Civil Procedure

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I Introduction

A number of important developments in the field of civil procedure have occurred since my last review of the topic in 2020. This review deals in part II with three significant official reports which are relevant to the rules of civil procedure. Part III deals with the novel issue of discounting an adverse costs award on the basis of common costs. Common fund orders in representative proceedings are discussed in part IV. Part V discusses an assortment of cases relevant to civil procedure issues. Finally, in part VI, the issue of compulsory referral to mediation is discussed from a civil procedure perspective.

II Official Reports Affecting Civil Procedure Issues

A *Digital Strategy for courts and tribunals (March 2023)*

In common with a number of overseas jurisdictions,[1] New Zealand has undertaken planning for a digital strategy for courts and tribunals. An initial consultation draft report was issued in September 2022.[2] This draft has been reformatted and refined and was published in final form in March 2023 (the Digital Strategy Report).[3]

The Digital Strategy Report explains why a digital strategy matters and refers to the limitations of paper files compared with the advantages of

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1 These jurisdictions included (as of 2019) the United Kingdom, Estonia, Singapore, Australia, Ontario, Alberta, the City of Vancouver in British Columbia and various United States state jurisdictions: see British Columbia Ministry of Attorney General *Court Digital Transformation Strategy 2019–23* (2019) at 7.

2 Courts of New Zealand *Digital Strategy for Courts and Tribunals: Consultation Draft* (6 September 2022) [*Digital Strategy Consultation Draft*].

3 Office of the Chief Justice *Digital Strategy for Courts and Tribunals* (29 March 2023) [*Digital Strategy Report*].

completing documents by entering the information required through an online portal. Such a digital system would also offer advantages in terms of trial documentation, searching court files and judicial handling of file material.[4]

From a civil procedure perspective, the Digital Strategy Report has implications in several areas.[5] A digital Caseflow project, known as Te Au Reka, is scheduled to adopt a fully digital system for document and case management requirements from 2023 onwards.[6] By the end of 2024, high-quality systems for remote audio-visual (AV) hearings are to be put in place.[7] The core capabilities of Te Au Reka are envisaged to include the progressive digitisation and elimination of paper files, an online portal for commencing and responding to civil claims, providing documents, evidence and digital bundles, access to court files and automated monitoring of compliance with timetable orders.[8]

The judiciary has identified priority initiatives to be pursued over the next five years in this area.[9] In relation to civil proceedings, these include a single portal providing information about processes in civil proceedings and a single portal for commencing and responding to civil proceedings.[10]

All of these initiatives will necessitate changes to the High Court Rules 2016 and the rules of procedure in other courts and tribunals. Such changes will need to cover areas such as the commencement and service of proceedings, pretrial steps, discovery and trial preparation, and processes such as the preparation of digital bundles and submissions. In relation to access to documents in the senior courts, both by the parties themselves and by interested third parties such as the media, online searching protocols and procedures will need to be developed. The policy and law reform implications of the digital strategy are summarised in the Digital Strategy Report.[11]

While there are undoubted benefits to be gained by a comprehensive digitisation strategy in terms of filing and storage of documents (not to mention saving trees and forests), accessibility of court documents and streamlining of court processes and judicial resources, care must be taken to balance these laudable objectives against some of the less promising realities of the digital age. Not all participants in the civil justice process

4 At 14–15.

5 As is recognised by the role of the Rules Committee in simplifying civil procedure: see *Digital Strategy Consultation Draft*, above n 2, at 3.

6 *Digital Strategy Report*, above n 3, at 23.

7 At 23.

8 At 24 and Appendix 3.

9 At 25.

10 At 25.

11 At 31.

are sophisticated users of electronic and digital processes. Indeed, there are still many New Zealanders, particularly in disadvantaged and older age groups, who are not digital natives, do not possess fast and efficient (or even any) online internet access, or who may have language, cultural or other disabilities in this area.

This issue, combined with the modern phenomenon of the rise of the self-represented litigant in civil cases in New Zealand, means that the quest for efficiency should not be pursued to the exclusion of the more digitally vulnerable or disadvantaged groups in our society. Reconciling a digital strategy for the courts with access to justice will be one of the challenges for implementing full digitisation.

The observations of the Chief Justice, the Rt Hon Dame Helen Winkelmann, in the foreword to the Digital Strategy Report support this point:[12]

> They [court proceedings] must be conducted in a way that enables all people to fully participate in the proceedings that affect them, respecting and responding fairly to ethnicity, culture, disability, financial or educational status. Using technology wisely to achieve these aims is now essential. It has the potential to be transformative, by better enabling access to the courts and reducing the cost and complexity of proceedings. But at the same time, we must maintain and strive to improve the connection between the community and the courts. And we must meet the needs of the people interacting with our court system. The model of justice we currently have is a very human one. That human quality is in my view fundamental and indispensable.

The Chief Justice of the Federal Court of Australia, the Hon James Allsop AC, expressed similar sentiments in a 2019 article in the University of Queensland Law Journal.[13] Under the sub-heading "Practical Obstacles to Implementation", the Judge gave a carefully reasoned critique of the usefulness or feasibility of adopting full digitalisation of court processes and the need to take account of the human element in the legal system, bearing in mind the variety of cases which come before the courts.[14] The Judge stated:[15]

> So, while there is great potential in the use of technology in courts, one must balance enthusiasm for new technologies with the recognition that the courts are faced with cases of varying natures; they vary in terms

12 At 4–5.

13 James Allsop "Technology and the Future of the Courts" (2019) 38 UQLJ 1.

14 At 9–11.

15 At 9–10.

> of appropriateness for certain technologies, and require varying levels of flexibility. This is not to say that the push to full digitisation is to be criticised, merely that it must be balanced and adopted at a rate that makes parties feel comfortable.

The trend to full digitisation in the civil courts is clearly a movement which is likely to be irresistible, but the undoubted advantages of the process must also not obscure some of its potential limitations in terms of its universal application.

B *Law Commission report on class actions and litigation funding*

This important report (Law Commission Report) was published on 27 June 2022, following a two-year period of review and consultation.[16] It is currently under consideration by the Government.[17] The recommendations in the Law Commission Report have various significant implications from a civil procedure standpoint.

By way of context, third party litigation funding is a developing market in New Zealand compared with Australia and other common law jurisdictions.[18]

The other preliminary issue which ought to be canvassed here relates to the opt-in/opt-out debate. This debate is the subject of various recommendations

16 The Law Commission published an Issues Paper IP45 on the topic on 4 December 2020 and sought feedback on its preliminary view that litigation funding was desirable in principle and on options for regulatory oversight of litigation funding: Law Commission *Class Actions and Litigation Funding* (NZLC IP45, 2020). Following receipt of submissions on the Issues Paper, the Commission published a Supplementary Issues Paper IP48 on 30 September 2021, leading up to publication of the final report in June 2022: Law Commission *Class Actions and Litigation Funding: Supplementary Issues Paper* (NZLC IP48, 2021); and Law Commission *Class Actions and Litigation Funding* (NZLC R147, 2022) [Law Commission Report].

17 The Government Response to R147 was issued on 30 November 2022 and supported the Commission's recommendations in principle: New Zealand Government *Government Response to Report of Te Aka Matua o te Ture | Law Commission on Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa | Class Actions and Litigation Funding* (30 November 2022). The Government stated at [21] that "advancing these reforms will take a period of time and resourcing this work will need to be balanced against other Government priorities". That may be a polite way of saying that progress with implementation may well be somewhat glacial.

18 The evolution of the New Zealand market and recent developments are explained by practitioners from an Australian class action firm, albeit written from the perspective of the interests of litigation funders as part of a country-by-country review of the topic: Jason Geisker and Simon Gibbs "The Third Party Litigation Funding Law Review: New Zealand" (8 December 2022) The Law Reviews <https://thelawreviews.co.uk>.

in ch 8 of the Law Commission Report, which the Commission wishes to see incorporated into the proposed Class Action statute.[19] The essential distinction between these two approaches is that an opt-in procedure requires intending claimants to proactively join the proceedings, such as through a formal registration process, whereas an opt-out approach automatically includes all eligible claimants unless they take specific steps to disassociate themselves from the proceeding.

As will be explained in the commentary on *Simons v ANZ Bank New Zealand Ltd*,[20] the Supreme Court in *Southern Response Earthquake Services Ltd v Ross* agreed with the decision of the Court of Appeal that a representative claim under r 4.24 of the High Court Rules should often preferably proceed on an opt-out basis.[21] The *Ross* litigation was subsequently settled, and the settlement and discontinuance of the claims was approved by the High Court in December 2021.[22]

In Australia, the opt-out procedure in class actions has encountered difficulties arising from the applicable statutory scheme, as is discussed below.[23] Complications have also arisen in England following the decision of the United Kingdom Supreme Court in *Lloyd v Google LLC*, where the Court held that plaintiffs bringing an opt-out claim need to be able to quantify their damages on a common basis across all of the intending class members.[24]

Turning now to the Law Commission Report, this is a detailed document of 465 pages plus appendices, made more digestible by the Executive Summary at the beginning.[25] A full exposition of the contents of the Law Commission Report would more than double the length of this review. In summary, the more significant recommendations include:

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19 See the discussion of this issue in *Simons v ANZ Bank New Zealand Ltd* [2022] NZHC 1836 in part IV of this review. See also Christine Gordon and Ben Stewart "Class actions — are we in or out?" [2021] NZLJ 104; and Louis Norton "The Opt-out Class Action: Economic Implications for Insurers and Insureds" (2022) 30 NZULR 309.

20 See part IV of this review.

21 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117. See the text accompanying n 84 below. This overcame the previous reluctance of the High Court in *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) to recognise the validity of opt-out representative claims.

22 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 3497.

23 See part IV of this review.

24 *Lloyd v Google LLC* [2021] UKSC 50, [2022] AC 1217. Opt-out claims have fared better in the competition law area in the United Kingdom. See *Le Patourel v BT Group plc* [2022] EWCA Civ 593, [2022] Bus LR 660, which upheld the availability of opt-out claims in competition law cases under the applicable United Kingdom competition legislation.

25 See Law Commission Report, above n 16, at 8–20.

- Legislation in the form of a Class Actions Act should be put in place and should take precedence over the existing court rules governing representative actions.[26]
- Various measures need to be introduced to safeguard the interests of members of class actions, including by defining the rights and responsibilities of the representative plaintiff.[27]
- The operation of any limitation periods applicable to individual class action members should be modified.[28]
- The court is to have the power to manage concurrent class actions.[29]
- A proposed class action should be certified by the court as being suitable having regard to the legal requirements, and both opt-in and opt-out claims should be permitted.[30]
- Non-resident claimants should only be able to join a class action on an opt-in basis.[31]
- The lawyer–class member relationship should be prescribed by legislation, which will require changes to be made to the existing regulatory framework governing lawyers.[32]
- Various pretrial steps during a class action are to be defined by the class action legislation.[33]
- To address the "free-rider" problem, the court is to have flexible powers to make a cost-sharing order and to set commission terms for litigation funders.[34]
- There are various recommendations as to class action judgments, alternative distributions such as to associated charities and modification of appeal rights by class members.[35]
- Court approval of a settlement and discontinuance of a class action will be required, with the court to consider various prescribed factors before granting approval.[36]
- The existing rules as to payment of adverse costs should continue, with it being envisaged that a representative plaintiff would be able to obtain an indemnity from a litigation funder, where funding is involved, against personal liability under an adverse costs order.[37]

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26 Recommendation 1: see ch 2.
27 Recommendations 8–10: see ch 3.
28 Recommendations 19–21: see ch 4.
29 Recommendations 26–28: see ch 5.
30 Recommendations 29–35: see ch 6.
31 Recommendation 42: see ch 7.
32 Recommendations 47–49: see ch 7.
33 Recommendations 50–65: see ch 8.
34 Recommendations 66–67: see ch 9.
35 Recommendations 68–72 and 76–80: see ch 10.
36 Recommendations 81, 83, 88–89 and 102: see ch 11.
37 Recommendation 104: see ch 12.

- Litigation funding is important in relation to promoting access to justice and, consistent with this principle, the torts of maintenance and champerty ought to be abolished.[38]
- Supervision of litigation funding arrangements is best addressed through regulation and court oversight with funding agreements, suitably redacted where necessary to preserve commercial confidentiality, to be disclosed by plaintiffs to the court and the defendant.[39]
- There should be a rebuttable presumption that a funded representative plaintiff will provide security for costs in a form enforceable within the jurisdiction, with the courts being empowered to order costs, including security for costs, directly against a litigation funder.[40]
- Various amendments to the existing regulatory framework for lawyers will be required to deal with lawyer–plaintiff conflicts of interest that can arise in the class action context and remove the personal liability of class action plaintiffs to meet unpaid legal costs or adverse costs awards in the event of a funder failing to meet its financial obligations.[41]
- Court approval of a class action funding agreement is to be required at an early stage in the class action process.[42]
- Putting in place a public class action fund is desirable for cases that may be unattractive to private litigation funders, and an online guide should be instituted to assist class action members in understanding the process in this area.[43]
- A draft of the proposed Class Actions legislation is included.[44]

It will be interesting to see how many of the Commission's recommendations survive the legislative process unscathed. On the whole, the Law Commission Report appears to strike a reasonable balance between the interests of plaintiffs (and their funders) and defendants in the class action process. However, businesses, whose interests are likely to be on the receiving end of the effects of legislative class action reforms and who are sufficiently well-resourced to exercise lobbying power, may be less than enthusiastic about the proposals. The previously unheralded Commission proposal for a public class action fund has also attracted much critical comment in the absence of surrounding detail as to how such a fund would operate.[45]

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38 Recommendation 107: see ch 13.

39 Recommendation 108: see ch 14.

40 Recommendation 109: see ch 15.

41 Recommendations 110–111: see ch 16.

42 Recommendations 112–113: see ch 17.

43 Recommendations 120–121: see ch 18.

44 See Appendix 1.

45 See, for example, Hamish McNicol "Devil in the detail: assessing the Law Com's class action regime" NBR (28 June 2022).

C Rules Committee report on improving access to civil justice

This important report (Rules Committee Report) was released by the Rules Committee on 23 November 2022 after three years of work.[46] It deals with ways of improving access to civil justice in the Disputes Tribunal, the District Court and the High Court.[47]

The 67-page Rules Committee Report is divided into four chapters. Chapter 1 is an introductory chapter dealing with the importance of access to civil justice, concerns based on financial, psychological and cultural and information barriers and the Committee's response to those concerns. Chapters 2, 3 and 4 then set out recommendations in relation to the Disputes Tribunal, the District Court and the High Court, respectively. A Summary of the Recommendations made is included at the end of the Rules Committee Report.

In relation to the Disputes Tribunal, the Committee describes the hearing process and its efficiencies and refers to the fact that Tribunal referees are nowadays generally comprised of lawyers with experience in dispute resolution. These skills are supplemented by appropriate training and support.

The Committee recommends in ch 2 that the jurisdictional cap of the Tribunal be increased above the current limit of $30,000 to $70,000 as of right and $100,000 by consent, an increased financial jurisdiction being universally supported by submitters on the Rules Committee Report. Existing rights of appeal to the District Court, limited to assertions of procedural unfairness, are to be retained for claims of up to $30,000, with a general right of appeal to the District Court to be instituted for claims of between $30,000 and $100,000. The existing rules as to representation (which exclude appearances by lawyers at the hearing) are to be retained. Hearings are to remain private as this is considered to be the procedure most conducive to resolution and settlement of claims and the promotion of access to justice by parties who might otherwise feel intimidated by a public hearing. Tribunal referees are to be legally qualified and are to be renamed as adjudicators. There are a few other recommendations mainly of a procedural nature.

Given the current issues with pursuing civil claims in the District Court, as discussed below, and the comparative efficiencies of the Disputes Tribunal processes, the proposed increase in jurisdiction is to be welcomed, as is the requirement for referees to be legally qualified. It accords with the New South Wales position in which the NSW Civil and Administrative

46 Rules Committee *Improving Access to Civil Justice* (23 November 2022) [Rules Committee Report].

47 For a summary of the recommendations in the 67-page Report see Reweti Kohere "Rules committee flags a raft of reforms to boost access to civil justice" *LawNews* (Auckland, 24 November 2022) at 6.

Tribunal has jurisdiction in respect of consumer claims up to AUD 100,000 concerning the supply of goods and services in NSW.[48]

In ch 3, dealing with civil claims in the District Court, the Rules Committee Report makes some quite direct comments about the decline of the District Court's civil jurisdiction and delays in obtaining defended civil hearing fixtures in the District Court.[49] This has no doubt been contributed to by the increase in the District Court's civil jurisdiction in 2016 to claims of up to $350,000, and the consequent expansion in the number of defended civil hearings lasting several days and which may be of relative complexity.[50] These issues are said to arise from deficiencies in centralised administration coupled with the fact that criminal hearings tend to be prioritised. Judicial appointments to the District Court are often, with some notable exceptions, of practitioners with the requisite experience and inclination to work in the criminal and family law areas.

The Committee recommends in ch 2 of the Rules Committee Report that a separate civil division be created in the District Court with a Principal Civil Judge to be appointed, the expertise of the civil registries be strengthened and that part-time judges be appointed to assist with the civil workload of the court. The Committee did not at present recommend introducing inquisitorial processes as the default mode of operation in the District Court. Finally, the Committee recommended the introduction of pre-action protocols for debt collection claims, requiring prescribed steps to be taken by creditors before debt collection proceedings are filed in the District Court.

While these initiatives are generally to be welcomed, the success of their implementation will no doubt require that adequate funding and judicial resources be made available to enable an increased emphasis on the civil work of the District Court to occur. That is a process which may well take some time to implement and the required legislative and rule changes would need to be put in place first.

Chapter 4 of the Rules Committee Report consists of various recommendations, some of which are relatively far-reaching, relating to the conduct of civil litigation in the High Court. The Committee identified the fact that "[c]ost and delay are barriers to access to justice".[51] Specific problems identified were "the scale and burden of discovery", "trials being

48 See NSW Civil and Administrative Tribunal (NCAT) "Consumers and businesses" <www.ncat.nsw.gov.au>.

49 See, for example, Rules Committee Report, above n 46, at [119].

50 Anecdotal examples are not difficult to come by here. The author is aware of one case in which a fixture for a three-day defended civil hearing could not be granted in a provincial District Court in the central North Island for between 12 and 18 months from the date the matter was set down for trial, apparently due to a significant backlog in assigning defended criminal hearing dates.

51 Rules Committee Report, above n 46, at [159].

unnecessarily extended" in various ways, and "a lack of focus" on key determinative issues.[52] Three key features of the reforms were set out:[53]

(a) Briefs of evidence are to be replaced by factual "will say" witness statements (which will be familiar to criminal law practitioners) to be served prior to discovery;
(b) A judicial issues conference will generally now occur after the new form of witness statements have been served;
(c) At trial, greater emphasis will be placed on the documentary record for establishing the facts and non-expert witness evidence will be limited to issues of fact to assist in eliminating submissions being made through the evidence.

In summary, the specific recommendations in the Rules Committee Report for modified High Court procedures are:

- Rule 1.2 of the High Court Rules is to be amended to introduce proportionality as a key principle in civil proceedings.[54]
- In accordance with the Committee's three key features referred to above, rules for exchange of briefs of evidence are to be replaced by a requirement to serve "will say" statements prior to discovery and the initial judicial issues conference.[55]
- The existing discovery rules are to be changed so that initial disclosure includes adverse documents known to a party, with subsequent discovery to be ordered at the judicial issues conference as necessary and proportionate to the determination of the issues in the case.[56]
- The judicial issues conference is to occur for specified purposes at a later stage after initial interlocutories and service of witness statements.[57]
- Interlocutory applications will be heard remotely with time limits and may be determined on the papers.[58]
- Expert evidence is subject to presumptions as to one expert per topic per party and experts will be required to confer before expert evidence can be led at trial.[59]
- The rules for evidence at trial are to be changed to enhance reliance on the documentary record in various ways, for witness evidence to

52 At [161].
53 At [167].
54 Recommendation 16.
55 Recommendation 17.
56 Recommendation 18.
57 Recommendation 19.
58 Recommendation 20.
59 Recommendation 21.

be restricted to genuine issues of fact and for witness statements to be allowed to be taken as read, while being supplemented by further statements or viva voce evidence.[60]

- Practices developed during the COVID-19 pandemic, including electronic filing, document management and remote hearings, are to be adopted as standard court procedures.[61]

While these initiatives appear admirable in principle, particularly electronic filing and streamlined case management steps, they could be criticised for imposing a "one size fits all" approach, regardless of the complexity of the matter at issue. There can, of course, be a wide variety of interlocutory applications, for example. These may range from relatively straightforward matters, such as requests for further particulars or uncomplicated discovery applications to quite involved applications such as the determination of a complex preliminary issue prior to trial, which may require a day or more of court hearing time and which may not be suitable for a remote hearing or a determination on the papers.

Similarly, restricting expert witnesses to one per topic may be suitable for cases of moderate complexity but not for very large competition law cases for example. In addition, requiring initial disclosure of adverse documents known to a party may place a heavy burden, in terms of access to justice considerations, on less-resourced parties.

It remains to be seen whether the proposed steps, if adopted in total, will allow for sufficient flexibility of application in practice to cater for the wide variety of cases which can arise in the course of civil litigation practice, while also taking into account access to justice issues.

III Adverse Costs Awards in Funded Claims and Objections Based on Common Costs

Litigation funding can provide lucrative returns to the funder when a major funded claim is successful, either through pretrial settlement or at trial. However, the flip side of the coin is where a major funded claim fails at trial, giving rise to a substantial costs liability for the plaintiffs.

Such a situation arose in *Cridge v Studorp Ltd*.[62] The judgment of Simon France J is currently under appeal and the decision of the Court of Appeal is

60 Recommendation 22.

61 Recommendation 23.

62 *Cridge v Studorp Ltd* [2021] NZHC 2077, [2022] 2 NZLR 309 [*Cridge v Studorp Ltd* (HC)]. An earlier interlocutory issue in the case proceeded to the Court of Appeal and resulted in a judgment defining the criteria for the grant of a representative order under

pending as of the time of writing in May 2023. The case concerned whether the Harditex sheet cladding building product provided by the defendant was a flawed product incapable of providing a watertight house. This was a representative claim brought on behalf of 153 property owners who had suffered water damage allegedly arising from the use of the Harditex cladding product in housing construction.

After hearing extensive lay and expert evidence, the Judge held that "in general a reasonably competent builder could and did use Harditex to build a sound waterproof house".[63] The Judge was also critical of the plaintiffs' expert evidence, holding that, in his view, some of the plaintiffs' experts were not reliable and others had strayed outside their areas of expertise.[64] The plaintiffs' claims were dismissed in their entirety.

In a subsequent judgment on costs, the Judge awarded costs of around $2.3m and disbursements of $4.8m to the defendant.[65] The claim had been funded by an external litigation funder and had been quantified at $127 million. The trial occupied 83 sitting days and involved 67 witnesses.[66] A novel aspect of the plaintiffs' challenge to the defendant's claim for costs, which this part of the present review will focus on, was an objection based on the alleged existence of "common costs".[67]

In addition to the *Cridge* proceeding brought in the High Court at Wellington, two other separate proceedings involving the Harditex product were running in the High Court at Auckland. The plaintiffs in *Cridge* therefore submitted that some of the evidence at trial was usable in all three claims by the defendant so that the defendant's claim for expert witnesses' fees and disbursements ought to be apportioned and reduced accordingly.[68]

The Court noted that the issue of apportionment of common costs was a novel one that did not appear to have arisen previously in New Zealand.[69]

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r 4.24 of the High Court Rules: see *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11] as cited in *Simons v ANZ Bank New Zealand Ltd*, above n 19, at [56]. In relation to representative claims, the Court of Appeal stated at [11(b)]: "Access to justice is also an important consideration. Representative actions make affordable otherwise unaffordable claims that would be beyond the means of any individual claimant. Further, they deter potential wrongdoers by disabusing them of the assumption that minor but widespread harm will not result in litigation." (footnote omitted).

63 *Cridge v Studorp Ltd* (HC), above n 62, at [890].

64 At [890].

65 *Cridge v Studorp Ltd* [2022] NZHC 2024 [*Cridge v Studorp Ltd (Costs)*].

66 At [6].

67 Other aspects of the costs judgment, including the availability of uplifts for increased costs for discovery, preparation of briefs, and trial preparation and the reasonableness of claims for disbursements, involve issues of costs that are relatively uncontroversial and will not be canvassed here.

68 *Cridge v Studorp Ltd (Costs)*, above n 65, at [15]–[19].

69 At [19].

Various English and Australian decisions were, however, relevant. The early English case of *Oppenshaw v Whitehead*, dating from 1854, took the strict view that it was not relevant that common costs had been incurred in two separate proceedings so that no apportionment was required.[70] However, the Judge in *Cridge* noted that subsequent English and Australian decisions had diverged from this strict approach and recognised that the *Oppenshaw* principle could give rise to injustice.[71]

The Judge noted that in New Zealand questions of costs were ultimately discretionary in nature and a wide range of factors needed to be assessed.[72] In the present costs application he considered the three proceedings:[73]

> … are simply separate cases, albeit there will be common issues, and evidence. That seems to me the determining factor and what sets this situation well apart from any of the cases referred to.

After considering the facts pertaining to the three sets of proceedings,[74] the Judge considered that a case for apportionment on the basis of common costs had not been made out on the basis of the authorities on the issue. One aspect that the Court did consider was whether, where there were concurrent claims, the party going to trial first could be treated unjustly in assessing the issue of common costs. In relation to this point, the Court observed:[75]

> I accept there is the policy argument that non-apportionment seems to place a hard burden on the claim going first. For myself, that concern would yield to the more important proposition that having three cases like this, if they are so much the same, is wholly undesirable. Visiting costs on the

70 *Oppenshaw v Whitehead* (1854) 9 Ex 384, 156 ER 163 as cited in *Cridge v Studorp Ltd (Costs)*, above n 65, at [32].

71 *Cridge v Studorp Ltd (Costs)*, above n 65, at [19]–[21] and [31]–[44]. The modern Australian approach is also discussed in *Bechara v Legal Services Commissioner* [2010] NSWCA 369, (2010) 79 NSWLR 763 where McClellan CJ stated at [138]: "[W]here a solicitor is retained to act for multiple clients whose proceedings are heard together with evidence in one being evidence in the other (regardless of whether the proceedings are formally consolidated), and the clients are charged on a time-costed basis, there must be an apportionment of time spent on matters common to two or more of the proceedings."

72 *Cridge v Studorp Ltd (Costs)*, above n 65, at [21] referring to *Kinney v Pardington* [2021] NZCA 174 at [1]. In *Kinney*, the Court of Appeal stated at [1]: "Questions of costs are ultimately a matter of discretion. The exercise often requires assessment of a wide range of factors. The overall objective is to achieve an outcome that best meets the interests of justice in the given case in accordance with any applicable costs rules and consistent with established principles. The trial judge is uniquely placed to make this assessment."

73 *Cridge v Studorp Ltd (Costs)*, above n 65, at [56].

74 At [55]–[67].

75 At [64].

> first does not of course deter that happening, but I would consider there is sound argument not to have a special rule to assist plaintiffs in this type of situation, which should not exist anyway.

On the issue of common costs, the judgment illustrates that the plaintiff will need to overcome various factual issues to establish that it ought to be entitled to an apportionment of costs and disbursements on that basis. The court will also scrutinise whether in fact the separate proceedings ought to have been brought as one integrated claim, though there may, of course, be sound reasons why this is impractical (not the least being the geographical location of the represented claimants).

Given the logistical factors involved, this issue may well only arise in the context of large representative claims, many of which are likely to be externally resourced by a litigation funder. While the legal basis for seeking an apportionment of common costs may be valid in terms of how the law in this area has evolved to date, successfully applying the law to the facts in any particular case appears likely to be a difficult exercise for the party raising an objection on this ground.

IV Litigation Funding Issues — Common Fund Orders

The case of *Simons v ANZ Bank New Zealand Ltd* is important on the subject of opt-out orders in representative proceedings.[76] The judgment of Venning J is also noteworthy for its discussion of the availability of Common fund orders (CFOs) where these are sought by litigation funders in representative proceedings.

In *Simons*, the High Court observed that stage one of the plaintiffs' application would involve a determination of whether the relevant provisions of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) applied to the claim, as was alleged by the plaintiffs.[77] If that issue was determined in favour of the plaintiffs, the claim would then proceed to considering the effect of that holding.

This then led the Court to consider the plaintiffs' application for CFOs.[78] Venning J began by defining the term CFO.[79] The Judge went on to explain

76 *Simons v ANZ Bank New Zealand Ltd*, above n 19.

77 See [139].

78 See [142]–[184].

79 At [142]: "The plaintiffs also seek CFOs at this time. CFOs provide for the quantum of the litigation funder's remuneration to be fixed as a proportion of any monies so recovered in the proceedings, for all class members to bear a proportionate share of that liability, and for the liability to be discharged as a first priority from any monies recovered."

that CFOs were developed to address the "free rider" issue, so that class members who had not subscribed to the funding agreement and had not contributed to the legal and funding costs of the litigation would not be able nevertheless to benefit from a successful outcome to the claim.[80]

The judgment then explained that CFOs were to be contrasted with funding equalisation orders (FEOs) as defined in the judgment.[81] Counsel for the plaintiffs submitted that FEOs were inferior to CFOs as FEOs did not provide an investment incentive for funders. Funders were unable to collect a commission on recoveries obtained by unfunded class members and lacked certainty as to their potential returns at the outset.[82]

The Court noted that the only other application for a CFO in New Zealand up to that time had been in the *Ross v Southern Response* litigation.[83] That application had been adjourned pending the determination of appeals on whether opt-out orders were available.[84]

The Court then considered the Australian decisions on CFOs, such as *BMW Australia Ltd v Brewster*.[85] The Court noted that the legislative context in New Zealand was different from the statutory class action scheme in Australia.[86]

The Court concluded:[87]

80 At [143].

81 At [144]: "CFOs can be contrasted with funding equalisation orders (FEOs). FEOs deduct an amount from the settlement or award paid to non-funded members that is equivalent to the amount they would have had to pay to the funder, had they entered the funding agreement. The amount deducted is then pooled and distributed pro rata amongst all class members, but not the funder. FEOs achieve equity amongst class members, but do not augment the sums paid to the funder."

82 At [145].

83 At [146], referring to *Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288.

84 In its existing judgment in *Southern Response Earthquake Services Ltd v Ross*, above n 21, the Supreme Court stated at [62]: "Mr and Mrs Ross have made an application for a common fund order. That application has not yet been dealt with by the High Court so we make no comment on the availability of that order. Nor do we comment on the availability of the other technique commonly used to ensure costs of litigation funding are distributed across all claims, namely, funding equalisation orders. The latter order allows deductions from the amounts payable on settlement to unfunded class members equating to the funding commission payable if they had entered into the litigation funding agreement."

85 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 269 CLR 574 as cited in *Simons v ANZ Bank New Zealand Ltd*, above n 19, at [151]–[159].

86 *Simons v ANZ Bank New Zealand Ltd*, above n 19, at [160].

87 At [165].

> Despite the defendants' submissions to the contrary, I consider the Court has jurisdiction to make CFOs in the context of representative proceedings such as these. Section 12 of the Senior Courts Act 2016 confirms the Court retains its inherent jurisdiction which includes the ability to control its own processes. It also includes such powers as may be necessary to enable it to act effectively and administer justice.

Despite the jurisdictional availability of such an order in New Zealand, the Court nevertheless held that it was premature to make CFOs at that preliminary stage of the proceeding.[88] Such orders were better left for further consideration at the conclusion of the stage one process.[89]

Meanwhile, in Australia, the debate about the validity of CFOs following the decision of its High Court in the *Brewster* case has continued, with divergent views being expressed in the Federal Court. *Brewster* had held that courts did not have power to order CFOs prior to any settlement, but subsequent Australian Federal Court decisions have differing views on whether a CFO could be ordered as part of a court-approved settlement of class action.[90] It appears that this issue will require definitive determination by the Australian High Court. Although a decision of the High Court in this area will be based on the provisions of the Australian class action legislation, which does not presently have a New Zealand counterpart, any observations as to the theoretical basis for CFOs are likely to be of interest in the New Zealand context.

The issue of the availability of CFOs to assist funders in bringing representative claims in New Zealand highlights one of the topical issues in current civil procedure. On the one hand the courts will wish to facilitate, from an access to justice perspective, claims brought by represented parties who would otherwise be unable to seek redress without recourse to external litigation funding. That in turn will involve giving a reasonable measure of assurance to funders as to the calculation of their return on investment in the event of a claim being successful.

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88 At [179].

89 At [181].

90 For examples of Federal Court decisions favouring the availability of CFOs in such cases see *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3*) [2020] FCA 1885, (2020) 385 ALR 625; *Pearson v State of Queensland (No 2*) [2020] FCA 619; and *Hall v Arnold Bloch Leibler (a firm) (No 2)* [2022] FCA 163. Cases taking the opposite view include *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637; and *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84. The *Davaria* litigation is referred to at [159] of the *Simons* case. At the time of writing the funder in the *Davaria* case has indicated that it intends to appeal to the High Court of Australia, which will be subject to leave to appeal being granted.

On the other hand, the court will also be concerned to ensure that funders do not profit excessively from their investment and so reduce unduly the return to the represented parties from a successful outcome to the claim. Given the inherently unpredictable nature of litigation in general, and of hard-fought commercial litigation claims in particular, litigation funding is an unavoidably risky undertaking. This is particularly so where cases do not settle prior to trial, as recent claims involving allegedly defective building products, such as the failed Harditex representative action,[91] have demonstrated. Balancing the need to ensure a reasonable return to funders with the need to protect the legitimate interests of the funded parties is likely to amount to a delicate balancing act in many cases.

V Various Cases on a Range of Civil Procedure Issues

This part of the review discusses an assortment of recent cases on various issues of civil procedure.

A *Joinder of parties*

The judgment of Dunningham J in *Bremworth Ltd (formerly Cavalier Corp Ltd) v Pebblemill Ltd* is interesting from a civil procedure standpoint for its discussion of the approach to be taken to applications for the joinder of parties.[92] Counsel for the defendant had contended in opening that the defendant's alleged duty of confidence was in fact owed to another entity, which the plaintiff then applied, somewhat belatedly, to join as a second plaintiff.

The High Court considered that the plaintiff's late application to join the other entity was not entirely unexplained as the issue had not been specifically addressed by the defendant in its pleadings. In terms of the jurisdiction to join parties under r 4.56 of the High Court Rules, the Court held that the other entity "should be before the Court to effectually and completely adjudicate upon and settle all issues in the proceedings" so that it would be unsatisfactory to leave that issue to be the subject of further litigation.[93] Any limitation issues arising from the joinder were matters for the plaintiff to address and the indulgence granted to the plaintiff by the late joinder application could be met by an award of costs to the defendant.

91 See part III of this review.

92 *Bremworth Ltd (formerly Cavalier Corp Ltd) v Pebblemill Ltd* [2022] NZHC 2352.

93 At [25], citing *Taylor v McDougall* [1963] NZLR 694 (SC) at 696.

The judgment shows that the court will be prepared to allow late applications where these are necessary to do justice in a particular case. However, it is always better to address such issues at an earlier stage rather than rely on a sympathetic exercise of the court's discretion at the eleventh hour.

B *Civil procedure elements in extradition cases*

The decision of the Supreme Court in *Minister of Justice v Kim* raises issues of both criminal procedure and civil procedure.[94] The case concerned the extradition of Mr Kim, a South Korean national, to the People's Republic of China (PRC) to face a charge of murder. It predominantly raised issues of criminal procedure concerning the assessment of the human rights situation in the country seeking extradition and whether the foreign trial would be conducted in accordance with fair trial standards prescribed by the International Covenant on Civil and Political Rights and the requirements of the Extradition Act 1999.

The Supreme Court held that so long as certain assurances were obtained and further inquiries were resolved satisfactorily, the Minister could properly take the view that Mr Kim would receive a fair trial under PRC law. Where the Court divided, on a point of civil procedure, was whether the appeal should be adjourned to enable the Minister to take these steps. The majority held that a joint report was to be provided setting out the proposed disposition of the case and whether a further hearing would be required. The minority, in contrast, held that the decision of the Minister should be quashed (as the Court of Appeal had held) and the Minister should be directed to reconsider the decision in accordance with the Supreme Court's judgment.

As matters transpired, the joint report was provided in December 2021 and this, perhaps predictably, gave rise to further appeals concerning aspects of the report. In a subsequent judgment delivered on 13 April 2022, the same majority of the Supreme Court as in the earlier appeal held that the Minister was entitled to rely on the further assurances provided by the PRC.[95] The same minority as earlier again dissented.

94 *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338.

95 *Minister of Justice v Kim (No 2*) [2022] NZSC 44, [2022] 1 NZLR 38 at [76]: "For these reasons, we are satisfied the further assurances provided a reasonable basis on which the Minister could be satisfied that there was no real risk Mr Kim would face an unfair trial on surrender to the PRC." As at the time of writing it appears that Mr Kim is still in New Zealand while the Government is assessing his state of health, which is said to be poor.

C *Practice and procedure in appellate cases where cross-cultural issues are present*

In *Deng v Zheng* the Supreme Court considered the extent to which evidence of the social and cultural background of witnesses at trial could be led to explain their conduct and the effect of such factors on the nature of the commercial relationship between the parties.[96] However, general evidence of this kind ought not to supplant a careful assessment of evidence which was specific to the particular case.

As the Court stated:

> [80] In all of this, judges need to take care to employ general evidence about social and cultural framework to assist in, rather than replace, a careful assessment of the case specific evidence. Assuming, without case-specific evidence, that the parties behaved in ways said to be characteristic of that ethnicity or culture is as inappropriate as assuming that they will behave according to Western norms of behaviour.

VI Compulsory Referral to Mediation — Civil Procedure Aspects

One of the traditional fundamental tenets of the common law system of civil procedure has been that the parties and their counsel have control of civil litigation subject to the need to abide by directions such as case management timetabling and other obligations to the court.[97] This traditional approach to civil procedure is increasingly becoming outdated as various jurisdictions, including New Zealand, embrace a move towards incorporating mediation in dispute resolution processes with various degrees of compulsion. This initiative is being implemented by means of legislation, judicial encouragement, court rules of procedure or costs sanctions for unreasonably failing to mediate. This trend is not entirely uncontroversial as there is a school of thought that holds that arbitration — and, by implication, possibly also alternative dispute resolution (ADR) processes — hinders

96 *Deng v Zheng* [2022] NZSC 76, [2022] 1 NZLR 151 at [78]–[79] set out various criteria that were relevant to the assessment of this issue.

97 For a discussion of this general approach see Cyril Glasser "Civil Procedure and the Lawyers — The Adversary System and the Decline of the Orality Principle" (1993) 56 MLR 307. Glasser notes at 307: "English civil litigation has always been regarded as a predominantly voluntary system in which the parties play a dominant role in formulating and developing the demand for a remedy and the presentation of the factual and legal issues for determination by the court."

the development of the common law by lessening the body of precedent essential to its development.[98] There is also a view that compulsory referral to mediation is inconsistent in principle with the voluntary nature of the mediation process.

Since the existing rules of civil procedure in the High Court Rules do not provide for compulsory or mandatory referral to mediation,[99] it is interesting from a procedural perspective to address the effect of this trend. Various legislative provisions are in force in New Zealand, of course, that do provide for compulsory mediation, such as in relation to Canterbury Earthquake claims[100] and claims by secured creditors to recover farm debts.[101]

In the general civil law area, s 145(1)(b) of the Trusts Act 2019 provides the best example of the court having the power to submit any internal trust matter (as defined in s 142) in dispute to an ADR process of its own motion, except if the terms of the trust indicate a contrary intention. This power was exercised by the High Court, apparently for the first time, in 2022 in *Wright v Pitfield*.[102]

Various specialised New Zealand courts and tribunals direct the parties in dispute to engage in compulsory or mediation processes (or processes which in practice amount to being compulsory) before claims are pursued. Examples can be found in the employment law context[103] and in relation to certain Family Court matters.[104]

98 See, for example, Raid Abu-Manneh, Mark Stefanini and Jeremy Holden "Is Arbitration Damaging the Common Law?" (2016) 19 Int ALR 65.

99 Rule 7.79(5) of the High Court Rules provides: "A Judge may, with the consent of the parties, make an order at any time directing the parties to attempt to settle their dispute by the form of mediation or other alternative dispute resolution (to be specified in the order) agreed to by the parties." Note that such a direction can only be made with the consent of the parties and not by the court on its own initiative.

100 Under s 27(1)(h) of the Canterbury Earthquakes Insurance Tribunal Act 2019, the Tribunal has power to, "even if the parties have attempted mediation previously, direct the parties to mediation and set time frames for mediation".

101 Under the Farm Debt Mediation Act 2019, a secured creditor must participate in the prescribed mediation process in good faith under ss 18 and 26 and obtain an enforcement certificate under s 34, which then entitles the secured creditor to take enforcement action under s 11(1) in relation to a farm debt.

102 *Wright v Pitfield* [2022] NZHC 385, discussed in Simon Barber "'If you take a horse to water it usually does drink' — mandatory mediation of trust disputes in New Zealand: *Wright v Pitfield* [2022] NZHC 385" (2022) 28(8) Trusts & Trustees 810.

103 See, for example, Employment Relations Act 2000, s 159(1).

104 Care of Children Act 2004, ss 46E–46F.

In the Environment Court, the 2023 Practice Note provides for an ADR process subject to the agreement of the parties. While that process is not mandatory on its express terms, parties to disputes to be heard by the Environment Court generally accept that in practice participation in an ADR process such as mediation is expected by the Court.[105]

In Australia, the courts in some state jurisdictions, such as New South Wales, have power to direct the parties to mediation with or without their consent.[106] Australian research apparently tends to indicate that the rates of success at mediation are similar regardless of whether the mediation process has taken place voluntarily or under compulsion. Compulsory referral to mediation does not, of course, oblige the parties to reach a mediated settlement so that the outcome of the mediation process remains voluntary even if the original impetus for embarking on mediation was not.[107]

At the time of writing, a proposal is undergoing consultation and subsequent consideration in England and Wales to refer smaller civil disputes in the County Court (involving amounts of up to £10,000) to compulsory mediation. This process would involve using government mediators.[108]

Finally, on this topic there have been periodic attempts in New Zealand to invoke costs sanctions against parties who have refused to engage in mediation of civil disputes or who have behaved unreasonably during the mediation process. These attempts have not tended to meet with any success to date.[109]

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105 See Environment Court Practice Note 2023 at [7.1(a)]: "The Managing Judge will normally refer a proceeding to some form of alternate dispute resolution (ADR) process (normally Court-assisted mediation) as a first step, subject to the agreement of the parties and any directions under s 268 of the [Resource Management Act 1991]." (emphasis omitted).

106 See Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW), s 4 which replaced s 110K of the Supreme Court Act 1970 (NSW). For a critique of this amending legislation see Bret Walker and Andrew S Bell "Justice according to compulsory mediation: Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW)" [2000] (Spring) NSW Bar News 7. Walker and Bell take the view that imposing compulsory mediation on parties is incompatible in principle with the voluntary nature of the mediation process. The counter-argument to this is, of course, that the element of compulsion only operates in relation to initial participation in the mediation process and does not oblige the parties to arrive at a mediated settlement.

107 Alan Limbury "Compulsory Mediation — the Australian Experience" (22 October 2018) Kluwer Mediation Blog <https://mediationblog.kluwerarbitration.com>.

108 United Kingdom Ministry of Justice *Increasing the use of mediation in the civil justice system* (CP721, July 2022).

109 For a survey of the New Zealand cases on this issue see Nic Scampion "Cost sanctions in civil courts for refusing to mediate" [2022] NZLJ 228 at 231–232.

In summary, apart from specific instances mandated by legislation or by accepted practice (as in the Environment Court), New Zealand law does not at present embody a general power to refer civil disputes filed in court to compulsory mediation. Any such power would need to be expressly conferred by legislation or by changes to the High Court Rules. Time will tell whether this comes about.