



The Rules Committee

CONSULTATION ON REPRESENTATIVE PROCEEDINGS

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Date submissions are due: 16 November 2018

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Introduction

1. The Rules Committee (the Committee) is seeking feedback on proposed rules that will clarify and formalise the procedure for bringing a representative proceeding under r 4.24 of the High Court Rules. At present the High Court Rules contain little guidance on the applicable procedure and principles for persons intending to commence a representative proceeding. The proposed rules set out the process for applying for a representation order and the information that must be disclosed by the party seeking the order. As well, the proposed rules clarify the date on which a representative proceeding is deemed to commence and the date from which the representation order applies.
2. The proposed rules are contained in the High Court Rules 2016 (Representative Proceedings) Amendment Rules 2018, which are attached to this consultation paper.

Background to the proposal

3. A representative proceeding enables one or more persons — the representatives — to bring a proceeding on behalf of a group of persons — the represented — sharing the same interest in the subject matter of the proceeding. Elsewhere such proceedings are known as class actions. Commonly, representative proceedings involve individual claimants being represented in proceedings funded by a litigation funder, who agrees to fund the litigation for consideration.

4. New Zealand has no legislative framework regulating the bringing of representative proceedings. Given the Committee’s jurisdictional limitation to matters of practice and procedure, the proposed rules do not address matters of policy which are best left for legislative response, such as whether an opt-out procedure should be permissible under the High Court Rules.
5. The Committee’s aim is to formalise and make accessible the procedure for bringing a representative proceeding and state the principles that should guide an application for a representation order.

The proposal

The application of the proposed rules

6. The proposed rules have been designed to supplement existing r 4.24, which allows one or more persons to sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding, either with the consent of the other persons with the same interest or as directed by the court on application.
7. The proposed rules will apply where:
 - a. the persons comprising the representative class are so numerous that, having regard to the nature of the claim, joinder of all of them would be impractical; *and*
 - b. the plaintiff does not have the consent of all those persons to bring the proceeding in a representative capacity.

The proposed rules will therefore bring the High Court Rules into alignment with current practice by allowing a representative proceeding to be brought on behalf of a subset of those with the same interest in the proceeding (i.e. on an “opt-in” basis).

General principles

8. In *Saunders v Houghton (Saunders)*, the Court of Appeal observed that a representative proceeding can be brought where each member of the class is alleged to have a separate cause of action, provided:
 - a. the order may not confer a right of action on the member of the class represented who could not have asserted such a right in separate proceedings, nor may it bar a defence which might have been available to the defendant in such separate proceeding;
 - b. there must be an interest shared in common by all members of the group; and
 - c. it must be for the benefit of other members of the class that the plaintiff is permitted to sue in a representative capacity.
9. The requirement for an interest shared in common by all members of the group was subsequently considered by the Supreme Court in *Credit Suisse Private Equity LLC v Houghton (Credit Suisse)*. In that case, Elias CJ and Anderson J observed that there must be a common issue of fact or law of significance for each member of the class represented.²

¹ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [13].

² *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [53].

10. In *Saunders*, the Court of Appeal endorsed the statement by Barker J in *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* that representative proceedings for damages are not foreclosed.³ A declaration of liability may be sought on the common issue, following which individual claims to establish individual damage may follow.
11. The Committee has explicitly adopted these principles in r 4.74 of the proposed rules.

Limitation

12. In *Credit Suisse*, a majority of the Supreme Court (McGrath, Glazebrook and Arnold JJ) held that a representative proceeding is brought by the plaintiff, and also by those represented by the plaintiff, when the statement of claim is filed.⁴ Therefore, time ceases to run against the members of the represented class in respect of both common issues and individual issues when the proceedings were filed and the representation order made.⁵
13. The Committee has addressed this matter and adopted this view in the draft r 4.70:

4.70 When representative proceedings are commenced

For the purposes of these rules, a representative proceeding is commenced by the following persons at the time the statement of claim is filed:

- (a) the person named in the statement of claim as the plaintiff suing in a representative capacity; and
- (b) all named and unnamed persons ultimately determined to comprise the class represented at the time the statement of claim is filed.

Procedural requirements

14. Under the Committee's proposed rules, the representative plaintiff will be required to file an application for an order granting leave to sue in a representative capacity. That application will need to be accompanied by an affidavit in support, and it will need to be filed with the statement of claim unless the court otherwise orders.
15. An application for a representation order may include applications for ancillary orders or directions concerning the proceeding. Such orders include orders or directions concerning steps the plaintiff must take in order to identify persons who are members of the class to be represented, and also the steps those persons must take in order to opt-in to the proceeding.
16. The affidavit filed in support will need to include the following information:
 - a. the constitution of the class on whose behalf the plaintiff seeks to bring the proceeding, including any subclass the plaintiff is aware of;
 - b. an outline of the class claims, issues, and likely defences;

³ *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [14]; citing *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* [1990] 1 NZLR 442 (HC) at 446.

⁴ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [127].

⁵ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [170].

- c. the common issues of fact or law that are of significance for members of the class to have determined by the proceeding:
- d. the nature and extent of any litigation already begun, by or against members of the class, concerning the claims and issues:
- e. whether the plaintiff's claim is wholly or partly funded for reward by a person who is not a party to the proceeding and, if so, the identity of that funder:
- f. if the plaintiff has not identified all persons who are members of the class, the plaintiff's proposals concerning the procedures to be followed—
 - (i) in order to notify members of the class of the proceeding; and
 - (ii) in order for members of the class to elect to opt-in to the proceeding.

17. The Committee invites submissions.

Return of Submissions

18. Submissions or comments on the proposed rules should be directed to Daniel McGivern, the Clerk to the Rules Committee, by **16 November 2018** by post to:

Daniel McGivern
Clerk to the Rules Committee
Auckland High Court
PO Box 60
Auckland 1010

Or by emailing the submissions to: Daniel.McGivern@justice.govt.nz

19. Submissions that are received may be posted on the Rules Committee website.

The Rules Committee would like to take the opportunity to remind members of the profession that feedback from the profession is a valuable way of ensuring that the rules are working well. If you have any concerns about a particular rule or its application, please raise this with the Committee by emailing RulesCommittee@courts.govt.nz

DRAFT FOR CONSULTATION

High Court Rules 2016 (Representative Proceedings) Amendment Rules 2018

Governor-General

Order in Council

At Wellington this day of 2018

Present:
in Council

These rules are made under section 148 of the Senior Courts Act 2016—

- (a) on the advice and with the consent of the Executive Council; and
- (b) with the concurrence of the Right Honourable Chief Justice and at least 2 other members of the Rules Committee continued under section 155 of the Senior Courts Act 2016 (of whom at least 1 was a Judge of the High Court).

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Rules

1 Title

These rules are the High Court Rules 2016 (Representative Proceedings) Amendment Rules 2018.

2 Commencement

These rules come into force on *date*.

3 Principal rules

These rules amend the High Court Rules 2016 (the **principal rules**).

4 Rule 4.1 amended (Limit on parties)

In rule 4.1, insert as subclause (2):

- (2) Clause (1) is subject to rules 4.65 to 4.74.

5 Rule 4.24 amended (Persons having same interest)

In rule 4.24, insert as subclause (2):

- (2) *See* the rules in subpart 11 of this Part (Representative proceedings), which supplement this rule.

6 New subpart 11 of Part 4 inserted

After subpart 10 of Part 4, insert:

Subpart 11—Representative proceedings

4.65 Nature and application of rules in subpart

The rules in this subpart supplement rule 4.24 (Persons having same interest).

4.66 Representative proceedings to which subpart applies

The rules in this subpart apply if—

- (a) the persons comprising the class that the plaintiff proposes to represent are so numerous that, having regard to the nature of the claim, joinder of all members of the class would be impractical; and
- (b) the plaintiff does not have the consent of all those persons to bring the proceeding in a representative capacity.

4.67 Representative proceedings under subpart distinguished from other proceedings and procedures

Nothing in this subpart affects other provisions of these rules concerning the court's powers to deal with similar claims or common issues in a proceeding, including—

- (a) representative proceedings referred to under rule 4.27;
- (b) the joinder of 2 or more persons as plaintiffs;
- (c) the consolidation of proceedings that have been commenced as separate proceedings.

4.68 Certain other enactments not affected

If any of the provisions of this subpart are inconsistent with provisions of another enactment that provide for a person to bring a proceeding on behalf of a class of persons, the provisions of that other enactment prevail.

4.69 Commencing representative proceedings

A person who wishes to commence a representative proceeding must comply with the requirements in rules 5.25 (Proceeding commenced by filing statement of claim) and 5.35 (Representative capacity of party).

4.70 When representative proceedings are commenced

For the purposes of these rules, a representative proceeding is commenced by the following persons at the time the statement of claim is filed:

- (a) the person named in the statement of claim as the plaintiff suing in a representative capacity; and
- (b) all named and unnamed persons ultimately determined to comprise the class represented at the time the statement of claim is filed.

4.71 Application for representation order

- (1) The person named in the statement of claim as the plaintiff suing in a representative capacity must file an application for an order granting leave for the plaintiff to sue in that capacity (a **representation order**) and an affidavit in support.
- (2) An application for a representation order may include applications for ancillary orders or directions concerning the proceeding, including—

- (a) orders or directions concerning steps that the plaintiff must take in order to identify persons who are members of the class that the plaintiff seeks to represent; and
 - (b) the steps that those persons must take in order to opt-in to the proceeding.
- (3) The application for a representation order must be filed with the statement of claim, unless the court otherwise orders.

4.72 Affidavit in support of application for representative order

The affidavit in support of an application for a representation order must include the following information:

- (a) the constitution of the class on whose behalf the plaintiff seeks to bring the proceeding, including any subclass that the plaintiff is aware of;
- (b) an outline of the class claims, issues, and likely defences;
- (c) the common issues of fact or law that are of significance for members of the class to have determined by the proceeding;
- (d) the nature and extent of any litigation already begun, by or against members of the class, concerning the claims and issues;
- (e) whether the plaintiff's claim is wholly or partly funded for reward by a person who is not a party to the proceeding and, if so, the identity of that funder;
- (f) if the plaintiff has not identified all persons who are members of the class, the plaintiff's proposals concerning the procedures to be followed—
 - (i) in order to notify members of the class of the proceeding; and
 - (ii) in order for members of the class to elect to opt-in to the proceeding.

4.73 Date from which application order applies

A representation order applies from the date that the statement of claim is filed, regardless of whether the court makes the order on or after that date.

4.74 Principles applying to determination of applications under subpart

The principles applying to determinations of applications under this subpart include the following:

- (a) members of the class to be represented must have a common interest in the determination of some substantial issue of law or fact in the proceeding;
- (b) members of the class to be represented may have a common interest within the meaning of paragraph (a) despite the fact that determining all the issues in the proceeding as they relate to different parties may in-

involve the Court making orders or giving directions in respect of different parties (for example, in proceedings for damages brought on a representative basis, questions of relief or other matters may require a staged hearing or modification of the terms of representation and for those purposes the Court may make orders for severance or joinder of parties):

- (c) the use of a representative form of proceeding does not—
 - (i) confer a right of action on a person who could not have asserted such a right in a separate proceeding; or
 - (ii) bar a defence that might have been available to the defendant in such a separate proceeding;
- (d) it must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.

Clerk of the Executive Council.

Explanatory note

This note is not part of the order, but is intended to indicate its general effect.

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*:

This order is administered by the .