

THE CLASS ACTIONS
LAW REVIEW

SECOND EDITION

Editor
Richard Swallow

THE LAWREVIEWS

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PREFACE

Class actions and major group litigation can be a seismic event not only for large commercial entities but for whole industries. Their reach and impact mean they are one of the few types of claim that have become truly global in both importance and scope as reflected in this second edition.

There are also a whole host of factors currently coalescing around the litigation space that increase the likelihood and magnitude of such actions, where very significant sums are now routinely at stake. These factors include the recent political change in Europe and North America, which has begun to impact the regulatory sphere, as for the first time in decades, there is a shift towards protectionism and greater regulatory oversight. Advances in technology not only change our understanding of the world but also result in new and ever more stringent standards, offering the potential for significant liability for those who fail to adhere to such protections. Finally, ever-growing consumer markets of greater sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more sophisticated and active in promoting and pursuing such claims, and local laws are being updated so as to facilitate such actions before the courts.

Despite this, or perhaps because this is an area that, although much anticipated, has only relatively recently been recognised as a real and present threat, little attempt has been made to provide a comprehensive study of the class actions sphere. As with the first edition of this review, this updated publication aims to provide practitioners and clients with a single overview handbook to which they can turn for the key procedures, developments and factors in play in a number of the world's most important jurisdictions.

Richard Swallow
Slaughter and May
London
April 2018

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HONG KONG

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I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

While Hong Kong's common law legal system is well established, highly regarded and operates independently from mainland China and Chinese law, its class actions framework remains rather rudimentary in comparison. Unlike a number of other jurisdictions with similarly advanced legal systems, Hong Kong currently does not have specific laws governing class actions or a set of procedures providing for separate forms of class action litigation. The Hong Kong procedures are modelled on the former English representative proceedings applicable in England prior to the enactment of the Civil Procedure (Amendment) Rules 2000.²

Multiparty proceedings in Hong Kong are governed by Order 15, Rule 12 of the Rules of the High Court (RHC), which 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.*³

Order 15, Rule 12 of the RHC also provides that the court may appoint a defendant as the representative defendant.⁴ The court's judgment would then be binding on all those persons represented by the representative plaintiff and/or representative defendant, as the case may be. There are equivalent provisions for representative actions in the District Court, which has jurisdiction for matters exceeding HK\$50,000 but below HK\$1 million.⁵ There is also a provision for appointing a representative plaintiff in the Small Claims Tribunal, which has jurisdiction for matters not exceeding HK\$50,000.⁶

Institutional support for amending the current class actions regime started to gain traction with the release of the Final Report by the Chief Justice's Working Party on Civil Justice Reform (the CJR Report) in March 2004. The CJR Report called for Hong Kong to adopt a dedicated scheme for multiparty litigation. This resulted in the Law Reform Commission of Hong Kong (LRC) taking up the topic for consideration. In May 2012,

¹ Mark Hughes is a partner and Kevin Warburton is a senior associate at Slaughter and May, Hong Kong.

² The multiparty proceedings approach has since been superseded in England by Section III of Part 19 of the Civil Procedure Rules.

³ Order 15, Rule 12(1), Rules of the High Court (Cap. 4A).

⁴ Order 15, Rule 12(2), Rules of the High Court (Cap. 4A).

⁵ Order 15, Rule 12, The Rules of the District Court (Cap. 336H).

⁶ Section 21, Small Claims Tribunal Ordinance (Cap. 338). The Small Claims Tribunal does not permit legal representation in hearings before it.

the LRC released its Report on Class Actions (the LRC Report) in which it considered the multiparty litigation models adopted by various jurisdictions, including Australia, Canada, England and Wales, and the United States. The LRC recommended that Hong Kong introduce a multiparty litigation model that used an ‘opt-out’ approach. In other words, once the court certifies a case is suitable for a class action suit, the members of the class would be automatically bound by the outcome, save and except for those actions involving a foreign plaintiff, in which case an ‘opt-in’ approach should be used instead.

Further, the LRC also proposed phasing the implementation of class action mechanism by starting first with consumer cases – with funding made available through a Consumer Legal Action Fund (the Fund) managed by the Hong Kong Consumer Council for class action proceedings arising from consumer claims. In this regard, the Fund is intended to give greater consumer access to legal remedies by providing financial support and legal assistance.

However, the Hong Kong Department of Justice (DOJ) is still in the process of exploring the LRC’s recommendations on class action suits. At the time of publication, no legislative bill has been drafted for submission to the Hong Kong Legislative Council for debate and consideration.

II THE YEAR IN REVIEW

As mentioned above, the implementation of a class action regime in Hong Kong has stalled of late. In May 2012, the DOJ set up a cross-sector working group chaired by the Solicitor General (and an associated subcommittee) to study the LRC’s class action proposals and to make recommendations to the Hong Kong government. To date, the working group has held over 20 meetings but has yet to give its recommendation.

Recent events in Hong Kong have highlighted the need for Hong Kong to have a more developed legal mechanism for class actions. For example, following discovery in 2015 that drinking water in certain public housing estates was contaminated by heavy metals, a member of Hong Kong’s Legislative Council wrote to the local media to suggest that a class action model would have been the most effective procedure for resolving claims from numerous affected occupants against the Housing Authority and responsible contractors.⁷

The introduction of a class action regime has also been linked to Hong Kong’s recent push to safeguard against anticompetitive practices. They were seen as positive developments aimed at promoting a fairer economy.⁸ While the Competition Ordinance has been in effect since late December 2015, the class action reform proposal continues to stall at the consultation stage. It remains a missed opportunity that the two complementary mechanisms are still not able to operate in tandem so as to allow victims of anticompetitive practices collective redress through a class action procedure.

There were no significant developments in 2017 for reforming Hong Kong’s class action regime.

⁷ Dennis Kwok, ‘Lead-in-water crisis highlights the need for class-action suits’, *Hong Kong Economic Journal* (25 July 2015), available at: www.ejinsight.com/20150725-lead-water-crisis-highlights-need-class-action-suits/.

⁸ David Webb, ‘Why HK should back competition law and class actions’, *International Financial Law Review* (28 February 2012) available at: www.iflr.com/Article/2986290/David-Webb-Why-HK-should-back-competition-law-and-class.html.

III PROCEDURE

i Types of action available

Representative plaintiff

For proceedings involving a representative plaintiff, RHC Order 15, Rule 12 provides that where numerous persons have the ‘same interest’, they may commence proceedings by nominating a representative plaintiff to represent all of them. The only exceptions are proceedings involving: (1) the estate of a deceased person; (2) property subject to a trust; and (3) construction of a written instrument including legislation, each of which is excluded from the representative proceedings regime.

The crucial element in considering whether RHC Order 15, Rule 12 has been satisfied is whether the representative plaintiff has the ‘same interest’ as the other plaintiffs. The Hong Kong courts have identified a ‘three-fold test’ to assess whether the ‘same interest’ threshold is met: (1) common interest; (2) common grievance; and (3) seeking a remedy that is beneficial to all.⁹

The ‘common interest’ element was traditionally extremely difficult to satisfy. The representative plaintiff originally had to establish that: (1) the same contract applied between all members of the represented class and the defendant; (2) the defendant would rely on the same defences against all members of the class; and (3) the same relief was being claimed by all the class members.¹⁰ If, for example, the defendant could show that he or she had a separate defence against even one of the members, then the ‘common interest’ part of the test would not be satisfied.¹¹ Further, the requirement that the same relief shall be claimed by each plaintiff meant that in practice, equitable relief (and not damages, which would more than likely be different for each plaintiff) was the only relief that could effectively be granted in representative proceedings.¹²

The courts have since moved to relax the strict interpretation with the aim of making representative actions ‘not a rigid matter of principle but a flexible tool of convenience to facilitate the administration of justice’.¹³

Instead of requiring a ‘common interest’, it is now sufficient that there is a ‘common ingredient’ or some ‘common element’ in the causes of action of the represented class members.¹⁴ If the representative plaintiff succeeds in his or her claim, then the defendant would be barred from challenging those common ingredients or elements on the principle of *res judicata*. The other class members would only need to establish the other elements in their own separate proceedings.¹⁵ The ‘same contract’ requirement is also no longer a prerequisite to commencing representative proceedings.¹⁶ The impediment of a defendant raising separate defences against different class members is also no longer a bar to bringing representative proceedings.¹⁷

⁹ *CBS / Sony Hong Kong Ltd v. Television Broadcasts Ltd* [1987] HKLR 306.

¹⁰ *Markt & Co. Ltd. v. Knight Steamship Co. Ltd* [1910] 2 KB 1021 (CA) at 1040–1045.

¹¹ *Ibid.*, at 1039–1040.

¹² *Prudential Assurance Co Ltd v. Newman Industries Ltd* [1981] Ch 229, at 244, 255.

¹³ *John v. Rees and Others* [1970] Ch 345.

¹⁴ *Prudential Assurance Co Ltd v. Newman Industries Ltd* [1981] Ch 229, at 252, 255.

¹⁵ *Ibid.*, at 255.

¹⁶ *Irish Shipping Ltd v. Commercial Union Assurance Co plc (The Irish Rowan)* [1991] 2 QB 206 (CA).

¹⁷ *Independiente Ltd v. Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch).

If a representative plaintiff discontinues his or her individual claim for any reason, the court may add or substitute him or her with any person in the represented class. To avoid the claim being time-barred if the addition or substitution occurs after the limitation period for the relevant claim has expired, the new plaintiff is treated as being the representative plaintiff at the date of the original writ.¹⁸

Representative defendant

The 'same interest' requirement also applies to the appointment of a representative defendant. Therefore, the legal principles discussed above for representative plaintiffs are equally applicable to representative defendants. However, where separate defences exist for some but not all members, the same interest requirement will not be met.¹⁹

The appointment of the representative defendant may only be made by the court on the application of the plaintiffs (discussed in greater detail below).

ii Commencing proceedings

Representative plaintiff

The individual (or individuals) claiming to represent others with the same interest should commence proceedings as the representative plaintiff or plaintiffs. The representative plaintiff is not required to seek leave of the court or an order of the court to act as the representative plaintiff. He or she may also act as the representative plaintiff on his or her own volition without first seeking the consent of those he or she purports to represent.²⁰ The representative plaintiff's writ must clearly and precisely define the 'class' being represented.²¹ The court must also be satisfied that the 'same interest' test has been met. The court will continually review whether the 'same interest' test is met as the case develops and may order the representative proceedings be dismissed if it is not.²²

A representative plaintiff action is suitable if there is a large number of plaintiffs with the same interest. If there are only a few members in the defined class, then, in the absence of any other acceptable justification, the court may order that all members be added as plaintiffs to the action instead.²³ There is no set number required, but a class that consists of five or fewer members is unlikely to suffice.²⁴

If a person who falls within the member class is to be excluded, that fact has to be included in the description of the class and the excluded persons must be made parties in their personal capacity. It is not possible to state in the writ that the representative plaintiff acts for some of the members of the class without specifying who those members are.²⁵

¹⁸ *Moon v. Atherton* [1972] 2 Q.B. 435, CA.

¹⁹ *London Association for Protection of Trade v. Greenlands Ltd* [1916] 2 A.C. 15.

²⁰ *Sung Sheung-hong v. Leung Wong Soo-ching* [1965] HKLR 602.

²¹ *Re Pentecostal Mission, Hong Kong and Kowloon* [1962] HKLR 171.

²² *Hong Kong Kam Lan Koon Ltd v. Realray Investments Ltd (No. 2)* [2005] 1 HKC 565.

²³ *Malayan Banking Berhad v. China Insurance Co Ltd.* [2003] HKEC 708.

²⁴ *Re Braybrook* [1916] WN 74.

²⁵ *Re Pentecostal Mission, Hong Kong and Kowloon* [1962] HKLR 171.

Representative defendant

An application for the appointment of a representative defendant can be made by the plaintiffs at any stage of the court proceedings. The application must be made by a writ of summons and the representative capacity of the defendant should be endorsed on the writ.²⁶ The representative application would usually be heard before a master, as opposed to a judge.

Similar to the criteria for representative plaintiffs, the court will consider whether there are sufficiently numerous defendants with the same interest such that it is appropriate to make the representative order.

The court retains the ultimate discretion in selecting the representative and will make a representation order to those it considers most proper, even if it is inconsistent with the choice made by the plaintiffs and defendants.²⁷ The court has the power to compel a defendant to be the representative defendant if it determines that defendant is the most suitable candidate, irrespective of whether that defendant wishes to be the representative defendant.²⁸

iii Defining the ‘class’

The potential plaintiffs must satisfy the court that their choice of candidate for representative plaintiff or representative defendant has sufficient interests in common with the class of individuals the potential plaintiffs contend the representative plaintiff or representative defendant represents. It is possible, in principle, for overseas plaintiffs to be included provided that they share the same interest as the representative plaintiff.

iv Binding effect on the ‘class’

A judgment or order given in a representative proceeding will be binding on all members represented by the representative plaintiff or representative defendant.²⁹ This also applies to judgments in default as well as judgments delivered after trial. However, an individual bound by the judgment in default could apply to be added to the action and then apply for the judgment in default to be set aside. In contrast, a judgment properly rendered at trial can only be challenged by the represented member on appeal.

The binding nature of the representative proceedings together with the lack of consent required from class members before a representative plaintiff commences proceedings mean that it will fall upon the individual members to opt-out by ensuring they are specifically excluded from the representative action when the writ is served.

v Procedural rules

Enforcement

Leave of the court is required to enforce a judgment against an individual who is not a party to the proceedings but who is a member being represented. The application for leave will be made by way of summons before a master and must be served personally on the individual against whom the judgment is to be enforced.³⁰

²⁶ Order 6, Rule 3(b), Rules of the High Court (Cap. 4A).

²⁷ *Walker v. Sur* [1914] 2 KB 930.

²⁸ *Baynard Ltd v. Secretary for Justice* [2011] 1 HKLRD C3 English Judgment.

²⁹ Order 15, Rule 12(3), Rules of the High Court (Cap. 4A).

³⁰ Order 15, Rule 12(4), Rules of the High Court (Cap. 4A).

The individual member cannot challenge the validity or binding nature of the judgment. Nor can he or she put forward any defence that could have been (but was not) raised in the proceedings. He or she can only challenge enforceability on the ground that the facts and matters in his or her particular case meant he or she, in fact, fell outside the definition of the class being represented and therefore the judgment should not be binding on him or her.

Size of the class

The size of the class should be determined at the outset by the plaintiffs' use of a clear definition of the 'class' being represented. The definition will be put forward when serving the writ through the representative plaintiff, or when making the representative application for appointment of a representative defendant. The court's concern generally is whether the represented class is large enough such that it is appropriate to make use of the representative proceedings mechanism. As discussed earlier, a class consisting of five or fewer members is likely too small. If the class is too small, the definition is not clearly defined or the court otherwise concludes that the representative method is wholly inappropriate in the circumstances, then the court may order that the proceedings be dismissed.

Speed of the litigation

The speed of the litigation for the representative proceedings will vary depending on the usual factors, such as the cause of action, the issues, the facts and the court diary. One of the principal aims of representative proceedings is to save time and resources by having the representative action be binding on all represented members such that, once that judgment is obtained, represented members are estopped from re-litigating common elements in their own proceedings.

Liability and quantum

As discussed above, in the past it was not possible to bring a representative action for damages. Those actions were instead confined to seeking equitable relief. The recent trend has been for the courts to relax this rigid approach, with the effect that the losing party to a representative proceeding is estopped from challenging the common elements for establishing liability (or lack thereof) in subsequent proceedings. The winning side need only establish the remaining elements (if any) in subsequent proceedings. The quantum for each class member, except the representative party, will also be determined in the subsequent separate proceedings. While that may save time in the overall process, the substantive hearing itself is likely to take as long as other litigation and, perhaps, even longer in the event there are disputes about the definition of the class or identity of the representative parties.

Damages and costs

In civil claims, the damages to be awarded will be determined by the presiding judge (save in defamation cases that are tried by jury, where the jury also determines the level of damages). Ordinary principles for assessment of damages will apply with the aim of compensating the plaintiff for loss suffered or putting him or her back in the same position as he or she would have been had the defendant not committed the wrong. In special cases, for example where the defendant's profits exceed the loss suffered or where there is a strong need for deterrence, the court may disgorge the defendant's profits or impose punitive damages.

Hong Kong still maintains the common law offences of champerty and maintenance. This position has been reaffirmed by the highest court in Hong Kong, the Court of Final Appeal.³¹ Therefore, success fee arrangements for recovery of costs, such as conditional or contingency fees, are not permitted except under three limited exceptions, namely where: (1) a person may have a legitimate common interest in the outcome of the litigation to sufficiently justify him supporting the litigation; (2) it is in the interests of promoting access to justice to fund a plaintiff who would otherwise be unable to pursue litigation owing to a lack of funds; and (3) funding is provided to a liquidator to pursue litigation that may improve the return to creditors.³² Hence, litigants funded by the Ordinary Legal Aid Scheme or the Supplementary Legal Aid Scheme, aimed at ensuring those without the means still have access to justice, are required to make a contribution out of their recovered proceeds back into the scheme fund.

The LRC Report has recommended that a general class actions fund, similar to the Supplementary Legal Aid Scheme fund, be set up to provide financial support to means-tested eligible class action plaintiffs, who must in turn contribute part of their recovered proceeds back into the fund.

Settlement

The representative plaintiff is the individual who has a real interest in the outcome of a case and, prior to the rendering of the court's judgment, may choose to settle and discontinue his or her action. In such an event, the rights of the represented members are not extinguished and they may commence proceedings in their own name. The court can also add or substitute an unnamed member of the class as the plaintiff of the action, who will be treated as being brought in at the date of the original writ.

IV CROSS-BORDER ISSUES

Despite attempts to make representative proceedings more flexible, there are very few instances of the mechanism being used in practice. In principle, an overseas plaintiff should not be treated differently to a local plaintiff falling within the same member class in a representative proceeding. However, the usual practice in respect of overseas plaintiffs is for them to pursue their case separately in their own name as opposed to relying on a representative plaintiff. It is also the usual practice for overseas plaintiffs to separately name and join each defendant to an action unless it is in their strategic interest, due to the large number of defendants, to apply to court for a representative defendant to be appointed.

V OUTLOOK AND CONCLUSIONS

Hong Kong's representative proceedings system remains an underutilised mechanism for plaintiffs pursuing class-action-type claims. As the Chief Justice's Working Party on Civil Justice Reform Interim Report and Consultative Paper note, there are still many 'self-evident' limitations under the existing system. First, the current system is still comparatively restrictive when it comes to defining 'same interest'. Second, even if a judgment is rendered

³¹ *Unruh v. Seeberger* [2007] 2 HKLRD 414.

³² *Ibid.* See also *Re Cyberworks Audio Video Technology Limited* [2010] 2 HKLRD 1137.

in a representative proceeding, there is still a lack of finality given that class members who are in principle bound by the decision can still plead that the facts and matters of their own case mean they should fall outside of the represented class. Finally, the existing provisions may not be able to cope with the special problems that arise in the context of a multiparty litigation.³³

As the LRC Report observes, very few Hong Kong cases have made use of representative proceedings. The LRC attributes this to the fact that despite initiatives to reform the system, judicial actions have been piecemeal at best and many hurdles still exist in order to bring about a representative proceeding, which dissuades plaintiffs from choosing this route.

The LRC's recommendations represent a positive step forward in the effort to reform the current class action regime in Hong Kong. However, the pace of reform is far from quick and Hong Kong is still some way off benefiting from a class actions regime that adequately addresses the needs of large-scale, cross-border multiparty litigation. The Panel on the Administration of Justice and Legal Services of the Legislative Council will review the work progress of introducing the class action regime within the 2017–2018 legislative session. It is, therefore, hoped that the working group and subcommittee will be able to make recommendations in light of the LRC's class action proposals in the near future and the DOJ will map out the process of drafting legislation to reform and update Hong Kong's class action regime.

³³ Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform Interim Report and Consultative Paper* (2001) at pp. 148–149.

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