BUDDLE FINDLAY

Class actions - To opt-in or opt-out?

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Rule 4.24 of the High Court Rules in New Zealand allows representative actions with the consent of those other persons who have the same interest, or as directed by the court. The Rule derives from historic procedures developed in the UK Court of Chancery to cater for cases where the interests of many parties were the same. In representative actions the court's determination is binding on all parties with the same interests, thereby preventing a multiplicity of claims on the same issues.

In *Ross v Southern Response*[1] the High Court was recently called upon to revisit the important question of whether a representative action should be on an "opt-in" or "opt-out" basis. In an opt-out proceeding all persons who share a common interest in the proceeding (ie "the class") are bound by the outcome of the representative proceeding unless they elect to exclude themselves. By contrast, in an opt-in proceeding persons must actively consent to be joined as part of the class.

Overseas regimes, notably Australia, Canada and United States of America, have adopted an opt-out model off the back of comprehensive Law Commission studies. The underlying rationale is that opt-out tends to promote a larger class and is said to protect more effectively the interests of vulnerable sections of society who are otherwise unlikely to participate in court proceedings. These regimes have enacted comprehensive class action legislation containing detailed regulations on matters of process unique to representative proceedings.

In New Zealand, though, the courts have only Rule 4.24. In a decision of French J in 2008, *Houghton v Saunders*, (in the *Feltex* litigation), her Honour found that an opt-out procedure was not expressly permitted under Rule 4.24; and that the Rules only contemplate opt-in. French J was influenced by the fact that opt-out procedures overseas had detailed legislative prescriptions which include safeguards to protect the interests of defendants, as well as members of the represented class. Her Honour considered that an opt-out procedure represents too radical a departure from the existing Rules.

Since *Houghton v Saunders*, opt-in proceedings have become the established orthodoxy in New Zealand. The courts have developed rules of procedure using their supervisory powers and have brought a creative mindset to bear to address issues such as (to name some) the court's role in reviewing communications to class members, the use of sub-classes and staged trial procedures (to accommodate different individual issues as between class members) as well as clarifying the position under the Limitation Act. For all this, though, legislative intervention remains highly desirable. Modern representative actions give rise to a plethora of procedural issues, particularly with the advent of modern commercial litigation funders, which the historic form of representative actions could never have envisaged. While the courts recognise that commercial funding has access to justice benefits, equally the commercial imperatives of litigation funders (who seek to make profits) can run into conflict with due process concerns - especially so in an opt-out proceeding. Unsurprisingly, in 2014, the then Chief Justice remarked that Rule 4.24 is ill-suited to the modern litigation landscape and "is being required to bear a weight for which it was not designed".

Despite signs of shuffling from within the corridors of the legislature, actual progress in this area has been somewhat glacial. In 2008 the Rules Committee published a draft Class Action Bill and draft High Court Amendment (Class Action Rules) which proposed that both opt-in and opt-out procedures were permitted, with criteria to guide the court on which should apply. This proposal was not acted on.

More recently, in 2018, the Rules Committee released new draft rules for representative proceedings for consultation, which expressly contemplated opt-in proceedings. However, the Rules Committee is restrained by its view that any substantive reform is a matter for Parliament. The Law Commission has recently reactivated its work in this area, but the priority of this investigation is presently unknown.

But back to *Ross v Southern Response*. In the High Court, the Rosses argued that French J's decision in Houghton v Saunders was wrong, and that the Court has jurisdiction under Rule 4.24 to order an opt-out proceeding and that it ought to do so. In a judgment released in late 2018 Associate Judge Matthews in the High Court declined to make an opt-out order, instead requiring the proceeding to be brought as an opt-in proceeding. The Judge noted that "[w]hilst New Zealand may be out of step, in a sense, with other comparable jurisdictions in not preferring opt-out orders, opt-in orders have been made in all cases in this country".

The Rosses have appealed to the Court of Appeal. The appeal was heard last month, with judgment pending. Whatever the outcome, the Court of Appeal's decision will represent a further milestone in the body of Judge-made law under Rule 4.24. All the while, the drums for legislative intervention continue to beat.

[1]In the interests of transparency it is noted that Buddle Findlay acted for the defendant in this proceeding.

This article was written by Kelly Paterson and Olly Peers for the NBR (September 2019).

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