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Client Update

Shaping the future of insurance law

To opt-in or out – that is the question before the Supreme Court when *Ross* returns in March

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AT A GLANCE

- New Zealand has no statutory or regulatory framework that specifically deals with class or representative actions. Claimants have relied on High Court rules as the mechanism to bring a representative action.
- The Courts considered, before *Ross v Southern Response Earthquake Services Limited*, the rule permitted only an opt-in action. The recent decision by the Court of Appeal in *Ross*, however, not only confirms opt-out actions are available but suggests that they should be the default for representative actions.
- The issue is likely to be further clarified when the Supreme Court considers *Ross* on appeal, set down for hearing on 23 and 24 March.
- The NZ Law Commission has also announced it is conducting a review of the law relating to class actions and litigation funding in New Zealand.

CLASS ACTIONS IN NEW ZEALAND

New Zealand has no statutory or regulatory framework that specifically deals with class or representative actions. The mechanism that New Zealand claimants have relied on to bring a representative action is rule 4.24 of the High Court Rules (HCR4.24). HCR4.24 empowers the Court to allow a plaintiff or plaintiffs to bring representative proceedings on behalf of other persons having the same interest in the subject matter of the proceeding[1]. This can either be done with the consent of those persons with the same interest or as directed by the Court.

Without a specific legislative framework for class or representative actions, the New Zealand Courts have been establishing their own rules, emphasising flexibility and the scope for continual procedural developments in this relatively new area of New Zealand law[2].

[1] HCR4.24 was not designed for class actions but has been flexibly applied by the Courts to allow for them. See commentary fromBaragwanath J in *Saunders v Houghton* [2010] 3 NZLR 331 (CA) at [10], *Credit Suisse Private Equity LLC v Houghton* [2014] 1 NZLR 541 (SC) per Elias CJ and Anderson J at [49], and *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431 at [39].

[2] Only one large-scale representative action has received final judgment to date: *Hourgton v Saunders* [2019] 1 NZLR 1 (SC)). There are several other substantial representative actions working their way through the Courts at present.

THE IMPACT OF *ROSS V SOUTHERN RESPONSE EARTHQUAKE SERVICES LIMITED*

In May 2018, Mr and Mrs Ross issued proceedings against Southern Response Earthquake Services Ltd, a government-owned company responsible for settling claims by AMI policyholders.

The Ross couple claimed that Southern Response Earthquake Services Ltd had provided incomplete information regarding the settlement of their residential earthquake claim. They also brought an application for leave to bring a representative action on behalf of approximately 3,000 other policyholders. The proceedings are split in two stages: the first involves the common issues and the Ross claim; and the second addresses the question of relief for the group.

A key preliminary question that arose in this case was whether the Ross couple could bring the representative action on an opt-out basis. Southern Response had no issue with a representative action but said that action should be on an opt-in basis.

Before *Ross*, the rule permitted only an opt-in action, or an action on behalf of people who expressly consent to being part of the action[3]. This was because comparable jurisdictions permitting opt-out actions have detailed legislative rules for these actions, as well as an earlier review of the High Court Rules that considered that legislative change was necessary before permitting opt-out actions[4].

The decision by the Court of Appeal in *Ross*, however, suggests that opt-out actions should now be the default[5]. The decision also highlights the Court's desire to promote access to justice.

> **Before *Ross*, the rule permitted only an opt-in action.**

The Court of Appeal expressly considered that HCR4.24 must include the ability to direct that actions proceed on an opt-out basis.

It did not consider there was any impediment in the rule for the Court to do so, and having such power is consistent with historical statutes and the common law. Consequently, there was no need for legislative change to enable opt-out representative actions.

Most importantly, the Court considered that opt-out actions would best serve the intended purpose of representative actions, the wider principles of justice and public interest. In particular, it considered that:

- claimants' access to justice will be improved by opt-out actions
- opt-out actions might incentivise insurers and large entities to comply with their legal obligations, and
- an ability to direct for opt-out actions would provide efficiency both in cost and substance.

The Court was unpersuaded that an opt-out option would materially increase the procedural and substantive supervision of representative actions by the courts.

Despite this ruling, no representative actions filed after *Ross* have sought orders for an opt-out action, although they have reserved any right to seek such orders in the future.

The Supreme Court granted leave to appeal *Ross*[6], and the matter is set to be heard by it on 23 and 24 March 2020.

NZ LAW COMMISSION REVIEW OF CLASS ACTIONS & LITIGATION FUNDING

The future of representative actions in New Zealand will also be affected by a parallel NZ Law Commission review.

The Commission has recognised that "the lack of detailed rules for representative actions can make proceedings inefficient and expensive"[7] and announced in December 2019 that it is conducting a review of the law relating to class actions and litigation funding in New Zealand.

Among the issues it is considering is whether, and to what extent, the law should allow class actions and litigation funding and how they should be regulated.

The Law Commission's report and recommendations are expected by the end of 2021.

[3] See discussion in *Credit Suisse Private Equity LLC v Houghton* [2014] NZLR 541 (SC), in which an opt-out class was created, but later amended to be opt-in. Subsequent representative actions have been on an opt-in basis. If the representative order is not made at the time the statement of claim is filed and if in the intervening period the limitation period has expired, then the representative order should be backdated to the date the statement of claim was filed.

[4] See *Houghton v Sanders* (2008) 19 PRNZ 173 (HC), at [157] to [168]. The appropriateness of opt-in versus opt-out was not the subject of any subsequent appeal, although the Supreme Court appears to have proceeded on the basis that both are available under HCR4.24: *Credit Suisse Private Equity LLC v Houghton* [2014] 1 NZLR 541 (SC), at [170].

[5] *Ross*, above, at [97] to [110].

[6] *Southern Response Earthquake Services Ltd v Ross* [2019] NZSC 140.

[7] https://www.lawcom.govt.nz/our-projects/class-actions-and-litigation-funding

A WAITING GAME

Ross goes to the Supreme Court on 23 and 24 March 2020 and the outcome will be significant for insurers.

If an opt-out position is endorsed by the Court, there is likely to be increased future insurance exposures in representative actions in New Zealand. Such a decision may also whet the appetite of litigation funders and lead to an increase in the volume of representative actions.

Other issues in the remainder of the *Ross* proceeding may also be significant. For example, the plaintiffs applied for orders establishing a common fund in the event they succeed in the stage 1 proceeding – a fund against which class members' costs are applied, litigation funders' fees are applied, and then the remainder applied to class members.

The Court of Appeal in *Ross* declined to comment on the availability of such orders, as the High Court Rules do not expressly empower the Court to do so.[8] The availability of common funds in New Zealand may increase litigation funders' appetites for, and increase future insurance exposures to, representative actions.

Other ongoing representative actions in New Zealand will also give rise to other tensions for all interested parties, given recent developments in Australia on causation theories in such actions,[9] and on addressing competing representative actions.[10]

Regardless of any Court's decision, the NZ Law Commission review also has the ability to significantly change the landscape of representative actions in New Zealand, particularly if its recommendations include a new legislative and regulatory framework for class actions and litigation funding.

For the moment, however, the only certainty is that clarity in this area of law will be welcomed by all parties.

NEED TO KNOW MORE?

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[8] By way of comparison, the High Court of Australia in October 2019 decided Australian Courts do not have the power to make such orders - *MW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45.
[9] The Federal Court in *Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747 accepted that plaintiffs do not need to establish reliance, but could rely on the market-based causation theory – the necessary causal link is established simply by the acquisition of shares in the artificially inflated market.
[10] For example, *Wigmans v AMP Ltd* [2019] NSWCA 243, in which the NSW Court of Appeal endorsed staying one representative action in favour of another competing representative action.