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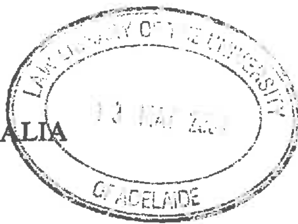
SOUTH AUSTRALIA



THIRTY-SIXTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO CLASS ACTIONS

1977

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE JACOBS, *Deputy Chairman.*

THE HONOURABLE MR. JUSTICE KING, *Deputy Chairman.*

THE HONOURABLE MR. ACTING JUSTICE WHITE.

B. R. COX, Q.C., S.G.

D. W. BOLLEN, Q.C.

J. F. KEELER.

K. T. GRIFFIN.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Adelaide, South Australia 5000.

THIRTY-SIXTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO CLASS ACTIONS

To:

The Honourable P. Duncan, M.P.,
Attorney-General for South Australia.

Sir,

Your predecessor referred to us the question of the introduction of class actions in this State as a means by which ordinary citizens could vindicate legal rights for themselves and for all others who have suffered loss from the like cause.

We have considered the question submitted to us and now advise as follows:—

The present position with regard to representative actions in this State is governed by Order 16 Rules 1, 4, 5, 9 and 11 of the Rules of Court. They read as follows:

> "1. All persons may be joined in one action, as plaintiffs, in whom any right to relief, in respect of or arising out of the same transaction or series of transactions, is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise: Provided that, if, upon the application of any defendant, it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a Judge may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief for such relief as he or they may be entitled to without any amendment.
>
> But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a Judge, in disposing of the costs, shall otherwise direct.
>
> 4. All persons may be joined in one action as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given against such one or more of the defendants as may be found liable according to their respective liabilities, without any amendment.
>
> 5. It shall not be necessary that every defendant shall be interested as to all the relief prayed for or as to every cause of action included in any proceeding against him; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.
>
> 9. Where seven or more persons have the same interest in the subject matter of a cause or matter, one or more of such persons may sue, or the Court or a Judge may authorise one or more of such persons to be sued or may direct that one or more of such persons shall defend, in such cause or matter, on behalf or for the benefit of all persons so interested.
>
> 11. (1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every

cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

(2) The Court or a Judge may, at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.

(3) No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto.

(4) Every party whose name is so added as defendant shall be served with the amended originating proceeding, or with notice in lieu of service as the case may be, in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on such service being effected."

In the ordinary course of litigation between parties prior to the introduction of such major issues of the present day as consumer protection, protection of the environment, ecological questions and questions which raise real but small losses on the part of large numbers of people which if not remedied would provide a large and wholly unjustified profit to the wrongdoer, these rules have in general worked well. They have their own problems and these are discussed in *Bullen and Leake*: *Precedents of Pleadings* 11th Edition pages 15-26 and in *Williams*: *Supreme Court Practice of Victoria* in his notes under Order 16 substituted for pages 209-247 of the original Volume 1. It is quite often difficult to know where the line should be drawn in relation to representative actions particularly under Order 16 Rule 9 and some rather fine lines of distinction exist in this area: see for example on the one side *Smith v. The Cardiff Corporation* 1954 1 *Q.B.* 210 and on the other side the judgment of Bray C.J. in *Gaetjens v. Arndale (Kilkenny) Pty. Ltd.* 1969 *S.A.S.R.* 470 *at* 483.

It is probable also, although the jurisdiction seems to have fallen into desuetude, that the Supreme Court of this State has the jurisdiction in Chancery relating to bills of peace which was in existence on the 28th day of December 1836, the date of the foundation of the then Province, now State of South Australia, by reason of the provisions of the Imperial Statute 4 & 5 Will. IV c. 95 s. 2—the Government of South Australia Act 1834—and the Ordinance Number 5 of 1837 constituting the Supreme Court of this State which endowed the Court with, amongst other things, the jurisdiction of the old Court of Chancery which jurisdiction has been continued in the successive Supreme Court Acts down to the present Act of 1935.

Bills of peace are dealt with in detail in Z. Chafee's book "Some Problems of Equity" Chapter V and in an article published by him in 45 *Harvard Law Review* 1297. Bills of peace could be brought in Chancery either in relation to common law causes of action or causes of action in equity. One of the earliest cases referred to by Chafee is *How v. The Tenants of Bromsgrove* (1681) 1 *Vernon* 22, where the lord of the manor filed a bill to ascertain first whether he had a grant of free warren

and secondly whether if so, sufficient common was left for the tenants. Lord Nottingham, L.C., observed that these issues would ordinarily be triable at common law, but accepted that Chancery had jurisdiction because the bill was brought to prevent multiplicity of suits. Similar actions were permitted in quite a number of similar situations, for example where a Vicar went to law with his parishioners about tithes: see *Brown v. Vermuden* (1676) 1 *Ch. Cas* 272. Chafee says at page 200 of his book that class suits began as an offshoot of bills of peace with multiple parties, so that the equitable bills of peace jurisdiction is the foundation of the wider class suit jurisdiction as it now exists in the United States of America.

The fact is that class actions of a restricted kind have been known to our law for many years because they have had to be invented as *ad hoc* expedients to deal with the lacunae in the present law. For example the present rules of Court recognise and regulate the wider type of class action which is necessary in relation to testamentary suits and testator's family maintenance applications where in many cases the beneficiaries are unascertained at the time of the bringing of the action or are numerous in number or in classes. So, too, the rise of the modern limited company and the oppression of minority by a majority shareholders brought into existence another type of class action. If the rule in *Foss v. Harbottle* (1843) 2 *Hare* 461 were carried to its full extent, there would be no relief for minority shareholders because the majority could always pass a resolution ratifying the acts of the company. The law does not permit them to do this where the acts complained of are fraudulent, oppressive or ultra vires and so class actions by minority shareholders were evolved: see *Smith on the Doctrine of Ultra Vires* pages 346-375. Some of the issues of policy underlying this part of the law are explored in the judgment of the Court of Appeal in *Wallersteiner v. Moir* (*No.* 2) 1975 1 *All E. R.* 849 especially in the dissenting judgment of Lord Denning, M.R.

Then, too, the use of declaratory actions has widened to a certain extent the ability of those who seek to take action as a class. The history of the development of this remedy is set out in the late *S.A. De Smith's "Judicial Review of Administrative Law" 3rd Edition* pages 384 and following. This remedy has been widened in its limits in the recent past but there are still difficulties in ascertaining the limits of the jurisdiction. Certain limits seem to be quite definitely set by the law. Thus, for example, if the fee simple of land is involved then the owner in fee simple must be a party to the declaratory action: see the judgment of Bray C.J. in *Ardennes Investment Company Proprietary Limited v. Feldman* (unreported) (delivered 12th November 1970) at page 6 of His Honour's judgment. Other limitations are much more difficult to spell out and neither the textbooks nor the cases speak with one mind on the subject. As De Smith says in another book of his: *"Constitutional and Administrative Law"* at page 585:—

> "The plaintiff must assert a personal right or interest of which the law takes cognizance and there must be a genuine existing legal controversy which the Courts have jurisdiction to resolve. The declaration is also a discretionary remedy; thus, the Courts may refuse a declaration if its award would serve no useful purpose or if there are more appropriate alternative remedies."

This quotation illustrates well the elements of policy and of discretion which render it difficult to predict exactly where the Court will draw the line in this matter.

Somewhat different tests in relation to jurisdiction to make declaratory orders are suggested in *Young on Declaratory Orders* Chapter 5 and *Garner*: *Administrative Law 4th Edition* pages 188 and following and in an article by the same author in 31 *M.L.R.* 512.

The class action assumes importance in any search for more effective means by which the ordinary citizen can assert and enforce his legal rights particularly with regard to this transactions as a consumer and to the protection of the environment in which he lives. The same wrongful act, or default, may affect the rights of many people. Each person may suffer loss or detriment which is important to him but which would not justify, on economic grounds, individual resort to the Courts. If action can be taken by one or more persons representing the class there may be an effective method by which the legal remedy for the wrong can be enforced. This representative procedure is not available under the present rule in most consumer and environmental cases. Our present Order 16 Rule 9 requires that the members of the class "have the same interest in the subject matter of a cause or matter". The rule therefore does not cover cases in which the claims of members of the class are based upon separate contracts or in which they have individual claims for damages. The present cost rules moreover present an insurmountable problem to the maintenance of a class action in the typical consumer or environmental case. No individual member of the class is likely to have a sufficient financial interest in the outcome to justify either the expenditure of the substantial costs likely to be involved in an action of that type or the incurring of the liability to pay the other party's costs in the event of failure. If the representative or class action is to be effective as a weapon in the hands of citizens whose rights have been infringed, a reformulation of the rules of law governing such actions is necessary.

The experience of the class action as it presently exists in the United States of America and particularly in the Federal jurisdiction of that country, is instructive. The Federal rules of civil procedure have been recast three times in the past thirty years in order to facilitate this type of action, and many States have made special provision for class actions in their own Courts. Until the recent curtailment of the operation of class actions by reason of the case of *Eisen v. U.S.* the United States experience could be summarised in the words of Pomerantz: *New Developments in Class Actions—Has their deathknell been sounded* (1970) 25 *Bus. Law* 1259:—

> "The class action is mushrooming throughout the Courts of our land. It has become one of the most socially useful remedies in history. Millions of victims of securities frauds, anti-trust violations and an endless variety of consumer wrongs are, thanks to the class action device, now able to gain access to our Courts. The Court dockets show that they are availing themselves of this opportunity in large and ever increasing numbers."

We recognise that there are features of the American legal system which facilitate class actions and which are not present in South Australia. The most important of such features is the American practice as to costs. Generally speaking, there are no party and party costs and the plaintiff's lawyers are remunerated by means of a contingency fee. This means that the representative plaintiff, if successful, pays his lawyers a previously agreed percentage of the fruits of the litigation and, if unsuccessful, is not liable to pay the defendant's costs. Nevertheless, we are of opinion that a class action procedure can be devised which harmonises with the basic legal system operating in this State and which will prove effective.

We recommend legislation to facilitate class actions. We do not think that the United States Federal Rule 23 is appropriate for our use in South Australia where we have neither the same federal diversity jurisdiction nor the contingency fee system. In our consideration of the forms which the proposed legislation should take, we have been guided rather by Canadian discussion of the question and in particular by the report entitled "Consumer Class Actions in Canada" prepared for the Consumers Association of Canada by Professor Neil J. Williams, Professor of Law, Osgoode Hall Law School, York University, Toronto, Ontario, and Professor Williams' subsequent report entitled "A Proposal for Class Actions under Competition Policy legislation". The draft bill which appears as an appendix to our report owes a great deal to the drafts contained in Professor Williams' reports. Professor Williams' report and draft bill deal only with consumer actions. We are of opinion that class actions should not be so restricted but that they should be available also in environmental and ecological litigation and indeed generally in all cases in which members of the class would have locus standi if they sued individually.

Our proposals for class action legislation are contained in the draft bill appended hereto. The bill seeks to remove the present obstacles to class actions in the typical consumer and environmental cases. The common interest provision of the present rule is widened in a manner which would permit class actions to be brought, notwithstanding that the remedies of the members of the class arise out of separate contracts and notwithstanding that they consist of individual claims for damages. If the common interest requirement is satisfied, the plaintiff may apply to the Court for an order that the action be maintained as a class action. At this stage it is envisaged that a Judge will consider the cause of action and the evidence proposed to be adduced in support of it in a summary way in order to determine whether it is suitable to proceed as a class action and whether "the action is brought in good faith and appears to have merit". The Judge at this stage will also consider and approve any special scheme as to costs. An important function of the Judge at this preliminary stage is to determine what notice is to be given to members of the class on whose behalf the action is brought. The problem of notice has bedevilled the class action in the United States due to the due process provisions of the United States Constitution. In *Eisen v. U.S.* 417 *United States Reports* 156, the Supreme Court of the United States has now laid down requirements as to notice, which are so stringent that they seem likely for the future to cripple class actions in that country in the majority of cases. That Court is bound by provisions in their Constitution which have no analogue in ours and we have thought it best to leave the question of notice to the discretion of the Judge who makes the order enabling the action to proceed as a class action. The central feature of a class action is that the judgment enures for the benefit of the members of the class and binds them. There is a provision for a member of the class to exclude himself from the class thereby depriving himself of the benefit of the class action but preserving his individual right of action. When the common questions have been determined, the individual members of a class must come in to establish the matters which are peculiar to them, including, of course, the quantum of the individual claim.

The cost provisions are radical and have been the subject of careful consideration by the committee. We are convinced that they are necessary if class actions are to be an effective means of redress. A representative plaintiff suing on behalf of a class of persons who seek damages for breach of warranty by the vendor of a mass distributed article or

on behalf of nearby residents who sue for damages for nuisance arising out of air pollution emanating from a factory, cannot be expected to expose himself to the risk of costs being awarded against him if the action fails. Unless he is relieved of that risk, class actions in the areas which are of interest to the general public will be rare. Our proposal is that there be no power to award costs to a defendant to a class action where the order permitting the action to proceed as a class action has been obtained without perjury or fraud on the part of the representative plaintiff. The ordinary rule as to costs would apply where the plaintiff failed in his application for the order to proceed as a class action, and in relation to the determination of the claims of the individual class members after the common questions have been decided. We appreciate the potential in this recommendation for injustice to a defendant who defeats the class claim but nevertheless cannot recover his costs. It is palliated to some extent by the fact that the plaintiff must show *bona fides* and an appearance of merit to obtain the order to proceed and by the fact that the defendants to class actions will, almost without exception, be public authorities or large corporations which will not find the costs of litigation ruinous. Nevertheless, the potential for injustice is there and must be acknowledged. It must be balanced against the serious injustice now done to great numbers of people who suffer loss and have no effective remedy. If, as we believe, this latter injustice can only be prevented by relieving the representative plaintiff of the ordinary party and party costs liability, we think that the balance is in favour of taking that course. While this recommendation relieves the representative plaintiff of the risk of having to pay the defendant's costs if unsuccessful, it does not provide the means by which he can launch and prosecute the action on behalf of the class. The representative plaintiff cannot be expected to provide out of his own resources the funds to enable the action to proceed for the benefit of the members of the class. The solicitor retained by the representative plaintiff cannot look to members of the class who have not instructed him. A solicitor cannot be expected to finance the litigation on the basis that he will obtain his fees and out of pocket expenses if the action succeeds but will bear them himself if the action fails. As explained above, this problem does not exist, or does not exist to the same degree in the United States of America where the contingency fee basis of remuneration of lawyers is generally practised and approved. It seems to us that some special scheme for the remuneration of the plaintiff's solicitor (and counsel if retained) is required if class actions are to be a useful remedy for ordinary people. The circumstances in which class actions will be brought will be so variable that we think a considerable degree of flexibility is necessary and that the approval of an appropriate scheme must be left to the Judge who makes the order for the action to proceed as a class action. Our proposal in the draft bill envisages an unsuccessful defendant paying, in certain circumstances, sums by way of costs which exceed the normal party and party costs. We think that this is justified on the general considerations of public interest referred to above and also by the consideration that the class action enables a host of claims arising out of the defendant's wrongdoing to be determined in the one action. Our proposals also envisage that, subject to the approval of the Judge, the plaintiff's solicitor be paid, if the action is successful, on a basis in excess of the ordinary scale of costs, the excess being that "determined by the Court as fair and reasonable compensation to the solicitor for the risk of loss incurred by him in undertaking the conduct of the action". We recognise that this imports a contingency element into the solicitor's remuneration and that this is in conflict with the traditional approach to legal fees in this country. We acknowledge the

force of the considerations which have led to the rejection of the contingency fee system of remuneration in this country and have given anxious consideration to this proposal. We are satisfied, however, that it is necessary if solicitors are to be encouraged to undertake class action work without looking to the representative plaintiff for their fees. We are, moreover, satisfied that the limited scope of the contingency element and the supervision of the Court provide adequate safeguards against the evils seen to exist in a fully fledged contingency fee system.

Sometimes a class action in respect of a money claim will result in a judgment which directs that a fixed amount or a readily ascertainable amount be paid to each member of the successful class; sometimes the entitlement of each member will have to be assessed in further proceedings. Clause 9 of the Draft Bill provides the procedure for finalisation of individual claims where, after the determination of the common questions, it is necessary to determine further questions in order to establish the individual's right to recover or to assess the amount of his claim. Clause 10 provides the procedure for payment into Court by the defendant of the total amount due under the judgment where no further questions remain to be determined either as to the individual's right to recover or as to amount and where the total amount is fixed or readily ascertainable. It also provides the procedure for distributing the total amount to class members. Where some class members cannot be traced, a procedure for payment of the balance is set out. Where a defendant has wrongfully received from class members a considerable sum of money or has profited from illegally dealing in goods and that fact has been proved to the satisfaction of the Court, the whole amount wrongfully obtained ought to be repaid by the defendant even though relatively small amounts may sometimes be repayable to individual members. Further, it may be difficult to ascertain the names and addresses of all class members, some of whom, in the preceding years, might have changed their addresses or otherwise become difficult to trace. There is a strong body of opinion in the United States of America, Canada and Australia, that a defendant should not be able to take advantage of the inertia and dispersion of class members when the wrongful conduct and the total amount involved has been proved to the Court's satisfaction. The clause provides that the defendant should pay into Court the total amount wrongfully received or acquired, reserving an option to the defendant, in appropriate cases, to credit to any current accounts the appropriate refunds, unless the class member specifically requests cash instead of such credit. After crediting so much of the total amount as the defendant wishes, the defendant must then pay the balance of the total amount into Court with a verified statement of what has been so credited. The defendant is then free of further responsibility. Thereupon, the plaintiff must undertake the task of making reasonable efforts to find and to pay unpaid class members, having regard to the individual amounts involved and the cost of such efforts. While a majority of class members may be found readily, there may well remain a hard core of members who cannot be located. The question arises—where should this balance be paid? Should it be kept by the defendant, paid into Consolidated Revenue or applied to some appropriate fund related to class actions? There are precedents in the United States for applying such moneys to funds designed to confer some benefit on persons who have been or will be affected by the type of conduct in question.

In order that class actions might have some hope of succeeding, we have thought it necessary to depart from traditional costs orders by making special provision for costs against defendants and for a special

costs scheme in class actions. As stated above we believe that the importance of ensuring that persons who are at present effectively denied access to justice should cease to be so deprived justifies recourse to these methods, despite their recognised disadvantages. If the funds available for purposes of legal aid and assistance could be appropriately augmented it might be possible to obtain the very clear benefits that the Committee sees in the class action without these attendant disadvantages. Assuming that this would be difficult to achieve the Committee proposes that if the balance of unclaimed moneys is used to create a fund which may be used as the source of legal assistance for plaintiffs in class actions then hardship to defendants could be mitigated by offsetting the burden of excess costs or costs of successful defendants and recourse to the new provisions relating to costs abandoned. Once such a fund had accumulated a reasonable amount sufficient to meet anticipated demands thereon, later undistributed balances could be paid to Consolidated Revenue. The amount invested in the fund could be reviewed from time to time. Court control and audit of such funds should alleviate anxieties about abuses thereof.

It is suggested that the Attorney-General should be served with a copy of the application to dispose of any undistributed balance in Court. There is a public interest element therein which should not be left simply to the contending interests of the plaintiff and the defendant. The Court should be further assisted by the Attorney-General's intervention.

Notwithstanding our proposals designed to facilitate class actions, we fear that many wrongs which ought to be remedied by the class action will remain without a remedy unless the public authority intervenes on behalf of the wronged members of the public. The standing of the Attorney-General or other appropriate public official to sue as *parens patriae* in respect of damage caused to individual citizens has been the subject of debate in the United States. We think that there should be statutory provisions authorising the appropriate public official or officials to institute class actions and act as representative plaintiffs to remedy wrongs suffered by a class consisting of numerous members of the public in areas of particular public concern, certainly in the consumer and environmental areas. The nomination of the officials to be given this authority and responsibility is a matter for government decision and we have therefore not included any provision on this topic in our draft bill.

Class actions require some modification of the rules regarding limitation of actions. The ordinary limitation provisions must be made subject to the right of individual members of a class to establish their claims after the common questions have been determined, notwithstanding that the time for instituting proceedings has expired. Some provision must also be made for members of the class who may have delayed their remedy as the result of the class action but who are disappointed in that expectation, as where an order to proceed as a class action is refused or having been granted is subsequently rescinded. We have not included these provisions in our draft bill as the parliamentary counsel will doubtless wish to advise the government as to whether such provisions should be included in the Class Actions Bill or in the statutes relating to limitation of actions.

Hitherto, the provisions as to representative actions have been found in the Rules of Court. We are aware, of course, of the fact that in the United States the class action has been regarded, as we have already

said, as an offshoot of the equitable Bill of Peace and whilst it has been said that equity is never presumed to be beyond the age of childbearing, we think that in the instant case the parturition would be much better accomplished by legislative process. The difficulties inherent in the development of this area of law by case law and by Rules of Court are well shown by the fact that three sets of rules to govern class actions have been evolved in the United States Federal jurisdiction in thirty-five years and the last set has already been through the United States Courts on at least five occasions, three of which relate to one action, namely, *Eisen v. U.S.*

In this report, we have confined ourselves to class actions or representative actions properly so called, that is to say, actions brought by a representative plaintiff on behalf of members of a class who each have a cause of action under the substantive law and who each have *locus standi* to prosecute that cause of action. Discussion as to class actions sometimes becomes involved with wider questions as to substantive rights and *locus standi,* particularly in the consumer and environmental field. If it is desired that members of the public have additional legal rights, these must be given by means of amendments to the substantive law. If it is thought that the present rules as to *locus standi* are inadequate (there have, of course, been many criticisms by groups which are active in the protection of the environment), they would have to be the subject of a separate inquiry and separate legislation. The subject of actions to enforce public rights or to seek remedies for the infringement of those rights, which may be brought only by the Attorney-General or on his fiat, are likewise not within the scope of our inquiry. The class action is essentially a procedural device by which a class of persons, who each individually have a good cause of action and *locus standi* to pursue it but are unable to do so effectively because the amount of the individual claims is disproportionate to the cost of litigating them, may enforce their rights through a representative plaintiff and by utilising the class action machinery.

Although the subject matter of the reference and hence our proposals are essentially procedural, we consider that if they are implemented the ordinary citizen should be in a better position to assert and enforce the rights which the law gives to him for his protection in the quality of his environment, in the quality of the goods and services with which he is or ought to be supplied, and in other important respects.

We have the honour to be—

HOWARD ZELLING
S. J. JACOBS
L. J. KING
J. M. WHITE
B. R. COX
D. W. BOLLEN
J. F. KEELER
K. T. GRIFFIN

The Law Reform Committee of South Australia

DRAFT BILL FOR A CLASS ACTIONS ACT

An Act to allow the enforcement in one action of the claims of numerous persons similarly situated.

Interpretation.

1. In this Act:—

"Class" means a number of people each having a cause of action maintainable in the Courts of the State.

"Class action" means an action maintained as a class action.

"Court" means the Supreme Court.

When class action allowed,

2. One or more members of a class may sue in the Court as representative parties on behalf of all provided—

(1) the class is numerous;

(2) there are questions of law or fact common to the class;

(3) the representative parties will fairly and adequately protect the interests of the class.

Order that action be maintained as class action.

3. (1) After the commencement of an action brought under section 2 the plaintiff shall apply to the Court for an order that the action is to be maintained as a class action.

(2) The plaintiff shall apply to the Court under subsection (1)—

(i) if the defendant has filed an appearance, on notice to the defendant within one month after the date of the appearance or within such further time as the Court may allow;

(ii) if the defendant has not filed an appearance within the time limited by the rules of procedure of the Court, within one month after the date of the default or within such further time as the Court may allow.

(3) The Court shall order that the action is to be maintained as a class action if the conditions set out in section 2 are satisfied and if in the opinion of the Court—

(*a*) the action is brought in good faith and appears to have merit; and

(*b*) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(4) In determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy, the Court shall consider among other matters:—

(*a*) whether common questions of law or fact predominate over any questions affecting individual members; and

(*b*) the difficulties likely to be encountered in administering relief to members of the class by reason of the size of their individual claims and the number of class members.

(5) The Court shall not refuse to order that the action is to be maintained as a class action on the ground only that—

(*a*) the relief claimed in the action on behalf of the members of the class or of some of them is or includes a claim for damages;

(*b*) any damages claimed for members of the class will require individual assessment, or

(*c*) the relief claimed in the action on behalf or the members of the class arises out of or relates to separate contracts or transactions made with or entered into between members of the class and the defendant.

(6) If the plaintiff does not apply to the Court as provided by subsection (2) or if on such application the Court determines that the action is not to be maintained as a class action the Court shall make all such amendments to the proceedings as will eliminate therefrom all reference to representation of absent persons and may make such other consequential orders as may be just and expedient.

(7) An order that an action is to be maintained as a class action shall—

(*a*) define the class on whose behalf the action is brought;

(*b*) describe briefly the nature of the claim made on behalf of members of the class and specify the relief claimed;

(*c*) define the questions of law or fact common to the class;

(*d*) specify a date before which members of the class may exclude themselves from the class;

(*e*) contain a scheme for the payment of the fees and out of pocket expenses of the plaintiff's solicitors.

(8) A scheme approved pursuant to subsection 7 (*e*) may, in addition to such other provisions as the Judge deems just and expedient, contain any of the following provisions—

(*a*) that the plaintiff or his solicitor be paid out of the fruits of the action, in accordance with a scheme approved by the Judge, the excess of the solicitor and client costs over any costs recovered from the defendant;

(*b*) that the solicitor for the plaintiff, in consideration of foregoing his right to be paid his costs by the plaintiff, be paid out of the fruits of the litigation or by the defendant, in accordance with a scheme approved by the Judge, a sum, in excess of solicitor and client costs, determined by the Court as fair and reasonable compensation to the solicitor for the risk of loss incurred by him in undertaking the conduct of the action;

(*c*) that the question of payment or recoupment of the plaintiff's costs be reserved to the trial Judge with power to that Judge to make an order including any of the above provisions and such other provisions as he deems just and expedient;

(*d*) that the solicitor for the plaintiff have a first charge for his costs on the fruits of the litigation.

(9) An order that the action be maintained as a class action and any provision thereof may be varied upon the application of any party thereto at any time before judgment in the action.

(10) An order that the action be maintained as a class action may be set aside upon the application of any party thereto at any time before judgment in the action if fresh evidence becomes available in consequence of which it appears to the Court that the order ought not to have been made and upon such setting aside the

Court may make all such amendments to the proceedings as will eliminate therefrom all reference to representation of absent persons and may make such other consequential orders as may be just and expedient.

Adequacy of representation.

4. (1) In determining whether the representative plaintiff will fairly and adequately protect the interests of the class for the purpose of section 2 (3) the Court may consider whether provision has been made for legal representation that is adequate for the protection of the interests of the class.

(2) If at any time after the Court has determined that the action is to be maintained as a class action it appears to the Court that the representative plaintiff will not fairly and adequately protect the interests of the class the Court shall—

(*a*) set aside the order that the action is to be maintained as a class action and make all such amendments to the proceedings as will eliminate therefrom all reference to representation of absent persons, and may make such other consequential orders as may be just and expedient; or

(*b*) substitute for the representative plaintiff any member of the class who consents to be so substituted and who in the opinion of the Court will fairly and adequately protect the interests of the class.

Notice to class.

5. (1) If the Court makes an order under section 3 that an action is to be maintained as a class action, the Court may order that notice be given to members of the class on whose behalf the action is brought advising them of the pendency of the action and that the Court will exclude them from the class if they so request by a specified date and that judgment in the action, whether favourable or not, will include all members who do not request exclusion.

(2) If the Court makes an order that notice be given to members of the class, the Court may in its discretion:—

(*a*) give directions as to—

(i) the members of the class to whom the notice is to be given,

(ii) the terms of the notice,

(iii) the mode of giving notice, including notice by advertisement;

(*b*) order that the defendant give the notice or pay the cost of giving the notice.

(3) The Court shall take the following matters into account when determining whether to order that notice be given to members of the class or in considering what directions to give under subsection (2):—

(*a*) the cost of giving notice in relation to the amount of any sums claimed in the action on behalf of individual members of the class;

(*b*) whether members of the class are likely to suffer substantial prejudice if they do not receive notice of the pendency of the action;

(*c*) the policy of this Act to facilitate class actions.

6. Whenever pursuant to this Act the Court amends proceedings so as to eliminate therefrom all reference to representation of absent persons the Court at the trial of the action shall give judgment in such form as to affect only the parties to the action.

Judgment after proceedings amended to exclude representation claim.

7. Judgment in a class action shall not affect—

Binding effect of class action judgment.

(1) a member of the class on whose behalf the action is brought who has excluded himself from the class;

(2) a member of the class who has not so excluded himself except to the extent that the judgment determines the claim described and the relief specified in the order that the action is to be maintained as a class action.

8. (1) A class action shall not be discontinued or dismissed or compromised without the approval of the Court and the Court may order notice of such proposed discontinuance, dismissal or compromise to be given in such manner as the Court directs.

(2) A representative plaintiff who has obtained an order that the action be maintained as a class action shall not change his solicitor without the approval of the Court.

9. Where the Court gives judgment for the plaintiff in a class action and the judgment does not determine questions of law or fact that affect only individual members of the class on whose behalf the action is brought the following provisions shall apply:—

Notice to class after judgment on common questions.

(1) The Court shall order that notice be given in such manner as it may direct to members of the class.

(2) The notice shall inform members of the class of the proceedings and state that the claim of a class member against the defendant for the relief specified in the order that the action be maintained as a class action may be made by filing a claim in the Court within such time and containing such particulars as the Court shall direct.

(3) The Court may order that notice be given as part of the notice referred to in paragraphs (1) and (2) above, or subsequently in such manner as it may direct to members of the class stating that unless a class member files his claim in accordance with the directions given in the notice and approved by the Court, his claim shall be extinguished, and upon failure to comply with the notice the claim of a class member shall be extinguished accordingly.

(4) The Court shall determine the claim of a class member filed in accordance with subsection (2) and may pronounce such judgment on the claim as is deemed proper.

(5) In such proceedings to determine the claim of a class member the class member and the defendant shall have the same rights of discovery against each other and be subject to the same liability for costs as the parties in an ordinary action in the Court and the defendant shall have the same right to pay money into Court as the defendant in an ordinary action.

10. (1) Where—

(*a*) judgment in a class action relates to the enforcement of money claims against the defendant;

(*b*) no further questions of law or fact remain to be determined in order to establish the right to recover of some or all of the members of the class;

(*c*) the amount of the individual claims of those members of the class referred to in paragraph (*b*) is, or can be readily, ascertained;

the Court shall, subject to subsection 2, order the defendant to pay into Court the sum of the claims of all such members of the class within such time as the Court shall fix and the claims of the other members of the class shall be dealt with in accordance with section 9.

(2) In appropriate cases, the Court may permit the defendant to comply with its order in whole or in part in lieu of payment into Court by crediting the relevant amount to any class member's current account with the defendant operated by the class member within six months prior to judgment unless a class member indicates in writing that payment in cash is required.

(3) In appropriate cases, the Court may require the defendant to give to the plaintiff particulars of the names and last known addresses of class members and particulars of the amounts payable under the judgment to each class member.

(4) The plaintiff shall make prompt and reasonable efforts by advertisement or otherwise to advise unpaid class members of their right to claim money paid into Court.

(5) Where the plaintiff is unable to locate class members after reasonable efforts reasonably commensurate with the amounts involved, he shall apply for further directions from the Court as to the application of the balance of money in Court and serve the Attorney-General with a copy of such application.

(6) (i) The Attorney-General may intervene and propose a scheme for the benefit of some or all members of the class or payment to the Indemnity Fund hereinafter described, and the Court may approve such scheme or payment.

(ii) If the Attorney-General does not intervene, or if the Court does not approve the scheme or payment, the Court may order that the balance in Court be repaid to the defendant or paid into the Indemnity Fund established under this section, or applied in accordance with the provisions of section 12 (*b*).

(7) (i) An Indemnity Fund to be known as "The Class Action Indemnity Fund" (hereinafter called "the Fund") is hereby created.

(ii) The purposes for which the Fund is created are—

(*a*) the provision of a legal aid scheme (limited to class actions) for proposed representative plaintiffs who are unable to obtain legal representation to institute and prosecute a class action without incurring personal liability for costs;

(*b*) provision in proper cases for the payment of the costs of defendants where such costs are irrecoverable by reason of section 11 (2).

(*c*) the alleviation of any hardship caused to class members by defaults or defalcations of a representative or his agents.

(iii) [Detailed provisions as to the constitution and management of the Fund].

11. (1) Subject to subsection (2) of this section the costs of a class action are in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs shall be paid.

Costs of class action.

(2) No costs shall be awarded to the defendant to a class action except that the Court may award costs to the defendant—

(*a*) on an application under section 3;

(*b*) on the determination of the claim of a class member under section 9 (4);

(*c*) on an interlocutory application where the application has been made necessary by some default or unreasonable act or omission on the part of the plaintiff;

(*d*) in respect of the costs of action in whole or in part of the order to maintain the action as a class action was obtained by fraud or perjury on the part of the plaintiff, or if the representative plaintiff is a public official acting in his official capacity;

(*e*) on an appeal or application for leave to appeal in accordance with directions previously given pursuant to subsection (3).

(3) (*a*) Where an appeal has been instituted or application has been made for leave to appeal against any judgment or order in a class action, any party may apply to the Court for directions as to the costs of the appeal.

(*b*) On such application the Court may give such directions as it thinks proper and in particular may, if it thinks that justice so requires, direct that the Court determining the appeal, or application for leave to appeal, be at liberty to award costs to the defendant.

12. The Court may at any stage of the action give directions for the purpose of doing justice as between the members of the class and, without limiting the generality of the foregoing may give directions—

(*a*) as to the defraying of the costs and expenses of doing anything required to be done under this Act;

(*b*) that, where appropriate, all or part of such costs and expenses be paid out of the unclaimed balance of money referred to in section 10;

(*c*) where such costs and expenses are paid out of a fund for distribution among the members of the class, the proportions in which such costs and expenses shall be borne by the members of the class;

(*d*) where the net amount available for distribution among members of the class is less than is required to satisfy the individual entitlements in full, the proportions in which the deficiency shall be borne by individual members of the class.

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