Civil Procedure

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I Introduction

This review covers various recent developments in civil procedure since the last review of this subject in 2017. Topics covered are representative actions and their relationship to the use of class actions in other jurisdictions, the Court's jurisdiction to strike out proceedings on the grounds of abuse of process, issue estoppel and applications for security for costs. As well as examining recent cases in these areas, this review also looks at the effect of the Senior Courts (Access to Court Documents) Rules 2017 on the granting of access to court documents, together with recent practice developments in the use of electronic casebooks in the senior courts and the trend towards increasing digitisation of the litigation process, especially given the effects of the COVID-19 pandemic.

II Representative Actions

A *The relationship between representative proceedings, class or group actions and litigation funding*

This part of the review deals with the issue of representative actions in civil cases from the perspective of the procedural issues which can arise. This is a matter of topical interest as it involves some consideration of how a representative action can facilitate access to justice in civil claims. This in turn concerns the related areas of class actions and third-party litigation funding. A detailed examination of these aspects is, however, beyond the scope of the current review and has been covered in depth by other commentators.[1]

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1 See, for example, Rachel Dunning "All for One and One for All: Class Action Litigation and Arbitration in New Zealand" (2016) 3 PILJNZ 68; Nikki Chamberlain "Class

A brief historical discussion is useful at the outset. In New Zealand, representative claims can be brought under the High Court Rules 2016 by persons having the same interest in a proceeding.[2] Such a proceeding can be brought "with the consent of the other persons who have the same interest"[3] or "as directed by the court on an application made by a party or intending party to the proceeding".[4] The legislative history of this rule can be traced back to the Supreme Court of Judicature Act 1873 in England.[5] Even prior to that enactment the Court of Chancery (though not the common law courts, which generally insisted that all plaintiffs claiming in the action present their case in court in person) in England allowed for a representative claim in order to do justice in a particular case.[6]

A similar legislative provision to that found in the 1873 United Kingdom Act was introduced in New Zealand in 1879.[7] This was in turn incorporated in the same terms into the Code of Civil Procedure 1908[8] and subsequently into the High Court Rules 1986.[9] While the New Zealand rule has therefore remained largely unchanged since its original legislative adoption here

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Actions in New Zealand: An Empirical Study" (2018) 24 NZBLQ 132; Rod Vaughan "Legislation and funding rules needed for class actions" *ADLS Law News* (Auckland, 22 March 2019) at 1; Jenny Stevens and Sophie East "Class/collective actions in New Zealand: overview" [2019] Practical Law 1; and Nick Butcher "Litigation funding and class actions: What's happening in New Zealand?" *LawTalk* (New Zealand, 7 June 2019) at 66.

2 High Court Rules 2016, r 4.24.

3 Rule 4.24(a).

4 Rule 4.24(b).

5 See the authoritative discussion by McGechan J of the historical background to the rule in *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 264–267. Rule 10 of the rules of procedure in the sch to the Supreme Court of Judicature Act 1873 (UK) provided (in quite similar terms to the present New Zealand r 4.24) that: "Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested."

6 As in the judgments of Lord Eldon LC in *Adair v The New River Co* (1805) 11 Ves 429 at 444, 32 ER 1153 (Ch) at 1159 ("where it is impracticable, the rule shall not be pressed"); *Cockburn v Thompson* (1809) 16 Ves 321 at 326, 33 ER 1005 at 1007 (Ch) ("but that, being a general rule, established for the convenient administration of justice, must not be adhered to in cases, to which consistently with practical convenience it is incapable of application"). For a general discussion of the Chancery practice in this area prior to the Act of 1873 see *The Duke of Bedford v Ellis* [1901] AC 1 (HL) at 10–11; and *Prudential Assurance Co Ltd v Newman Industries Ltd* [1979] 3 All ER 507 (Ch) at 511–512.

7 Supreme Court Act 1882, s 79.

8 Judicature Act 1908, sch 2 r 79.

9 High Court Rules 1986, r 78.

in 1882, other common law jurisdictions moved to provide legislative recognition of the class action phenomenon which had long been a part of United States jurisprudence.[10]

Legislation and rules of procedure relating to group or class actions have been adopted in England[11] and at the state and federal level in Australia.[12] Unlike the present position in New Zealand,[13] other common law jurisdictions have also modified or abolished by legislation the ancient torts of champerty and maintenance, which in New Zealand have served to create some degree of uncertainty in relation to the validity of third-party litigation funding of class actions.[14]

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10 Dating back at least to r 23 of the United States Federal Rules of Civil Procedure put in place in 1938 and extended during the 1960s, though claims brought under the antecedents of this rule were considered by the United States courts well before this. See, for example, *Terry v Little* 101 US 216 (1880); and *City of Quincy v Steel* 120 US 241 (1887).

11 See Ministry of Justice "Part 19 — Parties and Group Litigation" Civil Procedure Rules <www.justice.gov.uk>, rr 19.10–19.15, which allow for the making of Group Litigation Orders on an "opt-in" basis (that is, intending claimants must expressly elect to participate in the claim). Such orders are intended to be used in situations where the claimants are sufficiently numerous to justify this course (*Austin v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928, [2011] Env LR 32). In addition, certain United Kingdom statutes specifically allow for group claims to be brought. For example, the Competition Act 1998 (UK) and the Consumer Rights Act 2015 (UK) allow for certain collective claims under these Acts to be determined by the Competition Appeal Tribunal.

12 See the Federal Court of Australia Act 1976 (Cth), pt IVA; Civil Procedure Act 2005 (NSW), pt 10; and Supreme Court Act 1986 (Vict), ss 33A–33ZK. See also the recent report: Australian Law Reform Commission *Integrity, Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC 134, 2018). In general terms this report recommended legalising contingency fees under court supervision for class action lawyers, and additional Federal Court supervisory powers in respect of litigation funding arrangements and for addressing competing class actions, preferably by empowering the court to direct the bringing of a single class action. At the time of writing, the ALRC's recommendation on contingency fees is in the process of being adopted by legislation in the state of Victoria.

13 The rules as to champerty and maintenance in relation to litigation funding appear to have been somewhat relaxed, subject to certain conditions, in cases such as *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331; and *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91. However, in her dissenting judgment in *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735, Elias CJ reiterated at [114]–[134] that the torts of maintenance and champerty remained part of the law of New Zealand and required the courts to exercise control over third-party litigation funding arrangements to avoid oppressive or opportunistic conduct by litigation funders.

14 In England champerty and maintenance were abolished as crimes and torts by the Criminal Law Act 1967 (UK), ss 13–14. Tortious liability under these heads was

The applicable overseas provisions deal with many aspects of group or class litigation from both a legal and administrative perspective. In New South Wales, for example, the statutory procedure covers matters such as eligibility to bring a representative or group proceeding, standing, obtaining the consent of group members, the right to opt out of the proceedings, the powers of the court to give directions as to the conduct of the claim and provisions relating to court approval of settlement and discontinuance.[15]

The Australian experience shows, however, that even reasonably detailed statutory provisions or rules of procedure may not resolve all of the issues which can arise in group litigation. This is illustrated by the divergence of judicial views in recent appeals concerning the making of common fund orders, which require every group member to pay towards a funder's fee in order to secure funding assistance to a class action, even if they have not individually provided their signed agreement to the funding arrangements.

Intermediate appeals in relation to this issue were heard in a combined court sitting by the Full Court of the Federal Court[16] and by the Court of Appeal of New South Wales,[17] which both held that the courts below had power to make such a common fund order in the valid exercise of their discretion. On further appeal, the High Court of Australia reversed both of these decisions by a 5:2 majority, holding that while the availability of third-party funding was conducive to access to justice in general terms, that did not necessarily require the making of a common fund order.[18] It was not

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abolished in New South Wales by the Maintenance, Champerty and Barratry Abolition Act 1993 (NSW), in Victoria by the Wrongs Act 1958 (Vict), s 32 and by similar legislation in South Australia and the Australian Capital Territory. The High Court of Australia decided by a 5:2 majority in the case of *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 that third-party litigation funding arrangements should be permitted except where these were an abuse of process or contrary to public policy.

15 Civil Procedure Act 2005 (NSW), ss 155–184.

16 *Westpac Banking Corp v Lenthall* [2019] FCAFC 34, (2019) 366 ALR 136.

17 *BMW Australia Ltd v Brewster* [2019] NSWCA 35, (2019) 366 ALR 171.

18 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627. The plurality of the Court observed in their joint judgment at [47]: "… it is one thing for a court to make an order to ensure that the proceeding is brought fairly and effectively to a just outcome; it is another thing for a court to make an order in favour of a third party with a view to encouraging it to support the pursuit of the proceeding, especially where the merits of the claims in the proceeding are to be decided by that court. Whether an action can proceed at all is a radically different question from how it should proceed in order to achieve a just result."

the function of the court to assist litigation funders to alleviate their business risk in any particular case.[19]

There have been periodic attempts in New Zealand to introduce a more detailed legislative or procedural regime for representative claims. The Rules Committee issued a consultative document in September 2018[20] accompanied by a draft amendment to the High Court Rules containing additional rules dealing with representative proceedings which are intended to supplement the existing rule 4.24.[21] Similarly, the Law Commission decided in 2017 to review this area and produced terms of reference in 2018.[22] Interest in pursuing this project appears to have recently revived.[23]

Finally in this part, it is interesting from a theoretical standpoint to relate developments in class action litigation with political trends. In the United States, traditional thinking in this area has been that the extension and encouragement of class action litigation has tended to pit liberal interests in the community and politics against the interests of big business and large United States corporations. The latter have tended to be the target of substantial United States class action claims, especially in relation to tobacco litigation, oil spills, car industry issues and financial products such as credit card charges.[24]

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19 At [94]: "To the extent that a CFO may allow a litigation funder to avoid the burden of the process of book building by enlisting the court's aid, there is no warrant to supplement the legislative scheme by judicial involvement to ease the commercial anxieties of litigation funders or to relieve them of the need to make their decisions as to whether a class action should be supported based on their own analysis of risk and reward."

20 The Rules Committee *Consultation on Representative Proceedings* (September 2018). The Committee had earlier produced a draft Class Actions Bill and accompanying rule amendments in 2009 but these were not pursued by the Government at the time.

21 The draft rules are entitled the High Court Rules 2016 (Representative Proceedings) Amendment Rules 2018.

22 Law Commission "Review of Class Actions and Litigation Funding" (14 May 2018) <www.lawcom.govt.nz>.

23 See Stephen Forbes "The Law Commission dusts off a review of class actions and litigation funding after getting a green light from Minister of Justice Andrew Little to resume stalled project" (29 June 2019) Interest <www.interest.co.nz>. The Law Commission has advised on its website that it intends to produce a consultation document on class actions and litigation funding during 2020: see Law Commission "Class Actions and Litigation Funding" (2 June 2020) <www.lawcom.govt.nz>.

24 See, for example, *Exxon Shipping Co v Baker* 554 US 471 (2008) (*Exxon Valdez* oil spill compensation); *Altria Group Inc v Good* 555 US 70 (2008) (authorising a class action in relation to the allegedly fraudulent marketing of "light" cigarettes); United States Federal Trade Commission "Volkswagen to Spend up to $14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles" (press

An interesting recent study by Professor Brian Fitzpatrick of Vanderbilt Law School has, however, tended to cast doubt on the perception that the facilitating of class action procedures is necessarily inimical to conservative political theory.[25] Professor Fitzpatrick addresses and then proceeds to rebut on the basis of existing empirical evidence various arguments against class actions which have been or might be advanced by conservative political interests. These are that class actions are frivolous and lacking in merit, are of financial benefit to lawyers more than plaintiffs and fail to deter future corporate misfeasance.[26] He then advances an argument that class actions can be beneficial in terms of promoting access to justice by potential claimants, but could usefully be made subject to various areas of possible reform, such as limiting class action claims to certain categories of objectionable conduct and limiting class action expenses. This analysis does tend to support the view that class action procedures can be justified across the broad range of the political spectrum.

B *Some recent cases*

Several substantial representative proceedings have been brought in recent years in the New Zealand courts, or are in the process of being brought, most of which have been supported by third-party litigation funding.[27] These are:

- a long-running claim in respect of investment losses by shareholders in Feltex Carpets Ltd. This claim (which is supported by litigation funding) by several thousand shareholders of Feltex Carpets Ltd, who had suffered losses after investing in an initial public offering in 2004, began in 2008 with representative proceedings and litigation funding arrangements which were approved by the High Court[28] and upheld by

release, 28 June 2016); and Liz Kiesche "Visa, Mastercard $6.24B settlement gets preliminary okay from court" (22 Feburary 2019) Seeking Alpha <seekingalpha.com>.

25 Brian T Fitzpatrick *The Conservative Case for Class Actions* (The University of Chicago Press, Chicago, 2019).

26 It is of course debatable how much of the United States analysis is applicable in the New Zealand context given the different legal and regulatory regime in force here, in particular the bar in the ACC legislation on bringing personal injury claims in court, restrictions on the charging of contingency fees by lawyers, and the continued existence of the torts of maintenance and champerty. Available empirical evidence suggests that in fact litigation funders operating in the New Zealand market already (and quite understandably from their own perspective) tend to adopt a rigorous approach to deciding which cases to fund. See Butcher, above n 1, at 71–72.

27 For reference to a number of these see Stevens and East, above n 1, at 2–3.

28 *Houghton v Saunders* [2009] NZCCLR 13 (HC).

the Court of Appeal.[29] The claim proceeded through various interlocutory steps to a trial in the High Court[30] and then to the Court of Appeal, which upheld the judgment of the High Court.[31] A related appeal on a limitation point involving Credit Suisse went to the Court of Appeal[32] and that judgment was in turn upheld by the Supreme Court by a 3:2 majority.[33] In a judgment given in August 2018,[34] the Supreme Court allowed in part an appeal from the Court of Appeal's 2016 decision. The matter now appears, at the time of writing in early June 2020, to be possibly destined (subject to the provision of substantial security for costs by the claimants) to proceed to a further trial in the High Court, some 12 years or more after the proceedings originally commenced;[35]

- a claim in relation to the charging of bank fees (now settled);[36]
- a claim by kiwifruit growers against the Government for alleged negligence in administering its biosecurity responsibilities by allowing the vine disease Psa to enter New Zealand;[37]
- claims in respect of allegedly deficient building cladding systems against Studorp Ltd and James Hardie;[38]

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29 *Saunders v Houghton*, above n 13.

30 *Houghton v Saunders* [2014] NZHC 2229, [2015] 2 NZLR 74.

31 *Houghton v Saunders* [2016] NZCA 493, [2017] 2 NZLR 189.

32 *Saunders v Houghton* [2012] NZCA 545, [2013] 2 NZLR 652.

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

34 *Houghton v Saunders* [2018] NZSC 74, [2019] 1 NZLR 1.

35 *Houghton v Saunders* [2020] NZHC 1088, in which Dobson J ordered, in a judgment given on 22 May 2020, that the proceeding is to be struck out on 14 July 2020 unless security for costs in the sum of $1.65m was provided by the claimants by 13 July 2020.

36 The Court approved the making of a representative order under r 4.24 in this claim, which was funded by a litigation funder based in Australia, in *Cooper v ANZ Bank New Zealand Ltd* [2013] NZHC 2827 at [49]. The proceedings subsequently settled.

37 Leave was granted by the High Court under r 4.24 to bring this claim, which was supported by a New Zealand litigation funder, in *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596 at [87]. The matter proceeded to trial in the High Court which resulted in a judgment for the plaintiff (*Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559). This judgment has recently been reversed on appeal by the Court of Appeal (*Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98).

38 One group of claimants, represented by a Ms White, is funded by a United Kingdom-based litigation funder. For interlocutory judgments in this proceeding see *White v James Hardie New Zealand* [2018] NZHC 1627; *White v James Hardie New Zealand* [2018] NZHC 2812; and *White v James Hardie New Zealand* [2019] NZHC 188. A second group of claimants is self-funded and the Court has made representative orders in favour of a Ms Cridge (*Cridge v Studorp Ltd* [2016] NZHC 2451 (upheld by the Court of Appeal: *Cridge v Studorp Ltd* [2017] NZCA 376, leave to appeal to the Supreme Court refused: *Studorp Ltd v Cridge* [2017] NZSC 178)).

- a claim against Carter Holt Harvey Ltd involving a different external cladding product;[39]
- a claim against ANZ Bank in relation to an alleged Ponzi scheme operated by the convicted fraudster David Ross;[40]
- two sets of representative claims arising from the Christchurch earthquakes against the insurer Southern Response Earthquake Services Ltd;[41]
- two sets of representative proceedings, each backed by different litigation funders, filed in 2019 in relation to the collapse of failed insurer CBL. One claim is by shareholders against the directors only and is being led by Harbour Asset Management. A second claim is against the company only and is being led by a Mr Livingstone. There has been some friction, publicly expressed in the media, as between the two groups of claimants;[42] and
- a class action has been filed in the High Court at Auckland in April 2020 by a group of former shareholders in Intueri Education Group

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39 See *Paine v Carter Holt Harvey Ltd* [2019] NZHC 478 (leave to appeal refused: *Paine v Carter Holt Harvey Ltd* [2019] NZHC 1614), in which the High Court confirmed, in relation to a funded claim, that a representative claim coming within r 4.24(a) did not require the permission of the court even where a litigation funder was involved and that on the facts no actionable abuse of process was involved.

40 See Rob Stock "Victims of ponzi schemer David Ross get green light to sue ANZ" *Stuff* (online ed, Wellington, 14 August 2019). A striking-out application brought by the defendant was dismissed in the High Court at Wellington in a judgment given on 5 May 2020 (*Scott v ANZ Bank New Zealand Ltd* [2020] NZHC 906).

41 This litigation involves two sets of residential property owners affected by the Christchurch earthquakes, who are claiming against the defendant, Southern Response Earthquake Services Ltd, as their insurer. The first group is being funded by a New Zealand litigation funder and the Court has granted representation orders (*Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105, upheld by the Court of Appeal: *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312). The High Court granted a representation order on an "opt-in" basis to a second group of claimants against the same insurer (*Ross v Southern Response Earthquake Services Ltd* [2018] NZHC 3288). On appeal, the Court of Appeal allowed the appeal, changing the method of participation in the claim to an "opt-out" basis and widening the allowed class of claimants (*Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431). The Supreme Court has granted leave to appeal the decision of the Court of Appeal (*Southern Response Earthquake Services Ltd v Ross* [2019] NZSC 140) and stated in its decision that it might be assisted by submissions from the New Zealand Law Society and the New Zealand Bar Association on the applicable legal principles. A subsequent application by a litigation funder, LPF Group Ltd, for leave to intervene was granted on 16 March 2020 (*Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 20). The appeal is proceeding in the Supreme Court.

42 Tim Hunter "Shareholders pour into CBL class action" *NBR* (online ed, Auckland, 9 December 2019).

Ltd, alleging that IPO documents of the company contained various misleading statements.[43]

There have been several other proceedings involving applications for representative orders within the period covered by this review.[44] These include another application arising out of the Christchurch earthquakes.[45]

The above cases illustrate that the courts will be prepared to take a flexible and accommodating view of applications for representative orders in appropriate cases, even though the New Zealand rules of procedure in this area are lacking in detail compared with those in other jurisdictions. The decisions also illustrate an increasing acceptance of the role of litigation funders in facilitating access to justice, given the increasing cost and complexity of civil litigation in actions involving large groups of represented claimants.

III Striking-Out Proceedings on the Grounds of Abuse of Process

A *The jurisdiction to strike out proceedings*

As is well known, r 15.1 of the High Court Rules 2016 allows for all or part of a pleading to be struck out by the court if it discloses no reasonable cause of action or defence,[46] is likely to cause prejudice or delay, is frivolous or

43 Rob Stock "Shareholders file action over collapse of Intueri" *Stuff* (online ed, Wellington, 3 April 2020).

44 See *About Image Ltd v Advaro Ltd* [2017] NZHC 3264 (representative order not necessary as the represented parties were already plaintiffs); and *Tahi Enterprises Ltd v Taua* [2018] NZHC 516 (application by plaintiff to appoint a representative defendant not appropriate in the circumstances of the case).

45 *Smith v Claims Resolution Service Ltd* [2018] NZHC 127 (leave to appeal granted: *Smith v Claims Resolution Service Ltd* [2019] NZHC 2738). The plaintiff was granted a representation order on an "opt-in" basis where the defendant had agreed to provide dispute resolution services in relation to unresolved Canterbury earthquake insurance claims and was allegedly in breach of fiduciary duty and had made an unconscionable bargain by reason of an undisclosed joint venture arrangement.

46 As is commonly appreciated, this ground requires the court to be certain that the claim cannot succeed: *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA); *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725; *EBR Holdings Ltd (In Liq) v McLaren Guise Associates Ltd* [2016] NZCA 622, [2017] 3 NZLR 589. For an interesting recent example of a striking-out application brought in respect of novel causes of action based on alleged duties by the defendants to ensure the production of zero net atmospheric emissions by 2030 see *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419. In the High Court at Auckland, Wylie J struck out two of the three pleaded causes of action, stating at [101] that: "It was common ground that the law,

vexatious, or is otherwise an abuse of the process of the court. This part of the review is concerned with the court's power to strike out a pleading as an abuse of process.

Situations involving a real or alleged abuse of process can arise in a variety of circumstances, as the decided cases illustrate. A common example is the duplication in a new proceeding of the relief sought in an earlier proceeding, or issuing a second proceeding when the first proceeding has not yet been finally determined. Other examples include issuing proceedings for an improper motive, situations where issue estoppel arises (discussed in part III of this review), proceedings which involve serious breaches of court orders or directions, and causes of action which are being pursued in breach of the torts of maintenance and champerty.

Prior to the High Court Rules 1986 coming into effect, the New Zealand courts were inclined to strike out pleadings which disclosed no arguable cause of action as either being vexatious or an abuse of process, on the basis of English authorities at common law.[47] Under the 1986 Rules the basis for striking out pleadings was categorised into separate grounds,[48] and this approach has continued to the present time.

Before embarking on an examination of some recent cases, it is important to note that the concept of abuse of process requires the existence of serious instances of abuse. An applicant bears a heavy burden of establishing such

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on appropriate occasion, evolves, and that the common law is an important source of law. It is capable of creating new principles and causes of action, and from time to time does so — for example, a new tort of intrusion into seclusion has relatively recently been recognised in New Zealand. The common law however proceeds through the methodological consideration of the law that has been applied in the past and the use of analogy. The common law method brings stability, but it can also allow for the injection of new ideas and for the creation of new responses as required" (footnotes omitted).

47 See, for example, early reported cases such as *Stunnell v Olsen* (1896) 15 NZLR 64 (SC) at 65–66: " … I do not think the cases in England show that where there has been a mere blunder in pleading an application of this kind can be made. Where the statement of claim shows that the action is vexatious that is a very different matter"; and *Bouvy v Count De Courte* (1901) 20 NZLR 312 (SC) at 317: "The statement of claim does not, in my opinion, disclose any cause of action; and, this being so, there is ample authority that a Court will not allow its process to be abused; and it is an abuse of the process of the Court to proceed with a groundless and frivolous action … ".

48 High Court Rules 1986, r 186.

conduct and the court will intervene only in the most exceptional cases,[49] as the Court of Appeal has recently affirmed.[50]

B *Some recent cases*

One of the more common grounds for striking out pleadings as an abuse of process is that the relief being pursued in the claim mirrors or duplicates that sought in an earlier claim or a second proceeding has been issued while the first remains undetermined. A number of recent cases are based on such a fact situation.

BDM Grange Ltd v Trimex (New Zealand) Ltd concerned a claim for equitable compensation which could have been raised in an earlier proceeding had a late amendment to the earlier claim been pursued.[51] Summary judgment was granted to the defendant dismissing the second claim as an abuse of process. Several other recent examples of claimed abuse of process involving duplication of relief can also be mentioned here.[52]

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49 See the discussion of the concept of abuse of process in *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 (CA); *Williams v Spautz* (1992) 174 CLR 509; *Walton v Gardiner* (1993) 177 CLR 378; *Jeffrey and Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75; and *Waterhouse*, above n 13. A similar jurisdiction exists in criminal cases, where conduct by the prosecution may preclude a fair trial or produce an outcome inconsistent with the purposes of criminal justice. For a discussion of the applicable principles in criminal cases see *Attorney-General v District Court at Hamilton* [2004] 3 NZLR 777 (HC).

50 *Merisant Co Inc v Flujo Sanguineo Holdings Pty Ltd* [2018] NZCA 390, [2018] NZAR 1550 at [27]: "It is clear, therefore, that just as it is not every breach of the rules that would be regarded as an abuse of process, similarly not every action by a party which results in some form of unfairness to another party will be an abuse of process. The conduct must be 'manifestly unfair'. There must be something more than the breach of a rule or an action, which might offend a general sense of fair play. The action must be an abuse of the Court's process with all the seriousness that the word 'abuse' entails" (footnotes omitted).

51 *BDM Grange Ltd v Trimex (New Zealand) Ltd* [2017] NZHC 1259.

52 *Niwa v Commissioner of Inland Revenue* [2019] NZHC 853, [2019] NZAR 1104 (plaintiff's claim for judicial review of Commissioner's debt proceedings struck out as an abuse of process where the High Court had earlier struck out a defence and counterclaim by the present plaintiff who was seeking to defend earlier proceedings by the Commissioner); *Commerce Commission v Harmoney Ltd* [2017] NZHC 2421 (proceedings brought by the Commerce Commission to clarify the application of the Credit Contracts and Consumer Finance Act 2003 to situations of peer to peer lending were not identical in nature to earlier enforcement proceedings brought by the Commission and were not an abuse of process, but the situation could be suitably addressed by staying the earlier enforcement proceedings); *Sutcliffe v Tarr (No 2)* [2018]

There are also various recent examples where pleadings have been struck out as an abuse of process on other grounds. These include serious and persistent failure to comply with court rules and procedures or where the claim has been brought for an improper purpose.[53]

These recent cases confirm the long-standing principle that a pleading may be struck out as an abuse of process in a variety of circumstances. The court will, however, be concerned to ensure that the fact situation involves a serious breach and is not being pursued simply for the strategic advantage of the applicant.

IV Issue Estoppel

A *The nature of issue estoppel*

The doctrine of issue estoppel has as its object the bringing of finality to the litigation of disputes by preventing the same parties, or parties with a community or privity of interest in the previous proceeding,[54] from contesting in subsequent litigation an issue which has earlier been determined. A plea of issue estoppel seeks to achieve this objective by examining the reasoning and holdings in an earlier judgment, which need not necessarily be a judgment of a member court in the same hierarchy of courts.[55]

NZCA 135, [2018] NZAR 696 (plaintiff's claim struck out on appeal as an abuse of process where earlier proceedings had made inconsistent findings as to proof of loss); *Mailley v Legal Complaints Review Officer* [2018] NZHC 3363, [2019] NZAR 347 (subsequent judicial review proceedings against the defendant were stayed as an abuse of process where the relief sought was based on the same factual issues as those arising in an earlier civil proceeding which had also been stayed); *Whitford Properties Ltd (in liq) v Coumat Ltd* [2019] NZHC 1001 (plaintiff's claim struck out as an abuse of process where the claim relied on matters which should properly have been advanced in a previous proceeding).

53 *Yarrow v Finnigan* [2017] NZHC 1755 (claim by a lay litigant struck out as an abuse of process after six years of delay and procedural omissions including persistent failure to comply with court orders); *Rabson v Young* [2017] NZSC 146 (claim against various Supreme Court judges raised the same matters as in previous proceedings and was struck out as "an abuse of process, exemplified by circularity, repetitiveness and general vexatiousness": at [4]); and *Nottingham v Real Estate Agents Disciplinary Tribunal* [2017] NZHC 3018 (appeal contained "irrelevant, vexatious and scandalous material" and was struck out as an abuse of process: at [15]).

54 See *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL).

55 As in *van Heeren v Kidd* [2016] NZCA 401, [2017] 3 NZLR 141 (leave to appeal to the Supreme Court refused — *van Heeren v Kidd* [2016] NZSC 163), in which the New Zealand Court of Appeal held that an issue estoppel arose in subsequent New Zealand proceedings from the findings in the judgment of a South African court as to

The doctrine of issue estoppel is based both on the community interest in achieving finality in disputes and also on the need to prevent individuals being subjected to repeated claims arising from the same fact situation.[56] As the Court of Appeal held in the leading 1992 New Zealand case of *Talyancich v Index Developments Ltd*, an issue estoppel arises where an earlier judgment determines an issue in the litigation as an essential and fundamental step in the logic of the judgment, without which the judgment cannot stand.[57]

As is the case with many legal doctrines, the essential principle can be stated in relatively straightforward terms, but the application of the principle in a particular case is often more complicated. In the case of issue estoppel, judicial views may well differ as to which steps in the logic of the earlier judgment can be regarded as being indispensable, especially where the fact situation and the applicable legal principles in the earlier judgment are complex. This may particularly be the case where the earlier first-instance judgment has been reversed on appeal, either in whole or in part, or affirmed on other grounds.

B *Some recent cases*

The application of the doctrine of issue estoppel in a variety of different circumstances is illustrated by recent cases in this area.

In *McGougan v DePuy International Ltd* the Court of Appeal considered a representative claim by a number of New Zealanders who had received allegedly defective hip implants manufactured by a United Kingdom firm which did not carry on business in New Zealand.[58] The appellants had lodged ACC claims in New Zealand and received compensation, including payments in respect of loss of earnings. In their New Zealand proceedings, they claimed against the United Kingdom hip implant designer and manufacturer for additional compensation based on pain, suffering and loss of enjoyment of life.

The New Zealand claimants had previously sued the implant firm in proceedings in England in which it had been held that New Zealand law applied to their claim and that their claim for compensatory damages was barred under the ACC legislation. In the New Zealand proceedings the High

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the existence of a partnership and the making of misrepresentations as to the effect of an indemnity.

56 See the general discussion of the principle in the classic judgment of Diplock LJ in *Thoday v Thoday* [1964] 2 WLR 371 (CA) at 198.

57 *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA).

58 *McGougan v DePuy International Ltd* [2018] NZCA 91, [2018] 2 NZLR 916.

Court held that the claimants were estopped by the English judgment from relitigating their claims for compensatory damages in New Zealand.

On appeal, the Court of Appeal upheld the judgment of the High Court. The Court held that the ACC legislation barred personal injury claims for injuries suffered in New Zealand regardless of whether overseas conduct by persons outside New Zealand had given rise to the damage in question, although a claim for exemplary damages outside the ACC regime was still available. The New Zealand claimants had been represented by parties to the English proceedings. They had a clear and obvious interest in the subject matter of the proceedings and were directly affected by the outcome.[59] Having chosen to sue in England the claimants were bound by the outcome of the English proceedings.[60]

The concept of whether a party to subsequent litigation was privy to an earlier court decision for issue estoppel purposes was further considered by the Court of Appeal in *Muir v Commissioner of Inland Revenue*.[61] The appellant in that case appealed against a summary judgment for arrears of tax arising from a tax avoidance scheme. The Court held that the appellant was privy to an earlier adverse Supreme Court judgment concerning the scheme in question so that subsequent litigation raising the same issues was not capable of success and was an abuse of process.

In *K v District Court at North Shore* the second respondent had been granted a discharge without conviction in the North Shore District Court for assaulting one of K's daughters.[62] K sought to challenge the District Court sentencing decision by way of judicial review. There had been an earlier ruling made in respect of a similar proceeding filed some years previously that K lacked standing in the matter. The High Court held that this gave rise to an issue estoppel, so that K's claim was struck out.

A recent case in which a plea of issue estoppel by a defendant was unsuccessful was *Westpac New Zealand Ltd v Anderson*.[63] In that case the defendant was the subject of a claim by the plaintiff bank alleging fraudulent conduct on her part. She had previously been subject to a criminal prosecution which had resulted in a discharge and to a civil claim by a receiver which had been the subject of a pre-trial settlement at mediation. In the High Court, Venning J rejected the defendant's argument that these earlier matters gave rise to an issue estoppel against the present plaintiff. Although the interests of the plaintiff bank coincided in some respects with the interests of the Crown in bringing the earlier prosecution, that was not a sufficient alignment

59 At [68]–[92].

60 At [93]–[98].

61 *Muir v Commissioner of Inland Revenue* [2018] NZCA 129.

62 *K v District Court at North Shore* [2018] NZHC 2503, [2018] NZAR 1850.

63 *Westpac New Zealand Ltd v Anderson* [2019] NZHC 979.

of interest to make the bank's interests privy with those of the Crown. In addition, there had been no final judgment in the earlier civil claim as it had been settled by mediation before that could occur. The bank's claim was therefore not subject to issue estoppel and was not an abuse of process.

V Applications for Security for Costs in High Court Proceedings

A *The court's powers to award security for costs*

The court has power under the High Court Rules, on the application of a defendant, to make an order for security for costs against a non-resident plaintiff (including a corporation incorporated outside New Zealand or a subsidiary of such a corporation)[64] or where there is reason to believe that an unsuccessful plaintiff will be unable to pay the defendant's costs.[65] Under the High Court Rules 2016, unlike the position under earlier court rules, security for costs may be sought even if a defendant has taken steps in the proceeding.[66]

The cases in this area show that the court, in setting the amount of security, will be concerned to ensure that meritorious but impecunious plaintiffs are not shut out of court. Security is therefore frequently ordered for less than the amount that a successful plaintiff would stand to gain from an application of the cost principles and calculations under the court rules.[67]

B *Some recent cases*

A selection of recent cases in this area illustrates the applicable principles. In *Heke (also known as Lewis Reginald Stanton) v Nelson City Council* a claim by a self-represented litigant against the defendant Council, the Police and

64 Rule 5.45(1)(a).

65 Rule 5.45(1)(b).

66 Rule 5.45(5).

67 In *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) the Court of Appeal stated at [15]–[16]: "Access to the courts for a genuine plaintiff is not lightly to be denied. Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted." In *Sila v Nanai-Leota* [2018] NZHC 3163, where an impecunious plaintiff with a weak claim was ordered to pay security for costs in the sum of $10,000, the Court stated at [62] that: "Security is not necessarily ordered in an amount that represents the actual likely costs of the hearing." In *Taylor v Wynn Williams* [2017] NZHC 2598 security for costs of $15,000 was awarded in respect of a not unrealistic estimate of trial costs of $150,000.

the RSPCA, challenging various actions taken against him by the defendants, resulted in security for costs being granted to the RSPCA in the sum of $15,000.[68] The Court held that even though the order for security for costs might effectively bar the plaintiff's claim, that had to be balanced against the interests of the RSPCA as a charitable organisation, which was facing a weak claim and might not be able to recover costs against the impecunious plaintiff.[69]

Miah v AMP Life Ltd (No 3) was a case in which the defendant sought security for costs of $34,000 against a plaintiff who was likely to prove impecunious.[70] The plaintiff had, however, earlier obtained costs after a Court of Appeal hearing and had a credit of some $46,000 available to it. The Court considered that the defendant's application could be addressed by staying execution of the costs orders obtained by the plaintiff and making no further order in respect of security for costs.

Security can be given either by payment into court or by giving security to the satisfaction of a judge or registrar.[71] Some of the cases illustrate the latter form of providing security.[72] Security for costs can only be ordered against the plaintiff and not against a non-party to the litigation.[73]

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68 *Heke (also known as Lewis Reginald Stanton) v Nelson City Council* [2019] NZHC 433.

69 At [35]: "The courts are normally reluctant to bar a plaintiff with a worthy claim from the court. Their interests are often ranked ahead of the interests of a defendant who may not recover costs even if they succeed. But in this case, Hone's interests are outweighed by the RSPCA's. Hone's case appears weak. The RSPCA is a charitable organisation that relies on donations to carry out its activities, as opposed to more substantial organisations such as government agencies, banks and large corporations. The inability to recover costs is likely to hit it harder. Accordingly, even though ordering security may bar Hone from continuing his claim against the RSPCA, security should be ordered."

70 *Miah v AMP Life Ltd (No 3)* [2019] NZHC 750.

71 Rule 5.45(3)(a).

72 See, for example, *Burgess v Monk (No 2)* [2017] NZHC 2424 (security for costs ordered by the grant of an interim injunction restraining the plaintiff from dealing with a property which was to provide the security which was sought); *Burgess v Monk (No 5)* [2017] NZHC 2732 (the Court held that the interim injunction previously granted might not provide adequate security in the event of the plaintiff's bankruptcy so further security was ordered to be provided by way of entitlement to equity in the property). However, in *Jackson v Jackson* [2017] NZHC 2506, where the plaintiff relied for proof of his financial ability to pay costs on an alleged indemnity from the trustees of his family trust, the Court held that the indemnity was unenforceable and revocable so that the plaintiff was ordered to pay security for costs personally of $25,000; *Lee v Lee* [2019] NZCA 345 (the plaintiff's case had weak prospects of success and the sum of $75,000 security awarded was reasonable but the High Court should not have directed this to be provided by way of mortgage from a trust).

73 In *Oxygen Air Ltd v LG Electronics Australia Pty Ltd* [2018] NZHC 2504, [2018] NZAR 1699 the Court rejected an argument that the sole director and shareholder of the plaintiff

In the case of representative actions, security for costs may still be ordered against the plaintiffs even where a litigation funder is involved. This is because, as a matter of policy, a litigation funder stands to profit from the outcome of the litigation and will have allowed for this possibility in setting its funding arrangements. It should therefore not be exempt from contributing to an order for security for costs made against the plaintiff which it is funding.[74]

VI Access to Court Files in Civil Cases

A *Access to court files under the Senior Courts (Access to Court Documents) Rules 2017*

The Senior Courts (Access to Court Documents) Rules 2017 (2017 Rules) relating to access to court files in the senior courts took effect on 1 September 2017[75] and apply to requests to access court documents in the High Court, Court of Appeal and Supreme Court.[76] Rights of access to court documents in civil proceedings are subject to enactments, court orders or directions

company was the alter ego of the plaintiff company, so that the sole director should personally undertake to meet any award of costs against the plaintiff. The corporate structure of the plaintiff was not unusual and the director and the company were separate legal entities. Rule 5.45 did not allow for the ordering of security for costs against a non-party to the litigation.

74 In *Walker v Forbes* [2017] NZHC 1212 the Court stated (approving previous New Zealand and Australian authority such as *Saunders v Houghton*, above n 13) at [33]: "The existence of a litigation funder in the present case is an important factor that influences the exercise of the discretion for several reasons. The first of these is that the plaintiffs will not be precluded from continuing with their claims if a significant order for security is made. Furthermore, SPF [the litigation funder] stands to receive most, if not all, of the proceeds of any successful claim. It has no interest in the litigation beyond the profit it hopes to derive from what it clearly regards as a commercial venture. Commercial ventures generally require an investor to take risks and to incur expenditure as the price to be paid for the chance of success. SPF should therefore be required, as a matter of policy, to contribute significantly to the defendants' costs if the claims are unsuccessful." The Court took a similar approach in *White v James Hardie New Zealand (No 3)* [2019] NZHC 188, (2019) 24 PRNZ 493 where security for costs was ordered where the local plaintiffs were supported by a litigation funder based overseas. See also the judgment of Dobson J in *Houghton v Saunders*, above n 35, where security for costs of $1.65m was ordered.

75 Rule 2. In the District Court the corresponding access regime is to be found in the District Court (Access to Court Documents) Rules 2017.

76 Rule 3.

restricting access and publication[77] and access to documents in proceedings brought under certain enactments.[78]

In civil proceedings, any person may access the formal court record relating to the proceedings, which is a defined term that includes documents such as the register or index of the court proceeding and any court judgments on the court file.[79] Applications for further access to court documents can be made in writing to the court registrar and these are notified to the parties to the proceeding or their lawyers, who may object to the request.[80]

The 2017 Rules set out various matters for the court to consider,[81] including a right to protect certain information against disclosure consistent with the need to satisfy the principle of open justice,[82] the protection of confidential and privacy interests,[83] and the principle of open justice, including the encouragement of fair and accurate reporting of court hearings and decisions.[84] These factors are accorded differing weight before, during and after the substantive hearing.[85]

The 2017 Rules define a court document in a civil proceeding as including "records in electronic form",[86] so that the provisions of the 2017 Rules also apply to access to all electronic documents filed in the senior courts. Under the 2019 Court of Appeal Practice Note relating to electronic documentation,[87] access to electronic court documents in the Court of Appeal is to be managed according to the 2017 Rules.[88]

77 Rule 6(a).

78 Rules 6(b) and 7.

79 See rr 4 definition of "formal court record" and 8(1).

80 Rule 11.

81 Rule 12.

82 Rule 12(c), which states that a relevant matter for the court to consider is "the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice".

83 Rule 12(d).

84 Rule 12(e).

85 Rule 13.

86 Rule 4 definition of "document", para (a)(ii).

87 See part VII of this review.

88 In the Court of Appeal, see Court of Appeal of New Zealand - Te Kōti Pīra o Aotearoa *Electronic Document Practice Note 2019* (30 September 2019) at [10].

B *Some recent cases*

A detailed discussion of the case law under the previous access regime contained in the High Court Rules 2016[89] and the predecessor rules is beyond the scope of this review and has been dealt with elsewhere.[90] Two recent cases under the 2017 Rules may, however, be particularly noted here.

Dotcom v Twentieth Century Fox Film Corp concerned an application to access a court file in another matter in which the film corporation in question had brought an allegedly similar claim for breach of internet copyright.[91] That claim had subsequently been settled and the High Court had made an order sealing the file.

Fitzgerald J held that as the application had been made prior to the 2017 Rules coming into effect on 1 September 2017 the previous access regime under the High Court Rules 2016 applied but that this did not require the court to take a different approach to the application.[92] Her Honour went on to observe that while an application for access by a non-party would inevitably involve some element of "fishing", there must be a reasonable prospect of relevant material being found.[93] On the facts of the case, her Honour held that no such reasonable prospect existed and applying the relevant principles as to access, the application was accordingly declined.[94]

In the second case, *Peters v Bennett*, the Office of the Privacy Commissioner applied (without objection from the parties) to access to the statement of claim and statements of defence on the grounds that a privacy issue was involved in the proceedings.[95] Venning J was satisfied that the

89 Part 3 sub-pt 2.

90 See, for example, Andrew Beck "Litigation Section" [2018] NZLJ 16, who discusses the decision of the Court of Appeal in *Greymouth Petroleum Holdings Ltd v Empresa Nacional del Petróleo* [2017] NZCA 490, [2017] NZAR 1617 relating to the 2017 Rules.

91 *Dotcom v Twentieth Century Fox Film Corp* [2017] NZHC 3262.

92 At [9].

93 At [12].

94 At [27]–[37].

95 *Peters v Bennett* [2018] NZHC 1874. Other recent access to court file cases under the 2017 Rules are: *Hansen v Escape Rentals Ltd* [2017] NZHC 2185, (2017) 24 PRNZ 320 (application by journalist to access court file made before the pleadings had been finalised was premature in terms of the fair and orderly administration of justice at least until discovery and any amendments to the defendant's pleadings had been completed); *Deng v Ye* [2018] NZHC 928, (2018) 24 PRNZ 38 (application for access to a court file relating to recall of grant of administration under rule 8(2) was not opposed in terms of r 5 and was granted); *Offshore Holdings Ltd v Western Pacific Insurance Ltd (in liq)* [2018] NZHC 1307, (2018) 24 PRNZ 195 (application by Land Information New Zealand to access court file in a claim for damages against an insurer arising from the Christchurch earthquakes in order to determine the compensation payable

applicant had a proper interest in the proceedings and no matters in r 12 of the 2017 Rules counted against the application, which was granted.

VII The Use of Electronic Casebooks in the Senior Courts and the Digitisation of Court Processes

A *Recent developments in this area*

Perhaps one of the most far-reaching developments in civil procedure since my last review in 2017 has been the widespread adoption of electronic casebooks in civil hearings in the senior courts, both at first instance and on appeal, pursuant to the Senior Courts Civil Electronic Documents Protocol 2019.[96] This came into force on 1 March 2019, updating the earlier protocol.[97] This part of the review examines these developments and also discusses briefly the significance of the developing trend towards the increasing digitisation of court and litigation processes. This trend has received recent impetus both in New Zealand and in other common law jurisdictions as a consequence of the effect of the COVID-19 pandemic on court processes and the resulting necessity to develop innovative methods for conducting remote court hearings, as will be discussed further below.

The 2019 Protocol is intended to "encourage and facilitate the use of electronic casebooks for civil cases" in the senior courts.[98] It contains detailed default directions and a party must advise the registrar if deviations

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upon compulsory acquisition was properly made and was granted subject to LINZ only using the documents for its particular statutory role in terms of its application); and *Re Walker* [2020] NZHC 280 (concerning an application for access to documents in archived court files relating to divorce proceedings in the early 1930s concerning the applicant's paternal great-grandmother and paternal great-grandfather. Grice J held at [13] that access based on a general interest in family history matters would not in itself be sufficient reason. However, the Court held at [14] that there were additional reasons in this case justifying access, given that the information in the court files had been made public in a contemporary newspaper report, it constituted an important part of the applicant's family history and there were no surviving relatives from whom the relevant information could be obtained).

96 *Senior Courts Civil Electronic Documents Protocol 2019* (1 March 2019). The text of the 2019 Protocol can be found on the Courts of New Zealand website and is to be updated from time to time, so that users will need to check the latest online version when making reference to it.

97 See the earlier *Higher Courts Civil Electronic Document Protocol* (27 May 2016), which came into force on 10 December 2015 and was updated in 2016.

98 At [1.2].

from these are sought.[99] Where possible the electronic casebook created in the High Court will then be modified for use in any subsequent appeals.[100] The Protocol then sets out comprehensive provisions as to the creation, structure, contents, formatting, page numbering, hyperlinking and filing and service of the electronic casebook.[101] Examples of the prescribed processes, with illustrative examples, are then provided.[102]

A detailed examination of the technical aspects of electronic casebooks, and various intricacies such as OCR batching of documentation, electronic pagination and pinpointing of hyperlinks, is beyond the scope of this review and in any event has been covered in detail elsewhere.[103] This part of the review is therefore primarily concerned with the relevant instruments and rules implementing the use of electronic casebooks and some of the main features of the new regime. As this is a fast-developing area, reference is made to the various instruments and practice notes in force at the time of writing, being early June 2020.

In terms of the court rules, amendments have been made to the High Court Rules 2016,[104] the Court of Appeal (Civil) Rules 2005[105] and the Supreme Court Rules 2004[106] in relation to the use and content of electronic casebooks in each of those courts. In addition to the foregoing rule changes, relevant Practice Notes have been issued in the High Court[107] and Court of Appeal.[108]

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99 At [1.5].

100 At [1.8].

101 At [2]–[9].

102 At [13].

103 See, for example, the comprehensive treatment of the topic in Forrest Miller and others *Civil Electronic Casebooks — Senior Courts* (NZLS Seminar booklet, October 2019).

104 High Court Rules 2016, rr 9.4(2)(c) and 9.4(5A) which requires that where the common bundle is in electronic format "the parties must have regard to any practice note on electronic formats issued from time to time by the Chief High Court Judge".

105 Court of Appeal (Civil) Rules 2005, rr 10A, 40, 40E and 42. Rule 10A requires compliance, in relation to electronic documents, with the *Senior Courts Civil Electronic Document Protocol 2019* (1 March 2019).

106 Supreme Court Rules 2004, rr 10A and 35–37. Rule 10A requires compliance "with any practice note issued from time to time by the Chief Justice about electronic formats".

107 *2019 Practice Note: The Use of Electronic Common Bundles and Electronic Casebooks in the High Court* (HCPN 2019/1 (civ and crim), March 2019), replacing *2016 Practice Note: The Use of Electronic Common Bundles and Electronic Casebooks in the High Court* (HCPN 2016/1 (civ and crim), May 2017), which was itself updated in 2017.

108 Court of Appeal of New Zealand - Te Kōti Pīra o Aotearoa, above n 88, which took effect on 1 October 2019 and applies to all civil appeals filed after this commencement date — see [2(1)] and [2(2)].

In the High Court, the relevant practice note provides, in summary, in relation to civil cases:[109]

> The practice note is to be read and interpreted consistently with the Senior Courts Electronic Document Protocol 2019;
> Use of an electronic common bundle and/or casebook will usually be appropriate where the documentation involved exceeds 500 pages;
> Directions can be made by the Court at the case management conference which makes trial directions and at the pretrial conference as required;
> Default directions apply unless varied by court order.

In relation to Court of Appeal hearings, the following aspects of the Electronic Document Practice Note 2019 are particularly noteworthy:[110]

> The practice note is be read and interpreted consistently with the 2019 Protocol;
> The obligation on parties to co-ordinate in relation to preparation of the case on appeal is confirmed as being especially important in the case of electronic records;
> Electronic documentation is to be required in all civil appeals and a judge may convene a teleconference to give appropriate directions;
> There are prescribed default directions which apply unless varied by court order;
> The practice note deals with the date of filing of electronic documents.

B *A critical perspective on increasing digitisation*

Lest the following comments be misunderstood, let me state at the outset that there are undoubted benefits which flow from the increasing digitisation of court processes and hearings,[111] at least in relation to the use of electronic filing and casebooks. These include increases in efficiency in the litigation, hearing and judicial processes, promoting the convenience of remote working, cost savings in terms of court administration and (not least nowadays) saving forests of trees by way of paperless filing and court processes. Nevertheless,

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109 At [1.1], [2.3] and [2.5]–[2.7].

110 At [2(5)], [3(4)], [5(1)–(2)], [6(1)–(3)] and [8].

111 For an interesting recent discussion of these trends see Richard Susskind "The Case for Online Courts" (UCL Judicial Institute Lecture, University College London, 16 February 2017). In New Zealand the Electronic Courts and Tribunals Act 2016 is designed to authorise the use of permitted documents in electronic form in the processes and proceedings of courts and tribunals.

some notes of caution may also be appropriate. The trend towards increasing digitisation in civil cases raises various issues which need to be confronted from a procedural perspective.

Perhaps most significantly, the courts have to cater for not only tech-savvy lawyers and judges but also the general public, not to mention the increasingly popular phenomenon of the self-represented litigant.[112] Not all of these classes of non-legally trained persons are likely to be familiar with the intricacies of OCR-format electronic documentation (or sympathetic, as users of the system, to the additional costs involved in generating an electronic casebook).

Given that the promotion of access to justice in the context of the contemporary justice system is undeniably important, care needs to be exercised to ensure that relatively sophisticated (and more costly) electronic processes do not operate to the detriment of this principle by making it more difficult for unrepresented litigants to run cases and appeals in person.[113] In addition, as discussed below,[114] there is a need to ensure that court IT systems are adequately protected against computer hacking and unauthorised access by third parties.

There are also constitutional aspects to this broader issue. Concerns in this area have been expressed in recent times in a somewhat different context in relation to the use of audio-visual link (AVL) technology, mainly in criminal matters,[115] pursuant to the Courts (Remote Participation) Act 2010.[116]

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112 See the discussion of this topic in John Turner "Civil Procedure" [2017] NZ L Rev 681 at pt II.

113 The protocols and practice notes referred to above do admittedly give discretion to judges to depart from the electronic casebook requirements in appropriate cases.

114 John G Roberts Jr *2014 Year-End Report on the Federal Judiciary* (Supreme Court of the United States Public Information Office, December 2014).

115 See, for example, Jane Adams "'Distributed Courts': AVL in New Zealand's Courts" *LawTalk* (New Zealand, 3 November 2017) at 64, citing concerns expressed by the former Chief Justice Elias about the "risk of the blurring of the distinct role of the courts". In similar vein, see the comments of Winkelmann CJ in her address to the 2019 Annual Conference of the Criminal Bar Association: "We should be debating what the removal of the defendant from the room means for our system of justice. And what it tells us about that system": Helen Winkelmann, Chief Justice of New Zealand "Bringing the Defendant Back Into the Room" (speech to the Criminal Bar Association of New Zealand, Auckland, 3–4 August 2019) at 10 as cited in Jenni McManus "Chief Justice: 'Bring the defendant back into court'" *ADLS LawNews* (Auckland, 27 September 2019) at 1.

116 Under s 7, audio-visual links may also be used in civil proceedings, though their use in civil cases does not appear to be generally widespread. Section 5 of the Act sets out the criteria for the use of audio-visual links in both civil and criminal proceedings (s 5 being rendered applicable to civil proceedings by virtue of s 7(3)(a) of the Act). One

The transition from paper-based to paperless procedures in court can also be less than smooth. Where both systems are in use contemporaneously potential for conflict between them can occur, as the recent high-profile case in the United Kingdom Supreme Court concerning the powers of the United Kingdom's Prime Minister to prorogue Parliament has graphically illustrated.[117] In another English case in 2019, *Invista Textiles UK Ltd v Botes*,[118] Birss J noted various difficulties, both of a practical and technological nature, which arose in that case from the use of an electronic bundle of documents during cross-examination of witnesses.[119]

The Chief Justice of the United States Supreme Court, John G Roberts Jr, stated in 2014 in relation to the use of CM/ECF [Case Management/ Electronic Case Filing] in the United States federal courts:[120]

> When deploying CM/ECF, the judiciary must make sure that its operating instructions are clear, its applications and dashboards are intuitive, and its systems are compatible with a broad range of consumer hardware and software. Unlike commercial enterprises, the courts cannot decide to serve only the most technically-capable or well-equipped segments of the public. Indeed, the courts must remain open for those who do not have access to personal computers and need to file in paper, rather than electronic, form.

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of the general criteria for allowing the use of audio-visual links in any particular case is expressed in s 5(c) as being "the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including — (i) the ability to assess the credibility of witnesses and the reliability of evidence presented to the court; and (ii) the level of contact with other participants".

117 *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373. The televised arguments in this case will be remembered by many, not for the abstruse legal arguments on the prorogation of Parliament, but for the protracted struggle of the Court and counsel to reconcile the page numbering of the paperless and the electronic bundle of documents, prompting Lady Hale, the President of the United Kingdom Supreme Court, to remark, with some degree of exasperation: "there is always trouble with the documents in these cases and we need to sort it out": The Sun "Supreme Court chaos as Gina Miller's lawyer has different document page numbers to that of judges" (17 September 2019) YouTube <www.youtube.com>.

118 *Invista Textiles (UK) Ltd v Botes* [2019] EWHC 58 (Ch), [2019] IRLR 977.

119 At [47].

120 Roberts Jr, above n 114, at 9. Chief Justice Roberts also noted (at 10) in relation to preserving the security of court information: "Courts understandably proceed cautiously in introducing new information technology systems until they have fairly considered how to keep the information contained therein secure from foreign and domestic hackers, whose motives may range from fishing for secrets to discrediting the government or impairing court operations."

The ongoing search for increased efficiency and cost reductions associated with the progressive digitalisation of court and litigation processes should not be pursued so relentlessly that the end users of the system, being civil litigants in the present context, eventually feel alienated from the whole process. There have also been concerns expressed that moves towards the implementation of online courts, while they may increase efficiency and reduce costs, may not necessarily be conducive to improving access to justice for participants in the process.[121]

On the other side of the argument, online courts are not lacking in enthusiastic proponents.[122] These advocates stress the advantages of speed of determination, economy of cost, and a more intelligible and less combative process for dispute resolution.

It needs to be kept in mind that the process of expertly conducting civil litigation involves the weighing up of many competing factors, both tangible and intangible, and the use of considerable intuition and instinct on the part of litigation lawyers, often derived from years of experience in court. These factors may well include how a particular judge, whose personality and outlook on life may be well known to counsel, is likely to view the nuances of a particular set of complex facts and circumstances. They may also include perceptions as to how a witness is likely to fare under cross-examination by a particular opposing counsel and whether a specific witness (who may be inarticulate, unintelligent or simply mendacious) is likely to advance or hinder a litigant's prospects of success, for reasons which may be quite unrelated to the content of the evidence to be given.

This will be an extremely difficult skill set, at least in this writer's view, to be adequately replicated by even the most skilfully programmed of computers. These considerations need to be accorded sufficient weight in the arguments surrounding the promotion of increased digitisation, perhaps directed eventually towards the use of lawyerless courts. Just as war is too important to be left to the generals, as the then French Prime Minister Georges Clemenceau is said to have remarked in 1917 after the debacle of

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121 See, for example, Bridget Irvine "Aotearoa's future courts: should online courts be our future?" *LawTalk* (New Zealand, 10 May 2019) at 68, who concludes (at 69) that further investigation is necessary into whether online courts can actually improve access to justice, particularly for self-represented litigants: "In the traditional court model, it is the role of the lawyer to take a litigant's information and translate it into a claim that can be understood by the court. If online courts do become lawyerless, we need to know that the platform can carry out that critical gatekeeper role."

122 See, for example, Richard Susskind *Online Courts and the Future of Justice* (Oxford University Press, Oxford, 2019), reviewed by David Harvey "How and why we should develop online courts" *ADLS LawNews* (Auckland, November 2019) at 5; and "Online courts: accessible, available, useable" *ADLS LawNews* (Auckland, 6 December 2019) at 5.

Verdun in the First World War,[123] so issues such as the progressive digitisation of the courts and the civil litigation process may be too important to be left (at least entirely) to judges, lawyers and administrators.

C *The effects of the COVID-19 pandemic*

The philosophical debate over the trend towards the digitisation of the courts has recently been supplanted to a large extent by the practical exigencies arising from the COVID-19 pandemic and the associated lockdowns in New Zealand and in many other common law jurisdictions. At the time of editing for publication, in early September 2020, lockdown conditions of varying severity are continuing in New Zealand and the various Australian states, though the position in England and in United States state jurisdictions is somewhat less certain.

As practitioners in the civil litigation area will be well aware, the pandemic has given rise to urgent and quite far reaching procedural innovations in various areas in civil cases, ranging from remote hearings conducted by audio-visual means and electronic filing of documents to the use of unsworn affidavits attested in a specific approved manner. In New Zealand, the Government issued an Epidemic Notice in respect of COVID-19 on 24 March 2020.[124] Shortly afterwards, the High Court Rules 2016 were specifically amended to allow, inter alia, for remote hearings and electronic filing of court documents.[125] A Practice Note containing similar provisions has been issued by the Chief District Court Judge.[126] The Supreme Court

123 See John Hampden Jackson *Clemenceau and the Third Republic* (English Universities Press, London, 1946) at 228.

124 Epidemic Preparedness (COVID-19) Notice 2020.

125 See the High Court (COVID-19 Preparedness) Amendment Rules 2020, which came into force by Gazette Notice on 9 April 2020. Rule 3.4(5) of the 2020 Amendment expressly preserves the Court's inherent jurisdiction. In an accompanying statement dated 9 April 2020, the Chief High Court Judge and the Chair of the Rules Committee, Justice Dobson, stated: "The purpose of the Rules is to ensure that civil justice remains accessible during the outbreak [of COVID-19] by providing a clear and consistent basis for conducting civil litigation while movement and access to courthouses remains restricted": Justice Venning and Justice Dobson *Temporary Changes to the High Court Rules 2016 to Address the Impact of COVID-19* (April 2020) at 1. An earlier practice note had been issued on 2 April 2020: Justice Venning *High Court: COVID-19 Alert Level 4 Protocol — Update* (April 2020).

126 Judge Heemi Taumaunu *Practice Note: Civil proceedings — Covid-19 Preparedness* (April 2020) issued pursuant to the powers conferred by s 24 of the Epidemic Preparedness Act 2006 and which took effect as from 23 April 2020.

and Court of Appeal have made provision for remote hearings by way of a formal Protocol.[127]

Other common law jurisdictions have adopted similar measures during the COVID-19 pandemic. In Australia, the state and federal courts have taken various steps to address this unprecedented situation.[128]

In England, HM Courts & Tribunals Service has issued formal guidance, published online, on the use of telephone and video technology for the conducting of remote court hearings.[129] The courts in England have already undertaken major trials on a remote basis. For example, in a pre-trial ruling in *National Bank of Kazakhstan v The Bank of New York Mellon*, the trial judge, Teare J, stated, in giving his reasons why the trial of the action should proceed remotely, that this manner of trial was to be adopted during the COVID-19 pandemic.[130]

In another recent English case, *Re One Blackfriars Ltd (in liq) v Nygate*, the Court refused an adjournment application by the applicants and ordered the parties to co-operate on arrangements for a remote trial.[131] The Court noted other examples in England where fully remote trials had taken place.[132] While there might be technological challenges inherent in remote trials, these

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127 See Chief Justice Winkelmann and President Kós *Supreme Court and Court of Appeal Remote Hearings Protocol* (June 2020). A copy of the Protocol is available online on the Courts of New Zealand website. The Protocol was issued on 17 April 2020 and (as at the time of writing in early June 2020) has been updated on 10 June 2020.

128 For a summary of the steps put in place in the NSW courts in response to the COVID-19 pandemic see Supreme Court of New South Wales "Latest operational changes made in response to Coronavirus (COVID-19)" (25 March 2020) <www.supremecourt.justice.nsw.gov.au>. These various steps include remote hearings and teleconferencing. In the Federal Court of Australia, see Federal Court of Australia *Special Measures in Response to COVID-19 (SMIN-1): Special Measures Information Note — Updated 31 March 2020* (March 2020); and Federal Court of Australia *National Practitioners/Litigants Guide to Online Hearings and Microsoft Teams* (May 2020). The High Court of Australia has suspended its sittings during April, May and June 2020.

129 "Guidance: HMCTS telephone and video hearings during coronavirus outbreak" (30 June 2020) GOV.UK <www.gov.uk>.

130 I am indebted to Fiona Gillett, a litigation partner in the firm of Stewarts, solicitors of London, which acts for the plaintiff, for providing me with the transcript of day one of the pre-trial hearing on 19 March 2020. The reasons of Teare J are to be found at 64 of the transcript, where the Judge stated: "The courts exist to resolve disputes and, as I noted this morning, the guidance given by the Lord Chief Justice is very clear. The default position now, in all jurisdictions, must be that hearings should be conducted with one, more than one, or all participants attending remotely." Following this ruling, the substantive trial ran for four sitting days commencing on 26 March 2020. Judgment was issued on 22 April 2020: [2020] EWHC 916 (Comm).

131 *Re One Blackfriars Ltd (in liq) v Nygate* [2020] EWHC 845 (Ch).

132 At [44]–[46].

issues could be adequately addressed and did not justify an adjournment being granted.[133]

Finally, on a lighter note, one might sympathise with the observations of Judge Dennis Bailey, of the Florida state 17th Circuit Court in the United States, who issued a memorandum to members of the local Bar berating them for treating virtual court hearings as casual telephone conversations.[134] As the Judge observed:

> We've seen many lawyers in casual shirts and blouses, with no concern for ill-grooming, in bedrooms with the master bed in the background … One male lawyer appeared shirtless and one female attorney appeared still in bed, still under the covers …

Given the somewhat cooler temperatures prevailing in New Zealand, particularly in winter, as compared to Florida, one suspects that this may be a problem which will be somewhat less pronounced in this part of the world!

133 At [50]–[58].

134 See Jacqui Goddard "Lawyers get dressing down for being semi-naked in web hearings" *The Times* (online ed, London, 16 April 2020).