Commission, the Hong Kong Bar Association, the Hong Kong Christian Service, the Law Society of Hong Kong and the Hong Kong Federation of Insurers. We accordingly maintain this recommendation in this report. If the jurisdiction is to be extended to lower courts in the future, then jurisdictional boundaries would have to be devised. The Law Society of Hong Kong is already alive to this issue by asking (rhetorically at this stage) whether the court's jurisdiction is to be determined by reference to the quantum of the representative plaintiff's claim alone or the aggregate claims of the class as a whole. Since there is general support for all class actions to be started in the High Court, irrespective of amounts claimed, jurisdictional boundary questions can happily be deferred to a later stage, when sufficient experience in management of class actions has been gained.

9.51 Initially, all class action cases should be assigned to a specialist list where experienced judges will handle the interlocutory applications

---

41 Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform: Final Report* (2004). See the discussion on the implementation of the CJR recommendations under the heading "General management powers of the courts" in Chapter 5 above.

42 For example, the Department of Justice (Civil Division and Legal Policy Division), the Hong Kong Association of Banks, the Hong Kong Bar Association, the Law Society of Hong Kong, Neville Sarony QC SC, etc.

(including certification), trial and approval of settlement. In due course, consideration could be given to extending the jurisdiction to hear class actions to the District Court. There may well be class actions where even the aggregate of the claims of the class members would fall within the limits of jurisdiction of the District Court. In view of the complexities of some class actions, Recommendation 8(6) in the Consultation Paper proposed giving power to District Court judges to transfer appropriate cases to the Court of First Instance. We have decided to maintain this recommendation as it was endorsed by the respondents.

9.52 The function of the Small Claims Tribunal is to enable individuals to enforce small claims by way of an uncomplicated procedure. For this reason, Recommendation 8(7) in the Consultation Paper proposed that the Tribunal should not be empowered to hear class actions.[43] There was no dispute on this during the public consultation, and therefore this recommendation remains in this report. While supporting this recommendation, the Hong Kong Bar Association also suggested that, since numerous small claims with common questions of fact and/or law might be filed in the tribunal, a mechanism or some guidance might have to be provided to enable adjudicators to channel suitable claims into the multi-party litigation regime so that judicial economy and efficiency could be achieved.

The way forward

9.53 As mentioned at the beginning of this chapter, the mechanism for a full class actions regime would need to be in place from the outset, even though it is proposed that the regime should apply initially to only certain categories of claim. We have considered and identified in this chapter some of the features of the proposed regime, but the detailed provisions would have to be worked out before the regime could be introduced, even incrementally. To this end, we think that a working group or task force comprising representatives of the major stakeholders (including the Judiciary and the Department of Justice) should be formed to consider the fine detail of the proposed regime. It is only once that has been done that steps could be taken to implement the regime by legislation.

Recommendation 9

We recommend that:

(1) The proposed class actions regime should cover tortious and contractual claims made by consumers in relation to goods, services and immovable property.

[43] The Ontario Commission: *Report on Class Actions* at para 455 was of this opinion.

(2) **The provisions for introducing a new court procedure for class actions should be made by primary legislation in Hong Kong, thus enabling those elements of reform which may affect substantive law to be debated fully and implemented in a way that would preclude *ultra vires* challenges. The detailed design of the legislative provisions to be adopted for class action litigation should be further studied.**

(3) **The existing rule for representative actions under Order 15 rule 12 of the Rules of the High Court should be retained at least until the proposed regime is extended to all cases. Whether this rule should still be retained after the extension to all cases should be reviewed at that time.**

(4) **To implement our recommendation for appropriate procedures to filter out cases that are clearly not viable, class action proceedings should not be allowed to continue as collective proceedings unless certified by a court.**

(5) **In addition to certification, detailed design features which facilitate active case management should be incorporated into the class action procedural rules.**

(6) **The extension of the District Court jurisdiction to hear class actions should be deferred for a period of at least five years until a body of case law of the Court of First Instance on the new procedures has been established.**

(7) **District Court judges should be given the power to transfer appropriate class action cases (on the ground of complexity) to the Court of First Instance.**

(8) **The Small Claims Tribunal should not be empowered to hear class action proceedings.**

Chapter 10

Summary of recommendations

Chapter 3

Recommendation 1 (para 3.74)

We believe that there is a good case for the introduction of a comprehensive regime for multi-party litigation so as to enable efficient, well-defined and workable access to justice. In the light of opposition and reservations expressed in the consultation exercise, an incremental approach to implementing a class action regime merits consideration. For this purpose, a class action regime may start with consumer cases, and in the light of experience gained, the regime may be extended to other cases.

Recommendation 2 (para 3.99)

(1) We consider that the principle of equal access to justice, that is founded on the concepts of fairness, expedition and cost effectiveness, should guide any change to the present system for mass litigation. Thus guided, we are satisfied that, a good case has been made out for consideration to be given to the establishment of a general procedural framework for class actions in Hong Kong courts, bearing in mind the need for caution that litigation should not thereby be unduly promoted.

(2) We believe that in any system for class actions it is crucial that there are appropriate procedures for filtering out cases that are clearly not viable and that appropriate rules should be in place to assure fairness, expedition and cost effectiveness.

(3) In addition, Alternative Dispute Resolution techniques such as mediation and arbitration, on both an interim and final basis, should be fully utilised.

Chapter 4

Recommendation 3 (para 4.23)

We recommend that, subject to discretionary powers vested in the court to order otherwise in the interests of justice and the proper administration of justice, the new class action regime should adopt an opt-out approach. In other words, once the court certifies a case suitable for a class action, the members of the class, as defined in the order of court, would be automatically

considered to be bound by the litigation, unless within the time limits and in the manner prescribed by the court order a member opts out.

Chapter 5

Recommendation 4 (para 5.82)

We recommend that:

(1) the new class actions regime should apply to public law cases, in addition to the current section 21K(1) of the High Court Ordinance (Cap 4) and Order 53 of the Rules of the High Court; and

(2) an opt-out approach should be the default position unless the court orders otherwise in the interests of justice and the proper administration of justice.

Chapter 6

Recommendation 5 (para 6.34)

We recommend that:

(1) To prevent class members with sound financial capability from deliberately selecting impecunious plaintiffs to act as the class representatives, and thereby abusing the court process, a representative plaintiff's ability to satisfy an adverse costs order should be made a certification criterion and he should be required to prove to the court's satisfaction that suitable funding and costs-protection arrangements are already in place at the certification stage.

(2) Truly impecunious plaintiffs should have access to discretionary funding providing financial support for them to obtain legal remedies.

(3) To avoid abuse of the court process and to ensure that those put at risk of litigation should not suffer unfairly, the court should be empowered, in appropriate cases, to order representative plaintiffs to pay security for costs in accordance with the established principles for making such orders and by way of a provision similar to section 33ZG of the Federal Court of Australia Act 1976.

Chapter 7

Recommendation 6 (para 7.51)

We recommend that:

(1) (a) Where class action proceedings involve foreign plaintiffs, an opt-in procedure should be adopted as the default position, subject to the court's discretion to adopt an opt-out procedure for the entire class of foreign plaintiffs or for defined sub-classes, which may have their own representatives, in the light of the particular circumstances of each case upon application.

(b) On opting-in, foreign plaintiffs would need to give a declaration and undertaking that the class action judgment or settlement would amount to a final and conclusive resolution of their claims.

(2) The current rules on service of process outside Hong Kong as set out in order 11 of the Rules of the High Court should be applicable to foreign defendants, with an adaptation to the effect that as long as the representative plaintiff can make out a case for a grant of leave, an order should be made for service out of jurisdiction.

(3) The court may stay class action proceedings involving foreign plaintiffs or defendants in reliance on the common law rule of *forum non conveniens,* if it is clearly inappropriate to exercise its jurisdiction and if a court elsewhere has jurisdiction which is clearly more appropriate to resolve the dispute.

(4) To assist potential foreign plaintiffs to consider whether to join in class action proceedings commenced in Hong Kong, information on those proceedings should be publicised on a website.

Chapter 8

Recommendation 7 (para 8.54)

We recommend that:

(1) A legally aided person should not lose his legal aid funding by agreeing to act as representative plaintiff in a class action, but he should only be funded or protected to the extent as if he were pursuing a personal, as opposed to a class action.

(2) If a legally aided person becomes a representative plaintiff in a class action, that part of the total common fund costs which would be attributable to the aided person as if he were pursuing the action on a personal basis should be disaggregated.

Recommendation 8 (para 8.152)

(1) We conclude, as generally accepted, that if a suitable funding model for plaintiffs of limited means could not be found, little could be achieved by a class action regime.

(2) In the long term we recommend establishing a general class actions fund, that is a special public fund which can make discretionary grants to all eligible impecunious class action plaintiffs providing financial

support for them to obtain legal remedies and which in return the representative plaintiffs must reimburse from proceeds recovered from the defendants.

(3) Given the complexity and the difficulties of introducing a comprehensive funding mechanism in Hong Kong and our recommendation that the proposed class action regime should be implemented incrementally, starting with consumer cases, we recommend increasing the Consumer Legal Action Fund's resources to make funding available for class action proceedings arising from consumer claims. If the scope of the Fund were to be expanded to cover class actions, it would be important to devise mechanisms to ensure that class members who are not assisted by the Fund should share equitably in the costs of the proceedings.

Chapter 9

Recommendation 9 (para 9.53)

We recommend that:

(1) The proposed class actions regime should cover tortious and contractual claims made by consumers in relation to goods, services and immovable property.

(2) The provisions for introducing a new court procedure for class actions should be made by primary legislation in Hong Kong, thus enabling those elements of reform which may affect substantive law to be debated fully and implemented in a way that would preclude *ultra vires* challenges. The detailed design of the legislative provisions to be adopted for class action litigation should be further studied.

(3) The existing rule for representative actions under Order 15 rule 12 of the Rules of the High Court should be retained at least until the proposed regime is extended to all cases. Whether this rule should still be retained after the extension to all cases should be reviewed at that time.

(4) To implement our recommendation for appropriate procedures to filter out cases that are clearly not viable, class action proceedings should not be allowed to continue as collective proceedings unless certified by a court.

(5) In addition to certification, detailed design features which facilitate active case management should be incorporated into the class action procedural rules.

(6) The extension of the District Court jurisdiction to hear class actions should be deferred for a period of at least five years until a body of case law of the Court of First Instance on the new procedures has been established.

(7) District Court judges should be given the power to transfer appropriate class action cases (on the ground of complexity) to the Court of First Instance.

(8) The Small Claims Tribunal should not be empowered to hear class action proceedings.

Annex 1

Types of cases that might be suitable for class action proceedings

1. Insurance cases (tortuous or contractual claims)
2. Real estate development cases (such as purchasers' claims against developers on late delivery of vacant possession or poor workmanship)
3. Environmental cases
4. Labour disputes
5. Consumer cases (such as product liability and consumer fraud)
6. Public interest cases (such as constitutional issues, right of abode cases, etc)
7. Securities cases
8. Antitrust/competition cases
9. Insolvency cases (eg multi-creditor litigation)
10. Professional negligence cases (eg audit negligence, negligence in relation to construction work (such as sub-standard buildings))
11. Copyright infringement cases (eg claims by record companies against Napster for copyright infringement)
12. Usage of the internet (eg claims against internet service providers for mishandling personal data)
13. Defamation claims (eg defamation against a religious group or an organisation)
14. Personal injury cases (eg food poisoning cases, infection of hepatitis due to the consumption of contaminated seafood)
15. Claims against service providers for inadequate or substandard services (eg claims against healthcare providers for improper practices)
16. Claims against computer companies for hardware or software failures

Annex 2

Potential risks of a class action regime

Various overseas law reform agencies and academics have discussed the potential risks of introducing a class action regime. This table lists those risks and the related arguments.

Risk	*Argument*	*Counter-argument*
Promotes litigation	"Some persons who would not choose to sue in the absence of class action legislation will join class actions solely because they happen to be members of a defined class. This is most likely to occur where the claims are small because joining the class action costs little or nothing. In this way, class actions promote litigation unnecessarily. They simply become a means of harassing corporations, government and other defendants."[1]	"The alternative to accepting the risk of additional litigation is to fail to compensate persons with legitimate claims. We recognize that it can be uneconomical to pursue relatively modest claims whether or not multiple claims are involved. We are not saying that no consideration should be given to the social cost of litigation when designing the litigation system; we are saying that the law should foster just results. Modern class actions do this by making it possible for persons to gain access to justice where they would not otherwise sue because pursuing justice would be uneconomical or because the court system intimidates them. Moreover, although the individual claims may be small, when multiplied by a large number of persons small claims can add up to a large gain for a potential defendant if they are not pursued. Permitting enrichment from wrongdoing is unjust and should be discouraged."[2]
	"a litigious climate and the targeting of 'deep-pocket' defendants"[3]	

1 Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

2 Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

3 The Irish Law Reform Commission, *Consultation Paper on Multi-party Litigation (Class Actions)* (LRC CP 25-2003), at para 3.15.

Risk	*Argument*	*Counter-argument*
	"encourage litigation which ought to be a last resort"[4]	
Unmeritorious claims	"This risk stems from the belief that class actions 'magnify and strengthen unmeritorious claims.' This happens when class actions are launched as fishing expeditions in order to ascertain whether a cause of action exists. It also happens when a 'strike action' is brought."[5]	"A facet of this risk involves the assumption that claims that lack merit are easily identified. In the United States, the Rand Institute found, instead, that the merit of claims, in particular class actions, cannot be readily determined. That is because complex stories and ambiguous facts underlie most class actions. Defendants may 'sharply contest' their culpability, but because the issues tend to be complex and very few cases go to trial, the merits of the claims being made cannot be properly assessed. While a 'significant fraction' of class action cases are dropped before certification in the US, empirical data on the reasons why are lacking. It may occur 'when the plaintiff counsel concludes that the case cannot be certified or settled for money, when the case is dismissed by the court, or when the claims of representative plaintiffs are settled.' Moreover, protection against this risk rests in the fact that courts have ways of weeding out claims that lack merit. For example, the court may refuse to certify the proceeding, strike out the claim where it is frivolous or vexatious or involves an abuse of process, grant summary judgment against the claimant, or award costs."[6]
	"The opponents of class actions assert that the abuses of the procedure in the United States are sufficient reason not to introduce them into Australian courts. They point to amorphous classes where one person or a small group have	"Yet, as the examples above demonstrate, class actions for large amorphous classes are often not permitted to proceed. These arguments perhaps underestimate procedural safeguards already available to defendants in the

4 Scottish Law Commission, *Multi-Party Actions* (Scot Law Com No 154, 1996), at para 2.11.

5 Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

6 Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

Risk	*Argument*	*Counter-argument*
	brought legal proceedings purporting to make claims on behalf of: • 'all consumers of gasoline' in a given state; • 'all consumers of eggs in the United States' ; and even • 'all persons in the United States' . They fear enormous awards of damages which will have disastrous effects on Australian industry. They allege that large classes of unidentified members each with a small claim result in 'strike suits', that is, frivolous claims which utilise the threat of unmanageable and expensive litigation to compel defendants to settle because of the risks inherent in any litigation and the enormous costs of defending a class action. They say that a defendant faced with a class action is, therefore, forced to settle even if the plaintiff's claim is weak."[7]	United States. One study has noted that of 120 cases for damages over a six-year period, 81 had reached some kind of disposition at the trial level. Forty-four of the 81 cases were dismissed on preliminary motions. The same study referred to interviews with defendants' attorneys which disclosed that no more than a handful would label their opponents' cases as frivolous. The high proportion of dismissed claims tends to indicate that the class action is not a very effective tool for forcing an unjustified settlement."[8]
	"… may be abused by the raising of large claims of no substance ('blackmail litigation'). A class litigation may be unmanageable, particularly where damages, rather than a declarator or an interdict, are sought"[9]	
		"In our view, it would be inappropriate to reject an expanded class action procedure that can play a legitimate role in asserting the rights of persons with real grievances, simply because some individuals might abuse that procedure. A far more appropriate solution to the problem of

7 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

8 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

9 Scottish Law Commission, *Multi-Party Actions* (Scot Law Com No 154, 1996), at para 2.11.

Risk	*Argument*	*Counter-argument*
		unmeritorious class actions, or class actions brought solely to further the personal financial interest of the representative plaintiff, is to develop procedures to preclude the prosecution of such actions."[10]
"Entrepreneurial" lawyers	"Legal entrepreneurialism, whereby issues are sensationalised to encourage litigation and lawyers act for their own enrichment to initiate claims that would otherwise not be made, is becoming more common. Claims may be filed without due enquiry into the merits of the application. There are no clear rules regarding pre-trial use of the media by plaintiffs' and defendants' lawyers. Financial and reputational pressure can induce substantial out-of-court settlements regardless of the merits of the case." Extract of paper published by Allen Consulting Group cited in Phillips C, "Class Actions - Quo Vadis?" (Paper given at 1998 Corporate Law Conference, Melbourne, 24 September 1998) at 2.2.[11]	
	"This risk is that class actions will benefit persons whom they are not intended to benefit at the expense of the class members; that, motivated by the prospect of their own gain, entrepreneurial lawyers drive the frequency and variety of class actions litigation upwards. The risk, in other words, is that class actions will become simply vehicles for entrepreneurial lawyers to obtain fees. Plaintiff lawyers may launch an action in the hope of obtaining huge fees for relatively little work by reaching a quick settlement. Even though they may have a good defence, defendants may make a business decision to settle rather than defend because of the enormous	"Overall, the Rand Institute studies 'tell a more textured tale' of how damage class actions arise and certification is obtained in the US. They point out that class action lawyers played 'myriad roles'; they did not 'routinely garner the lion's share of settlements.' What was learned was that class counsel were sometimes more interested in reaching a settlement than in protecting the interests of class members by 'finding out what class members had lost, what defendants had gained, and how likely it was that defendants would actually be held liable if the suit were to go to trial, and negotiating a fair settlement based on the answers to these questions.'

[10] Ontario Law Reform Commission, *Report on Class Actions* (1982), at 163.

[11] Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co, 2005), at para 1.210.

Risk	*Argument*	*Counter-argument*
	costs involved in defending a large class action. They choose, in effect, to pay the litigants to go away. The risk of abuse is greatest where contingency fees are high and the risks low. The potential for gain causes class counsel to jockey for control of the litigation as lead counsel. Where government is targeted in this way the settlement amount comes out of tax payers' pockets, an outcome which does not benefit society."[12]	However, the facts did bear this much out: in the US, entrepreneurial plaintiff counsel do sometimes bring actions in the hope of obtaining a windfall fee based on a quick settlement. In our view, people should not be denied justice because lawyers will be paid for helping them to obtain it. Class counsel play a role that is quite different from the role of counsel in ordinary litigation and they should be remunerated appropriately for assuming and carrying out the additional risks and responsibilities associated with this role. In these circumstances, a large fee is not necessarily an excessive fee. Moreover, Canadian class action regimes add a safeguard to that available in ordinary litigation by requiring court scrutiny and approval of fee agreements in every case. In fact, more room for abuse exists where one lawyer acts for numerous individual litigants in mass non-class actions that may be brought under the existing law than in class action regimes that require court scrutiny and approval of fees. In addition, we think that if lawyers' earnings from litigation are to be reined in, the whole problem should be addressed, not just the problem in class actions."[13]
	"may have adverse effects upon the courts and the legal profession if 'lawyer entrepreneurs' are allowed to take charge of class litigation"[14]	
	"Some judges have expressed reservations about the legal entrepreneurialism associated with class actions. For example, Callinan J of the High Court of	

12 Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

13 Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

14 Scottish Law Commission, *Multi-Party Actions* (Scot Law Com No 154, 1996), at para 2.11.

Risk	Argument	Counter-argument
	Australia has said : *'[T]he problems to which I have just referred are likely to be aggravated by the increasingly competitive entrepreneurial activities of lawyers undertaking the conduct of class or group actions, in which, in a practical sense, the lawyers are often as much the litigants as the plaintiffs themselves, and with the same or even a greater stake in the outcome than any member of a group. This reality is likely to be productive of a multiplicity of group actions throughout the country.'* *Mobil Oil Australia Pty Ltd v The state of Victoria* (2002) 211 CLR 1 at 183."[15]	
Disproportionately high damages awards	"There are two aspects to this risk. The first aspect is that damages awards will be disproportionate to the wrong. For example, a class action brought for a small mistake, say the manufacture of a defective product resulting in individual claims for $10, could bankrupt a company if two million products were sold. One perception coming out of the US is that 'the aggregation of claims makes it more likely that a defendant will be found liable and result in a significantly higher damages award.' The prospect of a disproportionately high award may 'create a stronger than usual incentive to settle, even where the probability of an adverse judgment is low.' The second aspect of this risk is that defendants who are only remotely connected to the litigation will become liable for payment of the damages award which is already disproportionate. This will occur through the	"As to the first aspect of this risk, in our view, to limit access to justice on the grounds that it will impose costs on wrongdoers is not the appropriate social policy. The measure of the wrong is the loss caused by the wrongful conduct. We do not see a compelling difference between a 'minor slip up' that causes a big company to suffer a $100 million loss and a minor slip up that causes 100,000 people each to suffer a $1,000 loss (totalling $100 million). A moment's careless driving or a short-term failure to warn people about contaminated water in order to provide an opportunity to try to fix it may be expensive to the wrongdoer but no one says there should not be a remedy. The fact that a great many people are harmed should not make a difference to their right to obtain a remedy. We also suspect that the size of the damages awards in class actions in the United States

[15] Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co, 2005), at para 1.210.

Risk	*Argument*	*Counter-argument*
	operation of the doctrine of joint and several liability which leads plaintiffs to sue 'deep pocket' defendants."[16]	may have something to do with punitive damages awarded by juries. Neither punitive damages nor jury awards are common features of civil justice systems in Canada. As to the second aspect of this risk, the impact of the doctrine of joint and several liability is an issue that should be addressed separately. The procedure followed to gain legal remedies to legal rights is not the proper means through which to alter the legal right."[17]
Interests of class members poorly served	"This concern is that class actions do not adequately protect the interests of class members, which in turn means that they do not adequately serve the public interest. The risk stems from the fact that class members typically play a small role in the litigation. If the representative plaintiff is not actively instructing the class counsel, this 'clientless' litigation may lead plaintiff lawyers to engage in questionable practices, such as serving their own financial ends rather than the interest of class members. Beyond this, some plaintiff lawyers object that certification denies people an opportunity to pursue claims individually and leads to settlements that are questionably fair to class members. Settlements may be reached when plaintiff lawyers are 'motivated by the prospect of substantial fees for relatively little effort' and defendants want to 'settle early and inexpensively' in order to avoid the large transaction costs and adverse publicity of continued litigation. Such settlements 'may send inappropriate deterrence	"We agree that precautions need to be taken to ensure that the class actions provisions adequately protect the interests of class members and, through them, the public. We have kept our awareness of this need at the forefront in making our recommendations. The range of protections we recommend includes: a protective role for the court; notification to class members of critical events in the proceedings; attention to class counsel duties to class members; opportunities for class member participation; the possibility of replacing an ineffective representative plaintiff; and compensation as either a percentage of an aggregate award or on the basis of individual factors."[19]

16 Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

17 Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

19 Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

Risk	*Argument*	*Counter-argument*
	signals, waste resources, and encourage future frivolous litigation.' Also, a proposed settlement may satisfy the interests of the representative plaintiff but pay insufficient attention to the interests of class members. A further risk is that the compensation awarded will be uneven and, as a consequence, unfair. That is because, in the interests of minimizing transaction costs, compensation is often determined according to a formulaic scheme which may pay insufficient regard to variations in the nature and severity of class members' injuries. The result may be that some individual class members are overcompensated while others are under-compensated."[18]	
	"A further by-product of class actions is that, apart from the representative party, the role of the individual claimants and the degree of control they exercise is necessarily diminished. The individual claimants cannot prosecute their claims with the same degree of control as they would if conducting individual or unitary litigation."[20]	"So much was recognised by Lord Woolf, who in 1996 commented: '[T]he effective and economic handling of group actions necessarily requires a diminution, compromise or adjustment of the rights of individual litigants for the greater good of the action as a whole'. Lord Woolf, *Access to Justice Inquiry,* Issue Paper (Multi-Party Actions, 1996) at [2] and [2(a)]." [21]
	"loss of autonomy and individual representation for class members"[22]	
		"It is important to emphasise, however, that the risk that a class suit may be conducted in a manner which does not accord with the best interests of the absent class members does not justify or require a 'hostile' approach, by either judges or

18 Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

20 Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co, 2005), at para 1.200.

21 Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co, 2005), at para 1.200.

22 The Irish Law Reform Commission, *Consultation Paper on Multi-party Litigation (Class Actions)* (LRC CP 25-2003), at para 3.15.

Risk	*Argument*	*Counter-argument*
		legislatures, towards the concept of class actions. Instead, what is required, in order to protect the interests of absent class members, is the employment of special safeguards/procedures which are simply not found in the traditional forms of legal proceedings."[23]
Costs outweigh benefits	"The argument here is that 'damage class actions achieve little in the way of benefits for class members and society while imposing significant costs on defendants, courts and society.' An assumption underlying this risk is that the benefits to individual class members are often trivial. A second aspect has to do with the fact that the costs of litigating class actions can be substantial. They include not only fees and expenses for the plaintiff and defence lawyers but also the costs of notice and settlement administration. When this is combined with defendants' increased exposure to damages, some argue that, looked at from a business stance, 'certification gives them no recourse but to settle even in the absence of evidence proving liability'."[24]	"Experience in the US does not bear out the first assumption. In the lawsuits the Rand Institute examined, class members' estimated losses ranged widely. They were generally too modest to support individual action, but nevertheless often numbered in the hundreds or thousands of dollars. As for the second aspect, while it may be true that the costs of litigating class actions can be substantial, surely the question of whether the costs outweigh the benefits to the class is best answered by potential class members when they choose whether to join the class."[25]
	"high costs including legal fees"[26]	
Forum shopping	"This risk is that class action lawyers will file law suits in certain courts simply because they believe that the law or procedures in a jurisdiction give a strategic advantage, or that a particular judge is most likely to grant certification. The risk is heightened because class actions do not respect geographical	"We agree with the Rand Institute that forum choice provides plaintiff lawyers with an opportunity to jockey for control over the litigation. As in the US, it may allow defendants to 'seek out plaintiff lawyers who are attractive Settlement partners.' Furthermore, the interests of class members and the public may not

[23] Victorian Attorney-General's Law Reform Advisory Council, *Report on Class Actions in Victoria: Time for a New Approach,* 1997, at para 2.17.

[24] Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

[25] Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

[26] The Irish Law Reform Commission, *Consultation Paper on Multi-party Litigation (Class Actions)* (LRC CP 25-2003), at para 3.15.

Risk	*Argument*	*Counter-argument*
	boundaries, meaning that often they may be brought legitimately in any one of many jurisdictions – locally, nationally or internationally. What is more, as the Rand Institute points out, 'class action lawyers often have greater latitude in their choice of forum or venue than their counterparts in traditional litigation' and this drives transaction costs upwards: 'Under some circumstances, an attorney filing a statewide class action can file in any county of a state and an attorney filing a nationwide class action can file in virtually any state in the country, and perhaps any county in that state as well. In addition, class action attorneys often can file duplicative suits and pursue them simultaneously. These are powerful tools for shaping litigation, providing opportunities not only to seek out favourable law and positively disposed decision makers, but also to maintain (or wrest) control over high-stakes litigation from other class action attorneys.'"[27]	be well-served: 'Broad forum choice weakens judicial control over class action litigation.' It enables 'both plaintiff class action lawyers and defendants to seek better deals for themselves, which may or may not be in the best interests of class members or the public.' A means of minimizing this risk is required. We note that an Ontario judgment sets out some basic ground rules to 'cut through the clutter and impose some organization on multiple actions begun by competing counsel in different parts of Ontario.' However, the courts are 'still wrestling with the problem of imposing control on related class actions begun in different provinces.' It is beyond the scope of this project to address the inter-jurisdictional issues. The Uniform Law Conference of Canada has already adopted a *Court Jurisdiction and Proceedings Transfer Act* which rationalizes the basis for exercising jurisdiction in ordinary proceedings and also provides a mechanism to transfer cases to the most convenient forum. It would be an appropriate body to examine forum shopping issues in relation to class actions and make recommendations."[28]
Alteration of substantive law	"The size of classes and consequent problems of managing the facts and legal issues generated by so many individual claims (what in the United States is called the problem of 'manageability') have resulted in changes of the substantive law. … [C]ourts in the United States have had to develop new techniques to calculate damages because it is simply not possible to examine the separate claim of each individual	"The question to be considered in Australia is whether the time has arrived to develop less formal and rigid rules to assess damages so that the defendants cannot take advantage of conventional mechanisms to avoid compensating those who have suffered loss as a result of widespread wrongful conduct. At the same time the interests of defendants in being able to test claims against them cannot be

[27] Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

[28] Alberta Law Reform Institute, *Class Actions* (Final Report No 85, Dec 2000), para 125–145.

Risk	*Argument*	*Counter-argument*
	member of the class where the class may number thousands or even hundreds of thousands."[29]	overlooked. A proper balance must be achieved between these competing interests."[30]
Delay in receiving legal redress	"Because the potential liability is so much greater, class actions are more strenuously contested than individual litigation which could mean that a plaintiff does not receive his legal redress for some time later than might have been the case, if he had brought his own action."[31]	"This assumes, perhaps unjustifiably in many, if not most, cases, that the plaintiff would have brought his own action. The choice may sometimes be between the possible delay in receiving redress and receiving no redress at all."[32]
Penal characteristics	"Some of the new techniques for assessing damages calculate the total amount received by the defendant from its unlawful activities which is distributed to those members of the class who claim. A surplus often remains. Many members of the class do not bother to claim. Others may not be located. The courts order the surplus to be directed to a specific public purpose or to be paid into Consolidated Revenue. Opponents of class actions assert that there is a penal effect in depriving a defendant of his unjust enrichment. Deterrence and punishment, they say, are now the real goals; class actions result in confiscation not compensation. The proceedings are said to be no longer civil but criminal in character where the special protections of the criminal law (such as right to jury trial and proof beyond reasonable doubt) are denied the defendant."[33]	

29 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

30 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

31 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

32 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

33 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

Risk	*Argument*	*Counter-argument*
	"involve a misuse of civil procedure by, in effect, punishing the defender"[34]	
Persons other than parties to an action would be bound	"A view often advanced is that only those sufficiently motivated to approach the court should recover compensation. Windfall benefits received through a cheque in the mail, merely because someone unknown to the recipient has instituted an action on his behalf, are said to be a misuse of the proper function of the courts. Nor, it is said, should litigation be forced on those who have not chosen to bring it or who might not wish to bring it. Courts exist to resolve real disputes brought before them by interested contending parties: not to create funds to provide windfall benefits."[35]	
Destroys legitimate, reputable businesses	"Opponents of class actions point out that they have the potential to destroy legitimate, reputable businesses whereas the real villains are small 'fly-by-night operators one step ahead of the law and the would-be plaintiff'. Fly-by-night operators will often escape the law."[36]	"But to acknowledge this unfortunate reality is not to deny class actions. Fly-by-nighters have no monopoly in the field of unlawful or wrongful corporate activity. Why should redress be denied to those who suffer at the hand of an otherwise reputable corporation simply because it is usually law-abiding? Furthermore, so far as the Commission has been able to ascertain, class actions have not been the cause of any company going out of business in the United States."[37]
	"Some commentators have gone so far as to say that class actions could lead to an impediment to doing business in Australia:	

[34] Scottish Law Commission, *Multi-Party Actions* (Scot Law Com No 154, 1996), at para 2.11.

[35] The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

[36] The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

[37] The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

Risk	Argument	Counter-argument
	'*If the business community fails to lobby for legislative changes at the federal, state and territory level, class actions will become much more of an impediment to doing business in Australia*.' Clarke S and Williams G, 'Class Actions - A Growing Threat', *Australian Financial Review* (11 March 2004) at 79."[38]	
The community ultimately bears the cost of class actions	"The bill for any verdict, large or small, must be paid by someone. Unless the market is extremely competitive, the defendant will pass the cost on to other consumers in higher prices. If it cannot pass it on, it may go out of business. Alternatively, insurance premiums against class action recoveries will add to costs to be passed on to consumers. Management time spent in unproductive or defensive measures and in litigation itself will also add to costs. Moreover, the risk of liability in a class action could inhibit new initiatives and techniques which might have otherwise provided advantages to consumers."[39]	"But why should not the threat of a class action equally result in improved efficiency to avoid potential liability? There is little empirical evidence upon which a cost/benefit analysis of class actions could be undertaken. The general confidentiality of corporate finance precludes any meaningful study of this type. Instead of certain consumers incurring individual loss because of defective products, the cost of taking steps to avoid these defects is passed on to the general community. However, should individual redress achieved through a class action be denied only because of its potential to spread the cost more generally across the community in this way?"[40]
	"Successful class actions may lead to suppliers or manufacturers increasing their prices to offset anticipated claims"[41]	
Technical breaches by defendants	"Liability could occur where there has been a technical breach of the law or where judicial decision, perhaps on the meaning of a statute, invalidates a practice previously considered proper.	"However, these arguments overlook the fact that, given the same circumstances, the defendant would be liable in law to each individual plaintiff who chose to bring an action. If so, why

38 Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co, 2005), at para 1.210.

39 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

40 The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

41 Scottish Law Commission, *Multi-Party Actions* (Scot Law Com No 154, 1996), at para 2.11.

Risk	*Argument*	*Counter-argument*
	Business may have adopted a course of conduct in good faith relying on established practice or after having consulted both its legal advisers and the appropriate governmental agency. Liability in a class suit could be enormous and out of proportion to the loss suffered or the wrongfulness of the defendant's conduct."[42]	should it not be liable to the many who have suffered a loss which is legally actionable? On closer examination, it can be seen that the complaint is addressed more to a defect in the substantive law by which defendants are held liable. But the substantive law has been developed in a legal system without the facility of class actions. Penalties and liability for damages for illegal conduct have been predicated on individual breaches. The problem should not be faced necessarily by denying class actions. It may be preferable to alter the substantive law. The existence of defects in the substantive law is not a reason for denying class actions."[43]
Imposes inappropriate duties on judges	"For example, problems in the disbursement of a damages fund may raise difficult questions of social policy for the judge and may raise doubts about the ability of the courts adequately to consider all the competing claims"[44]	
Superficial sense of closure of legal claims	"multiple, separate proceedings (eg certain individual claims may have to be left over to another day) … arbitrary results from the standpoint of both plaintiffs and defendants"[45]	
Involvement of the media	"Successful manipulation of the media to publicise claims the subject of a particular class action undoubtedly heightens the pressure on a defendant to settle a claim irrespective of its merits. … Most defendants placed in the position simply cannot afford to	

[42] The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

[43] The Australian Law Reform Commission, *Access to the Courts – II, Class Actions* (Discussion Paper No 11, 1979), at para 23-31.

[44] Scottish Law Commission, *Multi-Party Actions* (Scot Law Com No 154, 1996), at para 2.11.

[45] The Irish Law Reform Commission, *Consultation Paper on Multi-party Litigation (Class Actions)* (LRC CP 25-2003), at para 3.15.

Risk	*Argument*	*Counter-argument*
	allow adverse publicity, accurate or otherwise, to damage their business. In the absence of any effective pre-emptive remedies to dispose of such actions, few, if any, defendants are prepared to endure the months or years of pain involved in allowing such a matter to proceed to trial. In those circumstances, many defendants would consider that there is no practical alternative to negotiating a settlement on the best terms available."[46]	

[46] Extract of paper published by Allen Consulting Group cited in Phillips C, "Class Actions - Quo Vadis?" (Paper given at 1998 Corporate Law Conference, Melbourne, 24 September 1998) at 2.2. Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co, 2005), at para 1.230.

Annex 3

Human rights and Basic Law issues relevant to an opt-out class action regime in Hong Kong

Article 35 of the Basic Law: access to the courts

1. Adopting an "opt-out" class action regime may raise concerns as to the right of access to court under Article 35 of the Basic Law and the right to a fair hearing under Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The first part of BL 35 provides that:

> *"Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies."*

2. The first part of Article 14(1) of the ICCPR (reflected in Article 10 of the Hong Kong Bill of Rights) provides that:

> *"All persons shall be equal before the courts and tribunals. In the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."*

3. While BL 35 expressly guarantees HK residents' right of access to the courts, the same protection is also implied under ICCPR Article 14(1). The jurisprudence of the European Court of Human Rights (ECtHR) indicates that the European equivalent of ICCPR Article 14(1) confers a right on individuals to submit disputes as to their civil rights and obligations for determination by a court (*Golder v UK*[1]).

4. As to whether the right of access to the courts is engaged by the opt-out approach, the Irish Law Reform Commission opined that:

> *"it is at least arguable that the right of access to the courts involves a corresponding and converse right of non-access or, in other words, a right not to be compelled to litigation."*[2]

5. We are not aware of any authorities of the local courts, the English court or the ECtHR upholding the right of "non-access" as contemplated by the Irish Law Reform Commission. Our preliminary view is

---

1 (1975) 1 EHRR 524.

2 Law Reform Commission of Ireland (2005) *Report on Multi-Party Litigation* (LRC 76-2005), at para 2.19.

that, whether or not there is a right of "non-access", ICCPR Article 14(1) and BL 35 are engaged in the present case. We note that the class members will be bound by the outcome of the litigation on the common issues, even though they are not party to and do not take any active part in that litigation. If the defendants win the common issues at trial, all class members' claims will be extinguished. In a way, the class action restricts an individual class member's access to the court and substantially limits his control of the conduct of his individual claim. In the absence of the class members' express consent, an "opt-out" approach to class actions is likely to be regarded as an interference with the individual members' right of access to court under both BL 35 and ICCPR Article 14(1). In this regard, the "opt-in" approach would address the potential human rights concerns as the individual class members must expressly give consent to taking part in the class proceedings.

6. As regards whether this interference is justified, there have been extensive discussions in both Professor Mulheron's book and in other commentaries of the pros and cons of the opt-out and opt-in models and their effectiveness in promoting access to justice. We do not propose to go into those issues in detail. For the present purpose, we assume that adoption of an opt-out regime would be made on the basis that it would be more effective in promoting access to justice and achieving the other objectives of saving court resources and achieving the consistent disposal of all claims with similar causes of action. On that assumption, we see no in-principle human rights objection to the adoption of an opt-out model. We would assume, for the present purpose, that the interference with an absent class member's right of access to court by the opt-out model pursues a legitimate aim (eg promotion of access to justice).

7. The remaining human rights issue is whether the interference with the right of access to court under BL 35 and ICCPR Article 14(1) is proportionate to the aim which it is sought achieve. That can only be determined by taking into account the procedures to be adopted under our proposed opt-out model.

8. As the human rights concern about the opt-out approach arises mainly from the absence of express consent from individual class members, it will be important to build in procedural safeguards to ensure that the potential class members are adequately informed of the class action and of their right to opt out. This raises the questions as to (i) whether the opt-out notice should be mandatory, (ii) whether personal notice should be given to individual class members; (iii) how the notice should be served; and (iv) what should be stated in the notice. In this connection, we note that the response to these issues differs from jurisdiction to jurisdiction. We think it may be helpful to identify the relevant principles which have to be taken into consideration in assessing the options.

9. The Due Process Clause of the Fourteenth Amendment to the US Constitution is not in the same terms as BL 35 and ICCPR Article 14(1), but it is nevertheless useful to make reference to the decision of the US Supreme

Court in *Philips Petroleum Co v Shutts*,[3] which was affirmed by the Federal Court of Australia in *Femcare Ltd v Bright*.[4] It was held in *Philips Petroleum* that:

> *"If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."*[5]

10. More extensive notice requirements (eg individual personal notice) coupled with procedures for opting out at a later stage would provide better safeguards for absent class members. However, an extensive notice requirement would be costly and might, in some cases, unnecessarily delay the proceedings. The principle set out in *Philips Petroleum* provides some guidance as to what is likely to be considered proportionate and therefore to satisfy BL 35 and ICCPR Article 14(1).

11. Some existing features of Hong Kong's civil justice system may, to some extent, interfere with an individual's right of access to court (eg limitation periods, leave requirements and security for costs). However, those features serve legitimate purposes (eg ensuring legal certainty and finality; and ensuring more effective use of court time). The same consideration arises in relation to an opt-out regime: while it interferes with the absent class members' right of access to court, that interference by pursues a legitimate aim and adequate procedural safeguards have been incorporated. The adoption of an opt-out model is in our view permissible so long as the procedures recommended for that model amount to a proportionate response to a legitimate aim (eg promotion of access to justice).

---

3 472 US 797 (1985).

4 (2000) 100 FCR 331.

5 Cited above, at 8-10.

Articles 6 and 105 of the Basic Law: property rights

12. Articles 6 and 105 of the Basic Law protect an individual's property rights. The question arises as to whether the opt-out model is consistent with the property rights guaranteed under BL 6 and 105.

13. BL 6 provides that "*[t]he [HKSAR] shall protect the right of private ownership of property in accordance with law*."

14. BL 105 provides:

> *"The [HKSAR] shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.*
>
> *Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay. …"*

15. In *Scott v Government of the HKSAR,* Hartmann J was satisfied that BL 6 and BL 105 protected only existing property rights. He said:

> *"In my judgment, arts 6 and 105 extend their protection to existing rights in property, not to anticipated rights, rights still uncertain as to their delineation. In short, they do not extend their protection to what in effect is no more than an expectation."*[6]

16. In his dissenting judgment in *Lau Kwok Fai Bernard v Secretary for Justice*[7] and *Michael Reid Scott v Secretary for Justice,*[8] Ma CJHC agreed with Hartmann J's reasons for rejecting the applicants' arguments based on BL 6 and 105.[9] Neither the majority judgments in the Court of Appeal nor the judgments in the Court of Final Appeal dealt with BL 6 and 105 and Hartmann J's views in *Scott* were not overturned by the CA's or the CFA's decisions in *Lau Kwok Fai Bernard* and *Michael Reid Scott*.

17. Hartmann J's view appears to be in line with the jurisprudence developed by the European Court of Human Rights under Article 1 of Protocol No 1 of the European Convention on Human Rights, which protects property rights. The European Court's approach is that for a claim to constitute a "possession" within the protection of Article 1, the applicant must be able to

---

6 Constitutional and Administrative Law List No. 188 of 2002, at para 79.

7 (CACV 199/2003).

8 (CACV 401/2003).

9 At para 54. Ma CJHC also agreed with Hartmann J that the reduction of pay of public officers was not a deprivation of "property".

show that there is a legal entitlement to the economic benefit at issue, or a legitimate expectation that the entitlement will materialise.[10]

18. For instance, in *Stran Greek Refineries v Greece,*[11] in order to determine whether the applicants had a "possession", the court examined whether the relevant domestic judgment and arbitration award "*had given rise to a debt in their favour that was sufficiently established to be enforceable*".[12] The court then distinguished between the judgment and the award. The former was a preliminary decision, the effect of which was merely to furnish the applicants with the hope that they would secure recognition of the claim put forward. However, this was not the case with regard to the arbitration award, which clearly recognised the state's liability. Under Greek legislation, arbitration awards had the force of final decisions and were deemed to be enforceable; and no provision was made for an appeal on the merits. The European Court thus concluded that the applicants' right under the arbitration award (but not that under the judgment) constituted a "possession" within the meaning of Article 1.

19. In his comparative study of the constitutional protection of property rights in 18 jurisdictions, Professor AJ van der Walt observed that:

> "*[i]t is generally accepted that any debt or right, to qualify as property, must have been created or established as an independent right, and must have vested in the claimant in terms of statute or a court order or the law of contract. Mere expectancies or future claims usually do not qualify*."[13]

20. The "opt-out" approach allows a class action to be commenced by the representative plaintiff without the express consent of the class members, and the class members will be bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class. These features of the "opt-out" model would impact on the right to claim of those class members who do not take any active part in the litigation. However, if the same approach is adopted as that followed by the Federal Court of Australia Act 1976 (Cth), which only applies to a cause of action arising after the commencement of Part IVA,[14] it may be reasonably argued that the opt-out model will not engage BL 6 and 105 because no accrued rights of action and hence no existing property rights will be affected. As it is not yet

---

10 Simor and Emmerson (eds), *Human Rights Practice* (loose-leaf edition, updated as of Jan 2008), para 15.010.

11 (1994) (Series A, No 301-B).

12 The discussion of this case was based on P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed, 1998), pp 623-4.

13 AJ van der Walt, *Constitutional Property Clauses* (1999), p 22.

14 See *Femcare Ltd v Bright* (2000) 100 FCR 331, para 11: Part IVA was inserted into the Federal Court Act in 1991 by the Federal Court of Australia Amendment Act 1991 (Cth), which commenced on 4 March 1992. Proceedings may be brought under Part IVA only in respect of a cause of action arising after that date by virtue of section 33B.

clear if the proposed "opt-out" model will be so limited in its application, it is assumed in this paper that the model does affect property rights protected under BL 6 and 105.

Deprivation of property

21. In the case of *Weson Investment Ltd v Commissioner of Inland Revenue,*[15] the Court of Appeal held that BL 105 had no application to legitimate taxation, which was governed under BL 108. Government taxation of necessity deprived the taxpayer of his property without any right to compensation. The court decided that the word "deprivation" in BL 105 was used in the sense of "expropriation" which was the expression used in its original Chinese text (namely, "徵用"). Genuine action taken to assess and enforce payment of tax, even if subsequently found to be wrong, did not come within the scope of expropriation of property under BL 105.[16]

22. This interpretation of the meaning of "deprivation" was followed by the Court of First Instance in *Harvest Good Development Ltd v Secretary for Justice & Ors*[17] and *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd* (No 5),[18] as well as by the Court of Appeal in巫振漢訴漁農自然護理署。[19]

23. However, in *Fine Tower Associates Ltd v Town Planning Board,*[20] the Court of Appeal held that the reliance on the Chinese language version of BL 105 (which, in the event of a discrepancy between the English and Chinese versions, must prevail)[21] was of no consequence for the courts would look to the reality rather than to the form to see whether there had been expropriation, and that if the effect of regulation was to denude a property of all meaningful economic value, deprivation in the sense intended by BL 105 had occurred, even though through no formal act by that name. In the Court of Appeal's view, it was well established that action adversely affecting the use of property, despite falling short of formal expropriation, might in certain circumstances nonetheless properly be described as deprivation, in which case there would be a right to compensation. To ascertain whether there had been a

---

15 [2007] 2 HKLRD 567.

16 At paragraphs 18-20, 79 and 82.

17 [2007] 4 HKC 1.

18 [2007] 5 HKC 122.

19 CACV 143/2007.

20 CACV 356/2006.

21 The decision of the Standing Committee of the National People's Congress adopted on 28 June 1990 provides: *"… the English translation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China which has been finalized upon examination under the auspices of the Law Committee of the National People's Congress shall be the official English text and shall be used in parallel with the Chinese text. In case of discrepancy between the two texts in the implication of any words used, the Chinese text shall prevail."*

deprivation, the court looked to the substance of the matter rather than to the form. Absent a formal expropriation, the question whether there had been a *de facto* deprivation of property was a question of fact and degree in every case: "*The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking*."[22]

24. Applying the judicial interpretation of "deprivation" referred to at paras 21 and 22 above, it can be argued that the proposed "opt-out" model for class actions cannot be reasonably considered as an "expropriation" of property by the Government. In his judgment in *Harvest Good Development Limited* Hartmann J quoted with approval of what Professor A J van der Walt said:

> *"The term expropriation … does not apply to or adequately explain the position in all jurisdictions. When referring to the acquisition of property in terms of the power of eminent domain, most constitutions in the Anglo tradition refer to compulsory acquisitions, whereas most jurisdictions in the Germanic tradition refer to expropriations, with the two terms having roughly the same meaning. The fairly widely accepted interpretation is that these terms require the state to actually acquire property or derive a benefit from the expropriation or acquisition in some way, thereby excluding state actions that destroy or take away property without any benefit for the state."*[23]

25. The "opt-out" model, to the extent that it may result in a class member being bound by an adverse determination by the court which rejected the claim for relief brought by the representative plaintiff, may bar the class member from suing for the same claim. However, this loss of a right to claim appears to fall within the scope of exclusion discussed by Professor AJ van der Walt.[24]

26. If the judicial approach of interpreting "deprivation" outlined in para 23 above is followed, it can be argued that the opt-out model for class actions does not amount to *de facto* deprivation in the light of its impact on the rights of a class member. This argument is supported by the decision by the Full Court of the Federal Court of Australia in *Femcare Ltd v Bright.*[25] The Full Federal Court of Australia concluded there that the opt-out procedure did not effect an acquisition of property of a group member as protected by section

---

22 *Fine Tower Associates Ltd v Town Planning Board,* cited above, at paras 16-19.

23 Professor AJ van der Walt*, Constitutional Property Clauses* (1999, Juta & Co Ltd), at 18, quoted by Hartmann J in *Harvest Good Development Ltd* [2007] 4 HKC 1, at paragraph 134.

24 The discussion here assumes that the affected right amounts to a property right protected under BL 6 and 105: see paras 20-25 above.

25 (2000) 100 FCR 331.

51 of the Commonwealth constitution.[26] A chose in action is not capable of being "used" although it may be enforced.

Australian jurisprudence

27. Section 51(xxxi) of the Australian constitution deals with the power of Parliament to make laws relating to the acquisition of property from any State or person. As observed by Peter Hanks,[27] the orthodox and unchallenged view of section 51(xxxi) was expressed by Dixon J in *Bank of New South Wales v Commonwealth* as follows:

> *"Section 51(xxxi) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time, as a condition upon the exercise of the power, it provides the individual or the State affected with a protection against governmental interferences with his proprietary rights without just recompense … In requiring just terms s51(xxxi) fetters the legislative power by forbidding laws with respect to acquisition on any terms that are not just."*[28]

28. In *Femcare*, the court considered whether provisions in Part IVA of the Federal Court Act authorising representative proceedings permitted an acquisition of property otherwise than on just terms for the purposes of section 51(xxxi) of the Australian constitution. The appellant submitted that under the provisions there would be an acquisition of property otherwise than on just terms which would not be authorised by section 51(xxxi). The acquisition was said to be the conferring upon the representative party of the right to "use" property of a group member, being the chose in action consisting of the group member's claim against the respondent in a representative proceeding. The "use" of the property, so it was argued, was the prosecution of the cause of action. The court rejected these arguments and held that the provisions authorising enforcement of that chose in action on behalf of another person could not be described as giving the representative party the "use" of the chose in action; nor as involving an alienation of any interest in the chose in action. There was thus no breach of section 51(xxxi). The relevant parts of the judgment read as follows:

> *"108 It may well be that the conferring on one person of the right to use property of another person, whether real property or chattels, involves an acquisition of property. Such an acquisition is not an acquisition of ownership or dominium. Rather, it is the creation of a ius in re aliena. That is to say, it is the creation of a proprietary right in respect of property owned by*

---

26 Section 51 (xxxi) of the constitution provides that Parliament has power to make laws with respect to *"the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."*

27 Peter Hanks, *Constitutional Law in Australia* (2nd ed, 1996), at 499.

28 (1948) 76 CLR 1, at 349-350.

another. Thus, a leasehold interest, and a life estate are both property. The carving out of the fee simple, or unencumbered ownership, of such a right and conferring that limited right on a third party is clearly capable of being an acquisition of property.

109 However, a chose in action, or an obligation, is not something that is capable of 'use'. It may be enforced. Nevertheless, absent any assignment, where enforcement of a chose in action or obligation is for the benefit of the owner of the chose in action or obligation, it is an unwarranted extension of language to suggest that a person who is authorized to enforce the chose in action or obligation on behalf of another person has the 'use' of that obligation. The submission that there is an alienation of an interest in a chose in action by the grant of authority to enforce that chose in action in litigation in a court on behalf of the holder is completely without substance."[29]

29. This decision should be viewed in the context of the scheme provided for in Part IVA of the Federal Court Act, where the commencement of a representative proceeding is subject to various threshold requirements and procedural safeguards to preserve a group member's freedom of choice. The applicants must show, *inter alia*, that seven or more persons have claims against the same person and that the claims of all those persons give rise to a substantial common issue of law or fact (section 33C(1)(a) and (c)). Further, the application commencing a representative proceeding, or a supporting document, must specify the nature of the claims made on behalf of group members (section 33H(1)(b)). If a respondent is able to establish not merely that there is uncertainty as to whether the claims of all group members will be made out, but that some claims on behalf of the group members have not been made in good faith, or otherwise constitute an abuse of the court's process, it is unlikely that the threshold requirements of section 33C will be held to have been satisfied.

30. With respect to provisions in Part IVA that are designed to preserve a group member's freedom of choice, while it is true that the consent of a person to be a group member in the representative proceeding is not generally required, a group member may opt out of the representative proceeding simply by giving notice at any time prior to the final date for opting out fixed by the Court (section 33J(1) and (2)). The time limit for opting out may be extended, in accordance with section 33J(3). Section 33T provides a remedy for a group member who considers that a representative party is not able adequately to represent the interests of the group members. In those circumstances, the court may substitute another group member as a representative party.

31. In *Femcare*, the Full Court of the Federal Court of Australia noted that representative proceedings under Part IVA did not necessarily require that individual notice be given to members of the represented group: section 33Y(5)

---

[29] *Femcare Ltd v Bright* (2000) 100 FCR 331, at paras 108-109.

provides that the court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive to do so. The court held that in determining what was "reasonably" practicable and not "unduly" expensive for the purposes of section 33Y(5), the court was bound to take account of the possible adverse consequence to a group member of the representative proceeding as well as any possible benefits. In its view, the court would be more likely to be satisfied that personal notice was reasonably practicable and not unduly expensive if an adverse determination would have significant consequences for a group member.

32. The Full Court of the Federal Court of Australia was clear as to the benefits of representative proceedings:

> *"Part IVA of the Federal Court Act aims to enhance access to justice by establishing procedures that enable legitimate common grievances to be remedied. These procedures provide advantages to group members whose claims would otherwise be without practical redress. The legislation in this respect seeks to strike a balance between the impracticability of requiring personal notice in every case and the need to give effective notice of the proceeding to group members. …"*[30]

The court noted that while a representative proceeding might lead to an adverse judgment rejecting the claim for relief, it might also result in a favourable judgment acceding to the claim.

33. As the proposed "opt-out" model bears features similar to those provided for in Part IVA of the Federal Court Act discussed above, it would be difficult to argue that that model would involve any taking away (*de facto* or otherwise) of an individual group/class member's right to claim. The Hong Kong Bar Association agreed that whether an opt-out regime might be a justified limitation to the rights guaranteed under BL 35 and Article 10 (of the Hong Kong Bill of Rights) could only be determined by taking into account the procedures to be adopted. The Bar suggested that further study and evaluation was required, particularly in relation to the notice requirements, the sufficiency of pleadings and the permissible extent of discovery.

34. We pointed out in Chapter 9 that details of the proposed class actions regime will have to be worked out before it is implemented. For the time being, it is noteworthy that the notice system under Part IVA has survived the constitutional challenge in the *Femcare* case, as discussed above. As regards "sufficiency of pleadings", we think the Bar was referring to whether there are enough common issues to represent the case of all class members. We believe that the certification process recommended in Chapter 9 would help screen out cases that are not suitable for class actions. Of particular significance here are the requirements that there be sufficient commonality of

---

[30] *Femcare Ltd v Bright*, cited above, at para 75.

interest and remedy among class members and that a class action be the most appropriate legal vehicle to resolve the issues in dispute.

35. Furthermore, the Bar observed:

> *"there is room for argument that the constitutional language of the courts of the HKSAR of 'adjudicating cases' may become the basis for constitutional challenge of multi-party litigation for Hong Kong where such a scheme is designed to incorporate third party funding possibilities, the award of aggregate damages and the management of the aggregate award for the represented group, so that the involvement of the courts and lawyers may be queried for being more policy-making than adjudicative, more litigious manufacturing than determining an immediate right, duty or liability, and undesirably substituting private for public enforcement of the law"*.

36. We have considered the Bar's observation. As to "third party funding", Chapter 8 has decided that conditional fees and litigation funding companies are not suitable for Hong Kong. The power to award aggregate damages is a common feature in various overseas class action regimes, including those in Ontario, Australia (Federal), Victoria, etc. The Victorian court's power to award such damages[31] was challenged in *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd and another*[32] on the basis of, *inter alia*, alteration of substantive rights of damages (albeit on grounds other than those mentioned by the Bar). The majority of the Supreme Court of Victoria upheld the rules on aggregate damages, holding, *inter alia*, that the power to award such damages did not alter the substantive law, but referred only to the manner in which the defendant might be required to satisfy its obligations and provided what was hoped to be a simpler and less expensive way of paying properly calculated damages to each class member.[33]

Fair balance

37. There remains the question of whether the proposed "opt-out" model would satisfy the "fair balance" test. Although the Hong Kong courts have not so far formally embraced the "fair balance" test developed under the European jurisprudence, it would be prudent to apply this test as an implicit requirement under BL 6 and 105 for interference with property rights which fall short of deprivation. Under this test, any such interference must strike a fair balance between the demands of the general interests of society (which such interference strives to serve) and the requirement that the individual's rights be

---

31 The court was also empowered to give directions as to the manner in which group members would share in damages awarded, and to provide for the constitution of a fund for the distribution to group members of the damages.

32 (2000) 1 VR 545.

33 (2000) 1 VR 545, at paras 34-37.

protected. There must be a reasonable relationship between the means employed and the aim sought to be realised.

38. In *Femcare*, the Full Court of the Federal Court of Australia said that the scheme of representative proceedings under Part IVA of the Federal Court Act was aimed at enhancing access to justice. It may also be noted that in *Lithgow v United Kingdom,*[34] the European Court of Human Rights considered the merits of a collective or multi-party system for dispute resolution.[35] In that case, the Aircraft and Ship Building Industries Act 1977 established a collective system for the settlement of disputes about compensation, where individual shareholders of the applicant company were denied individual rights of access to the Arbitration Tribunal. The court held that this limitation on a direct right of access pursued a legitimate aim (namely, the desire to avoid, in the context of a large-scale nationalisation measure, a multiplicity of claims and proceedings brought by individual shareholders), and there was a proportionate relationship between the means employed and the aim.

39. These judgments support the argument that the proposed "opt-out" model does pursue legitimate aims. If that model includes threshold requirements and procedural safeguards to preserve a group member's freedom of choice comparable to those provided for in Part IVA of the Federal Court Act, it is likely that it would meet the "fair balance" requirement arguably implicit in BL 6 and 105.

---

34 (1986) 8 EHRR 329.

35 The case was concerned with, *inter alia*, whether such a system (on the basis that it excluded the right to bring private litigation) complied with Article 6(1) of ECHR which provides that "*[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …*".

Annex 4

The application of the *forum non conveniens* doctrine to group litigation in other jurisdictions

England and Wales

1. In *Spiliada Maritime Corporation v Cansulex Ltd,* Lord Goff set out the basis for the application in England and Wales of the doctrine of *forum non conveniens*:

> *"… a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice."*[1]

2. In *Connelly v RTZ Corporation PLC,*[2] the House of Lords considered the application of the principle of *forum non conveniens* to an application by the defendant company to stay the personal injuries proceedings commenced by a Scottish plaintiff claiming damages for cancer allegedly caused by his work in Namibia. The plaintiff had worked for four years in a uranium mine in Namibia operated by a Namibian subsidiary of the first defendant, an English company. Three years later he was found to be suffering from cancer of the throat and underwent a laryngectomy. He commenced proceedings in England against the first defendant and one of its English subsidiaries claiming damages for negligence on the grounds that he had contracted the cancer as a result of their failure to provide a reasonably safe system of work affording protection from the effects of uranium ore dust while he worked in the mine. The defendants applied for an order staying the proceedings in England on the grounds of *forum non conveniences*.

3. The House of Lords dismissed the application and held that substantial justice could not be done in the appropriate forum (which was Namibia) but could only be done in a forum where appropriate resources were available. Lord Goff said:

> *"I therefore start from the position that, at least as a general rule, the court will not refuse to grant a stay simply because the plaintiff has shown that no financial assistance, for example in the form of legal aid, will be available to him in the appropriate forum, whereas such financial assistance will be available to him in England. … I cannot think that the absence of legal aid in*

---

1 [1987] AC 460, at 476.

2 [1998] AC 854.

the appropriate jurisdiction would of itself justify the refusal of a stay on the ground of forum non conveniens.

…

Even so, the availability of financial assistance in this country, coupled with its non-availability in the appropriate forum, may exceptionally be a relevant factor in this context. The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available."[3]

4. The House of Lords took into account the fact that there was no practical possibility of the issues which arose in the case being tried without the plaintiff having the benefit of professional legal assistance and that his case could not be developed before a court without evidence from expert scientific witnesses. If the case were to be tried in England, then the plaintiff would either obtain assistance in the form of legal aid or receive the benefit of a conditional fee agreement with his solicitor. In these circumstances, the court came to the conclusion that the discretion to stay the proceedings on the grounds of *forum non conveniens* should not be exercised:

"I am satisfied that this is a case in which, having regard to the nature of the litigation, substantial justice cannot be done in the appropriate forum, but can be done in this jurisdiction where the resources are available."[4]

5. In the case of *Lubbe v Cape Plc,*[5] the House of Lords considered an application for stay of proceedings commenced in England by more than 3,000 plaintiffs who were South African citizens resident in South Africa. The plaintiffs claimed damages for personal injury and death against the defendant, a company registered in England which owned a number of subsidiary companies in South Africa engaged in the mining and processing of asbestos and the sale of asbestos-related products. The cases were ordered to proceed as a group action. The House of Lords held that South Africa was clearly the more appropriate forum. However, when the claimants could be denied justice in South Africa because of the non-availability of funding (legal aid or contingency fee arrangements), legal representation and expert advice and established procedures for group litigation, then group action proceedings could be brought in the UK against UK-based parent companies of multinational corporations, arising from the actions of their subsidiaries in other jurisdictions. Lord Bingham said:

"If these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be

---

3 *Connelly v RTZ Corporation PLC*, cited above, at 873A-874D.

4 *Connelly v RTZ Corporation PLC*, cited above, at 874D.

5 [2000] 1 WLR 1545.

essential if these claims were to be justly decided. This would amount to a denial of justice. In the special and unusual circumstances of these proceedings, lack of the means in South Africa to prosecute these claims to a conclusion provides a compelling ground, at the second stage of the Spiliada test, for refusing to stay the proceedings here."[6]

Australia

6. The Australian courts have adopted a different approach to *forum non conveniens*. In *Oceanic Sun Line Special Shipping Co v Fay*[7] the High Court of Australia held that if the forum selected had a significant connection with the action (such as being the place of the transaction or the defendant's residence, or its law is applicable to one of the issues involved, or the proceedings instituted there involve a legitimate and substantive advantage to the plaintiff such as local assets against which judgment can be executed) the forum could not be described as clearly inappropriate.[8] Three reasons have been given for this development: "*a desire to adhere to established Australian authority, the view that the plaintiff has a right to select the forum which the court cannot deny, and a general distrust of judicial discretionary powers*."[9] This approach was confirmed in *Voth v Manildra Flour Mills*[10] where the High Court of Australia refused to adopt the "*most suitable forum*" approach and instead devised its own "*clearly inappropriate forum*" test: if the Australian court finds itself to be a "*clearly inappropriate forum*", it will decline jurisdiction.

7. The difference between the Australian formula and the English formula of *Spiliada* has been described as follows:

"The Australian formula is loaded in favour of a trial continuing in the forum, since, in practice, it is harder to show that the local forum is 'clearly inappropriate' than it is to show, under the Spiliada formula, that the alternative forum abroad is 'clearly more appropriate'. Where the present forum is proved to be appropriate for trial, there can be no stay under the Australian formula, while it is still possible under the Spiliada approach as

---

6 *Lubbe v Cape Plc,* cited above, at 1559. The "second stage" of the *Spiliada* test referred to here requires the court, even if it has concluded at the "first stage" that the other forum is clearly more appropriate for the trial of the action, nevertheless to decline to grant a stay if persuaded by the plaintiff, on whom the burden of proof then lies, that justice requires that a stay should not be granted.

7 (1988) 165 CLR 197.

8 Discussed in P E Nygh, *Conflict of Laws in Australia*, 6th ed (Sydney, Butterworths 1995), at 103.

9 Discussed in P E Nygh, *Conflict of Laws in Australia*, 6th ed (Sydney, Butterworths 1995), at 103.

10 (1990) 71 CLR 538.

long as there is a forum abroad that is clearly more appropriate."[11]

8. The adoption of this "clearly inappropriate forum" test leads to a more restrictive approach to forum determination by Australian courts. A study in 1999 found that of the 51 cases decided since *Voth*, orders for a stay of proceedings had been issued in only 10 (or approximately 19 per cent) of the cases.[12]

USA

9. In *Gulf Oil Corporation v Gilbert,*[13] the Supreme Court dealt with an appeal arising out of the decision of a Federal District Court which applied the doctrine of *forum non conveniens* in dismissing a tort action in New York. In this case, a resident of Virginia brought suit in the Federal District Court of New York against Gulf Oil, a Pennsylvania corporation qualified to do business in both Virginia and New York. The plaintiff sought to recover damages from the defendant, alleging that the defendant negligently delivered gasoline to his Virginia warehouse tanks and pumps causing an explosion and fire. The District Court's jurisdiction was solely based on diversity of citizenship (ie jurisdiction in suits between citizens of a state and foreign citizens). As all the events giving rise to litigation had happened in Virginia, the New York District Court applied the doctrine of *forum non conveniens* and dismissed the action. The decision of the District Court, which had been overturned by the Court of Appeals for the Third Circuit, was reinstated by the Supreme Court (by majority). As a result, the plaintiff was required to pursue the action in Virginia, where he was resident, rather than New York.

10. The Supreme Court was of the view that in the exercise of its discretion in determining whether or not the case should be dismissed on the grounds of *forum non conveniens*, the court should have regard to various private and public interest factors. The relevant paragraphs of the decision are as follows:

> *"The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorised by the letter of a general venue statute. … A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for any adversary, even at some inconvenience to himself. …*
>
> *Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of*

---

11 Zhenjie Hu *'Forum Non Conveniens*: An unjustified doctrine' (2001) 48 *Netherlands International Law Review* 143 at 154.

12 Richard Garnett, Stay of Proceedings in Australia: A "clearly inappropriate" test? (1999) 23 *Melbourne University Law Review* 31, quoted in Dan J Svantesson 'In Defence of the Doctrine of Forum Non Conveniens' (2005) 35 *Hong Kong Law Journal* 395 at 401.

13 330 US 501 (1946).

remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts ….

… If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to resources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favour of the defendant, the plaintiff's choice of form should rarely be disturbed.

… Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."[14]

11. These principles were applied in an international context in *Piper Aircraft Co v Rayne.*[15] The relevant facts of the case are as follows. In 1976, a small commercial aircraft crashed in Scotland. The pilot and all five passengers were killed. The decedents of the deceased were all Scottish citizens and residents. The wrongful death actions brought against both Piper Aircraft Company, the Pennsylvania manufacturer of the aircraft, and Hartzell Propeller Inc, the Ohio manufacturer of the propeller, were eventually transferred to the Middle District of Pennsylvania. Both defendants moved to dismiss the action on the ground of *forum non conveniens*. Relying on the balancing test of private/public interest factors developed in *Gulf Oil Corporation v Gilbert*, the District Court granted the motions. The Appellate

14 *Gulf Oil Corporation v Gilbert*, cited above, at paras 3 to 5.

15 454 US 235 (1981).

Court reversed this decision, holding that "*dismissal is never appropriate where the law of the alternative forum is less favourable to plaintiff*." The Supreme Court affirmed the dismissal by the District Court. Importantly the Supreme Court held that the strong presumption in favour of the plaintiff's choice of forum applied with less force when the plaintiff or the real party in interest was foreign and stated:

> *"The Court of Appeals also erred in rejecting the District Court's Gilbert analysis. The Court of Appeals stated that more weight should have been given to the plaintiff's choice of forum, and criticized the District Court's analysis of the private and public interests. However, the District Court's decision regarding the deference due plaintiff's choice of forum was appropriate. …*
>
> *The District Court acknowledged that there is ordinarily a strong presumption in favour of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. It held, however, that the presumption applies with less force when the plaintiff or real parties in interest are foreign. ...*
>
> *The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified. … When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniences inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."*[16]

12. Furthermore, the fact that the law of the foreign forum (Scotland in this case) was less favourable to the plaintiff than US law did not, by itself, prevent the case from being dismissed on *forum non conveniens* grounds. The Supreme Court described the legal position as follows:

> *"The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favourable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry."*[17]

13. Applying the *Gilbert* analysis to the private interest factors, the Supreme Court upheld the conclusion reached by the District Court and said that: "*the District Court did not act unreasonably in concluding that fewer evidentiary problems would be posed if the trial were held in Scotland. A large proportion of the relevant evidence is located in Great Britain*." The

---

16 *Piper Aircraft Co v Rayne*, cited above, at pages 265-266.

17 *Piper Aircraft Co v Rayne*, cited above, at page 261.

Supreme Court also supported the District Court's conclusion that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland.

14. Turning to the analysis of the District Court's review of the factors relating to the public interest, the Supreme Court was of the view that it was also reasonable for the following reasons:

> *"Scotland has a very strong interest in this litigation. The accident occurred in its airspace. All of the decedents were Scottish. Apart from Piper and Hartzell, all potential plaintiffs and defendants are either Scottish or English."*[18]

15. The Supreme Court rejected the argument that the American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products and stated the following:

> *"[T]he incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant. The American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here."*[19]

16. *Piper Aircraft* established itself as the leading decision in the determination of the proper forum for US cases with foreign plaintiffs:

> *"More than two decades later, federal and state courts continue to follow the Piper Aircraft Court's instructions: (1) give less deference to the foreign plaintiff's forum choice; (2) determine whether there is an adequate alternative forum for the plaintiff's claim; (3) apply Gilbert's private and public interest factors; and (4) expect that the appeals courts will review trial court's forum non conveniens dismissals only for abuse of discretion."*[20]

Recent case law in the USA

17. There are recent instances in which foreign residents have been precluded from joining opt-out class actions in the USA in accordance with the *forum non conveniens* doctrine at common law.

---

18 *Piper Aircraft Co v Rayne*, cited above, at 268.

19 *Piper Aircraft Co v Rayne*, cited above, at 268.

20 John R Wilson 'Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation' (2004) 65 *Ohio State Law Journal* 659, at 681-2.

In Re VIOXX[21]

18. In this action, 98 plaintiffs residing in England and Wales filed actions in New Jersey alleging product liability causes of action based upon defective design and failure to warn, as well as claims of breach of the New Jersey Consumer Fraud Act, breach of express warranty, wrongful death and survivorship, as well as loss of consortium. The causes of action related to a suspected association between long-term use of VIOXX (a medication used in the treatment of symptoms of arthritis) and an increased risk of heart attack. The Superior Court, Appellate Division of New Jersey held that the United Kingdom provided an adequate alternative forum for products liability litigation in terms of substantive/procedural law (and damages) and dismissed the consumers' personal injury lawsuits on the grounds of *forum non conveniens*.

19. The court rejected the plaintiffs' arguments that, as there was no UK analogue to the Consumer Fraud Act, there might be no basis for their breach of express warranty claims and a claim for loss of consortium would not be recognised. The court said:

> *"[I]f litigation were to occur in the UK, plaintiffs could still assert their strict liability causes of action, which are presently recognized in England and Wales and which constitute the mainstay of plaintiffs' legal theories of liability, as well as those causes of action arising from the death of persons taking VIOXX, and possibly, a negligence cause of action. Although relief under New Jersey's statutory Consumer Fraud Act would not be available, as well as other likely subsidiary causes of action, the unavailability of a specific cause of action in a foreign jurisdiction does not preclude forum non conveniens dismissal. As long as some cause of action is still available to plaintiffs, the unavailability of a specific claim in the alternate forum cannot be said to render that form inadequate. …*
>
> *[W]e are aware of no precedent holding that jurisdiction must be maintained in an inconvenient form simply because loss of consortium claims would not be recognized by the alternative court. … We deem it unreasonable to accord dispositive weight in a forum non conveniens analysis to such a derivative cause of action, regardless of the loss of a damages remedy. Such tail-wagging cannot overcome the well-established principles governing forum determination in this context."*[22]

20. The court considered that the costs-shifting regime in the UK would not put the plaintiffs at a disadvantage compared to the "American costs rule" (ie no costs rule) and did not render New Jersey the appropriate or convenient forum. The court stated:

---

21 395 NJ Super 358 (Sup Ct NJ, App Div, 2007).

22 *In Re VIOXX* , cited above, at paras 11-12.

> *"We are further satisfied that, as the result of the discretion given to courts of the UK in the imposition of costs on the loser, as we have described it, the 'English System' of cost recovery does not render the UK an inadequate forum for forum non conveniens purposes. …*
>
> *In sum, we have difficulty accepting the position of a group of residents of the UK that perceived inadequacies in the tort and damages laws and the rules for funding and cost allocation of their countries of residence entitle them to seek justice in New Jersey where the law and fee arrangements are more favourable. By this argument, plaintiffs essentially contend that the UK provides an inadequate forum for the resolution of the disputes of the English and Welsh living within its borders. We do not regard the claimed inadequacies of one country's system of funding suits and allocating costs as a ticket to relief elsewhere, but rather, as a subject for legislative or court reform, should such be warranted."*[23]

In re Factor VIII or IX Concentrate Blood Products[24]

21. In this action, haemophiliac residents of United Kingdom commenced suit against manufacturers of blood-clotting products for contracting HIV or Hepatitis C virus through exposure to those products. The manufacturers moved to dismiss, on the grounds of *forum non conveniens*. The Court of Appeals of the 7th Circuit held that the courts in the UK offered an adequate alternative forum.

22. The court was of the view that an alternative forum which lead to a change in applicable law unfavourable to the plaintiffs would not ordinarily justify a dismissal of the defendant's *forum non conveniens* application. The court held:

> *"The real question is whether the [district] court's conclusion that the UK courts offer an 'adequate' alternative was within its discretion. We think that it was. Piper Aircraft establishes that the law in the United Kingdom need not be identical to US law, or even as favourable to plaintiffs as US law may be. The Fairchild decision [a recent English House of Laws decision on the 'but for' principles of causation] demonstrates that the highest court of the United Kingdom has, at least in one setting, recognized the need to modify strict 'but for' rules in this kind of case. We do not know, of course, whether the UK courts will apply Fairchild to the present case, but that kind of certainty is not required (especially in a common-law system like theirs)."*[25]

---

23 *In Re VIOXX* , cited above, at para 13.

24 484F 3d 951 (7th Cir, 2007).

25 *In re Factor VIII or IX Concentrate Blood Products*, cited above, at para 4.5.

23. Turning to the funding issue of mounting cases such as the present one, the court was of the view that the difference in costs regimes between the United Kingdom and the USA did not justify the dismissal of the defendant's *forum non conveniens* application. The court held that:

> *"Plaintiffs argue that there are 'extreme impediments' to their funding of the litigation, if it were to proceed in the United Kingdom, largely because the English legal system uses a 'loser pays' rule for attorney fees and because compensatory damages tend to be low. We do not see how the use of a different fee-shifting rule for attorneys' fees can weigh against dismissal, however, in light of Piper Aircraft. Obviously the English Rule is less favourable to plaintiffs whose chances of losing are too great (which, for risk-averse plaintiffs, might even be 30% or 40%), but we believe that must be regarded as the kind of unfavourable difference in legal systems that carries little weight. In fact, the Untied States stands almost alone in its approach toward attorneys' fees, and so if we were to find that dismissal was wrong for this reason, we would risk gutting the doctrine of forum non conveniens entirely."*[26]

In re Royal Dutch/Shell Transport Securities[27]

24. The United States District Court for the District of New Jersey excluded all non-US purchasers of the securities of the defendant companies from taking part in a class action based on alleged securities fraud. The District Court Judge, adopting the finding of a special master appointed by the court, held that the defendants' conduct relating to the reclassification of its oil and gas reserves was insufficient to amount to more than mere preparatory acts in furtherance of the alleged fraud in reporting its proved oil and gas reserves in the Untied States. The court therefore lacked subject matter of jurisdiction over the securities claims brought by non-US purchasers of its stock.

25. The court adopted the conduct test of jurisdiction. That test requires a *nexus* between conduct in the United States and the alleged fraud, which the court suggested may mean "*a showing of direct causation … [and] that the level of domestic conduct, at the very least, must be significant and material to the fraud*."[28] Reviewing the factual findings of the special master, the court found that:

(a) all of Shell's public disclosures originated in Europe and the compilation, review and approval of oil and gas reserves occurred at its headquarters in the Netherlands;

(b) Shell's New York investor relations office did not take part in preparing announcements about oil and gas reserves or handle

---

26 *In re Factor VIII or IX Concentrate Blood Products*, cited above, at para 6.

27 Civ No 04-374(JAP), 2007 (DNJ Nov 13, 2007), 522 F Supp 2d 712.

28 *In re Royal Dutch/Shell Transport Securities*, cited above, at 718.

the documents filed with the Securities and Exchange Commission of USA;

(c) None of the shareholder and analyst meetings in which Shell participated in the United States were with European-based analysts or investors or included information about proved reserves; and

(d) Shell's US based service organisations, which specialised in deepwater exploration and technology research and development did not report or maintain proved reserves.[29]

26. The court therefore agreed with the findings of the special master that Shell's US activities were merely preparatory and non-essential to the alleged fraud on the non-US purchasers. The court therefore declined to exercise jurisdiction over the claims of the non-US purchasers.

27. In dismissing the claims of the non-US purchasers, the court was cognisant of the fact that a settlement agreement had been entered into and filed in the Amsterdam Court of Appeals in the Netherlands that would resolve all asserted and unasserted claims of non-US purchasers. As a joint request by all parties to the settlement agreement, Shell sought the Amsterdam Court of Appeals to declare the settlement agreement binding on all non-US purchasers pursuant to the Dutch Collective Financial Settlement Act. The court said:

> *"The Court also emphasizes that this holding does not leave the Non-US Purchasers without an alternative recourse to address their alleged injuries. Significantly, the Non-US Purchasers can seek recovery through the Settlement Agreement entered into before the Amsterdam Court of Appeals or through procedures available within their respective jurisdictions. Therefore, the result reached here does not prejudice the Non-US Purchasers and ultimately serves to preserve 'the precious resources of the United States courts."*[30]

---

29 *In re Royal Dutch/Shell Transport Securities,* cited above, at 719-721.

30 *In re Royal Dutch/Shell Transport Securities* cited above, at 724.